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BLACKSTONE'S COMMENTARIES.

BY THE HON. GEORGE SHARSWOOD, LL.D.,

PROFESSOR OF THE INSTITUTES OF LAW IN THE UNIVERSITY OF PENNSYLVANIA, AND PRESIDENT JUDGE OF THE DISTRICT COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

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THE above work is issued in a superior style, printed on fine white paper, sized and calendered, and with clear type, illustrated by a fine line-engraving of SIR WILLIAM BLACKSTONE, and accompanied by a carefully-prepared biographical sketch by the American editor.

The delivery of the lectures which constitute the Commentaries of Sir William Blackstone began at Oxford in 1758, and the publication of the Commentaries commenced in 1765. Since that period radical changes have taken place in the statute law of England, the practice of its courts has been greatly modified, new subjects of litigation have arisen, and many of the doctrines of the common law have received very extensive modifications and additions, in order to adapt them to the results of a century of change and progress.

The Commentaries do not, therefore, in their original form, wholly represent the existing state of legislation or of legal doctrine, even in the country where they were written. When we consider, also, that in the United States the legal systems of the several States and of the Federal Government have since grown up, we cannot avoid the conclusion that the Lectures of Blackstone, in respect of what they contain as well as of what they do not contain, become still more inadequate as a book for elementary study or general reading, unless accompanied by judicious and carefully-prepared annotations.

The deservedly strong hold which the Commentaries have upon the public and professional regard can never be wholly loosened, and they will always continue to be read by the scholar and student and consulted by the practitioner and judge. Hence the importance of a thorough, modern, and reliable American edition. The numerous English editions of Blackstone which have become necessary in order to bring up the work to the state of the law at different periods amount to about twenty-five in number, prepared by Christian, Archbold, Coleridge, Chitty, Stephen, Sweet, Warren, Stewart, Kerr, and others, all of which have been closely examined for the purpose of obtaining material for the present.

The object of the edition which we now submit to the public and the profession is two-fold,—first, to collect from all the different editions those annotations which seemed most important and valuable; second, to add such copious notes and references to American law as would fully adapt the work to the use of students, practitioners, and laymen in this country.

It is confidently believed that these results have been successfully accomplished by Judge Sharswood, whose long experience on the bench, and as a teacher of the law in the University of Pennsylvania, amply qualifies him for the editorship of Blackstone.

No pains have been spared, either by the editor or by the publishers, to present a thorough, comprehensive, and valuable edition of the Commentaries, which shall exhibit, in an attractive typographical form, the present state of the law both in England and the United States.

It may be added that it is erroneous to suppose that Blackstone is intended to be read only by lawyers. In fact, the lectures were not originally delivered exclusively to students or practitioners of the law; and they contain nothing which may not be easily understood by any intelligent reader, no matter what are his pursuits. In the style and getting-up of the present edition, some regard has been had to this class of readers; for the clear and legible type of the notes as well as of the text, and the full octavo page, constitute a work worthy, from its general tasteful appearance, of a place in every library.

For the convenience of students, Barron Field's Analysis of the Commentaries has been added at the end of the second volume.

The publishers confidently ask the attention of judges, lawyers, students, scholars, and general readers to this, as the very best edition of Blackstone's Commentaries which has ever appeared either in England or the United States.

☞ See testimonials on next page.

From HON. THEOPHILUS PARSONS, LL.D.,

The eminent law writer, and Professor of Law in Harvard University.

CAMBRIDGE, October 18, 1859

Messrs. CHILDS & PETERSON,—GENTLEMEN:—I have learned in this Law School how much Students of Law need an American edition of Blackstone, which should contain the best parts of the large annotations that have accumulated in the English editions, together with new American notes, bringing the law of Blackstone down to our own age and our own country. This is precisely what is done, and excellently well done, by Judge Sharswood. And you have used a page and type which, without any sacrifice of beauty or of convenience to the reader, enable you to include the whole work in two volumes and offer it at a very low price. I have already introduced it as a Text-Book in this Law School, and recommend it, emphatically, to gentlemen who consult me as to the edition they should buy. Very respectfully, your obedient servant, THEOPHILUS PARSONS.

From HON. HENRY DUTTON, LL.D.,

Kent Professor of Law in Yale College.

NEW HAVEN, October 25, 1859.

Messrs. CHILDS & PETERSON,—GENTLEMEN.—I am highly pleased with Judge Sharswood's edition of Blackstone's Commentaries. He has judiciously avoided the common error of supposing that the value of such a work depends upon the multiplication of references to new cases, without much regard to their pertinency or authority. In this edition the notes are chiefly confined to corrections and illustrations of the text, and are calculated to cause the work to continue to be, what it has always heretofore been, an unrivalled system of the whole common law and of English statute law

Such an edition was much needed; and I shall urgently recommend it to the students of Yale Law School, not only as an indispensable elementary work, but as a valuable standard authority. With the highest respect, HENRY DUTTON.

From HON. WILLIAM KENT, LL.D.,

Editor of Kent's Commentaries.

NEW YORK, October 25, 1859.

Messrs. CHILDS & PETERSON,—GENTLEMEN:—I have delayed acknowledging the receipt of Judge Sharswood's edition of Blackstone's Commentaries until I could look over the work with some care and attention.

I have not yet had time to examine the notes minutely, agreeable and useful as I find the perusal of them. I have read enough, however, to appreciate the plan of the editor, and, in some degree, his execution of it. His judicious selections from the annotations of preceding editors, and his own very learned and valuable notes, have made this edition the best, I think, that has appeared,—admirable for the law-student and useful to the practical lawyer. I have the honor to be, gentlemen, your obedient servant, WILLIAM KENT.

From THEODORE W. DWIGHT, LL.D.,

Professor of Law in Columbia College, N.Y.

COLUMBIA COLLEGE LAW SCHOOL, NEW YORK, October 16, 1859.

Messrs. CHILDS & PETERSON,—GENTLEMEN:—I have examined with some care your recent edition of Blackstone's Commentaries. It is very pleasant to me to see this favorite work reproduced in so beautiful a form and with such fulness of annotation.

It is quite common to speak disparagingly of Blackstone's labors. But, notwithstanding all that has been urged, what Dante says of another remains true of him,—"il gran comento feo." For, whatever may be said of its value to the practising lawyer, it cannot be dispensed with, as instructors in jurisprudence well know, as an introduction to legal study.

Judge Sharswood has, in my judgment, rendered an invaluable service to students of the law, in bringing within their reach the contributions made to the original text by English editors, as well as by his own learned and excellent notes.

I shall use Sharswood's Blackstone as a Text-Book in our Law School, and shall strongly recommend it to such persons as may ask my opinion of its value. THEO. W. DWIGHT.

From AMOS DEAN, LL.D.,

Professor of Law in the University of Albany.

ALBANY, October 22, 1859

Messrs. CHILDS & PETERSON,—GENTLEMEN:—The examination I have given your new edition of Blackstone's Commentaries by Judge Sharswood has convinced me of its very great superiority over all former editions. Both the omissions and additions made by him are important.

Blackstone's Commentaries have so long maintained their character as a legal classic among all students at law, that this American edition, adapting them to the present state and condition of the law in this country, must be highly acceptable to all those entering upon its study. I shall take great pleasure in recommending it, as having many advantages over any edition hitherto published. Very respectfully, yours, AMOS DEAN

Institutes of American Law.

By JOHN BOUVIER,

AUTHOR OF THE LAW DICTIONARY, EDITOR OF BACON'S ABRIDGMENT, &c.

4 vols. octavo, 2700 pages, best law binding. Price, $15.

NEW EDITION.

The Institutes of American Law, by the late Judge Bouvier, have now been before the profession for several years, and the increasing demand for the work attests the general appreciation of its merit. It has been used by courts, judges, lawyers, and laymen, and the result confirms the opinion of its "*very great value*," which Chief-Justice Taney expressed upon an examination of some of the proof-sheets of the first edition, and which, after the subsequent publication, was, as he says, "*strengthened* by looking further into it."

The arrangement adopted in the Institutes is in some respects novel. The method of teaching law in the form of lectures is in many particulars objectionable, and most of our modern law-books, which are made up of transcripts from a lecturer's memoranda, have been required to be almost wholly re-written in the notes, often exceeding the text in bulk and importance, or at least the generalities of the oral or written discourse have had to be supplemented by those more detailed references, distinctions, and discussions which were incompatible with the loose structure of the text, although requisite to be known by the practitioner. An institutional treatise upon the law as a science should be constructed upon a system of rigid analysis and classification, which will be more apt to beget a severely logical habit of mind in the student than the discursive style of lectures. Judge Bouvier was deeply read in the French and the Roman law, and he has evidently imbibed from those sources a taste for that orderly and accurate development of the subject which characterizes his Institutes.

Another feature of his work is, that it is a representation of American law,—of that general body of jurisprudence on the basis of which justice is at present administered throughout our country at large. His references are selected from the reports of our own tribunals in different States of the Union, so that the student immediately becomes familiar with our own authorities and is prepared for immediate action in his profession. He is not set to study the learning of obsolete titles, but becomes a thoroughly American lawyer, rather than an Americanized English lawyer.

The favor with which the work has been accepted by the profession, and its increasing sale, justify the encomiums which its matter and method have received from some of our most distinguished jurists. It may be added, as a circumstance of no small importance to the practitioner, that, notwithstanding the amount of legal learning here embodied, it is rendered immediately accessible by an accurate and exhaustive index, not only to each volume, but to the whole work, so that in the most hurried moments of inquiry, even during the trial of a cause, one may alight upon any particular passage contained in any one of the four volumes.

In order that the publishers may not be charged with indulging in undue exaggeration they refer with confidence to the subjoined communications from Chief-Justice Taney, and his associate justices, Catron, McLean, Wayne, Grier, and Nelson; Chief-Justice Green, of New Jersey; Prof. Greenleaf, author of "Greenleaf on Evidence;" Hon. George M. Dallas, and others.

From CHIEF-JUSTICE TANEY.

BALTIMORE, May 31, 1851.

DEAR SIR:—Accept my thanks for the proof-sheets of the Institutes of American Law, which you have been good enough to send me, and also for the letter which accompanied them. So far as I can judge of the work from the portions before me, it is one of VERY GREAT VALUE, and will undoubtedly attract public attention. The general plan, and the order and arrangements of the subject of which it treats, could not, I think, be improved. And I may say the same thing of the manner in which the plan is carried into execution; for every principle and rule is stated with brevity and perspicuity, and supported by the proper reference. After thus expressing my opinion of the work, I need not add that I shall feel much honored by having my name associated with it. And thanking you for the kind terms in which you are pleased to speak of me in your proposed dedication, I am, dear sir, with great respect, your obedient servant,

R. B. TANEY.

Hon. J. BOUVIER, Philadelphia.

BALTIMORE, July 17, 1851.

DEAR SIR:—Accept my thanks for the volumes of the Institutes of American Law. My impressions in its favor, which I expressed in my former letter to you, have been strengthened by looking further into it; and I hope the work will meet with the attention and encouragement which it so well deserves. With great respect, I am your obedient servant,

Hon. J. BOUVIER, Philadelphia. R. B TANEY.

From HON. SIMON GREENLEAF, LL.D.,

Author of "Greenleaf on Evidence," &c., and Professor of Law in Harvard University, Cambridge.

BOSTON, August, 1851.

GENTLEMEN:—I have received the volumes of the Institutes of Judge Bouvier, which he had the kindness to send me, through you.

In this work the learned author has taken the middle course, not occupied, that I know of, by any preceding American writer,—treating his subject with a degree of learning, compactness, precision of statement, and accuracy of definition, that cannot fail, I think, of rendering it highly acceptable to the profession.

Judge Bouvier is so well known to the profession, that any commendation of his Institutes from me would be superfluous; but it will give me great pleasure to be instrumental in making them known whenever opportunity may occur.

With sincere thanks for your kind attention, I beg to remain your much obliged and obedient servant,

S. GREENLEAF.

Messrs. CHILDS & PETERSON.

The following extract is from a letter received by the late Judge Bouvier from the Hon. Simon Greenleaf:—

"I beg you to accept my hearty thanks for the volumes of your Institutes, which I yesterday received. I have rapidly looked them over, plunging into one or two titles in which my present studies are most occupied, and am quite delighted with the work. *It will prove a very valuable and acceptable addition to our legal literature.*"

From HON. JOHN McLEAN,

One of the Associate Judges of the Supreme Court of the United States.

CINCINNATI, October 3, 1851.

GENTLEMEN:—I am under very great obligations to you for Judge Bouvier's Institutes of American Law. The classification of the topics explained appears to me to be lucid and natural; and I was struck with the excellent method of the work. The plan seems not to have been copied from any one, but it has more of the simplicity and manner of the civil-law writers than is found in the elementary treatises of the common law. The principles of law are succinctly and clearly stated and illustrated, and the notes appended are judiciously selected, without being crowded, as they are in many of our modern publications.

I know of no work which shows so much research, and which embodies so generally the elementary principles of American law, as the Institutes of Judge Bouvier. His name is most favorably known to the profession by his previous works; and I am greatly mistaken if his Institutes shall not add to his high reputation as an able and learned law-writer. *The Institutes ought not only to be found in the hands of every student of law, but on the shelf of every lawyer.*

With great respect, your obliged and obedient servant,

Messrs. CHILDS & PETERSON. JOHN McLEAN

From HON. JOHN CATRON,

One of the Associate Judges of the Supreme Court of the United States.

NASHVILLE, Nov. 12, 1852.

GENTLEMEN:—On reaching home in August I found a copy of Bouvier's Institutes of American Law, forwarded to me by you last November. I have examined the work, according to your request, and feel prepared to recommend it as one of *high merit.* The author has succeeded in presenting the laws of England generally in force throughout the United States, as they stand modified by strictly American law, in a manner more lucid, brief, and simple than will be found in any other general treatise on our law. The usual error of overloading the work with words and useless discussions has been avoided with rare success: this in itself is a great merit. *I think Judge Bouvier's work should be read by every law-student next after Blackstone's Commentaries.*

Very respectfully, your obedient servant, JNO. CATRON.

Messrs. CHILDS & PETERSON.

From HON. J. K. KANE,

Judge of the United States District Court for the Eastern District of Pennsylvania.

RENSSELAER, NEAR PHILADELPHIA, October 10, 1851.

I have devoted some time to an examination of Judge Bouvier's Institutes. I have traced his analysis of the law through its several subdivisions, and have also read several titles of the text, and I am satisfied that the work is worthy of its author's well-established reputation, and that *it must occupy a place in every well-stocked professional library.*

Very respectfully, your obedient servant, J. K. KANE

REVISED AND ENLARGED EDITION.

A

LAW DICTIONARY,

ADAPTED TO THE

CONSTITUTION AND LAWS

OF THE

UNITED STATES OF AMERICA,

AND OF THE

Several States of the American Union:

WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW.

By JOHN BOUVIER.

Ignoratis terminis ignoratur et ars.—Co. Litt. 2 a.
Je sais que chaque science et chaque art a ses termes propres, inconnu au commun des hommes.—Fleury.

TWELFTH EDITION, REVISED AND GREATLY ENLARGED.

VOL. I.

PHILADELPHIA:
GEORGE W. CHILDS, 600 CHESTNUT ST., (LEDGER BUILDING.)
1868.

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PRINTED BY T. K. COLLINS.

PUBLISHER'S PREFACE.

It has been the aim of the publisher of the present edition of the Law Dictionary to vary in nothing from the general plan of Judge Bouvier, and to make only such modifications and additions in his work as the changing conditions of the law seemed to require. The period since the death of the able author has been so fruitful, however, both in legislative enactments and judicial decisions, that numerous alterations and additions have been rendered necessary, resulting in an aggregate increase of matter to the extent of more than fifty per cent. This new matter has been prepared by gentlemen of recognized eminence at the bar or on the bench, and peculiarly well acquainted with the special topics upon which they have treated. The general editorial supervision has been performed in a very thorough and efficient manner by Daniel A. Gleason, Esq. The more useful part of Kelham's Dictionary, which in former editions was printed as a supplement, has been now incorporated in the body of the work. Careful attention has been given to the citation of authorities, and they have been brought down to the date of the preparation of the respective articles. By making use of a more condensed form of arrangement and of a somewhat smaller-sized type than were employed in the old editions, the contents have been increased to the extent above named without a corresponding enlargement of the bulk of the volumes.

The publisher cannot hope that in so extensive a labor there have been no mistakes, either of omission or commission. He can only claim that he has spared neither time, labor, nor expense in the endeavor to make the book thoroughly accurate and complete; and he submits the present edition of Bouvier's Law Dictionary to the profession and the general public, trusting that the work may be found even more valuable in the future than it has been in the past.

GEORGE W. CHILDS.

PHILADELPHIA, 1867.

PREFACE

TO THE FIRST EDITION.

To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises on the law the object of his inquiry, was a difficult task: he was in a labyrinth without a guide; and much of the time which was spent in finding his way out might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning; but he was too often disappointed: they seldom pointed out the authorities where the object of his inquiry might be found. It is true such works contain a great mass of information, but, from the manner in which they have been compiled, they sometimes embarrassed him more than if he had not consulted them. They were written for another country, possessing laws different from our own, and it became a question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigor, and not fitted to the present times, nor calculated for present use, even in England. And there is a great portion which, though useful to an English lawyer, is almost useless to the American student. What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their

births, their burials, their beer and ale houses, and a variety of similar subjects?

The most modern law dictionaries are compilations from the more ancient, with some modifications and alterations; and, in many instances, they are servile copies, without the slightest alteration. In the mean time the law has undergone a great change. Formerly the principal object of the law seemed to be to regulate real property, in all its various artificial modifications, while little or no attention was bestowed upon the rules which govern personal property and rights. The mercantile law has since arisen, like a bright pyramid, amid the gloom of the feudal law, and is now far more important in practice than that which refers to real estate. The law of real property, too, has changed, particularly in this country.

The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the Dictionaries of Cowel, Manly, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Williams, the Termes de Ley, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

It occurred to the author that a law dictionary, written entirely anew, and calculated to remedy those defects, would be useful to the profession. Probably overrating his strength, he resolved to undertake the task; and, if he should not fully succeed, he will have the consolation to know that his effort may induce some more gifted individual, and better qualified by his learning, to undertake such a task, and to render the American bar an important service. Upon an examination of the constitution and laws of the United States, and of the several states of the American Union, he perceived many technical expressions and much valuable information which he would be able to incorporate in his work. Many of these laws, although

local in their nature, will be found useful to every lawyer, particularly those engaged in mercantile practice. As instances of such laws the reader is referred to the articles *Acknowledgment*, *Descent*, *Divorce*, *Letters of Administration*, and *Limitation*. It is within the plan of this work to explain such technical expressions as relate to the legislative, executive, or judicial departments of the government; the political and the civil rights and duties of the citizens; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration; of the mode of acquiring and transferring property; to the criminal law, and its administration. It has also been an object with the author to embody in his work such decisions of the courts as appeared to him to be important, either because they differed from former judgments, or because they related to some point which was before either obscure or unsettled. He does not profess to have examined or even referred to all the American cases: it is a part of the plan, however, to refer to authorities, generally, which will lead the student to nearly all the cases.

The author was induced to believe that an occasional comparison of the civil, canon, and other systems of foreign law, with our own, would be useful to the profession, and illustrate many articles which, without such aid, would not appear very clear; and also to introduce many terms from foreign laws, which may supply a deficiency in ours. The articles *Condonation*, *Extradition*, and *Novation* are of this sort. He was induced to adopt this course because the civil law has been considered, perhaps not without justice, the best system of written reason; and as all laws are, or ought to be, founded in reason, it seemed peculiarly proper to have recourse to this fountain of wisdom: but another motive influenced this decision; one of the states of the Union derives most of its civil regulations from the civil law; and there seemed a peculiar propriety, therefore, in introducing it into an American law dictionary. He also had the example of a Story, a Kent, Mr. Angell, and others, who have ornamented their works from the same source. And he here takes the opportunity to acknowledge the benefits which he has derived from the learned labors of these gentlemen, and of those of Judge Sergeant, Judge Swift, Judge Gould, Mr. Rawle, and other writers on American law and jurisprudence.

In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject seemed to require it, and referring to others supporting the same point; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.

To those who are aware of the difficulties of the task, the author deems it unnecessary to make any apology for the imperfections which may be found in the work. His object has been to be useful: if that has been accomplished in any degree, he will be amply rewarded for his labor; and he relies upon the generous liberality of the members of the profession to overlook the errors which may have been committed in his endeavors to serve them.

PHILADELPHIA, September, 1839.

BOUVIER'S

LAW DICTIONARY AND INSTITUTES:

BY S. AUSTIN ALLIBONE, LL.D.,
AUTHOR OF "THE DICTIONARY OF AUTHORS."

From the North American Review for July, 1861.

THE author of these volumes taught lawyers by his books, but he taught all men by his example, and we should therefore greatly err if we failed to hold up, for the imitation of all, his successful warfare against early obstacles, his unconquerable zeal for the acquisition of knowledge, and his unsparing efforts to distribute the knowledge thus acquired for the benefit of his professional brethren. Born in the village of Codogman, in the department Du Gard, in the south of France, in the year 1787, at the age of fifteen he accompanied his father and mother—the last a member of the distinguished family of Benezet—to Philadelphia, where he immediately applied himself to those exertions for his own support which the rapid diminution of his father's large property had rendered necessary. In 1812 he became a citizen of the United States, and about the same time removed to West Philadelphia, where he built a printing-office, which still exists as an honorable monument of his enterprise. Two years later we find him settled at Brownsville, in the western part of Pennsylvania, where, in 1814, he commenced the publication of a weekly newspaper, entitled "The American Telegraph." In 1818, on Mr. Bouvier's removal to Uniontown, he united with it "The Genius of Liberty," and thenceforth issued the two journals in one sheet, under the title of "The Genius of Liberty and American Telegraph." He retained his connection with this periodical until July 18, 1820.

It was while busily engaged as editor and publisher that Mr. Bouvier resolved to commence the study of the law. He attacked Coke and Blackstone with the determination and energy which he carried into every department of action or speculation, and in 1818 he was admitted to practice in the Court of Common Pleas of Fayette county, Pennsylvania. During the September term of 1822 he was admitted as an attorney of the Supreme Court of Pennsylvania, and in the following year he removed to Philadelphia, where he resided until his death. In 1836 he was appointed by Governor Ritner Recorder of the City of Philadelphia, and in 1838 was commissioned by the same chief magistrate as an Associate Judge of the Court of Criminal Sessions. But the heavy draughts upon time and strength to which he was continually subjected had not been permitted to divert his mind from the cherished design of bestowing upon his profession a manual of which it had long stood in urgent need. While laboring as a student of law, and even after his admission to the bar, he had found his efforts for advance-

ment constantly obstructed, and often frustrated, by the want of a conveniently-arranged digest of that legal information which every student should have, and which every practising lawyer must have, always ready for immediate use. The English Law Dictionaries — based upon the jurisprudence of another country, incorporating peculiarities of the feudal law, that are to a great extent obsolete even in England, only partially brought up to the revised code of Great Britain, and totally omitting the distinctive features of our own codes—were manifestly insufficient for the wants of the American lawyer. A Law Dictionary for the profession on this side of the Atlantic should present a faithful incorporation of the old with the new,—of the spirit and the principles of the earlier codes, and the "newness of the letter" of modern statutes. The Mercantile Law, with the large body of exposition by which it has been recently illustrated; the Law of Real Property in the new shape which, especially in America, it has latterly assumed; the technical expressions scattered here and there throughout the Constitution of the United States, and the constitutions and laws of the several States of the American Union,—all these, and more than these, must be within the lawyer's easy reach if he would be spared embarrassment, mortification, and decadence.

A work which should come up to this standard would indeed be an invaluable aid to the profession; but what hope could be reasonably entertained that the requisites essential to its preparation — the learning, the zeal, the acumen to analyze, the judgment to synthesize, the necessary leisure, the persevering industry, and the bodily strength to carry to successful execution—would ever be combined in one man? Mr. Bouvier determined that it should not be his fault if such a work was not at least honestly attempted. Bravely he wrought, month in and out, year in and out, rewarded for his self-denying toil by each well-executed article, and rejoicing, at rare and prized intervals, over a completed letter of the alphabet.

In 1839 the author had the satisfaction of presenting in two octavo volumes the results of his anxious toils to his brethren and the world at large; and the approving verdict of the most eminent judges—Judge Story and Chancellor Kent, for example—assured him that he had "not labored in vain," nor "spent his strength for naught." This was well; but the author himself was the most rigid and unsparing of his critics. Contrary to the practice of many writers, considering the success of the first and second editions as a proper stimulus to additional accuracy, fulness, and completeness in every part, in 1848, when the third edition was called for, the second having been published in 1843, he was able to announce that he had not only "remodelled very many of the articles contained in the former editions," but also had "added upwards of twelve hundred new ones." He also presented the reader with "a very copious index to the whole, which, at the same time that it will assist the inquirer, will exhibit the great number of subjects treated of in these volumes."

He still made collections on all sides for the benefit of future issues, and it was found after the death of the author, in 1851, that he had accumulated a large mass of valuable materials. These, with much new matter, were, by competent editorial care, incorporated into the text of the third edition, and the whole was issued as the fourth edition in 1852. The work had been subjected to a thorough revision,—inaccuracies were eliminated, the various changes in the constitutions of several of the United States were noticed in their appropriate places, and under the head of "Maxims" alone thirteen hundred new articles were added.

That in the ensuing eight years six more editions were called for by the profession, is a tribute of so conclusive a character to the merits of the work that eulogy seems superfluous. Let us, then, briefly examine those features to which the great professional popularity of the Law Dictionary is to be attributed. Some of these, specified as *desiderata*, have been already referred to with sufficient particularity. But it has been the aim of the author to cover a wider field than the one thus designated. He has included in his plan technical expressions relating to the legislative, executive, and judicial departments of the government; the political and the civil rights and duties of citizens; the rights and duties of persons, especially such as are peculiar to the institutions of the United States,—for instance, the rights of descent and administration, the mode of acquiring and transferring property, and the criminal law and its administration.

He was persuaded—and here as elsewhere he has correctly interpreted the wants of the profession—that an occasional comparison of the civil, canon, and other systems of foreign law with our own would be eminently useful by way of illustration, as well as for other purposes too obvious to require recital. We will barely suggest the advantage to the student of civil law or canon law of having at hand a guide of this character. And we would express our hope that the student of civil or of canon law is not hereafter to be that *rara avis* in the United States which, little to our credit, he has long been. He who would be thoroughly furnished for his high vocation will not be satisfied to slake his thirst for knowledge even at the streams (to which, alas! few aspire) of Bracton, Britton, or Fleta; he will ascend rather to the fountains from which these drew their fertilizing supplies.

To suppose that he who draws up many thousands of definitions, and cites whole libraries of authorities, shall never err in the accuracy of statement or the relevancy of quotation, is to suppose such a combination of the best qualities of a Littleton, a Fearne, a Butler, and a Hargrave, as the world is not likely to behold while law-books are made and lawyers are needed. If Chancellor Kent, after "running over almost every article in" the first edition (we quote his own language), was "deeply impressed with the evidence of the industry, skill, learning, and judgment with which the work was completed," and Judge Story expressed a like favorable verdict, the rest of us, legal and lay, may, without any unbecoming humiliation, accept their *dicta* as conclusive. We say *legal and lay;* for the lay reader will make a sad mistake if he supposes that a Law Dictionary, especially *this* Law Dictionary, is out of "his line and measure." On the contrary, the Law Dictionary should stand on the same shelf with Sismondi's Italian Republics, Robertson's Charles the Fifth, Russell's Modern Europe, Guizot's Lectures, Hallam's Histories, Prescott's Ferdinand and Isabella, and the records of every country in which the influences of the canon law, the civil law, and the feudal law, separately or jointly, moulded society, and made men, manners, and customs what they were, and, to no small extent, what they still are.

In common with the profession on both sides of the water, Judge Bouvier had doubtless often experienced inconvenience from the absence of an Index to Matthew Bacon's New Abridgment of the Law. Not only was this defect an objection to that valuable compendium, but since the publication of the last edition there had been an accumulation of new matter which it was most desirable should be at the command of the law student, the practising lawyer, and the bench. In 1841 Judge Bouvier was solicited to prepare a new edition, and undertook the arduous task. The revised work was presented to the public in ten royal octavo volumes, dating from 1842 to 1846. With the exception of one volume, edited

by Judge Randall, and a part of another, edited by Mr. Robert E. Peterson, Judge Bouvier's son-in-law, the whole of the labor, including the copious Index, fell upon the broad shoulders of Judge Bouvier. This, the second American, was based upon the seventh English edition, prepared by Sir Henry Gwillim and Messrs. C. E. Dodd and William Blanshard, and published in eight royal octavos in 1832. In the first three volumes Bouvier confines his annotations to late American decisions; but in the remaining volumes he refers to recent English as well as to American Reports.

But this industrious scholar was to increase still further the obligations under which he had already laid the profession and the public. The preparation of a comprehensive yet systematic digest of American law had been for years a favorite object of contemplation to a mind which had long admired the analytical system of Pothier. Unwearied by the daily returning duties of his office and the bench, and by the unceasing vigilance necessary to the incorporation into the text of his Law Dictionary of the results of recent trials and annual legislation, he laid the foundations of his "Institutes of American Law," and perseveringly added block upon block, until, in the summer of 1851, he had the satisfaction of looking upon a completed edifice. Lawyers who had hailed with satisfaction the success of his earlier labors, and those who had grown into reputation since the results of those labors were first given to the world, united their verdict in favor of this last work.

It is hardly necessary to remark that it was only by a carefully adjusted apportionment of his hours that Judge Bouvier was enabled to accomplish so large an amount of intellectual labor, in addition to that "which came upon him daily,"—the still beginning, never ending, often vexatious duties connected with private legal practice and judicial deliberation. He rose every morning at from four to five o'clock, and worked in his library until seven or eight; then left his home for his office (where, in the intervals of business, he was employed on his "Law Dictionary" or "The Institutes") or his seat on the bench, and after the labor of the day wrought in his library from five o'clock until an hour before midnight.

We can trace in a case like this the worth of systematic industry. It was the remark of Thomas Kerchever Arnold, the author or compiler of forty-five different publications, chiefly educational manuals,—"The list of my works is undoubtedly a very large one; but regular industry, with a careful division of time and employments, carried on, with hardly an exception, for six days in every week, *will* accomplish a great deal in fifteen years."

While animated by aims thus expansive, Judge Bouvier did not forget to provide for the intellectual improvement of his own household. Observing a remarkable aptitude for learning and love of the acquisition of knowledge in his only child, he encouraged the taste, and furnished the young student with the educational apparatus adapted to her special proclivities. How wisely he judged of these, and how faithfully the means of instruction were put to profitable use, may be inferred from Miss Bouvier's "Familiar Astronomy," a work which elicited the high commendation of Lord Rosse, Sir John F. W. Herschel, Sir David Brewster, Rear-Admiral W. H. Smyth, Drs. Lardner and Dick, Professors Airy, Hind, Nichol, Bond, De Morgan, and others of the most eminent astronomers in Great Britain and America.

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TO THE HONORABLE

JOSEPH STORY, LL.D.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES,

This Work

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED,

AS A TOKEN OF THE

GREAT REGARD ENTERTAINED FOR HIS TALENTS, LEARNING, AND CHARACTER,

BY

THE AUTHOR.

LAW DICTIONARY.

A.

A. The first letter of the alphabet.

It is used to distinguish the first page of a folio, the second being marked "*b*," thus: Coke, Litt. 114 *a*, 114 *b*. It is also used as an abbreviation for many words of which it is the initial letter. See ABBREVIATIONS.

In *Latin phrases* it is a preposition, denoting *from, by, in, on, of, at,* and is of common use as a part of a title.

In *French phrases* it is also a preposition, denoting *of, at, to, for, in, with.*

Among the Romans this letter was used in criminal trials. The judges were furnished with small tables covered with wax, and each one inscribed on it the initial letter of his vote: A, when he voted to absolve the party on trial; C, when he was for condemnation; and N L (*non liquet*), when the matter did not appear clearly, and he desired a new argument.

A CONSILIIS (Lat. *consilium*, advice). A counsellor. The term is used in the civil law by some writers instead of *a responsis.* Spelman, Gloss. *Apocrisarius.*

A LATERE (Lat. *latus*, side). Collateral. Used in this sense in speaking of the succession to property. Bracton, 20 *b*, 62 *b*.

Without right. Bracton, 42 *b*.

Apostolic; having full powers to represent the Pope as if he were present. Du Cange, *Legati a latere;* 4 Blackstone, Comm. 306.

A ME (Lat. *ego*, I). A term denoting direct tenure of the superior lord. 2 Bell, Hou. L. Sc. 133.

Unjustly detaining from me. He is said to withhold *a me* (from me) who has obtained possession of my property unjustly. Calvinus, Lex.

To pay *a me*, is to pay from my money.

A MENSA ET THORO (Lat. from bed and board). A kind of divorce, which is rather a separation of the parties by law, than a dissolution of the marriage. Such a divorce does not affect the legitimacy of children, nor authorize a second marriage. See DIVORCE.

A PRENDRE (Fr. to take, to seize). Rightfully taken from the soil. 5 Adolph. & E. 764; 1 Nev. & P. 172; 4 Pick. Mass. 145.

Used in the phrase *profit à prendre*, which differs from a right of way or other easement which confers no interest in the land itself. 5 Barnew. & C. 221; 30 Eng. L. & Eq. 187, 189; 2 Washburn, Real Prop. 25.

A QUO (Lat.). From which. A court *a quo* is a court from which a cause has been removed. The judge *a quo* is the judge in such court. 6 Mart. La. 520. Its correlative is *ad quem.*

A RENDRE (Fr. to render, to yield). Which are to be paid or yielded. *Profits à rendre* comprehend rents and services. Hammond, Nisi P. 192.

A RETRO (Lat.). In arrear.

A RUBRO AD NIGRUM (Lat. from red to black). From the (red) title or rubric to the (black) body of the statute. It was anciently the custom to print statutes in this manner. Erskine, Inst. 1. 1. 49.

A VINCULO MATRIMONII (Lat. from the bond of matrimony). A kind of divorce which effects a complete destruction of the marriage contract.

After a divorce *a vinculo*, the innocent party is free to marry again. By statute, in several of the States, however, the guilty is prohibited contracting a second marriage during the lifetime of the innocent party. As to the effect of marriages entered into notwithstanding the prohibition, see 1 Pick. Mass. 506; 8 *id.* 433; 5 Ired. No. C. 535; 1 Yerg. Tenn. 110. See DIVORCE.

AB ACTIS (Lat. *actus*, an act). A notary; one who takes down words as they are spoken. Du Cange, *Acta;* Spelman, Gloss. *Cancellarius.*

A reporter who took down the decisions or *acta* of the court as they were given.

AB ANTE (Lat. *ante*, before). In advance.

A legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make. 1 Sumn. C. C. 308.

AB ANTECEDENTE (Lat. *antecedens*). Beforehand. 5 Maule & S. 110.

AB EXTRA (Lat. *extra*, beyond, without). From without. 14 Mass. 151.

AB INCONVENIENTI (Lat. *inconveniens*). From hardship; from what is incon-

venient. An argument *ab inconvenienti* is an argument drawn from the hardship of the case.

AB INITIO (Lat. *initium*, beginning). From the beginning; entirely; as to all the acts done; in the inception.

An estate may be said to be good, an agreement to be void, an act to be unlawful, a trespass to have existed, *ab initio*. Plowd. 6 *a*; 11 East, 395; 10 Johns. N. Y. 253, 369; 1 Sharswood, Blackst. Comm. 440. See Adams, Eq. 186. TRESPASS; TRESPASSER.

Before. Contrasted in this sense with *ex post facto*, 2 Blackstone, Comm. 308, or with *postea*, Calvinus, Lex, *Initium*.

AB INTESTAT. Intestate. 2 Low. C. 219.

AB INTESTATO (Lat. *testatus*, having made a will). From an intestate. Used both in the common and civil law to denote an inheritance derived from an ancestor who died without making a will. 2 Blackstone, Comm. 490; Story, Confl. Laws, 480.

AB INVITO (Lat. *invitum*). Unwillingly. See IN INVITUM.

AB IRATO (Lat. *iratus*, an angry man). By one who is angry. A devise or gift made by a man adversely to the interest of his heirs, on account of anger or hatred against them, is said to be made *ab irato*. A suit to set aside such a will is called an action *ab irato*. Merlin, Repert. *Ab irato*.

ABACTOR (Lat. *ab* and *agere*, to lead away). One who stole cattle in herds. Jacob, Law Dict. One who stole one horse, two mares, two oxen, two she-goats, or five rams. *Abigeus* was the term more commonly used to denote such an offender.

ABADENGO. In Spanish Law. Lands, town, and villages belonging to an abbot and under his jurisdiction. All lands belonging to ecclesiastical corporations, and as such exempt from taxation. Escriche, Dicc. Raz.

Lands of this kind were usually held in mortmain, and hence a law was enacted declaring that no land liable to taxation could be given to ecclesiastical institutions ("*ningun Realengo non pase a abadengo*"), which is repeatedly insisted on.

ABALIENATIO (Lat. *alienatio*). The most complete method of transferring lands, used among the Romans. It could take place only between Roman citizens. Calvinus, Lex, *Abalienatio*.

ABAMITA (Lat.). The sister of a great-great-grandfather. Calvinus, Lex.

ABANDONMENT. The relinquishment or surrender of rights or property by one person to another.

In Civil Law. The act by which a debtor surrenders his property for the benefit of his creditors. Merlin, Repert.

The act by which the owner of a ship surrenders the ship and freight to a creditor who has become such by contracts made by the master.

The effect of such abandonment is to release the owner from any further responsibility. The privilege in case of contracts is limited to those of a maritime nature. Pothier, Chart. Part. sec. 2, art. 2, § 51; Code de Commerce, liv. 2, tit. 2, art. 216. Similar provisions exist in England and the United States to some extent. 1 Parsons, Marit. Law, 395–405; 5 Stor. C. C. 465; 16 Bost. Law Rep. 686; 5 Mich. 368. See ABANDONMENT FOR TORTS.

By Husband or Wife. The act of a husband or wife who leaves his or her consort wilfully and with an intention of causing perpetual separation. See DESERTION.

In Insurance. The transfer by an assured to his underwriters of his interest in the insured subject, or the proceeds of it, or claims arising from it, so far as the subject is insured by the policy.

2. The term is used only in reference to risks in navigation; but the principle is applicable in fire insurance, where there are remnants, and sometimes also under stipulations in life policies in favor of creditors. 2 Phillips Ins. §§ 1490, 1514, 1515; 3 Kent, Comm. 265; 16 Ohio St. 200.

The object of abandonment being to recover the whole value of the subject of the insurance, it is requisite only where the subject itself, or remains of it, or claims on account of it, survive the peril which is the occasion of the loss. 2 Phillips, Ins. 1507, 15, §§ 1507, 1516; 36 Eng. L. & Eq. 198. In such case the assured must elect, immediately on receiving intelligence of a loss, whether to abandon, and not delay for the purpose of speculating on the state of the markets. 2 Phillips, Ins. § 1667. The English law and practice are more restricted than the American, by not making a loss over half the value conclusive of the right to abandon, and by testing the right to abandon by the circumstances at the time of action brought, and not by the circumstances existing at the date when the abandonment is made. 2 Phillips, Ins. § 1536; 1 Gray, Mass. 371.

3. The right is waived by commencing full repairs, but not by temporary repairs, 2 Phillips, Ins. §§ 1540, 1541, but is not lost by reason of the enhancement of the loss through the mere negligence or mistakes of the master or crew; but it is too late to abandon after the arrival *in specie* at the port of destination. An inexpedient or unnecessary sale of the subject by the master does not strengthen the right. 2 Phillips, Ins. §§ 1547, 1555, 1570, 1571. See SALVAGE; TOTAL LOSS.

Abandonment may be made upon information entitled to credit, but if made speculatively upon conjecture it is null. And it must be made without delay, after reasonably reliable information of loss is received; otherwise the right will be waived, the assured not being permitted to wait in order to speculate upon the state of the markets. 2 Phillips, Ins. §§ 1666 *et seq.*

In the absence of any stipulation on the subject, no particular form of abandonment is required; it may be in writing or oral, it

express terms or by obvious implication; but it must be absolute and unconditional, and the ground for it must be stated. 2 Phillips, Ins. §§ 1678, 1679 *et seq.*; 1 Curt. C. C. 148. Acceptance may cure a defect in abandonment, but is not necessary to its validity. 2 Phillips, Ins. § 1689. Nor is the underwriter obliged to accept or decline. He may, however, waive it. 2 Phillips, Ins. § 1698. But it is not subject to be defeated by subsequent events. 2 Phillips, Ins. § 1704; 6 Rich. Eq. So. C. 146. And the subject must be transferred free of incumbrance except expense for salvage. 1 Gray, Mass. 154. See TOTAL LOSS.

Of Rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon. 14 Mees. & W. Exch. 789; 9 Metc. Mass. 395. Mere non-user does not necessarily or usually constitute an abandonment. 10 Pick. Mass. 310; 23 *id.* 141; 3 Strobh. So. C. 224; 5 Rich. So. C. 405; 16 Barb. N. Y. 150; 24 *id.* 44; see Tudor, Lead. Cas. 129, 130; 2 Washburn, Real Prop. 83–85.

4. Abandonment is properly confined to incorporeal hereditaments, as legal rights once vested must be devested according to law, though equitable rights may be abandoned, 2 Wash. C. C. 106; 25 Penn. St. 259; 32 *id.* 401; 15 N. H. 412; see 1 Hen. & M. Va. 429; and an abandonment combined with sufficiently long possession by another party destroys the right of the original owner. 10 Watts, Penn. 192; 2 Metc. Mass. 32; 6 *id.* 337; 31 Me. 381; see also 8 Wend. N. Y. 480; 16 *id.* 545; 3 Ohio, 107; 3 Penn. St. 141; 2 Washburn, Real Prop. 453–458.

There may be an abandonment of an easement, 5 Gray, Mass. 409; 9 Metc. Mass. 395; 6 Conn. 289; 10 Humphr. Tenn. 165; 16 Wend. N. Y. 531; 16 Barb. N. Y. 184; 3 Barnew. & C. 332; of a mill site, 17 Mass. 297; 23 Pick. Mass. 216; 34 Me. 394; 4 M'Cord, So. C. 96; 7 Bingh. 682; an application for land, 2 Serg. & R. Penn. 378; 5 *id.* 215; of an improvement, 1 Yeates, Penn. 515; 2 *id.* 476; 3 Serg. & R. Penn. 319; of a trust fund, 3 Yerg. Tenn. 258; of an invention or discovery, 1 Stor. C. C. 280; 4 Mas. C. C. 111; property sunk in a steamboat and unclaimed, 12 La. Ann. 745; a mining claim, 6 Cal. 510; a right under a land warrant, 23 Penn. St. 271.

The question of abandonment is one of fact for the jury. 2 Washburn, Real Prop. 82.

The effect of abandonment when acted upon by another party is to devest all the owner's rights. 6 Cal. 510; 11 Ill. 588. Consult 2 Washburn, Real Prop. 56, 82–85; 253–258.

ABANDONMENT FOR TORTS. In Civil Law. The relinquishment of a slave or animal who had committed a trespass to the person injured, in discharge of the owner's liability for such trespass or injury. If this were done, the owner could not be held to any further responsibility.

A similar right exists in Louisiana. La. Civ. Code, Art. 180, 181, 2301.

ABARNARE (Lat.). To discover and disclose to a magistrate any secret crime. *Leges Canuti*, cap. 10.

ABATAMENTUM (Lat. *abatare*). An entry by interposition. Coke, Litt. 277. An abatement. Yelv. 151.

ABATARE. To abate. Yelv. 151.

ABATE. See ABATEMENT.

ABATEMENT (Fr. *abattre*, L. Fr. *abater*, signifying to throw down).

In Chancery Practice. A suspension of all proceedings in a suit, from the want of proper parties capable of proceeding therein.

It differs from an abatement at law in this: that in the latter the action is entirely dead and cannot be revived, 3 Blackstone, Comm. 168; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor. 21 N. H. 246; Story, Eq. Pl. § 354; Adams, Eq. 403; Mitford, Eq. Pl., by Jeremy, 57; Edwards, Receiv. 19.

Generally speaking, if any property or right in litigation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff, Edwards, Receiv. 19; 9 Paige, Ch. N. Y. 410; or it may be continued against him, or at least perfected, if he be defendant. Story, Eq. Pl. §§ 332, 442; 7 Paige, Ch. N. Y. 290. See PARTIES.

Death of a trustee does not abate a suit, but it must be suspended till a new one is appointed. 5 Gray, Mass. 162.

2. There are some cases, however, in which a court of equity will entertain applications, notwithstanding the suit is suspended: thus, proceedings may be had to preserve property in dispute, 2 Paige, Ch. N. Y. 368; to pay money out of court where the right is clear, 6 Ves. Ch. 250; or upon consent of parties, 2 Ves. Ch. 399; to punish a party for breach of an injunction, 4 Paige, Ch. N. Y. 163; to enroll a decree, 2 Dick. Ch. 612; or to make an order for the delivery of deeds and writings, 1 Ves. Ch. 185.

Although abatement in chancery suspends proceedings, it does not put an end to them; a party therefore imprisoned for contempt is not discharged, but must move that the complaint be revived in a specified time or the bill be dismissed and himself discharged. 3 Daniel, Chanc. Pract. 225. Nor will a receiver be discharged without special order of court. 2 Hog. 291; 1 Barb. Ch. N. Y. 329; Edwards, Receiv. 19.

3. All declinatory and dilatory pleas in equity are said to be pleas in abatement. See Story, Eq. Pl. § 708; Beames, Eq. Pl. 55–57; Cooper, Eq. Pl. 236. And such pleas must be pleaded before a plea in bar, if at all. Story, Eq. Pl. § 708; see 7 Johns. Ch. N. Y. 214; 20 Ga. 379. See PLEA.

In Contracts. A reduction made by the creditor, for the prompt payment of a debt due by the payer or debtor. Weskett, Ins. 7.

Of Freehold. The unlawful entry upon

and keeping possession of an estate by a stranger, after the death of the ancestor and before the heir or devisee takes possession. It is a species of ouster by intervention between the ancestor or devisor and the heir or devisee, thus defeating the rightful possession of the latter. 3 Sharswood, Blackst. Comm. 167; Coke, Litt. 277 *a*; Finch, Law, 195; Cruise, Dig. B. 1, 60.

4. By the ancient laws of Normandy, this term was used to signify the act of one who, having an apparent right of possession to an estate, took possession of it immediately after the death of the actual possessor, before the heir entered. *Howard, Anciennes Lois des Français*, tome 1, p. 539.

Of Legacies. The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies.

When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionably to an amount sufficient to pay the debts.

5. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionably. 2 Sharswood, Blackst. Comm. 513 and note; Bacon, Abr. Leg. H.; Roper, Leg. 253, 284; 2 Brown, Ch. 19; 2 P. Will. Ch. 283.

In Mercantile Law. The deduction from, or the refunding of, duties sometimes made at the custom house, on account of damages received by goods during importation or while in store. See Act of Congress, Mar. 2, 1799, § 52; 1 Story, U. S. Laws, 617; Andrews, Rev. Laws, §§ 113, 162.

Of Nuisances. The prostration or removal of a nuisance. 3 Blackstone, Comm. 5. See NUISANCE.

6. In Pleading. The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, and which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way. Stephen, Pl. 47; 3 Blackstone, Comm. 168; 1 Chitty, Pl. 6th Lond. ed. 446; Gould, Pl. ch. 5, § 65.

It has been applied rather inappropriately as a generic term to all pleas of a dilatory nature; whereas the word dilatory would seem to be the more proper generic term, and the word abatement applicable to a certain portion of dilatory pleas. Comyn, Dig. Abt. B.; 1 Chitty, Pl. 440 (6 Lond. ed.); Gould. Pl., ch. 5, § 65. In this general sense it has been used to include pleas to the jurisdiction of the court. See JURISDICTION.

7. AS TO THE PERSON OF THE PLAINTIFF AND DEFENDANT. It may be pleaded that there never was such a person in *rerum natura* as to the plaintiff. 1 Chitty, Pl. (6th Lond. ed.) 448; 6 Pick. Mass. 370; 17 Johns. N. Y. 308; 14 Ark. 27; and by one of two or more defendants as to one or more of his co-defendants. Archbold, Civ. Pl. 312. That one of the plaintiffs is a fictitious person, to defeat the action as to all. Comyn, Dig. Abt. E. 16; 1 Chitty, Pl. 448; Archbold, Civ. Pl. 304. This would also be a good plea in bar. 1 Bos. & P. 44. That the nominal plaintiff in the action of ejectment is fictitious, is not pleadable in any manner. 4 Maule & S. 301; 19 Johns. N.Y. 169. A defendant cannot plead matter which affects his co-defendant alone. 40 Me. 336; 4 Zabr. N. J. 333; 14 N. H. 243; 21 Wend. N. Y. 457.

8. *Certain legal disabilities* are pleadable in abatement, such as *outlawry*, Bacon, Abr. Abt. B; Coke, Litt. 128 A; *attainder* of treason or felony, 3 Blackstone, Comm. 301; Comyn, Dig. Abt. E, 3; also *premunire* and *excommunication*, 3 Blackstone, Comm. 301; Comyn, Dig. Abt. E. 5. The law in reference to these disabilities can be of no practical importance in the United States. Gould, Pl. ch. 5, § 32.

9. *Alienage.* That the plaintiff is an alien friend is pleadable only in some cases, where, for instance, he sues for property which he is incapacitated from holding or acquiring. Coke, Litt. 129 *b*; Busb. 250. By the common law, although he could not inherit, yet he might acquire by purchase, and hold as against all but the sovereign. Accordingly, he has been allowed in this country to sue upon a title by grant or devise. 1 Mass. 256; 7 Cranch, 603. But see 6 Cal. 250; 26 Mo. 426. The early English authority upon this point was otherwise. Bacon, Abr. Abt. B. 3, Aliens D; Coke, Litt. 129 *b*. He is in general able to maintain all actions relating to personal chattels or personal injuries. 3 Blackstone, Comm. 384; Cowp. 161; Bacon, Abr. Aliens D.; 2 Kent, Comm. 34; Coke, Litt. 129 *b*. But an alien enemy can maintain no action except by license or permission of the government. Bacon, Abr. Abt. B. 3, Aliens D.; 1 Salk. 46; 1 Ld. Raym. 282; 2 Strange, 1082; 4 East. 502; 6 Term, 23, 49; 8 *id.* 166; 6 Binn. Penn. 241; 9 Mass. 363, 377; 11 *id.* 119; 12 *id.* 8; 3 Maule & S. 533; 2 Johns. Ch. N. Y. 508; 15 East. 260; 1 Serg & R. Penn. 310; 1 Chitty, Pl. 434. This will be implied from the alien being suffered to remain, or to come to the country, after the commencement of hostilities, without being ordered away by the executive. 10 Johns. N. Y. 69. See 28 Eng. L. & Eq. 219. The better opinion seems to be that an alien enemy cannot sue as administrator. Gould, Pl. ch. 5, § 44.

10. *Corporations.* A plea in abatement is the proper manner of contesting the existence of an alleged corporation, plaintiff. Wright, Ohio, 12; 6 Cush. Mass. 279; 3 Pick. Mass. 236; 1 Mass. 485; 1 Md. 502; 33 Penn. St. 356; 28 N.H. 93; 1 Pet. 450; 4 *id.* 501; 5 *id.* 231. To a suit brought in the name of the "Judges of the County Court," after such court has been abolished, the defendant may plead in abatement that there are no such judges. 2 Bay, So. C. 519.

11. *Coverture* of the plaintiff is pleadable in abatement. Comyn, Dig. Abt. E, 6; Bacon, Abr. Abt. G.; Coke, Litt. 132; 3 Term, 631; 1 Chitty, Pl. 439; though occurring after suit

brought, 3 Blackstone, Comm. 316; Bacon, Abr. Abt. 9; 4 Serg. & R. Penn. 238; 17 Mass. 342; 7 Gray, Mass. 338; 6 Term, 265; 4 East, 502; and see 1 E. D. Smith, N. Y. 273; but not after plea in bar, unless the marriage arose after the plea in bar, 15 Conn. 569; but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge, and his pleading it. 4 Serg. & R. Penn. 238; 1 Bail. So. C. 369; 2 *id.* 349; 2 Wheat. 111; 14 Mass. 295; 1 Blackf. Ind. 288; 10 Serg. & R. Penn. 208; 7 Vt. 508; 4 *id.* 545; 1 Yeates, Penn. 185; 2 Dall. Penn. 184; 3 Bibb, Ky. 246. And it cannot be otherwise objected to if she sues for a cause of action that would survive to her on the death of her husband. 12 Mees. & W. Exch. 97; 3 C. B. 153; 10 Serg. & R. Penn. 208. Where she sues, not having any interest, the defence is one of substance, and may be pleaded in bar, by demurrer, or on the general issue, 4 Term, 361; 1 Salk. 114; 1 H. Blackst. 108; Croke, Jac. 644, whether she sues jointly or alone. So also where coverture avoids the contract or instrument, it is matter in bar. 14 Serg. & R. Penn. 379.

12. Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after, marriage, the coverture is pleadable in abatement, 1 Sid. 109; 3 Term, 629; and not otherwise, 9 Mees. & W. Exch. 299; Comyn, Dig. Abt. F 2. If the marriage takes place pending the action, it cannot be pleaded. 2 Ld. Raym. 1525; 5 Me. 445; 2 M'Cord, So. C. 469. It must be pleaded by the *feme* in person. 2 Saund. 209 *b*. Any thing which suspends the coverture suspends also the right to plead it. Comyn, Dig. Abt. F 2, § 3; Coke, Litt. 132 *b*; 2 W. Blackst. 1197; 1 Bos. & P. 358, n. (f); 4 Esp. 27, 28; 15 Mass. 31; 6 Pick. Mass. 29.

13. *Death* of the plaintiff before purchase of the writ may be pleaded in abatement. 1 Archbold, Civ. Pl. 304; Comyn, Dig. Abt. E 17; 3 Ill. 507; 1 Watts & S. Penn. 438; 14 Miss. 205; 2 M'Mull. So. C. 49. So may the death of a sole plaintiff who dies pending his suit at common law. Bacon, Abr. Abt. F; Comyn, Dig. Abt. H. 32, 33; 4 Hen. & M. Va. 410; 3 Mass. 296; 2 Root, Conn. 57; 9 Mass. 422; 2 Rand. Va. 454; 2 Me. 127. Otherwise now by statute, in most cases, in most if not all the States of the United States, and in England since 1852. The personal representatives are usually authorized to act in such cases. If the cause of action is such that the right dies with the person, the suit still abates. By statute 8 & 9 Wm. IV., ch. 2, sect. 7, which is understood to enact the common law rule, where the form of action is such that the death of one of several plaintiffs will not change the plea, the action does not abate by the death of any of the plaintiffs pending the suit The death of the lessor in ejectment never abates the suit. 8 Johns. N. Y. 495; 23 Ala. N. S. 193; 13 Ired. No. C. 43, 489; 1 Blatchf. C. C. 393.

14. The death of sole defendant pending an action abates it. Bacon, Abr. Abt. F; Comyn, Dig. Abt. H 32; Hayw. No. C. 500; 2 Binn. Penn. 1; Gilm. Va. 145; 4 M'Cord, So. C. 160; 7 Wheat. 530; 1 Watts, Penn. 229; 4 Mass. 480; 8 Me. 128; 11 Ga. 151. But where one of several co-defendants dies pending the action, his death is in general no cause of abatement, even by common law. Hargrave, 113, 151; Croke, Car. 426; Bacon, Abr. Abt. F; Gould, Pl. ch. 5, § 93. If the cause of action is such as would survive against the survivor or survivors, the plaintiff may proceed by suggesting the death upon the record. 24 Miss. 192; Gould, Pl. ch. 5, § 93. The inconvenience of abatement by death of parties was remedied by 17 Car. ii, ch. 8, and 8 & 9 Wm. III., ch. 2, ss. 6, 7. In the United States, on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them. Gould, Pl. ch. 5, § 95. The right of action against a tort-feasor dies with him; and such death should be pleaded in abatement. 3 Cal. 370. Many exceptions to this rule exist by statute.

15. *Infancy* is pleadable in abatement to the person of the plaintiff, unless the infant appear by guardian or *prochein ami*. Coke, Litt. 135 *b*; 2 Saund. 117; 3 Blackstone, Comm. 301; Bacon, Abr. Infancy, K 2; 7 Johns. N. Y. 379; 2 Conn. 357; 3 E. D. Smith, N. Y. 596; 1 Speers, So. C. 212. He cannot appear by attorney, since he cannot make a power of attorney. 1 Chitty, Pl. 436; Archbold, Civ. Pl. 301; 3 Saund. 212; 3 N. H. 345; 8 Pick. Mass. 552; 7 Mass. 241; 4 Halst. N. J. 381; 2 N. H. 487; 7 Johns. N. Y. 373. Where an infant sues as co-executor with an adult, both may appear by attorney, for, the suit being brought *in autre droit*, the personal rights of the infant are not affected, and therefore the adult is permitted to appoint an attorney for both. 3 Saund. 212; 1 Rolle, Abr. 288; Croke, Eliz. 542; 2 Strange, 784. At common law, judgment obtained for or against an infant plaintiff who appears by attorney, no plea being interposed, may be reversed by writ of error. 1 Rolle, Abr. 287; 3 Saund. 212; Croke, Jac. 441. By statute, however, such judgment is valid, if for the infant. 3 Saund. 212 (n. 5).

16. *Lunacy*. A lunatic may appear by attorney, and the court will on motion appoint an attorney for him. 18 Johns. N. Y. 135. But a suit brought by a lunatic under guardianship shall abate. Brayt. Vt. 18.

17. *Misjoinder*. The joinder of improper plaintiffs may be pleaded in abatement. Comyn, Dig. Abt. E 15; Archbold, Civ. Pl. 304; 1 Chitty, Pl. 8. Advantage may also be taken, if the misjoinder appear on record, by demurrer in arrest of judgment, or by writ of error. If it does not appear in the pleadings, it would be ground of non-suit on the trial. 1 Chitty, Pl. 66. Misjoinder of defendants in a personal action is not subject of a plea in abatement. 18 Ga. 509; Archbold, Civ. Pl. 68, 310. When an action is thus brought

against two upon a contract made by one, it is a good ground of defence under the general issue, Clayt. Del. 114; 1 East, 48; 2 Day, Conn. 272; 11 Johns. N. Y. 104; 1 Esp. 363; for in such case the proof disproves the declaration. If several are sued for a tort committed by one, such misjoinder is no ground of objection in any manner, as of co-defendants in actions *ex delicto*, some may be convicted and others acquitted. 1 Saund. 291. In a real action, if brought against several persons, they may plead several tenancy; that is, that they hold in severalty, not jointly, Comyn, Dig. Abt. F 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ. Comyn, Dig. Abt. F 13.

18. *Misnomer* of plaintiff, where the misnomer appears in the declaration, must be pleaded in abatement. 1 Chitty, Pl. 451; 1 Mass. 76; 5 *id.* 97; 15 *id.* 469; 10 Serg. & R. Penn. 257; 10 Humphr. Tenn. 512; 9 Barb. N. Y. 202; 32 N. H. 470. It is a good plea in abatement that the party sues by his surname only. Harp. So. C. 49; 1 Tayl. No. C. 148; Coxe, N. J. 138. A mistake in the Christian name is ground for abatement. 13 Ill. 570. In England the effect of pleas in abatement of misnomer has been diminished by statute 3 & 4 Wm. IV., ch. 42, s. 11, which allows an amendment at the cost of the plaintiff. The rule embodied in the English statute prevails in this country.

If the defendant is sued or declared against by a wrong name, he may plead the mistake in abatement, 3 Blackstone, Comm. 302; 1 Salk. 7; 3 East, 167; Bacon, Abr. D; and in abatement only, 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151; 3 *id.* 235; but one defendant cannot plead the misnomer of another. Comyn, Dig. Abt. F 18; 1 Chitty, Pl. 440; Archbold, Civ. Pl. 312; 1 Nev. & P. 26.

19. The omission of the initial letter between the Christian and surname of the party is not a misnomer or variance. 5 Johns. N. Y. 84. As to *idem sonans*, see 10 East, 83; 16 *id.* 110; 2 Taunt. 400. Since oyer of the writ has been prohibited, the misnomer must appear in the declaration. 1 Cow. N. Y. 37. Misnomer of defendant was never pleadable in any other manner than in abatement. 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151; 3 *id.* 235. In England this plea has been abolished. 3 & 4 Wm. IV., ch. 42, s. 11. And in the States, generally, the plaintiff is allowed to amend a misnomer.

In criminal practice the usual pleas in abatement are for misnomer. If the indictment assigns to the defendant no Christian name, or a wrong one, no surname, or a wrong one, he can only object to this matter by a plea in abatement. 2 Gabbett, Crim. Law 327. As to the evidence necessary in such case, see 1 Maule & S. 453; 1 Salk. 6; 1 Campb. 479; 3 Greenleaf, Ev. § 221.

20. *Non-joinder.* If one of several joint tenants sue, Coke, Litt. 180 *b*; Bacon Abr. *Joint Tenants*, K; 1 Bos. & P. 73; one of several joint contractors, in an action *ex contractu*, Archbold, Civ. Pl. 48–51, 53; one of several partners, 16 Ill. 340; 19 Penn. St. 273; 20 *id.* 228; Gow, Partn. 150; Collier, Partn. § 649; one of several joint executors who have proved the will, or even if they have not proved the will, 10 Ark. 169; 1 Chitty, Pl. 12, 13; one of several joint administrators, *id.* 13; the defendant may plead the non-joinder in abatement. Comyn, Dig. Abt. E; 1 Chitty, Pl. 12. The omission of one or more of the owners of the property in an action *ex delicto* is pleaded in abatement. 22 Vt. 388; 10 Ired. No. C. 169; 2 Cush. Mass. 130; 13 Penn. St. 497; 11 Ill. 22. Dormant partners may be omitted in suits on contracts to which they are not privy. 4 Wend. N. Y. 628; 8 Serg. & R. Penn. 55; 6 Pick. Mass. 352; 3 Cow. N. Y. 85. A non-joinder may also be taken advantage of in actions *ex contractu*, at the trial, under the general issue, by demurrer, or in arrest of judgment, if it appears on the face of the pleadings. 4 Wend. N. Y. 496.

21. *Non-joinder* of a person as defendant who is jointly interested in the contract upon which the action is brought can only be taken advantage of by plea in abatement, 5 Term, 651; 1 East, 20; 4 Term, 725; 3 Campb. 50; 2 Jur. 48; 2 Johns. Cas. N. Y. 382; 3 Caines, N. Y. 99; 18 Johns. N. Y. 459; 2 Iowa, 161; 24 Conn. 531; 26 Penn. St. 458; 24 N. H. 128; 8 Gill. Md. 59; 19 Ala. N. S. 340; 2 Zabr. N. J. 372; 9 B. Monr. Ky. 30; 23 Ga. 600; Archbold, Civ. Pl. 309; unless the mistake appear from the plaintiff's own pleadings, when it may be taken advantage of by demurrer or in arrest of judgment. 1 Saund. 271; 18 Johns. N. Y. 459; 1 Bos. & P. 72. Non-joinder of a co-tenant may be pleaded when the suit respects the land held in common. 44 Me. 92. When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties separately or jointly. 1 Chitty, Pl. 43; 1 Saund. 153, n. 1; 2 Burr. 1190; Brayt. Vt. 22. In actions of tort the plaintiff may join the parties concerned in the tort, or not, at his election. 6 Taunt. 29, 35, 42; 1 Saund. 291; 6 Moore, 154; 7 Price, Exch. 408; 3 Bos. & P. 54; Gould, Pl. ch. 5, § 118; 3 East, 62. The non-joinder of any of the wrong-doers is no defence in any form of action.

22. When husband and wife should be sued jointly, and one is sued alone, the non-joinder may be pleaded in abatement. Archbold, Civ. Pl. 309. Non-joinder of co-executors or co-administrators may be pleaded in abatement. Comyn, Dig. Abt. F W. The form of action is of no account where the action is substantially founded in contract. 6 Term 369; 5 *id.* 651. The law under this head has in a great measure become obsolete in many of the States, by statutory provisions making contracts which by the common law were joint, both joint and several.

23. *Privilege* of Defendant from being sued may be pleaded in abatement. 9 Yerg. Tenn. 1; Bacon, Abr. Abt. C. See PRIVILEGE. A peer of England cannot, as formerly, plead

his peerage in abatement of a writ of summons. 2 Wm. IV., ch. 39. It is a good cause of abatement that the defendant was arrested at a time when he was privileged from arrest, 2 N. H. 468; 4 T. B. Monr. Ky. 539; or that he was served with process while privileged from suits, 2 Wend. N. Y. 586; 1 South. N. J. 366; 1 Ala. 276. The privilege of defendant as member of the legislature has been pleaded in abatement. 4 Day. Conn. 129.

For cases where the defendant may plead non-tenure, see Archbold, Civ. Pl. 310; Croke, Eliz. 559; 33 Me. 343.

Where he may plead a disclaimer, see Archbold, Civ. Pl.; Comyn, Dig. Abt. F 15; 2 N. H. 10.

Pleas in Abatement to the count required oyer of the original writ; and, as this cannot now be had, these pleas are, it seems, abolished. 1 Chitty, Pl. 450 (6th Lond. ed.); Saunders, Pl. *Abatement.*

24. Pleas in Abatement of the Writ.—In general, any irregularity, defect, or informality in the terms, form, or structure of the writ, or mode of issuing it, is a ground of abatement. Gould, Pl. ch. 5, s. 132. Among them may be enumerated want of date, or impossible date; want of venue, or, in local actions, a wrong venue; a defective return. Gould, Pl. ch. 5, s. 133. Oyer of the writ being prohibited, these errors cannot be objected to unless they appear in the declaration, which is presumed to correspond with the writ. 1 Bos. & P. 645–648; 6 Fla. 724; 3 Bos. & P. 399; 14 Mees. & W. Exch. 161. The objection then is to the writ through the declaration, 1 Bos. & P. 648, there being no plea to the declaration alone, but in bar. 2 Saund. 209; 10 Mod. 210.

Such pleas are either to the form of the writ, or to the action thereof.

Those of the first description were formerly either for matter apparent on the face of the writ, or for matter *dehors.* Comyn, Dig. Abt. H 17.

Pleas in abatement to the form of the writ were formerly allowed for very trifling errors apparent on the face of the writ, 1 Lutw. 25; 1 Strange, 556; Ld. Raym. 1541; 2 Bos. & P. 395, but since oyer has been prohibited have fallen into disuse. Tidd, Pract. 636.

25. Pleas in abatement of the form of the writ are now principally for matters *dehors,* Comyn, Dig. Abt. H 17; Gilbert, C. P. 51, existing at the time of suing out the writ, or arising afterwards; such as misnomer of the plaintiff or defendant in Christian or surname. 1 Tidd, Pr. 637.

Pleas in Abatement to the Action of the Writ are that the action is misconceived, as if assumpsit is brought instead of *account,* or trespass when case is the proper action, 1 Show. 71; Hob. 199; 1 Tidd, Pr. 579, or that the right of action had not accrued at the commencement of the suit. 2 Lev. 197; Croke, Eliz. 325; Hob. 199; Comyn, Dig. *Action,* E 1. But these pleas are unusual, since advantage may be taken for the same reasons on demurrer or under the general issue. Gould, Pl. ch. 5, s. 137; 1 Crompt. & M. Exch. 492, 768. It may also be pleaded in abatement that there is another action pending. Comyn, Dig. Abt. H 24; Bacon, Abr. Abt. M; 1 Chitty, Pl. 443. See Lis pendens.

26. *Variance.* Where the count varies from the writ, or the writ varies from the record or instrument on which the action is brought, it is pleadable in abatement. 2 Wils. 85, 395; Croke, Eliz. 722; 1 H. Blackst. 249; 17 Ark. 254; 17 Ill. 529; 25 N. H. 521. If the variance is only in matter of mere form, as in time or place, when that circumstance is immaterial, advantage can be taken only by plea in abatement. 8 Ind. 354; 10 Ill. 75; Yelv. 120; Latch, 173; Gould, Pl. ch. 5, ss. 97, 98–101. But if the variance is in matter of substance, as if the writ sounds in contract and the declaration in tort, advantage may also be taken by motion in arrest of judgment. 28 N. H. 90; Hob. 279; Croke, Eliz. 722. Pleas under this head have been virtually abolished by the rule refusing oyer of the writ; and the operation of this rule extends to all pleas in abatement that cannot be proved without examination of the writ. Gould, Pl. ch. 5, s. 101. It seems that oyer of the writ is allowed in some of the States which retain the old system of pleading, as well as in those which have adopted new systems. In such States these rules as to variance are of force. 28 N. H. 90; 25 *id.* 521; 17 Ill. 529; 22 Ala. n. s. 588; 23 Miss. 193; 8 Ind. 354; 21 Ala. n. s. 404; 11 Ill. 573; 35 N. H. 172; 17 Ark. 154; 1 Harr. & G. Md. 164; 1 T. B. Monr. Ky. 35; 11 Wheat. 280; 12 Johns. N. Y. 430; 4 Halst. N. J. 284.

27. Qualities of Pleas in Abatement. The defendant may plead in abatement to part, and demur or plead in bar to the residue, of the declaration. 1 Chitty, Pl. 458 (6th Lond. ed.); 2 Saund. 210. The general rule is that whatever proves the writ false at the time of suing it out shall abate the writ entirely. Gilbert, C. P. 247; 1 Saund. 286 (n. 7).

As this plea delays the ascertainment of the merits of the action, it is not favored by the courts: the greatest accuracy and precision are therefore required; and it cannot be amended. 3 Term, 186; Willes, 42; 2 Saund. 298; Comyn, Dig. I 11; Coke, Litt. 392; Croke, Jac. 82; 13 Mees. & W. Exch. 464; 2 Johns. Cas. N. Y. 312; 8 Bingh. 416; 44 Me. 482; 18 Ark. 236; 1 Hempst. Ark. 215; 27 Ala. n. s. 678; 24 *id.* 329. It must contain a direct, full, and positive averment of all the material facts. 30 Vt. 76; 35 N. H. 172; 4 R. I. 110; 37 Me. 49; 28 N. H. 18; 26 Vt. 48; 24 Ala. n. s. 329; 1 Mich. 254. It must give enough so as to enable the plaintiff by amendment completely to supply the defect or avoid the mistake on which the plea is founded. 6 Taunt. 595; 4 Term, 224; 8 *id.* 515; 1 Saund. 274, (n. 4); 6 East, 600; 1 Day, Conn. 28; 3 Mass. 24; 2 *id.* 362; 1 Hayw. No. C. 501; 2 Ld. Raym. 1178; 1 East, 634.

28. It must not be double or repugnant. 5 Term, 487; Carth. 207; 3 Mees. & W. Exch. 607. It must have an apt and proper beginning and conclusion. 3 Term, 186; 2 Johns. Cas. N. Y. 312; 10 Johns. N. Y. 49; 2 Saund. 209. The whole matter of complaint must be covered by the plea. 2 Bos. & P. 420. It cannot be pleaded after making full defence. 1 Chitty, Pl. 441 (6th Lond. ed.).

As to the form of pleas in abatement, see 22 Vt. 211; 1 Chitty, Pl. (6th Lond. ed.) 454; Comyn, Dig. Abt. I 19; 2 Saund. 1 (n. 2).

As to the time of pleading matter in abatement, it must be pleaded before any plea to the merits, both in civil and criminal cases, except in cases where it arises or comes to the knowledge of the party subsequently. 6 Metc. Mass. 224; 11 Cush. Mass. 164; 21 Vt. 52; 40 Me. 218; 22 Barb. N. Y. 244; 14 Ark. 445; 35 Me. 121; 15 Ala. 675; 13 Mo. 547; and the right is waived by a subsequent plea to the merits. 14 How. 505; 15 Ala. 675; 19 Conn. 493; 1 Iowa, 165; 4 Gill, Md. 166. See PLEA PUIS DARREIN CONTINUANCE.

29. *Of the Affidavit of Truth.* Every dilatory plea must be proven to be true, either by affidavit, by matter apparent upon the record, or probable matter shown to the court to induce them to believe it. 3 & 4 Anne, ch. 16, s. 11; 3 Bos. & P. 397; 2 W. Blackst. 1088; 3 Nev. & M. 260; 30 Vt. 177; 1 Curt. C. C. 494; 17 Ala. 30; 1 Chandl. Wisc. 16; 1 Swan., Tenn. 391; 1 Iowa, 165. It is not necessary that the affidavit should be made by the party himself; his attorney, or even a third person, will do. Barnes, 344; 1 Saunders, Pl. & Ev. 3 (5th Am. ed.). The plaintiff may waive an affidavit. 5 Dowl. & L. 737; 16 Johns. N. Y. 307. The affidavit must be coextensive with the plea, 3 Nev. & M. 260, and leave nothing to be collected by inference. Say. 293. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea. 3 Strange, 705; 1 P. A. Browne, Penn. 77; 2 Dall. Penn. 184; 1 Yeates, Penn. 185.

30. JUDGMENT ON PLEAS IN ABATEMENT. If issue be joined on a plea in abatement, a judgment for the plaintiff upon a verdict is final, 2 Wils. 368; 1 Ld. Raym. 992; Tidd, Pr. 641; 1 Strange, 532; 1 Bibb, Ky. 234; 6 Wend. N. Y. 649; 8 Cush. Mass. 301; 3 N. H. 232; 2 Penn. St. 361; 3 Wend. N. Y. 258; but judgment for plaintiff upon a demurrer to a plea in abatement is not final, but merely *respondeat ouster*. 1 East, 542; 1 Ventr. 137; Ld. Raym. 992; Tidd, Pr. 641; 16 Mass, 147; 14 N. H. 371; 32 *id.* 361; 1 Blackf. Ind. 388. After judgment of *respondeat ouster*, the defendant has four days' time to plead, commencing after the judgment has been signed. 8 Bingh. 177. He may plead again in abatement, provided the subject-matter pleaded be not of the same degree, or of any preceding degree or class with that before pleaded. Comyn, Dig. Abt. I 3; 1 Saunders, Pl. & Ev. 4 (5th Am. ed.); Tidd, Pr. 641.

If the plea is determined in favor of the defendant either upon an issue of law or fact, the judgment is that the writ or bill be quashed. Yelv. 112; Bacon, Abr. Abt. P; Gould, Pl. ch. 5, § 159; 2 Saund. 211 (n. 3).

See further, on the subject of abatement of actions, Comyn, Dig. Abt.; Bacon, Abr. Abt.; United States Digest. Abt.; 1 Saunders, Pl. & Ev. 1 (5th Am. ed.); Graham, Pr. 224; Tidd, Pr. 636; Gould, Pl. ch. 5; 1 Chitty, Pl. 446 (6th Lond. ed.); Story, Pl. 1–70.

Of Taxes. A diminution or decrease in the amount of tax imposed upon any person. The provisions for securing this abatement are entirely matters of statute regulation, 5 Gray, Mass. 365; 4 R. I. 313; 30 Penn. St. 227; 18 Ark. 380; 18 Ill. 312, and vary in the different States. See the various digests of State laws and collections of statutes.

ABATOR. One who abates or destroys a nuisance. One who, having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. Littleton, § 397; Perkins, § 383; 2 Preston, Abstr. 296, 300. See Adams, Eject. 43; 1 Washburn, Real Prop. 225.

ABATUDA. Any thing diminished; as, *moneta abatuda*, which is money clipped or diminished in value.—Cowel.

ABAVIA. The great-grandmother.

ABAVITA. Used for *abamita*, which see.

ABAVUNCULUS. The great-great-grandmother's brother.—Calvinus, Lex.

ABAVUS. The great-grandfather, or fourth male ascendant.

ABBEY. A society of religious persons, having an abbot or abbess to preside over them.

Formerly some of the most considerable abbots and priors in England had seats and votes in the house of lords. The prior of St. John's of Jerusalem was styled the first baron of England, in respect to the lay-barons, but he was the last of the spiritual barons.

ABBREVIATION. A shortened form of a word obtained by the omission of one or more letters or syllables from the middle or end of the word.

The abbreviations in common use in modern times consist of the initial letter or letters, syllable or syllables, of the word. Anciently, also, contracted forms of words, obtained by the omission of letters intermediate between the initial and final letters, were much in use. These latter forms are now more commonly designated by the term *contraction*. Abbreviations are of frequent use in referring to text-books, reports, &c., and in indicating dates, but should be very sparingly employed, if at all, in formal and important legal documents. See 4 Carr. & P. 51; 9 Coke, 48. No part of an indictment should contain any abbreviations except in cases where a *fac-simile* of a written instrument is necessary to be set out. 1 East, 180, n. The variety and number of abbreviations is as nearly illimitable as the ingenuity of man can make them; and the advantages arising from their use are, to a great extent, counterbalanced by the ambiguity and uncertainty resulting from the usually inconsiderate selection which is made.

The following list of abbreviations, though very extensive, is necessarily incomplete, and does not include those used in the present edition of this work in referring to REPORTS, for which, as well as for an outline of the system of citation of authorities here adopted, reference is made to the article CITATION OF AUTHORITIES.

A, a. See A.

A. & A. on Corp. Angell & Ames on Corporations. Sometimes cited *Ang. on Corp.*

A. B. Anonymous Reports, printed at the end of Bendloe's Reports.

A. C. Appeal Court, Chancery.

A. D. Anno Domini; in the year of our Lord.

A. P. B. Ashurst, Paper Book.

A. S. Act of Sederunt.

A. & E. Adolphus and Ellis' Reports.

A. & E. (N. S.) Adolphus and Ellis' Reports, New Series, commonly cited *Q. B.*

A. & F. on Fixt. Amos & Ferrard on Fixtures.

A. K. Marsh. A. K. Marshall's Reports.

Ab. or *Abr.* Abridgment.

Ab. Ad. R. Abbott's Admiralty Reports.

Ab. Pl. Abbott's Pleadings under the Code.

Ab. Pr. R. Abbott's Practice Reports.

Ab. Ship. Abbott (Lord Tenterden) on Shipping.

Abr. Ca. Eq. Abridgment of Cases in Equity.

Abs. Absolute.

Acc. Accord or Agrees.

Act. Acton's Reports.

Act. Reg. Acta Regia.

Ad. Eject. Adams on Ejectment.

Ad. & Ell. Adolphus & Ellis' Reports.

Ad. fin. Ad finem. At or near the end.

Ad. Eq. Adams' Equity.

Ads. Ad sectam. Vide Ats.

Addams' R. Addams' Ecclesiastical Reports.

Addis. on Cont. Addison on the Law of Contracts and on Parties to Actions ex contractu.

Addis. R. Addison's Reports.

Adm. Admiralty.

Admr. Administrator.

Adye C. M. Adye on Courts Martial.

Aik. R. Aiken's Reports.

Al. Aleyn's Cases.

Al. Alinea. *Al. et. Et alii;* and others.

Al. & N. Alcock & Napier's Reports.

Ala. Alabama.

Alc. Alcock's Registration Cases.

Ald. & Van Hoes. Dig. A Digest of the Laws of Mississippi, by T. J. Fox Alden and J. A. Van Hoesen.

Ald. Ind. Alden's Index.

Aldr. Hist. Aldridge's History of the Courts of Law.

Alex. Ch. Pr. Alexander's Chancery Practice.

Alis. Prin. Alison's Principles of the Criminal Law of Scotland.

All. & Mor. Tr. Allen and Morris' Trial.

All. Sher. Allen on Sheriffs.

Alleyne, L. D. of Mar. Alleyne's Legal Degrees of Marriage Considered.

Alln. Part. Allnat on Partition.

Am. America, American, or Americana.

Am. Ch. Dig. American Chancery Digest.

Am. Dig. American Digest.

Am. Jur. American Jurist.

Am. L. J. American Law Journal.

Am. L. R. American Law Register.

Am. Lead. Cas. American Leading Cases.

Am. Pl. Ass. American Pleader's Assistant.

Am. Rail. Cas. American Railway Cases.

Am. & Fer. on Fixt. Amos & Ferrard on Fixtures.

Amb. Ambler's Reports.

An. Anonymous.

And. Anderson's Reports.

Anders. Ch. Ward. Anderson on Church Wardens.

Andr. Dig. Andrews' Digest.

Andr. Andrews' Reports.

Andr. Rev. L. Andrews on the Revenue Laws.

Ang. Angell.

Ang. on Adv. Enj. Angell's Inquiry into the Rule of Law which creates a Right to an Incorporeal Hereditament by an Adverse Enjoyment of Twenty Years. *Ang. on Ass.* Angell's Practical Summary of the Law of Assignments in Trust for Creditors. *Ang. on B. T.* Angell on Bank Tax. *Ang. on Corp.* Angell on the Law of Private Corporations. *Ang. & D. High.* Angell and Durfree on Highways. *Ang. Ins.* Angell on Insurance. *Ang. on Lim.* Angell's Treatise on the Limitation of Actions at Law and Suits in Equity. *Ang. on Tide Wat.* Angell on the Right of Property in Tide Waters. *Ang. on Water Courses.* Angell on the Common Law in Relation to Water Courses.

Ann. Anne; as, 1 Ann. c. 7.

Ann. Annaly's Reports. This book is usually cited *Cas. temp. Hardw.*

Ann. on Ins. Annesly on Insurance.

Anon. Anonymous.

Anstr. Anstruther's Reports.

Anth. Anthon. *Anth. Abr.* Anthon's Abridgment. *Anth. Ill. Dig.* Anthony's Illinois Digest. *Anth. L. S.* Anthon's Law Student. *Anth. N. P. Cas.* Anthon's Nisi Prius Cases. *Anth. Prec.* Anthon's Precedents. *Anth. Shep.* Anthon's edition of Sheppard's Touchstone.

Ap. Justin. Apud Justinium, or Justinian's Institutes.

App. Apposition.

Appx. Appendix.

Arch. Archbold. *Arch. Civ. Pl.* Archbold's Civil Pleadings. *Arch. Cr. Pl.* Archbold's Criminal Pleadings. *Arch. Pr.* Archbold's Practice. *Arch. B. L.* Archbold's Bankrupt Law. *Arch. L. & T.* Archbold on the Law of Landlord and Tenant. *Arch. N. P.* Archbold's Law of Nisi Prius.

Arg. Argumento, by an argument drawn from such a law. It also signifies *arguendo.*

Arg. Inst. Institution au Droit Français, par M. Argou.

Ark. Arkansas.

Ark. Rev. Stat. Arkansas Revised Statutes.

Arkley Rep. Arkley's Scotch Reports.

Arn. Ins. Arnould on Insurance.

Art. Article.

Ashm. R. Ashmead's Reports.

Aso & Man. Inst. Aso and Manuel's Institutes of the Laws of Spain.

Ass. or *Lib. Ass.* Liber Assissarium, or Pleas of the Crown.

Ast. Ent. Aston's Entries.

Ath. on Mar. Atherly on the Law of Marriage and other Family Settlements.

Atk. Atkyn's Reports.

Atk. P. T. Atkyn's Parliamentary Tracts.

Atk. on Con. Atkinson on Conveyancing.

Atk. on Tit. Atkinson on Marketable Titles.

Ats. in practice, is an abbreviation for the words *at suit of,* and is used when the defendant files any pleadings; for example: when the defendant enters a plea he puts his name before that of the plaintiff, reversing the order in which they are on the record. C. D. (the defendant), *ats* A. B. (the plaintiff). *Ads* is as frequently used for *ad sectam,* and having the same meaning.

Aust. on Jur. The Province of Jurisprudence determined, by John Austin.

Auth. Authentica, in the authentic; that is, the Summary of some of the Novels of the Civil Law inserted in the Code under such a title.

Ayl. Ayliffe's Pandect.

Ayl. Parerg. Ayliffe's *Parergon juris canonici Anglicani.*

Azun. Mar. Law. Azuni's Maritime Law of Europe.
B, b. See B.
B. B. Bail Bond.
B. N. P. Buller's Nisi Prius.
B. P. B. Buller's Paper Book.
B. or *Bk.* Book.
B. & A. Barnewell & Alderson's Reports.
B. & Aust. Cas. Barron & Austin's Election Cases.
B. & B. Ball & Beatty's Reports, or Broderip & Bingham's Reports.
B. C. C. Bail Court Cases.
B. C. R. Bail Court Reports.
B. Eccl. Law. Burns' Ecclesiastical Law.
B. & H. Dig. Bennett & Heard's Massachusetts Digest.
B. & H. Lead. Cas. Bennett & Heard's Leading Cases on Criminal Law.
B. Just. Burns' Justice.
B. N. C. Brooke's New Cases.
B. P. C. or *Bro. Parl. Cas.* and other variations on the same theme. Brown's Parliamentary Cases.
B. & P. or *Bos. & Pull.* Bosanquet and Puller's Reports.
B. R. or *K. B. Bancus Regis,* or King's Bench.
B. Tr. Bishop's Trial.
Bab. on Auct. Babington on the Law of Auctions.
Bab. Set-off. Babington on Set-off and Mutual Credit.
Bac. Bacon. *Bac. Abr.* Bacon's Abridgment. *Bac. Comp. Arb.* Bacon's (M.) Complete Arbitrator. *Bac. El.* Bacon's Elements of the Common Law. *Bac. Gov.* Bacon on Government. *Bac. Law Tr.* Bacon's Law Tracts. *Bac. Lease.* Bacon (M.) on Leases and Terms of Years. *Bac. Lib. Reg.* Bacon's (John) *Liber Regis, vel Thesaurus Rerum Ecclesiasticarum. Bac. Uses.* Bacon's Reading on the Statute of Uses. This is printed in his Law Tracts.
Bach. Man. Bache's Manual of a Pennsylvania Justice of the Peace.
Bain. M. & M. Bainbridge on Mines and Minerals.
Bald. Const. Baldwin on the Constitution.
Bald. R. Baldwin's Circuit Court Reports.
Ball & Beat. Ball and Beatty's Reports.
Ballan. Lim. Ballantine on Limitations.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank. Bankter's Institutes of Scott. Law.
Barb. Barbour. *Barb. Eq. Dig.* Barbour's Equity Digest. *Barb. Cr. Pl.* Barbour's Criminal Pleadings. *Barb. Pract. in Ch.* Barbour's Treatise on the Practice of the Court of Chancery. *Barb. on Set-off.* Barbour on the Law of Set-off, with an appendix of precedents. *Barb. S. C. Rep.* Barbour's Supreme Court Reports.
Barb. Grot. Grotius on War and Peace, with notes by Barbeyrac.
Barb. Puff. Puffendorf's Law of Nature and of Nations, with notes by Barbeyrac.
Barn. Barnardiston's Reports.
Barn. & Ad. Barnewell & Adolphus' Reports.
Barn. & Ald. Barnewell & Alderson's Reports.
Barn. Ch. Barnardiston's Chancery Reports.
Barn. & Cress. Barnewell & Cresswell's Reports.
Barn. Sher. Barnes' Sheriff.
Barnes. Barnes' Notes of Practice.
Barr. Obs. Stat. Barrington's Observations on the more Ancient Statutes.
Barr R. Barr's Reports.
Barr. Ten. Barry's Tenures.
Bart. Conv. Barton's Elements of Conveyancing.
Bart. Prec. Barton's Precedents of Conveyancing. *Bart. Eq.* Barton's Suit in Equity.
Bateman Ag. Bateman on Agency.
Batt. Sp. Perf. Batten on Specific Performance.
Batty's R. Batty's Reports.
Bay's R. Bay's Reports.
Bayl. Bills. Bayley on Bills.
Bayl. Ch. Pr. Bayley's Chamber Practice.
Beame Ne Exeat. Beames on the Writ of *Ne Exeat.*
Beame Eq. Pl. Beames on Equity Pleading.
Beame Ord. Chan. Beames' General Orders of the High Court of Chancery from 1600 to 1815.
Beat. R. Beatty's Reports determined in the High Court of Chancery in Ireland.
Beav. R. Beavan's Chancery Reports.
Beawes. Beawes' Lex Mercatoria.
Beck's Med. Jur. Beck's Medical Jurisprudence.
Bee R. Bee's Reports.
Bell Com. Bell's Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence. *Bell C. C.* Bell's Crown Cases. *Bell. Del. U. L.* Beller's Delineation of Universal Law. *Bell Dict.* Dictionary of the Law of Scotland. By Robert Bell. *Bell Dict. Dec.* Bell's Dictionary of Decisions. *Bell Med. Jur.* Bell's Medical Jurisprudence. *Bell H. & W.* Bell on Husband and Wife. *Bell P. C.* Bell's Cases in Parliament. *Bell S.* Bell on Sales. *Bell. Sess. Cas.* Bell's Cases in the Court of Sessions.
Bellew. Bellewe's Cases in the time of Richard III. Bellewe's Cases in the time of Henry VIII., Edw. VI., and 2 Mary, collected out of Brooke's Abridgment, and arranged under years, with a table, are cited as *Brooke's New Cases.*
Bellingh. Tr. Bellingham's Trial.
Belt Sup. Belt's Supplement. Supplement to the Reports in Chancery of Francis Vesey, Senior, Esq., during the time of Lord Ch. J. Hardwicke.
Belt Ves. sen. Belt's edition of Vesey senior's Reports.
Benl. Benloe & Dalison's Reports. See Reports, *Benloe.*
Ben. Ad. Benedict's Admiralty.
Ben. on Av. Benecke on Average.
Benn. Diss. Bennett's Short Dissertation on the Nature and Various Proceedings in the Master's Office in the Court of Chancery. Sometimes this book is called *Benn. Pract.*
Benn. Pract. See *Benn. Diss.*
Ben. & Sl. Dig. Benjamin & Slidell's Louisiana Digest.
Ben. Sum. Benedict's Summary on the Jurisdiction, &c. of Justices of the Peace in New York.
Benth. Ev. Bentham's Treatise on Judicial Evidence.
Best Pres. Best's Treatise on Presumptions of Law and Fact.
Betts Adm. Pr. Betts' Admiralty Practice.
Bev. Hom. Bevil on Homicide.
Bibb R. Bibb's Reports.
Bill. Aw. Billing on the Law of Awards.
Bing. Bingham. *Bing. Inf.* Bingham on Infancy. *Bing. Judg.* Bingham on Judgments and Executions. *Bing. L. & T.* Bingham on the Law of Landlord and Tenant. *Bing. R.* Bingham's Reports. *Bing. N. C.* Bingham's New Cases.
Bing. & Colv. Rents. Bingham & Colvin on Rents, &c.
Binn. Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney.
Binns' Just. Binns' Pennsylvania Justice.
Bird Conv. Bird on Conveyancing. *Bird L. & T.* Bird on the Laws respecting Landlords, Tenants, and Lodgers. *Bird's Sol. Pr.* Bird's Solution of Precedents of Settlements.
Biret, De l'Abs. Traité de l'Absence et de ses Effets, par M. Biret.
Bish. C. L. Bishop's Commentaries on Criminal Law.
Bish. Mar. Bishop on Marriage and Divorce.
Biss. Est. or *Biss. Life Est.* Bissett on the Law of Estates for Life.
Biss. Partn. Bissett on Partnership.
Bk. Jud. Book of Judgments, by Townsend; cited as 1 *Bk. Jud.* and 2 *Bk. Jud.*

Bl. Comm. or *Comm.* Commentaries on the Laws of England, by Sir William Blackstone.
Bl. & How. R. Blatchford & Howland's Admiralty Reports.
Bl. Rep. Sir William Blackstone's Reports.
Bl. H. Henry Blackstone's Reports, sometimes cited *H. Bl.*
Bl. L. T. Blackstone's Law Tracts.
Black R. Black's Reports.
Black. T. T. Blackwell on Tax Titles.
Blackb. Sales. Blackburn on the Effect of the Contract of Sales.
Blak. Ch. Pr. Blake's Practice in the Court of Chancery of the State of New York.
Blan. Annu. Blancy on Life Annuities.
Blansh. Lim. Blanshard on Limitations.
Bl. or *Blount.* Blount's Law Dictionary and Glossary.
Blyd. U. Blydenburg on Usury.
Booth Act. Booth on Real Actions.
Boh. Dec. Bohun's Declarations. *Boh. Eng. L.* Bohun's English Lawyer. *Boh. Priv. Lon.* Bohun's Privilegia Londini.
Boote. Boote Ch. Pr. Boote's Chancery Practice. *Boote S. L.* Boote's Suit at Law.
Booth's R. A. Booth on Real Actions.
Borth. L. L. Borthwick on the Law of Libel.
Bos. & Pull. Bosanquet & Puller's Reports.
Bosc. Conv. Boscawen on Convictions.
Bott. Bott's Poor Laws.
Bouch. Inst. Dr. Mar. Boucher, *Institution au Droit Maritime.*
Boulay Paty Dr. Com. Cours de Droit Commercial Maritime, par P. S. Boulay Paty.
Bourke Parl. Prec. Bourke's Parliamentary Precedents.
Bousq. Dict. de Dr. Bousquet, *Dictionnaire de Droit.*
Bout. Man. Boutwell's Manual of the Direct and Excise Tax System of the United States.
Bouv. Bouvier. *Bouv. L. D.* Bouvier's Law Dictionary. *Bouv. Inst. Institutiones Theologicæ, Auctore* J. Bouvier. Also, Bouvier's Institutes of American Law.
Bowl. Lib. Bowles on Libels.
Bowy. Com. Bowyer's Commentaries on Universal Public Law.
Br. or *Bro.* Brooke, Brown, or Brownlow.
Br. or *Brownl.* Brownlow's Reports.
Br. or *Br. Abr.* Brooke's Abridgment.
Brac. Bracton's Treatise on the Laws and Customs of England.
Brack. L. Misc. Brackenridge's Law Miscellany.
Brack. Trusts. Brackenridge on Trusts.
Brad. Brady's History of the Succession of the Crown of England, &c.
Bradb. Bradby on Distresses.
Bradf. R. Bradford's Reports.
Bradl. P. B. Bradley's Point Book.
Brandt Div. Brandt on Divorce or Matrimonial Causes.
Bran. Princ. or *Bran. Max.* Branch's *Principia Legis et Æquitatis,* being an alphabetical collection of maxims, &c.
Brayt. R. Brayton's Reports.
Breese R. Breese's Reports.
Brev. Dig. Brevard's Digest.
Brev. Sel. Brevia Selecta, or Choice Writs.
Brid. Dig. Ind. Bridgman's Digested Index. *Brid. Leg. Bib.* Bridgman's Legal Bibliography. *Brid. Conv.* Bridgman's Precedents of Conveyancing. *Brid. Refl.* Bridgman's Reflections on the Study of the Law. *Brid. Synth.* Bridgman's Synthesis. *Brid. Thes. Jur.* Bridgman's Thesaurus Juridicus.
Bright, H. & W. Bright on Husband and Wife.
Bright. Brightly. *Bright. Costs.* Brightly on Costs. *Bright. Eq.* Brightly's Equity Jurisprudence. *Bright. N. P.* Brightly's Nisi Prius Reports. *Bright. Purd.* Purdon's Pennsylvania Digest, edited by Brightly. *Bright. U. S. Dig.* Brightly's United States Digest.
Britton. Treatise on the Ancient Pleas of the Crown.
Bro. or *Brownl.* Brownlow's Reports. Also, Reports by Richard Brownlow and John Goldesborough. Cited 1 *Bro.* 2 *Bro.* See REPORTS.
Bro. Abr. Brooke's Abridgment.
Bro. A. & C. L. Brown's Admiralty and Civil Law.
Bro. Com. Brown's Commentaries.
Bro. C. R. Brown's Chancery Reports.
Bro. Max. Broon's Legal Maxims.
Bro. Of. Not. A Treatise on the Office and Practice of a Notary in England, as connected with Mercantile Instruments, &c. By Richard Brooke.
Bro. P. C. Brown's Parliamentary Cases.
Bro. R. Browne's Reports.
Bro. V. M. Brown's *Vade Mecum.*
Bro. Read. Brooke's Reading on the Statute of Limitations.
Bro. Sales. Brown on Sales.
Bro. St. Fr. Browne on the Statute of Frauds.
Brown R. Brown's Scotch Reports.
Brown Sup. Brown's Supplemental Scotch Reports.
Brown Syn. Dec. Brown's Synopsis of Decisions.
Brod. & Bing. Broderip & Bingham's Reports.
Broom Part. Broom on Parties to Actions.
Broom Max. Broom's Maxims.
Brownl. Rediv. or *Brownl. Ent. Brownlow Redivivus.*
Bruce M. L. Bruce's Military Law.
Buck Ca. Buck's Cases.
Bull. & Cur. Dig. Bullard & Curry's Louisiana Digest.
Bull. or *Bull. N. P.* Buller's Nisi Prius.
Bulst. Bulstrode's Reports.
Burg. Burge. *Burg. Col. Law.* Burge's Colonial Law. *Burg. Confl. Law.* Burge on the Conflict of Laws. *Burg. For. Law.* Burge on Foreign Law. *Burg. Sur.* Burge's Commentaries on the Law of Suretyship, &c.
Burlam. Burlamaqui's Natural and Political Law.
Burn. R. Burnett's Reports.
Burn. C. L. Burnett's Treatise on the Criminal Law of Scotland.
Burn L. D. Burn's Law Dictionary.
Burn Just. Burn's Justice of the Peace.
Burn Ec. Law, or *Burn E. L.* Burn's Ecclesiastical Law.
Burr. Burrow's Reports.
Burr. Assign. Burrill on Assignments.
Burr. C. Ev. Burrill on Circumstantial Evidence.
Burr. L. D. Burrill's Law Dictionary.
Burr. Pract. Burrill's Practice.
Burr. Sett. Cases. Burrow's Settlement Cases.
Burr Tr. Burr's Trial.
Burt. Man. Burton's Manual on the Law of Scotland. The work is in two parts, one relating to *public law,* and the other to the law of *private rights and obligations.* The former is cited *Burt. Man. P. L.;* the latter, *Burt. Man. Pr.*
Burt. Real Prop. Burton on Real Property.
Busb. Eq. R. Busbee's Equity Reports.
Busb. R. Busbee's Reports.
Butl. Hor. Jur. Butler's Horæ Juridicæ Subsecivæ.
Buny. Ass. Bunyon on Life Assurance.
Byles Bills. Byles on Bills.
C. Codex, the Code of Justinian. Code. Chancellor.
C. & A. Cooke and Alcock's Reports.
C. B. Communis Bancus, or Common Bench.
C. C. Circuit Court.
C. C. Cepi Corpus. C. C. and *B. B. Cepi Corpus* and Bail Bond.
C. C. or *Ch. Cas.* Cases in Chancery.

C. C. C. or *Cr. Cir. Com.* Crown Circuit Companion.
C. C. R. Crown Cases Reserved.
C. C. & C. Cepi Corpus et committitur. See *Capias ad satisfaciendum*, in the body of the work.
C. C. E. or *Cain. Cas.* Caines' Cases in Error.
C. D. or *Com. Dig.* Comyn's Digest.
C. & D. C. C. Crawford and Dix's Criminal Cases.
C. & D. Ab. C. Crawford and Dix's Abridged Cases.
C. & F. Clark and Finelly's Reports.
C. & H. Dig. Coventry & Hughes' Digest.
C. J. Chief Justice.
C. & J. Crompton & Jervis' Reports.
C. J. C. P. Chief Justice of the Common Pleas.
C. J. K. B. Chief Justice of the King's Bench.
C. J. Q. B. Chief Justice of the Queen's Bench.
C. J. U. P. Chief Justice of the Upper Bench. During the time of the Commonwealth, the English Court of the King's Bench was called the Upper Bench.
C. & K. Carrington & Kirwan's Reports.
C. L. R. Common Law Reports.
C. & M. Crompton & Meeson's Reports.
C. & Marsh. Carrington & Marshman's Reports.
C. M. & R. Crompton, Meeson, & Roscoe's Reports.
C. N. P. C. Campbell's Nisi Prius Cases.
C. P. Common Pleas.
C. P. Coop. C. P. Cooper's Reports.
C. & P. or *Car. & Payn.* Carrington & Payne's Reports.
C. & P. Craig & Phillips' Reports.
C. R. or *Ch. Rep.* Chancery Reports.
C. & R. Cockburn & Rowe's Reports.
C. W. Dudl. Eq. C. W. Dudley's Equity Reports.
C. Theod. Codice Theodosiano, in the Theodosian Code.
Ca. Case or placitum.
Ca. t. K. Select Cases *tempore* King.
Ca. t. Talb. Cases *tempore* Talbot.
Ca. resp. Capias ad respondendum.
Ca. sa., in practice, is the abbreviation of *capias ad satisfaciendum.*
Caines' Reports. Caines' Term Reports.
Caines' Cas. Caines' Cases in Error.
Caines' Pr. Caines' Practice.
Cal. California.
Cal. Pract. Hart's California Practice.
Cald. Arbit. Caldwell on Arbitration.
Callan Mil. L. Callan's Military Laws.
Call. Sew. Callis on the Law relating to Sewers.
Call R. Call's Reports.
Calth. R. Calthorp's Reports of Special Cases touching several customs and liberties of the City of London.
Calth. Copyh. Calthorpe on Copyholds.
Calv. on Part. Calvert on Parties to Suits in Equity.
Cam. & Norw. Cameron & Norwood's Reports.
Campb. Campbell's Reports.
Campb. Ld. Ch. Campbell's Lives of the Lord Chancellors.
Can. Canon.
Cap. Capitulo, chapter.
Car. Carolus; as, 13 Car. II., c. 1.
Car. L. Rep. Carolina Law Repository.
Carr. Cr. L. Carrington's Criminal Law.
Carr. & Kirw. Carrington & Kirwan's Reports.
Carr. & Marsh. Carrington & Marshman's Reports.
Carr. & Oliv. Carrow & Oliver's Railway and Canal Cases.
Cart. Carter's Reports. Reports in C. P. in 16, 17, 18, and 19 Charles II.
Carta de For. Carta de Foresta.
Cart. Ind. R. Carter's Indiana Reports.
Carth. Carthew's Reports.
Cary. Cary's Reports.
Cary Partn. Cary on the Law of Partnership.
Cas. App. Cases of Appeals to the House of Lords.
Cas. L. Eq. Cases and Opinions in Law, Equity, and Conveyancing.
Cas. Pr. Cases of Practice in the Court of the King's Bench, from the Reign of Eliz. to the 14 Geo. III.
Cas. R. Casey's Reports.
Cas. Sett. Cases of Settlement.
Ch. Chancellor.
Ch. Cas. Cases in Chancery.
Ch. Pr. Precedents in Chancery.
Ch. R. Reports in Chancery
Ch. Rep. See CH. CASES.
Chal. Op. Chalmers' Opinions.
Chamb. Jur. Chan. Chambers on the Jurisdiction of the High Court of Chancery over the Persons and Property of Infants.
Chamb. L. & T. Chambers on the Law of Landlord and Tenant.
Chand. R. Chandler's Reports.
Chandl. Tr. Chandler's Trials.
Char. Merc. Charta Mercatoria. See Bacon, Abr. *Smuggling*, C.
Charlt. Charlton. *T. U. P. Charlt.* T. U. P. Charlton's Reports. *R. M. Charlt.* R. M. Charlton's Reports.
Chase's Tr. Chase's Trial.
Cher. Cas. Cherokee Case.
Chest. Cas. Case of the City of Chester, on Quo Warranto.
Chev. C. C. Cheves' Chancery Cases.
Chev. R. Cheves' Reports.
Chipm. R. Chipman's Reports. *D. Chipm.* D. Chipman's Reports.
Chipm. Contr. Essay on the Law of Contracts for the Payment of Articles, by Daniel Chipman.
Chit. Chitty.
Chit. Contr. A Practical Treatise on the Law of Contracts. By Joseph Chitty, Jr. *Chit. App.* Chitty's Practical Treatise on the Law relating to Apprentices and Journeymen. *Chit. Bills.* Chitty on Bills. *Chit. Jr. Bills.* Chitty, junior, on Bills. *Chit. Com. L.* Chitty's Treatise on Commercial Law. *Chit. Cr. L.* Chitty's Criminal Law. *Chit. Des.* Chitty on the Law of Descents. *Chit. Eq. Dig.* Chitty's Equity Digest. *Chit. F.* Chitty's Forms and Practical Proceedings. *Chit. Med. Jur.* Chitty on Medical Jurisprudence. *Chit. Pl.* A Practical Treatise on Pleading, by Joseph Chitty. *Chit. Pr.* Precedents in Pleading, by Joseph Chitty, junior. *Chit. Pract.* Chitty's General Practice. *Chit. Prerog.* Chitty on the Law of the Prerogatives of the Crown. *Chit. Rep.* Chitty's Reports.
Christ. B. L. Christian's Bankrupt Laws.
Christ. Med. Jur. Christison's Treatise on Poisons, relating to Medical Jurisprudence, Physiology, and the Practice of Physic.
City Hall Rec. Rogers' City Hall Recorder.
Civ. Civil.
Civ. Code La. Civil Code of Louisiana.
Cl. The Clementines.
Cl. Ass. Clerk's Assistant.
Cl. Herne R. Clerk Herne's Scotch Reports.
Clan. H. & W. Clancy on the Rights, Duties, and Liabilities of Husband and Wife.
Clarke, Adm. Pr. Clarke's Practice in the Admiralty.
Clarke Ch. R. Clarke's Chancery Reports.
Clark & Fin. Clark and Finelly's Reports.
Clark Lease. Clark's Enquiry into the Nature of Leases.
Clark. Prax. Clarke's Praxis, being the manner of Proceeding in the Ecclesiastical Courts.
Clarke R. Clarke's Reports.
Clayt. Clayton's Reports.
Cleir. Us. et Coust. Cleirac, *Us et Coustumes de la Mer.*

Clerke Dig. Clerke's Digest.
Clerke's Rud. Clerke's Rudiments of American Law and Practice.
Clev. Bank. Cleveland on the Banking System.
Clift. Clift's Entries.
Cl. & Sp. Dig. Clinton and Spencer's Digest.
Clusk. P. T. Cluskey's Political Text Book.
Co. A particle used before other words to imply that the person spoken of possesses the same character as the other persons whose character is mentioned; as, co-executor, an executor with others; co-heir, an heir with others; co-partner, a partner with others, etc. *Co.* is also an abbreviation for *Company;* as, John Smith & Co. When so abbreviated it also represents *County.*
Co. or *Co. Rep.* Coke's Reports. Cited sometimes *Rep.*
Co. Ent. Coke's Entries.
Co. B. L. Cooke's Bankrupt Law.
Co. Courts. Coke on Courts; 4th Institute. See INSTITUTES.
Co. Litt. Coke on Littleton. See INSTITUTES.
Co. M. C. Coke's Magna Charta; 2d Institute. See INSTITUTES.
Co. P. C. Coke's Pleas of the Crown. See INSTITUTES.
Cobb R. Cobb's Reports.
Cobb Slav. Cobb on Slavery.
Cocke Const. Cocke's Constitutional History.
Cock. & Rowe. Cockburn & Rowe's Reports.
Code Civ. Code Civil, or Civil Code of France. This work is usually cited by the article.
Code Com. Code de Commerce.
Code La. Civil Code of Louisiana.
Code Nap. Code Napoléon. The same as Code Civil.
Code Pén. Code Pénal
Code Pro. Code de Procédure.
Code R. Code Reports.
Code Rep. Code Reporter.
Col. Column, in the first or second column of the book quoted.
Col. & Cai. Cas. Coleman & Caines' Cases.
Colb. Pr. Colby's Practice.
Cole Inf. Cole on Criminal Information, and Informations in the Nature of Quo Warranto.
Coll. Collation.
Coll. C. C. Collyer's Chancery Cases.
Coll. Id. Collinson on the Law concerning Idiots, &c.
Coll. Min. Collier on Mines.
Coll. Part. Collyer on Partnership.
Coll. Pat. Collier on the Law of Patents.
Coll. Colles' Reports, and also Collyer's Reports.
Com. Communes, or *Extravagantes Communes.*
Com. Comyn. *Com.* or *Com. Rep.* Comyn's Reports. *Com. Contr.* Comyn on Contracts. *Com. Dig.* Comyn's Digest. *Com. L. & T.* Comyn on the Law of Landlord and Tenant. *Com. Us.* Comyn on Usury.
Com. Law. Commercial Law.
Com. Law Rep. English Common Law Reports.
Comm. Blackstone's Commentaries.
Comst. Ex. Comstock on Executors.
Comst. R. Comstock's Reports.
Con. Dig. Connor's Digest.
Con. & Law. Connor & Lawson's Reports.
Con. Dig. Ind. Conover's Digested Index.
Cond. Condensed.
Cond. Ch. R. Condensed Chancery Reports.
Cond. Exch. R. Condensed Exchequer Reports.
Conf. Chart. Confirmatio Chartarum.
Conf. R. Conference Reports.
Cong. Congress.
Conk. Ad. Conkling's Admiralty.
Conk. Pr. Conkling's Practice of the Courts of the United States.
Conn. Connecticut.
Conr. Cust. R. Conroy's Custodian Reports.
Con. & Sim. Dig. Connor and Simonton's Equity Digest.
Cons. R. Consistory Reports.
Cons. del Mar. Consolato del Mare.
Cons. Ct. R. Constitutional Court Reports.
Cont. Contra.
Cooke Def. Cooke on Defamation.
Cooke R. Cooke's Reports.
Cooley R. Cooley's Reports.
Coop. Cooper. *Coop. Eq. R.* Cooper's Equity Reports. *Coop. Cas.* Cooper's Cases in Chancery. *Coop. Lib.* Cooper on the Law of Libel. *Coop. Eq. Pl.* Cooper's Equity Pleading. *Coop. Just.* Cooper's Justinian's Institutes. *Coop. Med. Jur.* Cooper's Medical Jurisprudence. *Coop. t. Brough.* Cooper's Cases in the time of Brougham. *Coop. P. P.* Cooper's Points of Practice.
Coote Mort. Coote on Mortgages.
Corb. & Dan. Corbett & Daniell's Election Cases.
Corn. Dig. Cornwell's Digest.
Corn. Uses. Cornish on Uses.
Corn. Rem. Cornish on Remainders.
Corp. Jur. Can. Corpus Juris Canonicis.
Corp. Jur. Civ. Corpus Juris Civilis.
Corvin. Corvinus. See Bacon Abr. *Mortgage* A, where this author is cited.
Coryton Pat. Coryton on Patents.
Cot. Abr. Cotton's Abridgment of Records.
Cov. Conv. Evid. Coventry on Conveyancer's Evidence.
Cow. Int. Cowel's Law Dictionary, or, "The Interpreter of Words and Terms used either in the Common or Statute Laws of Great Britain.
Cow. Tr. Cowen's Treatise.
Cox's Cas. Cox's Cases.
Coxe's R. Coxe's Reports.
Cra. Pr. Craig's Practice.
Cra. St. & Pat. Craig, Stewart, and Paten's Reports.
Crabb C. L. Crabb's Common Law. A History of the English Law. By George Crabb.
Crabb, R. P. Crabb on the Law of Real Property.
Crabbe R. Crabbe's Reports.
Craig & Phil. Craig & Phillip's Reports.
Cranch C. C. R. Cranch's Circuit Court Reports.
Cranch R. Cranch's Reports.
Cresswo. R. Cresswell's Reports of Cases decided in the Court for the Relief of Insolvent Debtors.
Crim. Con. Criminal conversation; adultery.
Critch. R. Critchfield's Reports.
Cro. Croke. *Cro. Eliz.* Croke's Reports during the time of Queen Elizabeth; also cited as 1 *Cro. Cro. Jac.* Croke's Reports during the time of King James I.; also cited as 2 Cro. *Cro. Car.* Croke's Reports during the time of Charles I.; also cited as 3 Cro.
Crock. Sher. Crocker on Sheriffs.
Crompt. Exch. Rep. Crompton's Exchequer Reports.
Crompt. J. C. Crompton's Jurisdiction of Courts.
Crompt. & Mees. Crompton & Meeson's Exchequer Reports.
Crompt. Mees. & Rosc. Crompton, Meeson, and Roscoe's Reports.
Cross Lien. Cross' Treatise on the Law of Liens and Stoppage in Transitu.
Cru. Dig. or *Cruise's Dig.* Cruise's Digest of the Law of Real Property.
Cul. Culpabilis, guilty; *non cul.,* not guilty: a plea entered in actions of trespass. *Cul. prit,* commonly written culprit; *cul.,* as above-mentioned, means *culpabilis,* or culpable; and *prit,* which is a corruption of *pret,* signifies ready. 1 Chitty Cr. Law, 416.
Cull. Bankr. L. Cullen's Principles of the Bankrupt Law.
Cun. Cunningham's Reports.
Cun. Dict. Cunningham's Dictionary.

Cur. adv. vult. *Curia advisare vult.* See CURIA ADVISARE VULT.

Cur. Scacc. *Curæus Scaccarii*, the Court of the Exchequer.

Cur. Phil. *Curia Philippica.*

Curs. Can. *Cursus Cancellariæ.*

Curt. Ad. Dig. Curtis's Admiralty Digest.

Curt. Seam. Curtis on American Seamen.

Curt. Curtis. *Curt. Com.* Curtis's Commentaries. *Curt. Cop.* Curtis on Copyrights. *Curt. Dec.* Curtis's Decisions. *Curt. Dig.* Curtis's Digest. *Curt. Eq. Prec.* Curtis's Equity Precedents. *Curt. Pat.* Curtis on Patents. *Curt. R.* Curtis's Reports.

Cush. Parl. L. Cushing's Parliamentary Law.

Cush. R. Cushing's Reports. Also, Cushman's Reports.

Cushm. R. Cushman's Reports.

Cush. Trust. Pr. Cushing on Trustee Process; or Foreign Attachment, of the Laws of Massachusetts and Maine.

Cust. de Norm. Custome de Normandie.

Custer R. Custer's Ecclesiastical Reports.

D. Dialogue; as, Dr. and Stud. d. 2, c. 24, or Doctor and Student, dialogue 2, chapter 24. *D.* Dictum; Digest of Justinian. The Digest or Pandects of the Civil Law is generally cited thus, D. 6. 1. 5.

D. C. District Court; District of Columbia.

D. C. L. Doctor of the Civil Law.

D. Chipm. R. D. Chipman's Reports.

D. S. B. *Debit sans breve.*

D. S. Deputy Sheriff.

D. & C. Dow & Clark's Reports.

D. & Chit. Deacon & Chitty's Reports.

D. & E. Durnford & East's Reports. This book is also cited as Term Reports, abbreviated *T. R.*

D. & L. Danson & Lloyd's Mercantile Cases.

D. & M. Davison's & Merivale's Reports.

D. & R. Dowling & Ryland's Reports of Cases decided at Nisi Prius.

D. & S. Doctor and Student.

D. & W. Drury & Walsh's Reports.

D'Agueseau, Œuvres. *Œuvres complètes du Chancellier D'Agueseau.*

Dag. Cr. L. Dagge's Criminal Law.

Dal. Dalison's Reports. See REPORTS, *Benloe.*

Dall. Dallas' Reports.

Dall. L. Dallas' Laws of Pennsylvania.

Dalloz, Dict. *Dictionnaire Général et raisonné de Législation, de Doctrine, et de Jurisprudence, en matière civile, commerciale, criminelle, administrative, et de Droit public. Par Armand Dalloz, jeune.*

Dalr. Dalrymple. *Dalr. Ent.* Dalrymple on the Polity of Entails. *Dalr. F. L.* Dalrymple's Feudal Law. *Dalr. Feud. Pr.* Dalrymple's Essay, or History of Feudal Property in Great Britain. Sometimes cited *Dalr. F. L. Dalr. R.* Dalrymple's Scotch Reports.

Dalt. Just. Dalton's Justice.

Dalt. Sh. Dalton's Sheriff.

D'Anv. Abr. D'Anvers' Abridgment.

Dan. & Ll. Danson & Lloyd's Reports.

Dan. Ord. Danish Ordinances.

Dan. Ch. Pr. Daniell's Chancery Practice.

Dan. Rep. Daniell's Reports.

Dana R. Dana's Reports.

Dane Abr. Dane's Abridgment of American Law.

Dart Vend. Dart on Vendors and Purchasers.

Dav. Davies' Reports of Cases in the Irish Courts.

Davis. Davis' Reports.

Dav. Just. Davis on the Authority and Duty of Justices of the Peace.

Dav. Pat. Davies' Collection of Cases respecting Patents.

Dav. Prec. Davidson's Precedents in Conveyancing.

Daw. Arr. Dawes' Commentaries on the Law of Arrest in Civil Cases.

Daw. Land. Pr. Dawes' Epitome of the Law of Landed Property.

Daw. Real Pr. Dawes' Introduction to the Knowledge of the Law on Real Estates.

Dawe. Or. Ley. Dawson's *Origo Leyum.*

Day R. Day's Reports.

Dayt. Sur. Dayton on Surrogates.

Deac. R. Deacon's Reports.

Deac. & Chit. Deacon & Chitty's Reports.

Deane R. Deane's Reports.

Dean Med. Jur. Dean's Medical Jurisprudence.

Deb. Jud. Debates on the Judiciary.

De Boism. Hall. De Boismont on Hallucinations.

Dec. temp. H. & M. Decisions in Admiralty during the time of Hay & Marriott.

Deas & And. R. Deas and Anderson's Scotch Reports.

Deft. Defendant.

De Gex & Jon. De Gex and Jones' Reports.

De Gex, M. & G. De Gex, Macnaghten, and Gordon's Reports.

De Gex & Sm. De Gex & Smale's Reports.

De Hart M. L. De Hart on Military Law.

Del. Delaware.

Den. Cr. Cas. Denison's Crown Cases.

Denio Rep. Denio's New York Reports.

Desaus. R. Desaussure's Chancery Reports.

Dev. & Bat. Eq. R. Devereux and Battle's Reports.

Di. or *Dy.* Dyer's Reports.

Dial. de Scac. *Dialogus de Scaccario.*

Dick. Just. Dickinson's Justice.

Dick. Pr. Dickinson's Practice of the Quarter and other Sessions.

Dict. Dictionary.

Dict. Dr. Can. *Dictionnaire de Droit Canonique.*

Dict. de Jur. *Dictionnaire de Jurisprudence.*

Dig. Digest of Writs. *Dig.* The Pandects, or Digest of the Civil Law, cited Dig. 1. 2. 5. 6. for Digest, book 1, tit. 2, law 5, section 6.

Dirl. Dirleton's Scotch Reports.

Dism. Gam. Disney's Law of Gaming,

Doct. & Stud. Doctor and Student.

Doct. Pl. *Doctrina Placitandi.*

Dod. Eng. Law. Doderidge's English Lawyer.

Dom. Domat, *Lois Civiles.*

Dom. Proc. *Domo Procerum.* In the House of Lords.

Domat. *Lois Civiles dans leur ordre naturel.* Par M. Domat.

Dow. or *Dow. P. C.* Dow's Parliamentary Cases.

Dow & Clark. Dow & Clark's Reports.

Dowl. Pr. C. Dowling's Practical Cases.

Dow. & R. N. P. Dowling & Ryan's Nisi Prius Cases.

Dow. & Ry. M. C. Dowling & Ryan's Magistrates Cases.

Drake Att. Drake on Attachments.

Dr. & St. Doctor and Student.

Drew. Inj. Drewry on Injunctions.

Dru. R. Drury's Reports.

Dru. & Wal. Drury & Walsh's Reports.

Dru. & War. Drury & Warren's Reports.

Dub. *Dubitatur.* *Dubitante.*

Duer. Duer. *Duer R.* Duer's Reports. *Duer Const.* Duer's Constitutional Jurisprudence. *Duer Repr.* Duer on Representations. *Duer Ins.* Duer on Marine Insurance.

Duke or *Duke Ch. Uses.* Duke's Law of Charitable Uses.

Dunl. Adm. Pr. Dunlap's Admiralty Practice.

Dunl. L. Penn. Dunlop's Laws of Pennsylvania.

Dunl. L. U. S. Dunlop's Laws of the United States.

Dunl. Pr. Dunlap's Practice.

Duponc. Const. Duponceau on the Constitution.

Duponc. Jur. Duponceau on Jurisdiction.

Dur. Dr. Fr. Duranton, Droit Français.

Durnf. & East. Durnford & East's Reports; also cited *D. & E.*, or *T. R.*

Durie. Durie's Scotch Reports.
Dutch. R. Dutcher's Reports.
Duc. Dr. Civ. Fr. Duvergier, Droit Civil Français. This is a continuation of Toullier's Droit Civil Français. The *first* volume of Duvergier is the *sixteenth* volume of the continuation. The work is sometimes cited 16 Toullier, instead of being cited 1 Duv. or 1 Duvergier, etc.
Dwar. Stat. Dwarris on Statutes.
Dy. Dyer's Reports.
E. Easter Term.
E. Edward; as, 9 E. III. c. 9. East's Reports.
E. of Cov. Earl of Coventry's Case.
E. C. L. R. English Common Law Reports, sometimes cited *Eng. Com. Law Rep.*, which see.
E. g. Exempli gratia. For instance or example.
E. P. C. or *East P. C.* East's Pleas of the Crown.
Eccl. Ecclesiastical.
Eccl. Law. Ecclesiastical Law.
Eccl. Rep. Ecclesiastical Reports. See *Eng. Eccl. Rep.*
Ed. or *Edit.* Edition.
Ed. Edward; as, 3 Ed. I. c. 9.
Ed. Eq. R. Eden's Equity Reports.
Ed. Inj. Eden on Injunction.
Ed. Pen. Law. Eden's Principles of Penal Law.
Edgar R. Edgar's Scotch Reports.
Edm. Exch. Pr. Edmund's Exchequer Practice.
Edw. Edward; as, 9 Edw. III. c. 2.
Edw. Edwards. *Edw. Ad. Rep.* Edwards' Admiralty Reports. *Edw. Bailm.* Edwards on Bailments. *Edw. Bills.* Edwards on Bills. *Edw. Ch. R.* Edwards' Chancery Reports. *Edw. Lead. Dec.* Edwards' Leading Decisions. *Edw. Part.* Edwards on Parties to Bills in Chancery. *Edw. Rec.* Edwards on Receivers in Chancery. *Edw. St.* Edwards on the Stamp Act. *Edw. Jur.* Edwards' Juryman's Guide.
Elchie R. Elchie's Scotch Reports.
Eliz. Elizabeth; as, 13 Eliz. c. 15.
Ell. & Bl. Ellis & Blackburn's Reports.
Ell. Deb. Elliot's Debates.
Ellis D. & Cr. Ellis on the Law relating to Debtor and Creditor.
Ellis Ins. Ellis on Insurance.
Elm. Dig. Elmer's Digest, N. Jersey.
Elm. Dilap. Elmes on Ecclesiastical and Civil Dilapidations.
Elsyn. Parl. Elsynge on Parliaments.
Elw. Med. Jur. Elwell's Medical Jurisprudence.
Emerigon. Emerigon on Insurance.
Encycl. Encyclopædia, or Encyclopédie.
Eng. English.
Eng. Adm. R. English Admiralty Reports.
Eng. Ch. R. English Chancery Reports.
Eng. Com. Law Rep. English Common Law Reports.
Eng. Eccl. R. English Ecclesiastical Reports.
Eng. Exch. R. English Exchequer Reports.
Eng. Jud. Cases in the Court of Sessions, by English Judges.
Eng. L. & Eq. R. English Law & Equity Reports.
Eng. Plead. English Pleader.
Eng. R. & C. Cas. English Railway and Canal Cases.
Eng. Rep. English's Arkansas Reports.
Eod. Eodem. Under the same title.
Eq. Ca. Ab. Equity Cases Abridged.
Eq. Draft. Equity Draftsman.
Ersk. Inst. Erskine's Institute of the Law of Scotland. *Ersk. Prin.* Erskine's Principles of the Laws of Scotland.
Esp. Ev. Espinasse on Evidence.
Esp. N. P. Espinasse's Nisi Prius.
Esp. N. P. R. Espinasse's Nisi Prius Reports.
Esp. Pen. Ev. Espinasse on Penal Evidence.
Esq. Esquire.
Et. al. Et alii. And others.
Eunom. Eunomus.
Ev. Evans. *Ev. Stat.* Evans' Collection of Statutes. *Ev. Pl.* Evans on Pleading. *Ev. R. L.* Evans' Road Laws S. Carolina. *Ev. Tr.* Evans' Trial. Also Evidence.
Ew. Just. Ewing's Justice.
Ex. or *Exor.* Executor. *Exex.* Executrix.
Exch. R. Exchequer Reports.
Exec. Execution.
Exp. Expired.
Exton Mar. Dicæo. Exton's Maritime Dicæologie.
Extrav. Extravagants.
F. Finalis, the last or latter part; Fitzherbert's Abridgment, or *Consuetudines Feudorum.*
F. N. B. Fitzherbert's Natura Brevium.
F. R. Forum Romanum.
F. & S. Fox & Smith's Reports.
Fac. Coll. Faculty Collection; the name of a series of Scotch Reports.
Fairf. R. Fairfield's Reports.
Falconer R. Falconer's Scotch Reports.
Falc. & Fitzh. Falconer & Fitzherbert's Election Cases.
Far. Farresly (7 Mod. Rep.) is sometimes so cited.
Farr Med. Jur. Farr's Elements of Medical Jurisprudence.
Fearne Rem. Fearne on Remainders.
Fed. The Federalist.
Ff. or *ff.* Pandects of Justinian: this is a careless way of writing the Greek π.
Fell Guar. Fell on Mercantile Guarantics.
Ferg. M. & D. Fergusson on Marriage and Divorce.
Ferg. R. Fergusson's Reports of the Consistorial Court of Scotland.
Ferr. Fixt. Ferrard on Fixtures.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Ferr. Mod. Ferriere, *Moderne, ou Nouveau Dictionnaire des Termes de Droit et de Pratique.*
Fess. Pat. Fessenden on Patents.
Fi. fa. Fieri facias.
Field Com. Law. Field on the Common Law of England.
Field. Pen. Laws. Fielding on Penal Laws.
Finch. Finch's Law; or a Discourse thereof, in five books. *Finch Pr.* Finch's Precedents in Chancery.
Finl. L. C. Finlayson's Leading Cases on Pleading.
Fish. Cop. Fisher on Copyholds.
Fitz. C. Fitz-Gibbon's Cases.
Fitzh. Fitzherbert's Abridgment. *Fitzh. Nat. Brev.* Fitzherbert's Natura Brevium.
Fl. & K. Rep. Flanagan & Kelly's Reports.
Fl. or *Fleta.* A Commentary on the English Law: written by an anonymous author, in the time of Edward I., while a prisoner in the Fleet.
Fla. Florida.
Fla. R. Florida Reports.
Fland. Ch. J. Flanders' Lives of the Chief Justices.
Fland. Mar. L. Flanders on Maritime Law.
Fland. Ship. Flanders on Shipping.
Fletch. Trusts. Fletcher on the Estates of Trustees.
Floy. Proct. Pr. Floyer's Proctor's Practice.
Fogg R. Fogg's Reports.
Fol. Folio. Also, Foley's Poor Laws.
Fonb. Eq. Fonblanque on Equity. *Fonb. Med. Jur.* Fonblanque on Medical Jurisprudence.
Fonb. N. R. Fonblanque's New Reports.
Forb. Bills. Forbes on Bills of Exchange.
Forb. Inst. Forbes' Institute of the Law of Scotland.
Form. Pla. Brown's *Formulæ Placitandi.*
Forr. Forrester's Cases during the time of Lord Talbot; commonly cited *Cas. temp. Talbot.*
Fors. Comp. Forsyth on the Law relating to Composition with Creditors.
Fors. Inf. Forsyth on Infants.

Fortesc. Fortescue *De Laudibus Legum Angliæ.* *Fortesc. R.* Fortescue's Reports *temp.* Wm. and Anne.
Forum. The Forum. By David Paul Brown.
Fost. R. Foster's Reports.
Fost. or *Fost. C. L.* Foster's Crown Law.
Fost. & Finl. N. P. Foster and Finlasar's Nisi Prius Reports.
Fost. S. F. Foster on *Scire Facias.*
Fount. Fountainhall's Scotch Reports.
Fox & Sm. Fox & Smith's Reports.
Fr. Fragmentum. Fragment.
Fr. Ord. French Ordinance. Sometimes cited *Ord. de la Mer.*
Fra. or *Fra. Max.* Francis' Maxims.
Fred. Co. Frederician Code.
Freem. Freeman's Reports. *Freem. C. C.* Freeman's Cases in Chancery.
Freem. Pr. Freeman's Practice, Illinois.
Fry Cont. Fry on the Specific Performance of Contracts.
G. George; as, 13 G. I. c. 29.
G. & J. Glyn & Jameson's Reports, or Gill & Johnson's Reports.
G. M. Dudl. R. G. M. Dudley's Reports.
Ga. Georgia.
Gale & Dav. Gale & Davison's Reports.
Gale Easm. Gale on Easements.
Gale Stat. Gale's Statutes of Illinois.
Gale & What. Gale & Whatley on Easements.
Gall. or *Gall. R.* Gallison's Reports.
Garde Ev. Garde's Practical Treatise on the General Principles and Elementary Rules of the Law of Evidence.
Geo. George; as, 13 Geo. I. c. 29.
Geo. R. George's Reports.
Geo. Lib. George on the Offence of Libel.
Gibb. D. & N. Gibbons on the Law of Dilapidations and Nuisances. *Gibb. Fixt.* Gibbons on Fixtures.
Gibbs R. Gibbs' Reports.
Gibs. Codex. Gibson's Codex *Juris Civilis.*
Gilb. Gilbert. *Gilb. Ev.* Gilbert's Evidence, by Lofft. *Gilb. U. & T.* Gilbert on Uses and Trusts. *Gilb. Ten.* Gilbert on Tenures. *Gilb. Rents.* Gilbert on Rents. *Gilb. Repl.* Gilbert on Replevin. *Gilb. Ex.* Gilbert on Executions. *Gilb. Exch.* Gilbert's Exchequer. *Gilb. For. Rom.* Gilbert's Forum Romanum. *Gilb. K. B.* Gilbert's King's Bench. *Gilb. Rem.* Gilbert on Remainders. *Gilb. Dev.* Gilbert on Devises. *Gilb. Lex. Præt.* Gilbert's Lex Prætoria. *Gilb. Cas.* Gilbert's Cases in Law and Equity. *Gilb. Rep.* Gilbert's Reports. *Gilb. C. P.* Gilbert's Common Pleas. *Gilb. Ch. Pr.* Gilbert's Chancery Practice.
Gill. & Johns. Gill & Johnson's Reports.
Gilm. & Falc. Gilmour & Falconer's Reports.
Gilm. R. Gilmer's Reports.
Gilman R. Gilman's Reports.
Gilp. R. Gilpin's Reports.
Gl. Glossa, a Gloss.
Glanv. Glanville's Treatise of the Laws and Customs of England.
Glassf. Ev. Glassford on Evidence.
Glov. Mun. Corp., or *Glov. Corp.* Glover on the Law of Municipal Corporations.
Glyn & Jam. Glyn & Jameson's Reports of Cases in Bankruptcy.
Godb. Godbolt's Reports.
Godolph. Godolphin's Orphan's Legacy.
Godolph. Adm. Jur. Godolphin's View of the Admiralty Jurisdiction.
Godolph. Rep. Can. Godolphin's *Repertorium Canonicum.*
Gods. Pat. Godson's Treatise on the Law of Patents.
Gord. Dec. Gordon on the Law of Decedents in Pennsylvania.
Gord. Dig. Gordon's Digest of the Laws of the United States.
Gould Pl. Gould on the Principles of Pleading in Civil Actions.
Gouldsb. Gouldsborough's Reports.
Gow Part. Gow on Partnership.
Gow R. Gow's Reports.
Grady Fixt. Grady on the Law of Fixtures.
Grah. Jur. Graham on Jurisdiction.
Grah. Pr. Graham's Practice.
Grah. & Wat. N. T. Graham & Waterman on New Trials.
Grand Cout. Grand Coutumier de Normandie.
Grant Bank. Grant on Banking.
Grant Cas. Grant's Cases.
Grant Ch. Pr. Grant's Chancery Practice.
Grant Corp. Grant on Corporations.
Grayd. F. Graydon's Forms.
Green B. L. Green's Bankrupt Laws.
Green. F. Greening's Forms.
Greenl. Cr. Greenleaf's Cruise on Real Property.
Greenl. Ev. Greenleaf's Treatise on the Law of Evidence.
Greenl. Ov. Cas. Greenleaf's Overruled Cases.
Greenl. R. Greenleaf's Reports.
Greenw. Courts. Greenwood on Courts.
Grein. Dig. Greiner's Digest.
Grein. Pr. Greiner's Practice.
Gresl. Eq. Ev. Gresley's Equity Evidence.
Grey. Grey's Debates in Parliament.
Griff. L. R. Griffith's Law Register.
Grimké Ex. Grimké on the Duty of Executors and Administrators.
Grimké Just. Grimké's Justice.
Grimké P. L. Grimké's Public Laws of South Carolina.
Grisw. R. Griswold's Reports.
Grot. Grotius *de Jure Belli.*
Gude's Pr. Gude's Practice on the Crown Side of the King's Bench, &c.
Gw. Sh. Gwynne on Sheriffs.
Gwill. Gwillim's Tithe Cases.
H. Henry (as, 19 H. VII. c. 15), or, Hilary Term.
H. A. Hoc Anno. This year.
h. v. Hoc verbum, this word; *his verbis,* in these words.
H. & B. Hudson & Brooke's Reports.
H. Bl. Henry Blackstone's Reports.
H. H. C. L. Hale's History of the Common Law.
H. & Disb. Pr. Holmes and Disbrow's Practice.
H. & G. Harris & Gill's Reports.
H. & J. Harris & Johnson's Reports.
H. & M. Hening & Munford's Reports.
H. & M'H., or *Harr. & M'H.* Harris & M'Henry's Reports.
H. & N. Hurlstone and Norman's Reports.
H. P. C. Hale's Pleas of the Crown.
h. t. Hoc titulum, this title; *hoc titulo,* in, or under, this title.
Hab. Corp. Habeas Corpus.
Hab. fa. poss. Habere facias possessionem.
Hab. fa. seis. Habere facias seisinam.
Hagg. C. R. Haggard's Reports in the Consistory Court of London.
Hale Hist. C. L. Hale's History of the Common Law.
Hale Jur. H. L. Hale's Jurisdiction of the House of Lords.
Hale P. C. Hale's Pleas of the Crown.
Hale Sum. Hale's Summary of Pleas.
Halifax Civ. Law. Halifax's Analysis of the Civil Law.
Halk. Dig. Halkerton's Digest of the Law of Scotland relating to Marriage.
Hall Adm. Pr. Hall's Admiralty Practice.
Hall Dig. Ind. Hall's Digested Index.
Hall & Tw. R. Hall & Twell's Reports.
Hallam. Hallam's Middle Ages. *Hallam Const. Hist.* Hallam's Constitutional History of England.
Halst. Halsted. *Halst. Ch. R.* Halsted's Chancery Reports. *Halst. Dig.* Halsted's Digest of

Reports. *Halst. Ev.* Halsted's Digest of the Law of Evidence. *Halst. R.* Halsted's Reports.

Hamm. Hammond. *Hamm. N. P.* Hammond's Nisi Prius. *Hamm. R.* Hammond's (Ohio) Reports. *Hamm. F. Ins.* Hammond on Fire Insurance. *Hamm. Part.* Hammond on Parties to Actions. *Hamm. Pl.* Hammond's Analysis of the Principles of Pleading.

Han. Hansard's Entries.

Hand Ch. Pr. Hand's Chancery Practice.

Hand Cr. Pr. Hand's Crown Practice.

Hand Fines. Hand on Fines and Recoveries.

Hand Pat. Hand on Patents.

Handy R. Handy's Reports.

Hans. Parl. Deb. Hansard's Parliamentary Debates.

Harcarse R. Harcarse's Reports.

Hard. Hardres' Reports.

Hardin R. Hardin's Reports.

Hare Dis. Hare on the Discovery of Evidence by Bill and Answer in Equity.

Hare R. Hare's Reports.

Harg. Hargrave. *Harg. Coll.* Hargrave's Juridical Arguments and Collection. *Harg. Exer.* Hargrave's Exercitations. *Harg. Law Tr.* Hargrave's Law Tracts. *Harg. St. Tr.* Hargrave's State Trials.

Harp. Eq. R. Harper's Equity Reports.

Harp. L. R. Harper's Law Reports.

Harr. Ch. Harrison's Chancery Practice.

Harr. Cond. La. R. Harrison's Condensed Reports of Cases in the Superior Court of the Territory of Orleans, and in the Supreme Court of Louisiana.

Harr. Dig. Harrison's Digest.

Harr. Ent. Harris' Entries.

Harr. (Mich.) R. Harrington's Reports of Cases in the Supreme Court of Michigan.

Harr. & Gill. Harris & Gill's Reports.

Harr. & Johns. Harris & Johnson's Reports.

Harr. & M'H. Harris & M'Henry's Reports.

Harr. R. Harris's Reports.

Harringt. R. Harrington's Delaware Reports.

Harrison R. Harrison's Reports.

Hart. Dig. Hartley's Digest.

Hasl. Med. Jur. Haslam's Medical Jurisprudence.

Hawk. P. C. Hawkins' Pleas of the Crown.

Hawk R. Hawk's Reports.

Hay. Est. An Elementary View of the Common Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates. By William Hayes.

Hay. Exch. R. Hayes' Exchequer Reports.

Hay. Lim. Hayes on Limitations.

Hayes & Jones. Hayes & Jones' Reports.

Hays R. P. Hays on Real Property.

Haywo. (N. C.) R. Haywood's North Carolina Reports.

Haywo. (Tenn.) R. Haywood's Tennessee Reports.

Heath Max. Heath's Maxims.

Heath R. Heath's Reports.

Hein. Elem. Juris Civ. Heineccii, Elementa Juris Civilis, secundum ordinem Institutionem.

Hein. Elem. Juris Nat. Heineccii, Elementa Juris Naturæ et Gentium.

Hemp. R. Hempstead's Reports.

Hen. For. Law. Henry on Foreign Law.

Hen. & Munf. Henning & Munford's Reports.

Hening J. P. Hening's Virginia Justice of the Peace.

Herne Ch. Uses. Herne's Law of Charitable Uses.

Herne Plead. Herne's Pleader.

Het. Hetley's Reports.

Heyw. El. Heywood on Elections.

High. Highmore. *High. Bail.* Highmore on Bail. *High. Lun.* Highmore on Lunacy. *High. Mortm.* Highmore on Mortmain.

Hild. Ins. Hildyard on Insurance.

Hill. Abr. Hilliard's Abridgment of the Law of Real Property.

Hill. Am. Jur. Hilliard's American Jurisprudence.

Hill Ch. Pr. Hill's Chancery Practice.

Hill & Den. R. Hill & Denio's Reports.

Hill. Mort. Hilliard on Mortgages.

Hill R. Hill's Reports.

Hill. R. P. Hilliard on Real Property.

Hill. Sales. Hilliard on Sales.

Hill. Tort. Hilliard on Torts.

Hill Trust. Hill on Trustees. A Practical Treatise on the Law relating to Trustees, &c.

Hill. Vend. Hilliard on Vendors.

Hilt. R. Hiltur's Reports.

Hind. Pat. Hindemarch on Patents.

Hind Pr. Hind's Practice.

Hob. Hobart's Reports.

Hodg. R. Hodge's Reports.

Hodges Railw. Hodges on the Law of Railways.

Hoffm. Outl. Hoffman's Outlines of Legal Study. *Hoffm. Leg. St.* Hoffman's Legal Studies. *Hoffm. Ch. Pr.* Hoffman's Chancery Practice. *Hoffm. Mas. Ch.* Hoffman's Master in Chancery.

Hoffm. R. Hoffman's Reports.

Hog. R. Hogan's Reports.

Hog. St. Tr. Hogan's State Trials.

Hogue's R. Hogue's Reports.

Holc. Holcombe. *Holc. Dig.* Holcombe's Digest. *Holc. D. & Cr.* Holcombe's Law of Debtor and Creditor. *Holc. Eq. Jur.* Holcombe's Equity Jurisprudence. *Holc. Lead. Cas.* Holcombe's Leading Cases.

Holt. L. D. Holthouse's Law Dictionary.

Holt. Lib. Holt on the Law of Libels.

Holt Nav. Holt on Navigation.

Holt R. Holt's Reports.

Holt Sh. Holt on the Law of Shipping.

Hood Ex. Hood on Executors.

Hopk. Adm. Dec. Hopkinson's Admiralty Decisions.

Hopk. R. Hopkins' Reports.

Houard Ang. Sax. Laws. Houard's Anglo-Saxon Laws and Ancient Laws of the French.

Houard Dict. Houard's Dictionary of the Customs of Normandy.

Hough C. M. Hough on Courts Martial.

Hov. Fr. Hovenden on Frauds.

Hov. Supp. Hovenden's Supplement to Vesey Junior's Reports.

How. App. Cas. Howard's Appeal Cases.

How. Pl. Howard's Pleading.

How. Pr. R. Howard's Practice Reports.

How. (Miss.) R. Howard's Mississippi Reports.

How. (U. S.) R. Howard's United States Reports.

Howe Pr. Howe's Practice in Civil Actions and Proceedings at Law in Massachusetts.

Hub. Suc. Hubback on Successions.

Huds. & Bro. Hudson & Brooke's Reports.

Hugh. Abr. Hughs' Abridgment.

Hughes Entr. Hughes' Entries.

Hughes Ins. Hughes on Insurance.

Hughes Wills. Hughes' Practical Directions for Taking Instructions for Drawing Wills.

Hughes Writs. Hughes' Comments upon Original Writs.

Hughs R. Hughs' Reports.

Hull. Costs. Hullock on the Law of Costs.

Hult. Conv. Hulton on Convictions.

Hume Com. Hume's Commentaries on the Criminal Law of Scotland.

Hume R. Hume's Scotch Reports.

Humph. R. Humphrey's Reports.

Hunt. Tr. Huntingdon's Trial.

Hurd F. & B. Hurd on Freedom and Bondage.

Hurd. Pers. Lib. Hurd on Personal Liberty.

Hust. L. T. Huston on Land Titles.

Hut. Hutton's Reports.

I. The Institutes of Justinian are sometimes cited, I. 1, 3, 4.

I. Infra. Beneath, or below.
Ib. Ibidem. The same.
Ictus. Jurisconsultus. This abbreviation is usually written with an I, though it would be more proper to write it with a J, the first letter of the word Jurisconsultus; c is the initial letter of the third syllable, and *tus* is the end of the word.
Id. Idem. The same.
Il Cons. del Mar. Il Consolato del Mare. See CONSOLATO DEL MARE, in the body of the work.
Ill. Illinois.
Imp. Pr. C. P. Impey's Practice in the Common Pleas. *Imp. Pr. K. B.* Impey's Practice in the King's Bench. *Imp. Pl.* Impey's Modern Pleader. *Imp. Sh.* Impey's Office of Sheriff.
In f. In fine. At the end of the title, law, or paragraph quoted.
In pr. In principio. In the beginning and before the first paragraph of a law.
In princ. In principio. In the beginning.
In sum. In summa. In the summary.
Ind. Index.
Ind. Indiana.
Inf. Infra. Beneath, or below.
Ing. Ingersoll. *Ing. Dig.* Ingersoll's Digest of the Laws of the United States. *Ing. Hab. Corp.* Ingersoll on Habeas Corpus. *Ing. Roc.* Ingersoll's Roccus.
Ingr. Insolv. Ingraham on Insolvency.
Inj. Injunction.
Ins. Insurance.
Inst. Institutes. Coke on Littleton is cited *Co. Lit.*, or 1 *Inst.* for First Institute. Coke's Magna Charta is cited *Co. M. C.*, or 2 *Inst.* for Second Institute. *Co. P. C.*, Coke's Pleas of the Crown, is cited 3 *Inst.* for Third Institute. *Co. Courts*, Coke on Courts, is cited 4 *Inst.* for Fourth Institute. In this book, Coke's Institutes are cited as Coke, Litt.; Coke, 2d Inst.; Coke, 3d Inst.; Coke, 4th Inst.
When the Institutes of Justinian are cited, the citation is made thus: *Inst.* 4, 2, 1; or *Inst. lib.* 4, tit. 2, l. 1; to signify Institutes, book 4, tit. 2, law 1.
Inst. Cl. or *Inst. Cler. Instructor Clericalis.*
Inst. Jur. Angl. Institutiones Juris Anglicani, by Doctor Cowel.
Introd. Introduction.
Iowa. Iowa.
Ir. Eq. R. Irish Equity Reports.
Ir. T. R. Irish Term Reports. Sometimes cited *Ridg. Irish T. R.* (q. v.)
Ired. Iredell. *Ired. Dig.* Iredell's Digest. *Ired. Eq. R.* Iredell's Equity Reports. *Ired. R.* Iredell's Reports.
Irvine R. Irvine's Scotch Reports.
J. Justice; also, Institutes of Justinian.
J. C. Juris Consultus.
J. C. P. Justice of the Common Pleas.
JJ. Justices.
J. Glo. Juncta Glossa. The Gloss joined to the text quoted.
J. K. B. Justice of the King's Bench.
J. P. Justice of the Peace.
J. Q. B. Justice of the Queen's Bench.
J. U. B. Justice of the Upper Bench. During the Commonwealth the English Court of the King's Bench was called Upper Bench.
Jac. Jacobus. James; as, 4 Jac. I. c. 1.
Jac. Introd. Jacob's Introduction to the Common, Civil, and Canon Law.
Jac. L. D. Jacob's Law Dictionary.
Jac. L. G. Jacob's Law Grammar.
Jac. Lex Mer. Jacob's *Lex Mercatoria*, or the Merchant's Companion.
Jac. R. Jacob's Chancery Reports.
Jac. & Walk. Jacob & Walker's Chancery Reports.
Jack. Pl. Jackson on Pleading.
Jarm. Ch. Pr. Jarman's Chancery Practice.
Jarm. Pow. Dev. Powell on Devises, with notes by Jarman.
Jarm. Wills. Jarman on the Law of Wills.
Jebb & B. Jebb and Bourke's Reports.
Jebb Ir. Cr. Cas. Jebb's Irish Criminal Cases.
Jebb & S. Jebb & Symes' Reports.
Jeff. Man. Jefferson's Manual.
Jeff. Rep. Thomas Jefferson's Reports.
Jenk. Jenkins' Eight Centuries of Reports; or, Eight Hundred Cases solemnly adjudged in the Exchequer Chamber, or upon Writs of Error, from K. Henry III. to 21 K. James I.
Jer. Jeremy. *Jer. Carr.* Jeremy's Law of Carriers. *Jer. Eq. Jur.* Jeremy on the Equity Jurisdiction of the High Court of Chancery.
Jerv. Cor. Jervis on Coroners.
Jo. Juris. Journal of Jurisprudence.
Johns. Johnson. *Johns. Eccl. Law.* Johnson's Ecclesiastical Law. *Johns. Bills.* The Law of Bills of Exchange, Promissory Notes, Checks, &c. By Cuthbert W. Johnson. *Johns. Civ. L. Sp.* Johnson's Civil Law of Spain. *Johns. V. C. Cases.* Johnson's Cases in Vice-Chancellor Wood's Court. See CITATION OF AUTHORITIES.
Jon. Jones. *Jon.* (1) Sir W. Jones' Reports. (2) Sir T. Jones' Reports. *Jon. Bail.* Jones' Law of Bailments. *Jon. & Car.* Jones & Carey's Reports. *Jon. Inst. Hind. L.* Jones' Institutes of Hindoo Law. *Jon. Lib.* Jones, De Libellis Famosis, or the Law of Libels. *Jones Intr.* Jones' Introduction to Legal Science. *Jones L. O. T.* Jones' Land Office Titles. See CITATION OF AUTHORITIES.
Joy Chal. Joy on Challenge to Jurors.
Joy Ev. Acc. Joy on the Evidence of Accomplices.
Joy Leg. Ed. Joy on Legal Education.
Joynes Lim. Joynes on Limitations.
Jud. Chr. Judicial Chronicle.
Jud. Repos. Judicial Repository.
Judg. Judgments.
Jur. The Jurist.
Jur. Eccl. Jura Ecclesiastica, or a Treatise on the Ecclesiastical Law and Courts, interspersed with various Cases of Law and Equity.
Jur. Mar. Molloy, *De Jure Maritimo.* Sometimes cited *Molloy.*
Jus. Nav. Rhod. Jus Navale Rhodiorum.
Just. Inst. Justinian's Institutes.
K. B. King's Bench.
K. C. B. Reports in the time of Chancellor King.
K. & O. Knapp & Omber's Election Cases.
Kames. Kames. *Kames Eq.* Kames' Principles of Equity. *Kames Ess.* Kames' Essays. *Kames Hist. L. T.* Kames' Historical Law Tracts. *Kames R. Cas.* Kames' Remarkable Cases. *Kames S. Cas.* Kames' Select Cases.
Kan. Kansas.
Keat. Fam. Settl. Keating on Family Settlements.
Keb. Keble's Reports.
Keb. Stat. Keble's English Statutes.
Keen R. Keen's Reports.
Keil., or *Keilw.* Keilway's Reports.
Kelh. Norm. L. D. Kelham's Norman French Law Dictionary.
Kell. R. Kelley's Reports.
Kell. Us. Kelley on Uses.
Kelley & Cobb. Kelley & Cobb's Reports.
Ken. Jur. Kennedy on Juries.
Kent Com. Kent's Commentaries on American Law.
Kern. R. Kernan's Reports.
Keyes F. I. C. Keyes on Future Interest in Chattels.
Keyes F. I. L. Keyes on Future Interest in Lands.
Keyes Rem. Keyes on Remainders.
Kirt. Sur. Pr. Kirtland on Practice in Surrogate's Court.
Kit., or *Kitch.* Kitchen on Courts.

Kna. & Omb. Knapp & Omber's Election Cases.
Knapp A. C. Knapp's Appeal Cases.
Knapp R. Knapp's Privy Council Reports.
Ky. Kentucky.
Kyd Aw. Kyd on the Law of Awards.
Kyd Bills. Kyd on the Law relating to Bills of Exchange.
Kyd Corp. Kyd on the Law relating to Corporations.
L. in citation means *law*, as L. 1, 33. *Furtum, ff. de Furtis*, i.e. Law 1, section or paragraph beginning with the word Furtum; ff. signifies the Digest, and the words *de Furtis* denote the title. *L.* signifies also *liber*, book.
L. & G. Lloyd & Goold's Reports.
L. I. Lr. Lincoln's Inn Library.
L. M. & P. Lowndes, Maxwell & Pollock's Practice Reports.
L. & W. Lloyd & Welsby's Mercantile Cases.
LL. Laws: as, *LL. Gul. I. c.* 42. Laws of William I. chapter 42. *LL. U. S.* Laws of the United States.
L. P. B. Lawrence's Paper Book.
L. S. Locus Sigilli. Place of the seal.
L. T. Law Times Reports.
La. Louisiana.
Lalaure, des Ser. Traité des Servitudes réelles, par M. Lalaure.
Lal. R. P. Lalor on Real Property.
Lamb. Archai. Lambard's Archaionomia.
Lamb. Dow. Lambert on Dower.
Lamb. Eiren. Lambard's Eirenarcha.
Lat. Latch's Reports.
Lat. Just. Latrobe's Justice.
Lauss. Eq. Laussat's Essay on Equity Practice in Pennsylvania.
Law. Chart. Part. Lawes on the Law of Charter Parties.
Laws Eccl. Law. Laws' Ecclesiastical Law.
Law Fr. & Latin Dict. Law French & Latin Dictionary.
Law Intel. Law Intelligencer.
Law Jur. Law's Jurisdiction of the Federal Courts.
Law Lib. Law Library.
Law. Pl. Lawes' Treatise on Pleading in Assumpsit.
Lawr. R. Lawrence's Reports.
Laws Wom. Laws of Women.
Lawy. Mag. Lawyer's Magazine.
Le. Ley's Reports.
Leach. Leach's Cases in Crown Law.
Lead. Cas. Eq. Leading Cases in Equity, by White and Tudor.
Lec. Elm. Leçons Elémentaires du Droit Civil Romain.
Lee Abst. Tit. Lee on the Evidence of Abstracts of Title to Real Property.
Lee Capt. Lee's Treatise of Captures in War.
Lee Dict. Lee's Dictionary of Practice.
Leg. Legibus.
Leg. Bibl. Legal Bibliography, by J. G. Marvin.
Leg. Obs. Legal Observer.
Leg. Oler. The Laws of Oleron.
Leg. Out. Legge on Outlawry.
Leg. Rhod. Leges Rhodiorum. Laws of Rhodes.
Leg. Ult. The Last Law.
Leg. Wisb. Leges Wisbriensis. Laws of Wisbury.
Leigh & Dal. Conv. Leigh & Dalzell on Conversion of Property.
Leigh N. P. Leigh's Nisi Prius.
Leo., or *Leon.* Leonard's Reports.
Lev. Ent. Levinz's Entries.
Lew. C. C. Lewin's Crown Cases.
Lew. Cr. Law. An Abridgment of the Criminal Law of the United States, by Ellis Lewis.
Lew. Perp. Lewis on the Law of Perpetuities.
Lew. Tr. Lewin on Trusts.
Lex Man. Lex Maneriorum.
Lex Mer. Lex Mercatoria. Lex Mer. Am. Lex Mercatoria Americana.
Lex Parl. Lex Parliamentaria.
Lib. Liber. Book.
Lib. Ass. Liber Assisarum. See REPORTS, Year B.
Lib. Ent. Old Book of Entries.
Lib. Feud. Liber Feudorum.
Lib. Intr. Liber Intrationum; or, Old Book of Entries.
Lib. L. & Eq. Library of Law and Equity.
Lib. Niger. Liber Niger. The Black Book.
Lib. Pl. Liber Placitandi. Book of Pleading.
Lib. Reg. Register Books.
Lib. Rub. Liber Ruber. The Red Book.
Lib. Ten. Liber Tenementum.
Lig. Dig. Ligon's Digest.
Lill. Conv. Lilly's Conveyancer.
Lill. Entr. Lilly's Entries. *Lill. Reg.* Lilly's Register.
Lind. Jur. Lindley's Jurisprudence.
Lind. Part. Lindley on Partnership.
Linn. Ind. Linn's Analytical Index.
Litt. R. Littel's Reports. *Litt. Sel. Cas.* Littel's Select Cases.
Litt. s. Littleton, section. *Litt. R.* Littleton's Reports.
Litt. Ten. Littleton's Tenures.
Liv. Livre. Book.
Liv. Ag. Livermore on the Law of Principal and Agent.
Liv. Syst. Livingston's System of Penal Law for the State of Louisiana. This work is sometimes cited Livingston's Report on the Plan of a Penal Code.
Liverm. Diss. Livermore's Dissertation on the Contrariety of Laws.
Ll. & Go. Lloyd & Goold's Reports.
Ll. & Go. t. Plunk. Lloyd & Goold during the time of Plunkett.
Ll. & Go. t. Sugd. Lloyd & Goold's Reports during the time of Sugden.
Ll. & Welsb. Lloyd & Welsby's Reports of Cases relating to Commerce, Manufactures, &c., determined in the Courts of Common Law.
Loc. cit. Loco citato. In the place cited.
Lock. O. Cas. Lockwood's Overruled Cases.
Log. Comp. Compendium of the Law of England, Scotland, and Ancient Rome. By James Logan.
Lois des Batim. Lois des Batimens.
Lom. Dig. Lomax's Digest of the Law of Real Property in the United States.
Lom. Ex. Lomax on Executors.
Long Quint. Year Book, part 10. See REPORTS, Year B.
Longf. & Towns. Longfield and Townsend's Reports.
Louis. Code. Civil Code of Louisiana.
Louis. R. Louisiana Reports.
Lovel. Wills. Lovelass on Wills.
Low. C. Lower Canada.
Lown. Leg. Lowndes on the Law of Legacies.
Lubé, Pl. Eq. An Analysis of the Principles of Equity Pleading. By D. G. Lubé.
Ludd. Ludden's Reports.
Luder's Elec. Cas. Luder's Election Cases.
Luml. Ann. Lumley on Annuities.
Luml. Parl. Pr. Lumley's Parliamentary Practice.
Luml. Settl. Lumley on Settlements and Removal.
Lut. Ent. Lutwyche's Entries.
Lut. Lutwyche's Reports.
M. Michaelmas Term; also, Maxim, or Maxims; also, Mary; as, 4 M. st. 3, c. 1.
M. & A. Montagu & Ayrton's Reports of Cases in Bankruptcy.
M. & B. Montagu & Bligh's Cases in Bankruptcy.

M. & C. Mylne & Craig's Reports; also, Montagu & Chitty's Reports.
M. & G. Manning & Granger's Reports; also, Maddock & Geldart's Reports.
M. G. & S. Manning, Granger & Scott's Reports.
M. & K. Mylne & Keen's Chancery Reports.
M. & M., or *Mo. & Malk. R.* Moody & Malkins' Nisi Prius Reports.
M. & P. Moore & Payne's Reports.
M. P. Exch. Modern Practice Exchequer.
M. & R. Manning & Ryland's Reports.
M. R. Master of the Rolls; also, Martin's Reports of the Supreme Court of the State of Louisiana.
M. & S. Moore & Scott's Reports; also, Maule & Selwyn's Reports.
M. & W. Meeson & Welsby's Reports.
M. & Y., or *Mart. & Yerg.* Martin & Yerger's Reports.
M. D. & De G. Montagu, Deacon & De Gex's Reports of Cases in Bankruptcy.
M'Arth. C. M. M'Arthur on Courts Martial.
M'Call Pr. M'Call's Precedents.
M'Cl. & Yo. M'Clelland & Young's Exchequer Reports.
McDonald Just. McDonald's Justice.
McKinn. Just. McKinney's Justice.
McKinn. Phil. Ev. McKinnon's Philosophy of Evidence.
McLean R. McLean's Reports.
Mac. & G. Macnaughton & Gordon's Reports.
Mack. C. L. Mackeldey's Civil Law.
Macn. Null. Macnamara on Nullities and Irregularities in the Practice of the Law.
Macnaght. Macnaghten on Courts Martial.
Macnal. Ev. Macnally's Rules of Evidence on Pleas of the Crown.
Macomb C. M. Macomb on Courts Martial.
Macph. Inf. Macpherson on Infants.
Macq. Div. Macqueen on Divorce and Matrimonial Causes.
Macq. H. & W. Macqueen on Husband and Wife.
Macq. R. Macqueen's Reports.
Macr. Pat. Cas. Macroy's Patent Cases.
Mad. Exch. Madox's History of the Exchequer.
Mad. Form. Madox's *Formulare Anglicanum.*
Madd. & Geld. Maddock's & Geldart's Reports.
Madd. Pr., or *Madd. Ch.* Maddock's Chancery Practice.
Mag. Ins. Magens on Insurance.
Magr. Rep. Magruder's Reports.
Maine R. Maine Reports.
Mal. Malyne's Lex Mercatoria.
Malt. C. M. Maltby on Courts Martial.
Malth. Pop. Malthus on Population.
Man. Manuscript.
Man. & Gra. Manning & Granger's Reports.
Man. Gr. & Sc. Manning, Granger & Scott's Reports.
Man. & Ry. Manning & Ryland's Reports.
Manb. Fines. Manby on Fines.
Mann. Comm. Manning's Commentaries of the Law of Nations.
Mann. Exch. Pr. Manning's Exchequer Practice.
Mans. Dem. Mansel on Demurrers.
Mans. Lim. Mansel on the Law of Limitations.
Manw. Manwood's Forest Laws.
Mar. Maritime.
Mar. N. C. March's New Cases. *Mar. R.* March's Reports.
Marg. Margin.
Marr. Form. Inst. Marriott's *Formulare Instrumentorum*; or a Formulary of Authentic Instruments, Writs, and Standing Orders used in the Court of Admiralty of Great Britain, of Prize and Instance.
Marsh. Dec. Brockenbrough's Reports of Chief-Justice Marshall's Decisions.
Marsh. Ins. Marshall on the Law of Insurance.
Mart. Law Nat. Martin's Law of Nations.
Mart. (La.) R. Martin's Louisiana Reports.
Mart. (N. C.) R. Martin's North Carolina Reports.
Marv. Leg. Bibl. Marvin's Legal Bibliography.
Marv. Salv. Marvin on Wrecks and Salvage.
Mart. N. S. Martin's Louisiana Reports. New Series.
Mart. & Yerg. Martin & Yerger's Reports.
Mass. Massachusetts.
Matth. Com. Matthews' Guide to Commissions in Chancery.
Matth. Dig. Matthews' Digest.
Matth. Ex. Matthews on Executors.
Matth. Pr. Ev. Matthews on Presumptive Evidence.
Maugh. Lit. Pr. Maughan on Literary Property.
Maule & Selw. Maule & Selwyn's Reports.
Max. Maxims.
Maxw. L. D. Maxwell's Dictionary of the Law of Bills of Exchange, etc.
Maxw. Mar. L. Maxwell's Spirit of the Marine Laws.
May Const. Hist. May's Constitutional History of England.
Mayn. Maynard's Reports. See REPORTS, Year B.
Mayne Dam. Mayne on Damages.
Mayo & Moult. Mayo & Moulton's Pension Laws.
Mayo Just. Mayo's Justice.
Md. Maryland.
Me. Maine.
Med. Jur. Medical Jurisprudence.
Mees. & Wels. Meeson & Welsby's Reports.
Meigs, R. Meigs' Tennessee Reports.
Mer. R. Merivale's Reports.
Merch. Dict. Merchant's Dictionary.
Merl. Quest. Merlin, *Questions de Droit.*
Merl. Repert. Merlin, *Répertoire.*
Merrif. Att. Merrifield's Law of Attorneys.
Merrif. Costs. Merrifield's Law of Costs.
Mich. Michaelmas; also, Michigan.
Mich. Rev. St. Michigan Revised Statutes.
Mill. Civ. Law. Miller's Civil Law.
Mill. Eq. Mort. Miller on Equitable Mortgages.
Mill. Ins. Miller's Elements of the Law relating to Insurances. Sometimes this work is cited *Mill. El.*
Mill. Part. Miller on Partition.
Mill. R. Miller's Reports; also, Mill's Reports.
Min. Dig. Minot's Digest.
Minn. Minnesota.
Min. R. Minor's Alabama Reports.
Mireh. Adv. Mirehead on Advowsons.
Mirr. Mirroir des Justices.
Miss. Mississippi.
Mitf. Pl. Mitford's Pleadings in Equity; also cited *Redesd. Pl.* Redesdale's Pleadings.
Mo. Missouri; also, Sir Francis Moore's Reports in the Reign of K. Henry VIII., Q. Elizabeth, & K. James.
Mo. C. C. Moody's Crown Cases.
Mo. Cas. Moody's Nisi Prius and Crown Cases.
Mod. Cas. Modern Cases.
Mod. C. L. & E. Modern Cases in Law and Equity. The eighth and ninth volumes of Modern Reports are sometimes so cited; the *eighth* cited as the *first*, and the *ninth* as the *second*.
Mod. Entr. Modern Entries.
Mod. Int. Modus Intrandi.
Mol. Molloy, De Jure Maritimo.
Mont. Montagu. *Mont. & Ayrt.* Montagu & Ayrton's Reports. *Mont. B. C.* Montagu's Bankrupt Cases. *Mont. & Bligh.* Montagu & Bligh's Cases in Bankruptcy. *Mont. & Chit.* Montagu & Chitty's Reports. *Mont. Comp.* Montagu on the Law of Composition. *Mont. B. L.* Montagu on the Bankrupt Laws. *Mont. Set-Off.* Montagu on

Set-Off. *Mont. Deac. & De Gex.* Montagu, Deacon & De Gex's Reports of Cases in Bankruptcy, argued and determined in the Court of Review, and on Appeals to the Lord Chancellor. *Mont. Dig.* Montagu's Digest of Pleadings in Equity. *Mont. Eq. Pl.* Montagu's Equity Pleadings. *Mont. & Mac.* Montagu & Macarthur's Reports.

Mirch. D. & S. Mirchall's Doctor and Student.

Montesq. Montesquieu, *Esprit des Lois.*

Moo. & Malk. Moody & Malkin's Reports.

Moo. & Rob. Moody & Robinson's Reports.

Moore A. C. Moore's Appeal Cases.

Moore R. J. B. Moore's Reports of Cases decided in the Court of Common Pleas.

Moore & Payne. Moore & Payne's Reports of Cases in C. P.

Moore & Scott. Moore & Scott's Reports of Cases in C. P.

Mor. Dict. Dec. Morison's Dictionary of Decisions.

Mor. Pr. Morehead's Practice.

Morr. R. Morris on Replevin; also, Morris's Reports.

Mort. Vend. Morton's Law of Vendors and Purchasers of Chattels Personal.

Mos. Mosely's Reports.

MSS. Manuscripts; as, Lord Colchester's MSS.

Mun. Municipal.

Munf. R. Munford's Reports.

Myl. & Cr. Mylne & Craig's Reports.

Myl. & Keen. Mylne & Keen's Chancery Reports.

N. Number. *N.*, or *Nov. Novellæ.* The Novels.

N. A. Non Allocatur.

N. B. Nulla Bona.

N. Benl. New Benloe. See REPORTS, *Benloe.*

N. C. Cas. North Carolina Cases.

N. C. Law Rep. North Carolina Law Repository.

N. C. Term R. North Carolina Term Reports. This volume is sometimes cited 2 *Tayl.*

N. Chipm. R. N. Chipman's Reports.

N. E. I. Non est inventus.

N. H. New Hampshire.

N. H. & C. Nicholl, Hare & Carrow's Reports.

N. J. New Jersey.

N. L. Nelson's edition of Lutwyche's Reports; also, *Non liquet.*

N. & M. Neville & Manning's Reports.

N. & M'C. Nott & M'Cord's Reports.

N. & P. Neville & Perry's Reports.

N. P. Nisi Prius.

N. R., or *New R.* New Reports; the new series, or 4 & 5 Bos. & Pull. Rep., are cited *N. R.*

N. S. New Series.

N. Y. New York. *N. Y. Co.* New York Code. *N. Y. Dig.* New York Digest. *N. Y. Rev. St.* New York Revised Statutes. *N. Y. Term R.* New York Term Reports. *N. Y. R.* New York Reports; Court of Appeals.

Nar. Conv. Nares on Convictions.

Nash. Pl. & Pr. Nash's Pleading and Practice.

Nd. Newfoundland.

Nd. R. Newfoundland Reports.

Neal F. & F. Neal's Feasts and Fasts: an Essay on the Rise, Progress and Present State of the Laws relating to Sundays and other Holidays, and other Days of Fasting.

Nels. Nelson. *Nels. Abr.* Nelson's Abridgment. *Nels. Lex Maner.* Nelson's Lex Manerierum. *Nels. R.* Nelson's Reports.

Nem. con. Nemine contradicente.

Nem. dis. Nemine dissentiente.

Nev. & Mann. Neville & Manning's Reports.

Nev. & Per. Neville & Perry's Reports.

New Benl. Benloe's Reports. See REPORTS, *Benloe.*

New Br. New Brunswick.

New Rep. New Reports. A continuation of Bosanquet & Puller's Reports. See ABBREVIATIONS, *B. & P.*

Newl. Ch. Pr. Newland's Chancery Practice.

Newl. Contr. Newland's Treatise on Contracts.

Newm. Conv. Newman on Conveyancing.

New Sess. Cas. New Session Cases.

Ni. Pri. Nisi Prius.

Nich. Adult. Bast. Nicholas on Adulterine Bastardy.

Nich. Har. & Car. Nicholl, Hare & Carrow's Reports.

Nient Cul. Nient culpable (Old French). Not guilty.

Nix. F. Nixon's Forms.

No. C. North Carolina.

Nol. P. L. Nolan's Poor-Laws.

Nol. R. Nolan's Reports of Cases relative to the Duty and Office of Justice of the Peace.

Non. Cul. Non Culpabilis. Not guilty.

North. Northington's Reports. Properly cited *Cas. temp. North.*

Nott & M'Cord. Nott & M'Cord's Reports.

Nott Mech. L. L. Nott on the Mechanic's Lien Law.

Nov. Novellæ. The Novels.

Nov. Rec. Novisimi Recopilacion de las Leyes de España.

Noy Max. Noy's Maxims. *Noy R.* Noy's Reports.

O. Benl. Old Benloe. See REPORTS, *Benloe.*

O. Bridg. Orlando Bridgman's Reports.

O. C. Old Code. The Civil Code of Louisiana of 1808 is so denominated.

O. N. B. Old Natura Brevium. See Abbreviations, *Vet. N. B.*, OLD NATURA BREVIUM.

O. Ni. These letters, which are an abbreviation for *oneratur nisi habent sufficientem exonerationem*, are, according to the practice of the English Exchequer, marked upon each head of a sheriff's account for issues, amerciaments, and mesne profits. Coke, 4 Inst. 116.

Oblig. Obligations.

O'Brien M. L. O'Brien's Military Law.

O'Neall Neg. L. O'Neall's Negro Law of S. Carolina.

Observ. Observations.

Off. Office. *Off. Br. Officina Brevium.*

Off. Ex. Wentworth's Office of Executors.

Ohio. Ohio.

Ol. Con. Oliver's Conveyancing.

Oldn. Oldnall's Welsh Practice.

Oliph. Hors. Oliphant's Law of Horses, &c.

Onsl. N. P. Onslow's Nisi Prius.

Opin. Atty. Gen. Opinions of the Attorneys General.

Ord. Amst. Ordinance of Amsterdam.

Ord. Ant. Ordinance of Antwerp.

Ord. Bilb. Ordinance of Bilboa.

Ord. Ch. Orders in Chancery.

Ord. Cla. Lord Clarendon's Orders.

Ord. Copenh. Ordinance of Copenhagen.

Ord. Cor. Orders of Court.

Ord. Flor. Ordinances of Florence.

Ord. Gen. Ordinance of Genoa.

Ord. Hamb. Ordinance of Hamburgh.

Ord. Konigs. Ordinance of Königsberg.

Ord. Leg. Ordinances of Leghorn.

Ord. de la Mer. Ordonnance de la Marine de Louis XIV.

Ord. Port. Ordinances of Portugal.

Ord. Prus. Ordinances of Prussia.

Ord. Rott. Ordinances of Rotterdam.

Ord. Swed. Ordinances of Sweden.

Ord Us. Ord on the Law of Usury.

Oreg. Oregon.

Orfil. Med. Jur. Orfila's Medical Jurisprudence.

Orig. Original.

Ough. Oughton's *Ordo Judiciorum.*

Overt. R. Overton's Reports.

Ow. Owen's Reports.

Owen Bankr. Owen on Bankruptcy.

P. Page, or Part; also, *Paschalis*, Easter Term.

P. C. Pleas of the Crown.
P. & D. Perry & Davison's Reports.
P. & H. Patton & Heath's Reports.
P. & K. Perry & Knapp's Election Cases.
P. & M. Philip and Mary; as, 1 & 2 P. & M. c. 4.
P. N. P. Peake's Nisi Prius.
Pa. R. Pennsylvania Reports.
Pp. Pages.
P. P Proprid personâ. In his own person.
P. R., or *P. R. C. P.* Practical Register in the Common Pleas.
P. Wms. Peere Williams' Reports.
Page Div. Page on Divorce.
Pal. Palmer's Reports.
Pal. Ag. Paley on the Law of Principal and Agent.
Pal. Conv. Paley on Convictions.
Palm. Pr. Lords. Palmer's Practice in the House of Lords.
Pamph. Pamphlets.
Pand. Pandects. See DIGEST.
Papy R. Papy's Reports.
Par. Paragraph; as, 29 Eliz. cap. 5, par. 21.
Par. & Fonb. M. J. Paris & Fonblanque on Medical Jurisprudence.
Pardess. Pardessus, Cours de Droit Commercial. In this work Pardessus is cited in several ways, namely: Pardessus, Dr. Compart. 3, tit. 1, c. 2, s. 4, n. 286; or 2 Pardessus, n. 286, which is the same reference.
Park. Cr. R. Parker's Criminal Reports.
Park Dow. Park on Dower.
Park Ins. Park on Insurance.
Park. Pr. Ch. Parker's Practice in Chancery.
Park. Ship. Parker on Shipping and Insurance.
Parl. Hist. Parliamentary History.
Pars. Parsons *Pars. Com.* Parsons' Commentaries. *Pars. Cont.* Parsons on Contracts. *Pars. Mar. L.* Parsons on Maritime Law. *Pars. Merc. L.* Parsons on Mercantile Law. *Pars. Bills.* Parsons on Notes and Bills. *Pars. R.* Parsons' Reports.
Partid. Partidas.
Patch Mortg. Patch's Treatise on the Law of Mortgages.
Paul's Par. Off. Paul's Parish Officer.
Pay. Mun. Rights. Payne's Municipal Rights.
Peake Ev. Peake on the Law of Evidence.
Peck R. Peck's Reports.
Peck Tr. Peck's Trial.
Penn. Pennsylvania.
Penn. Bl. Pennsylvania Blackstone, by John Reed, Esq.
Penn. Law J. Pennsylvania Law Journal.
Penn. Pr. Pennsylvania Practice; also cited *Tr. & Hal. Pr.* Troubat & Haly's Practice.
Penn. R., or *Pen. R.* Pennington's Reports; also, Pennsylvania Reports. See CITATION OF AUTHORITIES.
Penna. R. or *Pennsylv.* Pennsylvania Reports.
Penr. Anal. Penruddock's Analysis of the Criminal Law.
Penult. The last but one.
Per. & Dav. Perry & Davison's Reports.
Per. & Knapp. Perry & Knapp's Election Cases.
Perk. Perkins on Conveyancing.
Perk. Prof. B. Perkin's Profitable Book.
Perpig. on Pat. Perpigna on Patents. The full title of this work is, "The French Law and Practice of Patents for Inventions, Improvements, and Importations. By A. Perpigna, A.M., L.B., Barrister in the Royal Court of Paris; Member of the Society for the Encouragement of Arts, &c." The work is well written in the English language. The author is a French lawyer, and has written another work on the same subject in French.
Pet. Abr. Petersdorff's Abridgment.
Pet. Adm. Dec. Peters' Admiralty Decisions.
Pet. Bail, or *Petersd. Bail.* Petersdorff on the Law of Bail.
Petting. Jur. Pettingal on Juries.
Phil. Eq. R. Phillips' Chancery Reports.
Phil. Ev. Phillips on Evidence.
Phil. Ins. Phillips on Insurance.
Phil. St. Tr. Phillips' State Trials.
Phila. R. Philadelphia Reports.
Phil. Civ. & Can. Law. Phillimore on the Study of the Civil and Canon Law, Considered in Relation to the State, the Church and the Universities, and in Connection with the College of Advocates.
Phill. Dom. Phillimore on the Law of Domicile.
Phill. Ev. Phillimore on Evidence.
Pierce Am. R. R. L. Pierce's American Rail Road Laws.
Pig. Pigot on Recoveries.
Pig. & Rod. Pigott & Rodwell's Appeal Cases.
Pike Rep. Pike's Reports. See REPORTS, *Arkansas.*
Pitm. Pr. & Sur. Pitman on Principal and Surety.
Pl. Placitum, or plea. *Pl.*, or *Plow.*, or *Pl. Com.* Plowden's Commentaries or Reports.
Platt Cov. Platt on the Law of Covenants.
Platt Leas. Platt on Leases.
Plff. Plaintiff.
Pol. Pollexfen's Reports.
Poph. Popham's Reports. The cases at the end of Popham's Reports are cited 2 *Poph.*
Port. R. Porter's Reports.
Poth. Pothier. The numerous works of Pothier are cited by abbreviating his name *Poth.*, and then adding the name of the treatise; the figures generally refer to the number, as *Poth. Ob.* n. 100, which signifies Pothier's Treatise on the Law of Obligations, number 100. *Poth. du Mar.* Pothier *du Mariage. Poth. Vente.* Pothier *Traité de Vente*, &c. His Pandects, in twenty-four volumes, are cited *Poth. Pand.*, with the book, title, law, &c.
Potts L. D. Potts' Law Dictionary.
Pow. Powell. *Pow. Contr.* Powell on Contracts. *Pow. Dev.* Powell on Devises. *Pow. Mort.* Powell on Mortgages. *Pow. Powers.* Powell on Powers.
Poyn. M. Div. Poynter on the Law of Marriage and Divorce.
Pr. Principio. In pr. In principio. In the beginning.
Pr. Exch. R., or *Price Exch. R.* Price's Exchequer Reports.
Pr. Reg. C. P. Practical Register of the Common Pleas.
Pr. Reg. Ch., or *Pract. Reg. Ch.* Practical Register in Chancery.
Pr. St., or *Pr. Stat.* Private Statute.
Prat. H. & W. Prater on the Law of Husband and Wife.
Pref. Preface.
Prel. Préliminaire.
Prest. Preston. *Prest. Est.* Preston on Estates. *Prest. Abs. Tit.* Preston's Essay on Abstracts of Title. *Prest. Conv.* Preston's Treatise on Conveyancing. *Prest. Leg.* Preston on Legacies.
Pri. Price's Reports.
Price Gen. Pr. Price's General Practice.
Prin. Dec. Printed Decisions.
Prin. Principium. The beginning of a title or law.
Priv. Lond. Customs or Privileges of London.
Pro. L. Province Laws.
Pro. quer. Pro querentem. For the plaintiff.
Proct. Pr. Proctor's Practice.
Puff. Puffendorff's Law of Nature.
Q. or *Qu. Quæstione.* In such a question.
Q. B. Queen's Bench. Queen's Bench Reports.
Q. t. Qui tam.
Qu. Quere.
Q. Van Weyt. Q. Van Weytsen on Average.
Q. v. Quod vide. Which see.
Q. Warr. Quo Warranto.
Qu. claus. freg. Quare clausum fregit, which see.
Quart. L. J. Quarterly Law Journal.

Quest. Questions.
Quinti Quinto. Year-Book, 5 Henry V.
Quon. Attach. Quoniam Attachments. See Dalrymple, Feud. Laws, 47.
R. Resolved, Ruled, or Repealed; also, Richard; as, 2 R. II. c. 1.
RC. Rescriptum.
R. & M. Russell & Mylne's Reports.
R. & M. C. C. Ryan & Moody's Crown Cases.
R. & M. N. P. Ryan & Moody's Nisi Prius Cases.
R. & R. Russell & Ryan's Crown Cases.
Rs. Responsum.
R. S. L. Reading on Statute Law.
Ram Judgm. Ram on the Law relating to Legal Judgments.
Rand. Perp. Randall on the Law of Perpetuities.
Rast. Rastell's Entries.
Rawle Const. Rawle on the Constitution.
Rawle Cov. Rawle on Covenants for Title.
Ray Med. Jur. Ray's Medical Jurisprudence of Insanity.
Raym. Ch. Dig. Raymond's Chancery Digest.
Re. fa. lo. Recordari facias loquelam. See REFALO.
Rec. Recopilacion; also, Recorder; as, City Hall Rec.
Redd. Mar. Com. Reddie's Historical View of the Law of Maritime Commerce.
Redesd. Pl. Redesdale's Equity Pleading. This work is also, and most usually, cited *Mitf. Pl.*
Redf. Railw. Redfield on Railways.
Reeve Des. Reeve on Descents.
Reeve Dom. R. Reeve on Domestic Relations.
Reeves H. E. L. Reeves' History of the English Law. *Reeves Ship.* Reeves on the Law of Shipping and Navigation.
Reg. Regula. Rule. *Reg.* Register.
Reg. Brev. Registrum Brevium, or Register of Writs.
Reg. Cas. Registration Cases.
Reg. Gen. Regulæ Generales.
Reg. Jud. Registrum Judiciale.
Reg. Maj. Regiam Majestatem.
Reg. Pl. Regula Placitandi.
Renouard, des Brev d'Inv. Traité des Brevets d'Invention, de Perfectionnement, et d'Importation. Par Augustin Charles Renouard.
Rep. The Reports of Lord Coke are frequently cited 1 *Rep.*, 2 *Rep.*, &c.
Rép. Répertoire.
Rep. Const. Reports of the Constitutional Court of South Carolina.
Rep. Eq. Gilbert's Reports in Equity.
Rep. Q. A. Reports of Cases during the time of Queen Anne.
Rep. T. Reports *tempore.* Reports during the time of. *Rep. t. Finch.* Reports during the time of Finch. *Rep. t. Hard.* Reports during the time of Hardwicke. *Rep. t. Holt.* Reports during the time of Holt. *Rep. t. Talb.* Reports of Cases decided during the time of Talbot.
Res. Resolution. The cases reported in Coke's Reports are divided into resolutions on the different points of the case, and cited 1 *Res.*, &c.
Ret. Brev. Retorna Brevium.
Rev. St., or *Rev. Stat.* Revised Statutes.
Rey, des Inst. de l'Anglet. Des Institutiones Judiciaires de l'Angleterre comparées avec Celles de la France. Par Joseph Rey.
Reyn. Inst. Institutions du Droit de Gens, &c. par Gerard de Reyneval.
Ric. Richard; as, 12 Ric. II. c. 15.
Rice Dig. Rice's Digest.
Rich. Pr. C. P. Richardson's Practice in the Common Pleas.
Rich. Pr. K. B. Richardson's Practice in the King's Bench.
Rich. Wills. Richardson on Wills.
Ridg. Ridgeway. *Ridg. Irish T. R.* Ridgeway, Lapp & Schoales' Term Reports in the K. B.
Ridg. P. C. Ridgeway's Cases in Parliament. *Ridg. Rep.* Ridgeway's Reports of Cases in K. B. and Chancery. *Ridg. St. Tr.* Ridgeway's Reports of State Trials in Ireland.
Rob. Dig. Roberts' Digest of the English Statutes in Force in Pennsylvania.
Rob. Ent. Robinson's Entries.
Rob. Fr. Roberts on Frauds.
Rob. Fr. Conv. Roberts on Fraudulent Conveyances.
Rob. Gavelk. Robinson on Gavelkind.
Rob. Just. Robinson's Justice of the Peace.
Rob. La. Rep. Robinson's Louisiana Reports.
Rob. Pr. Robinson's Practice in Suits at Law in Virginia.
Rob. Wills. Roberts' Treatise on the Law of Wills and Codicils.
Roc. Ins. Roccus on Insurance. Vide *Ing. Roc.*
Rock. Min. Rockwell on Mines.
Rock. Sp. & Mex. L. Rockwell's Spanish and Mexican Law.
Roelk. Man. Roelker's Manual for Notaries and Bankers.
Rog. Eccl. Law. Roger's Ecclesiastical Law.
Rog. Rec. Roger's City Hall Recorder.
Roll. Rolle's Abridgment. *Roll. R.* Rolle's Reports.
Rom. Cr. Law. Romilly's Observations on the Criminal Law of England as it relates to Capital Punishments.
Root R. Root's Reports.
Rop. H. & W. A Treatise on the Law of Property arising from the Relation between Husband and Wife. By R. S. Dennison Roper.
Rop. Leg. Roper on Legacies.
Rop. Rev. Roper on Revocations.
Rosc. Roscoe. *Rosc. Act.* Roscoe on Actions relating to Real Property. *Rosc. Civ. Ev.* Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. *Rosc. Cr. Ev.* Roscoe on Criminal Evidence. *Rosc. Bills.* Roscoe's Treatise on the Law relating to Bills of Exchange, Promissory Notes, Bankers' Checks, &c.
Rose R. Rose's Reports of Cases in Bankruptcy.
Ross Lead. Cas. Ross's Leading Cases.
Ross V. & P. Ross on the Law of Vendors and Purchasers.
Rot. Parl. Rotulæ Parliamentariæ.
Rowe Sci. Jur. Rowe's Scintilla Juris.
Rub., or *Rubr.* Rubric, which see.
Ruff., or *Ruffin R.* Ruffin's Reports.
Ruffh. Ruffhead's Statutes at Large.
Runn. Ej. Runnington on Ejectments.
Runn. Stat. Runnington's Statutes at Large.
Rush. Rushworth's Collections.
Russ. Russell. *Russ. Cr.* Russell on Crimes and Misdemeanors. *Russ. Fact.* Russell on the Laws relating to Factors & Brokers. *Russ. & Ry.* Russell & Ryan's Crown Cases.
Russ. & Myl. Russell & Mylne's Chancery Reports.
Rutherf. Inst. Rutherford's Institutes of Natural Law.
Ry. F. Rymer's Fœdera.
Ry. & Mo. Ryan & Moody's Nisi Prius Reports. *Ry. & Mo. C. C.* Ryan & Moody's Crown Cases.
S., *s.* Section.
S. B. Bancus Superior. Upper Bench.
S. & B. Smith & Batty's Reports.
S. C. Same case; also, Sessions Cases; also, *Senatus Consultum*, a decree of the Senate.
S. C. C. Select Cases in Chancery.
S. & L. Schoales & Lefroy's Reports.
S. & M. Shaw & Maclean's Reports.
S. & M. Smedes & Marshall's Reports
S. & M. Ch. R. Smedes & Marshall's Chancery Reports.
S. P. Same point.
S. & R. Sergeant & Rawle's Reports.
S. & S. Sausse & Scully's Reports; also, Simons

& Stuart's Chancery Reports; also, Searle & Smith's Probate and Divorce Reports.

Sa. & Scul. Sausse & Scully's Reports.

Salk. Salkeld's Reports.

Sand Eq. Sand's Suit in Equity.

Sand. U. & T. Sanders on Uses and Trusts.

Sandf. Ent. Sandford on Entails.

Sandl. St. Pap. Sandler's State Papers.

Sant. de Assec. Santerna, *de Assecurationibus.*

Saund. Pl. & Ev. Saunders' Treatise on the Law of Pleading and Evidence.

Sav. Dr. Rom. Savigny, Droit Romain.

Sav. Dr. Rom. M. A. Savigny, Droit Romain au Moyen Age.

Sav. Hist. Rom. Law. Savigny's History of the Roman Law during the Middle Ages. Translated from the German of Carl von Savigny, by E. Cathcart.

Saxt. Ch. R. Saxton's Chancery Reports.

Say. Sayer's Reports. *Say. Costs.* Sayer's Law of Costs.

Sayle Pr. Sayle's Practice in Texas.

Scac. de Cam. Scaccia de Cambiis.

Scam. Rep. Scammon's Reports of Cases argued and determined in the Supreme Court of Illinois.

Scan. Mag. Scandalum Magnatum.

Sch. & Lef. Schoales & Lefroy's Reports.

Scheiff. Pr. Scheiffer's Practice.

Schm. C. L. Schmidt's Civil Law of Spain and Mexico.

Sci. Fa. Scire Facias.

Sci. fa. ad dis. deb. Scire facias ad disprobandum debitum.

Scil. Scilicet, i.e. scire licet. That is to say.

Sco. N. R. Scott's New Reports.

Scot. Jur. Scottish Jurist.

Scott R. Scott's Reports.

Scriv. Copyh. Scriven's Copyholds.

Seat. F. Ch. Seaton's Forms in Chancery.

Sec. Section.

Sec. Leg. Secundum Legem. According to law.

Sec. Reg. Secundum Regulam. According to rule.

Sedgw. Dam. Sedgwick on Damages.

Sedgw. Stat. Sedgwick on Statutory and Constitutional Law.

Sel. Ca. Chan. Select Cases in Chancery. See *S. C. C.*

Seld. Mar. Cla. Selden's Mare Clausum.

Seld. R. Selden's Reports.

Self. Tr. Selfridge's Trial.

Sell. Pr. Sellon's Practice in K. B. and C. P.

Selw. N. P. Selwyn's Nisi Prius. *Selw. R.* Selwyn's Reports. These Reports are usually cited *M. & S.* Maule and Selwyn's Reports.

Sem. or *Semb. Semble.* It seems.

Sen. Senate.

Seq. Sequentia. Following. *Sequitur.* It follows.

Serg. Sergeant. *Serg. Att.* Sergeant on the Law of Attachment. *Serg. Const. Law.* Sergeant on Constitutional Law. *Serg. Land L.* Sergeant on the Land Laws of Pennsylvania. *Serg. & Lowb.* Sergeant & Lowber's edition of the English Common Law Reports: more usually cited *Eng. Com. Law Rep. Serg. & Rawle,* or *S. & R.* Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Thomas Sergeant and William Rawle, Jun.

Sess. Ca. Sessions Cases in K. B., chiefly touching Settlements.

Set. Dec. Seton on Decrees.

Shars. Bl. Com. Sharswood's Blackstone; cited in this work *Sharswood Blackst. Comm.*

Shars. Lec. Sharswood's Lectures.

Shaw & Dunl. Shaw & Dunlop's Scotch Reports.

Shaw & Macl. Shaw & Maclean's Reports.

Shaw R. Shaw's Reports.

Shaw, W. & C. Shaw, Wilson & Courtenay's Reports.

Shelf. Shelford. *Shelf. Lun.* Shelford on Lunacy. *Shelf. Mort.* Shelford on the Law of Mortmain. *Shelf. Railw.* Shelford on Railways. *Shelf. R. Pr.* Shelford on Real Property.

Shep. To. Sheppard's Touchstone.

Shepl. R. Shepley's Reports.

Sher. Sheriff.

Shub. Jur. Lit. Shuback *de Jure Littoris.*

Sim. & Stu. Simon & Stuart's Chancery Reports.

Skene Verb. Sign. Skene *de Verborum Significatione;* An Explanation of Terms, Difficult Words, etc.

Skin. Skinner's Reports.

Skirr. U. Shff. Skirrow's Complete Practical Under-Sheriff.

Slade R. Slade's Reports; more usually cited Vermont Reports. See REPORTS, *Vermont.*

Smed. & Marsh. Smedes & Marshall's Reports.

Smed. & Marsh. Ch. R. Smedes & Marshall's Chancery Reports.

Smith Act. Smith's Action at Law.

Smith & Batty. Smith & Batty's Reports.

Smith C. P. R. Smith's New York Reports in the Court of Common Pleas.

Smith Ch. Pr. Smith's Chancery Practice.

Smith Comp. Smith's Compendium.

Smith Contr. Smith on Contracts.

Smith Eq. Smith's Equity.

Smith Ex. Int. Smith on Executory Interests.

Smith For. Med. Smith's Forensic Medicine.

Smith Hints. Smith's Hints for the Examination of Medical Witnesses.

Smith L. & T. Smith on Landlord and Tenant.

Smith M. L. Smith on Mercantile Law.

Smith N. Y. R. Smith's New York Reports, Court of Appeals.

Smith Pat. Smith on the Law of Patents.

Smith R. Smith's Reports in K. B., together with Cases in the Court of Chancery.

Smith Stat. Smith on Statutory and Constitutional Law.

Smith Wis. R. Smith's Wisconsin Reports.

Smyth R. Smyth's Reports.

Sneed R. Sneed's Reports.

Sol. Solutio. The answer to an objection.

Sol. J. Solicitor's Journal.

South Car. R. South Carolina Reports.

South. R. Southard's Reports.

Sp. Laws. Spirit of Laws, by Montesquieu.

Spel. Feuds. Spelman on Feuds.

Spel. Gl. Spelman's Glossary.

Spence Eq. Jur. Spence on the Equitable Jurisprudence of Chancery.

Ss. (usually put in small letters, *ss.*). *Scilicet.* That is to say.

St., or *Stat.* Statute.

St. Armand. St. Armand's Historical Essay on the Legislative Power of England.

St. Cas. Stillingfleet's Cases.

St. Tr. State Trials.

Stair Inst. Stair's Institutions of the Law of Scotland.

Stallm. Elect. Stallman on Election and Satisfaction.

Stant. R. Stanton's Reports.

Stark. Starkie. *Stark. Ev.* Starkie on the Law of Evidence. *Stark. Cr. Pl.* Starkie's Criminal Pleadings. *Stark. R.* Starkie's Reports. *Stark. Sl.* Starkie on Slander.

Stat. Statutes.

Stat. West. Statute of Westminster.

Statk. Abr. Statham's Abridgment.

Staunf., or *Staunf. P. C.* Staunford's Pleas of the Crown.

Stearns, R. A. Stearns on Real Actions.

Steph. Stephen. *Steph. Comm.* Stephen's New Commentaries on the Law of England. *Steph. Cr. Law.* Stephen on Criminal Law. *Steph. Pl.* Stephen on Pleading. *Steph. Proc.* Stephen on Procurations. *Steph. N. P.* Stephen's Nisi Prius.

Steph. Slav. Stephens on Slavery.

Stev. Av. Stevens on Average.

Stev. & Ben. Av. Stevens & Benecke on Average.

Stew. & Port. Stewart & Porter's Reports.

Stew. R. Stewart's Reports.

Stock. Ch. R. Stockton's Chancery Reports.

Stone B. So. Stone on Building Societies.

Story. Story's (Wm. W.) Reports.

Story Ag. Story on Agency. *Story Bail.* Story's Commentaries on the Law of Bailments. *Story Bills.* Story on Bills. *Story Confl.* Story on the Conflict of Laws. *Story Const.* Story on the Constitution of the United States. *Story Eq. Jur.* Story's Commentaries on Equity Jurisprudence. *Story Eq. Pl.* Story's Equity Pleadings. *Story's L. U. S.* Story's edition of the Laws of the United States, in three vols. The fourth and fifth volumes are a continuation of the same work, by George Sharswood, Esq. *Story Part.* Story on Partnership. *Story Prom. N.* Story on Promissory Notes. *Story Sales.* Story on Sales.

Story Contr. Story (Wm. W.) on Contracts.

Str. Strange's Reports.

Str. Hind. Law. Strange's Hindoo Laws.

Stracc. de Mer. Straccha de *Mercatura, Navibus Assecurationibus.*

Strah. Dom. Strahan's Translation of Domat's Civil Law.

Strob. Eq. R. Strobhart's Equity Reports.

Strob. R. Strobhart's Reports.

Stroud Sl. Stroud on Slavery.

Stuart (L. C.) R. Reports of Cases in the Court of King's Bench in the Provincial Court of Appeals of Lower Canada and Appeals from Lower Canada before the Lords of the Privy Council. By George Okill Stuart, Esq.

Sty. Style's Reports.

Sugd. Sugden. *Sugd. Pow.* Sugden on Powers. *Sugd. Vend.* Sugden on Vendors. *Sugd. Lett.* Sugden's Letters.

Sull. Land Tit. Sullivan's History of Land Titles in Massachusetts.

Sull. Lect. Sullivan's Lectures on the Feudal Law and Constitution and Laws of England.

Sum. Summa, the summary of a law.

Supers. Supersedeas.

Supp. Supplement. *Supp. Ves. Jr.* Supplement to Vesey Junior's Reports.

Swab. & Trist. Swabey & Tristram's Reports.

Swan Eccl. Cts. Swan on the Jurisdiction of Ecclesiastical Courts.

Swan Just. Swan's Justice.

Swan Pr. Swan's Practice.

Sweet Wills. Sweet's Popular Treatise on Wills.

Swift's Ev. Swift's Evidence.

Swift's Syst. Swift's System of the Laws of Connecticut. *Swift's Dig.* Swift's Digest of the Laws of Connecticut.

Swinb. Swinburne on the Law of Wills and Testaments. This work is generally cited by reference to the part, book, chapter, &c. *Swinb. Des.* Swinburne on the Law of Descents. *Swin. Mar.* Swinburne on Marriage; or *Swinb. Spo.* Swinburne on Spousals.

T. Title.

T. & G. Tyrwhitt & Granger's Reports.

T. & M. Temple & Mew's Reports.

T. & P. Turner & Phillips' Reports.

T. Jo. Sir Thomas Jones' Reports.

T. L. Termes de la Ley, or Terms of the Law.

T. R. Term Reports. Ridgeway's Reports are sometimes cited *Irish T. R.* Also, *Teste Rege.*

T. & R. Turner & Russell's Chancery Reports.

T. R. E., or *T. E. R. Tempore Regis Edwardi.* This abbreviation is frequently used in Domesday Book, and in the more ancient law writers. See Tyrrell's Hist. Eng., Intro. viii. p. 49. See also Coke Litt. 86, *a,* where, in a quotation from Domesday Book, this abbreviation is interpreted *Terra Regis Edwardi*; but in Cowel's Dict., verb. *Reveland,* it is said to be wrong.

T. Raym. Sir Thomas Raymond's Reports.

Tait Ev. Tait on Evidence.

Taml. Ev. Tamlyn on Evidence, principally with Reference to the Practice of the Court of Chancery, and in the Master's Office.

Taml. T. Y. Tamlyn on Terms for Years.

Tann. R. Tanner's Reports.

Tapp. Mand. Tapping on Mandamus.

Tate Am. F. Tate's American Form Book.

Tate Dig. Tate's Digest.

Tayl. Taylor. *Tayl. Civ. L.* Taylor's Civil Law. *Tayl. Ev.* Taylor on Evidence. *Tayl. Govern.* Taylor on Government. *Tayl. Law Glo.* Taylor's Law Glossary. *Tayl. L. & T.* Taylor's Treatise on the American Law of Landlord and Tenant. *Tayl. Med. Jur.* Taylor's Medical Jurisprudence. *Tayl. Pois.* Taylor on Poisons. *Tayl. R.* Taylor's North Carolina Reports. *Tayl. Wills.* Taylor on Wills.

Tech. Dict. Crabb's Technological Dictionary.

Tenn. Tennessee.

Tex. Texas.

Th. Thomson's Scotch Law; also, Thelvall's Digest.

Th. Br. Thesaurus Brevium.

Th. Dig. Thelvall's Digest.

Thach. Crim. Cas. Thacher's Criminal Cases.

Theo. Pres. Pr., or *Theo. Pres. Proof.* Theory of Presumptive Proof, or an Inquiry into the Nature of Circumstantial Evidence.

Tho. Co. Litt. Coke upon Littleton; newly arranged on the plan of Sir Matthew Hale's Analysis. By J. H. Thomas, Esq.

Tho. U. J. Thomas on Universal Jurisprudence.

Thomp. Bills. Thompson on Bills.

Thomp. Dig. Thompson's Digest.

Thorn. Conv. Thornton's Conveyancing.

Tidd Pr. Tidd's Practice.

Till. Prec. Tillinghast's Precedents.

Till. & Yat. App. Tillinghast & Yates on Appeals, &c.

Tit. Title.

Toll. Ex. Toller on Executors.

Toml. L. D. Tomlin's Law Dictionary.

Touchs. Sheppard's Touchstone.

Toull. Le Droit Civil Français suivant l'ordre du code; ouvrage dans lequel on a taché de reunir la théorie a la practique. Par M. C. B. M. Toullier. This work is sometimes cited Toull. Dr. Civ. Fr. liv. 3, t. 2, c. 1, n. 6; at other times, 3 Toull. n. 86, which latter signifies vol. 3 of Toullier's works, No. 86.

Town. Townshend. *Town. Co.* Townshend's Code. *Town. Pl.* Townshend's Pleading. *Town. Pr.* Townshend's Practice.

Tr. Eq. Treatise of Equity; the same as Fonblanque on Equity.

Tr. & H. Pr. Troubat & Haley's Practice.

Tr. & H. Prec. Troubat & Haley's Precedents of Indictments, &c.

Traill Med. Jur. Outlines of a Course of Lectures on Medical Jurisprudence. By Thomas Stewart Traill, M.D.

Trat. Jur. Mer. Tratade *de Jurisprudentia Mercantil.*

Tread. R. Treadway's Reports.

Treb. Jur. de la Med. Jurisprudence de la Médecine, de la Chirurgie, et de la Pharmacie. Par Adolphe Trebuchet.

Trem. Tremaine's Pleas of the Crown.

Trevor Tax. Suc. Trevor on Taxes on Succession.

Tri. Bish. Trial of the Seven Bishops.

Tri. per Pais. Trials per Pais.

Trin. Trinity Term.

Troub. Lim. Part. Troubat on Limited Partnership.

Tuck. Bl. Com. Blackstone's Commentaries, edited by Judge Tucker.

Tuck. Lect. Tucker's Lectures.
Tuck. Pl. Tucker's Pleading.
Tud. Lead. Cas. Tudor's Leading Cases on Mercantile and Maritime Law.
Turn. & Phill. Turner & Phillips' Reports.
Tyl. R. Tyler's Reports.
Tyrw. Tyrwhitt's Exchequer Reports.
Tyrw. & Gr. Tyrwhitt and Granger's Reports.
Tyt. Mil. Law. Tytler's Essay on Military Laws and the Practice of Military Courts Martial.
U. K. United Kingdom.
U. S. United States of America.
U. S. Crim. Dig. United States Criminal Digest.
U. S. Dig. United States Digest. See *Metc. & Perk. Dig.*
U. S. Eq. Dig. United States Equity Digest.
U. S. Stat. United States Statutes at Large.
Ult. Ultimo, ultima, the last: usually applied to the last title, paragraph, or law.
Umfrev. Off. Cor. Umfreville's Office of Coroner.
Under Sher. Under Sheriff: containing the Office and Duty of High Sheriff, Under Sheriffs and Bailiffs.
Ux. et. Et uxor., et uxorem. And wife.
V. Versus. Against; as, A B *v.* C D. Also, *Versiculo,* in such a verse. Also, *Vide,* see. Also, *Voce. See* Spelman, Gloss. *Cancellarius.*
V. & B. Vesey & Beames' Reports.
V. & S. Vernon & Scriven's Reports.
V. C. Vice-Chancellor.
Va. Virginia. *Va. Cas.* Virginia Cases.
Val. Com. Valen's Commentaries.
Van Heyth. Mar. Ev. Van Heythusen's Essay upon Marine Evidence in Courts of Law and Equity.
Van Ness. Van Ness's Prize Cases.
Van Sand. Pl. Van Sandvoord's Pleadings.
Van Sand. Prec. Van Sandvoord's Precedents.
Vand. Jud. Pr. Vanderlinden's Judicial Practice.
Vatt., or *Vattel.* Vattel's Law of Nations.
Vaugh. Vaughan's Reports.
Vend. Ex. Venditioni Exponas.
Verm. R. Vermont Reports.
Vern. Vernon's Reports.
Vern. & Scriv. Vernon & Scriven's Reports of Cases in the King's Courts, Dublin.
Verpl. Contr. Verplanck on Contracts.
Verpl. Ev. Verplanck on Evidence.
Ves. Vesey Senior's Reports. See REPORTS.
Ves. Jr. Vesey Junior's Reports. See REPORTS.
Ves. & Bea. Vesey & Beames' Reports.
Vet. N. B. Old Natura Brevium.
Vid. Vidian's Entries. Also, See.
Vin. Abr. Viner's Abridgment.
Vin. Supp. Supplement to Viner's Abridgment.
Vinn. Vinnius.
Viz. Videlicet, that is to say.
Voc. Voce, or *vocem.*
Voorh. Co. Voorhies' Code.
Vs. Versus. Against.
Vt. Vermont.
W. 1. *W.* 2. Statutes of Westminster, 1 and 2.
W. C. C. R. Washington's Circuit Court Reports.
W. & C. Wilson & Courtnay's Reports.
W. H. & G. Welsby, Hurlstone & Gordon's Reports.
W. Jo. Sir William Jones' Reports.
W. Kel. William Kelynge's Reports.
W. & M. William and Mary.
W. & M. R. Woodbury & Minot's Reports
W. & S. Wilson & Shaw's Reports of Cases decided in the House of Lords.
W. R. Weekly Reporter.
Walf. Part. Walford's Treatise on the Law respecting Parties to Action.
Walf. Railw. Walford on Railways.
Walk. Am. L., or *Walk. Introd.* Walker's Introduction to American Law.
Walk. Ch. Ca. Walker's Chancery Cases.
Walk. R. Walker's Reports.
Ward Leg. Ward on Legacies.
Ward. R. Warden's Reports.
Warr. Bl. Warren's Blackstone.
Warr. L. S. Warren's Law Studies.
Washb. Washburn. *Washb. R.* Washburn's Vermont Reports. *Washb. Real Prop.* Washburn's Real Property. *Washb. Easem.* Washburn on Easements and Servitudes.
Wat. Just. Waterman's Justice.
Watk. Conv. Watkin's Principles of Conveyancing.
Watk. Cop. Watkin's Copyhold.
Wats. Watson. *Wats. Arb.* Watson on the Law of Arbitrations and Awards. *Wats. Cler. Law.* Watson's Clergyman's Law. *Wats. Part.* Watson on the Law of Partnership. *Wats. Shff.* Watson on the Law relating to the Office and Duty of Sheriff.
Welf. Eq. Plead. Welford on Equity Pleading.
Wellw. Abr. Wellwood's Abridgment of Sea Laws.
Went. Wentworth. *Wentw. Off. Ex.* Wentworth's Office of Executor. *Wentw. Pl.* Wentworth's System of Pleading.
Wesk. Ins. Weskett on the Law of Insurance.
West Parl. R. West's Parliamentary Reports.
West R. West's Reports of Lord Chancellor Hardwicke.
West Symb. West's Symboliography, or a Description of Instruments and Precedents. In two parts.
Westl. Confl. Westlake's Conflict of Laws.
Westm. Westminster. *Westm.* 1. *Westminster primus.*
Weyt. Av. Quintén Van Weytsen on Average.
Whart. Wharton. *Whart. Conv.* Wharton's Conveyancing. *Whart. Cr. Law.* Wharton on the Criminal Law of the United States. *Whart. Dig.* Wharton's Digest. *Whart. Hom.* Wharton on Homicide. *Whart. Law Lex.* Wharton's Law Lexicon, or Dictionary of Jurisprudence. *Whart. Prec.* Wharton's Precedents of Indictments. *Whart. R.* Wharton's Reports. *Whart. St. Tr.* Wharton's State Trials. *Whart. & Stillé.* Wharton & Stillé's Medical Jurisprudence.
Wheat. Wheaton. *Wheat. R.* Wheaton's Reports. *Wheat. Capt.* Wheaton's Digest of the Law of Maritime Captures and Prizes. *Wheat. Hist. L. N.* Wheaton's History of the Law of Nations, in Europe and America. *Wheat. Int. L.* Wheaton's International Law.
Wheel. Wheeler. *Wheel. Abr.* Wheeler's Abridgment. *Wheel. Cr. Cas.* Wheeler's Criminal Law. *Wheel. Slav.* Wheeler on Slavery.
Whish. L. D. Whishaw's Law Dictionary.
Whit. Eq. Pr. Whitworth's Equity Precedents.
Whit. Lien. Whitaker on the Law of Lien.
Whit. Trans. Whitaker on Stoppage in Transitu.
White New Coll. A New Collection of the Laws, Charters, and Local Ordinances of the Governments of Great Britain, France, Spain, &c.
White Rec. White's Recopilacion.
Whitm. B. L. Whitmarsh's Bankrupt Law.
Wicq. L'Ambassadeur et ses fonctions, par de Wicquefort.
Wig. Disc. Wigram on Discovery.
Wig. Wills. Wigram on Wills.
Wightw. Wightwich's Reports in the Exchequer.
Wilc. Mun. Cor. Wilcock on Municipal Corporations.
Wilc. R. Wilcox's Reports.
Wild. Int. L. Wildman's International Law.
Wilk. Leg. Ang. Sax. Wilkin's Leges Anglo-Saxonicæ.
Wilk. Lim. Wilkinson on Limitations.
Wilk. Pub. Funds. Wilkinson on the Law relating to Public Funds, including the Practice of Distringas, &c.
Wilk. Replev. Wilkinson on the Law of Replevin.

Will. Auct. Williams on the Law of Auctions.
Will. Eq. Pl. Willes' Treatise on Equity Pleadings.
Will. Inter. Willis on Interrogatories.
Will. L. D. Williams' Law Dictionary.
Will. Per. Pr. Williams' Principles of the Law of Personal Property.
Will. (P.) R. Peere Williams' Reports.
Willard Eq. Willard's Equity.
Willard Ex. Willard on Executors.
Willc. Off. Const. Willcock on the Office of Constable.
Wills Cir. Ev. Wills on Circumstantial Evidence.
Wilm. Judg. Wilmot's Notes of Opinions and Judgments.
Wilm. Mortg. Wilmot on Mortgages.
Wils. Arb. Wilson on Arbitrations.
Wils. & Co. Wilson & Courtnay's Reports.
Wils. & Sha. Wilson & Shaw's Reports decided in the House of Lords.
Wils. R. Wilson's Reports.
Wils. Uses. Wilson on Springing Uses.
Win. Winch's Entries. *Win. R.* Winch's Reports.
Wing. Max. Wingate's Maxims.
Wisc. Wisconsin.
Wms. Ex. Williams on Executors.
Wms. Just. Williams' Justice.
Wms. Pers. Prop. Williams on Personal Property.
Wms. R. P. Williams on Real Property.
Wolff. Inst. Wolffius Institutiones Juris Naturæ et Gentium.
Wood Inst., or *Wood Inst. Com.* Wood's Institutes of the Common Law of England. *Wood Inst. Civ. Law.* Wood's Institutes of the Civil Law.
Wood. & Min. Rep. Woodbury & Minot's Reports.
Wooddes. Wooddeson. *Wooddes. El. Jur.* Wooddeson's Elements of Jurisprudence. *Wooddes. Lect.* Wooddeson's Vinerian Lectures.
Woodf. L. & T. Woodfall on the Law of Landlord and Tenant.
Woodm. R. Woodman's Reports of Criminal Cases tried in the Municipal Court of the City of Boston.
Wool. Com. Law. Woolrych's Treatise on the Commercial and Mercantile Law of England.
Wool. L. W. Woolrych's Law of Waters.
Wool. Ways. Woolrych on Ways.
Worth. Jur. Worthington's Inquiry into the Power of Juries to decide incidentally on Questions of Law.
Worth. Pre. Will. Worthington's General Precedents for Wills, with Practical Notes.
Wright Ch. R. Wright's Chancery Reports.
Wright Fr. Soc. Wright on Friendly Societies.
Wright Ten. Sir Martin Wright's Law of Tenures.
Wy. Pr. Reg. Wyatt's Practical Register.
Wythe Ch. R. Wythe's Chancery Reports.
X. The decretals of Gregory the Ninth are denoted by the letter X, thus, X.
Y. B. Year Books. See REPORTS.
Y. & C. Younge & Collyer's Exchequer Reports.
Y. & C. N. C. Younge & Collyer's New Cases.
Y. & J. Younge & Jervis' Exchequer Reports.
Yo. & Col. Younge & Collyer's Exchequer Reports.
Yo. & Col. N. C. Younge & Collyer's New Cases.
Yo. Rep. Younge's Reports.
Yo. & Jer. Younge & Jervis' Reports.
Zab. R. Zabriskie's Reports.
Zouch Adm. Zouch's Jurisdiction of the Admiralty of England, asserted.

ABBREVIATORS. **In eccl. law.** Officers whose duty it is to assist in drawing up the Pope's briefs, and reducing petitions into proper form, to be converted into Papal Bulls.

ABBROCHMENT. **In old Eng. law.** The forestalling of a market or fair.

ABDICATION. A simple renunciation of an office; generally understood of a supreme office.

James II. of England, Charles V. of Germany, and Christiana, Queen of Sweden, are said to have abdicated. When James II. of England left the kingdom, the Commons voted that he had *abdicated* the government, and that thereby the throne had become vacant. The House of Lords preferred the word *deserted;* but the Commons thought it not comprehensive enough, for then the king might have the liberty of returning.

ABDUCTION. Forcibly taking away a man's wife, his child, or his female maid. 3 Sharswood, Blackst. Comm. 443, 139–141.

The unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution. 4 Stephen, Comm. 129.

The remedy for taking away a man's wife was by a suit by the husband for damages, and the offender was also answerable to the king. 3 Sharswood, Blackst. Comm. 139.

If the original removal was without consent, subsequent assent to the marriage does not change the nature of the act.

It is stated to be the better opinion, that if a man marries a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children are taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, though the parties themselves consent to the marriage, such criminal means will render the act an offence at common law. 1 East, Pl. Cr. 458; 1 Russell, Crimes, 3d ed. 701; Roscoe, Crim. Ev. 4th Lond. ed. 254.

ABEARANCE. Behavior; as, a recognizance to be of good abearance, signifies to be of good behavior. 4 Blackstone, Comm. 251, 256.

ABEREMURDER. **In old Eng. law.** An apparent, plain, or downright murder. It was used to distinguish a wilful murder from chance-medley, or manslaughter. Spelman, Gloss.; Cowel; Blount.

ABET. **In crim. law.** To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Coke, Litt. 475.

ABETTOR. An instigator, or setter on; one that promotes or procures the commission of a crime. Old Nat. Brev. 21.

The distinction between abettors and accessories is the presence or absence at the commission of the crime. Coke, Litt. 475; Cowel; Fleta, *lib.* 1, *cap.* 34. Presence and participation are necessary to constitute a person an abettor. 4 Sharswood, Blackst. Comm. 33; 1 Hall N. Y. 446; Russ. & R. Cr. Cas. 99; 9 Bingh. N. C. 440; 13 Mo. 382; 1 Wisc. 159; 10 Pick. Mass. 477.

ABEYANCE (Fr. *abbayer*, to expect). In expectation, remembrance, and contemplation of law; the condition of a freehold when

there is no person in being in whom it is vested.

In such cases the freehold has been said to be *in nubibus* (in the clouds), and *in gremio legis* (in the bosom of the law). It has been denied by some that there is such a thing as an estate in abeyance. Fearne, Cont. Rem. 513. See also the note to 2 Sharswood, Blackst. Comm. 107.

The law requires that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance. 9 Serg. & R. Penn. 367; 3 Plowd, 29 *a*, *b*, 35 *a*; 1 Washburn, Real Prop. 47.

A parsonage may be in abeyance, in the United States. 9 Cranch, 47; 2 Mass. 500; 1 Washburn, Real Prop. 48. So also may the franchise of a corporation. 4 Wheat. 691. So, too, personal property may be in abeyance or legal sequestration, as in case of a vessel captured at sea from its capture until it becomes invested with the character of a prize. 1 Kent, Comm. 102; 1 C. Rob. Adm. 139; 3 *id.* 97, n. See generally, also, 5 Mass. 555; 15 *id.* 464.

ABIATICUS (Lat.). A son's son; a grandson in the male line. Spelman, Gloss. Sometimes spelled *Aviaticus*. Du Cange, *Avius*.

ABIDING BY. In Scotch law. A judicial declaration that the party abides by the deed on which he founds, in an action where the deed or writing is attacked as forged. Unless this is done, a decree that the deed is false will be pronounced. Paterson, Comp. It has the effect of pledging the party to stand the consequences of founding on a forged deed. Bell, Dict.

ABIGEAT. A particular kind of larceny, which is committed not by taking and carrying away the property from one place to another, but by driving a living thing away with an intention of feloniously appropriating the same.

ABIGEATORES. See ABIGEUS.

ABIGEATUS. See ABIGEUS.

ABIGEI. See ABIGEUS.

ABIGERE. See ABIGEUS.

ABIGEUS (Lat. *abigere*). One who steals cattle in numbers.

This is the common word used to denote a stealer of cattle in large numbers, which latter circumstance distinguishes the *abigeus* from the *fur*, who was simply a thief. He who steals a single animal may be called *fur*; he who steals a flock or herd is an *abigeus*. The word is derived from *abigere*, to lead or drive away, and is the same in signification as *Abactor*, *Abigeatores*, *Abigatores*, *Abigei*. Du Cange; Guyot, Rép. Univ.; 4 Blackstone, Comm. 239.

A distinction is also taken by some writers depending upon the place whence the cattle are taken; thus, one who takes cattle from a stable is called *fur*. Calvinus, Lex, *Abigei*.

ABJUDICATIO (Lat. *abjudicare*). A removal from court. Calvinus, Lex. It has the same signification as *foris-judicatio* both in the civil and canon law. Coke, Litt. 100 *b*; Calvinus, Lex.

ABJURATION (Lat. *abjuratio*, from *abjurare*, to forswear). A renunciation of allegiance, upon oath.

In Am. law. Every alien, upon application to become a citizen of the United States, must declare on oath or affirmation before the court where the application is made, amongst other things, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, &c., and particularly, by name, the prince, &c. whereof he was before a citizen or subject. Rawle, Const. 98; 2 Story, U. S. Laws, 850.

In Eng. law. The oath by which any person holding office in England is obliged to bind himself not to acknowledge any right in the Pretender to the throne of England. 1 Blackstone, Comm. 368.

It also denotes an oath abjuring certain doctrines of the church of Rome.

In the ancient English law, it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for safety fled to a sanctuary, might within forty days confess the fact, and take the oath of abjuration and perpetual banishment: he was then transported. This was abolished by stat. 1 Jac. I. c. 25. Ayliffe, Parerg. 14.

But the doctrine of abjuration has been recognized at least, in much later times. 1 Sharswood, Blackst. Comm. 334, 368; 4 *id.* 56; 11 East, 301; 2 Kent, Comm. 156, n.; Termes de la Ley.

ABLEGATI. Papal ambassadors of the second rank, who are sent with a less extensive commission to a court where there are no nuncios. This title is equivalent to *envoy*, which see.

ABNEPOS (Lat.). A great-great-grandson. The grandson of a grandson or granddaughter. Calvinus, Lex.

ABNEPTIS (Lat.). A great-great-granddaughter. The granddaughter of a grandson or granddaughter. Calvinus, Lex.

ABOLITION (Lat. *abolitio*, from *abolere*, to utterly destroy). The extinguishment, abrogation, or annihilation of a thing.

In the civil, French, and German law, abolition is used nearly synonymously with pardon, remission, grace. Dig. 39. 4. 3. 3. There is, however, this difference: *grace* is the generic term; *pardon*, according to those laws, is the clemency which the prince extends to a man who has participated in a crime, without being a principal or accomplice; *remission* is made in cases of involuntary homicides, and self-defence. *Abolition* is different: it is used when the crime cannot be remitted. The prince then may by letters of abolition remit the punishment, but the infamy remains, unless letters of abolition have been obtained before sentence. *Encycl. de D'Alembert.*

ABORDAGE (Fr.). The collision of vessels.

If the collision happen in the open sea, and the damaged ship is insured, the insurer must pay the loss, but is entitled in the civil law, at least, to be subrogated to the rights of the insured against the party causing the damage. *Ordonnance de la Marine de* 1681, *Art.* 8; *Jugements d' Oléron*; Emerigon, Insurance, c. 123, 14.

ABORTION. The expulsion of the fœtus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.

Its natural and innocent causes are to be sought either *in the mother*—as in a nervous, irritable temperament, disease, malformation of the pelvis, immoderate venereal indulgence, a habit of miscarriage, plethora, great debility; or *in the fœtus* or its dependencies; and this is usually disease existing in the ovum, in the membranes, the placenta, or the fœtus itself.

The criminal means of producing abortion are of two kinds. *General*, or those which seek to produce the expulsion through the constitution of the mother, which are venesection, emetics, cathartics, diuretics, emmenagogues, comprising mercury, savine, and the *secale cornutum* (spurred rye, ergot), to which much importance has been attached; or *local or mechanical* means, which consist either of external violence applied to the abdomen or loins, or of instruments introduced into the uterus for the purpose of rupturing the membranes and thus bringing on premature action of the womb. The latter is the more generally resorted to, as being the most effectual. These local or mechanical means not unfrequently produce the death of the mother, as well as that of the fœtus.

At common law, an attempt to destroy a child *en ventre sa mere*, appears to have been held in England to be a misdemeanor. Roscoe, Crim. Ev. 4th Lond. ed. 260; 1 Russell, Crimes, 3d Lond. ed. 671. In this country, it has been held that it is not an indictable offence, at common law, to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion and premature birth of the fœtus of which she is pregnant, by means of which an abortion is in fact caused, without averring and proving that, at the time of the administration of such drug or the performance of such operation, such woman was quick with child. 9 Metc. Mass. 263; 2 Zabr. N. J. 52. But in Pennsylvania a contrary doctrine has been held. 13 Penn. St. 631.

The former English statutes on this subject, the 43 Geo. III. c. 58, and 9 Geo. IV. c. 51, § 14, distinguished between the case where the woman was quick and was not quick with child; and under both acts the woman must have been pregnant at the time. 1 Mood. Cr. Cas. 216; 3 Carr. & P. 605. The terms of the recent act are, "with intent to procure the miscarriage of any woman," omitting the words "being then quick with child," &c.; and it is immaterial whether the woman is or is not pregnant, if the prisoner, believing her to be so, administers the drug, or uses the instrument, with the intent of producing abortion. 1 Den. Cr. Cas. 18; 2 Carr. & K. 293.

When, in consequence of the means used to secure an abortion, the death of the woman ensues, the crime is murder. And if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder. 2 Carr. & K. 784.

Consult 1 Beck, Med. Jur. 288–331, 429–435; Roscoe, Crim. Ev. 190; 1 Russell, Crimes, 3d Lond. ed. 671; 1 Briand, *Méd. Leg.* pt. 1, c. 4; Alison, Scotch Crim. Law, 628.

ABORTUS. The fruit of an abortion; the child born before its time, incapable of life. See ABORTION; BIRTH; BREATH; DEADBORN; GESTATION; LIFE.

ABOUTISSEMENT (Fr.). An abuttal or abutment. See Guyot, Répert. Univ. *Aboutissans.*

ABOVE. Higher; superior. As, court above, bail above.

ABPATRUUS (Lat.). A great-great-uncle; or, a great-great-grandfather's brother. Du Cange, *Patruus.* It sometimes means uncle, and sometimes great-uncle.

ABRIDGE. In practice. To shorten a declaration or count by taking away or severing some of the substance of it. Brooke, Abr. *Abridgment;* Comyn, Dig. *Abridgment;* 1 Viner, Abr. 109.

To abridge a plaint is to strike out a part of the demand and pray that the tenant answer to the rest. This was allowable generally in real actions where the writ was *de libero tenemento*, as assize, dower, etc., where the demandant claimed land of which the tenant was not seized. See 1 Wms. Saund. 207, n. 2; 2 *id.* 24, 330; Brooke, Abr. *Abridgment;* 1 Pet. 74; Stearns, Real Act. 204.

ABRIDGMENT. An epitome or compendium of another and larger work, wherein the principal ideas of the larger work are summarily contained.

When fairly made, it may justly be deemed, within the meaning of the law, a new work, the publication of which will not infringe the copyright of the work abridged. An injunction, however, will be granted against a mere colorable abridgment. 2 Atk. Ch. 143; 1 Brown, Ch. 451; 5 Ves. Ch. 709; Lofft, 775; Ambl. Ch. 403; 1 Story, C. C. 11; 3 *id.* 6; 1 Younge & C. Ch. 298; 39 Leg. Obs. 346; 2 Kent, Comm. 382.

Abridgments of the Law or Digests of Adjudged Cases serve the very useful purpose of an index to the cases abridged. 5 Coke, 25. Lord Coke says they are most profitable to those who make them. Coke, Litt., in preface to the table at the end of the work. With few exceptions, they are not entitled to be considered authoritative. See 2 Wils. 1, 2; 1 Burr. 364; 1 W. Blackst. 101; 3 Term, 64, 241; and an article in the North American Review, July, 1826, pp. 8–13, for an account of the principal abridgments, which was written by the late Justice Story, and is reprinted in his "Miscellaneous Writings," p. 79; Warren, Law Stud. 2d Lond. ed. pp. 778 *et seq.*

ABROGATION. The destruction of or

annulling a former law, by an act of the legislative power, or by usage.

A law may be abrogated, or only derogated from: it is abrogated when it is totally annulled; it is derogated from when only a part is abrogated: *derogatur legi, cùm pars detrahitur; abrogatur legi, cùm prorsùs tollitur.* Dig. 50. 17. 1. 102. Lex *rogatur* dum fertur (when it is passed); *abrogatur* dum tollitur (when it is repealed); *derogatur* idem dum quoddam ejus caput aboletur (when any part of it is abolished); *subrogatur* dum aliquid ei adjicitur (when any thing is added to it); *abrogatur* denique, quoties aliquid in eâ mutatur (as often as any thing in it is changed). Dupin, *Proleg. Jur.* art. iv.

Express abrogation is that literally pronounced by the new law either in general terms, as when a final clause abrogates or repeals all laws contrary to the provisions of the new one, or in particular terms, as when it abrogates certain preceding laws which are named.

Implied abrogation takes place when the new law contains provisions which are positively contrary to the former laws, without expressly abrogating such laws; for it is a maxim, *posteriora derogant prioribus.* 10 Mart. La. 172. 560; and also when the order of things for which the law had been made no longer exists, and hence the motives which had caused its enactment have ceased to operate; *ratione legis omnino cessante cessat lex.* Toullier, Droit Civil Français, tit. prel. § 11, n. 151; Merlin, Répert., *Abrogation.*

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process.

ABSCONDING DEBTOR. One who absconds from his creditors.

The statutes of the various states, and the decisions upon them, have determined who shall be treated in those states, respectively, as absconding debtors, and liable to be proceeded against as such. A person who has been in a state only transiently, or has come into it without any intention of settling therein, cannot be treated as an absconding debtor, 2 Caines, N. Y. 318; 15 Johns. N. Y. 196; 4 Watts Penn. 422; nor can one who openly changes his residence, 3 Yerg. Tenn. 414; 5 Conn. 117. For the rule in Vermont, see 2 Vt. 489; 6 *id.* 614. It is not necessary that the debtor should actually leave the state. 7 Md. 209.

ABSENCE. The state of being away from one's domicile or usual place of residence.

A presumption of death arises after the absence of a person for seven years without having been heard from. Peake, Ev. c. 14, § 1; 2 Starkie, Ev. 457, 458; Park, Ins. 433; 1 W. Blackst. 404; 1 Stark. 121; 2 Camph. 113; 4 Barnew. & Ald. 422; 4 Wheat. 150, 173; 15 Mass. 305; 18 Johns. N. Y. 141; 1 Hard. Ky. 479.

In Louisiana a curator is appointed under some circumstances to take charge of the estate of those who are out of the state during their absence. La. Civ. Code, art. 50, 51.

ABSENTEE. A landlord who resides in a country other than that from which he draws his rents. The discussions on the subject have generally had reference to Ireland. McCulloch, Polit. Econ.; 33 British Quarterly Review, 455.

ABSOILE. To pardon; to deliver from excommunication. Stamford, Pl. Cor. 72; Kelham. Sometimes spelled *Assoile,* which see.

ABSOLUTE. (Lat. *absolvere*). Complete, perfect, final; without any condition or incumbrance; as an absolute bond (*simplex obligatio*), in distinction from a conditional bond; an absolute estate, one that is free from all manner of condition or incumbrance. See CONDITION.

A *rule* is said to be absolute when on the hearing it is confirmed and made final. A *conveyance* is said to be absolute, as distinguished from a mortgage or other conditional conveyance. 1 Powell, Mortg. 125.

Absolute *rights* are such as appertain and belong to particular persons merely as individuals or single persons, as distinguished from relative rights, which are incident to them as members of society. 1 Sharswood, Blackst. Comm. 123; 1 Chitty, Plead. 364; 1 Chitty, Pract. 32.

Absolute *property* is where a man hath solely and exclusively the right and also the occupation of movable chattels; distinguished from a qualified property, as that of a bailee. 2 Sharswood, Blackst. Comm. 388; 2 Kent, Comm. 347.

ABSOLUTION. In Civil Law. A sentence whereby a party accused is declared innocent of the crime laid to his charge.

In Canon Law. A juridical act whereby the clergy declare that the sins of such as are penitent are remitted. The formula of absolution in the Roman Church is absolute; in the Greek Church it is deprecatory; in the Reformed Churches, declaratory. Among Protestants it is chiefly used for a sentence by which a person who stands excommunicated is released or freed from that punishment. Encyc. Brit.

In French Law. The dismissal of an accusation.

The term *acquitment* is employed when the accused is declared not guilty, and *absolution* when he is recognized as guilty but the act is not punishable by law or he is exonerated by some defect of intention or will.

ABSOLUTISM. In politics. That government in which public power is vested in some person or persons, unchecked and uncontrolled by any law or institution.

The word was first used at the beginning of this century, in Spain, where he who was in favor of the absolute power of the king and opposed to the constitutional system introduced by the Cortes during the struggle with the French, was called absolutista. The term Absolutist spread over Europe, and was applied exclusively to absolute monarchism; but absolute power may exist in an aristocracy and in a democracy as well. Dr. Lieber, therefore, uses in his works the term Absolute Democracy for that government in which the public power rests unchecked in the multitude (practically speaking, in the majority). All absolutism belongs to a crude political state of things, to Asiatic slavery or to effete periods, or else is a transitory dictatorship. The following schedule of a comparison between Monarchical and Democratic Absolutism is taken, with the permission

of that publicist, from one of his Lectures in the Columbia Law School.

ABSOLUTISM.

Monarchical.	Democratic.
As to Power.	
Lent (an individual cannot inherently have public power).	Real (and often fearfully so).
As to Responsibility.	
Concentrated and real at last.	Divided and unreal.
Real Wielder of the Power.	
One ruler proclaimed by name.	One essential leader and ruler without the name.
As to Opposition.	
Opposition considered heroic, patriotic.	Opposition considered unpatriotic, treasonable, yet no slave more abject than the slave of an unorganic multitude.
As to the foundation of Power.	
However irrational, and even immoral, is yet intelligible.	Illogical, because it transfers by necessity the absolute power, claimed because the united power of the whole, to the majority, without diminishing absolutism.

For a valuation of that combination of pretended democratic and monarchical absolutism, as we find it in the present French Empire, we refer the reader to Lieber's Civil Liberty and Self-Government.

ABSQUE ALIQUO INDE REDDENDO (Lat. without reserving any rent therefrom). A term used of a free grant by the crown. 2 Rolle, Abr. 502.

ABSQUE HOC (Lat.). Without this. See TRAVERSE.

ABSQUE IMPETITIONE VASTI (Without impeachment of waste). A term indicating freedom from any liability on the part of the tenant or lessee to answer in damages for the waste he may commit. See WASTE.

ABSQUE TALI CAUSA (Lat. without such cause). **In pleading.** A form of replication in an action *ex delicto* which works a general denial of the whole matter of the defendant's plea of *de injuria*. Gould, Plead. c. 7, § 10.

ABSTENTION. **In French Law.** The tacit renunciation of a succession by an heir. Merlin, Répert.

ABSTRACT OF A FINE. An abstract of the writ of covenant and the concord; naming the parties, the parcel of land, and the agreement. 2 Blackstone, Comm. 351.

ABSTRACT OF A TITLE. A brief account of all the deeds upon which the title rests. A synopsis of the distinctive portions of the various instruments which constitute the muniments of title. See Preston, Abstracts; Wharton, Dict. 2d Lond. ed.

ABUSE. Every thing which is contrary to good order established by usage. Merlin, Répert.

Among the civilians, abuse has another signification; which is the destruction of the substance of a thing in using it. For example, the borrower of wine or grain abuses the article lent by using it, because he cannot enjoy it without consuming it.

ABUSE OF FEMALE CHILD. See RAPE.

ABUT. To reach, to touch.

In old law, the ends were said to abut, the sides to adjoin. Croke, Jac. 184.

To take a new direction; as where a bounding line changes its course. Spelman, Gloss. *Abuttare*. In the modern law, to bound upon. 2 Chitty, Plead. 660.

ABUTTALS (Fr.). The buttings or boundings of lands, showing to what other lands, highways, or places they belong or are abutting. Termes de la Ley.

AC ETIAM (Lat. and also). The introduction to the statement of the real cause of action, used in those cases where it was necessary to allege a fictitious cause of action to give the court jurisdiction, and also the real cause in compliance with the statutes. It was first used in the K. B., and was afterwards adopted by Lord C. J. North in addition to the *clausum fregit* writs of his court upon which writs of *capias* might issue. He balanced a while whether he should not use the words *nec non* instead of *ac etiam*. See Burgess, Ins. 149–157; 3 Sharswood, Blackst. Comm. 288.

ACCEDAS AD CURIAM (Lat. that you go to court). **In Eng. Law.** An original writ issuing out of chancery and directed to the sheriff, for the purpose of removing a replevin suit from the Hundred Court or Court Baron before one of the superior courts of law. It directs the sheriff *to go to the lower court*, and there cause the plaint to be recorded and to return, etc. See Fitzherbert, Nat. Brev. 18; Dy. 169.

ACCEDAS AD VICE COMITEM (Lat. that you go to the sheriff). **In Eng. Law.** A writ directed to the coroner, commanding him to deliver a writ to the sheriff who suppresses a *pone* which has been delivered to him which commands the latter officer to return the *pone*.

ACCEPTANCE (Lat. *accipere*, to receive). The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221.

The element of receipt must enter into every acceptance, though receipt does not necessarily mean in this sense actual manual taking. To this element there must be added an intention to retain. This intention may exist at the time of the receipt, or subsequently; it may be indicated by words, or acts, or any medium understood by the parties; and an acceptance of goods will be implied from mere detention, in many instances.

An acceptance involves very generally the idea of a receipt in consequence of a previous undertaking on the part of the person offering, to deliver such a thing as the party accepting is in some manner bound to receive. It is through this meaning that the term acceptance, as used in reference to bills of exchange, has a relation to the more general use of the term. As distinguished from assent, acceptance would denote receipt of something in compliance and satisfactory fulfilment of a contract to which assent had been previously given. See ASSENT.

2. Under the statute of frauds (29 Car. II. c. 3) delivery and *acceptance* are necessary to

complete an oral contract for the sale of goods, in most cases. In such case, it is said the acceptance must be absolute and past recall, 2 Exch. 290; 5 Railw. Cas. 496; 1 Pick. Mass. 278; 10 *id.* 326, and communicated to the party making the offer. 4 Wheat. 225; 6 Wend. N. Y. 103, 397. As to how far a right to make future objections invalidates an acceptance, see 3 Barnew. & Ald. 521; 5 *id.* 557; 10 Bingh. 376; 10 Q. B. 111; 6 Exch. 903.

Acceptance of rent destroys the effect of a notice to quit for non-payment of such rent, 3 Taunt. 78; 4 Bingh. N. C. 178; 4 Barnew. & Ald. 401; 13 Wend. N. Y. 530; 11 Barb. N. Y. 33; 1 Busb. No. C. 418; 2 N. H. 163; 19 Vt. 587; 1 Washburn, Real Prop. 322, and may operate a waiver of forfeiture for other causes. 3 Coke, 64; 1 Wms. Saund. 287 *c*, note; 3 Cow. N. Y. 220; 5 Barb. N. Y. 339; 3 Cush. Mass. 325.

Of Bills of Exchange. An engagement to pay the bill in money when due. 4 East, 72; 19 Law Jour. 297.

Acceptances are said to be of the following kinds.

Absolute, which is a positive engagement to pay the bill according to its tenor.

Conditional, which is an undertaking to pay the bill on a contingency.

The holder is not bound to receive such an acceptance, but, if he does receive it, must observe its terms. 4 Maule & S. 466; 1 Campb. 425; 2 Wash. C. C. 485. For some examples of what do and what do not constitute conditional acceptances, see 1 Term, 182; 2 Strange, 1152, 1211; 2 Wils. 9; 6 Carr. & P. 218; 3 C. B. 841; 15 Miss. 244; 7 Me. 126; 1 Ala. 73; 10 Ala. N. S. 533; 1 Strobh. So. C. 271; 1 Miles, Penn. 294; 4 Watts & S. Penn. 346.

3. *Express*, which is an undertaking in direct and express terms to pay the bill.

Implied, which is an undertaking to pay the bill inferred from acts of a character fairly to warrant such an inference.

Partial, which is one varying from the tenor of the bill.

An acceptance to pay part of the amount for which the bill is drawn, 1 Strange, 214; 2 Wash. C. C. 485; or to pay at a different time, 14 Jur. 806; 25 Miss. 376; Molloy, b. 2, c. 10, § 20; or at a different place, 4 Maule & S. 462, would be partial.

Qualified, which are either conditional or partial.

Supra protest, which is the acceptance of the bill after protest for non-acceptance by the drawee, for the honor of the drawer or a particular endorser.

When a bill has been accepted *supra protest* for the honor of one party to the bill, it may be accepted *supra protest* by another individual for the honor of another. Beawes, Lex Merc., *Bills of Exchange*, pl. 52; 5 Campb. 447.

The acceptance must be made by the drawee or some one authorized to act for him. The drawee must have capacity to act and bind himself for the payment of the bill, or it may be treated as dishonored. See ACCEPTOR SUPRA PROTEST; Marius, 22; 2 Q. B. 16. As to when an acceptance by an agent, an officer of a corporation, etc., on behalf of the company, will bind the agent or officer personally, see 15 Jur. 335; 20 Law Journ. 160; 6 C. B. 766; 10 *id.* 318; 9 Exch. 154; 4 N. Y. 208; 6 Mass. 58; 8 Pick. Mass. 56; 11 Me. 267; 2 South. N. J. 828; see also 17 Wend. N. Y. 40; 5 B. Monr. Ky. 51; 2 Conn. 660; 19 Me. 352; 16 Vt. 220; 2 Metc. Mass. 47; 7 Miss. 371.

4. It may be made before the bill is drawn, in which case it must be in writing. 3 Mass. 1; 9 *id.* 55; 15 Johns. N. Y. 6; 10 *id.* 207; 2 Wend. N. Y. 545; 1 Bail. So. C. 522; 2 Green, N. J. 239; 2 Dan. Ky. 95; 5 B. Monr. Ky. 8; 15 Penn. St. 453; 2 Ind. 488; 3 Md. 265; 1 Pet. 264; 4 *id.* 121; 2 Wheat. 66; 2 McLean, C. C. 462; 2 Blatchf. C. C. 335. See 1 Stor. C. C. 22; 2 *id.* 213. It may be made after it is drawn and before it comes due, which is the usual course, or after it becomes due, 1 H. Blackst. 313; 2 Green, N. J. 339; or even after a previous refusal to accept. 5 East, 514; 1 Mas. C. C. 176. It must be made within twenty-four hours after presentment, or the holder may treat the bill as dishonored. Chitty, Bills, 212, 217. And upon refusal to accept, the bill is at once dishonored, and should be protested. Chitty, Bills, 217.

5. It may be in writing on the bill itself, or on another paper, 4 East, 91; or it may be oral, 4 East, 67; Rep. *temp.* Hardw. 74; 6 Carr. & P. 218; 1 Wend. N. Y. 522; 2 Green, N. J. 339; 1 Rich. So. C. 249; 3 Mass. 1; 2 Metc. 53; 22 N. H. 153; but must now be in writing, in England and New York. Stat. 19 & 20 Vict. c. 97, § 6. The usual form is by writing "accepted" across the bill and signing the acceptor's name, 1 Parsons, Contr. 223; 1 Mann. & R. 90; but the drawee's name alone is sufficient, or any words of equivalent force to accepted. See Byles, Bills, 147; 1 Atk. Ch. 611; 1 Mann. & R. 90; 21 Pick. Mass. 307; 3 Md. 265; 9 Gill, Md. 350.

Consult Bayley, Byles, Chitty, Parsons, Story on Bills; Parsons on Contracts; Edwards, Story on Bailments.

In Insurance. Acceptance of abandonment in insurance is in effect an acknowledgment of its sufficiency, and perfects the right of the assured to recover for a total loss if the cause of loss and circumstances have been truly made known. No particular form of acceptance is requisite, and the underwriter is not obliged to say whether he accepts. 2 Phillips, Ins. § 1689. An acceptance may be a constructive one, as by taking possession of an abandoned ship to repair it without authority so to do, 2 Curt. C. C. 322, or by retaining such possession an unreasonable time, under a stipulation authorizing the underwriter to take such possession. 16 Ill. 235.

ACCEPTILATION. In Civil Law. A release made by a creditor to his debtor of his debt, without receiving any consideration. Ayliffe, Pand. tit. 26, p. 570. It is a species of donation, but not subject to the forms of the latter, and is valid unless in fraud of creditors. Merlin, Répert.

Acceptilation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert*; or, a certain arrangement of words by which, on the

question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received what in fact he has not received. The acceptilation is an imaginary payment. Dig. 46. 4. 1, 19; Dig. 2. 14. 27. 9; Inst. 3. 30. 1.

ACCEPTOR. The party who accepts a bill of exchange. 3 Kent, Comm. 75.

The party who undertakes to pay a bill of exchange in the first instance.

The drawee is in general the acceptor; and unless the drawee accepts, the bill is dishonored. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting; for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting. 3 Kent, Comm. 75; 3 Burr. 1384; 1 W. Blackst. 390; 4 Dall. Penn. 204.

ACCEPTOR SUPRA PROTEST. A party who accepts a bill which has been protested, for the honor of the drawer or any one of the endorsers.

Any person, 1 Pet. 250, even the drawee himself, may accept a bill *supra protest*, Byles, Bills, 206; and two or more persons may become acceptors *supra protest* for the honor of different persons. The obligation on an acceptor *supra protest* is to pay if the drawee do not. 16 East, 391. See 3 Wend. N. Y. 491; 19 Pick. Mass. 220; 8 N. H. 66. An acceptor *supra protest* has his remedy against the person for whose honor he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser. 1 Ld. Raym. 574; 1 Esp. 112; Bayley, Bills, 209; 3 Kent, Comm. 75; Chitty, Bills, 312. The acceptor *supra protest* is required to give the same notice, in order to charge a party, which is necessary to be given by other holders. 8 Pick. Mass. 1, 79; 1 Pet. 262.

ACCESS. Approach, or the means or power of approaching.

Sometimes by access is understood sexual intercourse; at other times, the opportunity of communicating together so that sexual intercourse may have taken place, is also called access.

In this sense a man who can readily be in company with his wife is said to have access to her; and in that case her issue are presumed to be his issue. But this presumption may be rebutted by positive evidence that no sexual intercourse took place. 1 Turn. & R. 141.

Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law. Rep. *temp.* Hardw. 79; Buller, Nisi P. 113; Cowp. 592; 8 East, 203; 11 *id.* 133; 2 Munf. Va. 242; 3 *id.* 599; 3 Hawks, No. C. 323; 3 Hayw. Tenn. 221; 1 Ashm. Penn. 269; 1 Grant Cas. Penn. 377; 3 Paige Ch. N. Y. 129.

Non-access is not presumed from the mere fact that husband and wife lived apart. 1 Gale & D. 7. See 3 Carr. & P. 215; 1 Sim. & S. Ch. 153; 1 Greenleaf, Ev. § 28.

ACCESSARY. **In Criminal Law.** He who is not the chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

An accessary before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it. 1 Hale, Pl. Cr. 615. With regard to those cases where the principal goes beyond the terms of the solicitation, the approved test is, "Was the event alleged to be the crime to which the accused is charged to be accessary a probable cause of the act which he counselled?" 1 Fost. & F. Cr. Cas. 242; Roscoe, Crim. Ev. 4th Lond. ed. 207. When the act is committed through the agency of a person who has no legal discretion nor a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessary, for none can be accessary to the acts of a madman, but a principal in the first degree. 1 Hale Pl. Cr. 618. But if the instrument is aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the fact is committed, is an accessary before the fact, 1 Russ. & R. Cr. Cas. 363; 1 Den. Cr. Cas. 37; 1 Carr. & K. 589; or if he is present, as a principal in the second degree, 1 Fost. Cr. Cas. 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent. 2 Mood. Cr. Cas. 301; 1 Carr. & K. 395.

An accessary after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 4 Blackstone, Comm. 37.

No one who is a principal can be an accessary.

2. In certain crimes, there can be no accessaries; all who are concerned are principals, whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony. 4 Sharswood, Blackst. Comm. 35–40; Hawkins, Pl. Cr. b. 2, c. 29, § 16; 2 Den. Cr. Cas. 453; 5 Cox, Cr. Cas. 521; 2 Mood. Cr. Cas. 276; 8 Dan. Ky. 28; 20 Miss. 58; 3 Cush. Mass. 284; 3 Gray, Mass. 448. Such is the English law; but in the United States it appears not to be determined as regards the cases of persons assisting traitors. Sergeant, Const. Law, 382; 4 Cranch, 472, 501; United States *v.* Fries, Pamphl. 199.

3. It is evident there can be no accessary when there is no principal; if a principal in a transaction be not liable under our laws, no

one can be charged as a mere accessary to him. 1 Woodb. & M. C. C. 221.

By the rules of the common law, accessaries cannot be tried, without their consent, before the principals. Fost. Cr. Cas. 360.

But an accessary to a felony committed by several, some of whom have been convicted, may be tried as accessary to a felony committed by these last; but if he be indicted and tried as accessary to a felony committed by them all, and some of them have not been proceeded against, it is error. 7 Serg. & R. Penn. 491; 10 Pick. Mass. 484. If the principal is dead, the accessary cannot, by the common law, be tried at all. 16 Mass. 423.

ACCESSIO (Lat.). An increase or addition; that which lies next to a thing, and is supplementary and necessary to the principal thing; that which arises or is produced from the principal thing. Calvinus, Lex.

A manner of acquiring the property in a thing which becomes united with that which a person already possesses.

The doctrine of property arising from accessions is grounded on the rights of occupancy. It is said to be of six kinds in the Roman law.

First. That which assigns to the owner of a thing its products, as the fruit of trees, the young of animals.

Second. That which makes a man the owner of a thing which is made of another's property, upon payment of the value of the material taken. See also La. Civ. Code, art. 491. As where wine, bread, or oil is made of another man's grapes or olives. 2 Sharswood, Blackst. Comm. 404; 10 Johns. N. Y. 288.

Third. That which gives the owner of land new land formed by gradual deposit. See ALLUVION.

Fourth. That which gives the owner of a thing the property in what is added to it by way of adorning or completing it; as if a tailor should use the cloth of B. in repairing A.'s coat, all would belong to A.; but B. would have an action against both A. and the tailor for the cloth so used. This doctrine holds in the common law. F. Moore, 20; Poph. 38; Brooke, Abr. *Propertiæ*, 23.

Fifth. That which gives islands formed in a stream to the owner of the adjacent lands on either side.

Sixth. That which gives a person the property in things added to his own so that they cannot be separated without damage. Guyot, Répert. Univ.

An accessary obligation, and sometimes also the person who enters into an obligation as surety in which another is principal. Calvinus, Lex.

ACCESSION. The right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally or artificially. 2 Kent, Comm. 360; 2 Blackstone, Comm. 404.

2. If a man hath raised a building upon his own ground with the materials of another, or, on the contrary, if a man shall have built with his own materials upon the ground of another, in either case the edifice becomes the property of him to whom the ground belongs; for every building is an accession to the ground upon which it stands; and the owner of the ground, if liable at all, is only liable to the owner of the materials for the value of them. Inst. 2. 1. 29, 30; 2 Kent, Comm. 362. And the same rule holds where trees, vines, vegetables, or fruits are planted or sown in the ground of another. Inst. 2. 1. 31, 32.

3. If the materials of one person are united by labor to the materials of another, so as to form a single article, the property in the joint product is, in the absence of any agreement, in the owner of the principal part of the materials by accession. 7 Johns. N. Y. 473; 5 Pick. Mass. 177; 6 *id.* 209; 32 Me. 404; 16 Conn. 322; Inst. 2. 1. 26. But a vessel built of materials belonging to different persons, it has been said, will belong to the owner of the keel, according to the rule, *proprietas totius navis carinæ causam sequitur*. 2 Kent, Comm. 361; 6 Pick. Mass. 209; 7 Johns. N. Y. 473; 11 Wend. N. Y. 139. It is said to be the doctrine of the civil law, that the rule is the same though the adjunction of materials may have been dishonestly contrived; for, in determining the right of property in such a case, regard is had only to the *things joined*, and not to *the persons*, as where the materials are changed in species. Wood, Inst. 93; Inst. 2. 1. 25. And see ADJUNCTION.

4. Where, by agreement, an article is manufactured for another, the property in the article, while making and when finished, vests in him who furnished the whole or the principal part of the materials; and the maker, if he did not furnish the same, has simply a lien upon the article for his pay. 2 Den. N. Y. 268; 10 Johns. N. Y. 268; 15 Mass. 242; 4 Ired. No. C. 102.

The increase of an animal, as a general thing, belongs to its owner; but, if it be let to another, the person who thus becomes the temporary proprietor will be entitled to its increase, 8 Johns. N. Y. 435; Inst. 2. 1. 38; though it has been held that this would not be the consequence of simply putting a mare to pasture, in consideration of her services. 2 Penn. St. 166. The Civil Code of Louisiana, following the Roman law, makes a distinction in respect of the issue of slaves, which, though born during the temporary use or hiring of their mothers, belong not to the hirer, but to the permanent owner. La. Code, art. 539: Inst. 2. 1. 37; and see 31 Miss. 557; 4 Sneed, Tenn. 99; 2 Kent, Comm. 361. But the issue of slaves born during a tenancy for life belong to the tenant for life. 7 Harr. & J. Md. 257.

5. If there be a sale, mortgage, or pledge of a chattel, carried into effect by delivery or by a recording of the mortgage where that is equivalent to a delivery, and other materials are added, afterwards, by the labor of the vendor or mortgagor, these pass with the principal by accession. 12 Pick. Mass. 83; 1 R. I. 511.

If, by the labor of one man, the property of another has been converted into a thing of different species, so that its identity is destroyed, the original owner can only recover the value of the property in its unconverted state, and the article itself will belong to the person who wrought the conversion, if he wrought it *believing the material to be his own*. Such a change is said to be wrought when

wheat is made into bread, olives into oil, or grapes into wine. Inst. 2. 1. 25; 4 Den. N. Y. 332; Year B. 5 H. VII. 15; Brooke, Abr. *Property*, 23.

6. But, if there be a mere change of form or value, which does not destroy the identity of the materials, the original owner may still reclaim them or recover their value as thus improved; Brooke, Abr. *Property*, 23; F. Moore, 20; 2 N. Y. 379. So, if the change have been wrought by a wilful trespasser, or by one who knew that the materials were not his own; in such case, however radical the change may have been, the owner may reclaim them, or recover their value in their new shape: thus, where whiskey was made out of another's corn, 2 N. Y. 379; shingles out of another's trees, 9 Johns. N. Y. 362; coals out of another's wood, 6 Johns. N. Y. 168; 12 Ala. N. S. 590; leather out of another's hides, 21 Barb. N. Y. 92; in all these cases, the change having been made by one who knew the materials were another's, the original owner was held to be entitled to recover the property, or its value in the improved or converted state. And see 6 Hill, N. Y. 425; 2 Rawle, Penn. 427; 5 Johns. N. Y. 349; 21 Me. 287; 30 *id.* 370; 11 Metc. Mass. 493; Story, Bailm. § 40; 1 Brown, Civil and Adm. Law, 240, 241.

In International Law. The absolute or conditional acceptance, by one or several states, of a treaty already concluded between other sovereignties. Merlin, Répert., *Accession*.

ACCESSORY. Any thing which is joined to another thing as an ornament, or to render it more perfect.

For example, the halter of a horse, the frame of a picture, the keys of a house, and the like, each belong to the principal thing. The sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list, 2 Watts, Penn. 111; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Lois Civ., Part. 2, liv. 4, tit. 2, s. 4, n. 1. *Accessorium non ducit, sed sequitur principale.* Coke, Litt. 152, *a*.

See ACCESSION; ADJUNCTION; APPURTENANCES. Used also in the same sense as ACCESSARY, which see.

ACCESSORY ACTIONS. In Scotch Law. Those which are in some degree subservient to others. Bell, Dict.

ACCESSORY CONTRACT. One made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgages, and pledges.

It is a general rule, that payment or release of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation, Pothier, Ob. 1, c. 1, s. 1, art. 2, n. 14; *id.* n. 182, 186; see 8 Mass. 551; 15 *id.* 233; 17 *id.* 419; 4 Pick. Mass. 11; 8 *id.* 422; 5 Metc. Mass. 310; 7 Barb. N. Y. 22; 2 Barb. Ch. N. Y. 119; 1 Hill. & D. N. Y. 65; 6 Penn. St. 228; 24 N. H. 484; 3 Ired. No. C. 337; and that an assignment of the principal contract will carry the accessory contract with it. 7 Penn. St. 280; 17 Serg. & R. Penn. 400; 5 Cow. N. Y. 202; 5 Cal. 515; 4 Iowa, 434; 24 N. H. 484.

2. If the accessory contract be a contract by which one is to answer for the debt, default, or miscarriage of another, it must, under the statute of frauds, be in writing, and disclose the consideration, either explicitly, or by the use of terms from which it may be implied. 5 Mees. & W. Exch. 128; 7 *id.* 410; 5 Barnew. & Ad. 1109; 1 Bingh. N. C. 761; 6 Bingh. 201; 9 East, 348; 8 Cush. Mass. 156; 15 Penn. St. 27; 20 Barb. N. Y. 298; 13 N. Y. 232; 4 Jones, No. C. 287. Such a contract is not assignable so as to enable the assignee to sue thereon in his own name. 21 Pick. Mass. 140; 5 Wend. N. Y. 307.

3. An accessory contract of this kind is discharged not only by the fulfilment or release of the principal contract, but also by any material change in the terms of such contract by the parties thereto; for the surety is bound only by the precise terms of the agreement he has guarantied. 2 Nev. & P. 126; 9 Wheat. 680; 1 Eng. L. & Eq. 1; 3 Wash. C. C. 70; 12 N. H. 320; 13 *id.* 240. Thus, the surety will be discharged if the right of the creditor to enforce the debt be suspended for any definite period, however short; and a suspension for a day will have the same effect as if it were for a month or a year. 2 Ves. Sen. Ch. 540; 2 White & T. Lead. Cas. 707; 5 Ired. Eq. No. C. 91; 7 Hill, N. Y. 250; 3 Den. N. Y. 512; 2 Wheat. 253; 28 Vt. 209. But the surety may assent to the change, and waive his right to be discharged because of it. 13 N. H. 240; 2 McLean, C. C. 99; 5 Ohio, 510; 8 Me. 121.

4. If the parties to the principal contract have been guilty of any misrepresentation, or even concealment, of any material fact, which, had it been disclosed, would have deterred the surety from entering into the accessory contract, the security so given is voidable at law on the ground of fraud. 5 Bingh. N. C. 156; 3 Barnew. & C. 605; 1 Bos. & P. 419; 9 Ala. N. S. 42; 2 Rich. So. C. 590; 10 Clark & F. Hou. L. 936.

So the surety will be discharged should any condition, express or implied, that has been imposed upon the creditor by the accessory contract, be omitted by him. 8 Taunt. 208; 14 Barb. N. Y. 123; 6 Cal. 24; 27 Penn. St. 317; 6 Hill, N. Y. 540; 9 Wheat. 680; 17 Wend. N. Y. 179, 422.

An accessory contract to guarantee an original contract, which is void, has no binding effect. 7 Humphr. Tenn. 261; and see 27 Ala. N. S. 291.

ACCESSORY OBLIGATIONS. In Scotch Law. Obligations to antecedent or primary obligations, such as obligations to pay interest, &c.—Erskine, Inst. lib. 3, tit. 3, § 60.

ACCIDENT (Lat. *accidere*,—*ad*, to, and *cadere*, to fall). An event which, under the circumstances, is unusual and unexpected by the person to whom it happens.

The happening of an event without the

concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purpose of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind. 1 Fonblanque, Eq. 374, 375, n.

In Equity Practice. Such an unforeseen event, misfortune, loss, act, or omission as is not the result of any negligence or misconduct in the party. Francis, Max. 87; Story, Eq. Jur. § 78.

An occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law. Jeremy, Eq. 358. This definition is objected to, because, as accidents may arise in relation to other things besides contracts, it is inaccurate in confining accidents to contracts: besides, it does not exclude cases of unanticipated occurrences resulting from the negligence or misconduct of the party seeking relief. See also 1 Spence, Eq. Jur. 628. In many instances it closely resembles MISTAKE, which see.

2. In general, courts of equity will relieve a party who cannot obtain justice in consequence of an accident which will justify the interposition of a court of equity.

The jurisdiction which equity exerts in case of accident is mainly of two sorts: over bonds with penalties to prevent a forfeiture where the failure is the result of accident, 2 Freem. Ch. 128; 1 Spence, Eq. Jur. 629; 25 Ala. N. S. 452; 9 Ark. 533; 4 Paige, Ch. N. Y. 148; 4 Munf. Va. 68; as sickness, 1 Root, Conn. 298, 310, or where the bond has been lost, 5 Ired. Eq. No. C. 331. And, second, where a negotiable instrument has been lost, in which case no action lay at law, but where equity will allow the one entitled to recover upon giving proper indemnity. 4 Term, 170; 1 Ves. Ch. 338; 5 *id.* 288; 16 *id.* 430; 4 Price, Exch. 176.

3. The ground of equitable interference where a party has been defeated in a suit at law to which he might have made a good defence had he discovered the facts in season, may be referred also to this head, 2 Rich. Eq. So. C. 63; 3 Ga. 226; 7 Humphr. Tenn. 130; 18 Miss. 502; 6 How. 114. See 4 Ired. Eq. No. C. 178; but in such case there must have been no negligence on the part of the defendant. 18 Miss. 103; 7 Humphr. Tenn. 130; 1 Morr. Iowa, 150; 7 B. Monr. Ky. 120. See INEVITABLE ACCIDENT; MISTAKE; ACT OF GOD.

It is exercised by equity where there is not a plain, adequate, and complete remedy at law, 44 Me. 206; but not where such a remedy exists, 9 Gratt. Va. 379; 5 Sandf. N. Y. 612; and a complete excuse must be made. 14 Ala. N. S. 342.

ACCOMENDA. A contract which takes place when an individual intrusts personal property with the master of a vessel, to be sold for their joint account.

In such case, two contracts take place: first, the contract called *mandatum*, by which the owner of the property gives the master power to dispose of it; and the contract of partnership, in virtue of which the profits are to be divided between them. One party runs the risk of losing his capital, the other his labor. If the sale produces no more than first cost, the owner takes all the proceeds: it is only the profits which are to be divided. Emerigon, Mar. Loans, s. 5.

ACCOMMODATION PAPER. Promissory notes or bills of exchange made, accepted, or endorsed without any consideration therefor.

Such paper, in the hands of the party to whom it is made or for whose benefit the accommodation is given, is open to the defence of want of consideration, but when taken by third parties in the usual course of business, is governed by the same rules as other paper. 2 Kent, Comm. 86; 1 Bingh. N. C. 267; 1 Mees. & W. Exch. 212; 12 *id.* 705; 33 Eng. L. & Eq. 282; 2 Du. N. Y. 33; 26 Vt. 19; 5 Md. 389.

Consult Bayley; Chitty; Parsons; Story, Bills of Exchange.

ACCOMPLICE (Lat. *ad* and *complicare—con*, with, together, *plicare*, to fold, to wrap,—to fold together).

In Criminal Law. One who is in some way concerned in the commission of a crime, though not as a principal.

The term in its fulness includes in its meaning all persons who have been concerned in the commission of a crime, all *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact. Fost. Cr. Cas. 341; 1 Russell, Crimes, 21; 4 Blackstone, Comm. 331; 1 Phillipps, Ev. 28; Merlin, Répert., *Complice*.

It has been questioned, whether one who was an accomplice to a suicide can be punished as such. A case occurred in Prussia where a soldier, at the request of his comrade, had cut the latter in pieces; for this he was tried capitally. In the year 1817, a young woman named Leruth received a recompense for aiding a man to kill himself. He put the point of a bistoury on his naked breast, and used the hand of the young woman to plunge it with greater force into his bosom; hearing some noise, he ordered her away. The man, receiving effectual aid, was soon cured of the wound which had been inflicted; and she was tried and convicted of having inflicted the wound, and punished by ten years' imprisonment. Lepage, *Science du Droit*, ch. 2, art. 3, § 5. The case of Saul, the King of Israel, and his armor-bearer (1 Sam. xxxi. 4), and of David and the Amalekite (2 Sam. i. 2–16), will doubtless occur to the reader.

In Massachusetts, it has been held, that, if one counsels another to commit suicide, he is principal in the murder; for it is a presumption of law, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff or manifestly rejected and ridiculed at the time. 13 Mass. 359. See 7 Bost. Law Rep. 215.

It is now finally settled, that it is not a rule of law, but of *practice* only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the con

viction cannot be quashed as bad in law. The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice is corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed, as to one or more of the prisoners, to justify a conviction of those prisoners with respect to whom there is no confirmation. 7 Cox, Cr. Cas. 20; Dearsl. Cr. Cas. 555; 20 Pick. Mass. 397; 10 Cush. Mass. 535. See 1 Fost. & F. Cr. Cas. 388.

ACCORD. In Contracts. A satisfaction agreed upon between the party injuring and the party injured, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." 2 Greenleaf, Ev. 28; 3 Blackstone, Comm. 15; Bacon, Abr. *Accord;* 5 Md. 170.

It must be *legal.* An agreement to drop a criminal prosecution as a satisfaction for an assault and imprisonment, is void. 5 East, 294. See 2 Wils. 341; Croke, Eliz. 541.

It must be *advantageous* to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had. 2 Watts, Penn. 424; 2 Ala. 476; 3 J. J. Marsh. Ky. 497. Restoring to the plaintiff his chattels, or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries. Bacon, Abr. *Accord*, A; Perkins, § 749; Dy. 75; 5 East, 230; 11 *id.* 390; 1 Strange, 426; 3 Hawks, No. C. 580; 2 Litt. Ky. 49; 5 Day, Conn. 360; 1 Root, Conn. 426; 1 Wend. N. Y. 164; 3 *id.* 66; 14 *id.* 116. The payment of a part of the whole debt due is not a good satisfaction, even if accepted, 2 Greenleaf, Ev. § 28; 2 Parsons, Contr. 199; 4 Mod. 88; 3 Bingh. N. C. 454; 10 Mees. & W. Exch. 367; 12 Price, Exch. 183; 1 Zabr. N. J. 391; 5 Gill, Md. 189; 20 Conn. 559; 1 Metc. Mass. 276; 27 Me. 362, 370; 39 *id.* 203; 2 Strobh. So. C. 203; 15 B. Monr. Ky. 566; otherwise, however, if the amount of the claim is disputed, Croke, Eliz. 429; 3 Mees. & W. Exch. 651; 5 Barnew. & Ald. 117; 1 Ad. & E. 106; 21 Vt. 223; 23 *id.* 561; 4 Gill, Md. 406; 4 Den. N. Y. 166; 2 Du. N. Y. 302; 12 Metc. Mass. 551, or contingent, 14 B. Monr. Ky. 451; and if the negotiable note of the debtor, 15 Mees. & W. Exch. 23, or of a third person, 2 Metc. Mass. 283; 20 Johns. N. Y. 76; 1 Wend. N.Y. 164; 14 *id.* 116; 13 Ala. 353; 11 East, 390; 4 Barnew. & C. 506, for part, be given and received, it is sufficient; or if a part be given at a different place, 3 Hawks. No. C. 580; 29 Miss. 139, or an earlier time, it will be sufficient, 18 Pick. Mass. 414; and, in general, payment of part suffices if any additional benefit be received. 30 Vt. 424; 26 Conn. 392; 27 Barb. N. Y. 485; 4 Jones No. C. 518; 4 Iowa, 219. And the receipt of specific property if agreed to is sufficient, whatever its value, 19 Pick. Mass. 273; 5 Day, Conn. 360; but both delivery and acceptance must be proved. 1 Wash. C. C. 328; 3 Blackf. Ind. 354; 1 Dev. & B. No. C. 565; 8 Penn. St. 106; 16 *id.* 450; 4 Eng. L. & Eq. 185.

2. It must be *certain.* An agreement that the defendant shall relinquish the possession of a house in satisfaction, &c., is not valid, unless it is also agreed at what time it shall be relinquished. Yelv. 125. See 4 Mod. 88; 2 Johns. N. Y. 342; 3 Lev. 189; 2 Iowa, 553; 1 Hempst. Ark. 315.

It must be *complete.* That is, every thing must be done which the party undertakes to do, Comyns, Dig. *Accord*, B 4; T. Raym. 203; Kebl. 690; Croke, Eliz. 46; 9 Coke 79, *b;* 14 Eng. L. & Eq. 296; 2 Iowa, 553; 5 N. H. 136; 24 *id.* 289; 3 Johns. Cas. N. Y. 243; 5 Johns. N. Y. 386; 16 *id.* 86; 1 Gray, Mass. 245; 8 Ohio, 393; 7 Blackf. Ind. 582; 14 B. Monr. Ky. 459; 2 Ark. 45; 44 Me. 121; 15 Tex. 198; 29 Penn. St. 179; 8 Md. 188; but this performance may be merely the substitution of a new undertaking for the old if the parties so intended, 2 Parsons, Contr. 194 n.; 24 Conn. 613; 23 Barb. N. Y. 546; 7 Md. 259; and in some cases it is sufficient if performance be tendered and refused. 2 Greenleaf, Ev. § 31; 2 Barnew. & Ad. 328; 3 *id.* 701. But see 3 Bingh. N. C. 715; 16 Barb. N. Y. 598; 5 R. I. 219.

It must be *by the debtor or his agent,* 3 Wend. N. Y. 66; 2 Ala. 84; and if made by a stranger, will not avail the debtor in an action at law. Strange, 592; 3 T. B. Monr. Ky. 302; 6 Johns. N. Y. 37. See 6 Ohio St. 71. His remedy in such a case is in equity. Croke, Eliz. 541; 3 Taunt. 117; 5 East, 294.

3. Accord with satisfaction, when completed, has two effects: it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, in satisfaction; but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except perhaps the title; for in regard to this it cannot be doubted, that if the debtor gave on an accord and satisfaction the goods of another, there would be no satisfaction. But the intention of the parties is of the utmost consequence, 30 Vt. 424; as the debtor will be required only to execute the new contract to that point whence it was to operate a satisfaction of the pre-existing liability. See, generally, 2 Greenleaf, Ev. § 28 *et seq.;* 2 Parsons, Contr. 193 *et seq.;* Comyns, Dig. *Accord;* 1 Bouvier, Inst. n. 805; 3 *id.* n. 2478–2481; PAYMENT.

ACCOUCHEMENT. The act of giving birth to a child. It is frequently important to prove the filiation of an individual: this may be done in several ways. The fact of the accouchement may be proved by the direct testimony of one who was present, as a physician, a midwife, or other person. 1 Bouvier, Inst. n. 314.

ACCOUNT. A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. 1 Metc. Mass. 216; 1 Hempst. Ark. 114; 32 Penn. St. 202.

A statement of the receipts and payments of an executor, administrator, or other trustee, of the estate confided to him.

An *open* account is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many. 1 Ala. N. s. 62; 6 *id.* 438.

A form of action, called also account render, in which such a statement, and the recovery of the balance which thereby appears to be due, is sought by the party bringing it.

2. In Practice. In Equity. Jurisdiction concurrent with courts of law is taken over matters of account, 9 Johns. N. Y. 470; 2 A. K. Marsh. Ky. 338; 1 J. J. Marsh. Ky. 82; 2 Caines, Cas. N. Y. 1; 1 Paige, Ch. N. Y. 41; 1 Yerg. Tenn. 360; 1 Ga. 376, on three grounds: mutual accounts, 18 Beav. Rolls, 575; dealings so complicated that they cannot be adjusted in a court of law, 1 Schoales & L. Ch. Ir. 305; 2 *id.* 400; 2 Hou. L. Cas. 28; 2 Leigh, Va. 6; 1 Metc. Mass. 216; 15 Ala. N. s. 34; 17 Ga. 558; the existence of a fiduciary relation between the parties, 1 Sim. Ch. N. s. 573; 4 Gray, Mass. 227; 1 Story, Eq. Jur. 8th ed. § 459, *a*.

In addition to these peculiar grounds of jurisdiction, equity will grant a discovery in cases of account on the general principles regulating discoveries, 8 Ala. N. s. 743; 4 Sandf. N. Y. 112; 35 N. H. 339, and will afterwards proceed to grant full relief in many cases. 1 Madd. Ch. 86; 6 Ves. Ch. 136; 9 *id.* 437; 10 Johns. N. Y. 587; 17 *id.* 384; 5 Pet. 495.

3. Equitable jurisdiction over accounts applies to the *appropriation of payments*, 1 Story, Eq. Jur. 8th ed. §§ 459–461; agency, 2 McCord, Ch. So. C. 469; including factors, bailiffs, consignees, receivers, and stewards, where there are mutual or complicated accounts, 1 Jac. & W. Ch. 135; 13 Ves. Ch. 53; 9 Beav. Rolls, 284; 17 Ala. N. s. 667; trustees' accounts, 1 Story, Eq. Jur. § 465; 2 Mylne & K. Ch. 664; 9 Beav. Rolls, 284; 1 Stockt. N. J. 218; 4 Gray, Mass. 227; administrators and executors, 22 Vt. 50; 14 Mo. 116; 3 Jones, Eq. No. C. 316; 32 Ala. N. s. 314; see 23 Miss. 361; guardians, etc., 31 Penn. St. 318; 9 Rich. Eq. So. C. 311; 33 Miss. 553; tenants in common, joint tenants of real estate or chattels, 4 Ves. Ch. 752; 1 Ves. & B. Ch. 114; partners, 1 Hen. & M. Va. 9; 3 Gratt. Va. 364; 3 Cush. Mass. 331; 23 Vt. 576; 4 Sneed, Tenn. 238; 1 Johns. Ch. N. Y. 305; directors of companies, and similar officers, 1 Younge & C. Ch. 326; *apportionment* of apprentice fees, 2 Brown, Ch. 78; 1 Atk. Ch. 149; 13 Jur. 596; or rents, 2 Ves. & B. Ch. 331; 2 P. Will. Ch. 176, 501; see 1 Story, Eq. Jur. § 480; *contribution* to relieve real estate, 3 Coke, 12; 3 Bligh, 590; 2 Bos. & P. 270; 1 Johns. Ch. N. Y. 409, 425; 7 Mass. 355; 1 Story, Eq. Jur. § 487; general average, 2 Abbott, Shipp. pl. 3, c. 8, § 17; 18 Ves. Ch. 190; 4 Kay & J. Ch. 367; 2 Curt. C. C. 59; between sureties, 1 Story, Eq. Jur. §§ 492–504; *liens*, Sugden, Vend. 7th ed. 541; 8 Paige, Ch. N. Y. 182, 277; *rents* and *profits* between landlord and tenant, 1 Schoales & L. Ch. Ir. 305; 7 East, 353; 4 Johns. Ch. N. Y. 287; in case of torts, Bacon, Abr. *Accompt*, B.; a levy, 2 Atk. Ch. 362; 1 Ves. Sen. Ch. 250; 1 Eq. Cas. Abr. 285; and in other cases, 3 Gratt. Va. 330; *waste*, 1 P. Will. Ch. 407; 6 Ves. Ch. 88; 1 Brown, Ch. 194; 6 Jur. N. s. 809; 5 Johns. Ch. N. Y. 169; *tithes* and *moduses*, Comyns, Dig. *Chauncery* (3 C.), *Distress* (M. 13).

Equity follows the analogy of the law, in refusing to interfere with stated accounts. 2 Schoales & L. Ch. Ir. 629; 3 Brown, Ch. 639 n.; 19 Ves. Ch. 180; 13 Johns. Ch. N. Y. 578; 6 *id.* 360; 3 McLean C. C. 83; 4 Mass. C. C. 143; 3 Pet. 44; 6 *id.* 61; 9 *id.* 405. See Account Stated.

4. At Law. The action lay against bailiffs, receivers, and guardians, in socage only, at the common law, and, by a subsequent extension of the law, between merchants. 11 Coke, 89; 12 Mass. 149.

Privity of contract was required, and it did not lie by or against executors and administrators, 1 Wms. Saund. 216, n.; Willes, 208, until statutes were passed for that purpose, the last being that of 3 & 4 Anne, c. 16. 1 Story, Eq. Jur. § 445.

In several states of the United States, the action has received a liberal extension. 4 Watts & S. Penn. 550; 13 Vt. 517; 28 *id.* 338; 7 Penn. St. 175; 25 Conn. 137; 5 R. I. 402. Thus, it is said to be the proper remedy for one partner against another, 1 Dall. Penn. 340; 3 Binn. Penn. 317; 10 Serg. & R. Penn. 220; 15 *id.* 153; 2 Conn. 425; 4 Vt. 137; 3 Barb. N. Y. 419; 1 Cal. 448, for money used by one partner after the dissolution of the firm, 18 Pick. Mass. 299; though equity seems to be properly resorted to where a separate tribunal exists. 1 Hen. & M. Va. 9; 1 Johns. Ch. N. Y. 305. And see 1 Metc. Mass. 216; 1 Iowa 240.

5. In other states, reference may be made to an auditor by order of the court, in the common forms of actions founded on contract or tort, where there are complicated accounts or counter-demands. 12 Mass. 525; 6 Pick. Mass. 193; 8 Conn. 499; 13 N. H. 275; 1 Tex. 646. See Auditor. In the action of account, an interlocutory judgment of *quod computet* is first obtained, 2 Greenleaf, Ev. §§ 36, 39; 11 Ired. No. C. 391; 12 Ill. 111, on which no damages are awarded except *ratione interplacitationis*. Croke, Eliz. 83; 5 Binn. Penn. 564.

The account is then referred to an auditor, who now generally has authority to examine parties, 4 Fost. 198, though such was not the case formerly, before whom issue of law and fact may be taken in regard to each item, which he must report to the court. 2 Ves. Ch. 388; Metc. Yelv. 202; 5 Binn. Penn. 433; 5 Vt. 543; 26 N. H. 139.

A final judgment *quod recuperet* is entered for the amount found by him to be due; and the auditor's account will not be set aside except upon a very manifest case of error. 5 Penn. St. 413; 1 La. Ann. 380. See Auditors.

6. If the defendant is found in surplusage, that is, is creditor of the plaintiff on balancing

the accounts, he cannot in this action recover judgment for the balance so due. He may bring an action of debt, or, by some authorities, a sci. fac., against the plaintiff, whereon he may have judgment and execution against the plaintiff. See Palm. 512; 2 Bulst. 277–8; 1 Leon. 219; 3 Kebl. 362; 1 Rolle, Abr. 599, pl. 11; Brooke, Abr. *Accord*, 62; 1 Rolle, 87.

As the defendant could wage his law, 2 Wms. Saund. 65 *a;* Croke, Eliz. 479; and as the discovery, which is the main object sought, 5 Taunt. 431, can be more readily obtained and questions in dispute more readily settled in equity, resort is generally had to that jurisdiction in those states where a separate tribunal exists, or under statutes to the courts of law. 18 Vt. 345; 13 N. H. 275; 8 Conn. 499; 1 Metc. Mass. 216.

ACCOUNT BOOK. A book kept by a merchant, trader, mechanic, or other person, in which are entered from time to time the transactions of his trade or business. Such books, when regularly kept, may be admitted in evidence. Greenleaf, Ev. §§ 115–118.

ACCOUNT CURRENT. An open or running account between two parties.

ACCOUNT IN BANK. See BANK ACCOUNT.

ACCOUNT STATED. An agreed balance of accounts. An account which has been examined and accepted by the parties. 2 Atk. Ch. 251.

In Equity. Acceptance may be inferred from circumstances, as where an account is rendered to a merchant, and no objection is made, after sufficient time. 2 Vern. Ch. 276; 1 Sim. & S. Ch. 333; 3 Johns. Ch. 569; 7 Cranch, 147; 1 M'Cord, Ch. 156; 2 Md. Ch. Dec. 433.

Such an account is deemed conclusive between the parties, 2 Brown, Ch. 62, 310; 2 Ves. Ch. 566, 837; 1 Swanst. Ch. 460; 6 Madd. Ch. 146; 20 Ala. N. S. 747; 3 Johns. Ch. N. Y. 587; 1 Gill, Md. 350; 3 Jones, Eq. No. C. 109, to the extent agreed upon, 1 Hopk. Ch. N. Y. 239, unless some fraud, mistake, or plain error is shown, 1 Parsons, Contr. 174; 1 Johns. Ch. N. Y. 550; 1 M'Cord, So. C. 156; and in such case, generally, the account will not be opened, but liberty to surcharge or falsify will be given. 2 Atk. Ch. 119; 9 Ves. Ch. 265; 1 Schoales & L. Ch. Ir. 192; 7 Gill, Md. 119; 1 Md. Ch. Dec. 306.

At Law. An account stated is conclusive as to the liability of the parties with reference to the transactions included in it, 3 Jones, No. C., except in cases of fraud or manifest error. 1 Esp. 159; 24 Conn. 591; 4 Wisc. 219; 5 Fla. 478. See 4 Sandf. N. Y. 311.

2. *Acceptance* by the party to be charged must be shown by the one who relies upon the account. 10 Humphr. Tenn. 238; 12 Ill. 111. The acknowledgment that the sum is due is sufficient, 2 Mod. 44; 2 Term, 480, though there be but a single item in the account. 13 East, 249; 5 Maule & S. 65; 1 Show. 215.

Acceptance may also be inferred from retaining the account a sufficient time without making objection, 7 Cranch, 147; 3 Watts & S. Penn. 109; 10 Barb. N. Y. 213; 4 Sandf. N. Y. 311; see 22 Penn. St. 454, and from other circumstances. 1 Gill, Md. 234.

A definite ascertained *sum* must be stated to be due. 9 Serg. & R. Penn. 241.

It must be made *by a competent person*, excluding infants and those who are of unsound mind. 1 Term, 40.

Husband and wife may join and state an account with a third person. 2 Term, 483; 16 Eng. L. & Eq. 290.

An agent may bind his principal. 3 Johns. Ch. 569. Partners may state accounts; and an action lies for the party entitled to the balance. 4 Dall. Penn. 434; 1 Wash. C. C. 435; 16 Vt. 169.

The acceptance of the account is an acknowledgment of a debt due for the balance, and will support assumpsit, 11 Eng. L. & Eq. 421: it is not, therefore, necessary to prove the items, but only to prove an existing debt or demand, and the stating of the account. 16 Ala. N. S. 742.

ACCOUNTANT. One who is versed in accounts. A person or officer appointed to keep the accounts of a public company.

He who renders to another or to a court a just and detailed statement of the property which he holds as trustee, executor, administrator, or guardian. See 16 Viner, Abr. 155.

ACCOUNTANT GENERAL. An officer of the English Court of Chancery, by whom the moneys paid into court are received, deposited in bank, and disbursed. The office appears to have been established by an order of May 26, 1725, and 12 Geo. I. c. 32, before which time the effects of the suitors were locked up in the vaults of the Bank of England, under the care of the masters and two of the six clerks. 1 Smith, Chanc. Pract. 22.

ACCOUPLE. To marry; married.

ACCREDIT. In International Law. To acknowledge.

Used of the act by which a diplomatic agent is acknowledged by the government near which he is sent. This at once makes his public character known, and becomes his protection, and also of the act by which his sovereign commissions him.

ACCREDITULARE (Lat.). To purge oneself of an offence by oath. Whishaw; Blount.

ACCRESCERE (Lat.). To be added to.

The term is used in speaking of islands which are formed in rivers by deposit. Calvinus, Lex; 3 Kent, Comm. 428.

In Scotch Law. To pass to any one. Bell, Dict.

It is used in a related sense in the common law phrase *jus accrescendi*, the right of survivorship. 1 Washburn, Real Prop. 426.

In Pleading. To commence; to arise; *to accrue. Quod actio non accrevit infra sex annos*, that the action did not accrue within six years. 3 Chitty, Plead. 914.

ACCRETION (Lat. *accrescere*, to grow to). The increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that

already in possession of the owner. 2 Washburn, Real Prop. 451.

The term *alluvion* is applied to the deposit itself, while accretion rather denotes the act.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aquæ*. 2 Washburn, Real Prop. 452. Consult 2 Washburn, Real Prop. 451–453; 2 Sharswood, Blackst. Comm. 261, n.; 3 Kent, Comm. 428; Hargrave, Law Tracts, 5; Hale, de Jur. Mar. 14; 3 Barnew. & C. 91, 107; 6 Cow. N. Y. 537; 4 Pick. Mass. 268; 17 *id.* 41; 17 Vt. 387.

ACCROACH. To attempt to exercise royal power. 4 Blackstone, Comm. 76.

A knight who forcibly assaulted and detained one of the king's subjects till he paid him a sum of money was held to have committed treason on the ground of accroachment. 1 Hale, Pl. Cr. 80.

In French Law. To delay. Whishaw.

ACCRUE. To grow to; to be added to, as the interest accrues on the principal. *Accruing costs* are those which become due and are created after judgment; as the costs of an execution.

To arise, to happen, to come to pass; as the statute of limitations does not commence running until the cause of action has accrued. 1 Bouvier, Inst. n. 861; 2 Rawle, Penn. 277; 10 Watts, Penn. 363; Bacon, Abr. *Limitation of Actions* (D 3).

ACCUMULATIVE JUDGMENT. A second or additional judgment given against one who has been convicted, the execution or effect of which is to commence after the first has expired.

Thus, where a man is sentenced to an imprisonment for six months on conviction of larceny, and afterwards he is convicted of burglary, he may be sentenced to undergo an imprisonment for the latter crime, to commence after the expiration of the first imprisonment: this is called an accumulative judgment. And if the former sentence is shortened by a pardon, or by reversal on a writ of error, it expires, and the subsequent sentence takes effect, as if the former had expired by lapse of time. 11 Metc. Mass. 581. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. 15 Q. B. 594.

ACCUSATION. In Criminal Law. A charge made to a competent officer against one who has committed a crime or misdemeanor, so that he may be brought to justice and punishment.

A neglect to accuse may in some cases be considered a misdemeanor, or misprision (which see). 1 Brown, Civ. Law, 247; 2 *id.* 389; Inst. *lib.* 4, *tit.* 18.

It is a rule that no man is bound to accuse himself or testify against himself in a criminal case. 7 Q. B. 126. A man is competent, though not compellable, to prove his own crime. 14 Mees. & W. Exch. 256. See EVIDENCE; INTEREST; WITNESS.

ACCUSED. One who is charged with a crime or misdemeanor.

ACCUSER. One who makes an accusation.

ACHAT. In French Law. A purchase.

It is used in some of our law-books, as well as *achetor*, a purchaser, which in some ancient statutes means purveyor. Stat. 36 Edw. III.

ACHERSET. An ancient English measure of grain, supposed to be the same with their quarter, or eight bushels.

ACKNOWLEDGMENT. The act of one who has executed a deed, in going before some competent officer or court and declaring it to be his act or deed.

The acknowledgment is certified by the officer or court; and the term acknowledgment is sometimes used to designate the certificate.

The function of an acknowledgment is twofold: to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The same purposes may be accomplished by a subscribing witness going before the officer or court and making oath to the fact of the execution, which is certified in the same manner; but in some states this is only permitted in case of the death, absence, or refusal of the grantor. In some of the states a deed is void except as between the parties and their privies, unless acknowledged or proved.

The act of the officer in taking an acknowledgment is ministerial, and not judicial: he is, therefore, not disqualified by a relationship to grantee, 6 N. Y. 422; nor is it competent for him to alter his certificate after it is once made, without a re-acknowledgment.

2. As a general rule, it is held that the certificate is sufficient if it show that the requirements of the statute have been complied with in substance, though it fail to follow the words or precise form prescribed. So under a statute requiring that the officer should *endorse the certificate on the conveyance*, a certificate not endorsed, but subjoined, was held sufficient. 24 Wend. N. Y. 87.

The following is a statement of the substance of the laws of the several states and territories on this subject. This compend has been drawn from an original and careful examination of the statutes of every state and territory except those of Maryland and of South Carolina, the later statutes of which were not accessible; and for the articles respecting acknowledgments in those states we are indebted to Chief-Justice Legrand of Maryland, and to Chief-Justice O'Neall of South Carolina. Though it is not to be inferred that every certificate not conforming to the statements of the text is void, an acknowledgment which does conform to them may be deemed as sufficient. In addition to the statutes above cited, there are in many states various acts curing irregularities in acknowledgments and certificates.

ALABAMA. Acknowledgments and proof may be taken, *within the state*, before judges of the supreme and circuit courts and their clerks, chancellors, judges of the courts of probate, justices of the peace, and notaries public. Code, § 1276. The provisions of the Code respecting the jurisdiction of justices of the peace define it as extending to taking acknowledgments within their respective counties, but do not authorize them to do so without such counties. Code, § 712. *Without the state and within the United States*, before judges and clerks of any

federal court, judges of any court of record in any state, notaries public, or Alabama commissioners. *Without the United States*, before the judge of any court of record, mayor, or chief magistrate of any city, town, borough, or county, notaries public, or any diplomatic consul or commercial agent of the United States. *Id.* § 1277.

The certificate must be in substantially the following form:—Date. I [ ] hereby certify that [ ], whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this [ ] day of [ ] Code, § 1279.

A wife need not be separately examined. Conveyances by married women of lands, stocks, or slaves are inoperative, unless attested by two witnesses, or so acknowledged. *Id.* § 1282.

Notaries public of the state have power also to take acknowledgments of instruments relating to commerce or navigation. *Id.* § 857, subd. 1.

ARKANSAS.— *Within the state;* before the supreme court, the circuit court, or either of the judges thereof, or the clerk of either of these courts, or before the county court, or the presiding judge thereof, or before any justice of the peace within the state, or notary public. *Without the state, and within the United States or their territories;* before any court of the United States, or of any state or territory having a seal, or the clerk of any such court, or before the mayor of any city or town, or the chief officer of any city or town having a seal of office. *Without the United States;* before any court of any state, kingdom, or empire having a seal, or any mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country, who by the laws of such country is authorized to take probate of the conveyance of real estate of his own country, if such officer has by law an official seal.

An acknowledgment is to be made by the grantor's appearing in person before the court or officer, and stating that he executed the same for the consideration and purposes therein mentioned and set forth. If the grantor is a married woman, she must, in the absence of her husband, declare that she had of her own free will executed the deed or instrument in question, or that she had signed and sealed the relinquishment of dower for the purposes therein contained and set forth, without any compulsion or undue influence of her husband. Rev. Stat. c. 21; same statute, Gould, Dig. (1858) 267, §§ 18, 21.

In cases of acknowledgment or proof taken within the United States, when taken before a court or officer having a seal of office, such deed or conveyance must be attested under such seal of office; and if such officer have no seal of office, then under his official signature. Rev. Stat. 190; Gould, Dig. 267, § 14.

In all cases, acknowledgments or proof taken without the United States must be attested under the official seal of the court or officer. *Id.* § 15.

Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the estate of her husband, shall grant a certificate thereof, and cause such certificate to be endorsed on the instrument, which certificate shall be signed by the clerk of the court where the probate is taken in court, or by the officer before whom the same is taken, and sealed, if he have a seal of office. *Id.* § 16.

A deed of gift of slaves must be acknowledged. Rev. Stat. 71.

Notaries public may also take acknowledgments of instruments relating to commerce and navigation. Rev. Stat. 104, § 4.

CALIFORNIA.— *Within the state;* by some judge or clerk of a court having a seal, or some notary public or justice of the peace of the proper county. *Without the state, and within the United States;* by some judge or clerk of any court of the United States, or of any state or territory having a seal, or by a California commissioner. *Without the United States;* by some judge or clerk of any court of any state, kingdom, or empire having a seal, or by any notary public therein, or by any minister, commissioner, or consul of the United States appointed to reside therein. Cal. Laws, 1850–53, p. 513, § 4.

The officer's certificate, which must be endorsed or annexed, must be, when granted by a judge or clerk, under the hand of such judge or clerk, and the seal of the court; when granted by an officer who has a seal of office, under his hand and official seal. Cal. Laws, 1850–53, 513, § 5.

The certificate must show, in addition to the fact of the acknowledgment, that the person making such acknowledgment was personally known to the officer taking the same, to be the person whose name was subscribed to the conveyance as a party thereto, or must show that he was proved to be such by a credible witness (naming him). Cal. Laws, 1850–53, 513, §§ 6, 7.

The certificate is to be substantially in the following form:—"State of California, County of . On this day of , A.D. , personally appeared before me, a notary public (or judge, or officer, as the case may be) in and for the said county, A. B., known to me to be the person described in, and who executed the foregoing instrument, who acknowledged [*or, if the grantor is unknown*, A. B., satisfactorily proved to me to be the person described in, and who executed the within conveyance, by the oath of C. D., a competent and credible witness for that purpose, by me duly sworn, and he, the said A. B., acknowledged] that he executed the same freely and voluntarily for the uses and purposes therein mentioned." Cal. Laws, 1850–53, 514, §§ 8, 9.

The proof may be by a subscribing witness, or, when all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party, and of at least one subscribing witness, given by a credible witness to each signature. Cal. Laws, 1850–53, 514, § 10.

The certificate of such proof must set forth, that such subscribing witness was personally known to the officer to be the person whose name is subscribed to such conveyance as a witness thereto, or was proved to be such by oath of a witness (naming him); and must also set forth the proof given by such witness of the execution of such conveyance, and of the fact that the person whose name is subscribed in such conveyance, as a party thereto, is the person who executed the same, and that such witness subscribed his name to such conveyance as a witness thereof. Cal. Laws, 1850–53, 515, § 13.

No proof by evidence of the handwriting of the party and of a subscribing witness shall be taken, unless the officer taking the same shall be satisfied that all the subscribing witnesses to such conveyance are dead, or cannot be had to prove the execution thereof. Cal. Laws, 1850–53, 515, § 14.

No acknowledgment of a married woman shall be taken, unless she is personally known to the officer to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by a credible witness; nor unless she is made acquainted with the contents, and acknowledges on an examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without

fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same. *Id.* 516, § 22.

The certificate must be in the form above given, and must set forth that such married woman was personally known to the officer to be the person whose name is subscribed to such conveyance as a party thereto, or was proved to be such by a credible witness (naming him), and that she was made acquainted with the contents of such conveyance, and acknowledged on examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same. Every certificate which substantially conforms to the requirements of this act is valid. *Id.* § 23.

A deed affecting the married woman's separate property must be acknowledged by her upon an examination separate and apart from her husband, before any judge of a court of record or notary public; or, if executed out of the state, then before a judge of a court of record, or a California commissioner, or before any minister, secretary of legation, or consul of the United States, appointed for and residing in the country in which the deed is acknowledged. Laws of 1858, 22, c. 25.

CONNECTICUT.—All grants and deeds of bargain and sale, and mortgages, must be acknowledged by the grantors to be their free act and deed before a justice of the peace, or a notary public, or a town clerk, or before a judge of the supreme or district court of the United States, or of the supreme or superior court, or court of common pleas, or county court of any individual state; or before the commissioner of the school-fund; or before a commissioner or other officer having power to take acknowledgment of deeds; or before a county surveyor, when the land lies within his county; or before a Connecticut commissioner. When deeds are executed by an attorney duly authorized, his acknowledgment is sufficient; but the power of attorney must be acknowledged by the grantor of the power. Rev. Stat. (1849) 455, §§ 8, 9; 586, § 4; Laws of 1854, 130, c. 91.

All such instruments executed by any grantors residing in a foreign state or country, without the United States, may be acknowledged likewise before any United States consul resident in such country, or any notary public or justice of the peace of such country, or before a Connecticut commissioner. Rev. Stat. (1849) 456, § 10; Laws of 1857, c. 31.

DELAWARE.—A deed may be acknowledged by any party to it, or by his attorney, the power of attorney being first proved; or it may be proved by a subscribing witness. If acknowledged by a party, it may be in the superior court or before the chancellor, or any judge or notary public, or before two justices of the peace for the same county. A deed may be acknowledged in the superior court by attorney, by virtue of a power either contained in the deed or separate from it, or may be proved in that court by a subscribing witness.

A married woman who executes a deed to which her husband is a party must acknowledge, upon a private examination apart from her husband, that she executed it willingly, without compulsion or threats, or fear of her husband's displeasure. Her examination may be taken in any county before the officers above mentioned.

The certificate of any acknowledgment or proof must be authenticated under the hand and seal of the clerk or prothonotary of the court in which, or under the hand of the chancellor or other officer before whom, the same is taken, and must be endorsed on or annexed to the deed.

An acknowledgment or proof may be taken, *out of the state*, before a judge of any district or circuit court of the United States, or the chancellor, or any judge of a court of record of any state, territory, or country, or the chief officer of any city or borough; or, *within the United States*, by a Delaware commissioner. It must then be certified under the hand of such officer and his official seal; or the acknowledgment or proof may be taken in any court above mentioned, and certified under the hand of the clerk or other officer, and the seal of the court. In case of a certificate by a judge, the seal of his court may be affixed to his certificate, or to a certificate of attestation of the clerk or keeper of the seal. Rev. Code (1852), 267.

A deed of a corporation may be acknowledged before the chancellor or any judge of the state, or a judge of the district or circuit court of the United States, or a notary public, or two justices of the peace of the same county, by the presiding officer or legally constituted attorney of the corporation. *Id.*

Acknowledgments need not be taken within the county where the lands lie. *Id.*

The form of the certificate is prescribed by chapter 36, § 8; and see chapter 83, p. 267, § 9.

DISTRICT OF COLUMBIA.—Follow the form prescribed by the Laws of Maryland.

FLORIDA.—*Within the state;* before the recording officer, or a judicial officer of the state. *Without the state, and within the United States;* before a Florida commissioner, or, in cities and counties where there is no commissioner appointed or acting there, before the chief justice, judge, presiding justice, or president of any court of record of the United States, or of any state or territory thereof, having a seal and a clerk or prothonotary; but the acknowledgment must be taken within the jurisdiction of such court. The certificate must state the place, and that the court is a court of record; and it must be accompanied by the clerk's certificate under seal to the appointment of the judge.

Without the United States; if in Europe, or in North or South America, before any minister plenipotentiary, minister extraordinary, chargé d'affaires, or consul of United States, resident and accredited there. If in Great Britain, Ireland, or the dominions thereunto belonging, before the consul of the United States, resident or accredited therein, or before the mayor or other chief magistrate of London, Bristol, Liverpool, Dublin, or Edinburgh, the certificate to be under the hand and seal of the officer. In any other place out of the United States, where there is no public minister, consul or vice-consul, commercial agent or vice-commercial agent, of the United States, before two subscribing witnesses and a civil officer of such place; and the identity of such civil officer and credibility shall be certified by a consul or vice-consul of the United States, of the government of which such place is a part.

The certificate of acknowledgment of a married woman must state that she acknowledged, on a separate examination apart from her husband, that she executed such deed, &c., freely and without any fear or compulsion of her husband.

In any acknowledgment taken out of the state, the certificate must set forth that the officer knew or had satisfactory proof that the party making the acknowledgment was the individual described in, and who executed, the instrument. Thompson, Dig. 179–182.

GEORGIA.—Deeds are to be executed in the presence of two witnesses. They are to be acknowledged or proved, when *within the state;* before a justice of the peace, or the chief justice, or an assistant justice. If one of the witnesses is a notary public, a judge of the superior court, justice of the

inferior court, or justice of the peace, or if one witness is the ordinary or clerk of the inferior court, sheriff, tax receiver or collector, or county surveyor, of the county in which the instrument is executed or acknowledged, no further acknowledgment is necessary. Cobb, Dig. 387, § 14; 390, § 27; 400, § 74.

Without the state, and within the United States; before a Georgia commissioner; or they may be proved before any governor, chief justice, mayor, or other justice of either of the United States, and certified under the common or public seal of the state, court, city, or place. The affidavit of the witness must express the addition of the witness and the place of his abode. *Id.* 394, 387.

Consuls and vice-consuls may take the acknowledgments of citizens of the United States, or of other persons, being or residing within the districts of their consulates. Laws of 1839; Cobb, Dig. (1859) 397, § 55.

A married woman should acknowledge, on a private examination before the chief justice, or any justice of the peace, that she did, of her own free will and accord, subscribe, seal, and deliver the deed, with an intention thereby to renounce, give up, and forever quit-claim to her right of dower and thirds of, in, and to the lands, &c., therein mentioned. *Id.* 387, § 15.

ILLINOIS.—*Within the state;* before any judge, justice, or clerk of any court of record in the state having a seal, any mayor of a city, notary public, or commissioner of deeds having a seal, or any justice of the peace. *Without the state, and within the United States;* in conformity with the laws of the state, territory, or district; provided that a clerk of a court of record therein certifies that the instrument is executed and acknowledged in such conformity; or before a judge or justice of the superior or district court of the United States, an Illinois commissioner, a judge or justice of the supreme or superior or circuit court of any of the United States or territories, a justice of the peace, clerk of a court of record, or mayor of a city, or notary public, the last three to certify under their official seal. *Without the United States;* before any consul of the United States, or any court of any republic, state, kingdom, or empire having a seal, or before a mayor or chief officer of a city or town having a seal, or any officer authorized by the laws of such country to take acknowledgments; and proof of his authority must accompany his certificate. The certificate of such court, mayor, or officer must be under their official seal. Cooke, Ill. Stat. (1858) 962, § 16.

A married woman residing without the state, if over eighteen, may acknowledge in the same way as a feme sole; in other cases, the deed of a married woman should be acknowledged on a private examination, separate and apart from the husband, on which the officer must explain to her the contents of the deed, and she must acknowledge such conveyance to be her act and deed, that she executed the same voluntarily, freely, and without compulsion of her husband, and does not wish to retract; or, if it be a release of dower, that she executed the same and relinquishes her dower in the lands and tenements therein mentioned voluntarily and freely, and without the compulsion of her husband. The certificate must show that the woman was personally known to the officer, or was proved by a witness (naming him), and set forth the explanation, the examination, and the acknowledgment. *Id.* 961, § 15; 963, § 17. But defects in the certificate do not avoid it, if it appear that the contents of the instrument were known, and its execution voluntary. *Id.* 966, § 1.

The certificate of an acknowledgment taken before a justice of the peace residing within the state, but in another county than that in which the lands lie, must be certified by the clerk of the county commissioners' court. *Id.* 963, § 18.

A certificate of acknowledgment must state that the person was personally known to the officer to be the person whose name is subscribed to the deed or writing as having executed the same, or that he was proved to be such by a credible witness (naming him). *Id.* § 40.

INDIANA.—Acknowledgment, or proof by subscribing witness, may be: 1. If taken within the state; before any supreme or circuit judge, justice of the peace, notary public, or mayor of a city. 2. Elsewhere within the United States; before any judge of a supreme or circuit court, or court of common pleas, any justice of the peace, or mayor, or recorder of a city, notary public, or Indiana commissioner. 3. Beyond the United States; before a minister, *chargé d'affaires*, or consul of the United States. No separate examination of a married woman is now necessary. Rev. Stat. (1852) c. 23.

An officer taking an acknowledgment need not affix an ink scroll or seal, unless he is an officer required by law to keep an official seal. Laws of 1858, 39, c. 13, § 3.

IOWA.—Acknowledgment or proof may be made, *within the state*, before some court having a seal, or a judge or clerk thereof. A deed made or acknowledged *without the state, but within the United States*, shall be acknowledged before some court of record, or officer holding the seal thereof, or before an Iowa commissioner, or before some notary public or justice of the peace; and when before a justice of the peace, a certificate, under the official seal of the proper authority, of the official character of the justice and of his authority to take such acknowledgments, and of the genuineness of his signature, shall accompany the certificate of acknowledgment. Code, § 1218, as amended by Laws of 1855, 75, § 2.

A deed executed without the United States may be acknowledged or proved before any [the words "court of" seem to have been omitted here, in the statute] state, republic, kingdom, or province having a seal, or before any officer authorized by the laws of such foreign country to take acknowledgments; if he have an official seal, the certificate to be attested by the official seal, and in case the same is not before a court of record, or mayor, or other officer of a town having such seal, proof under the official seal of the proper authority that the officer was authorized by the laws of the country to do so, and that his certificate is genuine, must accompany it. Laws of 1855, 75, § 1.

If the grantor die before acknowledging, or if his attendance cannot be procured, or, appearing, he refuses to acknowledge, proof may be made by any competent testimony. In such case the certificate must state the title of the court or officer; that it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that having appeared he refused to acknowledge the deed; the names of the witnesses by whom the proof was made, and that it was proved by them that the instrument was executed by the person whose name is thereunto subscribed as a party.

KANSAS.—No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the register of deeds of the county in which the land lies, or in such other office as is, or may be, provided by law.

If acknowledged *within the territory* [state], it must be before some court having a seal, or some

judge, justice, or clerk thereof, or some justice of the peace, notary public, or register of deeds, county clerk, or mayor of a city. Kans. Comp. Stat. (1862) c. 1; c. 41, § 14; c. 46, § 31.

If acknowledged *out of the territory* [state], it must be before some court of record, or clerk, or officer holding the seal thereof, or before some commissioner to take the acknowledgments of deeds, appointed by the governor of the territory, or before some notary public, or justice of the peace. If taken before a justice of the peace, the acknowledgment shall be accompanied by a certificate of his official character, under the hand of the clerk of some court of record, to which the seal of said court shall be affixed.

The court or person taking the acknowledgment must endorse upon the deed a certificate setting forth the following particulars: 1. The title of the court or person before whom the acknowledgment is taken; 2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness (naming him); 3. That such person acknowledged the instrument to be his own voluntary act and deed.

If the grantor die before acknowledging the deed, or if, for any other reason, his attendance cannot be procured in order to make the acknowledgment, or if, having appeared, he refuses to acknowledge it, proof of the due execution and delivery of the deed may be made by any competent testimony before the same court or officers as are authorized to take acknowledgments of grantors.

The certificate endorsed upon the deed must state in this last case: 1. The title of the court or officer taking the proof; 2. That it was satisfactorily proved that the grantor was dead, or that, for some other cause, his attendance could not be procured to make the acknowledgment, or that, having appeared, he refused to acknowledge the deed; 3. The names of the witnesses by whom the proof was made, and that it was proved by them that the instrument was executed by the person whose name is thereunto subscribed as a party.

The certificate of proof or acknowledgment may be given under seal or otherwise, according to the mode by which the courts or officers granting the same usually authenticate their most solemn and formal official acts.

Any court or officer having power to take the proof above contemplated may issue the necessary subpœnas, and compel the attendance of witnesses residing within the county by attachments, if necessary.

No instrument containing a power to convey, or in any manner affect real estate, certified and recorded as above prescribed, can be revoked by an act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and deposited for record, and entered on the entry-book, in the same office in which the instrument conferring the power is recorded.

Every instrument in writing affecting real estate which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence, without further proof. Kans. Comp. Stat. 1862, c. 41, §§ 15–24.

A married woman may convey her interest in the same manner as other persons. *Id.* § 9.

KENTUCKY.—A deed executed *within the state* can be acknowledged before the clerk of the county court where the property lies; or the deed may be proved by the subscribing witnesses, or by one of them if he can prove the attestation of the other; or by proof by two witnesses that the two subscribing witnesses are dead, or out of the state, and proof of the signature of one of them and of the grantor. In such case, the certificate must state the witnesses' names.

A deed executed *out of the state, and within the United States*, may be acknowledged before a judge and certified under the seal of his court, or before a clerk of a court, mayor of a city, secretary of state, or Kentucky commissioner, and certified under his official seal.

A deed executed *out of the United States* may be acknowledged or proved before any foreign minister, consul, or secretary of legation of the United States, or before the secretary of foreign affairs, certified under his seal of office, or a judge of a superior court of the nation where acknowledged. On making proof by others than the subscribing witnesses, the names and residence of the witnesses must be stated in the certificate.

If a married woman is a grantor, the officer must explain to her the contents and effect of the deed separately and apart from her husband; and she must also declare that she did freely and voluntarily execute it, and is willing that it should be recorded. When the acknowledgment of a married woman is taken within the state, the officer may simply certify that the acknowledgment was made before him, and its date, and it will be presumed that the law was complied with.

When taken without the state, the certificate must be to this effect:—

County (*or*, Town, City, Department, *or*, Parish) of , sct.

I, A. B. [here give title], do certify that this instrument of writing from C. D. and wife [*or*, from E. F., wife of C. D.] was this day produced to me by the parties (which was acknowledged by the said C. D. to be his act and deed); and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did, freely and voluntarily, execute and deliver the same, to be her free act and deed, and consented that the same might be recorded.

[SEAL] Given under my hand and seal of office.
A. B.

If the deed of a married woman is not recorded within the time prescribed (viz., if executed in the state, eight months; without the state, and in the United States, twelve months; and without the United States, eighteen months), it is not effectual, but must be re-acknowledged before it can be recorded. Rev. Stat. (1852) 198; 200, §§ 15–23.

LOUISIANA.—The authentication of instruments *in the state* is effected by the parties appearing before a notary, who reduces the contract to writing and signs it, together with them, and in the presence of two male witnesses of at least fourteen years of age.

Without the state, and within the United States, acknowledgments and proof may be taken by Louisiana commissioners, and certified under their signature and seal; but the commissioner can only take such acknowledgment or proof where the party making it resides in the state or territory where the commissioner resides. Rev. Stat. (1856) 102, 103. *In any foreign country*, all American ministers, *chargés d'affaires*, consuls-general, consuls, vice-consuls, and commercial agents may act as commissioners. *Id.* 103.

Married women may borrow money or contract debts, and bind themselves or charge their separate estates, &c., by obtaining the sanction of the judge of the district or parish upon a private examination. Rev. Stat. 560. As to execution by agent of a power to renounce a mortgage or privilege on the husband's estate, see *id.* 561.

MAINE.—Deeds are to be acknowledged by the grantors, or one of them, or by their attorney executing the same, before a justice of the peace within the state, or any justice of the peace, magistrate, or notary public within the United States, or any minister or consul of the United States, or notary public in any foreign country. Rev. Stat. (1857) 451, § 17.

When a grantor dies or leaves the state without acknowledging the deed, it may be proved by a subscribing witness before any court of record in the state. When the witnesses are dead or out of the state, the handwriting of the grantor and witness may be proved. *Id.* §§ 18, 19.

A certificate must be endorsed on, or annexed to, the deed. *Id.* § 23.

Acknowledgments and proof may also be taken without the state, but, according to the laws of the state, by a Maine commissioner; his certificate to be under official seal, and annexed or endorsed. *Id.* 629, §§ 1, 2.

MARYLAND.—From the 24th article of the Code of 1860, the following is taken, being the law of Maryland on the subject of acknowledgments.

Section 66.—"The following forms of acknowledgment shall be sufficient."

Acknowledgment taken within the state of Maryland.

" county, to wit:—

Section 67.—"I hereby certify, that on this day of , in the year , before the subscriber (here insert style of the officer taking the acknowledgment), personally appeared (here insert the name of person making the acknowledgment), and acknowledged the foregoing deed to be his act."

Form of acknowledgment of husband and wife.

"State of Maryland, county, to wit:—

Section 68.—"I hereby certify, that on this day of , in the year , before the subscriber (here insert the official style of the judge taking the acknowledgment), personally appeared (here insert name of the husband) and (here insert name of the married woman making the acknowledgment), his wife, and did each acknowledge the foregoing deed to be their respective act."

Form of acknowledgment taken out of the state.

"State of , county, to wit:—

Section 69.—"I hereby certify, that on this day of , in the year of , before the subscriber (here insert the official style of the officer taking the acknowledgment), personally appeared (here insert the name of the person making the acknowledgment), and acknowledged the aforegoing deed to be his act.

"In testimony whereof, I have caused the seal of the court to be affixed (or have affixed my official seal), this day of ," &c. &c.

Seal of the Court.

Section 70.—"Any form of acknowledgment containing in substance the aforegoing forms shall be sufficient."

The acknowledgment is to be taken as follows:—

If in the county or city within which the real estate, or any part of it, lies, before some one justice of the peace of county or city; a judge of the orphans' court for county or city; the judge of the circuit court for county; the judge of the superior court, court of common pleas, or circuit court for Baltimore city.

If acknowledged *within the state, but out of the county where the land lies*, before any justice of the peace where the grantor may be, with a certificate of the justice's character, as such, under seal of the circuit or superior court; before any judge of the circuit court; or judge of superior, circuit, or court of common pleas in Baltimore.

If acknowledged *out of the state, but within the United States*, before a notary public, judge of any court of the United States, judge of any state or territory having a seal, or a commissioner of Maryland to take acknowledgments.

If acknowledged *without the United States*, before any minister or consul of the United States, a notary public, or a commissioner of Maryland, as above.

When an acknowledgment is taken before a judge, the seal of the court must be affixed.

Code of Public General Laws, Art. 25:—No private acknowledgment by the wife is necessary. The acknowledgment is merely that the parties "acknowledge the foregoing deed to be their act," or to this effect.

There must be added to the acknowledgments of mortgages and bills of sale the affidavit of the mortgagee or vendee, that the consideration is true and *bona fide* as therein set forth. *Id.*

MASSACHUSETTS.—Acknowledgments of deeds are to be by the grantors, or one of them, or by the attorney executing the same.

They may be taken before any justice of the peace of the state, or before any justice of the peace, magistrate, or notary public, or Massachusetts commissioner, within the United States or in any foreign country; or before a minister or consul of the United States in any foreign country. Gen. Stat. (1860) 467, §§ 18, 19.

If the grantor dies, or leaves the state, the execution may be proved by a subscribing witness.

MICHIGAN.—A deed executed within the state may be acknowledged before any judge or commissioner of a court of record, or any notary public, justice of the peace, or master in chancery within the state, or before the comptroller of Detroit or mayor of Flint. The officer must endorse on the deed a certificate of the acknowledgment, and the time and date of making it, under his hand.

A deed executed *without the state, and within the United States*, may be executed according to the laws of the state, territory, or district where executed, and may be acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer, authorized by the laws thereof to take acknowledgments, or before a Michigan commissioner. In such case, unless the acknowledgment is taken before a Michigan commissioner, there must be attached a certificate of the clerk, or other proper certifying officer, of a court of record for the county or district within which the acknowledgment was taken, under his official seal, that the person subscribing the certificate was, at the date of it, such officer as represented; that he believes the officer's signature to be genuine, and that the deed is executed according to the laws of the state, territory, or district. A deed executed *in a foreign country* may be executed according to the laws thereof, and acknowledged before any notary public, or any minister plenipotentiary, extraordinary, or resident; any *chargé d'affaires*, commissioner, or consul of the United States appointed to reside therein.

The acknowledgment of a married woman residing within the state must be taken separately and apart from her husband, and she must acknowledge that she executed the deed freely, and without fear or compulsion from any one. The acknowledgment of a married woman residing out of the state of a deed, in which she joins with her husband, may be the same as if she were sole. Rev. Stat. 1846, ss.; 2 Comp. Laws (1857), 838, 839, 840 (2727), §§ 8–13.

If a grantor dies, or leaves the state, or resides out of the state, the execution of the deed may be proved before any court of record by proceedings given by the statute; and if the grantor is residing in the state, and refuses to acknowledge the deed,

he must be summoned to attend. Rev. Stat. 1846, c. 65, ss.; 2 Comp. Laws, 1857, 840 (2733), §§ 14–20.

The former statutes of Michigan on this subject will be found collected in 2 Comp. Laws, 1857, 847, note.

MINNESOTA.— *Within the territory* [state]; before any judge or commissioner of a court of record, or before any notary public or justice of the peace within the territory.

Without the territory, and within the United States; the deed may be executed according to the laws of the state, territory, or district where executed, and acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of the place to take acknowledgments therein, or before a Minnesota commissioner.

In a foreign country, the execution may be according to its laws, and the acknowledgment may be before a notary public therein, or any minister plenipotentiary, extraordinary, or resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein, to be certified under the hand of the officer, and, if he is a notary, under his seal.

A married woman residing in the territory, and joining with her husband in a deed, must, separate and apart from her husband, acknowledge that she executed such deed freely, and without any fear or compulsion from any one. If she resides elsewhere, this is unnecessary.

Proof by witnesses may be taken before any court of record, when the grantor dies, or resides out of the territory, or refuses to acknowledge. Minn. Comp. Stat. (1858) c. 35, §§ 8–26.

MISSISSIPPI.— *When in the state*, deeds may be acknowledged or proved by one or more of the subscribing witnesses to them, before any judge of the high court of errors and appeals, or a judge of the circuit courts, or judge of probate, any clerk of any court of record who shall certify the same under the seal of his office, or any justice of the peace, or member of the board of police, whether the lands be within his county or not.

When in another state or territory of the United States, such deeds must be acknowledged or proved, as aforesaid, before a judge of the supreme court or of the district courts of the United States, or before any judge of the supreme or superior court of any state or territory in the Union; or any justice of the peace, whose official character shall be certified under the seal of some court of record in his county or by a Mississippi commissioner.

When out of the United States, such acknowledgment or proof may be made before any court of record, or mayor, or other chief magistrate of any city, borough, or corporation of such foreign kingdom, state, nation, or colony, or before any ambassador, secretary of legation, or consul of the United States to the kingdom or state, nation or colony; and the certificate in such cases must show the identity of the party, and that he acknowledged the execution of the deed, or that the execution was duly proved; or, if made before an ambassador, minister, or consul, then as such acts are usually certified by such officer. In the same way, a married woman residing without the United States may acknowledge her conveyance of lands or right to dower.

The real property or right of dower of a married woman does not pass by her deed, either jointly with her husband or alone, without a previous acknowledgment, on a private examination apart from her husband, before the proper officer, that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, which the certificate must state. Rev. Code (1857), 311, art. 28–32.

MISSOURI.— *Within the state;* before a court having a seal, or before a judge, justice, or clerk thereof, a notary public, or some justice of the peace for the county where the land lies. *Without the state, and within the United States*, by any notary public, or by any court of the United States, or of any state or territory, having a seal, or the clerk of such court, or before a Missouri commissioner. *Without the United States*, by any court of any state, kingdom, or empire, having a seal; or before the mayor or chief officer of any city or town having an official seal; or by any minister or consul of the United States, or notary public, having a seal.

The certificate must be endorsed on the instrument. If granted by a court, it must be under its seal; if by a clerk, then under his hand and the seal of his court; if by an officer having an official seal, then under his hand and seal; if by one who has no seal, then under his hand.

No acknowledgment must be taken unless the person offering to make it is personally known to at least one judge of the court, or to the officer taking it, to be the person whose name is subscribed, or unless he is proved to be such by at least two credible witnesses. The certificate must state this fact, as well as the fact of acknowledgment; and, if the identity was proved by witnesses, their names and residence must be stated. 1 Rev. Stat. (1855) 358, §§ 16–21.

The method of proof by subscribing witnesses or handwriting is the same as that above stated as the law of Kansas, except that the certificate must state also the residence of the witnesses. *Id.* §§ 22–30.

A married woman's relinquishment of dower may be acknowledged in the same way; but no such acknowledgment can be taken unless, in addition to the requirements in the case of other grantors, she is made acquainted with the contents of the conveyance, and acknowledges, on a separate examination apart from her husband, that she executed the same (*and, if it is a relinquishment of her dower*, that she relinquishes her dower in the real estate therein mentioned) freely, and without compulsion or undue influence of her husband. The certificate must set forth these facts, as well as those required to be stated in a certificate of acknowledgment by any other party. *Id.* §§ 31–39.

NEBRASKA.— *Within this territory;* before some court having a seal, or some judge, justice, or clerk thereof, or some justice of the peace, or notary public.* *Without the territory;* before a Nebraska commissioner, or before some officer authorized, by the laws of the state or country where the acknowledgment is made, to take the acknowledgment of deeds.

The certificate must be endorsed upon the instrument, and must set forth the title of the court or officer; that the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness (naming him); that such person acknowledged the instrument to be his voluntary act and deed.

The certificate of acknowledgment or proof may be under seal or otherwise, according to the mode by which the court or officer usually authenticates

* As to whether the prosecuting attorney, when acting instead of the judge of a county court, may take an acknowledgment, and whether justices of the peace and notaries are limited in taking them to their respective counties, compare Laws of 1855, 55, § 1; 62, § 30; 164, § 10.

the most solemn official acts. Laws of 1855, 165, §§ 10–16, 18.

The provisions respecting proof by witnesses are the same as those of Iowa, which see, above.

NEVADA.—Every conveyance in writing, whereby any real estate is conveyed or may be affected, must be acknowledged, or proved, and certified as provided by law. *Within the territory;* by some judge or clerk of a court having a seal, or some notary public or justice of the peace of the proper county. *Without the territory, but within the United States;* by a judge or clerk of any court of the United States, or of any state or territory having a seal, or by a commissioner appointed by the government of the territory for the purpose. *Without the United States;* by a judge or clerk of any court of any state, kingdom, or empire having a seal, or by any notary public therein, or by any minister, commissioner, or consul of the United States, appointed to reside therein.

A certificate must be endorsed or annexed by the officer taking the acknowledgment under seal of the court, or under the hand and the official seal of the officer taking it, when he has an official seal.

The person making the acknowledgment must be known personally by the officer taking the acknowledgment, or proved by the oath or affirmation of a credible witness, to be the person executing the instrument, and the fact must be stated in the certificate. The certificate must state, in addition, that the execution was made freely and voluntarily, and for the uses and purposes mentioned in the deed or other instrument.

Proof may be made by subscribing witnesses, and, where they are dead or cannot be had, by evidence of the handwriting of the party.

The subscribing witnesses must be personally known, or their identity established by oath or affirmation of one witness, and must establish that the person whose name is subscribed as a party is the person described as executing the instrument, did execute it, and that the witness subscribed his name. The certificate must set forth these facts.

Where the officer is satisfied that the subscribing witnesses are dead, proof may be made by a competent witness who swears or affirms that he knew the person who executed the instrument, knew his signature and believes it to be his, and a witness who testifies in the same manner as to the signature of the subscribing witness.

Compulsory process may be had for the attendance of witnesses.

A deed so acknowledged or proved may be recorded. Nev. Laws of 1861, c. 9, §§ 3–18.

NEW HAMPSHIRE.—Deeds are not valid, except as against the grantor and his heirs, unless attested by two or more witnesses, acknowledged and recorded. Acknowledgments are to be before a justice of the peace, notary public, or commissioner, or before a minister or consul of the United States in a foreign country. Comp. Laws (1853), 289.

NEW JERSEY.—Deeds, &c. must be acknowledged by the party or parties who executed them, the officer having first made known to them the contents, and being also satisfied that such person is the grantor mentioned in said deed, of all which the said officer shall make his certificate; or, if it be proved by one or more of the subscribing witnesses to it, that such party signed, sealed, and delivered the same as his, her, or their voluntary act and deed, before the chancellor of the state, or one of the justices of the supreme court, or one of the masters in chancery, or one of the judges of any of the courts of common pleas of the state; and if a certificate of such acknowledgment or proof shall be written upon or under the said deed or conveyance, and be signed by the person before whom it was made, the same may be received in evidence. Nixon's Dig. 1855, 121, § 1.

If the grantor or witnesses reside *without the state, but within the United States,* the acknowledgment or proof may be made before the chief justice of the United States, or an associate justice of the United States supreme court, or a district judge of the same, or any judge or justice of the supreme or superior court of any state or territory or in the District of Columbia; or before any mayor or chief magistrate of a city, duly certified under the seal of such city; or before a New Jersey commissioner for the state, territory, or district in which the party or witness resides; or before a judge of a court of common pleas of the state, district, or territory in which the party or witness may be; and in the latter case a certificate under the great seal of the state, or the seal of the county court in which it is made, that the officer is judge of the common pleas, is to be annexed. *Id.* § 5; *id.* 131, § 52.

Or it may be taken, if the party or witness reside in some other *state* of the United States, before a judge of any district or circuit court, or the chancellor of the state, in the manner directed by the laws of the state. This provision applies to deeds of femes covert residing in any other state of the United States. *Id.* 125, §§ 25, 26.

If the grantor or witnesses reside without the United States, it may be made before any court of law, mayor or chief magistrate of a city, borough, or corporation of the kingdom, state, nation, or colony in which they reside, or any ambassador, public minister, *chargé d'affaires,* secretary of legation, or other representative of the United States at the court thereof, and may be certified as such acts are usually authenticated by such officers. *Id.* 122, § 6; 132, §§ 57, 61.

No estate of a feme covert passes by her deed without her previous acknowledgment, on a private examination apart from her husband, that she signed, sealed, and delivered the same, as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof, written on or under the instrument, signed by the officer. *Id.* § 4.

The mode of making proof in case of the death of parties and witnesses is prescribed by Laws of 1850, 273; Nixon, Dig. 125.

NEW MEXICO.—Every instrument in writing by which real estate is transferred or affected in law or equity must be acknowledged and certified to as provided by law.

Within the territory; before any court having a seal, before any judge or clerk thereof, or before any justice of the peace of the county in which the land lies. *Without the territory, and within the United States;* before any United States court, or the court of any state or territory having a seal, or before a clerk of said courts. *Without the United States;* before any court of any state, kingdom, or empire having a seal, or before any magistrate, or the supreme power of any city, who may have a seal.

The person making the acknowledgment must be personally known to the officer taking the same to be the one executing the instrument, or his identity must be proved by two witnesses.

The certificate must state the fact of acknowledgment and one or the other of the above facts, as the case may be.

Acknowledgments may be made by married women before the same officers. In addition to evidence or knowledge of identity, as before stated, the woman must be informed of the contents of the instrument, and must confess, on examination independent of her husband, that she executed the same voluntarily, and without the compulsion or illicit influence of her husband; and the certificate must state the above facts. Laws of 1851, p. 373, §§ 5–13.

NEW YORK.—*Within the state;* before a justice of the supreme court, a county judge, surrogate, mayor, or recorder of a city, justice of the peace of a town, commissioner of deeds for a city or county, or notary public. 1 Rev. Stat. 756, § 4; Laws of 1840, 137, c. 238; Laws of 1859, 869, c. 360.

Without the state, but within the United States; before a judge of the United States supreme or district courts, or of the supreme, superior, or circuit court of any state or territory, or before a judge of the United States circuit court in the District of Columbia; but such acknowledgment must be taken at a place within the jurisdiction of such officer. Or before the mayor of any city; or before a New York commissioner, but the certificate of a New York commissioner must be accompanied by the certificate of the secretary of state of the state of New York, attesting the existence of the officer and the genuineness of his signature, and such commissioner can only act within the city or county in which he resided at the time of his appointment. 1 Rev. Stat. 757, § 4, subd. 2; Laws of 1845, 89, c. 109; Laws of 1850, 582, c. 270; am'd 2 Laws of 1857, 756, c. 788.

When made by any person residing *out of the state, and within the United States,* it may be made before any officer of the state or territory where made, authorized by its laws to take proof or acknowledgment; but no such acknowledgment is valid, unless the officer taking the same knows, or has satisfactory evidence, that the person making it is the individual described in and who executed the instrument. And there must be subjoined to the certificate of proof or acknowledgment a certificate under the name and official seal of the clerk and register, recorder, or prothonotary of the county in which such officer resides, or of the county or district court or court of common pleas thereof, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder, or prothonotary, is well acquainted with the handwriting of such officer, and verily believes his signature genuine. Laws of 1848, c. 195, as amended by Laws of 1856, c. 61, § 2.

Without the United States; when the party is in other parts of America, or in Europe, before a minister plenipotentiary, or minister extraordinary, or *chargé d'affaires* of the United States, resident and accredited there, or before any United States consul, resident in any port or country, or before a judge of the highest court in Upper or Lower Canada. In the British dominions, before the Lord Mayor of London, or chief magistrate of Dublin, Edinburgh, or Liverpool. 1 Rev. Stat. 759, § 6; Laws of 1829, 348, c. 222.

Acknowledgment may be made before a person specially authorized by the supreme court of the state, by a commission issued for the purpose. 1 Rev. Stat. 757, § 8.

The governor of New York is also authorized to appoint commissioners of deeds, not exceeding three in each, for the following cities: London, Liverpool, Glasgow, Paris, and Marseilles. Laws of 1858, 498, c. 308, § 1.

No acknowledgment is to be taken unless the officer knows, or has satisfactory evidence, that the person making such acknowledgment is the individual described in and who executed such conveyance. 1 Rev. Stat. 758, § 9.

An acknowledgment of a married woman residing within this state is void, unless she acknowledge, on a private examination apart from her husband, that she executed such conveyance freely, and without any fear or compulsion of her husband. 1 Rev. Stat. 758, § 10.

An acknowledgment or proof of conveyance by a *non-resident* married woman joining with her husband, may be made as if she were sole. 1 Rev. Stat. 758, § 11.

Where a married woman conveys her real estate acquired since the act of April 7, 1848, relating to the separate property of married women, it is held, that the deed may be drawn, executed, and acknowledged in the same manner as if she were unmarried, and no private examination is necessary. 17 Barb. N. Y. 660.

Proof of execution may be made by a subscribing witness, who shall state his own place of residence, and that he knew the person described in and who executed such conveyance; and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to such instrument. 1 Rev. Stat. 758, § 12.

The officer must endorse a certificate of the acknowledgment or proof, signed by himself, on the conveyance; and in such certificate shall set forth the matters required to be done, known, or proved, on such acknowledgment or proof, together with the names of the witnesses examined before such officer, and their places of residence, and the substance of the evidence by them given. 1 Rev. Stat. 759, § 15.

The certificate of a New York commissioner appointed in another state must be under his seal of office, and is wholly void unless it specifies the day on which, or [and?] the city or town in which, it was taken. Laws of 1850, 582, c. 270, §§ 2, 5.

NORTH CAROLINA.—*Within the state;* before a judge of the supreme or superior court, or in the county court of the county where the estate is situated, or before the clerk of such court or his deputy. Rev. Code (1855), 239, § 2.

Without the state; by a commissioner appointed for the purpose by the court of pleas and quarter sessions of the county. *Id.* § 3.

Without the state, and within the United States; before a judge of supreme jurisdiction, or a judge of a court of law of superior jurisdiction, within the state, territory, or district where the parties may be; and his certificate must be attested by the governor of the state; or, if in the District of Columbia, by the secretary of state of the United States; or it may be taken before a North Carolina commissioner.

Without the United States; before the chief magistrate of the city in which the instrument was executed, attested under the corporate seal; or before an ambassador, public minister, consul, or commercial agent, under his official seal. *Id.* 240, § 5; 241, §§ 6, 7; 125, § 2.

A married woman's acknowledgment is to be taken, within the state, before a judge of the supreme or superior court, or in the court of the county where the land lies, she being first privily examined by such judge, or some member of the county court appointed by the court for that purpose, or by a commission issued by the judge or court for that purpose, as to whether she voluntarily assents. Without the state, before the same officers specified above as authorized to take other acknowledgments without the state; but the same private examination is requisite wherever the acknowledgment may be taken. *Id.* 242, §§ 8, 9; 243, § 12.

OHIO.—Instruments affecting lands which are executed *within the state* are to be acknowledged before a judge of the supreme court or of the court of common pleas, a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city, or a county surveyor of the county. The certificate must be upon the same sheet with the instrument. Laws of 1831, 346; same statute, Swan, Rev. Stat. 308, 893, § 26.

A married woman must be examined by the officer separate and apart from her husband, and the contents of the deed be made known to her; and she must declare, upon such separate examination, that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith. Swan, Rev. Stat. 309, § 2.

A certificate of acknowledgment within the state need not show that the officer was satisfied of the identity of the grantor, nor that he made known the contents of the deed to a married woman, nor need it be sealed. *Id.* 312.

Instruments executed *without the state* may be proved or acknowledged in conformity with the laws of the state, territory, or country where acknowledged, or in conformity with the laws of Ohio. They may be taken before Ohio commissioners. *Id.* 310, § 5; 179, § 3. Laws of 1858, 15, § 12.

OREGON.—Acknowledgments are to be before any judge of the district court, probate judge, justice of the peace, or notary public; and the certificate, stating the true date, must be endorsed on the instrument. If the deed is executed in any other state, territory, or district of the United States, it may be executed and acknowledged according to the laws of such state, &c.; but in this case, unless it is acknowledged before an Oregon commissioner, the deed must have attached to it a certificate of the clerk, or other proper certifying officer, of a court of record of the county or district, under his seal of office, certifying that the person taking the acknowledgment was such officer as represented, that his signature is genuine, and that the deed was executed according to the laws of the place. If executed in any foreign country, it may be executed according to the laws thereof, and acknowledged before any notary public therein, or before any minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein, under his hand, and, if before a notary, under his seal of office.

The acknowledgment of a married woman residing within the territory, and joining in execution with her husband, must be taken separately and apart from her husband, and she must acknowledge that the execution was done freely, and without fear or compulsion from any one. If not residing in the territory, her acknowledgment may be as if she were sole. No acknowledgment can be taken unless the officer has satisfactory evidence that the person is the individual described in and who executed the conveyance. .

Proof may be by a subscribing witness personally known to the officer, or satisfactorily shown to him to be the subscribing witness. The witness must state his residence, and that he knew the person described in and who executed the conveyance.

In case of the death or absence of the grantor and witnesses, proof may be by handwriting of the grantor and of any witness. Proceedings for compelling witnesses to appear are also given by the statute.

The officer must endorse the certificate on the instrument, and set forth the matter required to be done, known, or proved, and the names and residences of witnesses examined, and the substance of their evidence. Statutes (1855), 519, §§ 10–21.

PENNSYLVANIA.—*Within the state;* before a judge of the supreme court, or of the courts of common pleas, or of the district courts, or a justice of the peace, or a recorder of deeds; the mayor, recorder, and aldermen, or any of them, of the cities of Allegheny, Carbondale, Philadelphia, and Pittsburg; the aldermen of the county of Philadelphia, and the mayor of the Northern Liberties of Philadelphia. Purd. Dig. (1857) 222 *c*; 246 *f*. Laws of 1859, 383, no. 381.

Without the state, and within the United States; before any officer authorized by the laws of the state in which the instrument was executed; proof of his authority by the certificate of a clerk of a court of record being affixed. Laws of 1854, 724, § 3; same statute, Purd. Dig. 1121, § 2. Or the acknowledgment may be before a judge of the supreme or district court of the United States, or before a judge or justice of the supreme or superior court, or court of common pleas, or court of probate, or court of record, of any state or territory within the United States; and so certified under the hand of the judge, or before a Pennsylvania commissioner. Purd. Dig. 221, 222, 224.

When made out of the United States; before a Pennsylvania commissioner, or any consul or vice-consul of the United States, duly appointed for and exercising consular functions in the state, kingdom, country, or place where such acknowledgment may be made (Purd. Dig. 221, § 1170); or any ambassador, minister plenipotentiary, *chargé d'affaires*, or other person exercising public ministerial functions, duly appointed by the United States. Laws of 1859, 353, no. 355.

Deeds made out of the state may be acknowledged or proved before one or more of the justices of the peace of this state, or before any mayor, or chief magistrate, or officer of the cities, towns, or places where such deeds or conveyances are so acknowledged or proved. The same to be certified by the officer under the common or public seal of the city, town, or place. Act of May 27, 1715; same statute, Purd. Dig. 220, § 10; 1 Pet. 433.

A married woman's acknowledgment of a deed to pass her separate estate is to be in the same form as her acknowledgment to bar dower. Purd. Dig. 1171, § 5.

The certificate of the acknowledgment of a feme covert must state—1, that she is of full age; 2, that the contents of the instrument have been made known to her; 3, that she has been examined separate and apart from her husband; and, 4, that she executed the deed of her own free will and accord, without any coercion or compulsion of her husband. It is the practice to make the certificate under seal; though a seal is not required. Act of Feb. 19, 1835.

RHODE ISLAND.—All deeds are void, except as between the parties and their heirs, unless acknowledged and recorded. Rev. Stat. (1857) 335.

Within the state, the acknowledgment must be before a senator, a judge, justice of the peace, notary public, or town clerk. *Id.*

A deed executed without the state, and within the United States, may be acknowledged before any judge, justice of the peace, mayor, or public notary, in the state where the same is executed; or by any commissioner, appointed by the governor and qualified; and, if without the United States, before any ambassador, minister, *chargé d'affaires*, recognized consul, vice-consul, or commercial agent of the United States, or any commissioner so appointed and qualified in the country in which the same is executed. *Id.*

Where husband and wife convey real property of which they are seized in the right of the wife, or property wherein the wife might be endowed, the latter must be examined privily and apart from her husband, and declare to the officer that the instrument shown and explained to her by him is her voluntary act, and that she does not wish to retract the same. *Id.* 316.

SOUTH CAROLINA.—To admit a deed to record in the register's office, or the secretary of state's office, it must be proved by the oath of one of the wit-

nesses before a magistrate, or any officer entitled to administer an oath, and endorsed on the deed in which the witness swears that he saw the grantor sign, seal, and deliver the deed to the grantee for the uses and purposes contained in the deed, and that the other witness with himself witnessed the due execution thereof.

A feme covert may renounce her dower by going before any judge of the court of common pleas, a magistrate of the district wherein she may reside or the land may be, and acknowledging, upon a private and separate examination, that she does freely and voluntarily, without any compulsion, dread, or fear of any person whatsoever, renounce and release her dower to the grantee and his heirs and assigns, in the premises mentioned in such deed. A certificate under the hand of the woman, and the hand and seal of the judge or magistrate, must be endorsed on the deed or separate instrument of writing to the same effect, in the form or to the purport following, and be recorded in the office of mesne conveyances or office of the clerk of the district where the land lies:—

The State of South Carolina.

District. I, Z. G., one of the judges of the court of common pleas in the said state [or a magistrate of district, as the case may be], do hereby certify unto all whom it may concern, that E. B., the wife of the within named A. B., did this day appear before me, and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within named C. D., his heirs and assigns forever, all her interest and estate, and all her right and claim of dower of, in, or to all and singular the premises within mentioned and released. Given under my hand and seal, this day of , Anno Domini

[L. S.] Z. G., judge of the court of common pleas in the state of South Carolina (or magistrate, as the case may be). E. B.

This provision, it must be observed, applies exclusively to "dower."

A feme covert of the age of twenty-one years, who may be entitled to any real estate as her inheritance, and is desirous of joining her husband in conveying away the fee simple of the same to any other person, may bar herself of her inheritance by joining her husband in the execution of the release, and seven days after the execution of the same going before a judge of the court of common pleas, or a magistrate of the district, and then, upon a private and separate examination by him, declaring to him that she did, at least seven days before such examination, actually join her husband in executing such release, and that she did then, and at the time of her examination still does, freely, voluntarily, and without any manner of compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish all her estate, interest, and inheritance in the premises mentioned in the release unto the grantee and his assigns. *Id.*

A certificate signed by the woman, and under the hand and seal of the judge or magistrate, must then immediately be endorsed upon the said release, or a separate instrument of writing to the same effect in the form of that required as above in dower, to which must be added to the following effect, to wit: that the woman did declare that the release was positively and bona fide executed at least seven days before such examination. The renunciation is not complete and legal until recorded; but if that be done in the lifetime of husband and wife, it is sufficient.

It may be well enough to remark that the term "inheritance" does not necessarily mean an estate descended to the wife, but an estate in her own right, and which may be inherited from her.

If the words required in the additional certificate appear in the body of the certificate, it will be sufficient.

A deed executed and acknowledged out of the state according to the form and using the necessary words required by the Act of 1795, before a commissioner appointed by South Carolina, would be sufficient.

TENNESSEE.—By a person *within the state*, an acknowledgment is to be before the clerk, or legally appointed deputy clerk, of the county court of some county in the state. *Without the state, but within the United States*, before any court of record, or clerk of any court of record, in any state, or a Tennessee commissioner, or a notary public. *Without the United States*, before a Tennessee commissioner or notary public, or before a consul, minister, or ambassador of the United States.

A certificate taken within the state must be endorsed on or annexed to the instrument. A notary, Tennessee commissioner, a consul, minister, or ambassador, must make the certificate under his seal of office.

If the acknowledgment is taken before a judge, he must certify under his hand, and the clerk of his court must, under seal (a private seal, if there is no official seal), certify to the official character of the judge; or his official character may be certified by the governor of the state or territory, under its great seal. If it is taken before a court of record, a copy of the entry on the record must be certified by the clerk under seal (a private seal, if he has no official seal); and in this case, or if the acknowledgment be before the clerk of a court of record of another state, the judge, chief justice, or presiding magistrate must certify to the official character of the clerk. Tenn. Code (1858), §§ 2038–2046.

Proof by witnesses may be before the same officers. *Id.* §§ 2047, &c.

A married woman uniting with her husband in a deed must be examined, privily and apart from her husband, touching her voluntary execution of the same, and her knowledge of its contents and effect, and must acknowledge that she executed it freely, voluntarily, and understandingly, without any compulsion or constraint on the part of her husband, and for the purposes therein expressed; which must be stated in the certificate. *Id.* § 2076.

TEXAS.—*Within the state;* before a notary public, or the chief justice, or the clerk, or deputy clerk, of any county court. *Without the state, and within the United States;* before some judge of a court of record having a seal. *Without the United States;* before a public minister, *chargé d'affaires*, or consul of the United States.

In all cases, the certificate must be under official seal. Oldham & W. Dig. (1859) 379, art. 1714, 1715, 1718.

The party should state that he executed the instrument for the consideration and purposes therein stated. Proof of execution may be made by one or more subscribing witnesses. *Id.* 1719, 1620.

A married woman's acknowledgment of conveyance of her separate property, or of the homestead, or other property exempt from execution, may be before a judge of the supreme or district court, or notary public, or the chief justice of a county court, or the clerk or deputy clerk of a county court. *Id.* 72, art. 207; 379, art. 1715, 1716, 1718.

She must be privily examined by the officer, apart from her husband, and must declare that she did freely and willingly sign and seal the writing, to be then shown and explained to her, and does no[t]

wish to retract it, and must acknowledge the instrument, so again shown to her, to be her act. The certificate must show these facts, and that the instrument was fully explained to her. *Id.* 72, art. 207.

If the husband and wife executed such conveyance without the state, the acknowledgment (which should be in the same form) may be taken before the officers who are specified above as authorized to take other acknowledgments.

UTAH.—The provision of the acts of the territory of Utah is as follows: The judges of the supreme and probate courts, their clerks, the clerks of the district courts, the mayors and aldermen of the several incorporated cities, the county and city recorders, and justices of the peace, in their respective jurisdiction, are authorized to take the acknowledgment of deeds, transfers, and other instruments of writing. Rev. Laws (1855), 271, § 2.

VERMONT.—All deeds and other conveyances of lands, or any estate or interest therein, must be signed and sealed by the party granting the same, and signed by two or more witnesses, and acknowledged by the grantor before a justice of the peace, a town clerk, a notary public, or master in chancery. Rev. Stat. tit. 14, c. 60, § 4; Laws of 1850, n. 53; same statute, Comp. Laws, 384, §§ 4, 5.

Married women are not required to acknowledge in a different way from others. Laws of 1851, 29, no. 27.

Acknowledgment or proof taken without the state, if certified agreeably to the laws of the state, province, or kingdom in which it was taken, is valid as though duly taken within the state; and the proof of the same may be taken, and the same acknowledged with like effect, before any justice of the peace, magistrate, or notary public, or Vermont commissioner within the United States, or in any foreign country; or before any minister, *chargé d'affaires*, or consul of the United States in any foreign country. Rev. Stat. tit. 14, c. 60, § 9; tit. 4, c. 8, § 51; same statute, Comp. Laws, 385, 87.

VIRGINIA.—The acknowledgment may be made before the court of the county where the instrument is to be recorded, or before the clerk of the court, in his office; or the deed may be proved by two witnesses.

A wife conveying must be examined by one of the justices of the court, or by the clerk, privily and apart from her husband; and, having such writing fully explained to her, must acknowledge the same to be her act, and declare that she executed it willingly, and does not wish to retract it. *Without the state, but within the Union;* before a justice (except that that of a married woman must be made before two justices together), or a notary public, or a Virginia commissioner.

Without the United States; before any minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul, or commercial agent, appointed by the government of the United States, or by the proper officer of any court of such country, or the mayor or other chief magistrate of any city, town, or corporation therein; the certificate to be under official seal. Code (1849), 512, §§ 2–4.

WASHINGTON.—A deed shall be in writing, signed and sealed by the party bound thereby, witnessed by two witnesses, and acknowledged by the party making it before a judge of the supreme court, a judge of the probate court, a justice of the peace, or a notary public, or county auditor, or a clerk of the district and supreme courts; or, if out of the territory and in the United States, before a Washington commissioner. Stat. (1855) 402, § 2, and 448, § 1; Acts of 1859, p. 21; Acts of 1858, 29.

A married woman is not bound by any deed affecting her own real estate or releasing dower, unless she joins in the conveyance by her husband, and, upon an examination by the officer, separate and apart from her husband, acknowledges that she did voluntarily, of her own free will and without the fear of, or coercion from, her husband, execute the deed; and the officer must make known to her the contents of the deed, and certify that he has made known to her its contents, and examined her separate and apart from her husband, as is above provided. Stat. (1855) 402 § 3.

WISCONSIN.—Deeds executed within the state may be acknowledged before a judge or commissioner of a court of record, and clerk of the board of supervisors, or a notary public, or justice of the peace of the state. The certificate must state the true date of the acknowledgment.

Deeds executed without the state, and within the United States, before a judge of a court of record, notary public, justice of the peace, master in chancery, or other officers authorized by the law of the place to take acknowledgments, or before a Wisconsin commissioner. Except in the last case, the certificate must be attested by the certifying officer of a court of record.

In a foreign country, before a notary public, or other officer authorized by the laws thereof, or any minister plenipotentiary, minister extraordinary, minister resident, *chargé d'affaires*, commissioner, or consul of the United States, appointed to reside therein. If before a notary public, his certificate must be under seal. Rev. Stat. (1858) 538, §§ 8, 11.

Married women residing in the state may acknowledge as if they were unmarried. *Id.* §§ 12, 14.

ACKNOWLEDGMENT MONEY. In English Law. A sum paid by tenants of copyhold in some parts of England, as a recognition of their superior lords. Cowel; Blount. Called a fine by Blackstone. 2 Sharswood, Blackst. Comm. 98.

ACQUEST. An estate acquired by purchase.

ACQUETS. In Civil Law. Property which has been acquired by purchase, gift, or otherwise than by succession.

Immovable property which has been acquired otherwise than by succession. Merlin, Répert.

The profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both.

This is the signification attached to the word in Louisiana. La. Civ. Code, 2371. The rule applies to all marriages contracted in that state, or out of it, when the parties afterward go there to live, as to acquets afterward made there. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of their marriage.

The parties may, however, lawfully stipulate there shall be no community of profits

or gains; but have no right to agree that they shall be governed by the laws of another country. 3 Mart. La. 581; 17 *id.* 571; La. Civ. Code, 2369, 2370, 2375. See 2 Kent, Comm. 153, note.

As to the sense in which it is used in Canada, see 2 Low C. 175.

ACOLYTE. An inferior church servant, who, next under the deacon, followed and waited upon the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACQUIESCENCE. A silent appearance of consent. Worcester, Dict.

Failure to make any objections.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other. It amounts to a consent which is impliedly given by one or both parties to a proposition, a clause, a condition, a judgment, or to any act whatever.

When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *primâ facie* evidence of such election. See 2 Roper, Leg. 439; 1 Ves. Ch. 335; 2 *id.* 371; 12 *id.* 136; 3 P. Will. Ch. 315. The acts of acquiescence which constitute an implied election must be decided rather by the circumstances of each case, than by any general principle. 1 Swanst. Ch. 382, note, and the numerous cases there cited.

Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority. 2 Bouvier, Inst. n. 1309; 2 Kent, Comm. 478; Story, Eq. Jur. § 255; Livermore, Ag. 45; Paley, Ag. Lloyd, ed. 41; 4 Wash. C. C. 559; 4 Mas. C. C. 296; 3 Pet. 69, 81; 6 Mass. 193; 3 Pick. Mass. 495; 1 Johns. Cas. N. Y. 110; 2 *id.* 424; 12 Johns. N. Y. 300; 3 Cow. N. Y. 281.

ACQUIETANDIS PLEGIIS. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied. Reg. of Writs, 158; Cowel; Blount.

ACQUIRE (Lat. *ad*, for, and *quærere*, to seek). To make property one's own.

It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition.

ACQUISITION. The act by which a person procures the property of a thing.

The thing the property in which is secured.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy, 1 Bouvier, Inst. n. 490; 2 Kent, Comm. 289; accession, 1 Bouvier, Inst. n. 499; 2 Kent, Comm. 293; intellectual labor,—namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights. 1 Bouvier, Inst. n. 508.

Derivative acquisitions are those which are procured from others, either by act of law or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

An acquisition may result from the act of the party himself, or those who are in his power acting for him, as his children while minors. 1 N. H. 28; 1 U. S. Law Journ. 513. See Dig. 41. 1. 53; Inst. 2. 9. 3.

ACQUITTAL. In Contracts. A release or discharge from an obligation or engagement.

According to Lord Coke, there are three kinds of acquittal, namely: by deed, when the party releases the obligation; by prescription; by tenure. Coke, Litt. 100, a.

In Criminal Practice. The absolution of a party charged with a crime or misdemeanor.

The absolution of a party accused on a trial before a traverse jury. 1 Nott & M'C. So. C. 36; 3 M'Cord, So. C. 461.

Acquittals in fact are those which take place when the jury, upon trial, finds a verdict of not guilty.

Acquittals in law are those which take place by mere operation of law; as where a man has been charged merely as an accessary, and the principal has been acquitted. Coke, 2d Inst. 364.

An acquittal is a bar to any future prosecution for the offence alleged in the first indictment.

When a prisoner has been acquitted, he becomes competent to testify either for the government or for his former co-defendants. 7 Cox, Cr. Cas. 341, 342, per *Monahan*, C. J. And it is clear, that where a married defendant is entirely removed from the record by a verdict pronounced in his favor, his wife may testify either for or against any other persons who may be parties to the record. 12 Mees. & W. Exch. 49, 50, per *Alderson* B.; 8 Carr. & P. 284; 2 Taylor, Ev. 3d ed. § 1230.

ACQUITTANCE. In Contracts. An agreement in writing to discharge a party from an engagement to pay a sum of money. It is evidence of payment, and differs from a release in this, that the latter must be under seal, while an acquittance need not be under seal. Pothier, Oblig. n. 781. See 3 Salk. 298; Coke, Litt. 212 *a*, 273 *a*; 1 Rawle, Pa. 391.

ACRE (Germ. *Aker*, perhaps Lat. *Ager*, a field). A quantity of land containing one hundred and sixty square rods of land, in whatever shape. Sergeant, Land Laws of Penn. 185; Croke, Eliz. 476, 665; 6 Coke, 67; Poph. 55; Coke, Litt. 5 *b*. The word formerly signified an open field; whence *acre-fight*, a contest in an open field. Jacob, Dict.

The measure seems to have been variable in amount in its earliest use, but was fixed by statute at a remote period. As originally used, it was applicable especially to meadowlands. Cowel.

ACCREDULITARE (Lat.). To purge one's self of an offence by oath.

It frequently happens that when a person has been arrested for a contempt, he comes into court and purges himself, on oath, of having intended any contempt. Blount, Leg. Inæ c. 36.

ACT (Lat. *agere*, to do; *actus*, done). Something done or established.

In its general legal sense, the word may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice; including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. Some general laws made by the Congress of the United States are styled joint resolutions, and these have the same force and effect as those styled acts.

An instrument in writing to verify facts. Webster, Dict.

It is used in this sense of the published acts of assembly, congress, etc. In a sense approaching this, it has been held in trials for treason that letters and other written documents were *acts*. 1 Fost. Cr. Cas. 198; 2 Stark. 116.

In Civil Law. A writing which states in a legal form that a thing has been done, said, or agreed. Merlin, Répert.

Private acts are those made by private persons as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code, 7. 32. 6; 4. 21; Dig. 22. 4; La. Civ. Code, art. 2231 to 2254; 8 Toullier, *Droit Civ. Français*, 94.

Acts under private signature are those which have been made by private individuals, under their hands. An act of this kind does not acquire the force of an authentic act by being registered in the office of a notary, 11 Mart. La. 243; 5 Mart. N. S. La. 693; 8 *id.* 568; 3 *id.* 396; 3 La. Ann. 419, unless it has been properly acknowledged before the officer by the parties to it. 5 Mart. N. S. La. 196.

Public acts are those which have a public authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records.

In Evidence. The act of one of several conspirators, performed in pursuance of the common design, is evidence against all of them. And see TREASON; PARTNER; PARTNERSHIP; AGENT; AGENCY.

In Legislation. A statute or law made by a legislative body.

General or *public* acts are those which bind the whole community. Of these the courts take judicial cognizance.

Private or *special* acts are those which operate only upon particular persons and private concerns.

Explanatory acts should not be enlarged by equity, Comb. 410; although such acts may be allowed to have a retrospective operation. Dupin, Notions de Droit, 145. 9. If an act of assembly expire or be repealed while a proceeding under it is *in fieri* or pending, the proceeding becomes abortive: as a prosecution for an offence, 7 Wheat. 552; or a proceeding under insolvent laws. 1 W. Blackst. 451; 3 Burr. 1456; 6 Cranch, 208; 9 Serg. & R. Penn. 283.

ACT OF BANKRUPTCY. An act which subjects a person to be proceeded against as a bankrupt.

The acts of bankruptcy enumerated in Act of Congress of August 19, 1841, § 1, are the following. Departure from the state, district, or territory of which a person, subject to the operation of the bankrupt laws, is an inhabitant, with intent to defraud his creditors. See, as to what will be considered a departure, 1 Campb. 279; Deac. & C. Bank. 451; 1 Rose, Bank. 387; 9 J. B. Moore, 217; 2 Ves. & B. Chanc. 177; 5 Term, 512; 1 Carr. & P. 77; 2 Bingh. 99; 2 Taunt. 176; Holt, 175. Concealment to avoid being arrested. See 1 Maule & S. 676; 2 Rose, Bank. 137; 1 *id.* 262; 15 Ves. Ch. 447; 14 *id.* 86; 6 Taunt. 540; 9 *id.* 176; 5 Term, 512; 1 Esp. 334. Willingly or fraudulently procuring himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; removal of his goods, chattels, and effects, or concealment of them, to prevent their being levied upon, or taken in execution, or by other process; making any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidences of debt. 15 Wend. N. Y. 588; 18 *id.* 375; 19 *id.* 414; 5 Cow. N. Y. 67; 1 Burr. 467, 471, 481; 4 Carr. & P. 315; 1 Dougl. 295; 7 East, 137; 16 Ves. Ch. 149; 17 *id.* 193; 1 J. B. Smith, 33; Rose, Bank. 213.

ACT OF GOD. An accident which arises from a cause which operates without interference or aid from man. 1 Parsons, Contr. 635; 1 Term, 27.

The term is sometimes defined as equivalent to inevitable accident, but incorrectly, as there is a distinction between the two; although Sir William Jones proposed the use of inevitable accident instead of *Act of God*. Jones, Bailm. 104. See Story, Bailm. § 25; 2 Sharswood, Blackst. Comm. 122; 2 Crabb, Real Prop. § 2176; 4 Dougl. 287; 21 Wend. N. Y. 190; 2 Ga. 349; 10 Miss. 572; 5 Blackf. Ind. 222.

Where the law casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; but where the party, *by his own contract*, engages to do an act, it is deemed to be his own fault and folly that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is, in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident, or other con-

tingency, although not foreseen by nor within the control of the party. Chitty, Contr. 272, 3; 1 Bouvier, Inst. n. 1024; 6 Term, 650; 8 *id.* 267; 3 Maule & S. 267; 7 Mass. 325; 13 *id.* 94.

See BAIL; COMMON CARRIER; PERIL OF THE SEA; SPECIFIC PERFORMANCE.

ACT OF GRACE. In Scotch Law. A statute by which the incarcerating creditor is bound to aliment his debtor in prison, if such debtor has no means of support, under penalty of a liberation of his debtor if such aliment be not provided. Paterson, Comp.

This statute provides that where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not aliment him within ten days after intimation for that purpose. Stat. 1695, c. 32; Erskine, Pract. 4.

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.

The instrument describes the bill, recites its protest, and the fact of a third person coming forward to accept, and the person or persons for whose honor the acceptance is made. The right to pay the debt of another, and still hold him, is allowed by the law merchant in this instance, and is an exception to the general rule of law; and the right can only be gained by proceeding in the form and manner sanctioned by the law. 3 Dan. Ky. 554; Bayley, Bills; Sewell, Banking.

ACT IN PAIS. An act performed out of court, and which is not a matter of record.

A deed or an assurance transacted between two or more private persons in the country, that is, according to the old common law, upon the very spot to be transferred, is matter in pais. 2 Blackstone, Comm. 294.

ACT ON PETITION. A form of summary proceeding formerly in use in the High Court of Admiralty, in England, in which the parties stated their respective cases briefly, and supported their statements by affidavit. 2 Dods. Adm. 174, 184; 1 Hagg. Adm. 1, note.

The suitors of the English Admiralty were, under the former practice, ordinarily entitled to elect to proceed either by act on petition, or by the ancient and more formal mode of "plea and proof;" that is, by libel and answer, and the examination of witnesses. W. Rob. Adm. 169, 171, 172. But, by the new rules which took effect Jan. 1, 1860, the modes of pleading theretofore used, as well in causes by act on petition as by plea and proof, were abolished, and a uniform mode of pleading substituted: the first pleading to be called the petition; the second, the answer; the third, the reply; the fourth, the rejoinder, &c. &c. Rules 65 and 66. Morris, Lectures on the Jurisdiction and Practice of the High Court of Admiralty, p. 28. See, as to proof under these rules, Rules 78, 79.

ACTA DIURNA (Lat.). A formula often used in signing. Ducange.

Daily transactions, chronicles, journals, registers. I do not find the thing published in the *acta diurna* (daily records of affairs). Tacitus, Ann. 3, 3; Ainsworth, Lex.; Smith, Lex.

ACTA PUBLICA (Lat.). Things of general knowledge and concern; matters transacted before certain public officers. Calvinus, Lex.

ACTIO. In Civil Law. A specific mode of enforcing a right before the courts of law: *e.g. legis actio; actio sacramenti.* In this sense we speak of *actions* in our law, *e.g.* the action of debt. The right to a remedy, thus: *ex nudo pacto non oritur actio;* no *right of action* can arise upon a naked pact. In this sense we rarely use the word action. Ortolan, Inst. vol. 3, sec. 1830; 5 Savigny, System, 10; Mackeldey (13th ed.), sec. 193.

The first sense here given is the older one. Justinian, following Celsus, gives the well-known definition: *Actio nihil aliud est, quam jus persequendi in judicio, quod sibi debetur,* which may be thus rendered: An action is simply the *right* to enforce one's demand in a court of law. See Inst. Jus. 4. 6, *de Actionibus.*

2. In the sense of a specific form of remedy, there are various divisions of *actiones.*

Actiones civiles are those forms of remedies which were established under the rigid and inflexible system of the civil law, the *jus civilis. Actiones honorariæ* are those which were gradually introduced by the prætors and ædiles, by virtue of their equitable powers, in order to prevent the failure of justice which too often resulted from the employment of the *actiones civiles.* These were found so beneficial in practice that they eventually supplanted the old remedies, of which in the time of Justinian hardly a trace remained. Mackeldey, Civ. Law, § 194; Savigny, System, vol. 5.

Directæ actiones, as a class, were forms of remedies for cases clearly defined and recognized as actionable by the law. *Utiles actiones* were remedies granted by the *magistrate* in cases to which no *actio directa* was applicable. They were framed for the special occasion, by analogy to the existing forms, and were generally fictitious; that is, they proceeded upon the assumption that a state of things existed which would have entitled the party to an *actio directa,* and the cause was tried upon this assumption, which the other party was not allowed to dispute. 5 Savigny, System, § 215.

3. Again, there are *actiones in personam* and *actiones in rem.* The former class includes all remedies for the breach of an *obligation,* and are considered to be directed against the person of the wrong-doer. The second class comprehends all remedies devised for the recovery of property, or the enforcement of a right not founded upon a contract between the parties, and are therefore considered as rather aimed at the *thing* in dispute, than at the person of the defendant. Mackeldey, § 195; 5 Savigny, System, §§ 206–209; 3 Ortolan, Inst. §§ 1952 *et seq.*

In respect to their *object,* actions are either *actiones rei persequendæ causa comparatæ,* to

which class belong all *in rem actiones*, and those of the *actiones in personam*, which were directed merely to the recovery of the value of a thing, or compensation for an injury; or they are *actiones pœnales*, called also *actiones ex delicto*, in which a penalty was recovered of the delinquent, or *actiones mixtæ*, in which were recovered both the actual damages and a penalty in addition. These classes, *actiones pœnales* and *actiones mixtæ*, comprehended cases of injuries, for which the civil law permitted redress by private action, but which modern civilization universally regards as crimes; that is, offences against society at large, and punished by proceedings in the name of the state alone. Thus, theft, receiving stolen goods, robbery, malicious mischief, and the murder or negligent homicide of a slave (in which case an injury to property was involved), gave rise to private actions for damages against the delinquent. Inst. 4. 1. *De obligationibus quæ ex delicto nascuntur; id.* 2. *De bonis vi raptis; id.* 3. *De lege Aquilia.* And see Mackeldey, § 196; 5 Savigny, System, §§ 210–212.

4. In respect to the mode of procedure: *actiones in personam* are divided into *stricti juris*, and *bonæ fidei actiones*. In the former the court was confined to the strict letter of the law; in the latter something was left to the discretion of the judge, who was governed in his decision by considerations of what ought to be expected from an honest man under circumstances similar to those of the plaintiff or defendant. Mackeldey, § 197 *a*.

It would not only be foreign to the purpose of this work to enter more minutely into a discussion of the Roman *actio*, but it would require more space than can here be afforded, since in Savigny's System there are more than a hundred different species of *actio* mentioned, and even in the succinct treatise of Mackeldey nearly eighty are enumerated.

In addition to the works cited in passing may be added the Introduction to Sander's Justinian, which may be profitably consulted by the student.

5. To this brief explanation of the most important classes of *actiones* we subjoin an outline of the Roman system of procedure. From the time of the twelve tables (and probably from a much earlier period) down to about the middle of the sixth century of Rome, the system of procedure was that known as the *actiones legis*. Of these but five have come down to us by name: the *actio sacramenti*, the *actio per judicis postulationem*, the *actio per condictionem*, the *actio per manus injectionem*, and the *actio per pignoris capionem*. The first three of these were actions in the usual sense of the term; the last two were modes of execution. The *actio sacramenti* is the best-known of all, because from the nature of the questions decided by means of it, which included those of *status*, of property *ex jure Quiritium*, and of successions; and, from the great popularity of the tribunal, the *centumviri*, which had cognizance of these questions, it was retained in practice long after the other actions had succumbed to a more liberal system of procedure. As the *actio sacramenti* was the longest-lived, so it was also the earliest, of the *actiones leges;* and it is not only in many particulars a type of the whole class, but the other species are conceived to have been formed by successive encroachments upon its field. The characteristic feature of this action was the *sacramentum*, a pecuniary deposit made in court by each party, which was to be forfeited by the loser. Subsequently, however, the parties were allowed, instead of an actual deposit, to give security in the amount required. Our knowledge of all these actions is exceedingly slight, being derived from fragments of the earlier jurisprudence preserved in literary works, laboriously pieced together by commentators, and the numerous gaps filled out by aid of ingenious and most copious conjectures. They bear all those marks which might have been expected of their origin in a barbarous or semi-barbarous age, among a people little skilled in the science of jurisprudence and having no acquaintance with the refined distinctions and complex business transactions of civilized life. They were all of that highly symbolical character found among men of rude habits but lively imaginations. They abounded in sacramental words and significant gestures, and, while they were inflexibly rigid in their application, they possessed a character almost sacred, so that the mistake of a word or the omission of a gesture might cause the loss of a suit. In the nature of things, such a system could not maintain itself against the advance of civilization, bringing with it increased complications in all the relations of man to man; and accordingly we find that it gradually, but sensibly, declined, and that at the time of Justinian not a trace of it existed in practice. See 3 Ortolan, Justinian, 467 *et seq.*

6. About the year of Rome 507 began the introduction of the system known as the procedure *per formulam* or *ordinaria judicia*. An important part of the population of Rome consisted of foreigners, whose disputes with each other or with Roman citizens could not be adjusted by means of the *actiones leges*, these being entirely confined to questions of the strict Roman law, which could only arise between Roman citizens.

To supply the want of a forum for foreign residents, a magistrate, the *prætor peregrinus*, was constituted with jurisdiction over this class of suits, and from the procedure established by this new court sprang the formulary system, which proved so convenient in practice that it was soon adopted in suits where both parties were Roman citizens, and gradually withdrew case after case from the domain of the *legis actiones*, until few questions were left in which that cumbrous procedure continued to be employed.

An important feature of the formulary system, though not peculiar to that system, was the distinction between the *jus* and the *judicium*, between the magistrate and the judge. The magistrate was vested with the civil authority, *imperium*, and that jurisdiction over law-suits which in every state is inherent in the supreme power; he received the parties, heard their conflicting statements, and referred the case to a special tribunal of one or more persons, *judex, arbiter, recuperatores*. The function of this tribunal was to ascertain the facts and pronounce judgment thereon, in conformity with a special authorization to that effect conferred by the magistrate. Here the authority of the judge ended: if the defeated party refused to comply with the sentence, the victor must again resort to the magistrate to enforce the judgment. From this it would appear that the functions of the judge or judges under the Roman system corresponded in many respects with those of the jury at common law. They decided the question of fact submitted to them by the magistrate, as the jury decides the issue eliminated by the pleadings; and, the decision made, their functions ceased, like those of the jury.

As to the amount at stake, the magistrate, in cases admitting it, had the power to fix the sum in dispute, and then the judge's duties were confined to the simple question whether the sum specified was due the plaintiff or not; and if he increased or diminished this amount he subjected himself to an action for damages. In other cases, instead of a precise sum, the magistrate fixed a *maximum* sum, beyond which the judge could not go in ascertaining the amount due; but in most cases the magistrate left the amount entirely to the discretion of the judge.

7. The directions of the magistrate to the judge were made up in a brief statement called the *formula*, which gives its name to this system of procedure. The composition of the formula was governed by well-established rules. When complete, it consisted of four parts, though some of these were frequently omitted, as they were unnecessary in certain classes of actions. The *first* part of the formula, called the *demonstratio*, recited the subject submitted to the judge, and consequently the facts of which he was to take cognizance. It varied, of course, with the subject-matter of the suit, though each class of cases had a fixed and appropriate form. This form, in an action by a vendor against his vendee, was as follows: "*Quod Aulus Agerius Numerio Negidio hominem vendidit;*" or, in case of a bailment, "*Quod Aulus Agerius apud Numerium Negidium hominem deposuit.*" The *second* part of the *formula* was the *intentio:* in this was stated the claim of the plaintiff, as founded upon the facts set out in the *demonstratio*. This, in a question of contracts, was in these words: "*Si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere,*" when the magistrate fixed the amount; or, "*Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere,*" when he left the amount to the discretion of the judge. In a claim of property the form was, "*Si paret hominem ex jure Quiritium Auli Agerii esse.*" The *third* part of the complete *formula* was the *adjudicatio*, which contained the authority to the judge to award to one party a right of property belonging to the other. It was in these words: "*Quantum adjudicari oportet judex, Titio, adjudicato.*" The *last* part of the *formula* was the *condemnatio*, which gave the judge authority to pronounce his decision for or against the defendant. It was as follows: "*Judex, Numerium Negidium Aulo Agerio sestertium X millia condemna: si non paret, absolve,*" when the amount was fixed; or, "*Ejus judex, Numerium Negidium Aulo Agerio duntaxat X millia condemna: si non paret, absolve,*" when the magistrate fixed a *maximum;* or, "Quanti ea res erit, tantam pecuniam, judex, *Numerium Negidium Aulo Agerio condemna: si non paret, absolvito,*" when it was left to the discretion of the judge.

8. Of these parts, the *intentio* and the *condemnatio* were always employed: the *demonstratio* was sometimes found unnecessary, and the *adjudicatio* only occurred in three species of actions,—*familiæ erciscundæ, communi dividundo,* and *finium regundorum,*—which were actions for division of an inheritance, actions of partition, and suits for the rectification of boundaries.

The above are the essential parts of the *formula* in their simplest form; but they were often enlarged by the insertion of clauses in the *demonstratio*, the *intentio*, or the *condemnatio*, which were useful or necessary in certain cases: these clauses are called *adjectiones*. When such a clause was inserted for the benefit of the defendant, containing a statement of his defence to the claim set out in the *intentio*, it was called an *exceptio*. To this the plaintiff might have an answer, which, when inserted, constituted the *replicatio*, and so on to the *duplicatio* and *triplicatio*. These clauses, like the *intentio* in which they were inserted, were all framed conditionally, and not, like the common-law pleadings, affirmatively. Thus: "*Si paret Numerium Negidium Aulo Agerio X millia dare oportere* (intentio); *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (exceptio); *Si non, &c.* (replicatio)."

In preparing the *formula* the plaintiff presented to the magistrate his *demonstratio*, intentio, &c. which was probably drawn in due form under the advice of a jurisconsult; the defendant then presented his *adjectiones*, the plaintiff responded with his replications, and so on. The magistrate might modify these, or insert new *adjectiones*, at his discretion. After this discussion *in jure, pro tribunali*, the magistrate reduced the results to form, and sent the *formula* to the judge, before whom the parties were confined to the case thus settled. See 3 Ortolan, Justinian, §§ 1909 *et seq.*

9. The procedure *per formulam* was supplanted in course of time by a third system, *extraordinaria judicia*, which in the days of Justinian had become universal. The essence of this system consisted in dispensing with the judge altogether, so that the magistrate decided the case himself, and the distinction between the *jus* and the *judicium* was practically abolished. This new system commenced with usurpation by the magistrates, in the extension of an exceptional jurisdiction, which had existed from the time of the *leges actiones*, to cases not originally within its scope. Its progress may be traced by successive enactments of the emperors, and was so gradual that, even when it had completely undermined its predecessor, the magistrate continued to reduce to writing a sort of formula representing the result of the pleadings. In time, however, this last relic of the former practice was abolished by an imperial constitution. Thus the formulary system, the creation of the great Roman jurisconsults, was swept away, and carried with it in its fall all those refinements of litigation in which they had so much delighted. Thenceforth the distinctions between the forms of actions were no longer regarded, and the word actio, losing its signification of a *form*, came to mean a *right, jus persequendi in judicio quod sibi debetur.*

See Ortolan, Hist. no. 392 *et seq.; id.* Instit. nos. 1833–2067; 5 Savigny, System, § 6; Sander, Justinian, Introduction; Glück's Pandecten, vol. 6, § 498.

ACTIO BONÆ FIDEI (Lat. an action of good faith). **In Civil Law.** A class of actions in which the judge might at the trial, *ex officio*, take into account any equitable circumstances that were presented to him affecting either of the parties to the action. 1 Spence, Eq. Jur. 218.

ACTIO COMMODATI CONTRARIA. In Civil Law. An action by the borrower against the lender, to compel the execution of the contract. Pothier, *Prêt à Usage*, n. 75.

ACTIO COMMODATI DIRECTA. In Civil Law. An action by a lender against a borrower, the principal object of which is to obtain a restitution of the thing lent. Pothier, *Prêt à Usage*, nn. 65, 68.

ACTIO COMMUNI DIVIDUNDO. In Civil Law. An action for a division of the property held in common. Story, Partn., Bennett ed. § 352.

ACTIO CONDICTIO INDEBITATI. In Civil Law. An action by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Pothier, *Promutuum*, n. 140.

ACTIO EX CONDUCTO. **In Civil Law.** An action which the bailor of a thing for hire may bring against the bailee, in order to compel him to re-deliver the thing hired. Pothier, *du Contr. de Louage*, n. 59.

ACTIO EX CONTRACTU. See ACTION.

ACTIO EX DELICTO. See ACTION.

ACTIO DEPOSITI CONTRARIA. **In Civil Law.** An action which the depositary has against the depositor, to compel him to fulfil his engagement towards him. Pothier, *Du Dépôt*, n. 69.

ACTIO DEPOSITI DIRECTA. **In Civil Law.** An action which is brought by the depositor against the depositary, in order to get back the thing deposited. Pothier, *Du Dépôt*, n. 60.

ACTIO AD EXHIBENDUM. **In Civil Law.** An action instituted for the purpose of compelling the person against whom it was brought to exhibit some thing or title in his power.

It was always preparatory to another action, which lay for the recovery of a thing movable or immovable. 1 Merlin, *Quest. de Droit*, 84.

ACTIO IN FACTUM. **In Civil Law.** An action adapted to the particular case which had an analogy to some *actio in jus*, which was founded on some subsisting acknowledged law. Spence, Eq. Jur. 212. The origin of these actions is strikingly similar to that of actions on the case at common law. See CASE.

ACTIO FAMILIÆ ERCISCUNDÆ. **In Civil Law.** An action for the division of an inheritance. Inst. 4. 6. 20; Bracton, 100 *b*.

ACTIO JUDICATI. **In Civil Law.** An action instituted, after four months had elapsed after the rendition of judgment, in which the judge issued his warrant to seize, first, the movables, which were sold within eight days afterwards; and then the immovables, which were delivered in pledge to the creditors, or put under the care of a curator, and if, at the end of two months, the debt was not paid, the land was sold. Dig. 42. 1; Code, 8. 34.

According to some authorities, if the defendant then utterly denied the rendition of the former judgment, the plaintiff was driven to a new action, conducted like any other action, which was called *actio judicati*, and which had for its object the determination of the question whether such a judgment had been rendered. The exact meaning of the term is by no means clear. See Savigny, Syst. 305, 411; 3 Ortolan, Just. § 2033.

ACTIO MANDATI. **In Civil Law.** An action founded upon a mandate.

ACTIO NON. **In Pleading.** The declaration in a special plea "that the said plaintiff ought not to have or maintain his aforesaid action thereof against" the defendant (in Latin, *actio non habere debet*).

It follows immediately after the statement of appearance and defence. 1 Chitty, Plead. 531; 2 *id.* 421; Stephens, Plead. 394.

ACTIO NON ACCREVIT INFRA SEX ANNOS (Lat.). The action did not accrue within six years.

In Pleading. A plea of the statute of limitations, by which the defendant insists that the plaintiff's action has not accrued within six years. It differs from *non assumpsit* in this: *non assumpsit* is the proper plea to an action on a simple contract, when the action accrues on the promise; but when it does not accrue on the promise, but subsequently to it, the proper plea is *actio non accrevit*, &c. Lawes, Plead. 733; 5 Binn. Penn. 200, 203; 2 Salk. 422; 1 Saund. 33, n. 2; 2 *id.* 63 *b*.

ACTIO PERSONALIS. A personal action. The proper term in the civil law is *actio in personam*.

ACTIO PERSONALIS MORITUR CUM PERSONA (Lat.). A personal action dies with the person.

In Practice. A maxim which formerly expressed the law in regard to the surviving of personal actions.

2. To render the maxim perfectly true, the expression "personal actions" must be restricted very much within its usual limits. In the most extensive sense, all actions are *personal* which are neither *real* nor *mixed*, and in this sense of the word personal the maxim is not true. A further distinction, moreover, is to be made between personal actions actually commenced and pending at the death of the plaintiff or defendant, and causes of action upon which suit might have been, but was not, brought by or against the deceased in his lifetime. In the case of actions actually commenced, the old rule was that the suit abated by the death of either party. But the inconvenience of this rigor of the common law has been modified by statutory provisions in England and the states of this country, which prescribe in substance that when the *cause of action* survives to or against the personal representatives of the deceased, the suit shall not abate by the death of the party, but may proceed on the substitution of the personal representatives on the record by *scire facias*, or, in some states, by simple suggestion of the facts on the record. See 6 Wheat. 260. And this brings us to the consideration of what causes of action survive.

3. CONTRACTS.—It is clear that, in general, a man's personal representatives are liable for his breach of contract on the one hand, and, on the other, are entitled to enforce contracts made with him. This is the rule; but it admits of a few exceptions. 4 Mass. 631, 422; 6 Me. 470; 2 D. Chipm. Vt. 41.

No action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor

cannot perform, and the performance of which is prevented by the death of testator, 3 Wils. Ch. 99; Croke, Eliz. 553; 1 Rolle, 359; as if an author undertakes to compose a work, or a master covenants to instruct an apprentice, but is prevented by death. See Williams, Exec. 1467. But for a breach committed by deceased in his lifetime, his executor would be answerable. Croke, Eliz. 553; 1 Mees. & W. Exch. 423, *per* Parke, B.; 19 Penn. St. 234.

As to what are such contracts, see 2 Perr. & D. 251; 10 Ad. & E. 45; 1 Mees. & W. Exch. 423; 1 Tyrwh. Exch. 349; 2 Strange, 1266; 2 W. Blackst. 856; 3 Wils. 380. But whether the contract is of such a nature is a mere question of construction, depending upon the intention of the parties, Hob. 9; Yelv. 9; Croke, Jac. 282; 1 Bingh. 225; unless the intention be such as the law will not enforce. 19 Penn. St. 233, *per* Lowrie, J.

4. Again, an executor, &c. cannot maintain an action on a promise made to deceased where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate, as a breach of promise of marriage. 2 Maule & S. 408; 4 Cush. Mass. 408. And as to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see 2 Cromp. M. & R. Exch. 588; 5 Tyrwh. Exch. 985, and the cases there cited.

The fact whether or not the estate of the deceased has suffered loss or damage would seem to be the criterion of the right of the personal representative to sue in another class of cases, that is, where there is a breach of an implied promise founded on a *tort*. For where the action, though in form *ex contractu*, is founded upon a *tort to the person*, it does not in general survive to the executor. Thus, with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskilfulness of medical practitioners; or the imprisonment of the party occasioned by the negligence of his attorney, no action, generally speaking, can be sustained by the executor or administrator on a breach of the *implied promise* by the person employed to exhibit a proper portion of skill and attention: such cases being in substance actions for injuries to the person. 2 Maule & S. 415, 416; 8 Mees. & W. Exch. 854. And it has been held that for the breach of an implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator sustained some actual damage as to his estate. 4 J. B. Moore, 532. But the law on this point has been considerably modified by statute. See §§ **7–15.**

5. On the other hand, where the breach of the implied promise has occasioned damage to the *personal estate* of the deceased, though it has been said that an action in form *ex contractu* founded upon a *tort* whereby damage has been occasioned to the estate of the deceased, as debt against the sheriff for an escape, does not survive at common law, 1 Ga. 514 (though in this case the rule is altered in that state by statute), yet the better opinion is that, if the executor can show that damage has accrued to the *personal estate* of the deceased by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, though the action is in some sort founded on a *tort*. Williams, Exec. 676; citing *in extenso*, 2 Brod. & B. 102; 4 J. B. Moore, 532. And see 3 Wooddeson, Lect. 78, 79; Marsh. 14. So, by waiving the *tort* in a trespass, and going for the value of the property, the action of *assumpsit* lies as well for as against executors. 1 Bay, So. C. 58.

In the case of an action on a contract commenced against joint defendants one of whom dies pending the suit, the rule varies. In some of the states the personal representatives of the deceased defendant may be added as parties and the judgment taken against them jointly with the survivors. 27 Miss. 455; 9 Tex. 519. In others the English rule obtains which requires judgment to be taken against the survivors only; and this is conceived to be the better rule, because the judgment against the original defendants is *de bonis propriis*, while that against the executors is *de bonis testatoris*.

6. TORTS.—The ancient maxim which we are discussing applies more peculiarly to cases of *tort*. It was a principle of the common law that, if an injury was done either to the person or property of another for which *damages* only could be recovered in satisfaction,—where the declaration imputes a tort done either to the person or property of another, and the plea must be *not guilty*,—the action died with the person to whom or by whom the wrong was done. See Williams, Exec. 668, 669; 3 Blackstone, Comm. 302; 1 Saund. 216, 217, n. (1); Cowp. 371–377; 3 Wooddeson, Lect. 73; Viner, Abr. *Executors*, 123; Comyn, Dig. *Administrator* (B. 13).

But if the goods, &c. of the testator taken away continue in specie in the hands of the wrong-doer, it has long been decided that *replevin* and *detinue* will lie for the executor to recover back the specific goods, &c., W. Jones, 173, 174; 1 Saund. 217, note (1); 1 Hempst. C. C. 711; 10 Ark. 504; or, in case they are sold, an action for money had and received will lie for the executor to recover the value. 1 Saund. 217, n. (1). And actions *ex delicto*, where one has obtained the property of another and converted it, survive to the representatives of the injured party, as replevin, trespass *de bonis asport.* But where the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action. 3 Mass. 321; 6 How. 11; 1 Bay, So. C. 58; 4 Mass. 480; 13 *id.* 272, 454; 1 Root, Conn. 216.

7. Successive innovations upon this rule of the common law have been made by va-

rious statutes, *with regard to actions which survive to* executors and administrators.

The stat. 4 Ed. III. c. 7 gave a remedy to executors for a *trespass* done to the personal estate of their testators, which was extended to executors of executors by the st. 25 Ed. III. c. 5. But these statutes did not include wrongs done to the person or freehold of the testator or intestate. Williams, Exec. 670. By an equitable construction of these statutes, an executor or administrator shall now have the same actions for any injury done to the personal estate of the testator in his lifetime, *whereby it has become less beneficial* to the executor or administrator, as the deceased himself might have had, whatever the form of action may be. 1 Saund. 217, n. (1); 1 Carr. & K. 271; Ow. 99; 7 East, 134, 136; 11 Viner, Abr. 125; Latch. 167; Poph. 190; W. Jones, 173, 174; 2 Maule & S. 416; 5 Coke, 27 *a*; 4 Mod. 403; 12 *id.* 71; Ld. Raym. 973; 1 Ventr. 31; 1 Rolle, Abr. 912; Croke, Car. 297; 2 Brod. & B. 103; 1 Strange, 212; 2 Brev. No. C. 27.

8. And the laws of the different states, either by express enactment or by having adopted the English statutes, give a remedy to executors in cases of injuries done to the personal property of their testator in his lifetime. Trover for a conversion in the lifetime of the testator may be brought by his executor. T. U. P. Charlt. Ga. 261; 4 Ark. 173; 11 Ala. N. S. 859. But an executor cannot sue for expenses incurred by his testator in defending against a groundless suit, 1 Day, Conn. 285; nor in *Alabama* (under the Act of 1826) for any injury done in the lifetime of deceased, 15 Ala. 109; nor in *Vermont* can he bring *trespass on the case*, except to recover damages for an injury to some specific property. 20 Vt. 244. And he cannot bring *case* against a sheriff for a false return in testator's action. *Ibid.* But he may have *case* against the sheriff for not keeping property attached, and delivering it to the officer holding the execution in his testator's suit, 20 Vt. 244, n.; and *case* against the sheriff for the default of his deputy in not paying over to testator money collected in execution. 22 Vt. 108. In *Maine*, an executor may revive an action against the sheriff for misfeasance of his deputy, but not an action against the deputy for his misfeasance. 30 Me. 194. So, where the action is merely penal, it does not survive, Cam. & N. No. C. 72; as to recover penalties for taking illegal fees by an officer from the intestate in his lifetime. 7 Serg. & R. Penn. 183. But in such case the administrator may recover back the excess paid above the legal charge. *Ibid.*

9. The stat. 3 & 4 W. IV. c. 42, § 2 gave a remedy to executors, &c. for injuries done in the lifetime of the testator or intestate to his real property, which case was not embraced in the stat. Ed. III. This statute has introduced a material alteration in the maxim *actio personalis moritur cum persona* as well in favor of executors and administrators of the party injured as against the personal representatives of the wrong-doer, but respects only injuries to personal and real property. Chitty, Pl. Parties to Actions in form *ex delicto*. Similar statutory provisions have been made in most of the states. Thus, *trespass quare clausum fregit* survives in *North Carolina*, 4 Dev. & B. No. C. 68; 3 Dev. No. C. 153; in *Maryland*, 1 Md. 102; in *Tennessee*, 3 Sneed, Tenn. 128; and in *Massachusetts*, 21 Pick. Mass. 250; and then it makes no difference whether the action was commenced before or after the death of the injured party. 22 Pick. Mass. 495. *Proceedings to recover damages* for injuries to land by overflowing survive in *North Carolina*, 7 Ired. No. C. 20; and *Virginia*, 11 Gratt. Va. 1. *Aliter* in *South Carolina*, 10 Rich. So. C. 92; and *Maryland*, 1 Harr. & M'H. Md. 224. *Ejectment* in the U. S. district court does not abate by death of plaintiff. 22 Vt. 659. But in *Illinois* the statute law allows an action to executors only for an injury to the personalty, or personal wrongs, leaving injuries to realty as at common law. 18 Ill. 403.

10. *Injuries to the person.* In cases of injuries to the *person*, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action at *common law* can be supported either by or against the executors or other personal representatives. 3 Blackstone, Comm. 302; 2 Maule & S. 408. Case for the seduction of a man's daughter, 9 Ga. 69; case for libel, 5 Cush. Mass. 544; and for malicious prosecution, 5 Cush. Mass. 543, are instances of this. But in one respect this rule has been materially modified in England by the stat. 9 & 10 Vict. c. 93, known as Lord Campbell's Act, and in this country by enactments of similar purport in many of the states. These provide for the case where a wrongful act, neglect, or default has caused the death of the injured person, and the act is of such a nature that the injured person, had he lived, would have had an action against the wrong-doer. In such cases the wrong-doer is rendered liable, in general, not to the executors or administrators of the deceased, but to his near relations, husband, wife, parent, or child. In the construction given to these acts, the courts have held that the measure of damages is in general the pecuniary value of the life of the person killed to the person bringing suit, and that vindictive or exemplary damages by reason of gross negligence on the part of the wrong-doer are not allowable. Sedgwick, Damages.

11. Pennsylvania, New Jersey, New York, Massachusetts, Connecticut, and some other states, have statutes founded on Lord Campbell's Act. In *Massachusetts*, under the statute, an action may be brought against a city or town for damages to the person of deceased occasioned by a defect in a highway. 7 Gray, Mass. 544. But where the death, caused by a railway collision, was instan-

taneous, no action can be maintained under the statute of that state; for the statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right. 9 Cush. Mass. 108. But the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the person injured. 9 Cush. Mass. 478. For the law in *New York*, see 16 Barb. N. Y. 54; 15 N. Y. 432; in *Missouri*, 18 Mo. 162; in *Connecticut*, 24 Conn. 575; in *Maine*, 45 Me. 209.

12. *Actions against the executors or administrators of the wrong-doer.* The common law principle was that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed. 1 Saund. 216 *a*, note (1); 1 Harr. & M'H. Md. 224. And where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a *tort*, or arises *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* must be *not guilty*, the rule of the common law is *actio personalis moritur cum persona;* and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator. But now in England the stat. 3 & 4 W. IV. c. 42, § 2 authorizes an action of trespass, or trespass on the case, for an injury committed by deceased in respect to property *real* or *personal* of another. And similar provisions are in force in most of the states of this country. Thus, in *Alabama*, by statute, *trover* may be maintained against an executor for a conversion by his testator. 11 Ala. N. s. 859. So in *New Jersey*, 1 Harr. N. J. 54; *Georgia*, 17 Ga. 495; and *North Carolina*, 10 Ired. No. C. 169.

13. In *North Carolina*, an action for the seduction of a slave from his master's service lies against the representatives of the wrong-doer. 1 Hayw. No. C. 182; Cam. & N. No. C. 95. In *Virginia*, by statute, *detinue* already commenced against the wrong-doer survives against his executors, if the chattel actually came into the executor's possession; otherwise not. 6 Leigh, Va. 42, 344. So in *Kentucky*, 5 Dan. Ky. 34. *Replevin* in *Missouri* does not abate on the death of defendant, 21 Mo. 115; nor does an action on a *replevin bond* in *Delaware*, 5 Harr. Del. 381. It has, indeed, been said that where the wrong-doer has secured no benefit to himself at the expense of the sufferer, the cause of action does not survive, but that where, by means of the offence, property is acquired which benefits the testator, then an action for the value of the property survives against the executor, 6 How. 11; 3 Mass. 321; 4 *id.* 480; 5 Pick. Mass. 285; 20 Johns. N.Y. 43; 1 Root, Conn. 216; 4 Halst. N. J. 173; 1 Bay, So. C. 58; and that where the wrong-doer has acquired gain by his wrong, the injured party may waive the *tort* and bring an action *ex contractu* against the representatives to recover compensation. 5 Pick. Mass. 285; 4 Halst. N. J. 173.

14. But this rule, that the wrong-doer must have acquired a gain by his act in order that the cause of action may survive against his representatives, is not universal. Thus, though formerly in *New York* an action would not lie for a fraud of deceased which did not benefit the assets, yet it was otherwise for his fraudulent performance of a contract, 20 Johns. 43; and now the statute of that state gives an action against the executor for every injury done by the testator, whether by force or negligence, to the property of another, 1 Hill & D. N.Y. 116; as for fraudulent representations by the deceased in the sale of land, 19 N. Y. 464; or wasting, destroying, taking, or carrying away personal property. 2 Johns. N. Y. 227. In *Massachusetts*, by statute, a sheriff's executors are liable for his official misconduct, 7 Mass. 317; 13 *id.* 454, but not the executors of a deputy sheriff. *Ibid.* So in *Kentucky*, 9 B. Monr. Ky. 135. And in *Missouri*, for false return of execution. 10 Mo. 234. Under the statute of *Ohio*, case for injury to property survives, 4 McLean, C. C. 599; under statute in *Missouri*, trespass, 15 Mo. 619; and a suit against an owner for the criminal act of his slave, 23 Mo. 401; in *North Carolina*, deceit in sale of chattels, 1 Car. Law Rep. 529; and the remedy by petition for damages caused by overflowing lands, 1 Ired. No. C. 24; in *Pennsylvania*, by statute, an action against an attorney for neglect, 24 Penn. St. 114; and such action has been maintained in England. 3 Stark, 154; 1 Dowl. & R. 30.

15. But in Texas the rule that the right of action for torts unconnected with contract does not survive the death of the wrong-doer, has not been changed by statute. 12 Tex. 11. And in *California* trespass does not lie against the representatives of the wrong-doer, 3 Cal. 370; nor in *Alabama* does it survive against the representatives of defendant. 19 Ala. 181. *Detinue* does not survive in *Tennessee*, whether brought in the lifetime of the wrong-doer or not, 3 Yerg. Tenn. 133; nor in *Missouri*, under the stat. of 1835. 17 Mo. 362. *Trespass for mesne profits* does not lie against personal representatives in *Pennsylvania*, 5 Watts, Penn. 474; 3 Penn. St. 93; nor in *New Hampshire*, 20 Vt. 326; nor in *New York*, 2 Bradf. Surr. N. Y. 80; but the representatives may be sued on contract. *Ibid.* But this action lies in *North Carolina*, 3 Hawks. No. C. 390, and *Vermont*, by statute. 20 Vt. 326. *Trespass for crim. con.*, where defendant dies pending the suit, does not survive against his personal representatives. 9 Penn. St. 128.

16. Where the intestate had falsely pretended that he was divorced from his wife, whereby another was induced to marry him, the latter cannot maintain an action against his personal representatives. 31 Penn. St. 533. *Case* for nuisance does not lie against executors of wrong-doer, 1 Bibb, Ky. 246; nor for fraud in the exchange of horses, 5 Ala. N. S. 369; nor, under the statute of *Virginia*, for fraudulently recommending a person as worthy of credit, 17 How. 212; nor for negligence of a constable, whereby he failed to make the money on an execution, 3 Ala. N. S. 366; nor for misfeasance of constable, 29 Me. 462; nor against the personal representatives of a sheriff for an escape, or for taking insufficient bail bond, Harr. N. J. 42; nor against the administrators of the marshal for a false return of execution, or imperfect and insufficient entries thereon, 6 How. 11; nor does *debt* for an escape survive against the sheriff's executors, 1 Caines, N.Y. 124; *aliter* in *Georgia*, by statute, 1 Ga. 514. An action against the sheriff to recover penalties for his failure to return process does not survive against his executors, 13 Ired. No. C. 483; nor does an action lie against the representatives of a deceased postmaster for money feloniously taken out of letters by his clerk. 1 Johns. N. Y. 396.

ACTIO IN PERSONAM (Lat. an action against the person).

A personal action.

This is the term in use in the civil law to denote the actions which in the common law are called personal. In modern usage it is applied in English and American law to those suits in admiralty which are directed against the person of the defendant, as distinguished from those *in rem* which are directed against the specific thing from which (or rather the proceeds of the sale of which) the complainant expects and claims a right to derive satisfaction for the injury done to him.

ACTIO PRÆSCRIPTIS VERBIS. In Civil Law. A form of action which derived its force from continued usage or the *responsa prudentium*, and was founded on the unwritten law. 1 Spence, Eq. Jur. 212.

The distinction between this action and an *actio in factum* is said to be, that the latter was founded not on usage or the unwritten law, but by analogy to or on the equity of some subsisting law. 1 Spence, Eq. Jur. 212.

ACTIO REALIS (Lat.). A real action. The proper term in the civil law was *Rei Vindicatio*.

ACTIO IN REM. An action against the thing. See ACTIO IN PERSONAM.

ACTIO REDHIBITORIA. In Civil Law. An action to compel a vender to take back the thing sold and return the price paid.

ACTIO RESCISSORIA In Civil Law. An action for rescinding a title acquired by prescription in a case where the party bringing the action was entitled to exemption from the operation of the prescription.

ACTIO PRO SOCIO. In Civil Law. An action by which either partner could compel his co-partners to perform the partnership contract. Story, Partn., Bennett ed. § 352; Pothier, Contr. de Société, n. 34.

ACTIO STRICTI JURIS (Lat. an action of strict right). An action in which the judge followed the formula that was sent to him closely, administered such relief only as that warranted, and admitted such claims as were distinctly set forth by the pleadings of the parties. 1 Spence, Eq. Jur. 218.

ACTIO UTILIS. An action for the benefit of those who had the beneficial use of property, but not the legal title; an equitable action. 1 Spence, Eq. Jur. 214.

It was subsequently extended to include many other instances where a party was equitably entitled to relief, although he did not come within the strict letter of the law and the formulæ appropriate thereto.

ACTIO VULGARIS. In Civil Law. A legal action; a common action.

ACTION (Lat. *agere*, to do; to lead; to conduct). A doing of something; something done.

In Practice. The formal demand of one's right from another person or party, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

In the Institutes of Justinian an action is defined as *jus persequendi in judicio quod sibi debetur* (the right of pursuing in a judicial tribunal what is due oneself). Inst. 4. 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, *Actio generaliter sumiter; vel pro ipso jure quod quis habet persequendi in judicio quod suum est sibi ve debetur; vel pro hac ipsa persecutione seu juris exercitio* (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or for the pursuit itself or exercise of the right). Dig. 50. 16. 16. Action was also said *continere formam agendi* (to include the form of proceeding). Dig. 1. 2. 10.

2. This definition of action has been adopted by Mr. Taylor. (Civ. Law, p. 50.) These forms were prescribed by the prætors originally, and were to be very strictly followed. The actions to which they applied were said to be *stricti juris*, and the slightest variation from the form prescribed was fatal. They were first reduced to a system by Applius Claudius, and were surreptitiously published by his clerk, Cneius Flavius. The publication was so pleasing to the people that Flavius was made a tribune of the people, a senator, and a curule edile (a somewhat more magnificent return than is apt to await the labors of the editor of a modern book of forms). Dig. 1. 2. 5.

These forms were very minute, and included the form for pronouncing the decision.

In modern law the signification of the right of pursuing, &c. has been generally dropped, though it is recognized by Bracton, 98 *b*; Coke, 2d Inst. 40; and Blackstone, 3 Comm. 116; while the two latter senses of the exercise of the right and the means or method of its exercise are still found.

3. The vital idea of an action is, a proceeding on the part of one person as actor against another, for

the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.

Subordinate to this is now connected in a quite common use, the idea of the answer of the defendant or person proceeded against; the adducing evidence by each party to sustain his position; the adjudication of the court upon the right of the plaintiff; and the means taken to enforce the right or recompense the wrong done, in case the right is established and shown to have been injuriously affected.

4. Actions are to be distinguished from those proceedings, such as writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court and not the plaintiff appears to be the actor. 6 Binn. Penn. 9. And it is not regularly applied, it would seem, to proceedings in a court of equity.

In the Civil Law.

Civil Actions.—Those personal actions which are instituted to compel payments or do some other thing purely civil. Pothier, Introd. Gen. aux Coutumes, 110.

Criminal Actions.—Those personal actions in which the plaintiff asks reparation for the commission of some tort or injury which he or those who belong to him have sustained.

Mixed Actions are those which partake of the nature of both real and personal actions; as, actions of partition, actions to recover property and damages. Just. Inst. 4, 6, 18–20; Domat, Supp. des Lois Civiles, Liv. 4, tit. 1, n. 4.

Mixed Personal Actions are those which partake of both a civil and a criminal character.

Personal Actions are those in which one person (actor) sues another as defendant (*reus*) in respect of some obligation which he is under to the actor, either *ex contractu* or *ex delicto*, to perform some act or make some compensation.

Real Actions.—Those by which a person seeks to recover his property which is in the possession of another.

In the Common Law.

5. The action properly is said to terminate at judgment. Coke, Litt. 289 *a;* Rolle, Abr. 291; 3 Sharswood, Blackst. Comm. 116; 3 Bouvier, Inst. n. 2639.

Civil Actions.—Those actions which have for their object the recovery of private or civil rights, or of compensation for their infraction.

Criminal Actions.—Those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime. See 1 Chitty, Crim. Law.

Local Actions.—Those civil actions the cause of which could have arisen in some particular place or county only. See LOCAL ACTIONS.

Mixed Actions.—Those which partake of the nature of both real and personal actions. See MIXED ACTION.

Personal Actions.—Those civil actions which are brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for the commission of an injury to the person or property. See PERSONAL ACTION.

Real Actions.—Those brought for the specific recovery of lands, tenements, or hereditaments. Stephen, Pl. 3. See REAL ACTION.

Transitory Actions.—Those civil actions the cause of which might have arisen in one place or county as well as another. See TRANSITORY ACTION.

In French Law. Stock in a company; shares in a corporation.

ACTION OF BOOK DEBT. A form of action resorted to in the states of Connecticut and Vermont for the recovery of claims, such as usually evidenced by a book account. 1 Day, Conn. 105; 4 *id.* 105; 2 Vt. 366. See 1 Conn. 75; 11 *id.* 205.

ACTION REDHIBITORY. See REDHIBITORY ACTION.

ACTION RESCISSORY. See RESCISSORY ACTION.

ACTIONS ORDINARY. In Scotch Law. All actions which are not rescissory.

ACTIONABLE. For which an action will lie. 3 Blackstone, Comm. 23.

Where words in themselves are actionable, malicious intent in publishing them is an inference of law. 2 Greenleaf, Ev. § 418. See LIBEL; SLANDER.

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or *actions* in a joint stock company.

ACTIONES NOMINATÆ (Lat. named actions).

In English Law. Those writs for which there were precedents in the English Chancery prior to the statute 13 Edw. I. (Westm 2d) c. 34.

The clerks would make no writs except in such actions prior to this statute, according to some accounts. See 17 Serg. & R. Penn. 195; CASE; ACTION.

ACTON BURNELL. An ancient English statute, so called because enacted by a parliament held at the village of Acton Burnell.

It is otherwise known as *statutum mercatorum* or *de mercatoribus*, the statute of the merchants. It was a statute for the collection of debts, the earliest of its class, being enacted in 1283.

A further statute for the same object, and known as De Mercatoribus, was enacted 13 Edw. I. (c. 3.) See STATUTE MERCHANT.

ACTOR (Lat. *agere*). **In Civil Law.** A patron, pleader, or advocate. Du Cange; Cowel; Spelman.

Actor ecclesiæ.—An advocate for a church; one who protects the temporal interests of a church. *Actor villæ* was the steward or head-bailiff of a town or village. Cowel.

One who takes care of his lord's lands. Du Cange.

A guardian or tutor. One who transacts the business of his lord or principal; nearly synonymous with agent, which comes from the same word.

The word has a variety of closely-related meanings, very nearly corresponding with manager. Thus, *actor dominæ*, manager of his master's farms; *actor ecclesiæ*, manager of church property; *actores provinciarum*, tax-gatherers, treasurers, and managers of the public debt.

A plaintiff; contrasted with *reus* the defendant. *Actores regis*, those who claimed money of the king. Du Cange, *Actor;* Spelman, Gloss.; Cowel.

ACTRIX (Lat.). A female actor; a female plaintiff. Calvinus, Lex.

ACTS OF COURT. Legal memoranda made in the admiralty courts in England, in the nature of pleas.

For example, the English court of admiralty disregards all tenders except those formally made by acts of court. Abbott, Shipp. 403; Dunlop, Adm. Pract. 104, 105; 4 C. Rob. Adm. 103; 1 Hagg. Adm. 157.

ACTS OF SEDERUNT. In Scotch Law. Ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have the power by virtue of a Scotch Act of Parliament passed in 1540. Erskine, Pract. book 1, tit. 1, § 14.

ACTUAL DAMAGES. The damages awarded for a loss or injury actually sustained; in contradistinction from damages implied by law, and from those awarded by way of punishment. See DAMAGES.

ACTUARIUS (Lat.). One who drew the acts or statutes.

One who wrote in brief the public acts.

An officer who had charge of the public baths; an officer who received the money for the soldiers, and distributed it among them; a notary.

An *actor*, which see. Du Cange.

ACTUARY. The manager of a joint stock company, particularly an insurance company. Penny Cyc.

A clerk, in some corporations vested with various powers.

In Ecclesiastical Law. A clerk who registers the acts and constitutions of the convocation.

ACTUM (Lat. *agere*). A deed; something done.

Datum relates to the time of the delivery of the instrument; *actum*, the time of making it; *factum*, the thing made. *Gestum* denotes a thing done without writing; *actum*, a thing done in writing. Du Cange. ACTUS.

ACTUS (Lat. *agere*, to do; *actus*, done).

In Civil Law. A thing done. See ACTUM.

In Roman Law. A servitude which carried the right of driving animals and vehicles across the lands of another.

It included also the *iter*, or right of passing across on foot or on horseback.

In English Law. An act of parliament. 8 Coke, 40.

A foot and horse way. Coke, Litt. 56 *a*.

AD (Lat.). At; by; for; near; on account of; to; until; upon.

AD ABUNDANTIOREM CAUTELAM (Lat.). For greater caution.

AD ALIUD EXAMEN (Lat.). To another tribunal. Calvinus, Lex.

AD CUSTAGIA. At the costs. Toullier; Cowel; Whishaw.

AD CUSTUM. At the cost. 1 Sharswood, Blackst. Comm. 314.

AD DAMNUM (Lat. *damnæ*). To the damage.

In Pleading. The technical name of that part of the writ which contains a statement of the amount of the plaintiff's injury.

The plaintiff cannot recover greater damages than he has laid in the *ad damnum*. 2 Greenleaf, Ev. § 260.

AD EXCAMBIUM (Lat.). For exchange; for compensation.

AD EXHÆREDITATIONEM. To the disherison, or disinheriting.

The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named *ad exhæreditationem*, &c. 3 Blackstone, Comm. 228; Fitzherbert, Nat. Brev. 55.

AD FACTUM PRÆSTANDUM. In Scotch Law. The name given to a class of obligations of great strictness.

A debtor *ad fac. præs.* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum*. Erskine, Inst. lib. 3, tit. 3, § 62; Kames, Eq. 216.

AD FIDEM. In allegiance. 2 Kent, Comm. 56. Subjects born in allegiance are said to be born *ad fidem*.

AD FILUM AQUÆ. To the thread of the stream; to the middle of the stream. 2 Cush. Mass. 207; 4 Hill, N. Y. 369; 2 N. H. 369; 2 Washburn, Real Prop. 632, 633; 3 Kent, Comm. 428 *et seq.*

A former meaning seems to have been, to a stream of water. Cowel; Blount. *Ad medium filum aquæ* would be etymologically more exact, 2 Eden, Inj. 260, and is often used; but the common use of *ad filum aquæ* is undoubtedly to the thread of the stream. 3 Summ. C. C. 170; 1 M'Cord, So. C. 580; 3 Kent, Comm. 431; 20 Wend. N. Y. 149; 4 Pick. Mass. 272.

AD FILUM VIÆ (Lat.). To the middle of the way. 8 Metc. Mass. 260.

AD FIRMAM. To farm.

Derived from an old Saxon word denoting rent; according to Blackstone, occurring in the phrase, *dedi concessi et ad firmam tradidi* (I have given, granted, and to farm let). 2 Sharswood, Blackst. Comm. 317. *Ad firmam noctis* was a fine or penalty equal in amount to the estimated cost of entertaining the king for one night. Cowel. *Ad feodi firmam*, to fee farm. Spelman, Gloss.; Cowel.

AD INQUIRENDUM (Lat. for inquiry).

In Practice. A judicial writ, commanding inquiry to be made of any thing relating to a cause depending in court.

AD INTERIM (Lat.). In the mean time.

An officer is sometimes appointed *ad interim*, when the principal officer is absent, or for some cause incapable of acting for the time.

AD LARGUM. At large: as, title at large; assize at large. See Dane, Abr. c. 144, art. 16, § 7.

AD LITEM (Lat. *lites*). For the suit.

Every court has the power to appoint a guardian *ad litem*. 2 Kent, Comm. 229; 2 Sharswood, Blackst. Comm. 427.

AD LUCRANDUM VEL PERDENDUM. For gain or loss.

AD MAJORAM CAUTELAM (Lat.). For greater caution.

AD NOCUMENTUM (Lat.). To the hurt or injury.

In an assize of nuisance, it must be alleged by the plaintiff that a particular thing has been done *ad nocumentum liberi tenementiari* (to the injury of his freehold). 3 Blackstone, Comm. 221.

AD OSTIUM ECCLESIÆ (Lat.). At the church-door.

One of the five species of dower formerly recognized at the common law. 1 Washburn, Real Prop. 149; 2 Blackstone, Comm. 132.

AD QUÆRIMONIAM. On complaint of.

AD QUEM (Lat.). To which.

The correlative term to *a quo*, used in the computation of time, definition of a risk, &c., denoting the end of the period or journey.

The *terminus a quo* is the point of beginning or departure; the *terminus ad quem*, the end of the period or point of arrival.

AD QUOD DAMNUM (Lat.). What injury.

A writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked. Whishaw; Fitzherbert, Nat. Brev. 221; Termes de la Ley.

AD RATIONEM PONERE. To cite a person to appear.

AD SECTAM. At the suit of.

It is commonly abbreviated. It is used where it is desirable to put the name of the defendant first, as in some cases where the defendant is filing his papers; thus, Roe *ads.* Doe, where Doe is plaintiff and Roe defendant. It is found in the indexes to cases decided in some of our older American books of reports, but has become pretty much disused.

AD TERMINUM QUI PRÆTERIT. A writ of entry which formerly lay for the lessor or his heirs, when a lease had been made of lands and tenements, for term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant, or other person possessing the same. Fitzherbert, Nat. Brev. 201.

The remedy now applied for holding over is by ejectment, or under local regulations, by summary proceedings.

AD TUNC ET IBIDEM. In Pleading. The technical name of that part of an indictment containing the statement of the subject-matter's "then and there being found." Bacon, Abr. *Indictment*, G 4; 1 No. C. 93.

2. In an indictment, the allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words *et ad tunc et ibidem*, and the effect of these words is equivalent to an actual repetition of the time and place. The *ad tunc et ibidem* must be added to every material fact in an indictment. Staund. 95. Thus, an indictment which alleged that J. S. at a certain time and place made an assault upon J. N., *et eum cum gladio felonicè percussit*, was held bad, because it was not said, *ad tunc et ibidem percussit*. Dy. 68, 69. And where, in an indictment for murder, it was stated that J. S. at a certain time and place, having a sword in his right hand, *percussit* J. N., without saying *ad tunc et ibidem percussit*, it was held insufficient; for the time and place laid related to the having the sword, and consequently it was not said when or where the stroke was given. Croke, Eliz. 738; 2 Hale, Pl. Cr. 178. And where the indictment charged that A. B. at N., in the county aforesaid, made an assault upon C. D., of F., in the county aforesaid, and him *ad tunc et ibidem quodam gladio percussit*, this indictment was held to be bad, because two places being named before, if it referred to both, it was impossible; if only to one, it must be to the last, and then it was insensible. 2 Hale, Pl. Cr. § 180.

AD VALOREM (Lat.). According to the valuation.

Duties may be specific or *ad valorem*. *Ad valorem* duties are always estimated at a certain per cent. on the valuation of the property. 3 U. S. Stat. at Large, 732; 24 Miss. 501.

AD VITAM AUT CULPAM (For life or until misbehavior).

Words descriptive of a tenure of office "for life or good behavior," equivalent to *quamdiu bene se gesserit*.

ADDICERE (Lat.). **In Civil Law.** To condemn. Calvinus, Lex.

Addictio denotes a transfer of the goods of a deceased debtor to one who assumes his liabilities. Calvinus, Lex. Also used of an assignment of the person of the debtor to the successful party in a suit.

ADDITION (Lat. *additio*, an adding to). Whatever is added to a man's name by way of title or description, as additions of mystery, place, or degree. Cowel; Termes de la Ley; 10 Wentworth, Plead. 371; Salk. 5; 2 Ld. Raym. 988; 1 Wils. 244.

Additions of estate are esquire, gentleman, and the like.

These titles can, however, be claimed by none, and may be assumed by any one. In Nash v. Battersby (2 Ld. Raym. 986; 6 Mod. 80), the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then

not the person named in the count. He should have replied that he is a gentleman.

Additions of mystery are such as scrivener, painter, printer, manufacturer, &c.

Additions of places are descriptions by the place of residence, as A. B. of Philadelphia, and the like. See Bacon, Abr. *Addition*; Doctr. Plac. 71; 2 Viner, Abr. 77; 1 Lilly, Reg. 39; 1 Metc. Mass. 151.

2. The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed. 2 Leach, Cr. Cas. 4th ed. 861; 10 Cush. Mass. 402. And if an addition is stated, it need not be proved. 2 Leach, Cr. Cas. 4th ed. 547; 2 Carr. & P. 230. But where a defendant was indicted for marrying E. C., "widow," his first wife being alive, it was held that the addition was material. 1 Mood. Cr. Cas. 303; 4 Carr. & P. 579. At common law there was no need of addition in any case, 2 Ld. Raym. 988; it was required only by stat. 1 Hen. V. c. 5, in cases where process of outlawry lies. In all other cases it is only a description of the person, and common reputation is sufficient. 2 Ld. Raym. 849. No addition is necessary in a *Homine Replegiando*. 2 Ld. Raym. 987; Salk. 5; 1 Wils. 244, 245; 6 Coke, 67.

In French Law. A supplementary process to obtain additional information. Guyot, *Répert.*

ADDITIONALES. Additional terms or propositions to be added to a former agreement.

ADDRESS. In Equity Pleading. That part of a bill which contains the appropriate and technical description of the court where the plaintiff seeks his remedy. Cooper, Eq. Plead. 8; Barton, Suit in Eq. 26; Story, Eq. Plead. § 26; Van Heythuysen, Eq. Draft. 2.

In Legislation. A formal request addressed to the executive by one or both branches of the legislative body, requesting him to perform some act.

It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment. It is not provided for in the Constitution of the United States; and even in those states where the right exists it is exercised but seldom, and generally with great unwillingness.

ADELANTADO. In Spanish Law. The military and political governor of a frontier province. His powers were equivalent to those of the president of a Roman province. He commanded the army of the territory which he governed, and, assisted by persons learned in the law, took cognizance of the civil and criminal suits that arose in his province. This office has long since been abolished.

ADEMPTION (Lat. *ademptio*, from *adimere*, to take away). The extinction or withholding of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.

2. The question of ademption of *a general legacy* depends entirely upon the intention of the testator, as inferred from his acts under the rules established in law. Where the relations of the parties are such that the legacy is, in law, considered as a portion, an advancement during the life of the testator will be presumed an ademption, at least, to the extent of the amount advanced, 5 Mylne & C. Ch. 29; 3 Hare, Ch. 509; 10 Ala. N. S. 72; 12 Leigh, Va. 1; and see 3 Clark & F. Hou. L. 154; 18 Ves. Ch. 151, 153; but not where the advancement and portion are not *ejusdem generis*, 1 Brown, Ch. 555; 1 Roper, Leg. 375; or where the advancement is contingent and the portion certain, 2 Atk. Ch. 493; 3 Mylne & C. Ch. 374; or where the advancement is expressed to be in *lieu* of, or *compensation* for, an interest, 1 Ves. Ch. 257; or where the bequest is of uncertain amount, 15 Ves. Ch. 513; 4 Brown, Ch. 494; but see 2 Hou. L. Cas. 131; or where the legacy is absolute and the advancement for life merely, 2 Ves. sen. Ch. 38; 7 Ves. Ch. 516; or where the devise is of real estate. 3 Younge & C. Exch. 397.

But where the testator was not a parent of the legatee, nor standing *in loco parentis*, the legacy is not to be held a portion, and the rule as to ademption does not apply, 2 Hare, Ch. 424; 2 Story, Eq. Jur. § 1117, except where there is a bequest for a particular purpose and money is advanced by the testator for the same purpose. 2 Brown, Ch. 166; 7 Ves. Ch. 516; 1 Ball & B. Ch. Ir. 303; see 3 Atk. Ch. 181; 6 Sim. Ch. 528; 3 Mylne & C. 359; 2 P. Will. Ch. 140; 1 Pars. Eq. Cas. Penn. 139; 15 Pick. Mass. 133; 1 Roper, Leg. c. 6.

3. The ademption of a *specific* legacy is effected by the extinction of the thing or fund, without regard to the testator's intention, 3 Brown, Ch. 432; 2 Cox, Ch. 182; 3 Watts, Penn. 338; 1 Roper, Leg. 329; and see 6 Pick. Mass. 48; 14 *id.* 318; 16 *id.* 133; 2 Halst. N. J. 414; but not where the extinction of the specific thing is by act of law and a new thing takes its place, Forr. Exch. 226; Ambl. Ch. 59; or where a breach of trust has been committed or any trick or device practised with a view to defeat the specific legacy, 2 Vern. Ch., Rathby ed. 748 n.; 8 Sim. Ch. 171; or where the fund remains the same in substance, with some unimportant alterations, 1 Cox, Ch. 427; 3 Brown, Ch. 416; 3 Mylne & K. Ch. 296; or where the testator lends the fund on condition of its being replaced. 2 Brown, Ch. 113.

Republication of a will may prevent the effect of what would otherwise cause an ademption. 1 Roper, Leg. 351.

ADHERING (Lat. *adhærere*, to cling to). Cleaving to, or joining; as, adhering to the enemies of the United States.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to

consist only in levying war against them, or in *adhering* to their enemies, giving them aid and comfort.

A citizen's cruising in an enemy's ship, with a design to capture or destroy American ships, would be an adhering to the enemies of the United States. 4 State Trials, 328; Salk. 634; 2 Gilbert, Ev., Lofft ed. 798.

If war be actually levied, that is, a body of men be actually assembled for the purpose of effecting by force a treasonable enterprise, all those who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are to be considered as traitors. 4 Cranch, 126.

ADITUS (Lat. *adire*). An approach; a way; a public way. Coke, Litt. 56 *a*.

ADJACENT. Next to, or near.

Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining. 1 Cooke, Tenn. 128.

ADJOURN (Fr. *adjourner*). To put off; to dismiss till an appointed day, or without any such appointment. See ADJOURNMENT.

ADJOURNED TERM. A continuation of a previous or regular term. 4 Ohio St. 473; 22 Ala. N. S. 27. The Massachusetts General Statutes, c. 112, § 26, provide for holding an adjourned law term from time to time.

ADJOURNMENT. The dismissal by some court, legislative assembly, or properly authorized officer, of the business before them, either finally (which, as popularly used, is called an adjournment *sine die*, without day), or to meet again at another time appointed (which is called a temporary adjournment).

The constitution of the United States, art. 1, s. 5, 4, directs that "neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting." See Comyns, Dig.; Viner, Abr.; Dict. de Jur.

In Civil Law. A calling into court; a summoning at an appointed time. Du Cange.

ADJOURNMENT DAY. In English Practice. A day appointed by the judges at the regular sittings for the trial of causes at *nisi prius*.

ADJOURNMENT DAY IN ERROR. In English Practice. A day appointed some days before the end of the term at which matters left undone on the affirmance day are finished. 2 Tidd, Pract. 1224.

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again. Cowel; Spelman, Gloss.; Sharswood, Blackst. Comm. 186.

ADJUDICATAIRE. In Canadian Law. A purchaser at a sheriff's sale. See 1 Low C. 241; 10 *id.* 325.

ADJUDICATION. In Practice. A judgment; giving or pronouncing judgment in a case.

In Scotch Law. A process for transferring the estate of a debtor to his creditor. Erskine, Inst. lib. 2, tit. 12, §§ 39–55; Bell, Dict., Shaw ed. 944.

It may be raised not only on a decree of court, but also where the debt is for a liquidated sum. The execution of a summons and notice to the opposite party prevents any transfer of the estate. Every creditor who obtains a decree within a year and a day is entitled to share with the first creditor, and, after ten years' possession under his adjudication, the title of the creditor is complete. Paterson, Comp. 1137, n. The matter is regulated by statute 1672, c. 19, Feb. 26, 1684. See Erskine, lib. 2, c. 12, §§ 15, 16.

ADJUNCTION (Lat. *adjungere*, to join to).

In Civil Law. The attachment or union permanently of a thing belonging to one person to that belonging to another. This union may be caused by *inclusion*, as if one man's diamond be set in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, as when one paints a picture on another's canvas.

In these cases, as a general rule, the accessory follows the principal: hence those things which are attached to the things of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which, although an accession, drew to itself the canvas, on account of the importance which was attached to it. Inst. 2. 1. 34; Dig. 41. 1. 9. 2. See 2 Blackstone, Comm. 404; 1 Bouvier, Inst. n. 499.

ADJUNCTS. Additional judges sometimes appointed in the High Court of Delegates. See Shelford, Lun. 310.

ADJUSTMENT. In Insurance. The determining of the amount of a loss. 2 Phillips, Ins. §§ 1814, 1815.

There is no specific form essentially requisite to an adjustment. To render it binding, it must be intended, and understood by the parties to a policy, to be absolute and final. It may be made by indorsement on the policy, or by payment of the loss, or the acceptance of an abandonment. 2 Phillips, Ins. § 1815; 4 Burr. 1966; 1 Campb. 134, 274; 4 Taunt. 725; 13 La. 13; 4 Metc. Mass. 270; 22 Pick. Mass. 191. If there is fraud by either party to an adjustment, it does not bind the other. 2 Phillips, Ins. § 1316; 2 Johns. Cas. N. Y. 233; 3 Campb. 319. If one party is led into a material mistake of fact by fault of the other, the adjustment will not bind him. 2 Phillips, Ins. § 1817; 2 East, 469; 2 Johns. N. Y. 157; 8 *id.* 334; 4 *id.* 331; 9 *id.* 405; 2 Johns. Cas. N. Y. 233.

The amount of a loss is governed by that of the insurable interest, so far as it is

covered by the insurance. See INSURABLE INTEREST; ABANDONMENT.

ADMEASUREMENT OF DOWER. **In Practice.** A remedy which lay for the heir on reaching his majority, to rectify an assignment of dower made during his minority, by which the doweress had received more than she was legally entitled to. 2 Blackstone, Comm. 136; Gilbert, Uses, 379.

The remedy is still subsisting, though of rare occurrence. See 1 Washburn, Real Prop. 225, 226; 1 Pick. Mass. 314; 2 Ind. 336.

In some of the states, the special proceeding which is given by statute to enable the widow to compel an assignment of dower, is termed an admeasurement of dower.

See, generally, DOWER; Fitzherbert, Nat. Brev. 148; Bacon, Abr. *Dower*, K; Coke, Litt. 39 *a*; 1 Washburn, Real Prop. 225, 226.

ADMEASUREMENT OF PASTURE. **In Practice.** A remedy which lay in certain cases for surcharge of common of pasture.

It lay where a common of pasture appurtenant or in gross was certain as to number; or where one had common appendant or appurtenant, the quantity of which had never been ascertained. The sheriff proceeded, with the assistance of a jury of twelve men, to admeasure and apportion the common as well of those who had surcharged as those who had not, and, *when the writ was fully executed*, returned it to the superior court. Termes de la Ley.

The remedy is now abolished in England, 3 Sharswood, Blackst. Comm. 239, n.; and in the United States. 3 Kent, Comm. 419.

ADMINICLE. **In Scotch Law.** Any writing or deed introduced for the purpose of proof of the tenor of a lost deed to which it refers. Erskine, Inst. lib. 4, tit. 1, § 55; Stair, Inst. lib. 4, tit. 32, §§ 6, 7.

In English Law. Aid; support. Stat. 1 Edw. IV. c. 1.

In Civil Law. Imperfect proof. Merlin, *Répert.*

ADMINICULAR EVIDENCE. **In Ecclesiastical Law.** Evidence brought in to explain and complete other evidence. 2 Lee, Eccl. 595.

ADMINISTERING POISON. An offence of an aggravated character, punishable under the various statutes defining the offence.

The stat. 9 G. IV. c. 31, s. 11, enacts "that if any person unlawfully and maliciously shall *administer*, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive things," &c., every such offender, &c. In a case which arose under this statute, it was decided that, to constitute the act of administering the poison, it was not absolutely necessary there should have been a delivery to the party poisoned, but that if she took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was an administering. 4 Carr. & P. 369; 1 Mood. Cr. Cas. 114.

The statute 7 Will. IV. & 1 Vict. c. 85 enacts that "whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing," shall be guilty of felony. Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute. 1 Dearsl. & B. Cr. Cas. 127, 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, but it must also appear that the drug administered was either a "poison" or a "noxious thing."

ADMINISTRATION (Lat. *administrare*, to assist in).

Of Estates. The management of the estate of an intestate, or of a testator who has no executor. 2 Blackstone, Comm. 494; 1 Williams, Ex. 330. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, &c. in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

At common law, the real estate of an intestate goes to his heirs; the personal, to his administrator. The fundamental rule is that all just debts shall be paid before any further disposition of the property. Coke, 2d Inst. 398. Originally, the king had the sole power of disposing of an intestate's goods and chattels. This power he early transferred to the bishops or ordinaries; and in England it is still exercised by their legal successors, the ecclesiastical courts, who appoint administrators and superintend the administration of estates. 4 Burns, Eccl. Law, 291; 2 Fonblanque, Eq. 313; 1 Williams, Ex. 331.

2. *Ad colligendum.* That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration, for collecting the assets of foreigners. It is taken out in the country where the assets are locally situate. Kent, Comm. 43 *et seq.*; 1 Williams, Ex., Am. Notes; 14 Ala. 829.

Cæterorum. See CÆTERORUM.

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will. Willard, Ex.; 2 Bradf. Surr. N.Y. 22. The residuary legatee is appointed such administrator rather than the next of kin. 2 Phill. Ch. 54, 310; 1 Ventr. Ch. 217; 4 Leigh, Va. 152; 2 Add. Penn. 352.

3. *De bonis non.* That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator. Bacon, Abr. *Executors*,

B 1; Rolle, Abr. 907; 22 Miss. 47; 27 Ala. 273; 9 Ind. 342; 4 Sneed, Tenn. 411; 31 Miss. 519; 29 Vt. 170; 11 Md. 412.

De bonis non cum testamento annexo. That which is granted when an executor dies leaving a part of the estate unadministered. Comyns, Dig. Adm. B 1.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. It is generally granted when the next of kin is beyond sea, lest the goods perish or the debts be lost. In England, it is not determined by the executor's dying abroad. 4 Hagg. Eccl. 360; 3 Bos. & P. 26.

Durante minori ætate. That which is granted when the executor is a minor. It continues until the minor attains his lawful age to act, which at common law is seventeen years. Godolph. 102; 5 Coke, 29. When an infant is sole executor, the statute 38 Geo. III. c. 87, s. 6 provides that probate shall not be granted to him until his full age of twenty-one years, and that *adm. cum test. annexo* shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell *bona peritura*, and perform such other acts as require immediate attention. He may sue and be sued. Bacon, Abr. *Executor*, B 1; Croke, Eliz. 718; 2 Sharswood, Blackst. Comm. 503; 5 Coke, 29.

4. *Foreign administration.* That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted abroad give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority. 5 Ves. Ch. 44; 9 Cranch, 151; 12 Wheat. 169; 2 Root, Conn. 462; 20 Mart. La. 232; 1 Dall. Penn. 456; 1 Binn. Penn. 63; 27 Ala. 273; 9 Tex. 13; 21 Mo. 434; 29 Miss. 127; 4 Rand. Va. 158; 10 Yerg. Tenn. 283; 5 Me. 261; 35 N. H. 484; 4 McLean, C. C. 577; 15 Pet. 1; 13 How. 458. Hence, when persons are domiciled and die in one country as A, and have personal property in another as B, the authority must be had in B, but exercised according to the laws of A. Story, Confl. Laws, 23, 447; 15 N. H. 137; 15 Mo. 118; 5 Md. 467; 4 Bradf. Surr. N. Y. 151, 249; and see DOMICILE.

There is no legal privity between administrators in different states. The principal administrator is to act in the intestate's domicile, and the ancillary is to collect claims and pay debts in the foreign jurisdiction and pay over the surplus to his principal. 2 Metc. Mass. 114; 3 Hagg. Eccl. 199; 6 Humph. Tenn. 116; 21 Conn. 577; 19 Penn. St. 476; 3 Day, Conn. 74; 1 Blatchf. & H. Dist. Ct. 309; 23 Miss. 199; 2 Curt. Eccl. 241; 1 Rich. So. C. 116.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state. 5 Ired. No. C. 421; 2 B. Monr. Ky. 12; 18 *id.* 582; 4 Call, Va. 89; 15 Pet. 1; 7 Gill, Md. 95; 12 Vt. 589. So it has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state. 2 Ala. 429; 18 Miss. 607; 2 Sandf. Ch. N. Y. 173. See CONFLICT OF LAWS.

5. *Pendente lite.* That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates. 2 P. Will. Ch. 589; 2 Atk. Ch. 286; 2 Cas. *temp.* Lee, 258; 1 Hagg. Eccl. 313; 26 N. H. 533; 9 Tex. 13; 16 Ga. 13. He may maintain suits, but cannot distribute the assets. 1 Ves. sen. Ch. 325; 2 Ves. & B. Ch. Ir. 97; 1 Ball & B. Ch. Ir. 192; 7 Md. 282.

Public. That which the public administrator performs. This happens in many of the states by statute in those cases where persons die intestate, leaving any who are entitled to apply for letters of administration. 3 Bradf. Surr. N. Y. 151; 4 *id.* 252.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of 31 Edw. III. c. 11, and 21 Hen. VIII. c. 5, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate. 1 Sneed, Tenn. 430.

6. *Jurisdiction* over administrations is in England lodged in the ecclesiastical courts, and these courts delegate the power of administering by *letters* of administration. In the United States, administration is a subject charged upon courts of civil jurisdiction. A perplexing multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, registrar of wills, &c. Williams, Ex. 237, notes; 8 Cranch, 536; 12 Gratt. Va. 85; 1 Watts & S. Penn. 396; 11 Ohio, 257; 22 Ga. 431; 29 Miss. 127; 2 Gray, Mass. 228; 2 Jones, No. C. 387. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts. 2 Kent, Comm. 410; 9 Dan. Ky. 91; 4 Johns. Ch. N. Y. 552; 4 Md. 1; 11 Serg & R. Penn. 432; 7 Paige, Ch. N. Y. 112; 1 Green, N. J. 480; 1 Hill, N. Y. 130; 5 Miss. 638; 12 *id.* 707; 30 *id.* 472.

Death of the intestate must have taken place, or the court will have no jurisdiction. A decree of the court is *prima facie* evidence of his death, and puts the burden of disproof upon the party pleading in abatement, 3 Term, 130; 26 Barb. N. Y. 383; 18 Ohio, 268; which cases overrule the statements in Greenleaf, Ev. § 41; 1 Jarman, Wills, 24, Am. note.

7. The *formalities* and requisites in regard to valid appointments and rules, as to notice, defective proceedings, &c. are widely various in the different states. Some of the later cases on the subject are these: 26 Mo. 332

28 Vt. 819; 28 Ala. N. s. 164, 218; 29 *id.* 510; 1 Bradf. Surr. N. Y. 182; 2 *id.* 200; 16 N. Y. 180; 4 Ind. 355; 10 *id.* 60; 18 Ill. 59; 31 Miss. 430; 12 La. Ann. 44. If letters appear to have been unduly granted, or to an unfaithful person, they will be revoked. 9 Gill, Md. 463; 12 Tex. 100; 18 Barb. N. Y. 24; 14 Ohio, 268; 4 Sneed, Tenn. 263.

The personal property of a decedent is appropriated to the payment of his debts, so far as required, and, until exhausted, must be first resorted to by creditors. And, by certain statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the deceased is not sufficient to pay his debts. 1 Bradf. Surr. N. Y. 10, 182, 234; 2 *id.* 50, 122, 157; 29 Ala. N. s. 210, 542; 4 Mich. 308; 4 Ind. 468; 18 Ill. 519. The purchasers at such a sale get as full a title as if they had been distributees; but no warranty can be implied by the silence of the administrator. 2 Stockt. N. J. 206; 20 Ga. 588; 13 Tex. 322; 30 Miss. 147, 502; 31 *id.* 348, 430. And a fraudulent sale will be annulled by the court. 16 N. Y. 174; 2 Bradf. Surr. N. Y. 200. See ASSETS.

Insolvent estates of intestate decedents are administered under different systems prescribed by the statutes of the various states. 4 R. I. 41; 34 N. H. 124, 381; 35 *id.* 484; 1 Sneed, Tenn. 351. See, generally, Raff; Redfield; Toller; Williams; Willard on *Executors*; Blackstone; Kent, *Commentaries;* Story, *Conflict of Laws;* DOMICIL; CONFLICT OF LAWS.

Of Government. The management of the executive department of the government.

Those charged with the management of the executive department of the government.

ADMINISTRATOR. A person authorized to manage and distribute the estate of an intestate, or of a testator who has no executor.

In English law, administrators are the officers of the Ordinary appointed by him in pursuance of the statute, and their title and authority are derived exclusively from the ecclesiastical judge, by grants called letters of administration. Williams, Ex. 331. At first the Ordinary was appointed administrator under the statute of Westm. 2d. Next, the 31 Edw. III. c. 11 required the Ordinary to appoint the next of kin and the relations by blood of the deceased. Next, under the 21 Hen. VIII., he could appoint the widow, or next of kin, or both at his discretion.

2. *The appointment* of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void *ab initio*, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a competent executor appointed under it. 8 Cranch, 23; 11 Mass. 512; 21 Barb. N. Y. 311; 1 Dane, Abr. 556–561. But, in general, anybody can be administrator who can make a contract. An infant or *feme covert* cannot. So, improvident persons, drunkards, gamblers, and the like, are disqualified by statute. 6 N. Y. 443; 14 *id.* 449.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence.

3. Order of appointment.—*First in order of appointment.*—The husband has his wife's personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the judge it may be refused her, or she may be joined with another. 2 Blackstone, Comm. 504; Williams, Ex. 342; 18 Pick. Mass. 26; 10 Md. 52.

Second in order of appointment are the next of kin. Kinship is computed by the civil-law rule. The English order, which is adopted in some states, is, *first*, husband or wife; *second*, sons or daughters; *third*, grandsons or granddaughters; *fourth*, great-grandsons or great-granddaughters; *fifth*, father or mother; *sixth*, brothers or sisters; *seventh*, grandparents; *eighth*, uncles, aunts, nephews, nieces, &c. 1 Atk. Ch. 454; 1 P. Will. Ch. 41; 2 Add. Eccl. 352; 24 Eng. L. & Eq. 593; 12 La. Ann. 610; 2 Kent, Comm. 514.

In New York the order is, the widow; the children; the father; the brothers; the sisters; the grandchildren; any distributee being next of kin. 2 N. Y. Rev. Stat. 74; 1 Bradf. Surr. N. Y. 64, 200, 259; 2 *id.* 281, 322; 4 *id.* 13, 173.

When two or three are in the same degree, the probate judge or surrogate may decide between them; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority concerning equigradal parties, which custom or statute has made. *Males* are generally preferred to females, though from no superior right. *Elder* sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So *solvent* persons to insolvent, though the latter may administer. So *business* men to others. So *unmarried* to married women. So relations of the *whole* blood to those of the half blood. So *distributees* to all other kinsmen.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it. In Massachusetts an administrator cannot be appointed within thirty days, so as to deprive the widow and the next of kin. In general, see Williams, Ex. 251; 1 Salk. 36; 15 Barb. N. Y. 302; 6 N. Y. 443; 5 Cal. 63; 4 Jones, No. C. 274.

4. *Third in order of appointment.*—Creditors (and, ordinarily, first the largest one) have the next right. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. In the United States a creditor may make oath of his account to prove his debt, but no rule esta-

blishes the size of the debt necessary to be proved before appointment. 1 Cush. Mass. 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens; but this is by custom only, and in England there is no such rule.

Co-administrators, in general, must be joined in suing and in being sued; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they have joint power. Bacon, Abr. Ex. C 4; 11 Viner, Abr. 358; Comyns, Dig. *Administration* (B 12); 1 Dane, Abr. 383; 2 Litt. Ky. 315. If one is removed by death, or otherwise, the whole authority is vested in the survivors. 6 Yerg. Tenn. 167; 5 Gray, Mass. 341; 29 Penn. St. 265. Each is liable only for the assets which have come to his own hands, and is not liable for the torts of others except when guilty of negligence or connivance. 1 Strange, 20; 2 Ves. Ch. 267; 2 Moll. c. 156; 8 Watts & S. Penn. 143; 8 Ga. 388; 5 Conn. 19; 24 Penn. St. 413; 4 Wash. C. C. 186; 3 Sandf. Ch. N. Y. 99; 3 Rich, Eq. So. C. 132. As to the several powers of each, see 10 Ired. No. C. 263; 9 Paige, Ch. N. Y. 52; 35 Me. 279; 4 Ired. No. C. 271; 28 Penn. St. 471; 20 Barb. N. Y. 91; 16 Ill. 329.

5. *The duty of an administrator* is in general to do the things set forth in his bond; and for this he is generally obliged to give security. Williams, Ex. 439, Am. notes; 4 Yerg. Tenn. 20; 5 Gray, Mass. 67. He must publish a notice of his appointment, as the law directs. Usually he must render an inventory. In practice, book accounts and unliquidated damages are not inventoried, but debts evidenced by mercantile paper, bonds, notes, &c., are. 1 Stockt. N. J. 572; 23 Penn. St. 223.

He must collect the outstanding claims and convert property into money. 2 Kent, Comm. 415; 18 Miss. 404; Taml. 279; 1 Mylne & C. Ch. 8; 6 Gill & J. Md. 171; 4 Edw. Ch. N. Y. 718; 4 Fla. 112; 20 Barb. N. Y. 100; 25 Miss. 422. As to what constitutes assets, see ASSETS.

For this purpose he acquires a property in the assets of the intestate. His right is not a personal one, but an incident to his office. 9 Mass. 74, 352; 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name. Williams, Ex. 747; 4 Hill, N. Y. 57; 17 Vt. 176; 4 Mich. 170, 132; 26 Mo. 76. This happens by *relation* to the day of death. 12 Metc. Mass. 425; 7 Jur. 492; 18 Ark. 424; 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed; but if he inventories it, it is cancelled by the giving of his bond. 11 Mass. 268.

6. He may declare, as administrator, wherever the money when received will be assets; and he may sue on a judgment once obtained, as if the debt were his own. He may summon supposed debtors or holders of his intestate's property to account, and has the right to an investigation in equity. In equity he may recover fraudulently-conveyed real estate, for the benefit of creditors. He may also bind the estate by arbitration. 4 Harr. N. J. 457; 35 Me. 357. He may assign notes, &c. See 35 N. H. 421; 28 Vt. 661; 2 Stockt. N. J. 320; 29 Miss. 70; 3 Ind. 369; 18 Ill. 116; 28 Penn. St. 459; 2 Patt. & H. Va. 462; 1 Sandf. N. Y. 132. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, when his intestate is a partner, until the debts are paid. 1 Bradf. Surr. N. Y. 24, 165. He must pay the intestate's debts in the order prescribed by law. There is no universal order of payment adopted in the United States; but debts of the last sickness and the funeral are preferred debts everywhere. Bacon, Abr. Ex. L 2; Williams, Ex. 679, 1213; 2 Kent, Comm. 416; 4 Leigh, Va. 35; 10 B. Monr. Ky. 147; 7 Ired. Eq. No. C. 62; 23 Miss. 228.

Next to these, as a general rule, debts due the state or the United States are privileged. The act of burial and its accompaniments may be done by third parties who have a preferred claim therefor, if reasonable. 3 Nev. & M. 512; 8 Ad. & E. 348. But the amount is often disputed. 1 Barnew. & Ad. 260; R. M. Charlt. Ga. 56. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets. 2 Kent, Comm. 419.

7. The statute prescribes a fixed time within which the administrator must ascertain the solvency of the estate. During this time he cannot be sued, unless he waives the right. 2 Nott & M'C. So. C. 259; 2 Du. N. Y. 160; 6 McLean, C. C. 443. And if the commissioner deems the estate insolvent, parties dissatisfied may resort to a court and jury. If the administrator makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of facts. 3 Pick. Mass. 261; 2 Gratt. Va. 319. In some states, debts cannot be brought in before due, if the estate is solvent.

The administrator may plead the statute of limitations, but he is not bound to, if satisfied that the debt is just. 1 Whart. Penn. 66; 1 Atk. Ch. 526; 9 Dowl. & R. 40; 11 N. H. 208; 3 Metc. Mass. 369; 9 Mo. 262; 28 Ala. N. S. 484; 10 Md. 242; 23 Penn. St. 95; 8 How. 402; 10 Humphr. Tenn. 301; 4 Fla. 481. He is, in some states, chargeable with interest, *first*, when he receives it upon assets put out at interest; *second*, when he uses them himself; *third*, when he has large debts paid him which he ought to have put out at interest. 5 N. H. 497; 1 Pick. Mass. 530; 13 Mass. 232. In some cases of need, as to relieve an estate from sale by the mortgagee, he may lend the estate-money and charge interest thereon. 10 Pick. Mass. 77. The widow's support is usually decreed by the judge. But the administrator is not liable for the education of infant children, or for

mourning-apparel for relatives and friends of the deceased. 11 Paige, Ch. N. Y. 265; 11 Serg. & R. Penn. 16.

He must distribute the residue amongst those entitled to it under direction of the court and according to law, deducting the amount of any advancements. 10 Watts, Penn. 54; 11 Johns. N. Y. 91; 6 Ired. No. C. 4.

The great rule is, that personal property is regulated by the law of the domicile. The rights of the distributees vest as soon as the intestate dies, but cannot be sued for till the lapse of the statute period of distribution. See 118th Novel of Justinian, Cooper's trans. 393; 2 P. Will. Ch. 447; 2 Story, Eq. Jur. § 1205; 20 Pick. Mass. 670; 12 Cush. Mass. 282; 31 Miss. 556. See DISTRIBUTION; CONFLICT OF LAWS.

8. *The liability* of an administrator is in general measured by the amount of assets. On his contracts he may render himself liable personally by his own contracts, or as administrator merely, according to the terms of his promise. 7 Taunt. 581; 7 Barnew. & C. 450. But to make him liable personally for contracts about the estate, a valid consideration must be shown. Yelv. 11; 3 Sim. Ch. 543; 2 Brod. & B. 460. And, in general, assets or forbearance will form the only consideration. 5 Mylne & C. Ch. 71; 9 Wend. N. Y. 273; 13 *id.* 557. But a bond of itself imports consideration; and hence a bond given by administrators to submit to arbitration is binding upon them personally. 8 Johns. N. Y. 120; 22 Miss. 161.

An administrator is liable for torts and for gross negligence in managing his intestate's property. This species of misconduct is called in law a *devastavit*. 2 Williams, Ex. 1529; 4 Hayw. Tenn. 134; 1 Dev. Eq. No. C. 516. Such is negligence in collecting notes or debts, 2 Green, Ch. N. J. 300; an unnecessary sale of property at a discount, 8 Gratt. Va. 140; paying undue funeral expenses, 1 Barnew. & Ad. 260; 2 Carr. & P. 207; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud, 2 Cox, Ch. 113; 4 Ves. Ch. 620; and he is sometimes made chargeable with compound interest in this country. 10 Pick. Mass. 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them. 5 Dan. Ky. 70; 6 Gill & J. Md. 186; Williams, Ex. 1567.

9. An administrator gets no pay in England, 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him. If too small a compensation be awarded him, he may appeal to a common-law court. 1 Edw. Ch. N. Y. 195; 4 Whart. 95; 20 Barb. N. Y. 91; 11 Md. 415; 3 Cal. 287; 7 Ohio St. 143. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts; but he may when the auctioneer is a state officer, and the sale public and *bona fide*. 2 Patt. & H. Va. 71; 9 Mass. 75; 4 Ind. 355; 6 Ohio St. 189.

ADMIRAL (Fr. *amiral*). A high officer or magistrate that hath the government of the king's navy, and the hearing of all causes belonging to the sea. Cowel. See ADMIRALTY.

The rank of admiral has not existed in the United States navy since its reorganization under the present constitution. By statute of July 16, 1862, the active lists of line-officers of the navy were divided into nine grades, of which the highest is that of rear-admiral.

ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal.

On the revival of commerce after the fall of the Western empire, and the conquest and settlement by the barbarians, it became necessary that some tribunal should be established that might hear and decide causes that arose out of maritime commerce. The rude courts established by the conquerors had properly jurisdiction of controversies that arose on land, and of matters pertaining to land, that being at the time the only property that was considered of value. To supply this want, which was felt by merchants and not by the government or the people at large, on the coast of Italy and the northern shores of the Mediterranean a court of consuls was established in each of the principal maritime cities. Contemporaneously with the establishment of these courts grew up the customs of the sea, partly borrowed, perhaps, from the Roman law, a copy of which had at that time been discovered at Amalfi, but more out of the usage of trade and the practice of the sea. These were collected from time to time, embodied in the form of a code, and published under the name of the *Consolato del Mare*. The first collection of these customs is said to be as early as the eleventh century; but the earliest authentic evidence we have of their existence is their publication, in 1266, by Alphonso X., King of Castile. 1 Pardessus, *Lois Maritimes*, 201.

2. On Christmas of each year, the principal merchants made choice of judges for the ensuing year, and at the same time of judges of appeal, and their courts had jurisdiction of all causes that arose out of the custom of the sea, that is, of all maritime causes whatever. Their judgments were carried into execution, under proper officers, on all movable property, ships as well as other goods, but an execution from these courts did not run against land. *Ordonnance de Valentia*, 1283, c. 1, §§ 22, 23.

When this species of property came to be of sufficient importance, and especially when trade on the sea became gainful and the merchants began to grow rich, their jurisdiction, in most maritime states, was transferred to a court of admiralty; and this is the origin of admiralty jurisdiction. The admiral was originally more a military than a civil officer, for nations were then more warlike than commercial. *Ordonnance de Louis XIV.*, liv. 1; 2 Brown, Civ. & Adm. Law, c. 1. The court had jurisdiction of all national affairs transacted at sea, and particularly of prize; and to this was added jurisdiction of all controversies of a private character that grew out of maritime employment and commerce; and this, as nations grew more commercial, became in the end its most important jurisdiction.

3. The admiralty is, therefore, properly the suc-

cessor of the consular courts, which were emphatically the courts of merchants and sea-going persons. The most trustworthy account of the jurisdiction thus transferred is given in the *Ordonnance de Louis XIV.*, published in 1631. This was compiled, under the inspiration of his great minister Colbert, by the most learned men of that age, from information drawn from every part of Europe, and was universally received at the time as an authoritative exposition of the common maritime law. Valin, Preface to his Commentaries; 3 Kent, Comm. 16. The changes made in the *Code de Commerce* and in the other maritime codes of Europe are unimportant and inconsiderable. This ordinance describes the jurisdiction of the admiralty courts as embracing all maritime contracts and torts arising from the building, equipment, and repairing of vessels, their manning and victualling, the government of their crews and their employment, whether by charter-party or bill of lading, from bottomry and insurance. This was the general jurisdiction of the admiralty: it took all the consular jurisdiction which was strictly of a maritime nature and related to the building and employment of vessels at sea.

In English Law. The court of the admiral.

4. This court, as at present organized, was erected by Edward III. It was held by the Lord High Admiral, whence it was called the High Court of Admiralty, or before his deputy, the Judge of the Admiralty, by which latter officer it has for a long time been exclusively held. It sits as two courts, with separate commissions, known as the Instance Court and the Prize Court, the former of which is commonly intended by the term admiralty. At its origin the jurisdiction of this court was very extensive, embracing all maritime matters. By the statutes 13 Rich. II. c. 5, and 15 Rich. II. c. 3, especially as explained by the common-law courts, their jurisdiction was much restricted. A violent and long-continued contest between the admiralty and common-law courts resulted in the establishment of the restriction, which continued until the statutes 3 & 4 Vict. c. 65 and 9 & 10 Vict. c. 99 materially enlarged its powers. See 2 Parsons, Marit. Law, 479, n.; 1 Kent, Comm. Lect. XVII.; 2 Gall. C. C. 398; 12 Wheat. 611; 1 Baldw. C. C. 544; Dav. Dist. Ct. 93; PRIZE COURT.

5. The *civil* jurisdiction of the court extends to *torts* committed on the high seas, including personal batteries, 4 C. Rob. Adm. 73; collision of ships, Abbott, Shipp. 230; restitution of possession from a claimant withholding unlawfully, 2 Barnew. & C. 244; 1 Hagg. 81, 240, 342; 2 Dods. Adm. 38; Edw. Adm. 242; 3 C. Rob. Adm. 93, 133, 213; 4 *id.* 275, 287; 5 *id.* 155; cases of piratical and illegal taking at sea and *contracts* of a maritime nature, including suits between part owners, 1 Hagg. 306; 3 *id.* 299; 1 Ld. Raym. 223; 2 *id.* 1235; 2 Barnew. & C. 248; for mariners' and officers' wages, 2 Ventr. 181; 3 Mod. 379; 1 Ld. Raym. 632; 2 *id.* 1206; 2 Strange, 858, 937; 1 *id.* 707; pilotage, Abbott, Shipp. 198, 200; bottomry and respondentia bonds, 6 Jur. 241; 3 Hagg. Adm. 66; 3 Term, 267; 2 Ld. Raym. 982; Rep. *temp.* Holt, 48; and salvage claims, 2 Hagg. Adm. 3; 3 C. Rob. Adm. 355; 1 W. Rob. Adm. 18.

The *criminal* jurisdiction of the court has been transferred to the Central Criminal Court by the 4 & 5 Will. IV. c. 36. It extended to all crimes and offences committed on the high seas, or within the ebb and flow of the tide and not within the body of a county.

6. The first step in the process in a plenary action may be the arrest of the person of the defendant, or of the ship, vessel, or furniture; in which cases the defendant must find bail, or *fidejussors* in the nature of bail, and the owner must give bonds or stipulations equal to the value of the vessel and her immediate earnings; or the first step may be a monition to the defendant. In 1840, the form of proceeding in this court was very considerably changed. The advocates, surrogates, and proctors of the Court of Arches were admitted to practice there; the proceedings generally were assimilated to those of the common-law courts, particularly in respect of the power to take *viva voce* evidence in open court; power to compel the attendance of witnesses and the production of papers; to ordering issues to be tried in any of the courts of Nisi Prius, and allowing bills of exception on the trial of such issues, and the grant of power to admiralty to direct a new trial of such issues; to make rules of court, and to commit for contempt. The judge may have the assistance of a jury, and in suits for collision he usually decides upon his own view of the facts and law, after having been assisted by, and hearing the opinion of, two or more Trinity masters.

7. A court of admiralty exists in Ireland; but the Scotch court was abolished by 1 Will. IV. c. 69. See VICE-ADMIRALTY COURTS.

In American Law. A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. 2 Parsons, Marit. Law, 508.

The court of original admiralty jurisdiction in the United States is the United States District Court. From this court causes may be removed, in certain cases, to the Circuit, and ultimately to the Supreme, Court. After a somewhat protracted contest, the jurisdiction of admiralty has been extended beyond that of the English admiralty court, and is said to be coequal with that of the English court as defined by the statutes of Rich. II., under the construction given them by the contemporaneous or immediately subsequent courts of admiralty. 2 Parsons, Marit. Law, 508. See 2 Gall. C. C. 398; Dav. Dist. Ct. 93; 3 Mas. C. C. 28; 1 Stor. C. C. 244; 2 *id.* 176; 12 Wheat. 611; 2 Cranch, 406; 4 *id.* 444; 3 Dall. 297; 6 How. 344; 17 *id.* 399, 477; 18 *id.* 267; 19 *id.* 82, 239; 20 *id.* 296, 583.

8. Its *civil* jurisdiction extends to cases of salvage, 2 Cranch, 240; 1 Pet. 511; 12 *id.* 72; bonds of bottomry, respondentia, or hypothecation of ship and cargo, 1 Curt. C. C. 340; 3 Sumn. C. C. 228; 1 Wheat. 96; 4 Cranch, 328; 8 Pet. 538; 18 How. 63; seamen's wages, 2 Parsons, Marit. Law, 509; seizures under the laws of impost, navigation, or trade, 1 U. S. Stat. at Large, 76; cases of prize or ransom, 3 Dall. 6; charter-parties, 1 Sumn. C. C. 551; 2 *id.* 589; 2 Stor. C. C. 81; Ware, Dist. Ct. 149; contracts of affreightment between different states or foreign ports, 2 Curt. C. C. 271; 2 Sumn. C. C.

567; Ware, Dist. Ct. 188, 263, 322; 6 How. 344; contracts for conveyance of passengers, 16 How. 469; 1 Blatchf. C. C. 560, 569; 1 Abbott, Adm. 48; 1 Newb. Adm. 494; contracts with material-men, 4 Wheat. 438; see 20 How. 393; 21 Bost. Law Rep. 601; jettisons, maritime contributions, and averages, 6 McLean, C. C. 573; 7 How. 729; 19 *id.* 162; 21 Bost. Law Rep. 87, 96; pilotage, 1 Mas. C. C. 508; 10 Pet. 108; 12 How. 299; see 2 Paine, C. C. 131; 9 Wheat. 1, 207; R. M. Charlt. Ga. 302, 314; 8 Metc. Mass. 332; 4 Bost. Law Rep. 20; surveys of ship and cargo, Story, Const. § 1665; 5 Mas. C. C. 465; 10 Wheat. 411; but see 2 Parsons, Marit. Law, 511, n.; and generally to all assaults and batteries, damages, and trespasses, occurring on the high seas. 2 Parsons, Marit. Law; see 2 Sumn. C. C. 1.

9. Its *criminal* jurisdiction extends to all crimes and offences committed on the high seas or beyond the jurisdiction of any country. See, as to jurisdiction generally, the article COURTS OF THE UNITED STATES, §§ **71–89, 57–62.**

A civil suit is commenced by filing a libel, upon which a warrant for arrest of the person, or attachment of his property if he cannot be found, even though in the hands of third persons, or a simple monition to appear, may issue; or, in suits *in rem*, a warrant for the arrest of the thing in question; or two or more of these separate processes may be combined. Thereupon bail or stipulations are taken if the party offer them.

In most cases of magnitude, oral evidence is not taken; but it may be taken, and it is the general custom to hear it in cases where smaller amounts are involved. The decrees are made by the court without the intervention of a jury.

In criminal cases the proceedings are similar to those at common law.

Consult the article COURTS OF THE UNITED STATES, §§ **71–89**; Conkling; Dunlap, *Admiralty Practice;* Sergeant; Story, *Constitution;* Abbott, *Shipping;* Parsons, *Maritime Law;* Kent, *Commentaries;* and the following cases, viz.: 2 Gall. C. C. 398; 5 Mas. C. C. 465; Dav. Dist. Ct. 93; 1 Baldw. C. C. 524; 4 How. 447; 6 *id.* 378; 12 *id.* 443; 20 *id.* 296, 393, 583; 21 *id.* 244, 248; 23 *id.* 209, 491.

ADMISSION (Lat. *ad*, to, *mittere*, to send).

In Practice. The act by which attorneys and counsellors become recognized as officers of the court and are allowed to practise. The qualifications required vary widely in the different states.

In Corporations or Companies. The act of a corporation or company by which an individual acquires the rights of a member of such corporation or company.

In trading and joint-stock corporations no vote of admission is requisite; for any person who owns stock therein, either by original subscription or by conveyance, is in general entitled to, and cannot be refused, the rights and privileges of a member. 3 Mass. 364; Dougl. 524; 1 Mann. & R. 529.

All that can be required of the person demanding a transfer on the books is to prove to the corporation his right to the property. See 8 Pick. Mass. 90.

In a mutual insurance company it has been held that a person may become a member by insuring his property, paying the premium and deposit-money, and rendering himself liable to be assessed according to the rules of the corporation. 2 Mass. 315.

ADMISSIONS. In Evidence. Concessions or voluntary acknowledgments made by a party of the existence or truth of certain facts.

As distinguished from confessions, the term is applied to civil transactions, and to matters of fact in criminal cases where there is no criminal intent. See CONFESSIONS.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period.

2. *Direct*, called also *express*, admissions are those which are made in direct terms.

Implied admissions are those which result from some act or failure to act of the party.

Incidental admissions are those made in some other connection, or involved in the admission of some other fact.

As to the *parties* by whom admissions must have been made to be considered as evidence:—

They may be made by a party to the record, or by one identified in interest with him. 9 Barnew. & C. 535; 7 Term, 563; 1 Dall. Penn. 65. Not, however, where the party of record is merely a nominal party and has no active interest in the suit. 1 Campb. 392; 2 *id.* 561; 2 Term, 763; 3 Barnew. & C. 421; 5 Pet. 580; 5 Wheat. 277; 7 Mass. 131; 9 Ala. N. S. 791; 20 Johns. N. Y. 142; 5 Gill & J. Md. 134.

3. They may be made by one of several having a joint interest, so as to be binding upon all. 2 Bingh. 306; 8 *id.* 309; 8 Barnew. & C. 36; 1 Stark. 488; 2 Pick. Mass. 581; 3 *id.* 291; 4 *id.* 382; 1 M'Cord, So. C. 541; 1 Johns. N. Y. 3; 7 Wend. N. Y. 441; 4 Conn. 336; 8 *id.* 268; 7 Me. 26; 5 Gill & J. Md. 144; 1 Gall. C. C. 635. Mere community of interest, however, as in case of co-executors, 1 Greenleaf, Ev. § 176; 4 Cow. N. Y. 493; 16 Johns. N. Y. 277; trustees, 3 Esp. 101; cotenants, 4 Cow. N. Y. 483; 15 Conn. 1, is not sufficient.

The interest in all cases must have subsisted at the time of making the admissions. 2 Stark. 41; 4 Conn. 544; 14 Mass. 245; 5 Johns. N. Y. 412; 1 Serg. & R. Penn. 526; 9 *id.* 47; 12 *id.* 328.

They may be made by any person interested in the subject-matter of the suit, though the suit be prosecuted in the name of another person as a cestui que trust. 1 Wils. 257; 1 Bingh. 45; but see 3 Nev. & P. 598; 6 Mann. & G. 261, on indemnifying creditor in an action against the sheriff. 4 East, 584; 7 Carr. & P. 629.

4. They may be made by a third person,

a stranger to the suit, where the issue is substantially upon the rights of such a person at a particular time, 1 Greenleaf, Ev. § 181; 2 Stark. 42; or who has been expressly referred to for information, 1 Campb. 366, n.; 3 Carr. & P. 532; or where there is a privity as ancestor and heir, 5 Barnew. & Ad. 223; 1 Bingh. N. C. 430; assignor and assignee, 54 Taunt. 16; 2 Pick. Mass. 536; 2 Me. 242; 10 *id.* 244; 3 Rawle, Penn. 437; 2 M'Cord, So. C. 241; 17 Conn. 399; intestate and administrator, 3 Bingh. N. C. 291; 1 Taunt. 141; grantor and grantee of land, 4 Johns. N. Y. 230; 7 Conn. 319; 4 Serg. & R. Penn. 174, and others.

They may be made by an agent, so as to bind the principal, Story, Ag. §§ 134–137, so far only, however, as the agent has authority, 1 Greenleaf, Ev. § 114, and not, it would seem, in regard to past transactions. 6 Mees. & W. Exch. 58; 11 Q. B. 46; 7 Me. 421; 4 Wend. N. Y. 394; 7 Harr. & J. Md. 104; 19 Pick. Mass. 220; 8 Metc. Mass. 142.

5. Thus, the admissions of the wife bind the husband so far only as she has authority in the matter, 1 Esp. 142; 4 Campb. 92; 1 Carr. & P. 621; 7 Term, 112; and so the formal admissions of an attorney bind his client. 7 Carr. & P. 6; 1 Mees. & W. Exch. 508; and see 2 Carr. & K. 216; 3 C. B. 608.

Implied admissions may result from assumed character, 1 Barnew. & Ald. 677; 2 Campb. 513; from conduct, 2 Sim. & S. Ch. 600; 6 Carr. & P. 241; 9 Barnew. & C. 78; 9 Watts, Penn. 441; from acquiescence, which is positive in its nature, 1 Sumn. C. C. 314; 4 Fla. 340; 3 Mas. C. C. 81; 2 Vt. 276; from possession of documents, in some cases. 5 Carr. & P. 75; 2 Stark. 140; 25 State Tr. 120.

6. In civil matters, constraint will not avoid admissions, if imposition or fraud were not made use of. As to the rule in criminal matters, see CONFESSIONS.

Admissions made in treating for an adjustment cannot be given in evidence where made under faith in a pending treaty. 7 Bingh. 101; 2 Campb. 106; 2 Pick. Mass. 290; 4 *id.* 374; 13 Ga. 406.

Judicial admissions, 1 Greenleaf, Ev. § 205; 2 Campb. 341; 5 Mass. 365; 5 Pick. Mass. 285, those which have been acted on by others, 3 Rob. La. 243; 17 Conn. 355; 13 Jur. 253, and in deeds as between parties and privies, 4 Pet. 1; 6 *id.* 611, are conclusive evidence against the party making them.

It frequently occurs in practice, that, in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without calling for proof of them.

These are usually reduced to writing, and the attorneys shortly add to this effect, namely, "We agree that the above facts shall on the trial of this cause be admitted, and taken as proved on each side;" and signing two copies now called "admissions" in the cause, each attorney takes one. Gresley, Eq. Ev. c. 2, p. 38.

7. In Pleading. The acknowledgment or recognition by one party of the truth of some matter alleged by the opposite party.

IN EQUITY.

Partial admissions are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

Plenary admissions are those which admit the truth of the matter without qualification, whether it be asserted as from information and belief or as from actual knowledge.

AT LAW.

In all pleadings in confession and avoidance, admission of the truth of the opposite party's pleading is made. Express admissions may be made of matters of fact only.

8. The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, &c., to proceed thus, "Because he says that, although it be true that," &c., repeating such of the allegations of the adverse party as are meant to be admitted. Lawes, Civ. Plead. 143, 144. See 1 Chitty, Plead. 600; Archbold, Civ. Plead. 215.

ADMITTANCE. In English Law. The act of giving possession of a copyhold estate. It is of three kinds: namely, upon a voluntary grant by the lord, upon a surrender by the former tenant, and upon descent.

ADMITTENDO IN SOCIUM. In English Law. A writ associating certain persons to justices of assize.

ADMONITION. A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that, should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, *Répert.*

The admonition was authorized as a species of punishment for slight misdemeanors.

ADNEPOS. The son of a great-great-grandson. Calvinus, Lex.

ADNEPTIS. The daughter of a great-great-granddaughter. Calvinus, Lex.

ADNOTATIO (Lat. *notare*). A subscription or signing.

In the civil law, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, called *adnotatio*. Code, 9. 16. 5; 4 Sharswood, Blackst. Comm. 187.

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues till twenty-one years complete.

ADOPTION. The act by which a person takes the child of another into his family, and treats him as his own.

A juridical act creating between two persons certain relations, purely civil, of paternity and filiation. 6 Demolombe, § 1.

Adoption was practised in the remotest antiquity, and was established to console those who had no

children of their own. Cicero asks, "*Quod est jus adoptionis?* nempe ut is *adoptit, qui neque procreare jam liberos possit*, et cum potuerit, sit expertus." At Athens, he who had adopted a son was not at liberty to marry without the permission of the magistrates. Gaius, Ulpian, and the Institutes of Justinian only treat of adoption as an act creating the paternal power. Originally the object of adoption was to introduce a person into the family and to acquire the paternal power over him. The adopted took the name of the adopter, and only preserved his own adjectively, as *Scipio Æmilianus; Cæsar Octavianus*, &c. According to Cicero, adoptions produced the right of succeeding to the name, the property, and the lares: "*hereditates nominis, pecuniæ, sacrorum secutæ sunt.*" *Pro Dom.* §§ 13, 35.

The first mode of adoption was in the form of a law passed by the *comitia curiata*. Afterwards, it was effected by the *mancipatio, alienatio per æs et libram*, and the *in jure cessio;* by means of the first the paternal authority of the father was dissolved, and by the second the adoption was completed. The *mancipatio* was a solemn sale made to the *emptor* in presence of five Roman citizens (who represented the five classes of the Roman people), and a *libripens*, or scalesman, to weigh the piece of copper which represented the price. By this sale the person sold became subject to the *mancipium* of the purchaser, who then emancipated him; whereupon he fell again under the paternal power; and in order to exhaust it entirely it was necessary to repeat the *mancipatio* three times: *si pater filium ter venum duit, filius a patre liber esto.* After the paternal power was thus dissolved, the party who desired to adopt the son instituted a fictitious suit against the purchaser who held him *in mancipium*, alleging that the person belonged to him or was subject to his paternal power; the defendant not denying the fact, the prætor rendered a decree accordingly, which constituted the *cessio in jure*, and completed the adoption. *Adoptantur autem, cum a parente in cujus potestate sunt, tertia mancipatione in jure ceduntur, atque ab eo, qui adoptat, apud eum apud quem legis actio est, vindicantur.* Gell. 5. 19.

Towards the end of the Republic another mode of adoption had been introduced by custom. This was by a declaration made by a testator, in his will, that he considered the person whom he wished to adopt as his son: in this manner Julius Cæsar adopted Octavius.

It is said that the adoption of which we have been speaking was limited to persons *alieni juris*. But there was another species of adoption, called adrogation, which applied exclusively to persons who were *sui juris*. By the adrogation a *pater-familias*, with all who were subject to his *patria potestas*, as well as his whole estate, entered into another family, and became subject to the paternal authority of the chief of that family. *Quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an velit eum quem adopturus sit, justum sibi filium esse; et is, qui adoptatur, rogatur, an id fieri patiatur; et populus rogatur an id fieri jubeat.* Gaius, 1. 99. The formulæ of these interrogations are given by Cicero, in his oration *pro Domo*, 20: "*Velitis, jubeatis, Quirites, uti Lucius Valerius Lucio Titio tam jure legeque filius sibi siet, quam si ex eo patre matreque familias ejus natus esset, utique eo vitæ necisque in eum potestas siet uti pariendo filio est; hoc ita ut dixi vos, Quirites rogo.*" This public and solemn form of adoption remained unchanged, with regard to adrogation, until the time of Justinian: up to that period it could only take place *populi auctoritate*. According to the Institutes, 1. 11. 1, adrogation took place by virtue of a rescript of the emperor,—*principali rescripto*, which only issued *causa cognita;* and the ordinary adoption took place in pursuance of the authorization of the magistrate,—*imperio magistratus*. The effect of the adoption was also modified in such a manner, that if a son was adopted by a stranger, *extranea persona*, he preserved all the family rights resulting from his birth, and at the same time acquired all the family rights produced by the adoption.

In the United States, adoption is regulated by the statutes of the several states. In Louisiana, where the civil law prevails, it was abolished by the Code of 1808, art. 35, p. 50. In many of the continental states of Europe it is still permitted under various restrictions.

ADPROMISSOR (Lat. *promittere*). One who binds himself for another; a surety; a peculiar species of *fidejussor*. Calvinus, Lex.

The term is used in the same sense in the Scotch law. The cautionary engagement was undertaken by a separate act: hence, one entering into it was called *ad promissor* (promissor in addition to). Erskine, Inst. 3. 3. 1.

ADROGATION. In Civil Law. The adoption of one who was *impubes*, that is, if a male, under fourteen years of age; if a female, under twelve. Dig. 1. 7. 17. 1.

ADSCRIPTI (Lat. *scribere*). Joined to by writing; ascribed; set apart; assigned to; annexed to.

ADSCRIPTI GLEBÆ. Slaves who served the master of the soil; who were annexed to the land, and passed with it when it was conveyed. Calvinus, Lex.

These *servi adscripti* (or *adscriptitii*) *glebæ* held the same position as the *villeins regardant* of the Normans. 2 Sharswood, Blackst. Comm. 93.

ADSCRIPTITII (Lat.). A species of slaves.

Those persons who were enrolled and liable to be drafted as legionary soldiers. Calvinus, Lex.

ADSESSORES (Lat. *sedere*). Side judges. Those who were joined to the regular magistrates as assistants or advisers; those who were appointed to supply the place of the regular magistrates in certain cases. Calvinus, Lex.

ADULT. In Civil Law. A male infant who has attained the age of fourteen; a female infant who has attained the age of twelve. Domat, *Liv. Prel.* tit. 2, § 2, n. 8.

In Common Law. One of the full age of twenty-one. Swanst. Ch. 553.

ADULTER (Lat.). One who corrupts; one who corrupts another man's wife.

Adulter solidorum. A corrupter of metals; a counterfeiter. Calvinus, Lex.

ADULTERA (Lat.). A woman who commits adultery. Calvinus, Lex.

ADULTERATION. The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind.

ADULTERATOR (Lat.). A corrupter; a counterfeiter.

Adulterator monetæ. A forger. Du Cange.

Adulterations of food, when wilful, are punishable by the laws of most countries. In Paris, malpractices connected with such adulteration are investigated by the Conseil de Salubrité, and punished. In Great Britain, numerous acts have been passed for the prevention of adulterations: they are usually punished by a fine, determined by a summary process before a magistrate. In Pennsylvania, the adulteration of articles of food and drink, and of drugs and medicines, is, by a statute of March 31, 1860, made a misdemeanor punishable by fine or imprisonment, or both.

ADULTERINE. The issue of adulterous intercourse.

Those are not deemed adulterine who are begotten of a woman openly married through ignorance of a former wife being alive.

Adulterine children are regarded more unfavorably than the illegitimate offspring of single persons. The Roman law refused the title of natural children, and the canon law discouraged their admission to orders.

ADULTERINE GUILDS. Companies of traders acting as corporations, without charters, and paying a fine annually for the privilege of exercising their usurped privileges. Smith, Wealth of Na., book 1, c. 10; Wharton, Dict., 2d Lond. ed.

ADULTERIUM. A fine imposed for the commission of adultery. Barrington, Stat. 62, n.

ADULTERY. The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Bishop, Man. & D. § 415; 6 Metc. Mass. 243; 36 Me. 261; 11 Ga. 56; 2 Strobh. Eq. So. C. 174.

The voluntary sexual intercourse of a married woman with a man other than her husband.

Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the crime in all cases. In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication. 1 Yeates, Penn. 6; 2 Dall. Penn. 124; 5 Jones, No. C. 416; 27 Ala. N. S. 23; 35 Me. 205; 7 Gratt. Va. 591; 6 *id.* 673. In Massachusetts, however, by statute, and some of the other states, if the woman be married, though the man be unmarried, he is guilty of adultery. 21 Pick. Mass. 509; 2 Blackf. Ind. 318; 18 Ga. 264; 9 N. H. 515; and see 1 Harr. N. J. 380; 29 Ala. 313. In Connecticut, and some other states, it seems that to constitute the offence of adultery it is necessary that the *woman* should be married; that if the man only is married, it is not the crime of adultery at common law or under the statute, so that an indictment for adultery could be sustained against either party; though within the meaning of the law respecting divorces it is adultery in the man.

It is not, by itself, indictable at common law, 4 Blackstone, Comm. 65; 5 Rand. Va. 627, 634, but is left to the ecclesiastical courts for punishment. In the United States it is punishable by fine and imprisonment under various statutes, which generally define the offence.

Parties to the crime may be jointly indicted, 2 Metc. Mass. 190; or one may be convicted and punished before or without the conviction of the other. 5 Jones, No. C. 416.

ADVANCEMENT. A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child would inherit on the death of the parent. 6 Watts, Penn. 87; 4 Serg. & R. Penn. 333; 17 Mass. 358; 11 Johns. N. Y. 91; Wright, Ohio, 339.

An advancement can be made only by a parent to a child, 5 Miss. 356; 2 Jones, No. C. 137; or in some states, by statute, to a grandchild, 4 Kent, Comm. 419; 4 Watts, Penn. 82; 4 Ves. Ch. 437.

The intention of the parent is to decide whether a gift is intended as an advancement. 23 Penn. St. 85; 11 Johns. N. Y. 91; 2 M'Cord, Ch. So. C. 103; see 26 Vt. 665.

A mere gift is presumptively an advancement, but the contrary intention may be shown. 22 Ga. 574; 8 Ired. No. C. 121; 18 Ill. 167; 3 Jones, No. C. 190; 3 Conn. 31; 6 *id.* 356; 1 Mass. 527. The maintenance and education of a child, or the gift of money without a view to a portion or settlement in life, is not deemed an advancement. 5 Rich, Eq. So. C. 15; 23 Conn. 516. If security is taken for repayment, it is a debt and not an advancement. 21 Penn. St. 283; 29 *id.* 298; 23 Ga. 531; 2 Patt. & H. Va. 1; 22 Pick. Mass. 508; and see 17 Mass. 93, 359; 2 Harr. & G. Md. 114.

2. No particular formality is requisite to indicate an advancement, stat. 22 & 23 Car. II. c. 10; 1 Maddox, Chanc. Prac. 507; 4 Kent, Comm. 418; 16 Vt. 197; unless a particular form of indicating such intention is prescribed by statute as requisite. 4 Kent, Comm. 418; 1 Gray, Mass. 587; 5 *id.* 341; 5 R. I. 255, 457.

The effect of an advancement is to reduce the distributive share of the child by the amount so received, estimating its value at the time of receipt, 1 Serg. & R. Penn. 422; 21 Mo. 347; 3 Yerg. Tenn. 112; 5 Harr. & J. Md. 459; 1 Wash. Va. 224; 3 Pick. Mass. 450; 3 Rand. Va. 117; 2 Hayw. No. C. 266; but adding interest in some cases, 2 Watts, Penn. 314; 12 Gratt. Va. 33; yet in some states the child has his option to retain the advancement and abandon his distributive share, 9 Dan. Ky. 193; 4 Ala. N. S. 121; to abandon his advancement and receive his equal share of the estate, 12 Gratt. Va. 33; 15 Ala. N. S. 85; 26 Miss. 592; 28 *id.* 674; 18 Ill. 167; but this privilege exists only in case of intestacy. 1 Hill, Ch. So. C. 10; 3 Yerg. Tenn. 95; 3 Sandf. Ch. N. Y. 520; 5 Paige, Ch. N. Y. 450; 7 Ohio, 432; 14 Ves. Ch. 323. See ADEMPTION.

ADVANCES. Payments made to the owner of goods by a factor or agent, who has or is to have possession of the goods for the purpose of selling them.

An agent is entitled to reimburse himself from the proceeds of the goods, and has a lien on them for the amount paid, Livermore, Ag. 38; and an action over for the balance, against his principal, if the sales are insuffi-

cient to cover the advances. 22 Pick. Mass. 40; 3 N. Y. 62; 12 N. H. 239; 2 Parsons, Contr. 466; 2 Bouvier, Inst. n. 1340.

ADVENA (Lat. *venire*). **In Roman Law.** One of foreign birth, who has left his own country and settled elsewhere, and who has not acquired citizenship in his new locality: often called *albanus*. Du Cange.

ADVENT. The period commencing on Sunday falling on St. Andrew's day (30th of November), or the first Sunday after, and continuing till Christmas.

It took its name from the fact that it immediately preceded the day set apart to commemorate the birth or coming (advent) of Christ. Cowel; Termes de la Ley.

Formerly, during this period, "all contentions at law were omitted." But, by statute 13 Edw. I. (Westm. 2) c. 48, certain actions were allowed.

ADVENTITIOUS (Lat. *adventitius*). That which comes incidentally, or out of the regular course.

ADVENTITIUS (Lat.). Foreign; coming from an unusual source.

Adventitia bona are goods which fall to a man otherwise than by inheritance.

Adventitia dos is a dowry or portion given by some friend other than the parent.

ADVENTURE. Sending goods abroad under charge of a supercargo or other agent, which are to be disposed of to the best advantage for the benefit of the owners.

The goods themselves so sent.

ADVERSE ENJOYMENT. The possession or exercise of an easement or privilege under a claim of right against the owner of the land out of which the easement is derived. 2 Washburn, Real Prop. 42.

Such an enjoyment, if open, 4 Mees. & W. Exch. 500; 4 Ad. & E. 369, and continued uninterruptedly, 9 Pick. Mass. 251; 8 Gray, Mass. 441; 17 Wend. N. Y. 564; 26 Me. 440; 20 Penn. St. 331; 2 N. H. 255; 9 *id.* 454; 2 Rich, So. C. 136; 11 Ad. & E. 788, for the term of twenty years, raises a conclusive presumption of a grant, provided that there was, during the time, some one in existence, in possession and occupation, who was not under disability to resist the use. 2 Washburn, Real Prop. 48.

ADVERSE POSSESSION. The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor. 3 East, 394; 1 Pick. Mass. 466; 2 Serg. & R. Penn. 527; 3 Penn. St. 132; 8 Conn. 440; 2 Aik. Vt. 364; 9 Johns. N. Y. 174; 18 *id.* 40, 355; 5 Pet. 402; 4 Bibb, Ky. 550.

When such possession has been actual, 3 Serg. & R. Penn. 517; 7 *id.* 192; 2 Wash. C. C. 478, and has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises the presumption of a grant. Angell, Wat. Cour. 85, *et seq.* But this presumption arises only when the use or occupation would otherwise have been unlawful. 3 Me. 120; 6 Cow. N. Y. 617, 677; 8 *id.* 589; 4 Serg. & R. Penn. 456. See 2 Smith, Lead. Cas. 307–416.

Possession is not adverse:

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons, and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims. Coke, Litt. s. 396;

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a cestui que trust for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the cestui que trust by the terms of the deed, the receipt was held not to be adverse to the title of the trustee. 8 East, 248;

When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John died, and afterwards the heirs of John and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for when two men are in possession, the law adjudges it to be the possession of him who has the right. 1 Ld. Raym. 329;

When the occupier has acknowledged the claimant's titles; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See 1 Bos. & P. 542; 8 Barnew. & C. 717; 2 Bouvier, Inst. n. 2193, 2194, 2351.

ADVERTISEMENT (Lat. *advertere*, to turn to).

Information or knowledge communicated to individuals or the public in a manner designed to attract general attention.

A notice published either in handbills or in a newspaper.

The law in many instances requires parties to advertise in order to give notice of acts which are to be done; in these cases, the advertisement is in general equivalent to notice. But there are cases in which such notice is not sufficient, unless brought home to the actual knowledge of the party. Thus, notice of the dissolution of partnership by advertisement in a newspaper printed in the city or county where the business is carried on, although it is of itself notice to all persons who have had no previous dealings with the firm, yet it is not notice to those who

have had such previous dealings. It must be shown that persons of the latter class have received actual notice. 4 Whart. Penn. 484. See 17 Wend. N. Y. 526; 22 *id.* 183; 9 Dan. Ky. 166; 2 Ala. N. S. 502; 8 Humphr. Tenn. 418; 3 Bingh. 2. It has been held that the printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up at the place where they book their names. 8 Watts & S. Penn. 373; 3 *id.* 520. An advertisement by a railroad corporation in a newspaper in the English language of a limitation of its liability for baggage is not notice to a passenger who does not understand English. 16 Penn. St. 68.

When an advertisement contains the terms of sale, or description of the property to be sold, it will bind the seller; and if there be a material misrepresentation, it may avoid the contract, or at least entitle the purchaser to a compensation and reduction from the agreed price. Knapp, Priv. Coun. 344.

2. Advertisements published *bonâ fide* for the apprehension of a person suspected of crime, or for the prevention of fraud, are privileged. Thus, an advertisement of the loss of certain bills of exchange, supposed to have been embezzled, made in the belief that it was necessary either for the purposes of justice with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, is privileged, if these were the defendant's only inducements. Heard, Libel & Slander, § 131.

A sign-board, at a person's place of business, giving notice of lottery-tickets being for sale there, is an "advertisement;" and, if erected before the passage of a statute making the advertising of lottery-tickets penal, a continuance of it is within the statute. 5 Pick. 42.

ADVICE. Information given by letter by one merchant or banker to another in regard to some business transaction which concerns him.

ADVISARE, ADVISARI (Lat.). To advise; to consider; to be advised; to consult.

Occurring often in the phrase *curia advisari vult* (usually abbreviated *cur. adv. vult*), the court wishes to consider of the matter. When a point of law requiring deliberation arose, the court, instead of giving an immediate decision, ordered a *cur. adv. vult* to be entered, and then, after consideration, gave a decision. Thus, from amongst numerous examples, in Clement *v.* Chivis, 2 Burnew. & C. 172, after the account of the argument we find *cur. adv. vult;* then, "on a subsequent day judgment was delivered," etc.

ADVISEMENT. Consideration; deliberation; consultation.

ADVOCATE. An assistant; adviser; a pleader of causes.

Derived from *advocare*, to summon to one's assistance, *advocatus* originally signified an assistant or helper of any kind, even an accomplice in the commission of a crime. Cicero, *Pro Cæcina*, c. 8; Livy, lib. ii. 55; iii. 47; Tertullian, *De Idolatr.* cap. xxiii.; Petron. *Satyric.* cap. xv. Secondarily, it was applied to one called in to assist a party in the conduct of a suit, Inst. 1. 11. D. 50. 13. *de extr. cogn.* Hence, a pleader, which is its present signification.

In Civil and Ecclesiastical Law. An officer of the court, learned in the law, who is engaged by a suitor to maintain or defend his cause. Advocates, like counsellors, have the exclusive privilege of addressing the court either orally or in written pleadings; and, in general, in regard to duties, liabilities, and privileges, the same rules apply *mutatis mutandis* to advocates as to counsellors. See COUNSELLOR.

Lord Advocate.—An officer in Scotland appointed by the crown, during pleasure, to take care of the king's interest before the courts of session, justiciary, and exchequer. All actions that concern the king's interest, civil or criminal, must be carried on with concourse of the lord advocate. He also discharges the duties of public prosecutor, either in person or by one of his four deputies, who are called *advocates-depute.* Indictments for crimes must be in his name as accuser. He supervises the proceedings in important criminal cases, and has the right to appear in all such cases. He is, in fact, secretary of state for Scotland, and the principal duties are connected directly with the administration of the government.

Inferior courts have a *procurator fiscal,* who supplies before them the place of the lord advocate in criminal cases. See 2 Bankt. Inst. 492.

College or Faculty of Advocates.—A corporate body in Scotland, consisting of the members of the bar in Edinburgh. A large portion of its members are not active practitioners, however. 2 Bankt. Inst. 486.

Church or Ecclesiastical Advocates.—Pleaders appointed by the church to maintain its rights.

In Ecclesiastical Law. A patron of a living; one who has the advowson, *advocatio.* Tech. Dict.; Ayliffe, Par. 53; Dane, Abr. c. 31, § 20; Erskine, Inst. 79. 9.

2. Originally the management of suits at law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterwards it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules: a limited number only were enrolled and allowed to practise in the higher courts, —one hundred and fifty before the *præfectus prætorio,* Dig. 8. 11; Code, 2. 7; fifty before the *præf. aug.* and *dux Ægypticus* at Alexandria. Dig. 8. 13. *Ibid.,* &c. &c. The enrolled advocates were called *advocati ordinarii.* Those not enrolled were called *adv. supernumerarii* or *extraordinarii,* and were allowed to practise in the inferior courts. Dig. 8. 13. *Ibid.* From their ranks vacancies in

the list of *ordinarii* were filled. *Ibid.* The *ordinarii* were either *fiscales*, who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the state, or *privati*, whose business was confined to private causes. The *advocati ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for a refusal; and they could be compelled to undertake the cause of a needy party, l. 7, C. 2, 6. The *supernumerarii* were not thus obliged, but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity.

The client must be defended against every person, even the emperor, though the *advocati fiscales* could not undertake a cause against the *fiscus* without a special permission, ll. 1 et 2, C. 2, 9, unless such cause was their own, or that of their parents, children, or ward, l. 10, pr. C. 11, D. 3, 1.

An advocate must have been at least seventeen years of age, l. 1, § 3, D. 3, 1; he must not be blind or deaf, l. 1, § 3 et 5, D. 3, 1; he must be of good repute, not convicted of an infamous act, l. 1, § 8, D. 3, 1; he could not be advocate and judge in the same cause, l. 6, pr. C. 2, 6; he could not even be a judge in a suit in which he had been engaged as advocate, l. 17, D. 2, 1; l. 14, C. 1, 51; nor after being appointed judge could he practise as advocate even in another court, l. 14, pr. C. 1, 51; nor could he be a witness in the cause in which he was acting as advocate, l. ult. D. 22, 5; 22 Glück, Pand. p. 161, *et seq.*

3. He was bound to bestow the utmost care and attention upon the cause, *nihil studii reliquentes, quod sibi possibile est*, l. 14, § 1, C. 3, 1. He was liable to his client for damages caused in any way by his fault. 5 Glück, Pand. 110. If he had signed the *concepit*, he was responsible that it contained no matter punishable or improper. Boehmer, Cons. et Decis. t. ii. p. 1, resp. cviii. no. 5. He must clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof. He must frankly inform them of the lawfulness or unlawfulness of their cause of action, and must be especially careful not to undertake a cause clearly unjust, or to let himself be used as an instrument of chicanery, malice, or other unlawful action, l. 6, §§ 3, 4, C. 2, 6; l. 13, § 9; l. 14, § 1, C. 3, 1. In pleading, he must abstain from invectives against the judge, the opposite party or his advocate, l. 6, § 1, C. 2, 6. Should it become necessary or advantageous to mention unpleasant truths, this must be done with the utmost forbearance and in the most moderate language. 5 Glück, Pand. 111. Conscientious honesty forbade his betraying secrets confided to him by his client or making any improper use of them; he should observe inviolable secrecy in respect to them, *ibid.*; he could not, therefore, be compelled to testify in regard to such secrets, l. ult. D. 22, 5.

If he violated the above duties, he was liable, in addition to compensation for the damage thereby caused, to fine, or imprisonment, or suspension, or entire removal from practice, or to still severer punishment, particularly where he had been guilty of a *prævaricatio*, or betrayal of his trust for the benefit of the opposite party. 5 Glück, Pand. 111.

4. *Compensation.*—By the *lex Cincia*, A. U. C. 549, advocates were prohibited from receiving any reward for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium*, from being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian. 5 Glück, Pand. 117. The fee was regulated by law unless the advocate had made a special agreement with his client, when the agreement fixed the amount. But a *pactum de quota litis*, *i.e.* an agreement to pay a contingent fee, was prohibited, under penalty of the advocate's forfeiting his privilege of practising, l. 5, C. 2, 6. A *palmarium*, or conditional fee in addition to the lawful charge and depending upon his gaining the cause, was also prohibited. 5 Glück, Pand. 120 *et seq.* But an agreement to pay a *palmarium* might be enforced when it was not entered into till after the conclusion of the suit, l. 1, § 12, D. 50, 13. The compensation of the advocate might also be in the way of an annual salary. 5 Glück, Pand. 122.

Remedy.—The advocate had the right to retain papers and instruments of his client until payment of his fee, l. 26, Dig. 3, 2. Should this fail, he could apply for redress to the court where the cause was tried by petition, a formal action being unnecessary. 5 Glück, Pand. 122.

ADVOCATI (Lat.). **In Roman Law.** Patrons; pleaders; speakers.

Anciently, any one who lent his aid to a friend, and who was supposed to be able in any way to influence a judge, was called *advocatus*.

Causidicus denoted a speaker or pleader merely; *advocatus* resembled more nearly a counsellor; or, still more exactly, causidicus might be rendered *barrister*, and advocatus *attorney*; though the duties of an *advocatus* were much more extended than those of a modern attorney. Du Cange; Calvinus, Lex.

A witness.

ADVOCATI ECCLESIÆ. Advocates of the church.

These were of two sorts; those retained as pleaders to argue the cases of the church and attend to its law-matters; and advocates, or patrons of the advowson. Cowel; Spelman, Gloss.

ADVOCATI FISCI. In Civil Law. Those chosen by the emperor to argue his cause whenever a question arose affecting his revenues. Calvinus, Lex.; 3 Sharswood Blackst. Comm. 27.

ADVOCATIA. In Civil Law. The

functions, duty, or privilege of an advocate. Du Cange, *Advocatia.*

ADVOCATION. In Scotch Law. The removal of a cause from an inferior to a superior court by virtue of a writ or warrant issuing from the superior court. See BILL OF ADVOCATION; LETTER OF ADVOCATION.

ADVOCATUS. A pleader; a narrator. Bracton, 412 *a*, 372 *b*.

ADVOWSON. A right of presentation to a church or benefice.

He who possesses this right is called the patron or advocate. When there is no patron, or he neglects to exercise his right within six months, it is called a *lapse*, and a title is given to the ordinary to collate to a church: when a presentation is made by one who has no right, it is called a *usurpation.*

Advowsons are of different kinds: as, *advowson appendant*, when it depends upon a manor, &c.; *advowson in gross*, when it belongs to a person and not to a manor; *advowson presentative*, where the patron presents to the bishop; *advowson donative*, where the king or patron puts the clerk into possession without presentation; *advowson collative*, where the bishop himself is patron; *advowson of the moiety of the church*, where there are two several patrons and two incumbents in the same church; *a moiety of advowson*, where two must join the presentation of one incumbent; *advowson of religious houses*, that which is vested in the person who founded such a house. 2 Blackstone, Comm. 21; Mirehouse, *Advowsons;* Comyns, Dig. *Advowson, Quare Impedit;* Bacon, Abr. *Simony;* Burns, Eccl. Law.

ADVOWTRY. In English Law. The crime committed by a woman who, having committed adultery, continued to live with the adulterer. Cowel; Termes de la Ley.

ÆDES (Lat.). **In Civil Law.** A dwelling; a house; a temple.

In the country every thing upon the surface of the soil passed under the term *ædes.* Du Cange; Calvinus, Lex.

ÆDILE (Lat.). **In Roman Law.** An officer who attended to the repairs of the temples and other public buildings; the repairs and cleanliness of the streets; the care of the weights and measures; the providing for funerals and games; and regulating the prices of provisions. Ainsworth, Lex.; Smith, Lex.; Du Cange.

ÆDILITIUM EDICTUM (Lat.). **In Roman Law.** That provision by which the buyer of a diseased or imperfect slave, horse, or other animal was relieved at the expense of the vendor who had sold him as sound knowing him to be imperfect. Calvinus, Lex.

AEL (Norman). A grandfather. Spelled also *aieul, ayle.* Kelham.

ÆS ALIENUM (Lat.). **In Civil Law.** A debt.

Literally translated, the property or money of another; the civil law considering borrowed money as the property of another, as distinguished from *æs suum*, one's own.

ÆSTIMATIO CAPITIS (Lat. the value of a head). The price to be paid for taking the life of a human being.

King Athelstan declared, in an assembly held at Exeter, that mulcts were to be paid *per æstimatio capitis.* For a king's head (or life), 30,000 thuringæ; for an archbishop's or prince's, 15,000; for a priest's or thane's, 2000. Leg. Hen. I.

ÆTAS INFANTILI PROXIMA (Lat.). The age next to infancy. Often written *ætas infantiæ proxima.*

See AGE. 4 Blackstone, Comm. 22.

AFFECTION. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Techn. Dict.

AFFECTUS (Lat.). Movement of the mind; disposition; intention.

One of the causes for a challenge of a juror is *propter affectum*, on account of a suspicion of *bias* or favor. 3 Blackstone, Comm. 363; Coke, Litt. 156.

AFFEERE. In English Law. To fix in amount; to liquidate.

To affeer an amercement.—To establish the amount which one amerced in a court-leet should pay.

To affeer an account.—To confirm it on oath in the exchequer.

AFFEERORS. In Old English Law. Those appointed by a court-leet to mulct those punishable, not by a fixed fine, but by an arbitrary sum called amercement. Termes de la Ley.

AFFIANCE (Lat. *affidare ad, fidem, dare*, to pledge to).

A plighting of troth between man and woman. Littleton, § 39.

An agreement by which a man and woman promise each other that they will marry together. Pothier, *Traité du Mar.* n. 24.

Marriage. Coke, Litt. 34 *a.* See Dig. 23, 1. 1; Code, 5. 1. 4.

AFFIANT. A deponent.

AFFIDARE (Lat. *ad fidem dare*). To pledge one's faith or do fealty by making oath. Cowel.

Used of the mutual relation arising between landlord and tenant. 1 Washburn, Real Prop. 19; 1 Sharswood, Blackst. Comm. 367; Termes de la Ley, *Fealty.* Affidavit is of kindred meaning.

AFFIDATUS. One who is not a vassal, but who for the sake of protection has connected himself with one more powerful. Spelman, Gloss.; 2 Sharswood, Blackst. Comm. 46.

AFFIDAVIT (Lat.). **In Practice.** A statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath.

It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte.* Gresley, Eq. Ev. 413.

By general practice, affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action; but they are not allowable to present evidence on the trial of an issue raised by the pleadings. Here the witnesses must be produced before the adverse party. They are generally required on all motions to open defaults or to grant delay in the proceedings and other applications by the defendant addressed to the favor of the court.

2. *Formal parts.*—An affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. The place where the affidavit is taken must be stated, to show that it was taken within the officer's jurisdiction. 1 Barbour, Chanc. Pract. 601. The deponent must sign the affidavit at the end. 11 Paige, Ch. N. Y. 173. The jurat must be signed by the officer with the addition of his official title. In the case of some officers the statutes conferring authority to take affidavits require also his seal to be affixed.

3. *In general,* an affidavit must describe the deponent sufficiently to show that he is entitled to offer it; for example, that he is a party, or agent or attorney of a party, to the proceeding, 7 Hill, N. Y. 177; 4 Den. N. Y. 71, 258; and this matter must be stated, not by way of recital or as mere description, but as an allegation in the affidavit. 3 N. Y. 41; 8 *id.* 158.

AFFIDAVIT OF DEFENCE. **In Practice.** A statement made in proper form that the defendant has a good ground of defence to the plaintiff's action upon the merits.

The statements required in such an affidavit vary considerably in the different states where they are required. In some, it must state a ground of defence, 1 Ashm. Penn. 4; in others, a simple statement of belief that it exists is sufficient. Called also an affidavit of merits.

It must be made by the defendant, or some person in his behalf who possesses a knowledge of the facts. 1 Ashm. Penn. 4.

The effect of a failure to make such affidavit is generally to default the defendant. 8 Watts, Penn. 367.

AFFIDAVIT TO HOLD TO BAIL. **In Practice.** An affidavit which is required in many cases before a person can be arrested.

Such an affidavit must contain a statement, clearly and certainly expressed, by some one acquainted with the fact, of an indebtedness from the defendant to the plaintiff, and must show a distinct cause of action. Selwyn, Pract. 104; 1 Chitty, Plead. 165. See BAIL.

AFFILARE. To put on record; to file. 8 Coke, 319; 2 Maule & S. 202.

AFFILIATION. **In French Law.** A species of adoption which exists by custom in some parts of France.

The person affiliated succeeded equally with other heirs to the property acquired by the deceased to whom he had been affiliated, but not to that which he inherited.

In Ecclesiastical Law. A condition which prevented the superior from removing the person affiliated to another convent. Guyot, *Répert.*

AFFINES (Lat. *finis*). **In Civil Law.** Connections by marriage, whether of the persons or their relatives. Calvinus, Lex.

From this word we have affinity, denoting relationship by marriage. 1 Blackstone, Comm. 434.

The singular, *affinis,* is used in a variety of related significations,—a boundary, Du Cange; a partaker or sharer, *affinis culpæ* (an aider or one who has knowledge of a crime). Calvinus, Lex.

AFFINITAS. **In Civil Law.** Affinity.

AFFINITAS AFFINITATIS. That connection between parties arising from marriage which is neither consanguinity nor affinity.

This term intends the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister. Erskine, Inst. 1. 6. 8.

AFFINITY. The connection existing, in consequence of marriage, between each of the married persons and the kindred of the other.

It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other: thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, &c., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.

A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See 1 Sharswood, Blackst. Comm. 435; Pothier, Traité du Mar. pt. 3, c. 3, art. 2; Inst. 1. 10. 6; Dig. 38. 10. 4. 3; 1 Phill. Eccl. 210; 5 Mart. La. 296.

AFFIRM (Lat. *affirmare,* to make firm; to establish).

To ratify or confirm a former law or judgment. Cowel.

Especially used of confirmations of the judgments of an inferior by an appellate tribunal.

To ratify or confirm a voidable act of the party.

To make a solemn religious asseveration in the nature of an oath. See AFFIRMATION.

AFFIRMANCE. The confirmation of a voidable act by the party acting, who is to be bound thereby.

The term is in accuracy to be distinguished from *ratification,* which is a recognition of the validity or binding force as against the party ratifying of some act performed by another person, and from *confirmation,* which would seem to apply more properly to cases where a doubtful authority has been exercised by another in behalf of the person rati-

fying; but these distinctions are not generally observed with much care. 1 Parsons, Contr. 243.

Express affirmance takes place where the party declares his determination of fulfilling the contract. Dudl. Ga. 203.

A mere acknowledgment that the debt existed, or that the contract was made, is not an affirmance, 10 N. H. 561; 2 Esp. 628; 1 Bail. So. C. 28; 9 Conn. 330; 2 Hawks. Tenn. 535; 1 Pick. Mass. 203; Dudl. Ga. 203; but it must be a direct and express confirmation, and substantially (though it need not be in form) a promise to pay the debt or fulfil the contract. 3 Wend. N. Y. 479; 4 Day, Conn. 57; 12 Conn. 550; 8 N. H. 374; 2 Hill, N. Y. 120; 19 Wend. N. Y. 301; 1 Parsons, Contr. 243; Bingham, Inf., 1st Am. ed. 69.

Implied affirmance arises from the acts of the party without any express declaration. 15 Mass. 220. See 10 N. H. 194; 11 Serg. & R. Penn. 305; 1 Parsons, Contr. 243; 1 Sharswood, Blackst. Comm. 466, n. 10.

AFFIRMANCE-DAY-GENERAL. In the English Court of Exchequer, is a day appointed by the judges of the common pleas, and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, Pract. 1091.

AFFIRMANT. In Practice. One who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn.

He is liable to all the pains and penalty of perjury, if he shall be guilty of wilfully and maliciously violating his affirmation. See PERJURY.

AFFIRMATION. In Practice. A solemn religious asseveration in the nature of an oath. 1 Greenleaf, Ev. § 371.

Quakers, as a class, and other persons who have conscientious scruples against taking an oath, are allowed to make affirmation in any mode which they may declare to be binding upon their consciences, in confirmation of the truth of testimony which they are about to give. 1 Atk. Ch. 21, 46; Cowp. 340, 389; 1 Leach, Cr. Cas. 64; 1 Ry. & M. 77; 6 Mass. 262; 16 Pick. Mass. 153; Buller, Nisi P. 292; 1 Greenleaf, Ev. § 371.

AFFIRMATIVE. That which establishes; that which asserts a thing to be true.

It is a general rule of evidence that the affirmative of the issue must be proved. Buller, Nisi P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it. Buller, Nisi P. 298; 1 Rolle, 83; Comb. 57; 3 Bos. & P. 307.

AFFIRMATIVE PREGNANT. In Pleading. An affirmative allegation implying some negative in favor of the adverse party.

For example, if to an action of assumpsit, which is barred by the act of limitations in *six* years, the defendant pleads that he did not undertake, &c., within *ten* years, a replication that he did undertake, &c. within ten years would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. Such a plea should be demurred to. Gould, Plead. c. 6, §§ 29, 37; Stephen, Plead. 381; Lawes, Civ. Plead. 113; Bacon, Abr. *Pleas* (n. 6).

AFFORCE THE ASSIZE. To compel unanimity among the jurors who disagree.

It was done either by confining them without meat and drink, or, more anciently, by adding other jurors to the panel to a limited extent, securing the concurrence of twelve in a verdict. See Bracton, 185 *b*, 292 *a*; Fleta, book 4, c. 9, § 2.

The practice is now discontinued.

AFFRANCHISE. To make free.

AFFRAY. In Criminal Law. The fighting of two or more persons in some public place to the terror of the people.

It differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only; and in that case none are guilty except those actually engaged in it. Hawkins, Pl. Cr. book 1, c. 65, § 3; 4 Blackstone, Comm. 146; 1 Russell, Crimes, 271.

Fighting in a private place is only an assault. 1 Crompt. M. & R. Exch. 757; 1 Cox, Cr. Cas. 177.

AFFRECTAMENTUM (Fr. *fret*). Affreightment.

The word *fret* means tons, according to Cowel. *Affreightamentum* was sometimes used. Du Cange.

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire. See FREIGHT; GENERAL SHIP.

AFORESAID. Before mentioned; already spoken of or described.

Whenever in any instrument a person has once been described, all future references may be made by giving his name merely and adding the term "aforesaid" for the purpose of identification. The same rule holds good also as to the mention of places or specific things described, and generally as to any description once given which it is desirable to refer to.

2. Where a place is once particularly described in the body of the indictment, it is sufficient afterwards to name such place, and to refer to the venue by adding the word "aforesaid," without repeating the whole description of the venue. 1 Gabbett, Crim. Law, 212; 5 Term, 616.

AFORETHOUGHT. In Criminal Law. Premeditated; prepense.

The length of time during which the accused has entertained the thought of committing the offence is not very material, provided he has in fact entertained such thought: he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. See MALICE AFORE-

THOUGHT; PREMEDITATION; 2 Chitty, Cr. Law, 785; 4 Blackstone, Comm. 199; Fost. Cr. Cas. 132, 291, 292; Croke, Car. 131; Palm. 545; W. Jones, 198; 4 Dall. Penn. 146.

AFTERMATH. The second crop of grass. A right to have the last crop of grass or pasturage. 1 Chitty, Pract. 181.

AGAINST THE FORM OF THE STATUTE. Technical words which must be used in framing an indictment for a breach of the statute prohibiting the act complained of.

The Latin phrase is *contra formam statuti.*

AGAINST THE WILL. Technical words which must be used in framing an indictment for robbery from the person. 1 Chitty, Crim. Law, 244.

In the statute of 13 Edw. I. (Westm. 2d) c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will.* Per *Tindal*, C. J., and *Parke*, B., in the addenda to 1 Den. Cr. Cas. 1. And in a very recent case this statute definition was adopted by all the judges. Bell, Cr. Cas. 63, 71.

AGARD. Award.

AGE. That period of life at which the law allows persons to do acts or discharge functions which for want of years they were prohibited from doing or undertaking before.

The full age of twenty-one years is held to be completed on the day preceding the twenty-first anniversary of birth. 1 Blackstone, Comm. 464; 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44; 1 Ld. Raym. 84; 3 Harr. Del. 557; 4 Dan. Ky. 597.

Males, before fourteen, are said not to be of discretion; at that age they may consent to marriage and choose a guardian. Twenty-one years is full age for all private purposes, and they may then exercise their rights as citizens by voting for public officers, and are eligible to all offices, unless otherwise provided for in the constitution.

Females, at twelve, arrive at years of discretion, and may consent to marriage; at fourteen, they may choose a guardian; and twenty-one, as in males, is full age, when they may exercise all the rights which belong to their sex. The age of puberty for both sexes is fourteen.

In the United States, at twenty-five, a man may be elected a representative in congress; at thirty, a senator; and at thirty-five, he may be chosen president. He is liable to serve in the militia from eighteen to forty-five inclusive, unless exempted for some particular reason. In England no one can be chosen member of parliament till he has attained twenty-one years; nor be ordained a priest under the age of twenty-four; nor made a bishop till he has completed his thirtieth year. The age of serving in the militia is from sixteen to forty-five years. The sovereignty of the realm is assumed at eighteen; though the law, according to Blackstone, recognizes no minority in the heir to the throne.

In French Law. A person must have attained the age of forty to be a member of the legislative body; twenty-five, to be a judge of a tribunal *de première instance;* twenty-seven, to be its president, or to be judge or clerk of a *cour royale;* thirty, to be its president or *procureur-général;* twenty-five, to be a justice of the peace; thirty, to be judge of a tribunal of commerce, and thirty-five, to be its president; twenty-five, to be a notary public; twenty-one, to be a testamentary witness; thirty, to be a juror. At sixteen, a minor may devise one-half of his property as if he were a major. A male cannot contract marriage till after the eighteenth year, nor a female before full fifteen years. At twenty-one, both males and females are capable to perform all the acts of civil life. Touillier, *Droit, Civ.* liv. 1, Intr. n. 188.

In Roman Law. Infancy (*infantia*) extended to the age of seven; the period of childhood (*pueritia*), which extended from seven to fourteen, was divided into two periods; the first, extending from seven to ten and a half, was called the period nearest childhood (*ætas infantiæ proxima*); the other, from ten and a half to fourteen, the period nearest puberty (*ætas pubertati proxima*); puberty (*pubertas*) extended from fourteen to eighteen; full puberty extended from eighteen to twenty-five; at twenty-five, the person was *major.* See Taylor, Civ. Law, 254; *Leçon El. du Droit Civ.* 22.

AGE-PRAYER. A statement made in a real action to which an infant is a party, of the fact of infancy and a request that the proceedings may be stayed until the infant becomes of age.

It is now abolished. Stat. 11 Geo. IV.; 1 Will. IV. c. 37, § 10; 1 Lilly, Reg. 54; 3 Blackstone, Comm. 300.

AGENCY. A relation between two or more persons, by which one party, usually called the agent or attorney, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal, constituent, or employer. Prof. Joel Parker, MSS. Lect. 1851.

The right on the part of the agent to act, is termed his authority or power. In some instances the authority or power must be exercised in the name of the principal, and the act done is for his benefit alone. In others, it may be executed in the name of the agent, and, if the power is coupled with an interest on the part, it may be executed for his own benefit. Prof. Joel Parker, Harvard Law School Lect. 1851.

2. *The creation* of the agency, when express, may be either by deed, in writing not by deed, or by a verbal delegation of authority. 2 Kent, Comm. 612; 3 Chitty, Comm. Law, 104; 9 Ves. Ch. 250; 11 Mass. 27, 97, 288; 1 Binn. Penn. 450; 4 Johns. Ch. N. Y. 667.

When the agency is not express, it may be inferred from the relation of the parties

and the nature of the employment, without proof of any express appointment. 2 Kent, Comm. 613; 15 East, 400; 1 Wash. Va. 19; 5 Day, Conn. 556.

In most of the ordinary transactions of business, the agency is either conferred verbally, or is implied from circumstances. But where the act is required to be done in the name of the principal by deed, the authority to the agent must also be by deed, unless the principal be present and verbally or impliedly authorize the agent to fix his name to the deed. 1 Livermore, Ag. 35; Paley, Ag. 157; Story, Ag. §§ 49, 51; 5 Binn. Penn. 613; 1 Wend. N. Y. 424; 9 *id.* 54, 68; 12 *id.* 525; 14 Serg. & R. Penn. 331.

3. The *authority* may be *general*, when it extends to all acts connected with a particular business or employment; or *special*, when it is confined to a single act. Story, Ag. § 17; 21 Wend. N. Y. 279; 9 N. H. 263; 3 Blackf. Ind. 436. If the powers are special, they form the limits of the authority; if general, they will be more liberally construed, according to the necessities of the occasion and the course of the transaction.

4. The agency must be antecedently given, or subsequently adopted; and in the latter case there must be an act of recognition, or an acquiescence in the act of the agent from which a recognition may be fairly implied. 2 Kent, Comm. 614. If, with full knowledge of what the agent has done, the principal ratify the act, the ratification will be equivalent to an original authority,—according to the maxim, *omnis ratihabitio mandato æquiparatur*. 1 Livermore, Ag. 44; Paley, Ag. 172. An intention to ratify may be presumed from the silence of the principal who has received a letter from the agent informing him of what has been done on his account. Paley, Ag. 31; 1 Livermore, Ag. 49, 50, 396; Story, Ag. § 258; 12 Johns. N. Y. 300; 3 Cow. N. Y. 281; 4 Wash. C. C. 549; 14 Serg. & R. Penn. 30.

5. The business of the agency may concern either the property of the principal, of a third person, of the principal and a third person, or of the principal and the agent, but must not relate solely to the business of the agent. A contract in relation to an illegal or immoral transaction cannot be the foundation of a legal agency. 1 Livermore, Ag. 6, 14.

6. *The termination* of the agency may be *by a countermand of authority* on the part of the principal, at the mere will of the principal; and this countermand may, in general, be effected at any time before the contract is completed, 3 Chitty, Com. & Man. 223; 2 Livermore, Ag. 309; Paley, Ag. 185; Story, Ag. §§ 463, 465; even though there may be an express agreement not to revoke. But when the authority or power is coupled with an interest, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it cannot be revoked. Story, Ag. §§ 476, 477; 2 Livermore, Ag. 308, 309; Paley, Ag. 184, 185; 2 Kent, Comm. 643, 644; 2 Mas. C. C. 244, 342. When the authority has been partially executed by the agent, if it admit of severance, or of being revoked as to the part which is unexecuted, it may be revoked as to that part; but if it be not thus severable, and the agent by its execution in part will sustain damage, it cannot be revoked as to the unexecuted part unless the agent be fully indemnified. Story, Ag. § 466. This revocation may be by a formal declaration publicly made known, by an informal writing, or by parol; or it may be implied from circumstances, as, if another person be appointed to do the same act. Story, Ag. § 474; 5 Binn. Penn. 305; 6 Pick. Mass. 198. It takes effect from the time it is made known, and not before, both as regards the agent and third persons. Story, Ag. § 470; Paley, Ag. 188; 2 Livermore, 306, 310; 2 Kent, Comm. 644; 11 N. H. 397.

7. *The determination* may be by the *renunciation* of the agent either before or after a part of the authority is executed, Story, Ag. § 478; it should be observed, however, that if the renunciation be made after the authority has been partly executed, the agent by renouncing it becomes liable for the damages which may thereby be sustained by his principal, Story, Ag. § 478; Jones, Bailm. 101; 4 Johns. N. Y. 84; or, by *operation of law*, in various ways. And the agency may terminate by the expiration of the period during which it was to exist and to have effect; as, if an agency be created to endure a year, or until the happening of a contingency, it becomes extinct at the end of the year, or on the happening of the contingency. Story, Ag. § 480.

8. *The determination* may result from the *marriage* of the principal, if a feme sole; his *insanity*, 2 Livermore, Ag. 307; Story, Ag. § 481; 10 N. H. 156; 8 Wheat. 174; *bankruptcy*, Story, Ag. § 482; 16 East, 382; Baldw. C. C. 38; or *death*, Story, Bailm. § 209; 2 Kent, Comm. 645; Paley, Ag. 186; *but not* when the authority is coupled with an interest, Story, Ag. § 483; 2 Livermore, Ag. 307; Paley, Ag. 187; 4 Campb. 325; or from the *insanity*, Story, Ag. § 487, *bankruptcy*, 5 Barnew. & Ald. 27, 31, or *death* of the agent, 2 Kent, Comm. 643; though not necessarily by marriage or bankruptcy, Story, Ag. §§ 485, 486; 12 Mod. 383; 3 Burr. 1469, 1471; from *the extinction* of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust. Story, Ag. § 499; Story, Bailm. § 207; 2 Bouvier, Inst. 51, 52.

AGENS (Lat. *agere*, to do; to conduct).

A conductor or manager of affairs.

Distinguished from *factor*, a workman.

A plaintiff. Fleta, lib. 4, c. 15, § 8.

AGENT (Lat. *agens;* from *agere*, to do).

One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. 1 Livermore, Ag. 67; 2 Bouvier, Inst. 3.

The term is one of a very wide application, and includes a great many classes of persons to which distinctive appellations are given; as, factors, brokers, attorneys, cashiers of banks, auctioneers, clerks, supercargoes, consignees, ships' husbands, masters of ships, and the like. The terms agent and attorney are often used synonymously. Thus, a letter or power of attorney is constantly spoken of as the formal instrument by which an agency is created. Paley, Ag., Dunl. ed. 1, n.

Who may be.

Many persons disqualified from acting for themselves, such as infants, persons attainted or outlaws, aliens, slaves, and others, may yet act as agents in the execution of a naked authority. 1 Livermore, Ag. 32; Coke, Litt. 252 *a;* Story, Ag. § 1. A feme covert may be the agent of her husband, and as such, with his consent, bind him by her contract or other act; and she may be the agent of another in a contract with her husband. Bacon, Abr. *Authority*, B; 6 N. H. 124; 3 Whart. Penn. 369; 16 Vt. 653. But although she is in general competent to act as the agent of a third person, 7 Bingh. 565; 1 Esp. 142; 2 *id.* 511; 4 Wend. N. Y. 465, it is not clear that she can do so when her husband expressly dissents, particularly when he may be rendered liable for her acts. Story, Ag. § 7. Persons *non compos mentis* cannot be agents for others; nor can a person act as agent in a transaction where he has an adverse interest or employment, 2 Ves. Ch. 317; 11 Clark & F. Hou. L. 714; 3 Beav. Rolls, 783; 2 Campb. 203; 2 Chitty, Bail. 205; 30 Me. 431; 24 Ala. N. s. 358; 3 Den. N. Y. 575; 19 Barb. N. Y. 595; 20 *id.* 470; 6 La. 407; 7 Watts, Penn. 472; and whenever the agent holds a fiduciary relation, he cannot contract with the same general binding force with his principal as when such a relation does not exist. Paley, Ag. 33–38; Story, Ag. § 9; 1 Livermore, Ag. 416–433; 1 Story, Eq. Jur. §§ 308, 328; 4 Mylne & C. 134; 14 Ves. Ch. 290; 3 Sumn. C. C. 476; 2 Johns. Ch. N. Y. 251; 11 Paige, Ch. N. Y. 538; 5 Me. 420; 6 Pick. Mass. 198; 4 Conn. 717; 10 Pet. 269.

Extent of authority.

The authority of the agent, unless the contrary clearly appears, is presumed to include all the necessary and usual means of executing it with effect, 1 Livermore, Ag. 105; Story, Ag. §§ 58, 85, 86; 5 Bingh. 442; 2 H. Blackst. 618; 10 Wend. N. Y. 218; 6 Serg. & R. Penn. 146; 11 Ill. 177; 9 Metc. Mass. 91; 22 Pick. Mass. 85; 15 Miss. 365; 9 Leigh, Va. 387; 11 N. H. 424; 6 Ired. No. C. 252; 10 Ala. N. s. 386; 21 *id.* 488; 1 Ga. 418; 1 Sneed, Tenn. 497; 8 Humphr. Tenn. 509; 15 Vt. 155; 2 McLean, C. C. 543; 8 How. 441. Where, however, the whole authority is conferred by a written instrument, its nature and extent must be ascertained from the instrument itself, and cannot be enlarged by parol evidence. Story, Ag. §§ 76, 79; Paley, Ag., Lloyd ed. 179, n. 5; 1 Taunt. 347; 5 Barnew. & Ald. 204; 7 Rich, So. C. 45; 1 Pet. 264; 3 Cranch, 415.

Generally, in private agencies, when an authority is given by the principal, 7 N. H. 253; 1 Dougl. Mich. 119; 11 Ala. N. s. 755; 1 Bos. & P. 229; 3 Term, 592, to two or more persons to do an act, and no several authority is given, all the agents must concur in doing it, in order to bind the principal, though one die or refuse. Paley, Ag. 177; Story, Ag. § 42; 3 Pick. Mass. 232; 2 *id.* 345; 6 *id.* 198; 12 Mass. 185; 23 Wend. N. Y. 324; 6 Johns. N. Y. 39; 9 Watts & S. Penn. 56; 10 Vt. 532; 12 N. H. 226; 1 Gratt. Va. 226.

The words jointly *and* severally, and jointly *or* severally, have been construed as authorizing all to act jointly, or each one to act separately, but not as authorizing any portion of the number to do the act jointly. Paley, Ag., Lloyd ed. 177, *note*. But where the authority is so worded that it is apparent the principal intended to give power to either of them, an execution by a part will be valid. Coke, Litt. 49 *b;* Dy. 62; 5 Barnew. & Ald. 628. And generally, in commercial transactions, each one of several agents possesses the whole power. For example, on a consignment of goods for sale to two factors (whether they are partners or not), each of them is understood to possess the whole power over the goods for the purposes of the consignment. 1 Livermore, Ag. 79; Story, Ag. § 44; 3 Wils. 94, 114; 20 Pick. Mass. 59; 24 *id.* 13. In public agencies an authority executed by a majority will be sufficient. 1 Coke, Litt. 181 *b;* Comyns, Dig. *Attorney*, c. 15; Bacon, Abr. *Authority*, C; 1 Term, 592.

A mere agent cannot generally appoint a sub-agent, so as to render the latter directly responsible to the principal. Story, Ag. § 13; 9 Coke, 75; 3 Mer. 237; 2 Maule & S. 298, 301; 1 Younge & J. Exch. 387; 4 Mass. 597; 12 *id.* 241; 1 Hill, N. Y. 501; 13 B. Monr. Ky. 400; 12 N. H. 226; 3 Stor. C. C. 411; but may when such is the usage of trade, or is understood by the parties to be the mode in which the particular business might be done. 9 Ves. Ch. 234; 1 Maule & S. 484; 2 *id.* 301; 6 Serg. & R. Penn. 386; 1 Ala. N. s. 249; 3 Johns. Ch. N. Y. 167.

Duties and liabilities.

The particular obligations of an agent vary according to the nature, terms, and end of his employment. Paley, Ag. 3; 2 Ld. Raym. 517. He is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them. Story, Ag. § 189; 6 Cow. N. Y. 128; 7 *id.* 456; 20 Wend. N. Y. 321. When his authority is limited by instructions, it is his duty to adhere faithfully to those instructions, Paley, Ag. 3, 4; 3 Bos. & P. 75; 5 *id.* 269; Story, Ag. § 192; 3 Johns. Cas. N. Y. 36; 1 Sandf. N. Y. 111; 26 Penn. St. 394; 14 Pet. 494; but cases of extreme necessity and unforeseen emergency constitute exceptions to this rule, 1 Stor. C. C. 45; 4 Binn. Penn. 361; 5 Day, Conn. 556; 26 Penn. St. 394; 4

Campb. 83; and where the agent is required to do an illegal or an immoral act, 6 C. Rob. Adm. 207; 7 Term, 157; 11 Wheat. 258, he may violate his instructions with impunity. Story, Ag. §§ 193, 194, 195. If he have no specific instructions, he must follow the accustomed course of the business. Paley, Ag. 4; Story, Ag. § 199; 1 Gall. C. C. 360; 11 Mart. La. 636. When the transaction may, with equal advantage to the principal, be done in two or more different ways, the agent may in general do it in either, provided a particular mode has not been prescribed to him. 1 Livermore, Ag. 103. He is to exercise the skill employed by persons of common capacity similarly engaged, and the same degree of diligence that persons of ordinary prudence are accustomed to use about their own affairs. Story, Ag. § 183; Pal. Ag. 77, 78; East, 348; 6 Taunt. 495; 10 Bingh. 57; 1 Johns. N. Y. 364; 20 Pick. Mass. 167; 6 Metc. Mass. 13; 24 Vt. 149. It is his duty to keep his principal informed of his doings, and to give him reasonable notice of whatever may be important to his interests. Paley, Ag. 27, 38, 39; Story, Ag. § 208; 5 Mees. & W. Exch. 527; 4 Watts & S. Penn. 305; 1 Stor. C. C. 43, 56; 4 Rawle, Penn. 229; 6 Whart. Penn. 9; 13 Mart. La. 214, 365. He is also bound to keep regular accounts, and to render his accounts to his principal at all reasonable times, without concealment or overcharge. Paley, Ag. 47, 48; Story, Ag. § 203; Story, Eq. Jur. § 468, 623.

As to their principals, the liabilities of agents arise from a violation of duties and obligations to them by exceeding his authority, by misconduct, or by any negligence, omission, or act by the natural result or just consequence of which the principal sustains a loss. Story, Ag. § 217 *c;* Paley, Ag. 7, 71, 74; 1 Livermore, Ag. 398; 1 Barnew. & Ad. 415; 6 Hare, Ch. 366; 12 Pick. Mass. 328; 20 *id.* 167; 11 Ohio, 363; 13 Wend. N. Y. 518; 6 Whart. Penn. 9. And joint agents who have a common interest are liable for the misconduct and omissions of each other, in violation of their duty, although the business has, in fact, been wholly transacted by one with the knowledge of the principal, and it has been privately agreed between themselves that neither shall be liable for the acts or losses of the other. 1 Livermore, Ag. 79–84; Story, Ag. § 232; Paley, Ag. 52, 53; 7 Taunt. 403.

The degree of neglect which will make the agent responsible for damages varies according to the nature of the business and the relation in which he stands to his principal. The rule of the common law is, that where a person holds himself out as of a certain business, trade, or profession, and undertakes, whether gratuitously or otherwise, to perform an act which relates to his particular employment, an omission of the skill which belongs to his situation or profession is imputable to him as a fraud upon his employer. Paley, Ag., Lloyd ed. 7, *note* 4. But where his employment does not necessarily imply skill in the business he has undertaken, and he is to have no compensation for what he does, he will not be liable to an action if he act *bonâ fide* and to the best of his ability. 1 Livermore, Ag. 336, 339, 340.

As to third parties, generally, when a person having full authority is known to act merely for another, his acts and contracts will be deemed those of the principal only, and the agent will incur no personal responsibility. 2 Livermore, Ag. 245; Story, Ag. § 261; Paley, Ag. 368, 369; 2 Kent, Comm. 629, 630; 15 East, 62; 3 P. Will. 277; 6 Binn. Penn. 324; 13 Johns. N. Y. 58, 77; 15 *id.* 1. But when an agent does an act without authority, or exceeds his authority, and the want of authority is unknown to the other party, the agent will be personally responsible to the person with whom he deals. Story, Ag. § 264; 2 Livermore, Ag. 255, 256; 2 Taunt. 385; 7 Wend. N. Y. 315; 8 Mass. 178. If the agent having original authority contract in the name of his principal, and it happen that at the time of the contract, unknown to both parties, his authority was revoked by the death of the principal, the agent will not be personally responsible. Story, Ag. § 265 *a;* 10 Mees. & W. Exch. 1.

An agent will be liable on a contract made with him when he expressly, or by implication, incurs a personal responsibility, Story, Ag. §§ 156–159, 269; as, if he make an express warranty of title, and the like; or if, though known to act as agent, he give or accept a draft in his own name, 5 Taunt. 74; 1 Mass. 27, 54; 2 Du. N. Y. 260; 2 Conn. 453; 5 Whart. Penn. 288; and public as well as private agents may, by a personal engagement, render themselves personally liable, Paley, Ag. 381. In general, although a person contract as agent, yet if there be no other responsible principal to whom resort can be had, he will be personally liable: as, if a man sign a note as "guardian of A. B.," an infant, in that case neither the infant nor his property will be liable, and the agent alone will be responsible. Paley, Ag. 374; Story, Ag. § 280; 2 Brod. & B. 460; 5 Mass. 299; 6 *id.* 58; 8 Cow. N. Y. 31. The case of an agent of government, acting in that capacity for the public, is an exception to this rule, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation; it not being presumed that a public agent meant to bind himself individually. Paley, Ag. 376, 377; and see 5 Barnew. & Ald. 34; 1 Brown, Ch. 101; 6 Dowl. & R. 122; 7 Bingh. 110. Masters of ships, though known to contract for the owners of the ships and not for themselves, are liable for the contracts they make for repairs, unless they negative their respon sibility by the express terms of the contract. Paley, Ag. 388; 15 Johns, N. Y. 298; 16 *id.* 89; 11 Mass. 34. As a general rule, the agent of a person resident in a foreign country is personally liable upon all contracts made by him for his employer, whether he

describe himself in the contract as agent or not, this being the usage of trade, and it being presumed that the credit was given to him and not to his principal, 2 Livermore, Ag. 249; Story, Ag. § 268; Paley, Ag. 248, 373, 382; 15 East, 68; 9 Barnew. & C. 78; 3 Hill, N. Y. 72; but this presumption may be rebutted by proof of a contrary agreement. 11 Ad. & E. 589, 594, 595.

An agent is personally responsible where money has been paid to him for the use of his principal under such circumstances that the party paying it becomes entitled to recall it. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent, Paley, Ag. 388, 389; 2 Livermore, Ag. 260, 261; Story, Ag. § 300; 3 Maule & S. 344; 7 Johns. N. Y. 179; 1 Wend. N. Y. 173; and if, in receiving the money, the agent was a wrong-doer, he will not be exempted from liability by payment to his principal. Paley, Ag. 393, 394; 1 Campb. 396.

With regard to the liability of agents to third persons for torts, there is a distinction between acts of misfeasance or positive wrongs, and non-feasances or mere omissions of duty. In the former case, the agent is personally liable to third persons, although authorized by his principal, Story, Ag. § 311; Paley, Ag. 396; 1 Wils. 328; 1 Bos. & P. 410; 28 Me. 464; while in the latter he is, in general, solely liable to his principal. Story, Ag. § 308; Paley, Ag. 396, 397, 398; Story, Bailm. §§ 400, 404, 507.

Where *sub-agents* are appointed, if the agent has either express or implied authority to appoint a sub-agent, he will not ordinarily be responsible for the acts or omissions of the substitute, 2 Bos. & P. 438; 2 Maule & S. 301; 1 Wash. C. C. 479; 8 Cow. N. Y. 198; and this is especially true of public officers, 1 Ld. Raym. 646; Cowp. 754; 15 East, 384; 7 Cranch, 242; 9 Wheat. 720; 8 Wend. N. Y. 403; 3 Hill, N. Y. 531; 22 N. H. 252; 13 Ohio, 523; 1 Pick. Mass. 418; 4 Mass. 378; 8 Watts, Penn. 455; but the sub-agent will himself be directly responsible to the principal for his own negligence or misconduct. Story, Ag. § 201, 217 *a*; 2 Gall. C. C. 565; 8 Cow. N. Y. 198.

Rights and privileges.

As to his principal, an agent is ordinarily entitled to compensation for his services, commonly called a commission, which is regulated either by special agreement, by the usage of trade, or by the presumed intention of the parties. Story, Ag. §§ 324, 326; Paley, Ag. 100, 101; 8 Bingh. 65; 1 Caines, N. Y. 349; 2 *id.* 357. In general, he must have faithfully performed the whole service or duty before he can claim any commissions. Story, Ag. §§ 329, 331; 1 Carr. & P. 384; 4 *id.* 289; 7 Bingh. 99; 16 Ohio, 412. He may forfeit his right to commissions by gross unskilfulness, by gross negligence, or gross misconduct, in the course of his agency, 3 Campb. 451; 7 Bingh. 569; 12 Pick. Mass. 328; as, by not keeping regular accounts, 8 Ves. Ch. 48; 11 *id.* 358; 17 Mass. 145; 2 Johns. Ch. N. Y. 108; by violating his instructions; by wilfully confounding his own property with that of his principal, 9 Beav. Rolls, 284; 5 Bos. & P. 136; 11 Ohio, 363; by fraudulently misapplying the funds of his principal, 3 Chitty, Comm. & M. 222; by embarking the property in illegal transactions; or by doing any thing which amounts to a betrayal of his trust. Story, Ag. §§ 331–334; Paley, Ag. 104, 105; Story, Eq. Jur. § 468; 12 Pick. Mass. 328, 332, 334.

The agent has a right to be reimbursed his advances, expenses, and disbursements reasonably and in good faith incurred and paid, without any default on his part, in the course of the agency, 2 Livermore, Ag. 11–13; Story, Ag. §§ 335, 336; Story, Bailm. §§ 196, 197, 357, 358; Paley, Ag. 107, 108; 5 Barnew. & C. 141; 3 Binn. Penn. 295; 11 Johns. N. Y. 439; 4 Halst. Ch. N. J. 657; and also to be paid interest on such advancements and disbursements whenever it may fairly be presumed to have been stipulated for, or to be due to him. Story, Ag. § 338; 2 Livermore, Ag. 17; 2 Bouvier, Inst. 36; 15 East, 223; 3 Campb. 467; 7 Wend. N. Y. 315; 3 Caines, 226; 3 Binn. Penn. 295. But he cannot recover for advances and disbursements made in the prosecution of an illegal transaction, though sanctioned by or even undertaken at the request of his principal, Story, Ag. § 344; 1 Livermore, Ag. 14–21; 3 Barnew. & C. 639; and he may forfeit all remedy against his principal even for his advances and disbursements made in the course of legal transactions by his own gross negligence, fraud, or misconduct, Story, Ag. § 348; 12 Wend. N. Y. 362; 12 Pick. Mass. 328, 332; 20 *id.* 167; nor will he be entitled to be reimbursed his expenses after he has notice that his authority has been revoked. Story, Ag. 349; 2 Term, 113; 8 *id.* 204; 3 Brown, Ch. 314.

The agent may enforce the payment of a debt due him from his principal on account of the agency, either by an action at law or by a bill in equity, according to the nature of the case; and he may also have the benefit of his claim by way of set-off to an action of his principal against him, provided the claim is not for uncertain damages, and is in other respects of such a nature as to be the subject of a set-off. 2 Livermore, Ag. 34; Story, Ag. §§ 350, 385; 4 Burr, 2133; 6 Cow. N. Y. 181; 11 Pick. Mass. 482. He has also a particular right of lien for all his necessary commissions, expenditures, advances, and services in and about the property intrusted to his agency, which right is in many respects analogous to the right of set-off. Story, Ag. § 373; 2 Livermore, Ag. 34; Paley, Ag. 127. Factors have a general lien upon the goods of their principal in their possession, and upon the price of such as have been lawfully sold by them, and the securities given therefor. Story, Ag. § 376; Paley, Ag. 128, 129; 2 Kent, Comm. 640; 26 Wend. N. Y. 367; 10

Paige, Ch. N. Y. 205. There are other cases in which a general lien exists in regard to particular classes of agents, either from usage, from a special agreement of the parties, or from the peculiar habit of dealing between them: such, for example, as insurance brokers, bankers, common carriers, attorneys at law and solicitors in equity, packers, calico-printers, fullers, dyers, and wharfingers. Story, Ag. §§ 379–384. See LIEN.

As to third persons, in general, a mere agent who has no beneficial interest in a contract which he has made on behalf of his principal cannot support an action thereon. 1 Livermore, Ag. 215. An agent acquires a right to maintain an action upon a contract against third persons in the following cases. *First*, when the contract is in writing, and made expressly with the agent, and imports to be a contract personally with him; as, for example, when a promissory note is given to the agent, as such, for the benefit of the principal, and the promise is to pay the money to the agent *eo nomine*, Story, Ag. §§ 393, 394; 1 Livermore, Ag. 215–221; 3 Pick. Mass. 322; 16 *id.* 381; 5 Vt. 500; and it has been held that the right of the agent in such case to sue in his own name is not confined to an express contract; thus, it has been said that one holding, as mere agent, a bill of exchange, or promissory note, indorsed in blank, or a check or note payable to bearer, may yet sue on it in his own name. Paley, Ag., Dunl. ed. 361, *note*. *Second*, the agent may maintain an action against third persons on contracts made with them, whenever he is the only known and ostensible principal, and consequently, in contemplation of law, the real contracting party, Russell, Fact. & B. 241, 244; Paley, Ag. 361, *note;* Story, Ag. § 393; as, if an agent sell goods of his principal in his own name, as though he were the owner, he is entitled to sue the buyer in his own name, 12 Wend. N. Y. 413; 5 Maule & S. 833; and, on the other hand, if he so buy, he may enforce the contract by action. The renunciation of the agent's contract by the principal does not necessarily preclude the agent from maintaining an action, but he will still be entitled to sue the party with whom he has contracted for any damages which he may have sustained by reason of a breach of contract by the latter. Russell, Fact. & B. 243, 244; 2 Barnew. & Ald. 962. *Third*, the right of the agent to sue in his own name exists when, by the usage of trade or the general course of business, he is authorized to act as owner, or as a principal contracting party, although his character as agent is known. Story, Ag. § 393. *Fourth*, where the agent has made a contract in the subject-matter of which he has a special interest or property, he may enforce his contract by action, whether he held himself out at the time to be acting in his own behalf or not, 1 Livermore, Ag. 215–219; Story, Ag. § 393; 27 Ala. N. S. 215: for example, an auctioneer who sells the goods of another may maintain an action for the price, though the sale be on the premises of the owner of the goods, because the auctioneer has a possession coupled with an interest. 2 Esp. 493; 1 H. Blackst. 81, 84, 85. But this right of the agent to bring an action in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent. 1 Livermore, Ag. 221; Story, Ag. § 403; 3 Hill, N. Y. 72, 73; 6 Serg. & R. Penn. 27; 4 Campb. 194.

An agent may maintain an action of trespass or trover against third persons for injuries affecting the possession of his principal's property; and when he has been induced by the fraud of a third person to sell or buy goods for his principal, and he has sustained a personal loss, he may maintain an action against such third person for such wrongful act, deceit, or fraud. Paley, Ag. 363; Story, Ag. §§ 414, 415; 9 Barnew. & C. 208; 3 Campb. 320; 1 H. Blackst. 81; 1 Barnew. & Ald. 59. But his remedy for mere torts is confined to cases like the foregoing, where his "right of possession is injuriously invaded, or where he incurs a personal responsibility, or loss, or damage in consequence of the tort." Story, Ag. § 416.

A sub-agent employed without the knowledge or consent of the principal has his remedy against his immediate employer only, with regard to whom he will have the same rights, obligations, and duties as if the agent were the sole principal. But where sub-agents are ordinarily or necessarily employed in the business of the agency, the sub-agent can maintain his claim for compensation both against the principal and the immediate employer, unless the agency be avowed and exclusive credit be given to the principal, in which case his remedy will be limited to the principal. 1 Livermore, Ag. 64–66; Story, Ag. §§ 386, 387; Paley, Ag. 49; 6 Taunt. 147.

A sub-agent will be clothed with a lien against the principal for services performed and disbursements made by him on account of the sub-agency, whenever a privity exists between them. 2 Livermore, Ag. 87–98; Paley, Ag. 148, 149; Story, Ag. § 388; 2 Campb. 218, 597; 2 East, 523; 6 Wend. N. Y. 475. He will acquire a lien against the principal if the latter ratifies his acts, or seeks to avail himself of the proceeds of the sub-agency, though employed by the agent without the knowledge or consent of the principal. Story, Ag. § 389; 2 Campb. 218, 597, 598; 4 *id.* 348, 353. He may avail himself of his general lien against the principal by way of substitution to the rights of his immediate employer, to the extent of the lien of the latter. Story, Ag. § 389; 1 East, 335; 2 *id.* 523, 529; 7 *id.* 7; 6 Taunt. 147. And there are cases in which a sub-agent who has no knowledge or reason to believe that his immediate employer is acting as an agent for another, will have a lien on the property for his general balance. 2 Livermore, Ag. 87–92; Paley, Ag. 148, 149; Story, Ag. § 390; 4 Campb. 60, 349, 353.

See INSURANCE AGENT.

Consult Livermore, Paley, Ross, Story, *Agency;* Addison, Chitty, Parsons, Story, *Contracts;* Cross, *Lien;* Kent, *Commentaries;* Bouvier, *Institutes.*

AGENT AND PATIENT. A phrase indicating the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another, and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right; he is then *agent and patient.* Termes de la Ley.

AGER (Lat.). **In Civil Law.** A field; land generally.

A portion of land enclosed by definite boundaries.

Used like the word *acre* in the old English law, denoting a measure of undetermined and variable value. Spelman, Gloss.; Du Cange; 3 Kent, Comm. 441.

AGGRAVATION (Lat. *ad,* to, and *gravis,* heavy; *aggravare,* to make heavy). That which increases the enormity of a crime or the injury of a wrong.

In Criminal Law. One of the rules respecting variances is, that cumulative allegations, or such as merely *operate in aggravation,* are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. This rule runs through the whole criminal law, that it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. Per Lord Ellenborough, 2 Campb. 583; 4 Barnew. & C. 329; 21 Pick. Mass. 525; 4 Gray, Mass. 18; 7 *id.* 49, 331; 1 Taylor, Ev. § 215. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation. Coke, Litt. 282 *a.*

In Pleading. The introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself. Stephen, Pl. 257; 12 Mod. 597. See 3 Am. Jur. 287–313.

An example of this is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about; the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation, 3 Wils. 294; and this matter need not be proved by the plaintiff or answered by the defendant.

AGGREGATE. A collection of particular persons or items, formed into one body.

See CORPORATION.

AGGRESSOR. He who begins a quarrel or dispute, either by threatening or striking another. No man may strike another because he has been threatened, or in consequence of the use of any words.

AGIO. A term used in commercial transactions to denote the difference of price between the value of bank-notes or other nominal money and the coin of the country. 5 Mees. & W. Exch. 535.

AGISTER. One who takes in horses or other animals to pasture at certain rates. Story, Bailm. § 443.

He is not, like an innkeeper, bound to take all horses offered to him, nor is he liable for any injury done to such animals in his care, unless he has been guilty of negligence, or from his ignorance negligence may be inferred. Holt, 457.

As to whether he is entitled to a lien, see 3 Hill, N. Y. 485, and LIEN.

AGISTMENT. The taking of another person's cattle into one's own ground to be fed, for a consideration to be paid by the owner. See AGISTER.

AGNATES. In Scotch Law. Relations on the father's side.

AGNATI. In Civil Law. The members of a Roman family who traced their origin and name to a common deceased ancestor through the male line, under whose paternal power they would be if he were living.

They were called *adgnati,—adcnati,* from the words *ad eum nati.* Ulpianus says: "*Adgnati autem sunt cognati virilis sexus ab eodem orti: nam post suos et consanguineos statim mihi proximus est consanguinei mei filius, et ego ei; patris quoque frater qui patruus appellatur; deinceps ceteri, si qui sunt, hinc orti in infinitum.*" Dig. 38. 16. *De suis,* 2, § 1. Thus, although, the grandfather and father being dead, the children become *sui juris,* and the males may become the founders of new families, still they all continue to be agnates; and the *agnatio* spreads and is perpetuated not only in the direct but also in the collateral line. Marriage, adoption, and adrogation also create the relationship of the *agnatio.* In the Sentences of Paulus, the order of inheritance is stated as follows: *Intestatorum hereditas, lege Duodecim Tabularum primum suis heredibus, deinde adgnatis et aliquando quoque gentibus deferebatur.*

They are distinguished from the *cognati,* those related through females. See COGNATI.

AGNATIO (Lat.). **In Civil Law.** A relationship through males; the male children.

Especially spoken of the children of a free father and slave mother; the rule in such cases was *agnatio sequitur ventrem.* Du Cange.

AGNOMEN (Lat.). A name or title which a *man* gets by some action or peculiarity; the last of the four names sometimes given a Roman. Thus, Scipio *Africanus* (the African), from his African victories. Ainsworth, Lex.; Calvinus, Lex. See NOMEN.

AGRARIAN LAWS. In Roman Law. Those laws by which the commonwealth disposed of its public land, or regulated the possession thereof by individuals, were termed Agrarian Laws.

The greater part of the public lands acquired by conquest were laid open to the possession of any citizen, but the state reserved the title and the right to resume possession. The object of many of the agrarian laws was to limit the area of public land of which any one person might take pos-

session. The law of Cassius, B.C. 486, is the most noted of these laws.

Until a comparatively recent period, it has been assumed that these laws were framed to reach private property as well as to restrict possession of the public domain, and hence the term agrarian is, in legal and political literature, to a great degree fixed with the meaning of a confiscatory law, intended to reduce large estates and increase the number of landholders. Harrington, in his "Oceana," and the philosophers of the French Revolution, have advocated agrarian laws in this sense. The researches of Heyne, Op. 4. 351; Niehbuhr, Hist. vol. ii., trans.; and Savigny, Das Recht des Besitzes, have redeemed the Roman word from the burden of this meaning.

AGREAMENTUM. Agreement.

Spelman says that it is equivalent in meaning to *aggregatio mentium*, though not derived therefrom.

AGREEMENT. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Comyn, Dig. *Agreement*, A 1; Plowd. 5 *a*, 6 *a*.

Aggregatio mentium.—When two or more minds are united in a thing done or to be done.

It ought to be so certain and complete that either party may have an action on it, and there must be a *quid pro quo*. Dane, Abr. c. 11.

The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right, or benefit. Bacon, Abr.

A mutual contract in consideration between two or more parties. 5 East, 10; 4 Gill & J. Md. 1; 12 How. 126.

Agreement is seldom applied to specialties; contract is generally confined to simple contracts; and promise refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties. Parsons, Contr. 6.

An agreement ceases to be such by being put in writing under seal, but not when put in writing for a memorandum. Dane, Abr. c. 11.

A promise or undertaking.

This is the loose and inaccurate use of the word. 5 East, 10; 3 Brod. & B. 14; 3 Conn. 335.

The writing or instrument which is evidence of an agreement.

This is a loose and evidently inaccurate use of the term. The agreement may be valid, and yet the written evidence thereof insufficient: as, if a promissory note be given for twenty dollars, the amount of a previous debt, where the note may generally be neglected and the debt collected by means of other evidence; or, again, if a note good in form be given for an illegal consideration, in which case the instrument is good and the agreement void.

Conditional agreements are those which are to have full effect only in case of the happening of certain events, or the existence of a given state of things.

Executed agreements are those where nothing further remains to be done by the parties.

Executed agreements take place when two or more persons make over their respective rights in a thing to one another, and thereby change their property therein either presently and at once, or at a future time upon some event that shall give it full effect, without either party trusting to the other. Such an agreement exists where a thing is bought, paid for, and delivered.

Executory agreements are such as rest on articles, memorandums, parol promises or undertakings, and the like, to be performed in the future, or which are entered into preparatory to more solemn and formal alienations of property. Powell, Contr.

An *executed* agreement always conveys a chose in *possession*, while an executory one conveys a chose in *action* only.

Express agreements are those in which the terms are openly uttered and avowed by the parties at the time of making.

Implied agreements are those which the law supposes the parties to have made, although the terms were not openly expressed.

Thus, every one who undertakes any office, employment, or duty impliedly contracts with his employers to do it with integrity, diligence, and skill; and he impliedly contracts to do whatever is fairly within the scope of his employment. 6 Scott, 761. Implied promises, or promises in law, only exist where there is no express stipulation between the parties touching the same matter; for *expressum facit cessare tacitum*. 2 Blackstone, Comm. 444; 2 Term, 105; 7 Scott, 69; 1 Nev. & P. 633.

The parties must agree or assent. There must be a definitive promise by one party accepted by the other. 3 Johns. N. Y. 534; 12 *id.* 190; 9 Ala. 69; 29 Ala. N. s. 864; 4 R. I. 14; 2 Dutch. N. J. 268; 3 Halst. N. J. 147; 29 Penn. St. 358. And they must assent to the same thing in the same sense. 4 Wheat. 225; 1 Sumn. C. C. 218; 2 Woodb. & M. C. C. 359; 7 Johns. N. Y. 240; 18 Ala. 605; 9 Mees. & W. Exch. 535. The assent must be mutual and obligatory: there must be a request on one side, and an assent on the other. 5 Bingh. N. c. 75. The assent must comprehend the whole of the proposition: it must be exactly equal to its extent and provision, and it must not qualify them by any new matter, 1 Parsons, Contr. 400; and even a slight qualification destroys the assent. 5 Mees. & W. Exch. 535; 2 Sandf. N. Y. 133. The question of assent when gathered from conversations is for the jury. 1 Cush. Mass. 89; 13 Johns. N. Y. 294.

A sufficient consideration for the agreement must exist, 2 Blackstone, Comm. 444; Chitty, Contr. 20; 2 Q. B. 851; 5 Ad. & E. 548; 7 Brown, Ch. 550; 7 Term, 350; as against third parties this consideration must be good or valuable, 10 Barnew. & C. 606; Chitty, Contr. 28; as between the parties it may be equitable only.

But it need not be adequate, if only it have some real value. 3 Anstr. 732; 2 Schoales & L. Ch. Ir. 395, n. *a*; 9 Ves. Ch. 246; 16 East, 372; 11 Ad. & E. 983; 1 Metc. Mass. 84. If the consideration be illegal in whole or in part, the agreement will be void. 6 Dan. Ky. 91; 3 Bibb, Ky. 500; 9 Vt. 23; 5 Penn. St. 452; 22 Me. 488. So also if the consideration be impossible. 5 Viner, Abr. 110, *Condition*; Coke, Litt. 206 *a*; Sheppard, Touchst. 164. See CONSIDERATION.

The agreement may be to do any thing which is lawful, as to sell or buy real estate or personal property. But the evidence of the sale of real property must be by deed, sealed: and in most cases agreements in regard to personal property must be reduced to writing. See STATUTE OF FRAUDS.

Or to hire or let personal estate.

The construction to be given to agreements is to be favorable to upholding them, and according to the intention of the parties at the time of making it, as nearly as the meaning of the words used and the rules of law will permit. 1 Parsons, Contr. 7; 2 Kent, Comm. 555; 1 H. Blackst. 569, 614; 30 Eng. L. & E. 479; 5 Hill, N. Y. 147. This intent cannot prevail against the plain meaning of words. 5 Mees. & W. Exch. 535. Neither will it be allowed to contravene established rules of law.

And that the agreement may be supported, it will be construed so as to operate in a way somewhat different from that intended, if this will prevent the agreement from failing altogether. 22 Pick. Mass. 376; 9 Wend. N. Y. 611; 16 Conn. 474.

Agreements are construed most strongly against the party proposing (*i.e. contra proferentem*). 6 Mees. & W. Exch. 662; 2 Parsons, Contr. 20. See CONTRACTS.

The effect of an agreement is to bind the parties to the performance of what they have thereby undertaken. In case of failure, the common law provides a remedy by damages, and equity will in some cases compel a specific performance.

The obligation may be avoided or destroyed by *performance*, which must be by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him, 2 Parsons, Contr. 148; by *acts of the party* to be benefited, which either prevent the performance, as where some act is to be done by one party before the act of the other, the second party is excused from performance if the first fails, 15 Mees. & W. Exch. 109; 8 Q. B. 358; 6 Barnew. & C. 325; 10 East, 359; by *rescission*, which may be made by the party to be benefited without any provision therefor in the agreement, and the mere acquiescence of the other party will constitute sufficient mutuality to satisfy the general rule that rescission must be mutual, 4 Pick. Mass. 114; 5 Me. 277; 7 Bingh. 266; 1 Watts & S. Penn. 442; by *acts of law*, as confusion, merger, 29 Vt. 412; 4 Jones, No. C. 87, lapse of time, death, as when a master who has bound himself to teach an apprentice dies, or extinction of the subject-matter of the agreement; or *generally* by showing that the agreement is of no validity on account of its lacking some of the elements essential to an agreement. See also ASSENT; CONTRACT; DISCHARGE OF CONTRACTS; PARTIES; PAYMENT; RESCISSION.

AGREEMENT FOR INSURANCE. An agreement often made in short terms preliminary to the filling out and delivery of a policy with the specific stipulations.

Such an agreement, specifying the rate of premium, the subject, and risk, and amount to be insured, in general terms, and being assented to by the parties, is binding. 1 Phillips, Ins. c. 1, § 3; 2 Curt. C. C. 277; 19 N. Y. 305. It is usually in writing, but may be by parol or by parol acceptance of a written proposal. 2 Curt. C. C. 524; 19 How. 318; 31 Ala. 711. It must be in such form or expression that the parties, subject, and risk can be thereby distinctly known, either by being specified or by references so that it can be definitely reduced to writing. 1 Phillips, Ins. §§ 6–14 *et seq.*; 2 Parsons, Marit. Law, 19; 19 N. Y. 305.

Such an agreement must have an express or implied reference to some form of policy. The ordinary form of the underwriters in like cases is implied, where no other is specified or implied. 1 Phillips, Ins. §§ 16, 18; 7 Taunt. 157; 2 Carr. & P. 91; 3 Bingh. 285; 3 Barnew. & Ad. 906.

The agreement to be valid must be on a legal interest against legal risks. 1 Phillips, Ins. c. 3, § 2; *id.* c. 10; 19 N. Y. 184.

Where the agreement is by a communication between parties at a distance, an offer by either will be binding upon both on a despatch by the other of his acceptance within a reasonable or the prescribed time, and prior to the offer having been countermanded. 1 Phillips, Ins. §§ 17, 21; 27 Penn. St. 263. See INSURANCE POLICY.

AID AND COMFORT. Help; support; assistance; counsel; encouragement.

The constitution of the United States, art. 3, s. 3, declares, that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial construction. They import, however, help, support, assistance, countenance, encouragement. The word *aid*, which occurs in the stat. Westm. 1, c. 14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act (and he adds, what is not applicable to the crime of treason), who are not present when the act is done. See also 1 Burn, Just. 5, 6; 4 Blackstone, Comm. 37, 38.

AID PRAYER. **In English Law.** A petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the curtesy, or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ, to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. Fitzherbert, Nat. Brev. 50; Cowel.

AIDER BY VERDICT. **In Pleading.** The presumption which arises after verdict, whether in a civil or criminal case, that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.

The rule is thus laid down, that where a matter is so essentially necessary to be proved, that had it not been in evidence the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial. 1 Maule & S. 234, 237; 1 Saund., 6th ed. 227, 228; 1 Den. Cr. Cas. 356; 2 Carr. & H. 868; 13 Q. B. 790; 1 *id.* 911, 912; 2 Mann. & G. 405; 2 Scott, N. R. 459; 9 Dowl. 409; 13 Mees. & W. Exch. 377; 6 C. B. 136; 9 *id.* 364; 6 Metc. Mass. 334; 6 Pick. Mass. 409; 16 *id.* 541; 2 Cush. Mass. 316; 6 *id.* 524; 17 Johns. N. Y. 439, 458.

AIDING AND ABETTING. In Criminal Law. The offence committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator thereof. 4 Sharswood, Blackst. Comm. 34; Russ. & R. Cr. Cas. 363, 421; 9 Ired. No. C. 440; 1 Woodb. & M. C. C. 221; 10 Pick. Mass. 477; 12 Whart. Penn. 460; 26 Miss. 299.

A principal in the second degree is he who is present aiding and abetting the fact to be done. 1 Hale, Pl. Cr. 615.

Actual presence is not necessary: it is sufficient to be so situated as to come readily to the assistance of his fellows. 13 Mo. 382.

AIDS. In English Law. A species of tax payable by the tenant of lands to his superior lord on the happening of certain events.

They were originally mere benevolences granted to the lord in certain times of danger and distress, but soon came to be claimed as a right. They were originally given in three cases only, and were of uncertain amount. For a period they were demanded in additional cases; but this abuse was corrected by Magna Charta (of John) and the stat. 25 Edw. I. (*confirmatio chartarum*), and they were made payable only,—to ransom the lord's person, when taken prisoner; to make the lord's eldest son a knight; to marry the lord's eldest daughter, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament (25 Edw. III. c. 11) at twenty shillings each, being the supposed twentieth part of a knight's fee. 2 Blackstone, Comm. 64. They were abolished by the 12 Car. II. c. 24; 2 Sharswood, Blackst. Comm. 77, n.

AIEL (spelled also *Ayel*, *Aile*, and *Ayle*). Cowel.

A writ which lieth where the grandfather was seised in his demesne as of fee of any lands or tenements in fee simple the day that he died, and a stranger abateth or entereth the same day and dispossesseth the heir. Fitzherbert, Nat. Brev. 222; Spelman, Gloss.; Termes de la Ley; 3 Sharswood, Blackst. Comm. 186.

AIELESSE (Norman). A grandmother. Kelham.

AILE. A corruption of the French word *aïeul*, grandfather. See AIEL.

AIR. That fluid transparent substance which surrounds our globe.

No property can be had in the air; it belongs equally to all men, being indispensable to their existence. But this must be understood with this qualification, that no man has a right to use the air over another man's land in such a manner as to be injurious to him. To poison or materially to change the air, to the annoyance of the public, is a nuisance. Croke, Car. 510; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Strange, 686; Dane, Abr., Index; see NUISANCE. See 4 Campb. 219; 4 Bouvier, Inst. n. 3601; Grotius, *Droit de la Guerre, etc.* liv. 2, c. 2, § 3, note 3 et 4.

An easement of light and air coming over the land of another cannot be acquired by prescription in the United States, 6 Gray, Mass. 255; 14 *id.* 583; 2 Watts, Penn. 327; 10 Barb. N. Y. 543; 13 Wend. N. Y. 263; 19 *id.* 309; 4 Sandf. Ch. N. Y. 438; 2 Conn. 597; 16 Ill. 217; 1 Green, Ch. N. J. 57; 1 Dudl. So. C. 131; 5 Rich, So. C. 311; 26 Me. 436; 11 Md. 1; 10 Ala. N. S. 63; though the rule is otherwise in England. 8 Ell. & B. 39; see 2 Washburn, Real Prop. 62 *et seq.*

AISIAMENTUM (spelled also *Esamentum*). An easement. Spelman, Gloss.

AJUAR. In Spanish Law. The jewels and furniture which a wife brings in marriage.

AJUTAGE (spelled also *Adjutage*). A conical tube used in drawing water through an aperture, by the use of which the quantity of water drawn is much increased.

When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture, has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties. 2 Whart. Penn. 477.

ALABAMA. One of the new states of the United States of America.

The territory of Alabama was organized under an act of congress of March 3, 1817, 3 Statutes at Large, 371. An act of congress was passed, March 2, 1819, authorizing the inhabitants of the territory of Alabama to form for themselves a constitution and state government. In pursuance of that act, the constitution of the state of Alabama was framed by a convention which met in Hunstville, July 5, and adjourned August 2, 1819.

The constitution provides that amendments to it may be proposed by vote of two-thirds of each house of the general assembly; and that, if amendments so proposed shall, at the next general election, be approved by the votes of a majority of the citizens voting for representatives, and shall afterwards, and before another election, be ratified by two-thirds of each house of the general assembly, they shall become parts of the constitution. Under this provision the constitution was amended in 1830, 1846, and 1850, but has never been otherwise changed.

All white male citizens of the state, who are citizens of the United States, twenty-one years of

age, who have resided in the state six months, and in the county where they vote three months, are qualified voters.

The Legislative Power.

2. The legislative power of the state is vested in a senate and house of representatives, together composing the general assembly. The senators are elected for a term of four years, and the representatives for a term of two years, on the first Monday in August, by the electors. The voting is by ballot. The senators are divided into two classes, one of which goes out of office at the end of every period of two years. Const. Amend. of 1850; Code, 174. The number of representatives is one hundred, and the number of senators is thirty-three; the largest number in both houses allowed by the constitution. The senators and representatives are apportioned among the counties according to their white population at the regular session of the general assembly next after each enumeration of the inhabitants, which is taken at the end of every successive period of ten years. Each county is entitled to one representative. Counties composing a senatorial district must not be entirely separated by any county belonging to another district, and no county must be divided in forming a senatorial district. Amend. of 1850; Code, 49; Acts, 1855–6, p. 6.

3. *The qualifications of senators and representatives* are that they shall be white men, and citizens of the United States, and shall have resided in the county or district for one year next preceding the election.

The senators must be twenty-seven, and the representatives twenty-one years of age. Persons are ineligible who hold any lucrative office under the United States, this state, or any other power (the offices of postmaster, militia offices without annual salary, and the office of justice of the peace, excepted). And no collector or holder of public moneys can have a seat in the general assembly, or be eligible to any office of trust or profit, until he has accounted for and paid into the treasury all sums of money for which he is accountable. Members of the general assembly during the session, and when going to and returning from the same (allowing one day for every twenty miles of the distance of their residences from the capitol), are privileged from arrest unless for treason, felony, or breach of the peace, and from accountability for words spoken in debate. They receive a compensation fixed by law, which cannot be increased by a law taking effect at the session of its adoption. They cannot be appointed to offices of profit created, or improved in its emoluments, during their terms, except such offices as are filled by popular election.

§ 3. Bills for raising revenue can only originate in the house of representatives, but all other bills may originate in either house. Each house chooses its presiding officer and other officers; judges of the election, qualification, and returns of its members, except that contested elections must be determined as directed by law; determines the rules of its proceedings, punishes for disorderly conduct, and keeps and prints a journal of its proceedings. A majority of each house constitutes a quorum, but a smaller number may adjourn from day to day, and compel the attendance of absent members; and any member may dissent from any act or resolution, and have the reason of his dissent entered upon the journal. The governor issues writs of election to fill vacancies. The doors of each house are kept open, except when the occasion requires secrecy. Neither house without the consent of the other can adjourn for more than three days, or to a different place. Const. art. iii. sect. 1–27.

The house of representatives has the sole power of impeachment, but impeachments are tried by the senate,—the senators acting upon oath or affirmation, and the concurrence of two-thirds of those present being requisite to conviction. Const. art. v., Impeachments, §§ 1, 2.

The Executive Department.

4. *The Governor* is the chief magistrate of the state, and in him is vested the supreme executive power. He is elected by the qualified voters of the state for a term of two years, but is ineligible for more than four in any period of six years; and no person is eligible to the office unless he is at least thirty years of age and a native citizen of the United States, and has been four years a resident of the state. And no other office under this state, or any other power, can be held at the same time with that of governor. His salary, fixed by statute, is four thousand dollars *per annum*, and the constitution prohibits its being either increased or diminished during his term of office. He is commander-in-chief of the army and navy of the state, and of the militia, except when called into the service of the United States, and then his rank is fixed by the legislature. He may require information in writing from the officers of the executive department, may convene the general assembly on extraordinary occasions, and may adjourn it if the two houses disagree as to the time of adjournment. It is his duty to give information to the general assembly and recommend measures for its consideration, and also to approve or veto bills passed by the general assembly; but if a bill returned with his objection is afterwards passed in each house by a majority of all the members elected, it becomes a law without his approval. He is required to take care that the laws be faithfully executed, and he has the power of granting reprieves and pardons and of remitting fines and forfeitures under the rules and regulations prescribed by law, except in cases of treason and impeachment; and he may in cases of treason respite the sentence until the end of the next session of the general assembly, and grant reprieves and pardons with the advice and consent of the senate.

He has power to fill all vacancies in offices the appointment of which is vested in the general assembly, during the recess, by granting commissions to expire at the end of the next session of the general assembly. He has also authority to fill vacancies in the offices of judge of the circuit court, and judge of the probate court, and sheriff, who are elected by the popular vote. Amend. 1850. In case of the governor's impeachment, removal from office, death, refusal to qualify, resignation, or absence from the state, the president of the senate fills the office until the next election, unless the general assembly shall provide by law for an election to fill the vacancy, or until the governor absent or impeached shall return or be acquitted. In like circumstances in reference to the president of the senate when governor, the speaker of the house of representatives fills the office. Const. art. iv. sect. 1–24.

5. *The Secretary of State* is appointed by joint vote of the two houses of the general assembly for a term of two years. Const. iv. § 13.

The Comptroller of Public Accounts and *Treasurer.*—The constitution requires that these officers should be elected annually by joint vote of both houses of the general assembly.

Superintendent of Education.—The constitution directs that "schools and the means of education shall forever be encouraged in this state." Accordingly, provision has been made by law for the establishment of schools in all the townships of the state, for the gratuitous education of children within the proper ages, though the fund is yet in-

adequate to the full accomplishment of the benevolent purpose contemplated. The superintendent of public instruction is elected biennially by the general assembly, and exercises a general supervision over the free public schools and educational interests of the state. Acts, 1853–4, p. 8.

The Judicial Department.

6. *The Supreme Court*, under a statutory regulation, is composed of three judges, who elect one of their number chief justice, and appoint a reporter of the decisions of the court, and its clerk, and marshal. Code, sect. 567, 578, 585. The judges are elected by joint vote of the two houses of the general assembly. The constitution prescribes that the court shall be held at the capitol, and that it shall have appellate jurisdiction coextensive with the state, under such restrictions and regulations not repugnant to the constitution as may, from time to time, be prescribed by law; provided that it shall have power to issue writs of injunction, quo warranto, habeas corpus, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions; and the judges are by the constitution made conservators of the peace throughout the state. Const. art. v. sect. 2. 16. 4. The decisions of the court are delivered in writing, and reported.

The reports of the decisions are now embraced in fifty-two volumes, as follows, to wit: 1 of Minor, 3 of Stewart, 5 of Stewart and Porter, 9 of Porter, and 34 of Alabama Reports, new series.

7. *The Circuit Court.*—This court has a plenary grant of original jurisdiction over all criminal cases and civil cases, where the matter in controversy exceeds fifty dollars; but its jurisdiction over chancery causes ceased with the establishment of a separate chancery court by an act passed in pursuance of the constitution. The judges have power to issue writs of injunction returnable into the court of chancery.

A circuit court is required to be held in each county of the state at least twice in every year. The constitution directs that the state shall be divided into convenient circuits; that each circuit shall contain not less than three nor more than six counties; that there shall be a judge for each circuit, who shall reside within it; and that the judges may interchange with each other when they deem it expedient, and shall do so when directed by law. Const. art. v. sect. 5–8. The state is, by act of the legislature, divided into eleven circuits. The judges are chosen by the electors of the respective circuits. Amend. of 1850.

8. *The City Court of Mobile.*—This court is held in the city of Mobile. It was established by a statute passed under the authority given by the constitution to establish inferior courts; and it has jurisdiction over criminal causes in Mobile county, and civil causes pertaining to courts of common law, except actions of ejectment and *treepass quare clausum fregit*. Const. art. v. sect. 1; 24 Ala. 521; 18 Ala. 521. The judge is chosen by the electors of Mobile county.

Chancery Courts.—Equity jurisdiction was exercised by the circuit courts till 1839, when a separate chancery court was established, and the state is now divided into three chancery divisions, for each of which there is a chancellor, who is chosen by joint vote of the two houses of the general assembly. Const. art. v. sect. 8–12; Acts of 1839, p. 22; Code, sect. 596–601.

9. *Probate Courts.*—These courts are established in each county. They have a single officer, who is both judge and clerk, but is called judge, and is chosen by the electors of the county for a term of six years, and is compensated by fees of office. He has jurisdiction of the probate of wills; the granting and revoking of letters testamentary and of administration; the administration of estates; the guardianship of minors and persons of unsound mind; the binding-out of apprentices, and all controversies between master and apprentice; the allotment of dower in lands, when it can be made by metes and bounds; partition of lands; change of name, &c. Const. art. v. sect. 9; Code, sect. 670, 1369, 173, 661.

The Court of County Commissioners is established by law in each county. It is composed of the probate judge and four commissioners, who are elected by the qualified voters of the county for a term of three years. It has jurisdiction in relation to roads, bridges, causeways, and ferries; and it has authority to direct and control the property of the county; to levy county taxes; to examine, settle, and allow all claims against the county; to examine and audit the accounts of all officers having the care, management, collection, or disbursement of money belonging to the county, or appropriated for its use and benefit; to make rules and regulations for the support of the poor, and to lay off the counties into suitable election precincts. Code, sect. 697, 703, 704, 182.

10. *Justices of the Peace.*—The constitution authorizes the appointment of a competent number of justices of the peace in each county, in such mode and for such term as the general assembly may direct, and restricts their jurisdiction in civil cases to controversies where the amount does not exceed fifty dollars. Const. art. v. sect. 10. Under this authority it is provided by law that two justices of the peace shall be elected for each election precinct by the qualified voters thereof. Code, sect. 253, 708. They are also conservators of the peace and committing magistrates.

11. *Of the Judges generally.*—No person seventy years of age can hold or continue in the office of judge in this state. The judges are elected for a term of six years. Amend. of 1830 and of 1850; Code, § 661. For wilful neglect of duty or other reasonable cause, not being sufficient ground for impeachment, they may be removed by the governor on the address of two-thirds of each house of the general assembly; but the cause of removal must be stated at length in the address and entered on the journal of each house, and the judge must be notified of the cause and admitted to a hearing in his defence, before a vote for the address shall pass, and the vote must be taken by yeas and nays and entered upon the journal of each house respectively. Amend. of 1830. Judges of the supreme and circuit and chancery courts receive stated salaries, which cannot be diminished during their continuance in office; and they are prohibited from receiving any fees or perquisites of office, and from holding any other office of trust or profit under this state, the United States, or any other power. Const. art. v. sect. 11–14.

12. *Regulations applicable to Officers generally.*—Legislative, executive, and judicial officers are required to take an oath to support the constitution of the United States and the state of Alabama, while remaining citizens of the state, and to discharge to the best of their abilities the duties of their offices. Const. art. vi. sect. 1. In pursuance of a section of the constitution authorizing the enactment of laws to suppress the evil practice of duelling, extending to disqualification for office or the tenure thereof, a law has been adopted requiring every public officer to take an anti-duelling oath. Const. art. vi. sect. 3; Code, sect. 110. All civil officers are liable to impeachment for misdemeanors in office. Judgment in cases of impeachment can only be for removal from, and disqualification for, office, but the impeachment does not bar an indictment. Const. art. v., Impeachment, sect. 3.

ALBA FIRMA. White rents; rents reserved payable in silver, or white money.

They were so called to distinguish them from *reditus nigri*, which were rents reserved payable in work, grain, and the like. Coke, 2d Inst. 19.

ALCADE. In Spanish Law. A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.

ALDERMAN (equivalent to senator or senior).

In English Law. An associate to the chief civil magistrate of a corporate town or city.

The word was formerly of very extended signification. Spelman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office. Spelman, Gloss.

Aldermannus civitatis burgi seu castellæ (alderman of a city, borough, or castle). 1 Sharswood, Blackst. Comm. 475, n.

Aldermannus comitatus (alderman of the county), who is thought by Spelman to have held an intermediate place between an earl and sheriff; by others, held the same as the earl. 1 Sharswood, Blackst. Comm. 116.

Aldermannus hundredi seu wapentachii (alderman of a hundred or wapentake). Spelman.

Aldermannus regis (alderman of the king) was so called, either because he was appointed by the king, or because he gave the judgment of the king in the premises allotted to him.

Aldermannus totius Angliæ (alderman of all England). An officer of high rank whose duties cannot be precisely determined. See Spelman, Gloss.

The aldermen of the city of London were probably originally the chiefs of guilds. See 1 Spence, Eq. Jur. 54, 56.

In American Cities. The aldermen are generally a legislative body, having limited judicial powers as a body, as in matters of internal police regulation, laying out and repairing streets, constructing sewers, and the like; though in many cities they hold separate courts, and have magisterial powers to a considerable extent. Consult Spelman, *Gloss.;* Cowel; 1 Sharswood, *Blackst. Comm.* 116; Reeve, *Hist. Eng. Law;* Spence, *Eq. Jur.*

ALEATOR (Lat. *alea*, dice). A dice-player; a gambler.

"The more skilful a player he is, the wickeder he is." Calvinus, Lex.

ALEATORY CONTRACT. In Civil Law. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event. La. Civ. Code, art. 2951.

The term includes contracts, such as insurance, annuities, and the like.

ALE-CONNER (also called *ale-taster*). An officer appointed by the court-leet, sworn to look to the assize and goodness of ale and beer within the precincts of the leet. Kitchin, Courts Bar., 46; Whishaw.

An officer appointed in every court-leet, and sworn to look to the assize of bread, ale, or beer within the precincts of that lordship. Cowel.

This officer is still continued in name, though the duties are changed or given up. 1 Crabb, Real Prop. 501.

ALER SANS JOUR (Fr. *aller sans jour*, to go without day).

In Practice. A phrase formerly used to indicate the final dismissal of a case from court.

The defendant was then at liberty to go, without any day appointed for his subsequent appearance. Kitch. 146.

ALFET. The vessel in which hot water was put, for the purpose of dipping a criminal's arm in it up to the elbow in the ordeal by water. Cowel.

ALIA ENORMIA (Lat., other wrongs).

In Pleading. A general allegation, at the end of a declaration, of wrongful acts committed by the defendant to the damage of the plaintiff. In form it is, "and other wrongs then and there did against the peace, etc." Under this allegation, damages and matters which naturally arise from the act complained of may be given in evidence, 2 Greenleaf, Ev. § 678, including battery of servants, etc. in a declaration for breaking into and entering a house, 6 Mod. 127; 2 Term, 166; 7 Harr. & J. Md. 68; and all matters in general which go in aggravation of damages merely, but would not of themselves be ground for an action. Buller, Nisi P. 89; 3 Mass. 222; 6 Munf. Va. 308.

But matters in aggravation may be stated specially, 15 Mass. 194; Gilm. Va. 227; and matters which of themselves would constitute a ground of action must be so stated. 1 Chitty, Plead. 348; 17 Pick. Mass. 284. See generally 1 Chitty, Plead. 648; Buller, Nisi P. 89; 2 Greenleaf, Ev. §§ 268, 273, 278; 2 Salk. 643; Peake, Ev. 505.

ALIAS (Lat. *alius*, another). **In Practice.** Before; at another time.

An *alias* writ is a writ issued where one of the same kind has been issued *before* in the same cause.

The second writ runs, in such case, "we command you as we have *before* commanded you" (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs.

ALIAS DICTUS (Lat., otherwise called). A description of the defendant by adding to his real name that by which he is known in some writing on which he is to be charged, or by which he is known. 4 Johns. N. Y. 118; 2 Caines, N. Y. 362; 3 *id.* 219.

ALIBI (Lat., elsewhere.). Presence in another place than that described.

When a person, charged with a crime, proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton, 140.

This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings; as if the party could prove by a record, properly authenticated, that on the day or at the time in question he was in another place.

ALIEN (Lat. *alienus*, belonging to another; foreign). A foreigner; one of foreign birth.

In England, one born out of the allegiance of the king.

In the United States, one born out of the jurisdiction of the United States, and who has not been naturalized under their constitution and laws. 2 Kent, Comm. 50. The children of ambassadors and ministers at foreign courts, however, are not aliens. And see 10 U. S. Stat. 604.

2. An alien cannot in general acquire title to real estate by descent, or by other mere operation of law, 7 Coke, 25 *a;* 1 Ventr. 417; 3 Johns. Cas. N. Y. 109; Hard. Ky. 61; and if he purchase land, he may be divested of the fee, upon an inquest of office found; but until this is done he may sell, convey, or devise the lands and pass a good title to the same. 4 Wheat. 453; 12 Mass. 143; 6 Johns. Ch. N. Y. 365; 7 N. H. 475; 1 Washburn, Real Prop. 49. The disabilities of aliens in respect to holding lands are removed by statute in many of the states of the United States; in *Arkansas*, if they have declared an intention to become citizens, Rev. Stat. c. 7, § 1; *California*, wholly if resident, Const. art. 7, § 17; Act of 1856, c. 116; *Connecticut*, wholly, Comp. Stat. 1854, p. 630, § 6; *Delaware*, as in Arkansas, Rev. Code, 1852, c. 81, § 1; *Florida*, wholly, Thompson, Dig. div. 2, tit. 2, c. 1, § 3; *Georgia*, as in Arkansas, Cobb, Dig. 1851, p. 307; *Illinois*, in part, Rev. Stat. 1856, c. 34, § 2; *Iowa*, wholly, Const. art. 1, § 22; *Kentucky*, wholly if resident, Rev. Stat. 1851–52, c. 15, art. 3, § 1; see 2 Dan. Ky. 40; *Maine*, wholly, Rev. Stat. 1857, c. 73, § 2; *Massachusetts*, wholly, Gen. Stat. c. 90, § 38; *Michigan*, wholly, Rev. Stat. 1846, c. 66, § 5; *Mississippi*, wholly if resident, Rev. Code, 1857, c. 36, § 9, art. 65; *Missouri*, as in Mississippi, Rev. Stat. 1845, c. 6, § 1; *New Hampshire*, wholly if resident, Comp. Stat. 1853, c. 135, § 1; *New Jersey*, wholly, Rev. Stat. 1847, c. 1, § 1; *New York*, partly, 2 Rev. Stat. 1852, p. 128, §§ 24, 25; *Ohio*, wholly, Rev. Stat. 1854, c. 3, § 1; *Pennsylvania*, wholly, Dunlop, Laws, p. 73; *Rhode Island*, partly, Rev. Stat. 1857, c. 151, § 21; *South Carolina*, as in Arkansas, 5 Stat. at Large, 547; see 1 M'Cord, Ch. So. C. 146; *Tennessee*, partly, Carruther & N. Dig. 1837, p. 87; *Texas*, wholly if a resident, and an intention to become a resident has been declared, Stat. 1854, c. 70, § 2; *Virginia*, partly, Code, 1849, c. 115, § 5; *Wisconsin*, wholly, Rev. Stat. 1849, c. 62, § 35. In *Alabama*, Code, 1852, § 580; 4 Ala. 60; *Maryland; North Carolina*, Code, 1854, c. 38, § 9; 3 Ired. No. C. 146; *Vermont*, the common law prevails. 1 Washburn, Real Prop. 49, n.

3. An alien has a right to acquire personal estate, make and enforce contracts in relation to the same; he is protected from injuries and wrongs to his person and property, his relative rights and character; he may sue and be sued. 7 Coke, 17; Dy. 2 *b;* 1 Cush. Mass. 531; 2 Sandf. Ch. N. Y. 586; 2 Woodb. & M. C. C. 1; 2 Kent, Comm. 63.

An alien, even after being naturalized, is ineligible to the office of president of the United States, and in some states, as in New York, to that of governor; he cannot be a member of congress till the expiration of seven years after his naturalization. An alien can exercise no political rights whatever; he cannot, therefore, vote at any political election, fill any office, or serve as a juror. 6 Johns. N. Y. 332. The disabilities of aliens may be removed, and they may become citizens, under the provisions of the Acts of Congress of April 14, 1802, c. 28; March 3, 1813, c. 184; March 22, 1816, c. 32; May 26, 1824, c. 186; May 24, 1828, c. 116. See 2 Curt. C. C. 98; 1 Woodb. & M. C. C. 323; 4 Gray, Mass. 559; 33 N. H. 89.

An alien owes a temporary local allegiance, and his property is liable to taxation. As to the case of alien enemies, see that title.

Consult Kent, *Commentaries;* Bouvier, *Institutes;* Washburn, *Real Property.*

Of Estates. To alienate; to transfer.

ALIEN ENEMY. One who owes allegiance to the adverse belligerent. 1 Kent, Comm. 73.

He who owes a temporary but not a permanent allegiance is an alien enemy in respect to acts done during such temporary allegiance only; and when his allegiance terminates, his hostile character terminates also. 1 Bos. & P. 163.

Alien enemies are said to have no rights, no privileges, unless by the king's special favor, during time of war. 1 Sharswood, Blackst. Comm. 372; Bynkershoek, 195; 8 Term, 166. But the tendency of modern law is to give them protection for person and property until ordered out of the country. If resident within the country, they may sue and be sued. 2 Kent, Comm. 63; 10 Johns. N. Y. 69; 6 Binn. Penn. 241.

ALIENAGE. The condition or state of an alien.

ALIENATE. To convey; to transfer. Coke, Litt. 118 *b*. *Alien* is very commonly used in the same sense. 1 Washburn, Real Prop. 53.

ALIENATION. Of Estates. The transfer of the property and possession of lands, tenements, or other things, from one person to another. Termes de la Ley.

It is particularly applied to absolute conveyances of real property. 1 N. Y. 290, 294.

Alienations by deed may be by conveyances at common law, which are either *original* or *primary*, being those by means of which the benefit or estate is created or first arises; or *derivative* or *secondary* conveyances, being those by which the benefit or estate originally created is enlarged, restrained, transferred, or extinguished; or they may be by conveyances under the statute of uses. The

original conveyances are the following: feoffment, gift, grant, lease, exchange, partition. The *derivative* are, release, confirmation, surrender, assignment, defeasance. Those deriving their force from the *statute of uses* are, covenants to stand seised to uses, bargains and sale, lease and release, deeds to lead or declare the uses of other more direct conveyances, deeds of revocation of uses. 2 Blackstone, Comm. c. 20; 2 Washburn, Real Prop. 600 *et seq.* See CONVEYANCE; DEED. *Alienations by matter of record* may be: by private acts of the legislature; by grants, as by patents of lands; by fines; by common recovery.

As to *alienations by devise*, see DEVISE; WILL.

In Medical Jurisprudence. A generic term denoting the different kinds of aberration of the human understanding. 1 Beck, Med. Jur. 535.

ALIENATION OFFICE. In English Law. An office to which all writs of covenants and entries were carried for the recovery of fines levied thereon.

ALIENEE. One to whom an alienation is made.

ALIENI GENERIS (Lat.). Of another kind.

ALIENI JURIS (Lat.). Subject to the authority of another. An infant who is under the authority of his father or guardian, and a wife under the power of her husband, are said to be *alieni juris*. See SUI JURIS.

ALIENIGENA (Lat.). One of foreign birth; an alien. 7 Coke, 31.

ALIENOR. He who makes a grant or alienation.

ALIMENT. In Scotch Law. To support; to provide with necessaries. Paterson, Comp. §§ 845, 850.

Maintenance; support; an allowance from the husband's estate for the support of the wife. Paterson, Comp. § 893.

In Civil Law. Food and other things necessary to the support of life; money allowed for the purpose of procuring these. Dig. 50. 16. 43.

In Common Law. To supply with necessaries. 3 Edw. Ch. N. Y. 194.

ALIMENTA (Lat. *alere*, to support). Things necessary to sustain life.

Under the appellation are included food, clothing, and a house: water also, it is said, in those regions where water is sold. Calvinus, Lex.; Dig. 50. 16. 43.

ALIMONY. The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. Bishop, Marr. & D. § 549.

Alimony pendente lite is that ordered during the pendency of a suit.

Permanent alimony is that ordered for the use of the wife after the termination of the suit during their joint lives.

2. To entitle a wife to permanent alimony, the following conditions must be complied with. *First*, a legal and valid marriage must be proved. 1 Rob. Eccl. 484; 2 Add. Eccl. 484; 4 Hen. & M. Va. 507; 10 Ga. 477; 5 Sess. Cas. N. S. Sc. 1288. *Second*, by the common law the relation of husband and wife must continue to subsist; for which reason no alimony could be awarded upon a divorce *a vinculo matrimonii*, or a sentence of nullity. 1 Lee, Eccl. 621; 1 Blackf. Ind. 360; 1 Iowa, 440; 2 Hagg. Cons. 395; Saxt. N. J. 96; 13 Mass. 264; 5 Pick. Mass. 461; 18 Me. 308; 4 Barb. N. Y. 295; 1 Gill & J. Md. 463; 8 Yerg. Tenn. 67. This rule, however, has been very generally changed by statute in this country. Bishop, Marr. & D. § 563. *Third*, the wife must be separated from the bed and board of her husband by judicial decree; voluntary separation, for whatever cause, is insufficient. And, as a general rule, the alimony must be awarded by the same decree which grants the separation, or at least in the same suit, it not being generally competent to maintain a subsequent and independent suit for that purpose. 9 Watts, Penn. 90; 27 Miss. 630, 692; 21 Conn. 185; 1 Blackf. Ind. 360; 8 Yerg. Tenn. 67. *Fourth*, the wife must not be the guilty party. 1 Paige, Ch. N. Y. 276; 2 Barb. Ch. 311; 2 Ill. 242; Wright, Ohio, 514; 6 B. Monr. Ky. 496; 11 Ala. N. S. 763; 24 N. H. 564.

3. Alimony *pendente lite* is granted much more freely than permanent alimony, it being very much a matter of course to allow the former, unless the wife has sufficient separate property, upon the institution of a suit, 1 Hagg. Eccl. 773; 1 Curt. Eccl. 444; 2 B. Monr. Ky. 142; 2 Paige, Ch. N. Y. 8; 11 *id.* 166, either for the purpose of obtaining a separation from bed and board, 1 Edw. Ch. N. Y. 255, a divorce *a vinculo matrimonii*, 9 Mo. 539; 18 Me. 308; 1 Bland. Ch. Md. 101, or a sentence of nullity, and whether the wife is plaintiff or defendant. The reason is, that it is improper for the parties to live in matrimonial cohabitation during the pendency of such a suit, whatever may be its final result. 1 Sandf. Ch. N. Y. 483. Upon the same principle, the husband who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; otherwise she would be denied justice. 2 Barb. Ch. N. Y. 146; Walk. Ch. Mich. 421; 2 Md. Ch. Dec. 335, 393. See 1 Jones, No. C. 528; Bishop, Marr. & D. §§ 569–590.

4. Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals, for her support from year to year. 6 Harr. & J. Md. 485; 9 N. H. 309; 9 B. Monr. Ky. 49; 6 Watts & S. Penn. 85. It must secure to her as wife a maintenance separate from her husband: an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony. 3 Hagg. Eccl. 322; 7 Dan. Ky. 181; 6 Harr. & J. Md. 485; 4 Hen. & M. Va. 587; 6 Ired.

No. C. 293. Nor is alimony regarded, in any general sense, as the separate property of the wife. Hence she can neither alienate nor charge it, 5 Paige, Ch. N. Y. 509; if she suffers it to remain in arrear for more than one year, she cannot generally recover such arrears, 3 Hagg. Eccl. 322; if she saves up any thing from her annual allowance, upon her death it will go to her husband, 6 Watts & S. Penn. 85; 12 Ga. 201; if there are any arrears at the time of her death, they cannot be recovered by her executors, 8 Sim. Ch. 321; 8 Term, 545; 6 Watts & S. Penn. 85; as the husband is only bound to support his wife during his own life, her right to alimony ceases with his death, 1 Root, Conn. 349; 4 Hayw. Tenn. 75; 4 Md. Ch. Dec. 289; and as it is a maintenance for the wife living separate from her husband, it ceases upon reconciliation and cohabitation. So also its amount is liable at any time to be increased or diminished at the discretion of the court. 8 Sim. Ch. 315, 321, n.; 6 Watts & S. Penn. 85; Bishop, Marr. & D. §§ 591–599. The preceding observations, however, respecting the nature and incidents of alimony should be received with some caution in this country, where the subject is so largely regulated by statute. 10 Paige, Ch. N. Y. 20; 7 Hill, N. Y. 207; Bishop, Marr. & D. §§ 600–602 *a*, 619 *d*–631.

5. In respect to the amount to be awarded for alimony, it depends upon a great variety of considerations and is governed by no fixed rules. 4 Gill, Md. 105; 7 Hill, N. Y. 107; 1 Green, Ch. N. J. 90; 1 Iowa, 151; 10 Ga. 477. The ability of the husband, however, is a circumstance of more importance than the necessity of the wife, especially as regards permanent alimony; and in estimating his ability his entire income will be taken into consideration, whether it is derived from his property or his personal exertions. 3 Curt. Eccl. 3, 41; 1 Rich, Eq. So. C. 282; 2 B. Monr. Ky. 370; 5 Pick. Mass. 427; 1 R. I. 212. But if the wife has separate property, 2 Phill. Eccl. 40; 2 Add. Eccl. 1, or derives income from her personal exertions, this will also be taken into account. The method of computation is, to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate; then from the sum so determined deduct her separate income, and the remainder will be the annual allowance to be made her. There are various other circumstances, however, besides the husband's ability, to be taken into consideration: as, whether the bulk of the property came from the wife, or belonged originally to the husband, 2 Litt. Ky. 337; 4 Humphr. Tenn. 510, or was accumulated by the joint exertions of both, subsequent to the marriage, 11 Ala. N. S. 763; 3 Harr. Del. 142; whether there are children to be supported and educated, and upon whom their support and education devolves, 3 Paige, Ch. N. Y. 267; 4 *id.* 643; 3 Green, Ch. N. J. 171; 2 Litt. Ky. 337; 10 Ga. 477; the nature and extent of the husband's *delictum*, 3 Hagg. Eccl. 657; 2 Johns. Ch. N. Y. 391; 4 Des. Eq. So. C. 183; 24 N. H. 564; the demeanor and conduct of the wife towards the husband who desires cohabitation, 7 Hill, N. Y. 207; 5 Dan. Ky. 499; 15 Ill. 145; the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support, 1 Hagg. Eccl. 526, 532; the condition in life, circumstances, health, place of residence, and consequent necessary expenditures of the wife, 5 Pick. Mass. 427; 4 Gill, Md. 105; 11 Ala. N. S. 763; the age of the parties, 6 Johns. Ch. N. Y. 91; 4 Gill, Md. 105; and whatever other circumstances may address themselves to a sound judicial discretion.

6. So far as any general rule can be deduced from the decisions and practice of the courts, the proportion of the joint income to be awarded for permanent alimony is said to range from one-half to one-third, while in case of alimony *pendente lite* it is not usual to allow more than about one-fifth, Bishop, Marr. & D. § 613; and generally a less proportion will be allowed out of a large estate than a small one; for, though no such rule exists in respect to permanent alimony, there may be good reasons for giving less where the question is on alimony during the suit; when the wife should live in seclusion, and wants only a comfortable subsistence. Bishop, Marr. & D. §§ 603–619; 2 Phill. Eccl. 40.

ALIO INTUITU (Lat.). Under a different aspect. See DIVERSO INTUITU.

ALITER (Lat.). Otherwise; otherwise held or decided.

ALIUNDE (Lat.). From another place. Evidence *aliunde* (*i.e.* from without the will) may be received to explain an ambiguity in a will. 1 Greenleaf, Ev. § 291.

ALL FOURS. A metaphorical expression, signifying that a case agrees in all its circumstances with another.

ALLEGATA. A word which the emperors formerly signed at the bottom of their rescripts and constitutions; under other instruments they usually wrote *signata* or *testata*. Encyc. Lond.

ALLEGATA ET PROBATA (Lat., things alleged and proved). The allegations made by a party to a suit, and the proof adduced in their support.

It is a general rule of evidence that the *allegata* and *probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the allegations of the party. 1 Greenleaf, Ev. § 51; 2 Sumn. C. C. 206; 3 Mart. N. S. La. 636.

ALLEGATION. The assertion, declaration, or statement of a party of what he can prove.

In Ecclesiastical Law. The statement of the facts intended to be relied on in support of the contested suit.

It is applied either to the libel, or to the answer of the respondent, setting forth new facts, the latter

being, however, generally called the *defensive allegation*. See 1 Browne, Civ. Law, 472, 473, n.

ALLEGATION OF FACULTIES. A statement made by the wife of the property of her husband, in order to her obtaining alimony. 11 Ala. N. s. 763; 3 Tex. 168.

To such an allegation the husband makes answer, upon which the amount of alimony is determined, 2 Lee, Eccl. 593; 3 Phill. Eccl. 387; or she may produce other proof, if necessary in consequence of his failure to make a full and complete disclosure. 2 Hagg. Cons. 199; 3 Knapp, Priv. Coun. 42; Bishop, Marr. & D. § 605.

ALLEGIANCE. The tie which binds the citizen to the government, in return for the protection which the government affords him.

Acquired allegiance is that binding a citizen who was born an alien, but has been naturalized.

Local allegiance is that which is due from an alien while resident in a country, in return for the protection afforded by the government.

Natural allegiance is that which results from the birth of a person within the territory and under the obedience of the government. 2 Kent, Comm. 42.

2. Natural allegiance cannot be renounced except by permission of the government to which it is due. 1 Blackstone, Comm. 370, 371; 1 East, Pl. Cr. 81; Dy. 298 *b*; 3 Dall. 133; 2 Cranch, 64, 82, n.; 7 Wheat. 283; 3 Pet. 99; 1 Pet. C. C. 159; 9 Mass. 461; 9 Barb. N. Y. 35. See 9 Dan. Ky. 178; 2 Hill, So. C. 1. But for commercial purposes a natural-born subject may acquire the rights of a citizen of another country, Com. 627; 8 Term, 31; 1 Bos. & P. 430, yet without losing his original character, or ceasing to be bound to the country of his birth. 1 Pet. C. C. 159; 2 Cranch, 64; 2 Kent, Comm. 50. See ALIEN; ANTENATUS; NATURALIZATION.

ALLIANCE (Lat. *ad*, to, *ligare*, to bind). The union or connection of two persons or families by marriage; affinity.

In International Law. A contract, treaty, or league between two sovereigns or states, made to insure their safety and common defence.

Defensive alliances are those in which a nation agrees to defend her ally in case she is attacked.

Offensive alliances are those in which nations unite for the purpose of making an attack, or jointly waging the war against another nation.

Alliances may be at the same time offensive and defensive; and most offensive alliances are of this character. Vattel, b. 3, c. 6, § 79. 2 Dall. Penn. 15.

ALLISION. Running one vessel against another.

To be distinguished from collision, which denotes the running of two vessels against each other. The distinction is not observed, but collision is used to denote cases strictly of allision.

ALLOCATION. An allowance upon an account in the English Exchequer. Cowel.

Placing or adding to a thing. Encyc. Lond.

ALLOCATIONE FACIENDA. In English Law. A writ directed to the lord treasurer and barons of the exchequer, commanding that an allowance be made to an accountant for such moneys as he has lawfully expended in his office.

ALLOCATUR (Lat., it is allowed).

A Latin word formerly used to denote that a writ or order was allowed.

A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account. Lee, Dict.

ALLOCATUR EXIGENT. A writ of exigent which issued in a process of outlawry, upon the sheriff's making return to the original exigent that there were not five county courts held between the *teste* of the original writ and the return day. 1 Tidd, Pract. 128.

ALLODARII. Those who own allodial lands.

Those who have as large an estate as a subject can have. Coke, Litt. 1; Bacon, Abr. *Tenure*, A.

ALLODIUM (Sax. *a*, privative, and *lode* or *leude*, a vassal; that is, without vassalage).

An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof. 1 Washburn, Real Prop. 16.

It is used in opposition to *feodum* or *fief*, which means property the use of which was bestowed upon another by the proprietor, on condition that the grantee should perform certain services for the grantor, and upon the failure of which the property should revert to the original possessor.

In the United States the title to land is essentially allodial, and every tenant in fee simple has an absolute and unqualified dominion over it; yet in technical language his estate is said to be in fee, a word which implies a feudal relation, although such a relation has ceased to exist in any form, while in several of the states the lands have been declared to be allodial. 5 Rawle, Penn. 111–113; 10 Gill & J. Md. 443; but see 7 Cush. Mass. 92; 2 Sharswood, Blackst. Comm. 77, n.; 1 Washburn Real Prop. 41, 42.

In England there is no allodial tenure, for all land is held mediately or immediately of the king; but the words *tenancy in fee simple* are there properly used to express the most absolute dominion which a man can have over his property. 3 Kent, Comm. 390; Cruise, Prelim. Dis. c. 1, § 13; 2 Blackstone, Comm 45.

ALLONGE (Fr.). A piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument

itself. Pardessus, n. 343; Story, Prom. Notes, §§ 121, 151.

ALLOY (spelled also *allay*). An inferior metal used with gold and silver in making coin.

The amount of alloy to be used is determined by law, and is subject to changes from time to time.

ALLUVIO MARIS (Lat.). Soil formed by the washing-up of earth from the sea. Schultes, Aq. Rights, 138.

ALLUVION. That increase of the earth on a shore or bank of a river by the force of the water, as by a current or by waves, which is so gradual that no one can judge how much is added at each moment of time. Inst. l. 2, t. 1, § 20; 3 Barnew. & C. 91; Code Civil Annotè, n. 556.

The proprietor of the bank increased by alluvion is entitled to the addition, this being regarded as the equivalent for the loss he may sustain from the breaking-in or encroachment of the waters upon his land. 1 Washburn, Real Prop. 451; 2 Md. Ch. Dec. 485; 1 Gill & J. Md. 249; 4 Pick. Mass. 273; 17 *id.* 41; 1 Hawks' Tenn. 56; 6 Mart. La. 19; 11 Ohio, 311; 10 Pet. 662; 5 Wheat. 380. The increase is to be divided among riparian proprietors by the following rule: measure the whole extent of their ancient line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly-formed river-line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line, and then draw lines from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed shore. In applying this rule, allowance must be made for projections and indentations in the old line. 17 Pick. Mass. 41; 9 Me. 44; 17 Vt. 387. Where the increase is instantaneous, it belongs to the sovereign, upon the ground that it was a part of the bed of the river of which he was proprietor. 17 Ala. 9; 2 Blackstone, Comm. 269.

Sea-weed which is thrown upon a beach, as partaking of the nature of alluvion, belongs to the owner of the beach. 7 Metc. Mass. 373; 2 Johns. N. Y. 322; 3 Barnew. & Ad. 967. But sea-weed below low-water mark on the bed of a navigable river belongs to the public. 9 Conn. 38.

Alluvion differs from avulsion in this, that the latter is sudden and perceptible. See AVULSION. And see 2 Ld. Raym. 737; Phear, Rights of Water, 12; 1 Swift, Dig. 11; Cooper, Inst. l. 2, t. 1; Angell, Watercourses, § 53 *et seq.*; Phillimore, Int. Law, 255; Schultes, Aq. Rights, 116; 2 Am. Law Jour. 282, 295; Angell, Tide Waters, 249; Inst. 2. 1. 20; Dig. 41. 1. 7; *id.* 39. 2. 9; *id.* 6. 1. 23; *id.* 41. 1. 5; 1 Bouvier, Inst. 74.

ALLY. A nation which has entered into an alliance with another nation. 1 Kent, Comm. 69.

A citizen or subject of one of two or more allied nations. 4 C. Rob. Adm. 251; 6 *id.* 205; 2 Dall. 15; Dane, Abr., Index.

ALMS. Any species of relief bestowed upon the poor.

That which is given by public authority for the relief of the poor. Shelford, Mortm. 802, note (X); Haywood, Election, 263; 1 Dougl. El. Cas. 370; 2 *id.* 107.

ALNAGER (spelled also *Ulnager*). A public sworn officer of the king, who, by himself or his deputy, looks to the assize of woolen cloth made throughout the land, and to the putting on the seals for that purpose ordained. Statute 17 Ric. II. c. 2; Cowel; Blount; Termes de la Ley.

ALNETUM. A place where alder-trees grow. Doomsday Book; Cowel; Blount.

ALTA PRODITIO. High treason.

ALTA VIA. The highway.

ALTARAGE. In Ecclesiastical Law. Offerings made on the altar; all profits which accrue to the priest by means of the altar. Ayliffe, Par. 61; 2 Croke, 516.

ALTERATION. A change in the terms of a contract made by the agreement of the parties thereto.

An act done upon an instrument in writing by a party entitled under it, without the consent of the other party, by which its meaning or language is changed.

The term is properly applied to the change in the language of instruments, and is not used of changes in the contract itself. And it is in strictness to be distinguished from the act of a stranger in changing the form or language of the instrument, which is called a *spoliation*. This latter distinction is not always observed in practice, however.

An alteration avoids the instrument, 11 Coke, 27; 5 C. B. 181; 4 Term, 320; 15 East, 29; 8 Cow. N. Y. 71; 2 Halst. N. J. 175; but not, it seems, if the alteration be not material. 2 N. H. 543; 8 *id.* 139; 10 Conn. 192; 5 Mass. 540; 6 *id.* 519; 20 Vt. 217; 3 Ohio St. 445. The insertion of such words as the law supplies is said to be not material. 15 Pick. Mass. 239; 3 Metc. Mass. 103; 29 Me. 298. As to whether tearing and putting on a seal is material, see 2 Pick. Mass. 451; 4 Gilm. Va. 411; 11 Mees. & W. Exch. 778; 13 *id.* 343; 1 Parsons, Contr. 227. The question of materiality is one of law for the court. 1 N. H. 95; 2 *id.* 543; 11 Me. 115; 13 Pick. Mass. 165; 5 Miss. 231. Alteration of a deed will not defeat a vested estate or interest acquired under the deed, 11 Mees. & W. Exch. 800; 2 H. Blackst. 259; 23 Pick. Mass. 231; 1 Me. 73; 1 Watts, Penn. 236; 3 Barb. N. Y. 404; see 18 Vt. 466; but as to a suit upon covenants has the same effect as alteration of a parol contract. 11 Mees. & W. Exch. 800; 23 Pick. Mass. 231; 2 Barb. Ch. N. Y. 19. As to filling up blanks in deeds, see 6 Mees. & W. Exch. 200; 5 Mass. 538; 17 Serg. & R. Penn. 438; 20 Penn. St. 12; 4 M'Cord, So. C. 239; 7 Cow. N. Y. 484; 2 Dan. Ky. 142; 4 491; 2 Wash. Va. 164; 2 Ala. 517.

ill not avoid an instrument,

even if material, if the original words can be restored with certainty. 1 Parsons, Contr. 224; 1 Greenleaf, Ev. § 566.

Where there has been manifestly an alteration of a parol instrument, the party claiming under it is bound to explain the alteration. 6 Cush. Mass. 314; 9 Penn. St. 186; 11 N. H. 395; 13 *id.* 385; 2 La. 290; 3 Harr. Del. 404; 8 Miss. 414; 17 *id.* 375; 7 Barb. N. Y. 564; 6 Carr. & P. 273; 7 Ad. & E. 444; 8 *id.* 215; 2 Mann. & G. 890, 909; see 11 Conn. 531; 9 Mo. 705; 2 Zabr. N. J. 424; 5 Harr. & J. Md. 36; 20 Vt. 205; 13 Me. 386. As to the rule in case of deeds, see Coke, Litt. 225 *b;* 1 Kebl. 22; 5 Eng. L. & Eq. 349; 1 Zabr. N. J. 280.

ALTERNAT. A usage among diplomatists by which the rank and places of different powers, who have the same right and pretensions to precedence, are changed from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Wheaton, Int. Law, pt. 2, c. 3, § 4.

ALTERNATIVE. Allowing a choice between two or more things or acts to be done.

In contracts, a party has often the choice which of several things to perform. A writ is in the alternative which commands the defendant to do the thing required, or show the reason wherefore he has not done it. Finch, 257; 3 Blackstone, Comm. 273. The first *mandamus* is an alternative writ. 3 Blackstone, Comm. 111.

ALTIUS NON TOLLENDI. In Civil Law. A servitude by which the owner of a house is restrained from building beyond a certain height.

ALTIUS TOLLENDI. In Civil Law. A servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO. High and low.

This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso, to arbitration. Cowel.

ALTUM MARE. The high sea.

ALUMNUS. A foster-child.

ALVEUS (Lat.). The bed or channel through which the stream flows when it runs within its ordinary channel. Calvinus, Lex.

Alveus derelictus, a deserted channel. 1 Mackeldy, Civ. Law, 280.

AMALPHITAN TABLE. A code of sea laws compiled for the free and trading republic of Amalphi toward the end of the eleventh century. 3 Kent, Comm. 9.

It consists of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean; and, on account of its being collected into one regular system, it was for a long time received as authority in those countries. 1 Azuni, Mar. Law, 376.

AMBACTUS (Lat. *ambire*, to go about). A servant sent about; one whose services his master hired out. Spelman, Gloss.

AMBASSADOR. In International Law. A public minister sent abroad by some sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent.

Extraordinary are those employed on particular or extraordinary occasions, or residing at a foreign court for an indeterminate period. Vattel, *Droit des Gens*, l. 4, c. 6, §§ 70–79.

Ordinary are those sent on permanent missions.

An ambassador is a minister of the highest rank.

The United States have always been represented by ministers plenipotentiary, never having sent a person of the rank of an ambassador in the diplomatic sense. 1 Kent, Comm. 39, n.

2. Ambassadors, when acknowledged as such, are exempted absolutely from all allegiance, and from all responsibility to the laws. 7 Cranch, 138. If, however, they should be so regardless of their duty, and of the object of their privilege, as to insult or openly to attack the laws of the government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed, and required to depart within a reasonable time. By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides in the foreign state, shall be considered as a member of his own country, and the government he represents has exclusive cognizance of his conduct and control of his person. Grotius, b. 2, c. 18, §§ 1–6.

Ambassadors' children born abroad are held not to be aliens. 7 Coke, 18 *a*. The persons of ambassadors and their domestic servants are exempt from arrest on civil process. 1 Burr. 401; 3 Burr. 1731; Cas. *temp.* Hardw. 5; Stat. 7 Anne, c. 12; Act of Cong. April 30, 1790, § 25.

Consult 2 Wash. C. C. 435; 7 Cranch, 138; 1 Kent, Comm. 14, 38, 182; 1 Blackstone, Comm. 253; Rutherford, Inst. b. 2, c. 9; Vattel, b. 4, c. 8, § 113; Grotius, l. 2, c. 8, §§ 1, 3.

AMBIDEXTER (Lat.). Skilful with both hands.

Applied anciently to an attorney who took pay from both sides, and subsequently to a juror guilty of the same offence. Cowel.

AMBIGUITY (Lat. *ambiguitas*, indistinctness; duplicity). Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument.

Latent is that which arises from some col-

lateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible.

Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intention. 4 Mass. 205; 4 Cranch, 167; 1 Greenleaf, Ev. §§ 292–300.

2. The term does not include mere *inaccuracy*, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense, Wigram, Wills, 174; 3 Sim. Ch. 24; 3 Mann. & G. 452; 8 Metc. Mass. 576; 13 Vt. 36; see 21 Wend. N. Y. 651; and intends such expressions as would be found of uncertain meaning by persons of competent skill and information. 1 Greenleaf, Ev. § 298.

Latent ambiguities are subjects for the consideration of a jury, and may be explained by parol evidence. 1 Greenleaf, Ev. § 301; and see Wigram, Wills, 48; 2 Starkie, Ev. 565; 1 Stark. 210; 5 Ad. & E. 302; 6 *id.* 153; 3 Barnew. & Ad. 728; 8 Metc. Mass. 576; 7 Cow. N. Y. 202; 1 Mas. C. C. 11. *Patent* ambiguity cannot be explained by parol evidence, and renders the instrument as far as it extends inoperative. 4 Mass. 205; 7 Cranch, 167; Jarman, Wills, 315.

AMBIT. A boundary line.

AMBITUS (Lat.). A space beside a building two and a half feet in width, and of the same length as the building; a space two and a half feet in width between two adjacent buildings; the circuit, or distance around. Cicero; Calvinus, Lex.

AMBULATORY (Lat. *ambulare*, to walk about). Movable; changeable; that which is not fixed.

Ambulatoria voluntas (a changeable will) denotes the power which a testator possesses of altering his will during his lifetime.

AMELIORATIONS. Betterments. 6 Low. C. 294; 9 *id.* 503.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment.

AMENDE HONORABLE. In English Law. A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck and a torch in the hand, and begging the pardon of God, or the king, or any private individual, for some delinquency.

In French Law. A punishment somewhat similar to this, and which bore the same name, was common in France: it was abolished by the law of the 25th of September, 1791. Merlin, *Répert.*

AMENDMENT. In Legislation. An alteration or change of something proposed in a bill or established as law.

Thus, the senate of the United States may amend money-bills passed by the house of representatives, but cannot originate such bills. The constitution of the United States contains a provision for its amendment. U. S. Const. art. 5.

In Practice. The correction, by allowance of the court, of an error committed in the progress of a cause.

Amendments, at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice. Under statutes in modern practice, they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending, or upon such terms as the court think proper to order.

An amendment, where there is something to amend by, may be made in a criminal as in a civil case. 12 Ad. & E. 217; 2 Pick. Mass. 550. But an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged. 2 Hawkins, Pl. Cr. c. 25, §§ 97, 98; 13 Pick. Mass. 200.

An information may be amended after demurrer. 4 Term, 457; 4 Burr. 2568.

AMENDS. A satisfaction given by a wrong-doer to the party injured, for a wrong committed. 1 Lilly, Reg. 81.

By statute 24 Geo. II. c. 44, in England, and by similar statutes in some of the United States, justices of the peace, upon being notified of an intended suit against them, may tender amends for the wrong alleged or done by them in their official character, and, if found sufficient, the tender debars the action. 5 Serg. & R. Penn. 209, 517; 4 Binn. Penn. 20; 6 *id.* 83.

AMERCEMENT. In Practice. A pecuniary penalty imposed upon an offender by a judicial tribunal.

The judgment of the court is, that the party be at the mercy of the court (*sit in misericordia*), upon which the *affeerors*—or, in the superior courts, the coroner—liquidate the penalty. As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount until it had been affeered. Either party to a suit who failed was to be *amerced pro clamore falso* (for his false claim); but these amercements have been long since disused. 4 Blackstone, Comm. 379; Bacon, Abr., *Fines* and *Amercements*.

The officers of the court, and any person who committed a contempt of court, was also liable to be amerced.

Formerly, if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; but this practice has been generally superseded by attachment. In some of the United States, however, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute. Coxe, N. J. 136, 169; 2 South. N. J. 433; 3 Halst. N. J. 270; 5 *id.* 319; 6 *id.* 334; 1 Green, N. J. 159, 341; 2 *id.* 350; 1 Ohio,

275; 2 *id.* 503; 6 *id.* 452; Wright, Ohio, 720; 3 Ired. No. C. 407; 5 *id.* 385; Cam. & N. No. C. 477.

AMEUBLISSEMENT. See 1 Low. C. 25, 58.

AMI (Fr.). A friend. See PROCHEIN AMY.

AMICABLE ACTION. In Practice. An action entered by agreement of parties on the dockets of the courts.

This practice prevails in Pennsylvania. When entered, such action is considered as if it had been adversely commenced and the defendant had been regularly summoned. An amicable action may be entered by attorney, independently of the provisions of the act of 1806. 8 Serg. & R. Penn. 567.

AMICUS CURIÆ (Lat. a friend of the court).

In Practice. A friend of the court.

One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken. Coke, 2d Inst. 178; 2 Viner, Abr. 475. The information may extend to any matter of which the court takes judicial cognizance. 8 Coke, 15.

Any one as *amicus curiæ* may make application to the court in favor of an infant, though he be no relation. 1 Ves. sen. 313; and see 11 Gratt. Va. 656; 11 Tex. 698; 2 Mass. 215.

AMITA (Lat.). An aunt on the father's side.

Amita magna. A great-aunt on the father's side.

Amita major. A great-great-aunt on the father's side.

Amita maxima. A great-great-great-aunt, or a great-great-grandfather's sister. Calvinus, Lex.

AMITINUS. Children of brothers or sisters; cousins; those who have the same grandfather, but different fathers and mothers. Calvinus, Lex.

AMITTERE CURIAM (Lat. to lose court).

To be excluded from the right to attend court. Stat. Westm. 2, c. 44.

AMITTERE LIBERAM LEGEM. To lose the privilege of giving evidence under oath in any court; to become infamous, and incapable of giving evidence. Glanville, 2.

If either party in a wager of battle cried "craven," he was condemned *amittere liberam legem.* 3 Sharswood, Blackst. Comm. 340.

AMNESTY. An act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period.

Express amnesty is one granted in direct terms.

Implied amnesty is one which results when a treaty of peace is made between contending parties. Vattel, l. 4, c. 2, §§ 20–22.

Amnesty and pardon are very different. The former is an act of the sovereign power, the object of which is to efface and to cause to be forgotten a crime or misdemeanor; the latter is an act of the same authority, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. 7 Pet. 160. Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. A pardon is given to one who is certainly guilty, or has been convicted; amnesty, to those who may have been so.

Their *effects* are also different. That of pardon is the remission of the whole or a part of the punishment awarded by the law,—the conviction remaining unaffected when only a partial pardon is granted; an amnesty, on the contrary, has the effect of destroying the criminal act, so that it is as if it had not been committed, as far as the public interests are concerned.

Their *application* also differs. Pardon is always given to individuals, and properly only after judgment or conviction; amnesty may be granted either before judgment or afterwards, and it is in general given to whole classes of criminals or supposed criminals, for the purpose of restoring tranquillity in the state. But sometimes amnesties are limited, and certain classes are excluded from their operation.

AMORTISE. To alien lands in mortmain.

AMORTIZATION. An alienation of lands or tenements in mortmain.

The reduction of the property of lands or tenements to mortmain.

AMOTION (Lat. *amovere*, to remove; to take away).

An unlawful taking of personal chattels out of the possession of the owner, or of one who has a special authority in them.

A turning out the proprietor of an estate in realty before the termination of his estate. 3 Blackstone, Comm. 198, 199.

In Corporations. A removal of an official agent of a corporation from the station assigned to him before the expiration of the term for which he was appointed. 8 Term, 356; 1 East, 562; 6 Conn. 532.

The term is distinguished from disfranchisement, which deprives a *member* of all rights as a corporator. The term seems in strictness not to apply properly to cases where officers are appointed merely during the will of the corporation, and are superseded by the choice of a successor, but as commonly used includes such cases.

The right may be exercised with or without an *express* reservation by the corporation, *for just cause*, 1 Burr. 539; Dougl. 149; and in the case of mere ministerial officers appointed *durante bene placito*, at the mere pleasure of those appointing him. Willcock, Mun. Corp. 253; 23 Mo. 22; see 1 Ventr. 77; 2 Show. 70; 11 Mod. 403; 9 Wend. N. Y. 394. Mere acts which are a cause for amotion do not create a vacancy till the amotion takes place. 2 Green, N. J. 332.

The causes for amotion may be: *first*, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise, but indictment and conviction must precede amotion for such causes; *second*, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition an-

nexed to his office; *third*, such as are an offence not only against the duty of his office, but also a matter indictable at common law. Dougl. 149; 2 Binn. Penn. 448. For special instances coming under these classes, see Angell & A. Corp., Lothrop ed. § 427; 4 Mod. 36; 5 *id.* 257; 8 *id.* 186; 11 *id.* 75; Carth. 229; 2 Burr. 731–736; 4 *id.* 2004; 2 Strange, 819; Atk. Ch. 184; 3 Salk. 229; 1 Rolle, 409; Cas. *temp.* Hardw. 155; 1 Ventr. 115; 3 Barnew. & C. 56; for causes held insufficient, see 8 Mod. 186; Say. 40; Cowp. 502; Dougl. 85; 1 Burr. 40; 4 *id.* 2087; 2 Term, 182; Sid. 282; T. Raym. 446; 2 Maule & S. 144.

Consult Angell & A. Corp., Lothrop ed. §§ 408, 423–432; Willcock, Mun. Corp.; Dougl. 149; 6 Conn. 532; 6 Mass. 462.

AMOUNT COVERED. In Insurance. The amount that is insured, and for which underwriters are liable for loss under a policy of insurance.

It is limited by that specified in the policy to be insured, and this limit may be applied to an identical subject only, as a ship, a building, or life; or to successive subjects, as successive cargoes on the same ship, or successive parcels of goods transmitted on a certain canal or railroad during a specified period; and it may also be limited by the terms of the contract to a certain proportion, as a quarter, half, etc., of the value of the subject or interest on which the insurance is made. 2 Phillips, Ins. c. xiv. sect. 1, 2; 10 Ill. 235; 16 B. Monr. Ky. 242; 2 Dutch, N. J. 111; 6 Gray, Mass. 574; 7 *id.* 246; 13 La. Ann. 246; 34 Me. 487; 39 Eng. L. & Eq. 228.

AMOUNT OF LOSS. In Insurance. The diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance. 2 Phillips, Ins. c. xv., xvi., xvii.; 2 Parsons, Mar. Law, c. x. § 1, c. xi., xii.; 9 Cush. Mass. 415; 1 Gray, Mass. 371; 26 N. H. 389; 31 *id.* 238; 5 Du. N. Y. 1; 1 Dutch, N. J. 506; 6 Ohio St. 200; 5 R. I. 426; 2 Md. 217; 7 Ell. & B. 172.

AMOVEAS MANUS (Lat. that you remove your hands). After office found, the king was entitled to the things forfeited, either lands or personal property; the remedy for a person aggrieved was by "petition," or "*monstrans de droit*," or "*traverses*," to establish his superior right. Thereupon a writ issued, *quod manus domini regis amoveantur*. 3 Sharswood, Blackst. Comm. 260.

AMPARO (Span.). A document protecting the claimant of land till properly authorized papers can be issued. 1 Tex. 790.

AMPLIATION. In Civil Law. A deferring of judgment until the cause is further examined.

In this case, the judges pronounced the word *amplius*, or by writing the letters N. L. for *non liquet*, signifying that the cause was not clear. It is very similar to the common-law practice of entering *cur. adv. vult* in similar cases.

In French Law. A duplicate of an acquittance or other instrument.

A notary's copy of acts passed before him, delivered to the parties.

AMY (Fr.). Friend. See PROCHEIN AMY.

AN, JOUR ET WASTE. See YEAR, DAY AND WASTE.

ANALOGY. The similitude of relations which exist between things compared.

Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments. 3 Bingh. 265; 8 *id.* 557; 1 Turn. & R. 103; 4 Burr. 1962, 2022, 2068; 4 Barnew. & C. 855; 7 *id.* 168; 1 W. Blackst. 151; 6 Ves. Ch. 675; 3 Swanst. Ch. 561; 3 P. Will. Ch. 391; 3 Brown, Ch. 639, n.

ANARCHY. The absence of all political government; by extension, confusion in government.

ANATHEMA. In Ecclesiastical Law. A punishment by which a person is separated from the body of the church, and forbidden all intercourse with the faithful.

It differs from excommunication, which simply forbids the person excommunicated from going into the church and communicating with the faithful.

ANATOCISM. In Civil Law. Taking interest on interest; receiving compound interest.

ANCESTOR. One who has preceded another in a direct line of descent; an ascendant.

A former possessor; the person last seised. Termes de la Ley; 2 Sharswood, Blackst. Comm. 201.

In the common law, the word is understood as well of the immediate parents as of those that are higher; as may appear by the statute 25 Edw. III., *De natis ultra mare*, and by the statute 6 Ric. II. c. 6, and by many others. But the civilians' relations in the ascending line, up to the great-grandfather's *parents*, and those above them, they term *majores*, which common lawyers aptly expound *antecessors* or ancestors, for in the descendants of like degree they are called *posteriores*. Cary, Litt. 45. The term *ancestor* is applied to natural persons. The words predecessors and successors are used in respect to the persons composing a body corporate. See 2 Blackstone, Comm. 209; Bacon, Abr.; Ayliffe, Pand. 58; Reeve, Descents.

ANCESTRAL. What relates to or has been done by one's ancestors; as homage ancestral, and the like.

That which belonged to one's ancestors.

Ancestral estates are such as come to the possessor by descent. 2 Washburn, Real Prop. 411, 412.

ANCHOR. A measure containing ten gallons.

ANCHORAGE. A toll paid for every anchor cast from a ship in a port.

Such a toll is said to be incident to almost

every port, 1 W. Blackst. 413; 4 Term, 260; and is sometimes payable though no anchor is cast. 2 Chitty, Com. Law, 16.

ANCIENT DEMESNE. Manors which in the time of William the Conqueror were in the hands of the crown, and are so recorded in the Domesday Book. Fitzherbert, Nat. Brev. 14, 56.

Tenure in *ancient demesne* may be pleaded in abatement to an action of ejectment. 2 Burr. 1046.

Tenants of this class had many privileges. 2 Sharswood, Blackst. Comm. 99.

ANCIENT HOUSE. One which has stood long enough to acquire an easement of support. 3 Kent, Comm. 437; 2 Washburn, Real Prop. 74, 76. See SUPPORT; EASEMENT.

ANCIENT LIGHTS. Windows or openings which have remained in the same place and condition twenty years or more. 5 Harr. & J. Md. 477; 12 Mass. 157, 220.

In England, a right to unobstructed light and air through such openings is secured by mere user.

In the United States, such right is not acquired without an express grant, in most of the states. 2 Washburn, Real Prop. 62, 63; 3 Kent, Comm. 446, n. See 11 Md. 1; AIR; LIGHT AND AIR.

ANCIENT READINGS. Essays on the early English statutes. Coke, Litt. 280.

ANCIENT RENT. The rent reserved at the time the lease was made, if the building was not then under lease. 2 Vern. Ch. 542.

ANCIENT WRITINGS. Deeds, wills, and other writings, more than thirty years old.

They may, in general, be read in evidence without any other proof of their execution than that they have been in the possession of those claiming rights under them. 1 Phillips, Ev. 273; 1 Greenleaf, Ev. § 141; 2 Bingh. No. C. 183, 200; 12 Mees. & W. Exch. 205; 8 Q. B. 158; 10 *id.* 314; 11 *id.* 884; 2 Anstr. 601; 3 Taunt. 91; 1 Price, Exch. 225; 5 *id.* 312; 4 Perr. & D. 193; 7 Beav. Rolls, 93; 8 Barnew. & C. 22; 4 Wheat. 213; 5 Pet. 319; 9 *id.* 663–675; 5 Cow. N. Y. 221; 3 Johns. N. Y. 292; 7 Wend. N. Y. 371; 2 Nott & M'C. So. C. 55, 400; 4 Pick. Mass. 160; 24 *id.* 71; 16 Me. 27.

ANCIENTS. Gentlemen in the Inns of Courts who are of a certain standing.

In the Middle Temple, all who have passed their readings are termed ancients. In Gray's Inn, the ancients are the oldest barristers; besides which, the society consists of benchers, barristers, and students; in the Inns of Chancery, it consists of ancients, and students or clerks.

ANCIENTY. Eldership; seniority. Used in the statute of Ireland, 14 Hen. VIII. Cowel.

ANCILLARY (Lat. *ancilla*, a handmaid). Auxiliary; subordinate.

As it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives its final determination. 3 Sharswood, Blackst. Comm. 98.

Used of deeds, and also of an administration taken out in the place where assets are situated, which is subordinate to the principal administration. 1 Story, Eq. Jur. § 583.

ANCIPITIS USUS (Lat.). Useful for various purposes.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from its immediate destination. 1 Kent, Comm. 140.

ANDROLEPSY. The taking by one nation of the citizens or subjects of another, in order to compel the latter to do justice to the former. Wolffius, § 1164; Molloy, *de Jure Mar.* 26.

ANECIUS (Lat. Spelled also *æsnecius*, *enitius*, *æneas*, *eneyus*). The eldest-born; the first-born; senior, as contrasted with the *puis-ne* (younger). Spelman, Gloss., *Æsnecia.*

ANGARIA. In Roman Law. A service or punishment exacted by government.

They were of six kinds, viz.: maintaining a post-station where horses are changed; furnishing horses or carts; burdens imposed on lands or persons; disturbance, injury, anxiety of mind; the three- or four-day periods of fasting observed during the year; saddles or yokes borne by criminals from county to county, as a disgraceful mode of punishment among the Germans or Franks. Du Cange, *verb. Angaria.*

In Feudal Law. Any troublesome or vexatious personal service paid by the tenant to his lord. Spelman, Gloss.

ANGEL. An ancient English coin, of the value of ten shillings sterling. Jacobs, Law Dict.

ANGILD (Sax.). The bare, single valuation or estimation of a man or thing according to the legal estimates.

The terms *twigild*, *trigild*, denote twice, thrice, etc., the *angild*. *Leges Inæ*, c. 20; Cowel.

ANHLOTE (Sax.). The sense is, that every one should pay, according to the custom of the country, his respective part and share. Spelman, Gloss.

ANIENS. Void; of no force. Fitzherbert, Nat. Brev. 214.

ANIMAL. Any animate being which is not human, endowed with the power of voluntary motion.

Domitæ are those which have been tamed by man; domestic.

Ferœ naturæ are those which still retain their wild nature.

2. A man may have an absolute property in animals of a domestic nature, 2 Mod. 319; 2 Blackstone, Comm. 390; but not so in animals *ferœ naturæ*, which belong to him only while in his possession. 3 Binn. Penn. 546; 3 Caines, N. Y. 175; 7 Johns. N. Y. 16; 13 Miss. 383; 8 Blackf. Ind. 498; 2 Barnew. & C. 934; 4 Dowl. & R. 518. Yet animals which are sometimes *ferœ naturæ* may be tamed so

the officers of the mint, they are tried by weight, and then a certain number are taken from the whole and melted into a bar, from which the assay trials are made, and a verdict is rendered according to the results which have been ascertained. Encyc. Brit., title *Assaying*.

ANNUAL RENT. In Scotch Law. Interest.

To avoid the law against taking interest, a yearly rent was purchased: hence the term came to signify interest. Bell, Dict.; Paterson, Comp. §§ 19, 265.

ANNUITY (Lat. *annuus*, yearly). A yearly sum stipulated to be paid to another in fee, or for life, or years, and chargeable only on the person of the grantor. Coke, Litt. 144 *b*; 2 Blackstone, Comm. 40; Lumley, Ann. 1; 5 Mart. La. 312; Dav. Ir. 14.

An annuity is different from a rent-charge, with which it is sometimes confounded,—the annuity being chargeable on the person merely, and so far personalty; while a rent-charge is something reserved out of realty, or fixed as a burden upon the estate in land. 2 Sharswood, Blackst. Comm. 40; Rolle, Abr. 226; 10 Watts, Penn. 127. An annuity in fee is said to be a personal fee; for, though transmissible, as is real estate of inheritance, Ambl. Ch. 782, liable to forfeiture as a hereditament, 7 Coke, 34 *a*, and not constituting assets in the hands of an executor, it lacks some other characteristics of realty. The husband is not entitled to curtesy, nor the wife to dower, in an annuity. Coke, Litt. 32 *a*. It cannot be conveyed by way of use, 2 Wils. 224, is not within the statute of frauds, and may be bequeathed and assigned as personal estate. 2 Ves. Sen. Ch. 70; 4 Barnew. & Ald. 59; Roscoe, Real Act. 68, 35; 3 Kent, Comm. 460.

2. To enforce the payment of an annuity, an action of annuity lay at common law, but when brought for arrears must be before the annuity determines. Coke, Litt. 285. In case of the insolvency or bankruptcy of the debtor, the capital of the constituted annuity becomes exigible. La. Civ. Code, art. 2769; stat. 6 Geo. IV. c. 16, §§ 54, 108; 5 Ves. Ch. 708; 4 *id.* 763; 1 Belt, Suppl. Ves. Ch. 308, 431. See 1 Roper, Leg. 588; CHARGE.

ANNULUS ET BACULUS (Lat. ring and staff). The investiture of a bishop was *per annulum et baculum*, by the prince's delivering to the prelate a ring and pastoral staff, or crozier. 1 Sharswood, Blackst. Comm. 378; Spelman, Gloss.

ANNUM, DIEM ET VASTUM. See YEAR, DAY, AND WASTE.

ANNUS LUCTUS (Lat.). The year of mourning. Code, 5. 9. 2.

It was a rule among the Romans, and also the Danes and Saxons, that the widows should not marry *infra annum luctûs* (within the year of mourning). 1 Sharswood, Blackst. Comm. 457.

ANNUS UTILIS. A year made up of available or serviceable days. Brissonius; Calvinus, Lex.

ANNUUS REDITUS. A yearly rent; annuity. 2 Sharswood, Blackst. Comm. 41; Reg. Orig. 158 *b*.

ANONYMOUS. Without name.

Books published without the name of the author are said to be anonymous. Cases in the reports of which the names of the parties are not given are said to be anonymous.

ANSWER. In Equity Pleading. A defence in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff against him in a court of equity.

In case relief is sought by the bill, the answer contains both the defendant's defence to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill of which discovery is sought. Gresley, Eq. Ev. 19; Mitford, Eq. Pl., Jeremy ed. 15, 16.

2. As to the *form* of the answer: it usually contains in the following order; *the title*, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer, 8 Ves. Ch. 79; 11 *id.* 62; 1 Russ. Ch. 441; see 17 Ala. N. S. 89; *a reservation* to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits, Beames, Eq. Pl. 46; 1 Hempst. C. C. 715; 4 Md. 107; *the substance* of the answer, according to the defendant's knowledge, remembrance, information, and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case on his own behalf; *a general traverse* or denial of all unlawful combinations charged in the bill, and of all other matters therein contained.

3. The answer must be upon oath of the defendant, or under the seal of a corporation defendant, 21 Ga. 161; 1 Barb. N. Y. 22; see 8 Gill, Md. 170; unless the plaintiff waives the right, Story, Eq. Plead. § 824; 10 Cush. Mass. 58; 2 Gray, Mass. 431; in which case it must be generally signed by the defendant, 6 Ves. Ch. 171, 285; 10 *id.* 441; 14 *id.* 172; Cooper, Eq. Plead. 326; and must be signed by counsel, Story, Eq. Plead. § 876; unless taken under a commission. 4 McLean, C. C. 136.

4. *As to substance*, the answer must be full and perfect to all the material allegations of the bill, confessing and avoiding, denying or traversing, all the material parts, Comyns, Dig. *Chauncery*, K. 2; 28 N. H. 440; 6 Rich, Eq. So. C. 1; 10 Ga. 449; 3 *id.* 302; not literally merely, but answering the substance of the charge, Mitford, Eq. Plead. 309; 28 Ala. N. S. 289; 16 Ga. 442; 1 Halst. Ch. N. J. 60; and see 2 Stockt. Ch. N. J. 267; must be responsive, 3 Halst. Ch. N. J. 17; 13 Ill. 318; 21 Vt. 326; and must state facts, and not arguments, directly and without evasion, Story, Eq. Plead. § 852; 7 Ind. 661; 24 Vt. 70; 4 Ired. Eq. No. C. 390; 9 Mo. 605; without scandal, 19 Me. 214; 18 Ark. 215; or impertinence, 3 Story, C. C. 13; 6 Beav. Rolls, 558; 4 McLean, C. C. 202; 8 Blackf. Ind.

124. See 10 Sim. Ch. 345; 13 *id.* 583; 17 Eng. L. & Eq. 509; 22 Ala. N. s. 221.

Insufficiency of answer is a ground for exception when some material allegation, charge, or interrogatory is unanswered or not freely answered. 1 Md. Ch. Dec. 358; 7 How. 726; 6 Humphr. Tenn. 18. See 10 Humphr. Tenn. 280; 11 Paige, Ch. N. Y. 543.

5. An answer may, in some cases, be amended, 2 Brown, Ch. 143; 2 Ves. Ch. 85; to correct a mistake of fact, Ambl. Ch. 292; 1 P. Will. 297; but not of law, Ambl. Ch. 65; nor any mistake in a material matter except upon evidence of surprise, 36 Me. 124; 3 Sumn. C. C. 583; 1 Brown, Ch. 319; and not, it seems, to the injury of others. Story, Eq. Plead. § 904; 1 Halst. Ch. N. J. 49. A supplemental answer may be filed to introduce new matter, 6 McLean, C. C. 459; or correct mistakes, 2 Colly. Ch. 133; 15 Ala. N. s. 634; 7 Ga. 99; 8 Blackf. Ind. 24; which is considered as forming a part of the original answer. See DISCOVERY; Redesdale, Ch. Plead. 244, 254; Cooper, Eq. Plead. 312, 327; Beames, Eq. Plead. 34; Bouvier, Inst., Index.

For an historical account of the instrument, see 2 Brown, Civ. Law 371, n.; Barton, Suit in Eq.

In Practice. The declaration of a fact by a witness after a question has been put, asking for it.

ANTAPOCHA (Lat.). An instrument by which the debtor acknowledges the debt due the creditor, and binds himself. A copy of the *apocha* signed by the debtor and delivered to the creditor. Calvinus, Lex.

ANTE JURAMENTUM (Lat. called also *Juramentum Calumniæ*). The oath formerly required of the parties previous to a suit,—of the plaintiff that he would prosecute, and of the defendant that he was innocent. Jacobs, Dict.; Whishaw.

ANTE LITEM MOTAM. Before suit brought.

ANTE-NUPTIAL. Before marriage; before marriage, with a view to entering into marriage.

ANTECEDENT. See MAXIMS.

ANTEDATE. To put a date to an instrument of a time before the time it was written.

ANTENATI (Lat. born before). Those born in a country before a change in its political condition such as to affect their allegiance.

The term is ordinarily applied by American writers to denote those born in this country prior to the declaration of independence. It is distinguished from *postnati*, those born after the event.

As to the rights of British *antenati* in the United States, see Kirb. Conn. 413; 2 Halst. N. J. 305, 337; 2 Mass. 236, 244; 9 *id.* 460; 2 Pick. Mass. 394; 2 Johns. Cas. N. Y. 29; 3 *id.* 109; 4 Johns. N. Y. 75; 1 Munf. Va. 218; 6 Call, Va. 60; 3 Binn. Penn. 75; 4 Cranch, 321; 7 *id.* 603; 3 Pet. 99. As to their rights in England, see 7 Coke, 1, 27; 2 Barnew. & C. 779; 5 *id.* 771; 1 Wooddesson, Lect. 382.

ANTI MANIFESTO. The declaration of the reasons which one of the belligerants publishes, to show that the war as to him is defensive. Wolffius, § 1187.

ANTICHRESIS (Lat.). **In Civil Law.** An agreement by which the debtor gives to the creditor the income from the property which he has pledged, in lieu of the interest on his debt. Guyot, *Répert.*

It is analogous to the Welsh mortgage of the common law. In the French law, if the income was more than the interest, the debtor was entitled to demand an account of the income, and might claim any excess. La. Civ. Code, 2085. See Dig. 20. 1. 11; *id.* 13. 7. 1; Code, 8. 28. 1; 11 Pet. 351; 1 Kent, Comm. 137.

ANTICIPATION (Lat. *ante*, before, *capere*, to take). The act of doing or taking a thing before its proper time.

In deeds of trust there is frequently a provision that the income of the estate shall be paid by the trustee as it shall accrue, and not by way of anticipation. A payment made contrary to such provision would not be considered as a discharge of the trustee.

ANTINOMIA. In Roman Law. A real or apparent contradiction or inconsistency in the laws. Merlin, *Répert.*

It is sometimes used as an English word, and spelled Antinomy.

ANTIQUA CUSTUMA (L. Lat. ancient custom). The duty due upon wool, woolfells, and leather, under the statute 3 Edw. I.

The distinction between *antiqua* and *nova custuma* arose upon the imposition of a new and increased duty upon the same articles, by the king, in the twenty-second year of his reign. Bacon, Abr., *Smuggling*, C. I.

ANTIQUA STATUTA. English statutes from the time of Richard First to Edward Third.

ANTITHETARIUS. In old English Law. A man who endeavors to discharge himself of the crime of which he is accused, by retorting the charge on the accuser. He differs from an approver in this, that the latter does not charge the accuser, but others. Jacobs, Law Dict.

ANY TERM OF YEARS. In Criminal Law. In Massachusetts this term, in the statutes relating to additional punishment, means a period of time not less than two years. 14 Pick. Mass. 40, 86, 90, 94.

APANAGE. In French Law. A portion set apart for the use and support of the younger ones, upon condition, however, that it should revert, upon failure of male issue, to his original donor and his heirs. Spelman, Gloss.

APARTMENT. A part of a house occupied by a person, while the rest is occupied by another, or others. 7 Mann. & G. 95; 6 Mod. 214; Woodfall, L. & T. 178. As to what is not an apartment, see 10 Pick. Mass. 293.

APEX JURIS (Lat. the summit of the law).

A rule of law of extreme refinement. A term used to denote a stricter application of the rules of law than is indicated by the

phrase *summum jus*. 2 Caines, N. Y. 117; 2 Stor. C. C. 143; 5 Conn. 334; 2 Parsons, Notes and Bills, ch. 25, § 11. See, also, Coke, Litt. 3046; Wingate, Max. 19; MAXIMS.

APOCÆ (Lat.). A writing acknowledging payments; acquittance.

It differs from acceptilation in this, that acceptilation imports a complete discharge of the former obligation whether payment be made or not; *apocha*, discharge only upon payment being made. Calvinus, Lex.

APOCRISARIUS (Lat.). **In Civil Law.** A messenger; an ambassador.

Applied to legates or messengers, as they carried the messages (*αποκρισις*) of their principals. They performed several duties distinct in character, but generally pertaining to ecclesiastical affairs.

A messenger sent to transact ecclesiastical business and report to his superior; an officer who had charge of the treasury of a monastic edifice; an officer who took charge of opening and closing the doors. Ducange; Spelman, Gloss.; Calvinus, Lex.

Apocrisarius Cancellarius. An officer who took charge of the royal seal and signed royal despatches.

Called, also, *secretarius, consiliarius* (from his giving advice); *referendarius; a consiliis* (from his acting as counsellor); *a responsis*, or *responsalis*.

APOGRAPHIA. In Civil Law. An examination and enumeration of things possessed; an inventory. Calvinus, Lex.

APOPLEXY AND PARALYSIS. In Medical Jurisprudence. These terms imply an affection of the brain, and they are supposed to be only different degrees of the same affection.

In the first, the patient is suddenly deprived of all consciousness and sensibility, and so continues for a period varying from a few hours to a few days, when he dies or begins to recover. The recovery, however, may be imperfect, some mental impairment, or loss of power in the muscles of voluntary motion, remaining for a time, if not for life. Paralysis is a loss of power in some of the voluntary muscles,—those of the face, eyes, arms, or legs. It may be the sequel of apoplexy, or it may be the primary affection, occurring very much like an attack of apoplexy.

The mental impairment succeeding these disorders presents no uniform characters, but varies indefinitely, in extent and severity, from a little failure of memory, to an entire abolition of all the intellectual faculties. The power of speech is usually more or less affected: it may be a slight difficulty of utterance, or an inability to remember certain words or parts of words, or an entire loss of the power of articulation. This feature may arise from two different causes,—either from a loss of the power of language, or a loss of power in the muscles of the larynx. This fact must be borne in mind by the medical jurist, and there can be little difficulty in distinguishing between them. In the latter, the patient is as capable as ever of reading, writing, or understanding spoken language. In the former, he is unable to communicate his thoughts by writing, because they are disconnected from their articulate signs. He recognizes their meaning when he sees them, but cannot recall them by any effort of the perceptive powers. This affection of the faculty of language is manifested in various ways. One person loses all recollection of the names of persons and things, while other parts of speech are still at command. Another forgets every thing but substantives, and only those which express some mental quality or abstract idea. Another loses the memory of all words but yes or no. In these cases the patient is able to repeat the words on hearing them pronounced, but, after a second or third repetition, loses them altogether.

2. Wills and contracts are not unfrequently made in that equivocal condition of mind which sometimes follows an attack of apoplexy or paralysis; and their validity is contested on the score of mental incompetency. In cases of this kind there are generally two questions at issue, viz., the absolute amount of mental impairment, and the degree of foreign influence exerted upon the party. They cannot be considered independently of each other. Neither of them alone might be sufficient to invalidate an act, while together, even in a much smaller degree, they would have this effect.

3. In testing the mental capacity of paralytics, reference should be had to the nature of the act in question. The question is not, had the testator sufficient capacity to make *a* will? but, had he sufficient capacity to make *the* will in dispute? A capacity which might be quite adequate to a distribution of a little personal property among a few near relatives would be just as clearly inadequate to the disposition of a large estate among a host of relatives and friends possessing very unequal claims upon the testator's bounty. Here, as in other mental conditions, all that is required is mind sufficient for the purpose, neither more nor less. See DEMENTIA; DELIRIUM; IMBECILITY; MANIA. In order to arrive at correct conclusions on this point, we must be careful, among other things, not to confound the power to appreciate the terms of a proposition with the power to discern its relations and consequences.

4. In testing the mental capacity of one who has lost the power of speech, it is always difficult, and often impossible, to arrive at correct results. If the person is able and willing to communicate his thoughts in writing, his mental capacity may be clearly revealed. If not disposed to write, he may communicate by constructing words and sentences by the help of a dictionary or block letters. Failing in this, the only other intellectual manifestation possible is the expression of assent or dissent by signs to propositions made by others. Any of these means of communication, other than that of writing, must leave us much in the dark respecting the amount of intellect possessed by the party. If the act in question is complicated in its relations, if it is unreasonable in its dispositions, if it bears the slightest trace of foreign influence, it cannot but be regarded with suspicion. If the party has only the power of assenting or dissenting, it must always be impossible to decide whether this does not refer to the terms rather than the merits of the proposition; and, therefore, an act which bears no other evidence than this of the will of the person certainly ought not

to be established. Besides, it must be considered that a will drawn up in this manner is, actually, not the will of the testator, since every disposition has originated in the minds of others. Ray, Med. Jur. 363. The phenomena and legal consequences of paralytic affections are extensively discussed in 1 Paige, Ch. N. Y. 171; 1 Hagg. Eccl. 502, 577; 2 *id.* 84; 1 Curt. Eccl. 782; Parish Will Case, 4 vols. N. Y. 1858. And see DEATH; INSANITY.

APOSTLES. Brief letters of dismissal granted to a party who takes an appeal from the decision of an English court of admiralty, stating the case, and declaring that the record will be transmitted. 2 Brown, Civ. and Adm. Law, 438; Dig. 49. 6.

This term was used in the civil law. It is derived from *apostolos*, a Greek word, which signifies *one sent*, because the judge from whose sentence an appeal was made, sent to the superior judge these letters of dismission, or apostles. Merlin, *Répert.* mot *Apôtres;* 1 Parsons, Marit. Law, 745; 1 Blatchf. C. C. 663.

APOSTOLI. In Civil Law. Certificates of the inferior judge from whom a cause is removed, directed to the superior. Dig. 49. 6. See APOSTLES.

Those sent as messengers. Spelman, Gloss.

APPARATOR (Lat.). A furnisher; a provider.

The sheriff of Bucks had formerly a considerable allowance as *apparator comitatus* (apparator for the county). Cowel.

APPARENT (Lat. *apparens*). That which appears; that which is manifest; what is proved. It is required that all things upon which a court must pass should be made to appear, if matter in pays, under oath; if matter of record, by the record. It is a rule that those things which do not appear are to be considered as not existing: *de non apparentibus et non existentibus eadem est ratio.* Broom, Max. 20. What does not appear does not exist: *quod non apparet, non est.* 8 Cow. N. Y. 600; 1 Term, 404; 12 Mees. & W. Exch. 316.

APPARITOR (Lat.). An officer or messenger employed to serve the process of the spiritual courts in England and summon offenders. Cowel.

APPARURA (Lat.). **In Old English Law.** Furniture or implements.

Carucariæ apparura, plough-tackle. Cowel; Jacob, Dict.

APPEAL (Fr. *appeler*, to call). **In Criminal Practice.** A formal accusation made by one private person against another of having committed some heinous crime. 4 Blackstone, Comm. 312.

Anciently, appeals lay for treason as well as felonies; but appeals for treason were abolished by statutes 5 Edw. III. c. 9, 25 Edw. III. c. 24, and 1 Hen. IV. c. 14, and for all other crimes by the statute 59 Geo. III. c. 46.

An appeal lay for the heir male for the death of his ancestors; for the widow while unmarried for the death of her husband; and by the party injured, for certain crimes, as robbery, rape, mayhem, etc. Coke, Litt. 287 *b.*

It might be brought at any time within a year and a day, even though an indictment had been found. If the appellee was found innocent, the appellor was liable to imprisonment for a year, a fine, and damages to the appellee.

The appellee might claim *wager of battle.* This claim was last made in the year 1818 in England. 1 Barnew. & Ald. 405. And see 2 W. Blackst. 713; 5 Burr. 2643, 2793; 4 Sharswood, Blackst. Comm. 312–318, and notes.

2. In Practice. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial. *Ellsworth,* C. J., 3 Dall. 321; 7 Cranch, 110; 10 Pet. 205; 14 Mass. 414; 1 Serg. & R. Penn. 78; 1 Binn. Penn. 219; 3 *id.* 48.

It is a civil-law proceeding in its origin, and differs from a writ of error in this, that it subjects both the law and the facts to a review and a retrial, while a writ of error is a common-law process which removes matter of law only for re-examination. 7 Cranch, 111.

On an appeal the whole case is examined and tried, as if it had not been tried before, while on a writ of error the matters of law merely are examined, and judgment reversed if any errors have been committed. Dane, Abr. *Appeal.* The word is used, however, in the sense here given both in chancery and in common-law practice, 16 Md. 282; 20 How. 198; and in criminal as well as in civil law. 9 Ind. 569; 6 Fla. 679.

An appeal generally annuls the judgment of the inferior court so far that no action can be taken upon it until after the final decision of the cause. 26 Barb. N. Y. 55; 5 Fla. 234; 4 Iowa, 230; 5 Wisc. 185.

The rules of the various states regulating appeals are too numerous and various, and too much matters of mere local practice, to be given here.

They lie usually where an inferior and a superior court have concurrent jurisdiction to some extent, or where the inferior court is the court of original jurisdiction. See COURTS OF THE UNITED STATES.

In Legislation. The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer, or "chair," procures a vote of the body upon the decision. In the House of Representatives of the United States the question on an appeal is put to the House in this form: "Shall the decision of the chair stand as the judgment of the House?"

If the appeal relates to an alleged breach of decorum, or transgression of the rules of order, the question is taken without debate. If it relates to the admissibility or relevancy of a proposition, debate is permitted, except when a motion for the previous question is pending.

APPEARANCE. In Practice. A coming into court as party to a suit, whether as plaintiff or defendant.

The formal proceeding by which a defendant submits himself to the jurisdiction of the court.

Appearance anciently meant an actual coming into court, either in person or by attorney. It is so used both in the civil and the common law. It is indicated by the word "comes," "and the said C. D. *comes* and *defends*," and, in modern practice, is accomplished by the entry of the name of the attorney of the party in the proper place on the record, or by filing bail where that is required. It is a formal matter, but necessary to give the court jurisdiction over the person of the defendant.

A time is generally fixed within which the defendant must enter his appearance. If the defendant failed to appear within this period, the remedy in ancient practice was by distress infinite when the injuries were committed without force, and by capias or attachment when the injuries were committed against the peace, that is, were technical trespasses. But, until appearance, the courts could go no further than apply this process to secure appearance. See PROCESS.

In modern practice, a failure to appear generally entitles the plaintiff to judgment against the defendant by default. See CONFLICT OF LAWS.

2. It may be of the following kinds:

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event. See DE BENE ESSE.

General.—A simple and absolute submission to the jurisdiction of the court.

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit.

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff. See Daniell, Ch. Pract.

Voluntary.—That which is made in answer to a subpœna or summons, without process. 1 Barbour, Ch. Pract. 77.

3. *How to be made.*—On the part of the plaintiff no formality is required. On the part of the defendant it may be effected by making certain formal entries in the proper office of the court, expressing his appearance, 5 Watts & S. Penn. 215; 2 Ill. 250; 3 *id.* 462; 15 Ala. 352; 18 *id.* 272; 6 Mo. 50; 7 *id.* 411; 17 Vt. 531; 2 Ark. 26; or, in case of arrest, is effected by giving bail, by putting in an answer, 4 Johns. Ch. N. Y. 94, or a demurrer. 6 Pet. 323.

By whom to be made.—In civil cases it may in general be made either by the party or his attorney; and in those cases where it is said that the party must appear in person, it is sufficient if it is so entered on the record; although, in fact, the appearance is by attorney. 2 Johns. N. Y. 192; 8 *id.* 418; 14 *id.* 417.

An appearance by attorney is, in strictness, improper where a party wishes to plead to the jurisdiction of the court, because the appointment of an attorney of the court admits its jurisdiction, 1 Chitty, Plead. 398; 2 Wms. Saund. 209 *b*; and is insufficient in those cases where the party has not sufficient capacity to appoint an attorney. Thus, *an idiot* can appear only in person, and as a plaintiff he may sue in person or by his next friend.

4. *An infant* cannot appoint an attorney; he must, therefore, appear by guardian or prochein ami.

A lunatic, if of full age, may appear by attorney; if under age, by guardian only. 2 Wms. Saund. 335; *id.* 332 (*a*), n. (4).

A married woman, when sued without her husband, should defend in person. 1 Wms. Saund. 209 *b*. And see 1 Chitty, Plead. 398.

In criminal cases the personal presence in court of the defendant is often necessary. See 2 Burr. 931; *id.* 1786; 1 W. Blackst. 198.

The effect of an appearance by the defendant is, that both parties are considered to be in court.

And an actual appearance in person is necessary to give effect *in personam* to the judgment of a sister state. But a mere special appearance is not sufficient without personal service. 37 N. H. 9. See CONFLICT OF LAWS.

5. *In criminal cases* the personal appearance of the accused is often necessary. The verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential. Bacon, Abr. *Verdict*, B; Archbold, Crim. Plead., 14th ed. 149.

6. No motion for a new trial is allowed unless the defendant, or, if more than one, the defendants who have been convicted, are present in court when the motion is made. 3 Maule & S. 10, note; 17 Q. B. 503; 2 Den. Cr. Cas. 372, note. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine only, 2 Den. Cr. Cas. 459; or where the defendant is in custody on criminal process. 4 Barnew. & C. 329. On a charge of felony, a party suing out a writ of error must appear in person to assign errors; and it is said that if the party is in custody in the prison of the county or city in which the trial has taken place, he must be brought up by habeas corpus, for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in 2 Den. Cr. Cas. 287; 17 Q. B. 317; 8 Ell. & B. 54; 1 Dearsl. & B. Cr. Cas. 375.

Where a defendant is not liable to personal punishment, but to a fine, sentence may be pronounced against him in his absence. 1 Chitty, Crim. Law, 695. See 2 Burr. 931; 3 *id.* 1780.

APPELLANT. **In Practice.** He who makes an appeal from one jurisdiction to another.

APPELLATE JURISDICTION. In Practice. The jurisdiction which a superior court has to re-hear causes which have been tried in inferior courts. See JURISDICTION.

APPELLATIO (Lat.). An appeal.

APPELLEE. In Practice. The party in a cause against whom an appeal has been taken.

APPELLOR. A criminal who accuses his accomplices; one who challenges a jury.

APPENDANT (Lat. *ad* to, *pendere*, to hang). Annexed or belonging to something superior; an incorporeal inheritance belonging to another inheritance.

Appendant in deeds includes nothing which is substantial corporeal property, capable of passing by feoffment and livery of seisin. Coke, Litt. 121; 4 Coke, 86; 8 Barnew. & C. 150; 6 Bingh. 150. A matter *appendant* must arise by prescription; while a matter appurtenant may be created at any time. 2 Viner, Abr. 594; 3 Kent, Comm. 404.

APPENDITIA (Lat. *appendere*, to hang at or on). The appendages or pertinances of an estate; the appurtenances to a dwelling, &c.: thus, *pent-houses* are the *appenditia domus*.

APPLICATION (Lat. *applicare*). The act of making a request for something.

A written request.

A written request to have a certain quantity of land at or near a certain specified place. 3 Binn. Penn. 21; 5 *id.* 151.

The use or disposition made of a thing.

In Insurance. The preliminary statement made by a party applying for an insurance on life, or against fire. It usually consists of written answers to interrogatories proposed by the company applied to, respecting the proposed subject. It corresponds to the "representations" preliminary to maritime insurance. It is usually referred to expressly in the policy as being the basis or a part of the contract, and this reference is, in effect, a warranty of the truth of the statements. Phillips, Ins. ch. vii., xv., xvi. An oral misrepresentation of a material fact will defeat a policy on life or against fire, no less than in maritime insurance, on the ground of fraud. 1 Phillips, Ins. § 650. See REPRESENTATION; MISREPRESENTATION.

Of Purchase-Money. The use or disposition made of the funds received by a trustee on a sale of real estate held under the trust.

The purchaser of real estate held in trust is held liable to the *cestuis que trust*, in equity for the value of the property, unless he receives a discharge from them, or unless the trustee be expressly or impliedly authorized to sell, free from such responsibility on the part of the purchaser, by the instrument creating the trust.

APPOINTEE. A person who is appointed or selected for a particular purpose; as, the appointee under a power is the person who is to receive the benefit of the trust or power.

APPOINTMENT. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

The making out a commission is conclusive evidence of an appointment to an office for holding which a commission is required. 1 Cranch, 137; 10 Pet. 343.

As distinguished from an election, it seems that an appointment is generally made by one person, or a limited number acting with delegated powers, while an election is made by all of a class.

The word is sometimes used in a sense quite akin to this, and apparently derived from it as denoting the right or privilege conferred by an appointment: thus, the act of authorizing a man to print the laws of the United States by authority, and the right thereby conveyed, are considered such an appointment, but the right is not an office. 17 Serg. & R. Penn. 29, 233. And see 3 *id.* 157; Cooper, Justin. 599, 604.

In Chancery Practice. The exercise of a right to designate the person or persons who are to take the use of real estate. 2 Washburn, Real Prop. 302.

By whom to be made.—It must be made by the person authorized, 2 Bouvier, Inst. § 1922; who may be any person competent to dispose of an estate of his own in the same manner, 4 Kent. Comm. 324; including a married woman, 1 Sugden, Pow. 182; 3 C. B. 578; 5 *id.* 741; 3 Johns. Ch. N. Y. 523; 5 Wheat. Penn. 445; 2 Dall. 201; 8 How. 27; even though her husband be the appointee, 21 Penn. St. 72; or an infant, if the power be simply collateral. 2 Washburn, Real Prop. 317. And see 1 Sugden, Pow. ed. 1856, 211. Where two or more are named as donees, all must, in general, join, 2 Washburn, Real Prop. 322; 14 Johns. N. Y. 553; but where given to several who act in a trust capacity, as a class, it may be by the survivors. 10 Pet. 564; 13 Metc. Mass. 220; Story, Eq. Jur. § 1062, n.

How to be made.—A very precise compliance with the directions of the donor is necessary, 2 Ves. Ch. 231; 1 P. Will. Ch. 740; 3 East, 410, 430; 1 Jac. & W. Ch. 93; 6 Mann. & G. 386; 8 How. 30; having regard to the intention, especially in substantial matters. Tudor, Lead. Cas. 306; 2 Washburn, Real Prop. 318; Ambl. Ch. 555; 3 Ves. Ch. 421. It may be a partial execution of the power only, and yet be valid, 4 Cruise, Dig. 205; or, if excessive, may be good to the extent of the power. 2 Ves. Sen. 640; 3 Drur. & Warr. Ch. 339. It must come within the spirit of the power: thus, if the appointment is to be *to* and *amongst* several, a fair allotment must be made to each, 4 Ves. Ch. 771; 2 Vern. Ch. 513; otherwise, where it is made to such as the donee may select. 5 Ves. Ch. 857.

The effect of an appointment is to vest the estate in the appointee, as if conveyed by the original donor. 2 Washburn, Real Prop. 320; 2 Crabb, Real Prop. 726, 741; 2 Sugden, Pow. ed. 1856, 22; 11 Johns. N. Y. 169. See POWER. Consult 2 Washburn, Real Prop. 298, 337; Tudor, Lead. Cas.; Chance, Pow.; 4 Greenleaf; Cruise, Dig.

APPOINTOR. One authorized by the

donor, under the statute of uses, to execute a power. 2 Bouvier, Inst. n. 1923.

APPORTIONMENT. The division or distribution of a subject-matter in proportionate parts. Coke, Litt. 147; 1 Swanst. Ch. 37, n.; 1 Story, Eq. Jur. 475 *a*.

Of Contracts. The allowance, in case of the partial performance of a contract, of a proportionate part of what the party would have received as a recompense for the entire performance of the contract.

Where the contract is to do an entire thing for a certain specified compensation, there can be no apportionment. 2 Parsons, Contr. 33; 3 Kent. Comm. 471. When no compensation is specified, it is said the contract is apportionable. 2 Barnew. & Ad. 882; 14 Wend. N. Y. 257; 25 Penn. St. 382.

Annuities, at common law, are not apportionable; but by statute 11 Geo. II. some classes have been made so. 2 P. Will. 501; 3 Atk. 260; 2 W. Blackst. 843; 17 Serg. & R. Penn. 173; 3 Kent, Comm. 471.

Wages are not apportionable where the hiring takes place for a definite period. 6 Term, 320; 5 Bos. & P. 651; 11 Q. B. 755; 2 Pick. Mass. 267; 19 *id.* 528; 2 Mass. 147; 4 Metc. Mass. 465; 12 *id.* 286; 34 Me. 102; 8 Cow. N. Y. 63; 13 Johns. N. Y. 365; 14 Wend. N. Y. 257; 12 Vt. 49; 13 *id.* 268; 17 *id.* 355; 1 Ind. 257; 19 Ala. N. S. 54. See 2 Pick. Mass. 332; 23 *id.* 492; 17 Me. 38; 11 Vt. 273; 7 Hill, N. Y. 110; 3 Den. N. Y. 175.

Of Incumbrances. Determining the amounts which each of several parties interested in an estate shall pay towards the removal or in support of the burden of an incumbrance.

As between a tenant for life and the remainder man, the tenant's share is limited to keeping down the interest; if, then, the principal is paid, the tenant for life must pay a gross sum equivalent to the amount of all the interest he would pay, making a proper estimate of his chances of life. 1 Washburn, Real Prop. 96, 534; 1 Story, Eq. Jur. § 487. See 2 Dev. & B. Eq. No. C. 179; 5 Johns. Ch. N. Y. 482; 10 Paige, Ch. N. Y. 71, 158; 13 Pick. Mass. 158.

Of Rent. The allotment of their shares in a rent to each of several parties owning it.

The determination of the amount of rent to be paid when the tenancy is terminated at some period other than one of the regular intervals for the payment of rent.

An apportionment of rent follows upon every transfer of a part of the reversion, 17 Mass. 439; 22 Wend. N. Y. 121; 22 Penn. St. 144; see 18 N. Y. 529; or where there are several assignees, as in case of a descent to several heirs, 3 Watts, Penn. 394; 13 Ill. 25; 25 Wend. N. Y. 456; 10 Coke, 128; Comyn, Land. & Ten. 422, where a levy for debt is made on a part of the reversion, or is set off to a widow for dower, 1 Rolle, Abr. 237; but whoever owns at the time the rent falls due is entitled to the whole. 7 Md. 368; 3 Metc. Mass. 76; 1 Washburn, Real Prop. 98, 337. See Williams, Ex. 709.

Rent is not, at common law, apportionable as to time. Smith, Land. & Ten. 134; Taylor, Land. & Ten. §§ 384–387; 3 Kent. Comm. 470; 5 Watts & S. Penn. 432; 13 N. H. 343; 3 Bradf. Surr. N. Y. 359. It is apportionable by statute 11 Geo. II. c. 19, § 15; and similar statutes have been adopted in this country to some extent, 1 Washburn, Real Prop. 98; 13 N. H. 343; 14 Mass. 94; 1 Hill, Abr. c. 16, § 50.

Consult 1 Washburn, Real Prop. 98, 337; 3 Kent, Comm. 469, 470; 2 Parsons, Contr. 33; 1 Story, Eq. Jur. 475 *a*; Williams, Executors, 709; Taylor, Land. & Ten. §§ 384–387; 2 Bouvier, Inst. n. 1675.

Of Representatives. Representatives and direct taxes shall be apportioned among the several states, which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative. U. S. Const. Art. 1, § 2.

From and after the 3d day of March, 1853, the house of representatives shall be composed of two hundred and thirty-three members, to be apportioned among the several states in manner following: so soon as each enumeration of the inhabitants of the several states, directed by the constitution to be taken, shall be completed, it shall be the duty of the secretary of the interior to ascertain the aggregate representative population of the United States, by adding to the whole number of free persons in all the states, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons, which aggregate population he shall divide by the number two hundred and thirty-three, and the product of such division, rejecting any fraction of an unit, shall be the ratio or rule of apportionment of representatives under such enumeration; he shall then proceed in the same manner to ascertain the representative population of each state, and divide this number by the ratio already determined by him, and the product of this last division shall be the number of representatives apportioned to such state. The loss in the number of members caused by the fractions remaining in the several states, is compensated for by assigning to the states having the largest fractions one additional member each for so many of such fractions as may be necessary to make the whole number of representatives two hundred and thirty-three. If, after an apportionment, a new state shall be admitted, the representative or representatives assigned to it shall be, in addition to

the two hundred and thirty-three, but such excess shall not continue beyond the next apportionment.

A certificate of the number of members apportioned to each state shall be made out and transmitted by the secretary of the interior, under the seal of his office, without delay, to the house of representatives, and also to the executive of each state, certifying the number for such state. Act May 23, 1850; 9 U. S. Stat. at Large, 432; Brightly's U. S. Dig. 120, 121; Sheppard's Const. Text-Book, 66; Ex. Doc. 1851–2, vol. 6, Doc. No. 74.

Under the present constitution, representatives' apportionments have been made as follows. The first house of representatives consisted of sixty-five members, or one for every thirty thousand of the representative population. By the census of 1790, it consisted of one hundred and six representatives, or one for every thirty-three thousand; by the census of 1800, one hundred and forty-two representatives, or one for every thirty-three thousand; by the census of 1810, one hundred and eighty-three representatives, or one for every thirty-five thousand; by the census of 1820, two hundred and thirteen representatives, one for every forty thousand; by the census of 1830, two hundred and forty-two representatives, or one for every forty-seven thousand seven hundred; by the census of 1840, two hundred and twenty-three representatives, or one for every seventy thousand six hundred and eighty; by the census of 1850, and under the act of May 23, 1850, the number of representatives was increased to two hundred and thirty-three, or one for every ninety-three thousand four hundred and twenty-three of the representative population. Sheppard's Const. Text-Book, 65; Acts 30 July, 1852, 10 Stat. 25; May 11, 1858, 11 Stat. 285; 14 Feb. 1859, 11 Stat. 383.

Under the census of 1860, the ratio was ascertained to be for one hundred and twenty-four thousand one hundred and eighty-three upon the basis of two hundred and thirty-three members; but by the act of 4th March, 1862, the number of representatives was increased to two hundred and forty-one, by allowing one additional representative to each of the following states,—Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island.

APPOSAL OF SHERIFFS. In English Law. The charging them with money received upon account of the Exchequer. 22 & 23 Car. II.; Cowel.

APPOSER. In English Law. An officer of the Exchequer, whose duty it was to examine the sheriffs in regard to their accounts handed in to the exchequer. He was also called the foreign apposer.

APPOSTILLE. In French Law. An addition or annotation made in the margin of a writing. Merlin, *Répert.*

APPRAISEMENT. A just valuation of property.

Appraisements are required to be made of the property of persons dying intestate, of insolvents and others; an inventory (*q. v.*) of the goods ought to be made, and a just valuation put upon them. When property real or personal is taken for public use, an appraisement of it is made, that the owner may be paid its value.

APPRAISER. In Practice. A person appointed by competent authority to appraise or value goods or real estate.

APPREHENSION. In Practice. The capture or arrest of a person on a criminal charge.

The term apprehension is applied to criminal cases, and arrest to civil cases; as, one having authority may *arrest* on *civil* process, and *apprehend* on a *criminal* warrant. See ARREST.

APPRENTICE, Person, Contracts. A person bound in due form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. 1 Blackstone, Comm. 426; 2 Kent, Comm. 211; 3 Rawle, Penn. 307; Chitty, App.; 4 Term, 735; Bouvier, Inst. *Index.*

Formerly the name of *apprentice en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprentici ad barras.* And in some of the ancient law-writers the terms apprentice and barrister are synonymous. Coke, 2d Inst. 214; Eunomus, Dial. 2, § 53, p. 155.

APPRENTICESHIP. A contract by which one person who understands some art, trade, or business, and called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business.

The term during which an apprentice is to serve. Pardessus, *Droit Comm.* n. 34.

2. At common law, an infant may bind himself apprentice by indenture, because it is for his benefit. 5 Maule & S. 257; 6 Term, 652; 5 Dowl. & R. 339. But this contract, both in England and in the United States, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian (the father, if both parents be alive, being the proper party to such consent, 8 W. & S. 339), or by the parent and guardian for him, with his consent, such consent to be made a part of the contract, 2 Kent, Comm. 261; 8 Johns. N. Y. 328; 14 *id.* 374; 2 Penn. 977; 4 Watts, Penn. 80; 43 Me. 458; 12 N. H. 437; 4 Leigh, Va. 493; or, if the infant be a pauper, by the proper authorities without his consent. 3 Serg. & R. Penn. 158; 32 Me. 299; 3 Jones, No. C. 21; 15 B. Monr. Ky. 499; 30 N. H. 104; 5 Gratt. Va. 285. The contract need not specify the particular trade to be taught, but is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice. 9 Barb. N. Y.

309; 1 Sandf. N. Y. 672. In a common indenture of apprenticeship the father is bound for the performance of the covenants by the son. Dougl. 500; 3 Barnew. & Ald. 59. But to an action of covenant against the father for the desertion of the son it is a sufficient answer that the master has abandoned the trade which the son was apprenticed to learn, or that he has driven the son away by cruel treatment. 4 Eng. L. & Eq. 412; 4 Mass. 480; 2 Pick. Mass. 357.

This contract must generally be entered into by indenture or deed, 1 Salk. 68; 4 Maule & S. 383; 10 Serg. & R. Penn. 416; 1 Vt. 69; 18 Conn. 337, and is to continue, if the apprentice be a male, only during minority, and if a female, only until she arrives at the age of eighteen. 2 Kent, Comm. 264; 5 Term, 715. The English statute law as to binding out minors as apprentices to learn some useful art, trade, or business, has been generally adopted in the United States, with some variations which cannot be noticed here. 2 Kent, Comm. 264. As to the provisions of the English statutes, see 1 Harrison, Dig. 206–227.

3. *The duties of the master* are to instruct the apprentice by teaching him *bonâ fide* the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master. 2 Dan. Ky. 131; 5 Metc. Mass. 37; 1 Dev. & B. No. C. 402. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfil all the covenants he has entered into by the indenture. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law, 4 Clark & F. Hou. L. 234, but may correct him with moderation for negligence and misbehavior. 1 Ashm. Penn. 267. He cannot dismiss his apprentice except by consent of all the parties to the indenture, 1 Serg. & R. Penn. 330; 12 Pick. Mass. 110; 2 Burr. 766, 801; 1 Carr. & K. 622, or with the sanction of some competent tribunal, 1 Mass. 24; 2 Pick. Mass. 451; 8 Conn. 14; 1 Bail. So. C. 209, even though the apprentice should steal his master's property, or by reason of incurable illness become incapable of service, the covenants of the master and apprentice being independent. 2 Pick. Mass. 451; 2 Dowl. & R. 465; 1 Barnew. & C. 460. He cannot remove the apprentice out of the state under the laws of which he was apprenticed, unless such removal is provided for in the contract or may be implied from its nature; and if he do so remove him, the contract ceases to be obligatory. 6 Binn. Penn. 202; 6 Serg. & R. Penn. 526; 2 Pick. Mass. 357; 13 Metc. Mass. 80. An infant apprentice is not capable in law of consenting to his own discharge, 1 Burr. 501; 3 Barnew. & C. 484; nor can the justices, according to some authorities, order money to be returned on the discharge of an apprentice. Strange, 69; *contra*, Salk. 67, 68, 490; 11 Mod. 110; 12 *id.* 498, 553. After the apprenticeship is at an end, the master cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

4. *An apprentice* is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavor to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He must not leave his master's service during the term of the apprenticeship. 6 Johns. N. Y. 274; 2 Pick. Mass. 357. The apprentice is entitled to payment for extraordinary services when promised by the master, 1 Am. Law Jour. 308; see 1 Whart. Penn. 113; and even when no express promise has been made, under peculiar circumstances. 2 Cranch, 240, 270; 3 C. Rob. Adm. 237; but see 1 Whart. Penn. 113. Upon the death of the master, the apprenticeship, being a personal trust, is dissolved. 1 Salk. 66; Strange, 284; 1 Day, Conn. 30.

To be binding on the apprentice, the contract must be made as prescribed by statute, 5 Cush. Mass. 417; 5 Pick. Mass. 250; but if not so made, it can only be avoided by the apprentice himself, 9 Barb. N. Y. 309; 8 Johns. N. Y. 328; 5 Strobh. So. C. 104; and if the apprentice do elect to avoid it, he will not be allowed to recover wages for his services, the relation being sufficient to rebut any promise to pay which might otherwise be implied. 12 Barb. N. Y. 473; 2 *id.* 208; but see 13 Metc. Mass. 80. The master will be bound by his covenants, though additional to those required by statute. 10 Humphr. Tenn. 179.

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to all his earnings, whether the person who employed him did or did not know that he was an apprentice, 6 Johns. N. Y. 274; 3 N. H. 274; 7 Me. 457; 2 Aik. Vt. 243; 1 E. D. Smith, N. Y. 408; 1 Sandf. N. Y. 711; but in an action for harboring or enticing away an apprentice, a knowledge of the apprenticeship by the defendant is an indispensable requisite to recovery. 2 Harr. & G. Md. 182; 1 Wend. N. Y. 376; 1 Gilm. Va. 46; 5 Ired. No. C. 216.

5. Apprenticeship is a relation which cannot be assigned at common law, 5 Binn. Penn. 423; 4 Term, 373; Dougl. 70; 3 Keble, 519; 12 Mod. 554; 18 Ala. N. s. 99; Busb. No. C. 419; though, if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship. Dougl. 70; 4 Term, 373; 19 Johns. N. Y. 113; 5 Cow. N. Y. 363; 2 Bail. So. C. 93. But in Pennsylvania and some other states the assign-

ment of indentures of apprenticeship is authorized by statute. 1 Serg. & R. Penn. 249; 3 *id.* 161; 6 Vt. 430. See, generally, 2 Kent, Comm. 261–266; Bacon, Abr. *Master and Servant;* 1 Saund. 313, n. 1, 2, 3, and 4; 1 Bouvier, Inst. n. 396 *et seq.* The law of France on this subject is strikingly similar to our own. Pardessus, *Droit Com.* nn. 518, 522.

APPRIZING. In Scotch Law. A form of process by which a creditor formerly took possession of the estates of the debtor in payment of the debt due.

It is now superseded by adjudications.

APPROACH. The right of visit or visitation to determine the national character of the ship approached for that purpose only. 1 Kent, Comm. 153.

APPROBATE AND REPROBATE. In Scotch Law. To approve and reject.

The doctrine of *approbate and reprobate* is the English doctrine of election. A party cannot both *approbate and reprobate* the same deed. 4 Wils. & S. Hou. L. 460; 1 Ross, Lead. Cas. 617; Paterson, Comp. 710; 1 Bell, Comm. 146.

APPROPRIATION. In Ecclesiastical Law. The perpetual annexation of an ecclesiastical benefice which is the general property of the church to the use of some spiritual corporation, either sole or aggregate.

It corresponds with impropriation, which is setting apart a benefice to the use of a lay corporation. The name came from the custom of monks in England to retain the churches in their gift and all the profits of them *in proprio usus* to their own immediate benefit. 1 Burns, Eccl. Law, 71.

To effect a good appropriation, the king's license and the bishop's consent must first be obtained. When the corporation having the benefice is dissolved, the parsonage becomes disappropriate at common law. Coke, Litt. 46; 1 Blackstone, Comm. 385; 1 Hagg. Eccl. 162. There have been no appropriations since the dissolution of monasteries. For the form of an appropriation, see Jacob, Introd. 411.

Of Payments. The application of a payment made to a creditor by his debtor, to one or more of several debts.

2. *The debtor* has the first right of appropriation. No precise declaration is required of him, his *intention*, when made known, being sufficient. Wythe, 13; 7 Blackf. Ind. 236; 10 Ill. 449; 1 Fla. 409. Still, such facts must be proved as will lead a jury to infer that the debtor did purpose the specific appropriation claimed. 14 East, 239, 243, n.; 4 Ad. & E. 840; 8 Watts & S. Penn. 320; 2 Hall, N. Y. 185; 10 Leigh, Va. 481; 1 Ga. 241; 17 Mass. 575; 5 Ired. No. C. 551; 2 Rob. Va. 2, 27; 12 Vt. 608; 36 Me. 222; 4 J. J. Marsh. Ky. 621; 4 Gill & J. Md. 361. An entry made by the debtor in his own book at the time of payment is an appropriation, if made known to the creditor; but otherwise, if not made known to him. The same rule applies to a creditor's entry communicated to his debtor. 3 Dowl. & R. 549; 8 Carr. & P. 704; 2 Barnew. & C. 65; 5 Den. N. Y. 470; 11 Barb. N. Y. 80.

3. *The creditor* may apply the payment, as a general rule, if the debtor does not. 4 Cranch, 316; 7 How. 681; 20 Pick. Mass. 339; 25 Penn. St. 411; 1 M'Cord, So. C. 308; 5 Day, Conn. 166; 1 Mo. 315; 2 Ill. 196. But there are some restrictions upon this right. The debtor must have known and waived his right to appropriate. Hence an agent cannot always apply his principal's payment. He cannot, on receipt of money due his principal, apply the funds to debts due himself as agent, selecting those barred by the statute of limitations. 8 Dowl. Bail, 563; 1 Mann. & G. 54; 5 N. H. 297. But on an agent's appropriations, see 5 Bligh, N. S. 1; 3 Barnew. & Ad. 320; 9 Pick. Mass. 325; 1 La. Ann. 393; 19 N. H. 479; 29 Miss. 139. A prior *legal* debt the creditor must prefer to a posterior equitable debt. Where only one of several debts is valid and lawful, all the payments must be applied to this, irrespective of its order in the account. 27 Vt. 187. Whether if the equitable be prior it must first be paid, see 9 Cow. 420; 2 Stark. 74; 1 Crompt. & M. Exch. 33; 6 Taunt. 597.

4. If the creditor is also *trustee* for another creditor of his own debtor, he must apply the unappropriated funds *pro rata* to his own claims and those of his *cestui que trust.* 18 Pick. Mass. 361. But if the debtor, besides the debts in his own right, owe also debts as executor or administrator, the unappropriated funds should first be applied to his personal debt, and not to his debts as executor. 2 Strange, 1194; 4 Harr. & J. Md. 566; 14 N. H. 352; 2 Dowl. Parl. Cas. 477. A creditor cannot apply unappropriated funds to such of his claims as are *illegal* and not recoverable at law. 3 Barnew. & C. 165; 4 Mann. & G. 860; 4 Dowl. & R. 783; 2 Deac. & C. Bank. 534; 11 Cush. Mass. 44; 14 N. H. 431. But in the case of some debts illegal by statute—namely, those contracted by sales of spirituous liquors—an appropriation to them has been adjudged good. 2 Ad. & E. 41; 5 Carr. & P. 19; 1 Mood. & R. 100; 34 Me. 112. And the debtor may always elect to have his payment applied to an illegal debt.

5. If some of the debts are barred by the *statute of limitations*, the creditor cannot first apply the unappropriated funds to them, and thus revive them and take them out of the statute. 2 Crompt. M. & R. Exch. 723; 2 C. B. 476; 7 Scott, 444; 31 Eng. L. & Eq. 555; 13 Ark. 754; 1 Gray, Mass. 630. Still, a debtor may waive the bar of the statute, just as he may apply his funds to an illegal debt; and the creditor may insist, in the silence of the debtor, unless other facts controvert it, that the money was paid on the barred debts. 5 Mees. & W. Exch. 300; 26 N. H. 85; 25 Penn. St. 411. Proof of such intent on the debtor's part may be deduced from a mutual adjustment of accounts before the money is sent, or from his paying interest on the barred debt. But, in general, the creditor cannot insist that a part-payment revives the rest of the debt. He can only retain such partial payment as has been made. 1 Gray, Mass. 630. It has been held that the creditor

may first apply a general payment to discharging any one of several accounts all barred, and by so doing he will revive the balance of that particular account. But he is not allowed to distribute the funds upon all the barred notes, so as to revive all. 19 Vt. 26. See LIMITATIONS.

6. Wherever the payment is not *voluntary*, the creditor has not the option in appropriation, but he must apply the funds received ratably to all the notes or accounts. This is the rule wherever proceeds are obtained by judicial proceedings. So, in cases of assignment by an insolvent debtor, the share received by a creditor, a party to the assignment, must be applied *pro rata* to all his claims, and not to such debts only as are not otherwise secured. 10 Pick. Mass. 129; 24 *id.* 270; 1 Mann. & G. 54; 1 Perr. & D. 138; 1 Miss. 526; 12 N. H. 320; 22 Me. 295; 1 Sandf. N. Y. 416.

A creditor having several demands may apply the payments to a debt not secured by sureties, where other rules do not prohibit it. 11 Metc. Mass. 185. Where appropriations are made by a receipt, *prima facie* the creditor has made them, because the language of the receipt is his. Dav. Dist. Ct. 146.

It is sufficiently evident from the foregoing rules that the principle of the Roman law which required the creditor to act for his debtor's interest in appropriation more than for his own, is not a part of the common law. The nearest approach to the civil law rule is the doctrine that when the right of appropriation falls to the creditor he must make such an application as his debtor could not *reasonably* have objected to. 21 Vt. 456; 20 Miss. 631. See IMPUTATION.

7. *The law will apply* part-payments in accordance with the justice and equity of the case. 9 Wheat. 720; 12 Serg. & R. Penn. 301; 2 Vern. Ch. 24; 6 Cranch, 28, 253, 264; 4 Mas. C. C. 333; 5 *id.* 82.

Unappropriated funds are always applied to a *debt due* at the time of payment, rather than to one not then due. 2 Esp. 666; 1 Bibb, Ky. 334; 5 Gratt. Va. 57; 9 Cow. N. Y. 420; 5 Mas. C. C. 11; 27 Ala. N. S. 445; 20 *id.* 313; 10 Watts, 255; 4 Wisc. 442. But an express agreement with the debtor will make good an appropriation to debts not due. 22 Pick. Mass. 305. The creditor should refuse a payment on an account not yet due, if he be unwilling to receive it; but if he do receive it he must apply it as the debtor directs. 40 Me. 325. A payment is applied to a *certain* rather than to a contingent debt, and, therefore, to a debt on which the payer is bound directly, rather than to one which binds him collaterally. 22 Me. 295; 1 Smedes & M. Ch. Miss. 331. And where the amount paid is precisely equal to one of several debts, a jury is authorized to infer its intended application to that debt. 8 Wend. N. Y. 403; 3 Caines, N. Y. 14; 1 Woodb. & M. C. C. 150.

8. The law, as a general rule, will apply a payment in the way most beneficial to the *debtor* at the time of payment. This rule seems to be similar to the civil law doctrine. Thus, *e.g.*, courts will apply money to a mortgage debt rather than to a simple contract debt. See 12 Mod. 559; 2 Harr. & J. Md. 402; 10 Humphr. Tenn. 238; 12 Vt. 246; 9 Cow. N. Y. 747, 765; 1 Md. Ch. Dec. 160; 25 Miss. 95. Yet, on the other hand, in the pursuit of equity, courts will sometimes assist the *creditor*. Hence, of two sets of debts, courts allow the creditor to apply unappropriated funds to the debts least strongly secured. 1 Stark. 153; 1 Freem. Ch. 502; 18 Miss. 113; 15 Conn. 438; 10 Ired. No. C. 165; 11 *id.* 253; 2 Rich. Eq. So. C. 63; 13 Vt. 15; 6 Cranch, 8; 11 Leigh, Va. 512; 14 Ark. 86; 4 Gratt. Va. 53; 15 Ga. 321; 9 Cow. N. Y. 747, 765.

9. *Interest.* Payments made on account are first to be applied to the interest which has accrued thereon. And if the payment exceed the amount of interest, the balance goes to extinguish the principal. 1 Dev. No. C. 341; 11 Paige, Ch. N. Y. 619; 1 Strobh. Eq. So. C. 426; 16 Miss. 368; 4 Tex. 455; 10 *id.* 216; 5 Cow. N. Y. 331; 3 Sandf. Ch. N. Y. 608; Wright, Ohio, 169; 5 Ohio, 260; 2 Fla. 445; 8 Watts & S. Penn. 17. Funds must be applied by the creditor to a judgment bearing interest, and not to an unliquidated account. 4 T. B. Monr. Ky. 389.

10. *Priority.* When no other rules of appropriation intervene, the law applies part-payments to debts in the order of time, discharging the oldest first. 3 Woodb. & M. C. C. 150, 390; 1 Bay, So. C. 497; 40 Me. 378; 10 Barb. N. Y. 183; 4 Harr. & J. Md. 351; 7 Gratt. Va. 86; 27 Vt. 478; 9 Watts, Penn. 386; 27 Ala. N. S. 445. So strong is this priority rule that it has been said that equity will apply payments to the earliest items even where the creditor has security for these items and none for later ones. 6 N. Y. 147. But this is opposed to the prevailing rule.

Sureties. The general rule is that neither debtor nor creditor can so apply a payment as to affect the liabilities of sureties, without their consent. 12 N. H. 320; 1 McLean, C. C. 493; 16 Pet. 121; Gilp. Dist. Ct. 106. Where a principal makes general payments, the law presumes them, *prima facie*, to be made upon debts guaranteed by a surety, rather than upon others; though circumstances and intent will control this rule of surety, as they do other rules of appropriation. 2 Maule & S. 18, 39; 2 Stark. 101; 1 Carr. & P. 600; 8 Ad. & E. 855; 10 J. B. Moore, 362; 4 Gill & J. Md. 361; 5 Leigh, Va. 329.

11. *Continuous Accounts.* In these, payments are applied to the earliest items of account, unless a different intent can be inferred. 1 Mer. Ch. 529, 609; 4 Russ. 154; 2 Brod. & B. 70; 3 Moore & S. 174; 5 Bingh. 13; 4 Barnew. & Ad. 766; 2 Barnew. & Ald. 45; 1 Nev. & M. 742; 4 Q. B. 792; 9 Wheat. 720; 3 Sumn. C. C. 98; 23 Me. 24; 28 Vt. 498; 4 Mas. C. C. 336; 5 Metc. Mass. 268; 19 Conn. 191.

Partners. Where a creditor of the old firm

continues his account with the new firm, payments by the latter will be applied to the old debt, *prima facie*, the preceding rule of continuous accounts guiding the appropriations. As above, however, a different intent, clearly proved, will prevail. 3 Nev. & M. 167; 5 Barnew. & Ad. 925; 2 Barnew. & C. 65; 3 Bingh. 71; 2 Barnew. & Ald. 39; 10 J. B. Moore, 362; 3 Younge & C. Exch. 625; 3 Dowl. & R. 252; 3 Moore & S. 174; 6 Watts & S. Penn. 9. When a creditor of the firm is also the creditor of one partner, a payment by the latter of partnership funds must be applied to the partnership debts. Yet circumstances may allow a different application. 1 Mood. & M. 40; 10 Conn. 175; 1 Rice, So. C. 291; 2 A. K. Marsh. Ky. 277; 28 Me. 91; 2 Harr. Del. 172. And so unappropriated payments made by a party indebted severally and also jointly with another to the same creditor, for items of book-charges, are to be applied upon the several debts. 33 Me. 428.

12. The rules of appropriation, it has now been seen, apply equally well whether the debts are of the same or of different orders, and though some are specialties while others are simple contracts. 2 Vt. 606; 4 Cranch, 317; 15 Ga. 221; 22 Penn. St. 492; 2 Hayw. No. C. 385. As to the time during which the application must be made in order to be valid, there is much discrepancy among the authorities. But perhaps a correct rule is that any time will be good as between debtor and creditor, but a *reasonable* time only when third parties are affected. 6 Taunt. 597; 9 Mod. 427; 3 Green. N. J. 314; 20 Me. 457; 1 Bail. So. C. 89; 1 Bail. Eq. So. C. 430; 1 Overt. Tenn. 488; 4 Ired. Eq. No. C. 42; 12 Vt. 249; 10 Conn. 184.

When once made, the appropriation cannot be changed but by common consent; and rendering an account, or bringing suit and declaring in a particular way, is evidence of an appropriation. 1 Wash. Va. 128; 12 Serg. & R. Penn. 305; 2 Rawle, Penn. 316; 2 Wash. C. C. 47; 12 Ill. 159; 28 Me. 91. Consult Burge, Suretyship, 126–128; 2 Parsons, Contr. *Payment;* 1 Hare & W. Sel. Dec. 123–158; 11 East, 36; 1 Alc. & N. 196; 7 Dowl. & R. 201; 2 Dowl. Bail, 511; 8 *id.* 573; 6 Ves. Ch. 94; 1 Tyrwh. & G. 137; 2 Crompt. M. & R. Exch. 723; 2 Sumn. C. C. 99; 2 Stor. C. C. 243; 22 Me. 138, 295; 31 *id.* 497; 3 Ill. 347; 2 J. J. Marsh. Ky. 414; 6 Dan. Ky. 217; 1 M'Mull. So. C. 82, 310; 1 M'Cord, Ch. So. C. 318; 9 Paige, Ch. N. Y. 165.

Of Government. No money can be drawn from the treasury of the United States but in consequence of appropriations made by law. Const. art. 1, s. 9. Under this clause of the constitution it is necessary for congress to appropriate money for the support of the federal government and in payment of claims against it; and this is done annually by acts of appropriation, some of which are for the general purposes of government, and others special and private in their nature. These general appropriation bills, as they are commonly termed, extend to the 30th of June in the following year, and usually originate in the house of representatives, being prepared by the committee of ways and means; but they are distinct from the bills for raising revenue, which the constitution declares shall originate in the house of representatives. A rule of the house gives appropriation bills precedence over all other business, and requires them to be first discussed in committee of the whole. Where money once appropriated remains unexpended for more than two years after the expiration of the fiscal year in which the act shall have been passed, such appropriations are deemed to have ceased and determined, and the moneys so unexpended are immediately thereafter carried to the "surplus fund," and it is not lawful thereafter to pay them out for any purpose without further and specific appropriations by law. Certain appropriations, however, are excepted from the operation of this law, viz.: moneys appropriated for payment of the interest on the funded debt, or the payment of interest and reimbursement according to contract of any loan or loans made on account of the United States; as likewise moneys appropriated for a purpose in respect to which a longer duration is specially assigned by law. Act 31 Aug. 1852, 10 Statutes, 98; 7 Opinions of Attorney-Generals, 1.

APPROVE. To increase the profits upon a thing.

Used of common or waste lands which were enclosed and devoted to husbandry. 3 Kent, Comm. 406; Old Nat. Brev. 79.

While confessing crime oneself, to accuse another of the same crime.

It is so called because the accuser must prove what he asserts. Staundford, Pl. Cr. 142; Crompton, Jus. Peace, 250.

To vouch. To appropriate. To improve. Kelham.

APPROVED ENDORSED NOTES. Notes endorsed by another person than the maker, for additional security.

Public sales are generally made, when a credit is granted, on approved endorsed notes. The meaning of the term is that the purchaser shall give his promissory note for the amount of his purchases, endorsed by another, which, if approved of by the seller, shall be received in payment. If the party approve of the notes, he consents to ratify the sale. 20 Wend. N. Y. 431.

APPROVER. In English Criminal Law. One confessing himself guilty of felony, and accusing others of the same crime to save himself. Crompton, Inst. 250; Coke, 3d Inst. 129.

Such an one was obliged to maintain the truth of his charge, by the old law. Cowel. The approvement must have taken place before plea pleaded. 4 Sharswood, Blackst. Comm. 330.

Certain men sent into the several counties to increase the farms (rents) of hundreds and *wapentakes*, which formerly were let at a certain value to the sheriffs. Cowel.

Sheriffs are called the king's approvers. Termes de la Ley.

Approvers in the Marches were those who had license to sell and purchase beasts there.

APPURTENANCES. Things belonging to another thing as principal, and which pass as incident to the principal thing. 10 Pet. 25; Angell, Wat. C. 43; 1 Serg. & R. Penn. 169; 5 *id.* 110; Croke, Jac. 121; Wood, Inst. 121; 1 P. Will. Ch. 603; Croke, Jac. 526; 2 Coke, 32; Coke, Litt. 5 *b*, 56 *a*, *b*; 1 Plowd. 171; 2 Saund. 401, n. 2; 1 Lev. 131; 1 Sid. 211; 1 Bos. & P. 371; 1 Crompt. & M. Exch. 439; 4 Ad. & E. 761; 2 Nev. & M. 517; 5 Toullier, n. 531.

2. Thus, if a house and land be conveyed, every thing passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto. 1 Sumn. C. C. 492. Under this term are included the curtilage, 2 Sharswood, Blackst. Comm. 17; a right of way, 4 Ad. & E. 749; watercourses and secondary easements, under some circumstances, Angell, Water-Courses, 43; a turbary, 3 Salk. 40; and, generally, any thing necessary to the enjoyment of a thing. 4 Kent, Comm. 468, n.

3. If a house is blown down, a new one erected there shall have the old appurtenances. 4 Coke, 86. The word appurtenances, at least in a deed, will not pass any corporeal real property, but only incorporeal easements, or rights and privileges. Coke, Litt. 121; 8 Barnew. & C. 150; 6 Bingh. 150; 1 Chitty, Pract. 153, 4. See APPENDANT.

4. Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Ballast was held no appurtenance. 1 Leon. 46. Boats and cable are such, 17 Mass. 405; also, a rudder and cordage, 5 Barnew. & Ald. 942; 1 Dods. Adm. 278; fishing-stores, 1 Hagg. Adm. 109; chronometers, 6 Jur. 910. See 15 Me. 421. For a full and able discussion of the subject of appurtenances to a ship, see 1 Parsons, Marit. Law, 71–74.

APPURTENANT. Belonging to; pertaining to.

The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant. 2 Sharswood, Blackst. Comm. 19; 1 Plowd. 170; 1 Sumn. C. C. 21. A right of common may be appurtenant, as when it is annexed to lands in other lordships, or is of beasts not generally commonable. 2 Sharswood, Blackst. Comm. 33. Such can be claimed only by immemorial usage and prescription.

APUD ACTA (Lat.). Among the recorded acts. This was one of the verbal appeals (so called by the French commentators), and was obtained by simply saying, *appello*.

AQUA (Lat.). Water. It is a rule that water belongs to the land which it covers when it is stationary. *Aqua cedit solo* (water follows the soil). 2 Blackstone, Comm. 18; Coke, Litt. 4.

But the owner of running water cannot obstruct the flow to the injury of an inheritance below him. *Aqua currit, et currere debet* (water runs, and ought to run). 3 Kent, Comm. 439; 26 Penn. St. 413.

AQUÆ DUCTUS. In Civil Law. A servitude which consists in the right to carry water by means of pipes or conduits over or through the estate of another. Dig. 8. 3. 1; Inst. 2. 3; Lalaure, *Des Serv.* c. 5, p. 23.

AQUÆ HAUSTUS. In Civil Law. A servitude which consists in the right to draw water from the fountain, pool, or spring of another. Inst. 2. 3. 2; Dig. 8. 3. 1. 1.

AQUÆ IMMITTENDÆ. In Civil Law. A servitude which frequently occurs among neighbors.

It is the right which the owner of a house, built in such a manner as to be surrounded with other buildings, so that it has no outlet for its waters, has to cast water out of his windows on his neighbor's roof, court, or soil. Lalaure, *Des Serv.* 23. It is recognized in the common law as an easement of drip. 15 Barb. N. Y. 96; Gale & Whatley, Easements. See EASEMENTS.

AQUAGIUM (Lat.). A water-course. Cowel.

Canals or ditches through marshes. Spelman. A signal placed in the *aquagium* to indicate the height of water therein. Spelman.

AQUATIC RIGHTS. Rights which individuals have in water.

ARALIA (Lat. *arare*). Land fit for the plough. Denoting the character of land, rather than its condition. Spelman. Kindred in meaning, *arare*, to plough; *arator*, a ploughman; *aratrum terræ*, as much land as could be cultivated by a single *arator; araturia*, land fit for cultivation.

ARBITER. A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man. Cowel.

This distinction between arbiters and arbitrators is not observed in modern law. Russell, Arbitrator, 112. See ARBITRATOR.

One appointed by the prætor to decide by the equity of the case, as distinguished from the *judex*, who followed the law. Calvinus, Lex.

One chosen by the parties to decide the dispute; an arbitrator. Bell, Dict.

ARBITRAMENT AND AWARD. A plea to an action brought for the same cause which had been submitted to arbitration and on which an award had been made. Watson, Arb. 256.

ARBITRARY PUNISHMENT. In Practice. That punishment which is left to the decision of the judge, in distinction from those defined by statute.

ARBITRATION (Lat. *arbitratio*). **In Practice.** The investigation and determina-

tion of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees. Worcester, Dict.; 3 Sharswood, Blackst. Comm. 16.

Compulsory arbitration is that which takes place when the consent of one of the parties is enforced by statutory provisions.

Voluntary arbitration is that which takes place by mutual and free consent of the parties.

It usually takes place in pursuance of an agreement (commonly in writing) between the parties, termed a submission; and the determination of the arbitrators or referee is called an award. See SUBMISSION; AWARD.

At common law it was either *in pais*,—that is, by simple agreement of the parties,—or by the intervention of a court of law or equity. The latter was called arbitration by rule of court. 3 Blackstone, Comm. 16.

Besides arbitration at common law, there exists arbitration, in England as well as the United States, under various statutes, to which reference is made for local peculiarities.

Most of them are founded on the 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. ch. 42, § 49, by which it is allowed to refer a matter in dispute, not then in court, to arbitrators, and agree that the submission be made a rule of court. This agreement, being proved on the oath of one of the witnesses thereto, is enforced as if it had been made at first under a rule of court. 3 Blackstone, Comm. 18; Kyd, Aw. 22. Particular reference may be made to the statutes of Pennsylvania, in which state the legislation on the subject of arbitration has been extensive and peculiar.

2. *Any matter* may be determined by arbitration which the parties may adjust by agreement, or which may be the subject of a suit at law. Crimes, however, and perhaps actions (*qui tam*) on penal statutes by common informers, cannot be made the subject of adjustment and composition by arbitration. See SUBMISSION.

Any person who is capable of making a valid and binding contract with regard to the subject may, in general, be a party to a reference or arbitration. Every one is so far, and only so far, bound by the award as he would be by an agreement of the same kind made directly by him. For example, the submission of a minor is not void, but voidable. See SUBMISSION.

3. At common law it is entirely voluntary, and depends upon the agreement of the parties, to waive the right of trial in court by a jury.

In Pennsylvania, however, there exist compulsory arbitrations. Either party in a civil suit or action, or his attorney, may enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain, to be mentioned therein, not exceeding thirty days, for the trial of all matters in variance in the suit between the parties. A copy of this rule is served on the opposite party.

On the day appointed, they meet at the prothonotary's and endeavour to agree upon arbitrators. If they cannot, the prothonotary makes out a list, on which are inscribed the names of a number of citizens, and the parties alternately strike, each, one of them from the list, beginning with the plaintiff, until only the number agreed upon, or fixed by the prothonotary, are left, who are to be the arbitrators. A time of meeting is then agreed upon, or appointed by the prothonotary if the parties cannot agree; at which time the arbitrators, having been sworn or affirmed justly and equitably to try all matters in variance submitted to them, proceed to hear and decide the case. Their award is filed in the office of the prothonotary, and has the effect of a judgment, subject, however, to appeal, which may be entered at any time within twenty days from the filing of such award. Act of 16th June, 1836; Pamphl. p. 715.

This is somewhat similar to the arbitrations of the Romans. There the prætor selected, from a list of citizens made for the purpose, one or more persons, who were authorized to decide all suits submitted to them and which had been brought before him. The authority which the prætor gave them conferred on them a public character, and their judgments were without appeal. Toullier, *Droit Civ. Fr.* liv. 3, t. 3, c. 4, n. 820.

4. *In England*, also, by the Common Law Procedure Act [1854], it is provided that if it appear, at any time after the issuing of the writ, to the satisfaction of the court, or judge, upon the application of *either* party, that the matter in dispute consists wholly, or in part, of matters of mere account, which cannot be conveniently tried in the ordinary way, it shall then be lawful for such court or judge to decide such matter summarily, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, upon such terms, as to costs, as shall be reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred. 17 & 18 Vict. c. 125, §§ 3, 4.

5. The arbitrator so appointed may refer questions of law to the decision of the court, or send issues of fact to a jury. The decision of the court in such cases, as well as the finding of the jury, are to be binding upon him. See, generally, ARBITRATOR; SUBMISSION; AWARD.

Consult Caldwell; Stephens; Watson, *Arbitration;* Russell, *Arbitrator;* Billings; Kyd; Loring; Reed, *Awards;* Bacon, Abridgment; 3 Bouvier, *Institutes*, n. 2482.

ARBITRATOR. **In Practice.** A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties. Worcester, Dict.

Referee is of frequent modern use as a synonym of arbitrator, but is in its origin of broader signification and less accurate than arbitrator.

2. *Appointment.* Usually, a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation that, if they do

not agree, another person, called an umpire, named, or to be selected by the arbitrators, shall be called in, to whom the matter is to be referred. Caldwell, Arb. 99; 2 Vern. 485; 16 East, 51; 9 Barnew. & C. 624; 3 Barnew. & Ald. 248; 5 Barnew. & Ad. 488; 7 Scott, 841; 9 Ad. & E. 699; 6 Harr. & J. Md. 403; 17 Johns. N. Y. 405; 1 Barb. N. Y. 325; 2 M'Cord, So. C. 279; 4 Rand. Va. 275; 15 Vt. 548; 2 Bibb, Ky. 88; 4 Dall. Penn. 471; 9 Ind. 150. In general, any objection to the appointment of an arbitrator or umpire will be waived by attending him. 2 Eng. L. & Eq. 284; 9 Ad. & E. 679; 8 East, 344; 1 Jac. & W. Ch. 511; 1 Ryl. & M. 17; 3 Ind. 277; 9 Penn. St. 254, 487; 10 B. Monr. Ky. 536.

Any person selected may be an arbitrator, notwithstanding natural incapacity or legal disability, as infancy, coverture, or lunacy. Watson, Arb. 71; Russell, Arb. 107; Viner, Abr. *Arbitration*, A 2; 8 Dowl. 879; 1 Pet. 228; 7 Watts & S. Penn. 142; 26 Miss. 127; *contra*, Comyns, Dig. *Abatement*, B, C; West, Symb. *Compromise*, p. 164, §§ 23, 26; Brooke, Abr.; 10 Ad. & E. 775; 11 Q. B. 7; or disqualification on account of interest, provided it be known to the parties at the time of making the submission. 9 Bingh. 672; 2 Vern. Ch. 251; 1 Dowl. 611; 5 *id.* 247; 4 Mod. 226; 1 Jac. & W. Ch. 511; 1 Caines, N. Y. 147; 1 Bibb, Ky. 148; Hard. Ky. 318; 14 Conn. 26; 26 Miss. 127; 27 Me. 251; 2 E. D. Smith, N. Y. 32. In the civil law the rule was otherwise. Domat, Civ. Law, §§ 1112, 1113; D. 9. 1.

3. *The proceedings.* Arbitrators proceed on the reference as judges, not as agents of the parties appointing them. 1 Ves. Ch. 226; 9 *id.* 69. They should give notice of the time and place of proceeding to the parties interested. 3 Atk. 529; 8 Md. 208; 6 Harr. & J. Md. 403; 3 Gill, Md. 31; 7 *id.* 488; 24 Miss. 346; 23 Wend. N. Y. 628; 6 Cow. N. Y. 103; 12 Metc. Mass. 293; 1 Dall. Pa. 81; 4 *id.* 432; 1 Conn. 498; 17 *id.* 309; 2 N. H. 97; 6 Vt. 666; 3 Rand. Va. 2; Hard. Ky. 46; 32 Me. 455, 513. They should all conduct the investigation together, and should sign the award in each other's presence, 4 Me. 468; but a majority is held sufficient. 1 Wash. C. C. 448; 11 Johns. N. Y. 402; 3 R. I. 192; 30 Penn. St. 384; 2 Dutch. N. J. 175; 9 Ind. 150; 7 *id.* 669; 14 B. Monr. Ky. 292; 21 Ga. 1.

In investigating matters in dispute, they are allowed the greatest latitude. 13 East, 251; 9 Bingh. 679; 1 Bos. & P. 91; 7 Beav. Rolls, 455; 14 Mees. & W. Exch. 264; 5 C. B. 211, 581; 6 Cow. N. Y. 103; 1 Hill, N. Y. 319; 1 Sandf. N. Y. 681; 1 Dall. Penn. 161; 6 Pick. Mass. 148; 10 Vt. 79; 2 Bay, So. C. 370; 1 Bail. So. C. 46. But see 1 Halst. N. J. 386; 1 Wash. Va. 193; 4 Cush. Mass. 111; 7 Hill, N. Y. 463; 2 Johns. Cas. N. Y. 224; 1 Binn. Penn. 458. They are judges both of law and of fact, and are not bound by the rules of practice adopted by the courts. 3 Atk. Ch. 486; 1 Ves. Ch. 369; 1 Price, 81; 11 *id.* 57; 13 *id.* 533; 1 Swanst. 58; 1 Taunt. 52, n.; 6 *id.* 255; 13 East, 358; 9 Bingh. 681; 2 Barnew. & Ald. 692; 3 *id.* 239; 4 Ad. & E. 347; 7 *id.* 601; 1 Dowl. & L. 465; 1 Dowl. & R. 366; 17 How. 344; 2 Gall. C. C. 61; 7 Metc. Mass. 316, 486; 36 Me. 19, 108; 2 Johns. Ch. N. Y. 276, 368; 3 Du. N. Y. 69; 1 E. D. Smith, N. Y. 85, 265; 5 Md. 353; 19 Penn. St. 431; 21 Vt. 99, 250; 25 Conn. 66; 16 Ill. 34, 99; 12 Gratt. Va. 554; 7 Ind. 49; 2 Cal. 64, 122; 23 Miss. 272. Thus, the witnesses were not sworn in Hill & D. N. Y. 110; 28 Vt. 776. They may decide *ex æquo et bono*, and need not follow the law: the award will be set aside only when it appears that they meant to be governed by the law but have mistaken it. 9 Ves. 364; 14 *id.* 271: 3 East, 18; 13 *id.* 351; 4 Tyrwh. 997; 2 C. B. 705; 3 *id.* 705; 2 Gall. C. C. 61; 1 Dall. Penn. 487; 6 Pick. Mass. 148; 6 Metc. Mass. 131; 7 *id.* 486; 6 Vt. 529; 21 *id.* 250; 4 N. H. 357; 1 Hall, N. Y. 598. See 19 Mo. 373.

4. Under submissions *in pais*, the attendance of witnesses and the production of papers was entirely voluntary at common law. 1 Dowl. & L. 676; 2 Sim. & S. 418; 2 Carr. & P. 550. It was otherwise when made under a rule of court. Various statutes in England and the United States now provide for compelling attendance. 3 & 4 Will. IV. c. 42, § 40. And see the statutes of the various states.

Duties and Powers of. Arbitrators cannot delegate their authority: it is a personal trust. 2 Atk. Ch. 401; Croke, Eliz. 726; 9 Dowl. Parl. Cas. 1044; 6 C. B. 258; 4 Dall. Penn. 71; 7 Serg. & R. Penn. 228; 1 Wash. C. C. 448. The power ceases with the publication of the award, 9 Mo. 30; and death after publication and before delivery does not vitiate it. 21 Ga. 1. They cannot be compelled to make an award; in which respect the common law differs from the Roman, Story, Eq. Jur. § 1457; Kyd, Aw. 2d ed. 100; or to disclose the grounds of their judgment. 3 Atk. 644; 7 Serg. & R. Penn. 448; 5 Md. 253; 19 Mo. 373.

An arbitrator may retain the award till paid for his services, but cannot maintain assumpsit in England without an express promise. 8 East, 12; 4 Esp. 47; 2 Mann. & G. 847, 870; 3 Q. B. 466, 928. But see 1 Gow. 7; 1 Bos. & P. 93. In the United States he may, however. 1 Den. N. Y. 188; 29 N. H. 48.

The powers and duties of arbitrators are now regulated very fully by statute, both in England and the United States. See SUBMISSION, and also ARBITRATION, where a list of authorities on the subject is given.

ARBITRIUM (Lat.). Decision; award; judgment.

For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound men. 1 Sharswood, Blackst. Comm. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at

liberty to adapt the general principles of justice to the peculiar circumstances of the case.

ARBOR (Lat.). A tree; a plant; something larger than an herb; a general term including vines, osiers, and even reeds. The mast of a ship. Brissonius. Timber. Ainsworth; Calvinus, Lex.

Arbor Civilis. A genealogical tree. Coke, Inst.

A common form of showing genealogies is by means of a tree representing the different *branches* of the family. Many of the terms in the law of descent are figurative, and derived hence. Such a tree is called, also, *arbor consanguinitatis.*

ARCARIUS (Lat. *arca*). A treasurer; one who keeps the public money. Spelman, Gloss.

ARCHAIONOMIA. The name of a collection of Saxon laws published during the reign of the English Queen Elizabeth, in the Saxon language, with a Latin version, by Mr. Lambard. Dr. Wilkins enlarged this collection in his work entitled Leges Anglo-Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; those of William the Conqueror, in Norman and Latin; and of Henry I., Stephen, and Henry II., in Latin.

ARCHBISHOP. In Ecclesiastical Law. The chief of the clergy of a whole province.

He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority. 1 Blackstone, Comm. 380; 1 Ld. Raym. 541.

ARCHDEACON. In Ecclesiastical Law. A ministerial officer subordinate to the bishop.

In the primitive church, the archdeacons were employed by the bishop in the more servile duties of collecting and distributing alms and offerings. Afterwards they became, in effect, "eyes to the overseers of the Church." Cowel.

His jurisdiction is ecclesiastical, and immediately subordinate to that of the bishop, throughout the whole or a part of the diocese. He is a ministerial officer. 1 Sharswood, Blackst. Comm. 383.

ARCHDEACON'S COURT. In English Law. The lowest court of ecclesiastical jurisdiction in England.

It is held before a person appointed by the archdeacon, called his official. Its jurisdiction is limited to ecclesiastical causes arising within the archdeaconry. It had until recently, also, jurisdiction of matters of probate and granting administrations. In ordinary cases, its jurisdiction is concurrent with that of the Bishop's Court; but in some instances cases must be commenced in this court. In all cases, an appeal lies to the Bishop's Court. 24 Hen. VIII. c. 12; 3 Blackstone, Comm. 64.

ARCHES' COURT. See COURT OF ARCHES.

ARCHIVES (*archivum, arcibum*). The Rolls; any place where ancient records, charters, and evidences are kept. In libraries, the private depositary. Cowel; Spelman, Gloss.

The records need not be ancient to constitute the place of keeping them the Archives.

ARCHIVIST. One to whose care the archives have been confided.

ARCTA ET SALVA CUSTODIA (Lat.). In safe and close custody or keeping.

When a defendant is arrested on a *capias ad satisfaciendum* (*ca. sa.*), he is to be kept *arcta et salva custodia.* 3 Sharswood, Blackst. Comm. 415.

ARE. A French measure of surface. This is a square the sides of which are of the length of ten mètres. The *are* is equal to 1076.441 square feet.

AREA. An enclosed yard or opening in a house; an open place adjoining to a house. 1 Chitty, Pract. 176.

ARENALES. In Spanish Law. Sandy beaches.

ARENTARE (Lat.). To rent; to let out at a certain rent. Cowel.

Arentatio. A renting.

ARGENTARII (Lat. *argentum*). Moneylenders.

Called, also, *nummularii* (from *nummus*, coin) *mensarii* (lenders by the month). They were so called whether living in Rome or in the country towns, and had their shops or tables in the forum. *Argentarius* is the singular. *Argentarium* denotes the instrument of the loan, approaching in sense to our *note* or *bond.*

Argentarius miles was the servant or porter who carried the money from the lower to the upper treasury to be tested. Spelman, Gloss.

ARGENTUM ALBUM (Lat.). Unstamped silver; bullion. Spelman, Gloss.; Cowel.

ARGENTUM DEI (Lat.). God's money; God's penny; money given as earnest in making a bargain. Cowel.

ARGUMENT AB INCONVENIENTI. An argument arising from the inconvenience which the construction of the law would create.

It is to have effect only in a case where the law is doubtful: where the law is certain, such an argument is of no force. Bacon, Abr. *Baron and Feme, H.*

ARGUMENTATIVE. By way of reasoning.

A plea must be (among other things) direct and positive, and not argumentative. 3 Sharswood, Blackst. Comm. 308.

ARIBANNUM. A fine for not setting out to join the army in obedience to the summons of the king.

ARIMANNI (Lat.). The possessors of lands holden or derived from their lords. Clients joined to some lord for protection. By some, said to be soldiers holding lands from a lord; but the term is also applied to women and slaves. Spelman, Gloss.

ARISTOCRACY. A government in which a class of men rules supreme.

Aristotle classified governments according to the person or persons in whom the supreme power is vested: in monarchies or kingdoms, in which one

rules supreme; in aristocracies, in which a class of men rules supreme; and in democracies, in which the people at large, the multitude, rules. The term aristocracy is derived from the Greek word ἄριστος, which came, indeed, to settle down as the superlative of ἀγαθός, good, but originally meant the strongest, the most powerful; and in the compound term aristocracy it meant those who wielded the greatest power and had the greatest influence,—the privileged ones. The aristocracies in ancient Greece were, in many cases, governments arrogated by violence. If the number of ruling aristocrats was very small, the government was called an oligarchy. Aristotle says that in democracies the "demagogues lead the people to place themselves above the laws, and divide the people, by constantly speaking against the rich; and in oligarchies the rulers always speak in the interest of the rich. At present," he says, "the rulers, in some oligarchies, take an oath, 'And I will be hostile to the people, and advise, as much as is in my power, what may be injurious to them.'" (Politics, v. ch. 9.) There are circumstances which may make an aristocracy unavoidable; but it has always this inherent deficiency, that the body of aristocrats, being set apart from the people indeed, yet not sufficiently so, as the monarch is (who, besides, being but one, must needs rely on the classes beneath him), shows itself severe and harsh so soon as the people become a substantial portion of the community. The struggle between the aristocratic and the democratic element is a prominent feature of the middle ages; and at a later period it is equally remarkable that the crown, in almost every country of the European continent, waged war, generally with the assistance of the commonalty, with the privileged class, or aristocracy. The real aristocracy is that type of government which has nearly entirely vanished from our cis-Caucasian race; although the aristocratic element is found, like the democratic element, in various degrees, in most of the existing governments. The term aristocracy is at present frequently used for the body of privileged persons in the government of any institution,—for instance, in the church. In the first French Revolution, Aristocrat came to mean any person not belonging to the levellers, and whom the latter desired to pull down. The modern French communists use the slang term Aristo for aristocrat. The most complete and consistently developed aristocracy in history was the Republic of Venice,—a government considered by many early publicists as a model: it illustrated, however, in an eminent degree, the fear and consequent severity inherent in aristocracies. See GOVERNMENT; ABSOLUTISM; MONARCHY.

ARISTODEMOCRACY. A form of government where the power is divided between the great men of the nation and the people.

ARIZONA. One of the territories of the United States.

The organic act is the act of congress Feb. 24, 1863, 12 U. S. Stat. at Large, 664. By this act, the territory embraces "all that part of the territory of New Mexico situated west of a line running due south from the point where the southwest corner of the territory of Colorado joins the northern boundary of the territory of New Mexico to the southern boundary of the territory of New Mexico." The frame of government is the same as that of New Mexico, except that slavery is expressly prohibited; and the laws of New Mexico are extended to this territory, except those recognizing the relation of master and slave. See NEW MEXICO.

ARKANSAS One of the United States of America; admitted into the Union by act of congress of June 15, 1836.

It was formed of part of the Louisiana Territory purchased by the United States of France, by treaty of April 30, 1803. By act of congress of March 2, 1819, a separate territorial government was established for Arkansas. 3 Stat. at Large, 493.

On the 30th of January, 1836, the state constitution was adopted by a convention, and was not submitted to a vote of the people for ratification.

It contains a preamble setting forth the name and style of the state as The State of Arkansas; a bill of rights enumerating and securing many rights to the people, in whom all power is declared to inhere.

2. Free white male citizens of the United States of the age of twenty-one and upwards, who have been citizens of the state six months, are entitled to vote; but soldiers, seamen, and marines in the army or navy of the United States are excluded from the right. All voting is to be by ballot; and elections are held every two years on the first Monday in August. Gould, Dig. c. 62. The electors are privileged from arrest, except for treason, felony, or breach of the peace, while attending, going to, and returning from elections. Public defaulters are ineligible to any office.

The Legislative Power.

3. *The Senate* is to consist of not less than fifteen nor more than thirty-three members, chosen every four years by the qualified electors of the several districts from among the free white male citizens of the United States, thirty years of age, who have been inhabitants of the state one year and are actual residents of the districts for which they are chosen.

The senators, on their first meeting, were divided by lot into two classes, in order that one class might be elected every two years.

The state is to be divided, from time to time, into senatorial districts, based upon the free white male inhabitants, so that each senator may, as nearly as practicable, represent an equal number.

Provision is to be made by law for taking an enumeration of the inhabitants every four years, commencing on the 1st of January, 1838; and the senatorial districts are to be arranged by the general assembly at its first meeting after each enumeration.

The ratio of representation in the senate is to be fifteen hundred white male inhabitants to each senator, until the senators amount to twenty-five, when the ratio is to be increased, without increasing the senators, until the population of the state amounts to five hundred thousand, when the senators may be increased, and divided again into classes, by lot, as above provided.

4. *The House of Representatives* is to consist of not less than fifty-four nor more than one hundred representatives, chosen every second year, by the qualified electors of the several counties, from among the free white male citizens of the United States, above the age of twenty-five years, who have resided in the state one year at least and are actual residents of the counties for which they are chosen, apportioned among the several counties according to the number of white male inhabitants therein, taking five hundred as the ratio, until the number of representatives amounts to twenty-five; when they shall not be further increased until the population of the state amounts to five hundred thousand. *Provided*, that each county organized when the constitution was adopted shall be entitled to one representative, though its population may not give the existing ratio. A new apportionment of representatives is to be made at the first session of the general assembly after each enumeration of the population.

5. The general assembly meets biennially.

Vacancies in either house are filled by writs of election, issued by the governor. No person holding any lucrative office under the United States, or state, except militia officers, justices of the peace, postmasters, and judges of the county court, is eligible to a seat in either house.

Sections fifteen, sixteen, and seventeen contain the usual provisions for regulation of the conduct of the members, by the two houses, publication of proceedings, and open sessions.

Bills may originate in either house and be amended or rejected in the other; and every bill must be read on three different days, in each house, unless two-thirds of the house dispense with the rule. Every bill, having passed both houses, must be signed by the president of the senate and speaker of the house of representatives.

Elections by the joint or concurrent vote of both houses, or the separate vote of either house, must be *viva voce*, and the vote entered on the journal.

6. Senators and representatives are privileged from arrest, except in cases of treason, felony, or breach of the peace, during the session of the general assembly, and for fifteen days before the commencement and after the termination thereof; and for any speech or debate in either house they are not to be questioned in any other place. They are to receive compensation from the public treasury for their services, which may be increased or diminished; but no alteration thereof shall take effect during the session at which it is made.

The general assembly must direct, by law, in what courts and in what manner suits may be brought against the state. They can pass no bill of divorce, but may direct the manner in which divorces may be obtained in the courts.

7. They may prohibit the introduction into the state of slaves guilty of high crimes in other states or territories,—also, the introduction of slaves for speculation, or as trade or merchandise,—but shall have no power to prevent emigrants to the state from bringing with them such persons as are deemed slaves by the laws of any one of the United States. They have power to oblige the owners of slaves to treat them with humanity; and in the prosecution of slaves for crime, they are not to be deprived of an impartial jury, and, when convicted of a capital offence, must suffer the same degree of punishment as would be inflicted on a free white person, and no other; and the courts before whom slaves are tried shall assign them counsel for their defence. The general assembly has no power to pass laws for the emancipation of slaves without the consent of the owners, but may pass laws to permit the owners to emancipate them, saving the rights of creditors and preventing them from becoming a public charge.

8. The principal executive officers, the judges of all of the courts, and prosecuting attorneys, are subject to impeachment for misdemeanor in office.

Impeachments are to be preferred by the house and tried by the senate. When the governor is tried, the chief justice of the supreme court is to preside.

The appointment of officers not otherwise directed by the constitution is to be made in such manner as may be prescribed by law; and all officers must take an oath or affirmation to support the constitution of the United States, and of the state, and to demean themselves faithfully in office.

The territory of existing counties is not to be reduced by the establishment of new ones to less than nine hundred square miles, nor the population to less than the ratio of representation in the house; and no new county is to be formed with less than that quantity of territory or number of population.

9. It is provided that the style of the laws shall be, "Be it enacted by the General Assembly of the State of Arkansas."

Amendments to the constitution may be proposed by a vote of two-thirds of each house, at one session, published in all the newspapers of the state three times, twelve months before the next general election, and ratified at the next session by a like vote of each house. The amendments, when prepared and when ratified, must be read in each house on three several days, and the vote taken by yeas and nays. But the bill of rights cannot be thus amended.

The Executive Power.

10. *The Governor* is elected, at the time and places of voting for representatives, for four years from installation, and holds his office until his successor is qualified, but is not eligible for more than eight years in any term of twelve. He must be thirty years of age, a native-born citizen of the state or of the United States, or a resident of Arkansas ten years previous to the adoption of the constitution, if not a native of the United States, and must have been a resident of the same at least four years next before his election. The person receiving the highest number of votes is to be governor; and if two or more receive the same number, the general assembly is to elect one by joint vote.

11. He is commander-in-chief of the army and militia of the state, except when called into the service of the United States; may require information in writing from officers of the executive department, relative to their official duties; may convene the general assembly, by proclamation, on extraordinary occasions, at the seat of government, or at a different place, if that shall have become dangerous, since the last adjournment, from an enemy or contagious disease; in case of disagreement between the two houses with respect to the time of adjournment, may adjourn them to such time as he may think proper, not beyond the day of the next meeting of the general assembly; shall give them information of the state of the government, and recommend to their consideration such measures as he may deem expedient. He shall take care that the laws are faithfully executed; in criminal and penal cases, except treason, where the consent of the senate is required, and impeachment, has power to grant pardons and remit fines, under such regulations as may be prescribed by law. He is the keeper of the seal of the state. All commissions must be signed by him, sealed with the seal of the state, and attested by the secretary of state. He has the veto power.

12. When the governor is impeached or absent from the state, or the office is vacant, provision is made for the president of the senate or speaker of the house to act as governor. If the vacancy occur more than eighteen months before the expiration of his term, it is filled by writ of election to be issued by the acting governor. He is required to reside at the seat of government, and can hold no other office, civil or military, while governor. Const. art. 5, sect. 1–23.

The Auditor and *Treasurer* are elected by the general assembly for the term of two years, must keep their offices at the seat of government, and perform such duties as shall be prescribed by law.

The Judicial Power.

13. *The Supreme Court* is composed of three judges, one of whom is styled chief justice; and two of them constitute a quorum; and the concurrence of two is necessary to a decision, except in cases otherwise directed by the constitution. The supreme court has appellate jurisdiction only, which is coextensive with the state, under such restrictions and regulations as may be prescribed by law. It has a general superintending control over all inferior courts of law and equity, and has power to issue writs of error and *supersedeas*, *certiorari* and *habeas corpus*, *mandamus* and *quo warranto*, and other remedial writs, and to hear and determine the same. The judges are conservators of the peace

throughout the state, and severally have power to issue any of the above-mentioned writs.

The judges of the supreme court are elected by joint vote of both houses of the general assembly, and hold their offices for the term of eight years from the date of their commission, and until their successors are elected and qualified, Amend. Nov. 17, 1846; and must be at least thirty years of age. Their terms were so arranged, by classification of the judges first elected, as to cause one of them to be chosen every fourth, sixth, and eighth year. This court appoints its own clerk, or clerks, for the term of four years.

14. *The Circuit Court* is composed of judges elected one from each of the districts into which the state is divided. A judge must be twenty-five years old, at least, and must be and continue a resident of the district during his term.

Judges of the circuit courts may temporarily exchange circuits or hold courts for each other, under such regulations as may be pointed out by law.

The general assembly has power to compel them to interchange circuits, either temporarily or permanently, under such regulations as may be provided by law. Amend. 1846.

This court has original jurisdiction over all criminal cases not otherwise provided for by law, and exclusive original jurisdiction of all crimes amounting to felony at the common law, and original jurisdiction of all civil cases which are not cognizable before justices of the peace, until otherwise directed by the general assembly, and original jurisdiction in all matters of contract where the sum in controversy, exclusive of interest (1 Ark. 275), is over one hundred dollars. It holds its terms at such place and times in each county as directed by law.

15. It exercises a superintending control over the county courts and justices of the peace in each county in their respective circuits, and has power to issue all the necessary writs to carry into effect their general and specific powers.

Until the general assembly deem it expedient to establish courts of chancery, the circuit courts have jurisdiction in matters of equity, subject to appeal to the supreme court in such manner as may be prescribed by law.

A county court, to be holden by the justices of the peace, is established in each county, which has jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties.

16. *A presiding judge* of this court is elected by the qualified voters of each county for the term of two years, who, in addition to the duties that may be required of him by law as such presiding judge, shall be a judge of the court of probate, and have such jurisdiction in matters relative to the estates of deceased persons, executors, administrators, and guardians, as may be prescribed by law, until otherwise directed by the general assembly.

A prosecuting attorney for the state is elected by the qualified voters of each judicial circuit, who continues in office for two years, who must reside within the circuit for which he was elected; and, on his failure to attend and prosecute according to law, the court may appoint an attorney *pro tem.* The attorney for the circuit in which the supreme court holds its terms acts as attorney-general. Const. art. 6, sect. 13. Amend. 1848.

17. *Justices of the peace* are elected for the term of two years, by the qualified voters residing in each township, for the respective townships. For every fifty voters there may be elected one justice of the peace; provided that each township, however small, shall have two justices of the peace. They are to be commissioned by the governor, and reside in the townships for which they were elected. They have individually, or two or more of them jointly exclusive original jurisdiction in all matters of contract, except in actions of covenant, where the sum in controversy is an hundred dollars or less, exclusive of interest. They have in no case jurisdiction to try and determine any criminal case or penal offence against the state, but may sit as examining courts, and commit, discharge, or recognize to the court having jurisdiction, for further trial, offenders against the peace. For the foregoing purposes they have power to issue all the necessary process. They shall also have power to bind to keep the peace, or for good behavior.

18. No person who denies the being of God can hold any office in the civil department of the state, nor be allowed his oath.

The person of the debtor, except where there is strong presumption to fraud, is neither to be imprisoned nor continued in prison after delivering up his estate for the benefit of his creditors in such manner as may be prescribed by law.

No bank or banking institution shall be hereafter incorporated or established in this state. Amend. 1846.

ARLES. Earnest.

Used in Yorkshire in the phrase *Arles-penny*. Cowel. In Scotland it has the same signification. Bell, Dict.

ARM OF THE SEA. A portion of the sea projecting inland, in which the tide ebbs and flows.

It includes bays, roads, creeks, coves, ports, and rivers where the water flows and reflows. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the ingress and pressure of the tide. Angell, Tide Wat. 2d ed. 73; 7 Pet. 324; 2 Dougl. 441; 6 Clark & F. Hou. L. 628; Olc. Adm. 18. See CREEK; HAVEN; NAVIGABLE; PORT; RELICTION; RIVER; ROAD.

ARMA MOLUTA (Lat.). Sharp weapons; weapons which cut, as distinguished from those which bruise. Cowel; Blount.

ARMIGER (Lat.). An armor-bearer; an esquire. A title of dignity belonging to gentlemen authorized to bear arms. Kennett, Paroch. Antiq.; Cowel.

In its earlier meaning, a servant who carried the arms of a knight. Spelman, Gloss.

A tenant by scutage; a servant or valet; applied, also, to the higher servants in convents. Spelman, Gloss.; Whishaw.

ARMISTICE. A cessation of hostilities between belligerent nations for a considerable time.

It is either partial and local, or general. It differs from a mere suspension of arms, which takes place to enable the two armies to bury their dead, their chiefs to hold conferences or pourparlers, and the like. Vattel, *Droit des Gens*, l. 3, c. 16, § 233. The terms truce and armistice are sometimes used in the same sense. See TRUCE.

ARMS. Any thing that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Coke, Litt. 161 *b*, 162 *a*; Crompton, Just. P. 65; Cunningham, Dict.

The constitution of the United States, Amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." In Kentucky, a statute "to prevent persons from wearing concealed arms" has been declared to be unconstitutional, 2 Litt. Ky. 90; while in Indiana a similar statute has been holden valid and constitutional. 3 Blackf. Ind. 229. See Story, Const. §§ 1889, 1890; American Citizen, 176; 1 Tucker, Blackst. Comm., App. 300; Rawle, Const. 125.

Signs of arms, or drawings, painted on shields, banners, and the like.

The arms of the United States are described in the resolution of congress of June 20, 1782.

ARPENNUS. A measure of land of, uncertain amount. It was called arpent also. Spelman, Gloss.; Cowel.

In French Law A measure of different amount in each of the sixty-four provinces. Guyot, Répert., *Arpenteur.*

The measure was adopted in Louisiana. 6 Pet. 763.

ARPENT. A quantity of land containing a French acre. 4 Hall, Law Journal, 518.

ARPENTATOR. A measurer or surveyor of land.

ARRA. In Civil Law. Earnest; evidence of a completed bargain.

Used of a contract of marriage, as well as any other. Spelled, also, *Arrha, Arræ.* Calvinus, Lex.

ARRAIGN. To call a prisoner to the bar of the court to answer the matter charged in the indictment. 2 Hale, Pl. Cr. 216. To set in order. An assize may be arraigned. Littleton, § 242; 3 Mod. 273; *Termes de la Ley;* Cowel.

ARRAIGNMENT. In Criminal Practice. Calling the defendant to the bar of the court, to answer the accusation contained in the indictment.

The *first* step in the proceeding consists in calling the defendant to the bar by his name, and commanding him to hold up his hand.

This is done for the purpose of completely identifying the prisoner as the person named in the indictment. The holding up his hand is not, however, indispensable; for if the prisoner should refuse to do so, he may be identified by any admission that he is the person intended. 1 W. Blackst. 33. See Archbold, Crim. Plead. 1859 ed., 128.

The *second* step is the reading the indictment to the accused person.

This is done to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, &c., for that you, on, &c.," and then go through the whole of the indictment.

The *third* step is to ask the prisoner, "How say you [A B], are you guilty, or not guilty?"

Upon this, if the prisoner confesses the charge, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, the confession is recorded, and nothing further is done till judgment. If, on the contrary, he answers, "Not guilty," that plea is entered for him, and the clerk or attorney-general replies that he is guilty; when an issue is formed. 1 Mass. 95.

If the defendant, when called upon, makes no answer, and it is a matter of doubt whether or not he is mute of malice, the court may direct a jury to be forthwith impanelled and sworn, to try whether the prisoner is mute of malice or *ex visitatione Dei;* and such jury may consist of any twelve men who may happen to be present. If a person is found to be mute *ex visitatione Dei,* the court in its discretion will use such means as may be sufficient to enable the defendant to understand the charge and make his answer; and if this is found impracticable, a plea of not guilty will be entered, and the trial proceed. But if the jury return a verdict that he is mute fraudulently and wilfully, the court will pass sentence as upon a conviction. 1 Mass. 103; 13 *id.* 299; 9 *id.* 402; 10 Metc. Mass. 222; Archbold, Crim. Plead, 14th Lond. ed. 129; Carrington, Crim. Law, 57; 3 Carr. & K. 121; Roscoe, Crim. Ev. 4th Lond. ed. 215. See the case of a deaf person who could not be induced to plead, 1 Leach, Cr. Cas. 4th ed. 451; of a person deaf and dumb, 1 Leach, Cr. Cas. 4th ed. 102; 14 Mass. 207; 7 Carr. & P. 303; 6 Cox, Cr. Cas. 386; 3 Carr. & K. 328.

ARRAMEUR. An ancient officer of a port, whose business was to load and unload vessels.

There were formerly, in several ports of Guyenne, certain officers, called *arrameurs,* or stowers, who were master-carpenters by profession, and were paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely, all goods in casks, bales, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and manage every thing to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers, but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers,* who were very ancient officers, as may be seen in the Theodosian code, *Unica de Scaccariis Portus Romæ,* lib. 14. Their business was to load and unload vessels loaded with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise. 1 Pet. Adm. App. xxv.

ARRAS. In Spanish Law. The donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote,* or portion, which he receives from her. Aso & Man. Inst. b. 1, t. 7, c. 3.

The property contributed by the husband *ad sustinenda onera matrimonii* (for bearing the expenses).

The husband is under no obligation to give arras; but it is a donation purely voluntary. He is not permitted to give in *arras* more than a tenth of his property. The *arras* is the exclusive property of the wife, subject to the husband's usufruct during his life. Burge, Confl. Laws, 417.

ARRAY. In Practice. The whole body of jurors summoned to attend a court, as they are *arrayed* or arranged on the panel. See CHALLENGES; Dane, Abr. Index; 1 Chitty, Cr. Law, 536; Comyns, Dig. *Challenge,* B.

ARREARAGES. Arrears.

ARREARS (Fr.). The remainder of an account or sum of money in the hands of an

accountant. Any money due and unpaid at a given time. Cowel; Spelman, Gloss.

ARRECT. To accuse. *Arrectati*, those accused or suspected.

ARREST (Fr. *arrêter*, to stay, to stop, to detain). To deprive a person of his liberty by legal authority. The seizing a person and detaining him in the custody of the law.

As ordinarily used, the terms arrest and attachment coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to attachment, including the act of taking, it would seem to differ from arrest in that it is more peculiarly applicable to a taking of property, while *arrest* is more commonly used in speaking of persons.

The terms are, however, often interchanged when speaking of the taking a man by virtue of legal authority. Arrest is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law.

In Civil Practice. The apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action.

2. One of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment. La. Civ. Code, art. 211. Acts which amount to a taking into custody are necessary to constitute an arrest; but there need be no actual force or manual touching the body: it is enough if the party be within the power of the officer and submit to the arrest, Cas. *temp.* Hardw. 301; 5 Bos. & P. 211; Buller, Nisi P. 62; 2 N. H. 318; 8 Dan. Ky. 190; 3 Harr. Del. 416; 1 Harp. So. C. 453; 8 Me. 127; 1 Wend. N. Y. 215; 2 Blackf. Ind. 294; but mere words without submission are not sufficient. 2 Hale, Pl. Cr. 129; 13 Ark. 79; 13 Ired. No. C. 448.

Who to be made by. It must be made by an officer having proper authority. This is, in the United States, the sheriff, or one of his deputies, general or special, see United States Digest, *Sheriff*, and the statutes of the various states; or by a mere assistant of the officer, if he be so near as to be considered as acting, though he do not actually make the arrest. Cowp. 65.

The process of the United States courts is executed by a marshal. As to the power of a sergeant-at-arms of a legislative body to arrest for contempt or other causes, see 1 Kent, Comm. 10th ed. 253, and notes; Bost. Law Rep. May, 1860.

3. *Who is liable to.* All persons found within the jurisdiction are liable to arrest, with the exception of certain specified classes, including *administrators* in suits on the intestate's promises, Metc. Yelv. 63; see 1 Term, 16; *ambassadors* and their servants, 1 Barnew. & C. 554; 3 Dowl. & R. 25, 833; 4 Sandf. N. Y. 619; *attorneys at law; barristers* attending court or on circuit, 1 H. Blackst. 636; see 19 Ga. 608; *bail* attending court as such, 1 H. Blackst. 636; 1 Maule & S. 638; *bankrupts* until the time for surrender is passed, and under some other circumstances, 8 Term, 475, 534; *bishops*,—not so in the United States, however; *consuls-general*, 9 East, 447, though doubtful, and the privilege does not extend to consuls, 1 Taunt. 106; 3 Maule & S. 284; *clergymen*, while performing divine service, Bacon, Abr. *Trespass; electors* attending a public election; *executors* sued on the testator's liability; *heirs* sued as such; *hundredors* sued as such; *insolvent debtors* lawfully discharged, 3 Maule & S. 595; 19 Pick. Mass. 260; and see 4 Taunt. 631; 5 Watts, Penn. 141; 7 Metc. Mass. 257; not when sued on subsequent liabilities or promises, 6 Taunt. 563; see 4 Harr. Del. 240; *Irish peers*, stat. 39 & 40 Geo. III. c. 67, § 4; *judges* on process from their own court, 8 Johns. N. Y. 381; 1 Halst. N. J. 419; *marshal* of the King's Bench; *married women*, on suits arising from contracts, 1 Term, 486; 6 *id.* 451; 7 Taunt. 55; but the privilege may be forfeited by her conduct, 1 Bos. & P. 8; 5 *id.* 380; *members* of congress and the state legislatures while attending the respective assemblies to which they belong, 4 Dall. Penn. 341; 4 Day, Conn. 133; 2 Bay, So. C. 406; 3 Gratt. Va. 237; *militia*-men while engaged in the performance of military duty; *officers* of the army and militia, to some extent, 4 Taunt. 557; but see 8 Term, 105; 1 Dall. Penn. 295; *parties* to a suit attending court, 11 East, 439; Coxe, N. J. 142; 4 Call. Va. 97; 2 Va. Cas. 381; 4 Dall. Penn. 387; 6 Mass. 245, 264; 12 Ill. 61; 5 Rich. So. C. 523; 1 Wash. C. C. 186; 1 Pet. C. C. 41; see 1 Brev. No. C. 167; including a court of insolvency, 2 Marsh. 57; 6 Taunt. 336; 7 Ves. 312; 1 Ves. & B. 316; 2 Rose, 24; 5 Gray, Mass. 538; a reference, 1 Caines, N. Y. 115; 1 Rich. So. C. 194; *soldiers*, 8 Dan. Ky. 190; 3 Ga. 397; *sovereigns*, including, undoubtedly, governors of the states; *the Warden of the Fleet; witnesses* attending a judicial tribunal, 1 Chitt. 679; 3 Barnew. & Ald. 252; 3 East, 189; 7 Johns. N. Y. 538; 4 Edw. Ch. N. Y. 557; 3 Harr. Del. 517; by legal compulsion, 6 Mass. 264; 9 Serg. & R. Penn. 147; 6 Cal. 32; 3 Cow. N. Y. 381; 2 Penn. N. J. 516; see 4 T. B. Monr. Ky. 540; *women*, Wright, Ohio, 455; and perhaps other classes, under local statutes. Reference must be had in many of the above cases to statutes for modifications of the privilege. In all cases where the privilege attaches in consideration of an attendance at a specified place in a certain character, it includes the stay and a reasonable time for going and returning, 2 W. Blackst. 1113; 4 Dall. Penn. 329; 2 Johns. Cas. N. Y. 222; 6 Blackf. Ind. 278; 3 Harr. Del. 517; but not including delays in the way, 3 Barnew. & Ald. 252; 4 Dall. Penn. 329; or deviations. 19 Pick. Mass. 260. And see, beyond, **8.**

4. *Where and when* it may be made. An arrest may be made in any place, except in the actual or constructive presence of court, and the defendant's own house, 4 Black-

stone, Comm. 288; 6 Taunt. 246; Cowp. 1; and even there the officer may break inner doors to find the defendant. 5 Johns. N. Y. 352; 17 *id.* 127; 8 Taunt. 250; Cowp. 2. See 10 Wend. N. Y. 300. It cannot be made on Sunday or any public holiday. Stat. 29 Car. II. c. 7; *contra*, 6 Blackf. Ind. 447. It must generally be made in the daytime.

Discharge from arrest on mesne process may be obtained by giving sufficient bail, which the officer is bound to take, 4 Taunt. 669; 1 Bingh. 103; 3 Maule & S. 283; 6 Term, 355; 15 East, 320; but when the arrest is on final process, giving bail does not authorize a discharge.

If the defendant otherwise withdraw himself from arrest, or if the officer discharge him without authority, it is an *escape;* and the sheriff is liable to the plaintiff. See ESCAPE. If the party is withdrawn forcibly from the custody of the officer by third persons, it is a *rescue.* See RESCUE.

And other extended facilities are offered to poor debtors to obtain a discharge under the statutes of most if not all of the states of the United States. In consequence, except in cases of apprehended fraud, as in the concealment of property or an intention to abscond, arrests are infrequently made. See, as to excepted cases, 19 Conn. 540; 28 Me. 45.

5. *Generally.* An unauthorized arrest, as under process materially irregular or informal, 26 N. H. 268; 6 Barb. N. Y. 654; 1 Hayw. No. C. 471; 5 Ired. No. C. 72; 11 *id.* 242; 3 Harr. & M'H. Md. 113; 3 Yerg. Tenn. 392; 36 Me. 366; 2 R. I. 436; 1 Conn. 40; 13 Mass. 286; see 20 Vt. 321; or process issuing from a court which has no general jurisdiction of the subject-matter, 10 Coke, 68; Strange, 711; 2 Wils. 275, 384; 10 Barnew. & C. 28; 8 Q. B. 1020; 7 Carr. & P. 542; 4 Mass. 497; 1 Gray, Mass. 1; 2 Cush. Mass. 577; 4 Conn. 107; 7 *id.* 452; 11 *id.* 95; 1 Ill. 18; 7 Ala. 518; 2 Fla. 171; 3 Dev. No. C. 471; 4 B. Monr. Ky. 230; 21 N. H. 262; 9 Ga. 73; 37 Me. 130; 3 Cranch, 448; 1 Curt. C. C. 311; and see 5 Wend. N. Y. 170; 16 Barb. N. Y. 268; 5 N. Y. 381; 3 Binn. Penn. 215; but if the failure of jurisdiction be as to person, place, or process, it must appear on the warrant, to have this effect, Buller, Nisi P. 83; 5 Wend. N. Y. 175; 3 Barb. N. Y. 17; 12 Vt. 661; 6 Ill. 401; 1 Rich. So. C. 147; 2 J. J. Marsh. Ky. 44; 1 Conn. 40; 6 Blackf. Ind. 249, 344; 3 Munf. Va. 458; 13 Mo. 171; 3 Binn. Penn. 38; 8 Metc. Mass. 326; 1 R. I. 464; 1 Mood. 281; 3 Burr. 1766; 1 W. Blackst. 555; or arrest of the wrong person, 2 Scott, N. s. 86; 1 Mann. & G. 775; 2 Taunt. 400; 8 N. H. 406; 4 Wend. N. Y. 555; 9 *id.* 319; 6 Cow. N. Y. 456; 7 *id.* 332, renders the officer liable for a trespass to the party arrested. See 1 Bennett & H. Lead. Crim. Cas. 180–184.

In Criminal Cases. The apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime.

The word *arrest* is said to be more properly used in civil cases, and *apprehension* in criminal. Thus, a man is arrested under a *capias ad respondendum*, and apprehended under a warrant charging him with larceny.

6. *Who may make.* The person to whom the warrant is addressed is the proper person in case a warrant has been issued, whether he be described by name, Salk. 176; 24 Wend. N. Y. 418; 2 Ired. No. C. 201, or by his office. 1 Barnew. & C. 288; 2 Dowl. & R. 444; 7 Exch. 827; 6 Barb. N. Y. 654. See 1 Mass. 488. But, if the authority of the warrant is insufficient, he may be liable as a trespasser. See, before, **5.**

7. Any peace officer, as a justice of the peace, 1 Hale, Pl. Cr. 86; sheriff, 1 Saund. 77; 1 Taunt. 46; coroner, 4 Blackstone, Comm. 292; constable, 32 Eng. L. & Eq. 783; 36 N. H. 246; or watchman, 3 Taunt. 14; 3 Campb. 420, may without a warrant arrest any person committing a felony in his presence, 6 Binn. Penn. 318; Sullivan, Lect. 402; 3 Hawkins, Pl. Cr. 164, or committing a breach of the peace, during its continuance or immediately afterwards, 1 Carr. & P. 40; 4 *id.* 387; 6 *id.* 741; 32 Eng. L. & Eq. 186; 3 Wend. N. Y. 384; 1 Root, Conn. 66; 2 Nott & M'C. So. C. 475; 1 Pet. C. C. 390; or even to prevent the commission; and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not, 3 Campb. 420; 5 Cush. Mass. 281; 6 Humphr. Tenn. 53; 6 Binn. Penn. 316; 3 Wend. N. Y. 350; 1 N. H. 54; whether acting on his own knowledge or facts communicated by others, 6 Barnew. & C. 635; but not unless the offence amount to a felony. 1 Mood. Crim. 80; 5 Exch. 378; 5 Cush. Mass. 281; 11 *id.* 246, 415. See Russ. & R. 329. See FELONY.

8. A private person who is present when a felony is committed, 1 Mood. 93; 3 Wend. N. Y. 353; 12 Ga. 293; or during the commission of a breach of the peace, 10 Clark & F. Hou. L. 28; 1 Crompt. M. & R. Exch. 757; 25 Vt. 261, may and should arrest the felon, and may upon reasonable suspicion that the person arrested is the felon, if a felony has been committed, 4 Taunt. 34, 35; 1 Price, Exch. 525; but in defence to an action he must allege and prove the offence to have been committed, 1 Mees. & W. Exch. 516; 2 *id.* 477; 10 *id.* 105; 2 Q. B. 375; 11 *id.* 311; 6 Carr. & P. 723, 684; 2 Bingh. 523; 6 Term, 315; 6 Barnew. & C. 638; 3 Wend. N. Y. 353; 5 Cush. Mass. 281; and also reasonable grounds for suspecting the person arrested. 1 Holt, 478; 3 Campb. 35; 4 Taunt. 34; 9 C. B. 141; 2 Q. B. 169; 1 Term, 493; 5 Bingh. N. C. 722; 1 Eng. L. & Eq. 566; 25 *id.* 550; 6 Barb. N. Y. 84; 9 Penn. St. 137; 6 Binn. Penn. 316; 6 Blackf. Ind. 406; 18 Ala. 195; 6 *id.* 196; 5 Humphr. Tenn. 357; 12 Pick. Mass. 324; 4 Wash. C. C. 82. And see 3 Strobh. So. C. 546; 8 Watts & S. Penn. 308; 2 Carr. & P. 361, 565; 1 Bennett & H. Lead. Cas. 143–157. As to arrest to prevent the

commission of crimes, see 2 Bos. & P. 260; 9 Carr. & P. 262. As to arrest by hue and cry, see HUE AND CRY. As to arrest by military officers, see 7 How. 1.

Who liable to. Any person is liable to arrest for crime, except ambassadors and their servants. 3 Mass. 197; 4 *id.* 29; 27 Vt. 762.

9. *When and where* it may be made. An arrest may be made at night as well as by day; and for treason, felony, breach of the peace, or generally for an indictable offence, on Sunday as well as on other days. 16 Mees. & W. 172; 2 Ell. & B. 717; 13 Mass. 547; 24 Me. 158. And the officer may break open doors even of the criminal's own house, 10 Cush. Mass. 501; 14 B. Monr. Ky. 305; as may a private person in fresh pursuit, under circumstances which authorize him to make an arrest. 4 Blackstone, Comm. 293.

It must be made within the jurisdiction of the court under whose authority the officer acts, 1 Hill, N. Y. 377; 2 Cranch, 187; 8 Vt. 194; 3 Harr. Del. 416; and see 4 Maule & S. 361; 1 Barnew. & C. 288; and jurisdiction for this purpose can be extended to foreign countries only by virtue of treaties or express laws of those countries. 1 Bishop, Crim. Law, § 598; Wheaton, Int. Law, 177; 10 Serg. & R. Penn. 125; 12 Vt. 631; 1 Woodb. & M. C. C. 66; 1 Barb. N. Y. 248; 1 Park. Crim. N. Y. 108, 429. And see, as between the states of the United States, 5 How. 215; 5 Metc. Mass. 536; 4 Day, Conn. 121; R. M. Charlt. Ga. 120; 2 Humphr. Tenn. 258.

10. *Manner* of making. An officer authorized to make an arrest, whether by warrant or from the circumstances, may use necessary force, 9 Port. Ala. 195; 3 Harr. Del. 568; 24 Me. 158; 35 *id.* 472; 16 Barb. N. Y. 268; 4 Cush. Mass. 60; 7 Blackf. Ind. 64; 2 Ired. No. C. 52; 4 Barnew. & C. 596; 6 Dowl. & R. 623; may kill the felon if he cannot otherwise be taken, see 7 Carr. & P. 140; 2 Mood. & R. 39; and so may a private person in making an arrest which he is *enjoined* to make, 4 Sharswood, Blackst. Comm. 293; and if the officer or private person is killed, in such case it is murder.

ARREST OF JUDGMENT. In Practice. The act of a court by which the judges refuse to give judgment, because upon the face of the record it appears that the plaintiff is not entitled to it.

A motion for arrest of judgment must be grounded on some objection arising on the face of the record itself; and no defect in the evidence or irregularity at the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which is not aided by the verdict, is a ground for arresting the judgment. Although the defendant himself omits to make any motion in arrest of judgment, the court, if on a review of the case it is satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment. 1 East, 146. Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment. 18 Q. B. 761; Dearsl. Cr. Cas. 3. See also 8 Ad. & E. 496; 1 Russ. & R. Cr. Cas. 429; 11 Pick. Mass. 350; 21 *id.* 373; 6 Cush. Mass. 465; 12 *id.* 501. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a new indictment. Comyns, Dig. *Indictment*, N.

ARRESTANDIS BONIS NE DISSIPENTUR. In English Law. A writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE. In Scotch Law. He in whose hands a debt, or property in his possession, has been arrested by a regular arrestment.

If, in contempt of the arrestment, he make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester. Erskine, Inst. 3. 6. 6.

ARRESTER. In Scotch Law. One who sues out and obtains an arrestment of his debtor's goods or movable obligations. Erskine, Inst. 3. 6. 1.

ARRESTMENT. In Scotch Law. Securing a criminal's person till trial, or that of a debtor till he give security *judicio sisti*. The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3. 6. 1; 1. 2. 12.

Where arrestment proceeds on a depending action, it may be loosed by the common debtor's giving security to the arrester for his debt, in the event it shall be found due. Erskine, Inst. 3. 6. 7.

ARRET (Fr.). A judgment, sentence, or decree of a court of competent jurisdiction.

The term is derived from the French law, and is used in Canada and Louisiana.

Saisie arrêt is an attachment of property in the hands of a third person. La. Code Pract. art. 209; 2 Low. C. 77; 5 *id.* 198, 218.

ARRETTED (*arrectatus*, i.e. *ad rectum vocatus*).

Convened before a judge and charged with a crime.

Ad rectum malefactorem is, according to Bracton, to have a malefactor forthcoming to be put on his trial.

Imputed, or laid to one's charge; as, no folly may be *arretted* to any one under age. Bracton, l. 3, tr. 2, c. 10; Cunningham, Dict.

ARRHÆ. Money or other valuable things given by the buyer to the seller, for the purpose of evidencing the contract; earnest.

There are two kinds of arrhæ: one kind given when a contract has only been proposed; the other

when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to them in the opposite party, in case he should refuse to complete the proposed bargain; and the receiver of arrhæ is obliged on his part to return double the amount to the giver of them in case he should fail to complete his part of the contract. Pothier, *Contr. de Vente*, n. 498. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected. Arrhæ are therefore defined *quod ante pretium datur, et fidem fecit contractus, facti totiusque pecuniæ solvendæ.* Id. n. 506; Cod. 4. 45. 2.

ARRIAGE AND CARRIAGE. Services of an indefinite amount formerly exacted from tenants under the Scotch law. Bell, Dict.

ARRIER BAN. A second summons to join the lord, addressed to those who had neglected the first. A summons of the inferiors or vassals of the lord. Spelman, Gloss.

To be distinguished from *aribannum.*

ARRIERE FIEF (Fr.). An inferior fee granted out of a superior.

ARRIVE. To come to a particular place; to reach a particular or certain place. See 1 Brock. C. C. 411; 2 Cush. Mass. 439; 8 Barnew. & C. 119.

ARROGATION. The adoption of a person *sui juris.* 1 Brown, Civ. Law, 119; Dig. 1. 7. 5; Inst. 1. 11. 3.

ARSER IN LE MAIN. (Burning in the hand.) The punishment inflicted on those who received the benefit of clergy. *Termes de la Ley.*

ARSON (Lat. *ardere*, to burn.). The malicious burning of the house of another. Coke, 3d Inst. 66; Bishop, Crim. Law, § 415; 4 Blackstone, Comm. 220; 2 Pick. Mass. 320; 10 Cush. Mass. 479; 7 Gratt. Va. 619; 9 Ala. 175; 7 Blackf. Ind. 168; 1 Leach, Cr. Cas. 4th ed. 218.

The house, or some part of it, however small, must be consumed by fire. 9 Carr. & P. 45; 16 Mass. 105; 5 Ired. No. C. 350. The question of burning is one of fact for the jury. 1 Mood. Cr. Cas. 398; 5 Cush. Mass. 427.

2. It must be *another's* house, 1 Bishop, Crim. Law, § 389; but if a man set fire to his own house with a view to burn his neighbor's, and does so, it is, at least, a great misdemeanor. 1 Hale, Pl. Cr. 568; 2 East, Pl. Cr. 1027; 5 Russ. & R. Cr. Cas. 487; W. Jones, 351; 2 Pick. Mass. 325; 34 Me. 428; 2 Nott & M'C. So. C. 36; 8 Gratt. Va. 624; 5 Barnew. & Ad. 27. See 1 Park. Cr. Cas. N. Y. 560; 2 Johns. N. Y. 105; 7 Blackf. Ind. 168.

The *house* of another must be burned, to constitute arson at common law; but the term "house" comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like, being within the curtilage, or same common fence, as the mansion itself. 1 Carr. & K. 533; 14 Mees. & W. Exch. 181; 4 Carr. & P. 245; 20 Conn. 245; 16 Johns. N. Y. 203; 18 *id.* 115; 3 Ired. No. C. 570; 3 Rich. So. C. 242; 5 Whart. Penn. 427; 4 Leigh, Va. 683; 4 Call. Va. 109. And it has also been said that the burning of a barn, though no part of the mansion, if it has corn or hay in it, is felony at common law. 1 Gabbett, Crim. Law, 75; 4 Carr. & P. 245; 5 Watts & S. Penn. 385. In Massachusetts, the statute refers to the dwelling-house strictly. 16 Pick. Mass. 161; 10 Cush. Mass. 478. And see 3 Story, U. S. Laws, 19, 99. The burning must have been both malicious and wilful. Roscoe, Crim. Ev. 272; 2 East, Pl. Cr. 1019, 1031; 1 Bishop, Crim. Law, § 259. And generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved. 1 Russ. & R. Cr. Cas. 26. On a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing. 1 Russ. & R. Cr. Cas. 207; 1 Mood. Cr. Cas. 263; 2 Barnew. & C. 264. But this doctrine can only arise where the act is wilful; and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not be liable.

It is a felony at common law, and originally punishable with death, Coke, 3d Inst. 66; 2 East, Pl. Cr. 1015; 5 Watts & S. Penn. 385; but this is otherwise, to a considerable extent, by statute. 8 Rich. So. C. 276; 4 Dev. No. C. 305; 4 Call. Va. 109; 5 Cranch, C. C. 73. If homicide result, the act is murder. 1 Green, N. J. 361; 1 Bishop, Crim. Law, 361.

ARSURA. The trial of money by heating it after it was coined. Now obsolete.

ART. A principle put in practice and applied to some art, machine, manufacture, or composition of matter. 4 Mas. C. C. 1. See act of Cong. July 4, 1836, § 6.

Copper-plate printing on the back of a bank-note is an art for which a patent may be granted. 4 Wash. C. C. 9.

ART AND PART. In Scotch Law. The offence committed by one who aids and assists the commission of a crime, but who is not the principal or chief actor in its actual commission. An accessory. A principal in the second degree. Paterson, Comp.

A person may be guilty, art and part, either by giving advice or counsel to commit the crime; or by giving warrant or mandate to commit it; or by actually assisting the criminal in the execution.

In the more atrocious crimes, it seems agreed that the adviser is equally punishable with the criminal, and that, in the slighter offences, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving the advice, &c., may be received as pleas for softening the punishment.

One who gives a mandate to commit a crime, as he is the first spring of the action, seems more guilty than the person employed as the instrument in executing it.

Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him, with a criminal intent, with poison, arms, or other means of perpetrating it. That sort of assistance which is not given till after the criminal act, and which is commonly called abetting, though it be itself criminal, does not infer art and part of the principal crime. Erskine, Inst. 4. 4. 4.

ARTICLES (Lat. *articulus, artus*, a joint). Divisions of a written or printed document or agreement.

A specification of distinct matters agreed upon or established by authority or requiring judicial action.

The fundamental idea of an article is that of an object comprising some integral part of a complex whole. See Worcester, Dict. The term may be applied, for example, to a single complete question in a series of interrogatories; the statement of the undertakings and liabilities of the various parties to an agreement in any given event, where several contingencies are provided for in the same agreement; a statement of a variety of powers secured to a branch of government by a constitution; a statement of particular regulations in reference to one general subject of legislation in a system of laws; and in many other instances resembling these in principle. It is also used in the plural of the subject made up of these separate and related articles, as, articles of agreement, articles of war, the different divisions generally having, however, some relation to each other, though not necessarily a dependence upon each other.

2. In Chancery Practice. A formal written statement of objections to the credibility of witnesses in a cause in chancery, filed by a party to the proceedings after the depositions have been taken and published.

The object of articles is to enable the party filing them to introduce evidence to discredit the witnesses to whom the objections apply, where it is too late to do so in any other manner, 2 Daniell, Chanc. Pract. 1158, and to apprize the party whose witnesses are objected to of the nature of the objections, that he may be prepared to meet them. 2 Daniell, Chanc. Pract. 1159.

Upon filing the articles, a special order is obtained to take evidence. 2 Dick. Ch. 532.

The interrogatories must be so shaped as not to call for evidence which applies directly to facts in issue in the case. 2 Sumn. C. C. 316, 605; 3 Johns. Ch. N. Y. 558; 10 Ves. Ch. 49. The objections can be taken only to the credit and not to the competency of the witnesses, 3 Atk. Ch. 643; 3 Johns. Ch. N. Y. 558; and the court are to hear all the evidence read and judge of its value. 2 Ves. Ch. 219. See, generally, 2 Daniell, Chanc. Pract. 1158 *et seq.*; 10 Ves. Ch. 49; 19 *id.* 127; 2 Ves. & B. Ch. 267; 1 Sim. & S. Ch. 467.

In Ecclesiastical Law. A complaint in the form of a libel exhibited to an ecclesiastical court.

In Scotch Law. Matters; business. Bell, Dict.

ARTICLES OF AGREEMENT. A written memorandum of the terms of an agreement.

They may relate either to real or personal estate, or both, and if in proper form will create an equitable estate or trust such that a specific performance may be had in equity.

The instrument should contain a clear and explicit statement of the *names of the parties*, with their additions for purposes of distinction, as well as a designation as parties of the first, second, etc. part; *the subject-matter* of the contract, including the time, place, and more important details of the manner of performance; *the covenants* to be performed by each party; *the date*, which should be truly stated. It should be signed by the parties or their agents. When signed by an agent, the proper form is, A B, by his agent [or attorney], C D.

ARTICLES APPROBATORY. In Scotch Law That part of the proceedings which corresponds to the answer to the charge in an English bill in chancery. Paterson, Comp.

ARTICLES OF CONFEDERATION. The title of the compact which was made by the thirteen original states of the United States of America.

2. The full title was, "Articles of Confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was adopted and went into force on the first day of March, 1781, and remained as the supreme law until the first Wednesday of March, 1789. 5 Wheat. 420.

The accompanying analysis of this important instrument is copied from Judge Story's Commentaries on the Constitution of the United States, book 2, c. 3.

3. The style of the confederacy was, by the first article, declared to be, "The United States of America." The second article declared that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this confederation *expressly* delegated to the United States, in congress assembled. The third article declared that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions as the inhabitants; that fugitives from justice should, upon the demand of the executive of the state from which they fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

4. Having thus provided for the security and intercourse of the states, the next article (5th) pro-

vided for the organization of a general congress, declaring that delegates should be chosen in such manner as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two nor more than seven members. No delegate was eligible for more than three in any term of six years; and no delegate was capable of holding any office of emolument under the United States. Each state was to maintain its own delegates, and, in determining questions in congress, was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

5. By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations as to treaties of commerce; of establishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

6. Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

7. Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits should not be infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

8. Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislatures of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

9. Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon when desired by any delegate.

10. Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided that congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by vote of the majority of the states.

11. The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers as congress, with the assent of nine states, should think it expedient to vest them with, except powers for the exercise of which, by the articles of confederation, the assent of nine states was required, which could not be thus delegated.

12. It was further provided that all bills of credit, moneys borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and improvements thereon, to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

13. Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into any treaty with, any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imposts or duties which might interfere with any proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence or trade; nor any body of forces, except such as should be deemed requisite by congress to garrison its forts and necessary for its defence.

But every state was required always to keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal, except after a declaration of war by congress, unless such state were infested by pirates, and then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.

14. There was also provision made for the admission of Canada into the Union, and of other colonies, with the assent of nine states. And it was finally declared that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that *the union should be perpetual;* and that no alterations should be made in any of the articles, unless agreed to by congress and confirmed by the legislatures of every state.

ARTICLES OF IMPEACHMENT. A written articulate allegation of the causes for impeachment.

They are called by Blackstone a kind of bills of indictment, and perform the same office which an indictment does in a common criminal case. They do not usually pursue the strict form and accuracy of an indictment, but are sometimes quite general in the form of the allegations. Wooddeson, Lect. 605; Comyns, Dig. *Parliament* (L. 21); Story, Const. § 806. They should, however, contain so much certainty as to enable a party to put himself on the proper defence, and in case of an acquittal to avail himself of it as a bar to another impeachment. Additional articles may perhaps be exhibited at any stage of the proceedings. Rawle, Const. 216.

The answer to articles of impeachment is exempted from observing great strictness of form; and it may contain arguments as well as facts. It is usual to give a full and particular answer to each article of the accusation. Story, Const. § 808.

ARTICLES IMPROBATORY. In Scotch Law. Articulate averments setting forth the facts relied upon. Bell, Dict.

That part of the proceedings which corresponds to the charge in our English bill in chancery to set aside a deed. Paterson, Comp. The answer is called articles approbatory.

ARTICLES OF PARTNERSHIP. A written agreement by which the parties enter into a partnership upon the conditions therein mentioned.

These are to be distinguished from agreements to enter into a partnership at a future time. By articles of partnership a partnership is actually established; while an agreement for a partnership is merely a contract, which may be taken advantage of in a manner similar to other contracts. Where an agreement to enter into a partnership is broken, an action lies *at law* to recover damages; and *equity*, in some cases, to prevent frauds or manifestly mischievous consequences, will enforce specific performance. Watson, Partn. 60; Gow. Partn. 109; Story, Partn. § 109; Story, Eq. Jur. § 666, n.; 3 Atk. Ch. 383; 1 Swanst. Ch. 513, n.; but not when the partnership may be immediately dissolved. 9 Ves. Ch. 360.

2. The instrument should contain *the names* of the contracting parties severally set out; the *agreement* that the parties do by the instrument enter into a partnership, expressed in such terms as to distinguish it from a covenant to enter into partnership at a subsequent time; the *date*, and necessary *stipulations*, some of the more common of which follow.

The *commencement* of the partnership should be expressly provided for. The date of the articles is the time, when no other time is fixed by them. Collyer, Partn. 140; 5 Barnew. & C. 108.

The *duration* of the partnership should be stated. It may be for life, for a limited period of time, or for a limited number of adventures. When a term is fixed, it is presumed to endure until that period has elapsed, and when no term is fixed, for the life of the parties, unless sooner dissolved by the acts of one of them, by mutual consent, or operation of law. Story, Partn. § 84. The duration will not be presumed to be beyond the life of all the partners, 1 Swanst. 521; but provision may be made for the succession of the executors or administrators or a child or children of a deceased partner to his place and rights. Collyer, Partn. 147; 9 Ves. Ch. 500. Where provision is made for a succession by appointment, and the partner dies without appointing, his executors or administrators may continue the partnership or not, at their option. Collyer, Partn. 149; 1 M'Clell. & Y. Exch. 579; Colly. Ch. 157. A continuance of the partnership beyond the period fixed for its termination, in the absence of circumstances showing intent, will be implied to be upon the basis of the old articles, 5 Mas. C. C. 176, 185; 15 Ves. Ch. 218; 1 Moll. Ch. Jr. 466; but for an indefinite time. 17 Ves. Ch. 298.

3. The *nature* of the business and the *place* of carrying it on should be very carefully and exactly specified. Courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles. Story, Partn. § 193; Gower, Partn. 398.

The *name* of the firm should be ascertained. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases. Collyer, Partn. 141; 2 Jac. & W. Ch. 266; 9 Ad. & E. 314; 11 *id.* 339; Story, Partn. §§ 102, 136, 142, 202.

The *management* of the business, or of some particular branch of it, is frequently intrusted by stipulation to one partner, and such partner will be protected in his rights by equity, Collyer, Partn. 753; Story, Partn. §§ 172, 182, 193, 202; and see La. Civ. Code, art. 2838–2840; Pothier, *Société*, n. 71; Dig. 14. 1. 1. 13; Pothier, Pand. 14. 1. 4; or it may be to a majority of the partners, and should be where they are numerous. See PARTNERS.

4. The *manner* of furnishing capital and stock should be provided for. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm. Collyer, Partn. 141; Story, Partn. § 203; 1 Swanst. Ch. 89. Sometimes a provision is inserted that real estate and fixtures belonging to the firm shall be considered, as between the partners, not as partnership but as several property. In cases of bankruptcy, this property will be treated as the separate property of the partners. Collyer, Partn. 141, 595, 600; 5 Ves. Ch. 189; 3 Madd. Ch. 63.

The *apportionment* of profits and losses should be provided for. The law distributes these equally, in the absence of controlling circumstances, without regard to the capital furnished by each. Watson, Partn. 59; Story, Partn. 24; 3 Kent, Comm. 28; 6 Wend. N. Y. 263. But see 7 Bligh, 432; 5 Wils. & S. Hou. L. 16.

5. *Periodical accounts* of the property of the partnership may be stipulated for. These, when settled, are at least *prima facie* evidence of the facts they contain. 7 Sim. Ch. 239.

The *expulsion* of a partner for gross misconduct, bankruptcy, or other specified causes may be provided for; and the provision will govern, when the case occurs.

A *settlement* of the affairs of the partnership should always be provided for. It is generally accomplished in one of the three following ways: *first*, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; or, *second*, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; or, *third*, that all the property of the partnership shall be appraised, and that after paying the partnership debts it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations. Collyer, Partn. 145; Story, Partn. § 207; 8 Sim. Ch. 529.

Submission of disputes to arbitration is provided for frequently; but such a clause is nugatory, as no action will lie for a breach. Story, Partn. § 215. The articles should be executed by the parties, but need not be under seal. See PARTIES; PARTNERS; PARTNERSHIP.

ARTICLES OF THE PEACE. A complaint made before a court of competent jurisdiction by one who has just cause to fear that an injury to his person or property is about to be committed or caused by the party complained of, alleging the causes of his belief, and asking the protection of the court.

The object of articles is to compel the party complained of to find sureties of the peace. This will be granted when the articles are on oath, 1 Strange, 527; 12 Mod. 243; 12 Ad. & E. 599, unless the articles on their face are false, 2 Burr. 806; 3 *id.* 1922, or are offered under suspicious circumstances. 2 Strange, 835; 1 W. Blackst. 233. Their truth cannot be controverted by affidavit or otherwise; but exception may be taken to their sufficiency, or affidavits for reduction of the amount of bail tendered. 2 Strange, 1202; 13 East, 171.

ARTICLES OF ROUP. In Scotch Law. The conditions under which property is offered for sale at auction. Paterson, Comp.

ARTICLES OF SET. In Scotch Law. An agreement for a lease. Paterson, Comp.

ARTICLES OF WAR. The code of laws established for the government of the army.

The term is used in this sense both in England and the United States. The term also includes the code established for the government of the navy. See Acts Apr. 23, 1800, and Apr. 10, 1806 (1 Story, U. S. Laws, 761; 2 *id.* 992), and 22 Geo. II. c. 33; 19 Geo. III. c. 17; 37 Geo. III. cc. 70, 71; 47 Geo. III. c. 71; MARTIAL LAW.

ARTICULATE ADJUDICATION. In Scotch Law. Separate adjudication for each of several claims of a creditor.

It is so made in order that a mistake in accumulating one debt need not affect the proceedings on other claims which are correctly accumulated.

ARTIFICIAL. Having its existence in the given manner by virtue of or in consideration only of the law.

Artificial person. A body, company, or corporation considered in law as an individual.

ARURA. Days' work at ploughing.

AS (Lat.). A pound.

It was composed of twelve ounces. The parts were reckoned (as may be seen in the law, *Servum de hæredibus*, Inst. lib. xiii. *Pandect*) as follows: *uncia*, 1 ounce; *sextans*, 2 ounces; *triens*, 3 ounces; *quadrans*, 4 ounces; *quincunx*, 5 ounces; *semis*, 6 ounces; *septunx*, 7 ounces; *bes*, 8 ounces; *dodrans*, 9 ounces; *dextans*, 10 ounces; *deunx*, 11 ounces.

The whole of a thing; *solidum quid.*

Thus, *as* signified the whole of an inheritance: so that an heir *ex asse* was an heir of the whole inheritance. An heir *ex triente, ex semisse, ex besse*, or *ex deunce*, was an heir of *one-third, one-half, two-thirds*, or *eleven-twelfths*.

ASCENDANTS (Lat. *ascendere*, to ascend, to go up to, to climb up to). Those from whom a person is descended, or from whom he derives his birth, however remote they may be.

Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus, in going up we ascend by various lines, which fork at every generation. By this progress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth; sixty-four, at the sixth; one hundred and twenty-eight, at the

seventh; and so on. By this progressive increase, a person has at the twenty-fifth generation thirty-three million five hundred and fifty-four thousand four hundred and thirty-two ascendants. But, as many of the ascendants of a person have descended from the same ancestor, the lines which were forked reunite to the first common ancestor, from whom the other descends; and this multiplication thus frequently interrupted by the common ancestors may be reduced to a few persons.

ASCRIPTITIUS. One enrolled; foreigners who have been enrolled. Among the Romans, ascriptitii were foreigners who had been naturalized, and who had in general the same rights as natives. Nov. 22, c. 17; Cod. 11. 47. *Ascriptitii* is the plural.

ASPHYXY. In Medical Jurisprudence. A temporary suspension of the motion of the heart and arteries; swooning; fainting.

This term applies to the situation of persons who have been asphyxiated by submersion or drowning; by breathing mephitic gas; by the effect of lightning; by the effect of cold; by heat; by suspension or strangulation. In a legal point of view, it is always proper to ascertain whether the person who has thus been deprived of his senses is the victim of another, whether the injury has been caused by accident, or whether it is the act of the sufferer himself.

ASPORTATION (Lat. *asportatio*). The act of carrying a thing away; the removing a thing from one place to another.

ASSASSINATION. Murder committed for hire, without provocation or cause of resentment given to the murderer by the person upon whom the crime is committed. Erskine, Inst. b. 4, t. 4, n. 45.

A murder committed treacherously, with advantage of time, place, or other circumstances.

ASSAULT. An unlawful offer or attempt with force or violence to do a corporal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril.

Aggravated assault is one committed with the intention of committing some additional crime. *Simple assault* is one committed with no intention to do any other injury.

Assault is generally coupled with battery, and for the excellent practical reason that they generally go together; but the assault is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery. 1 Hawkins, Pl. Cr. c. 62, § 1.

Where a person is only *assaulted*, still the form of the declaration is the same as where there has been a *battery*, "that the defendant assaulted, and beat, bruised, and wounded the plaintiff." 1 Saund. 6th ed. 14 *a*. The word "ill-treated" is frequently inserted; and if the assaulting and ill-treating are justified in the plea, although the beating, bruising, and wounding are not, yet it is held that the plea amounts to a justification of the battery. 7 Taunt. 689; 1 J. B. Moore, 420. So where the plaintiff declared, in trespass, for assaulting him, seizing and laying hold of him, and imprisoning him, and the defendant pleaded a justification under a writ of capias, it was held, that the plea admitted a battery. 3 Mees. & W. Exch. 28. But where in trespass for assaulting the plaintiff, and throwing water upon him, and also wetting and damaging his clothes, the defendant pleaded a justification as to assaulting the plaintiff and wetting and damaging his clothes, it was held, that, though the declaration alleged a battery, yet the matter justified by the plea did not amount to a battery. 8 Ad. & E. 602; 3 Nev. & P. 564. And see 1 Bishop, Crim. Law, § 409.

2. Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault, 4 Carr. & P. 349; 9 *id.* 483, 626; 1 Ired. No. C. 125, 375; 11 *id.* 475; 1 Serg. & R. Penn. 347; 3 Strobh. So. C. 137; 9 Ala. 79; 2 Wash. C. C. 435; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal. 2 Metc. Mass. 24, 25; 1 Gray, Mass. 63, 64.

3. If a master takes indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault. Russ. & R. Cr. Cas. 130; 6 Cox, Cr. Cas. 64; 9 Carr. & P. 722. So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes. 1 Moody, 19; 1 Lewin, 11. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, it was held that he was properly convicted of an assault. 1 Den. Cr. Cas. 580; 4 Cox, Cr. Cas. 220; Templ. & M. Cr. Cas. 218. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl. 8 Carr. & P. 589; 2 Mood. Cr. Cas. 123; 9 Carr. & P. 213, 215; 8 *id.* 574; 7 Cox, Cr. Cas. 145. And see 1 Den. Cr. Cas. 377; 2 Carr. & K. 957; 3 Cox, Cr. Cas. 266; Templ. & M. Cr. Cas. 52. In one case it was held that if a person puts a deleterious drug (as cantharides) into coffee, in order that another may take it, if it is taken, he is guilty of an assault upon the party by whom it is taken. 8 Carr. & P. 660. But this case has been overruled. 2 Mood. & R. 531; 2 Carr. & K. 912; 1 Cox, Cr. Cas. 282. An unlawful imprisonment is also an assault. 1 Hawkins, Pl. Cr. c. 62, § 1.

ASSAY. The proof or trial of the purity or fineness of metals,—particularly the precious metals, gold and silver.

2. By this proof the amount of pure metal in any homogeneous mass is ascertained. In

the case of gold, the base metals, such as copper or tin, are removed by a method called *cupellation*, which is conducted in an assay-furnace, in a cupel, or little cup composed of calcined bones. To the other metals lead is added,—this metal possessing the properties of oxidizing and vitrifying under the action of heat, of promoting, at the same time, the oxidation of any of the base metals which may be present, and of drawing such metals with it into the pores of the cupel, and thus leaving behind the gold only, together with any amount of silver which may be present. The silver is separated from the gold by another process, founded on the property possessed by nitric acid of dissolving silver without acting upon gold.

3. The assay of silver is generally made by a method called the *humid assay*. The silver is dissolved in nitric acid, and a solution of common salt in water is added, by which the silver is precipitated in the form of a white powder, which is an insoluble chloride. It has been ascertained that one hundred parts, by weight, of pure salt will convert into chloride of silver just one hundred and eighty-four and one-fourth parts of pure silver. From this theorem the fineness of the specimen operated upon is deduced from the quantity of salt used to convert into chloride a given amount of silver.

4. Assays at the mint are for two purposes. 1. To determine the value of the deposits of gold and of silver. 2. To ascertain whether the ingots prepared for coinage are of the legal standard of fineness. The standard gold of the United States is so constituted that in one thousand parts, by weight, nine hundred shall be of pure gold and one hundred of an alloy composed of silver and copper. The standard silver of the United States is composed of nine hundred parts of pure silver and one hundred of copper. See ANNUAL ASSAY.

ASSAY OFFICE. An establishment, or department, in which the manipulations attending the assay of bullion and coins are conducted. See ASSAY.

2. Departments of this character are attached to the national mint and each of its branches. Prior to the establishment of the branch mint at San Francisco, an assay office was established in California, by act of Congress September 30, 1850, 7 U. S. Stat. at Large, 531; but this act was subsequently repealed, by the act of July 3, 1852, 10 U. S. Stat. at Large, 11. An assay office at New York was established by the act of March 4, 1853, sect. 10, "for the receipt, and for the melting, refining, parting, and assaying, of gold and silver bullion and foreign coins." 10 U. S. Stat. at Large, 212.

3. And it was further provided that "all gold or silver bullion and foreign coin deposited, melted, parted, refined, or assayed, as aforesaid, shall, at the option of the depositor, be cast, in the said office, into bars, ingots, or disks, either of pure metal or of standard fineness (as the owner may prefer), with a stamp thereon of such form and device as shall be prescribed by the secretary of the treasury, accurately designating its weight and fineness: *provided*, that no ingot, bar, or disk shall be cast of less weight than five ounces, unless the same be of standard fineness, and of either one, two, or three ounces in weight." 10 U. S. Stat. at Large, 213.

4. This section also provides that "all gold or silver bullion and foreign coin intended by the depositor to be converted into the coins of the United States, shall, as soon as assayed and its net value certified as above provided, be transferred to the mint of the United States, under such directions as shall be made by the secretary of the treasury, and at the expense of the contingent fund of the mint, and shall there be coined." The operation of melting, parting, refining, and assaying, in the assay office, is "under the general directions of the director of the mint, in subordination to the secretary of the treasury; and it shall be the duty of the said director to prescribe such regulations and to order such tests as shall be requisite to insure faithfulness, accuracy, and uniformity in the operations of the said office." 10 U. S. Stat. at Large, 213. The assay office is also subject to the laws and regulations applied to the mint. 10 U. S. Stat. at Large, 213.

ASSECURARE (Lat.). To assure; to make secure by pledges, or any solemn interposition of faith. Spelman, Gloss.; Cowel.

ASSECURATION. In European Law. Assurance; insurance of a vessel, freight, or cargo. Opposition to the decree of Grenoble. Ferriere.

ASSECURATOR. An insurer.

ASSEDATION. In Scotch Law. An old term, used indiscriminately to signify a lease or feu-right. Bell's Dict.; Erskine, Inst. lib. 2. tit. 6. § 20.

ASSEMBLY. The meeting of a number of persons in the same place.

Political assemblies are those required by the constitution and laws: for example, the general assembly, which includes the senate and house of representatives. The meeting of the electors of the president and vice-president of the United States may also be called an assembly.

Popular assemblies are those where the people meet to deliberate upon their rights: these are guaranteed by the constitution. U. S. Const. Amend. art. 1.

Unlawful assembly is the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution.

It differs from a riot or rout, because in each of the latter cases there is some act done besides the simple meeting. See 1 Ired. No. C. 30; 9 Carr. & P. 91, 431; 5 *id.* 154; 1 Bishop, Crim. Law, § 395; 2 *id.* §§ 1039, 1040.

ASSENT. Approval of something done.

An undertaking to do something in compliance with a request.

In strictness, *assent* is to be distinguished from *consent*, which denotes a willingness that something about to be done, be done; *acceptance*, compliance with, or receipt of, something offered; *ratification*, rendering valid something done without authority; and *approval*, an expression of satisfaction with some act done for the benefit of another beside the party approving. But in practice the term is often used in the sense of acceptance and approval. Thus, an offer is said to be assented to, although properly an offer and acceptance complete an agreement. It is apprehended that this confusion has arisen from the fact that a request, assent, and concurrence of the party requesting complete a contract as fully as an offer and acceptance. Thus, it is said there must be a request on one side, and assent on the other, in every contract, 5 Bingh. N. C. 75; and this assent becomes a promise enforceable by the party requesting, when he has done any thing to entitle him to the right. Assent thus becomes in reality (so far as it is *assent* merely, and not *acceptance*) an offer made in response to a request. Assent and approval, as applied to acts of parliament and of congress, have become confounded, from the fact that the bills of parliament were originally requests from parliament to the king. See 1 Blackstone, Comm. 183.

Express assent is that which is openly declared. *Implied assent* is that which is presumed by law.

2. Unless express dissent is shown, acceptance of what it is for a person's benefit to take, is presumed, as in the case of a conveyance of land, 2 Ventr. 201; 3 Mod. 296; 3 Lev. 284; 3 Barnew. & Ald. 31; 1 Binn. Penn. 502; 5 Serg. & R. Penn. 523; 14 *id.* 296; 12 Mass. 461; 2 Hayw. No. C. 234; 4 Day, Conn. 395; 20 Johns. N. Y. 184; 15 Wend. N. Y. 656; 4 Halst. N. J. 161; 6 Vt. 411; as to the effect of assent (or acceptance) of the grantee upon the delivery of a deed by a person other than the grantor, see 9 Mass. 307; 8 Metc. Mass. 436; 9 Ill. 176; 5 N. H. 71; 4 Day, Conn. 66; 20 Johns. N. Y. 187; 2 Ired. Eq. No. C. 557; 5 Barnew. & C. 671; 1 Ohio, pt. 2, 50; 2 Washburn, Real Prop. 579; or in case of a devise which draws after it no charge or risk of loss. 17 Mass. 73; 3 Munf. Va. 345; 4 *id.* 332; 8 Watts, Penn. 9. See 1 Wash. C. C. 70.

3. Assent must be to the same thing in the same sense, 1 Sumn. C. C. 218; 3 Johns. N. Y. 534; 7 *id.* 470; 18 Ala. 605; 3 Cal. 147; 4 Wheat. 225; 5 Mees. & W. Exch. 575; it must comprehend the whole of the proposition, must be exactly equal to its extent and provisions, and must not qualify them by any new matter. 5 Mees. & W. Exch. 535; 4 *id.* 155; 4 Whart. Penn. 369; 3 Wend. N. Y. 459; 11 N. Y. 441; 1 Metc. Mass. 93; 1 Parsons, Contr. 400.

In general, when an assignment is made to one for the benefit of creditors, the assent of the assignees will be presumed. 1 Binn. Penn. 502, 518; 6 Watts & S. Penn. 339; 8 Leigh, Va. 272, 281. But see 24 Wend. N. Y. 280.

ASSESS. To rate or fix the proportion which every person has to pay of any particular tax.

To tax.

To adjust the shares of a contribution by several towards a common beneficial object according to the benefit received.

To fix the value of; to fix the amount of.

ASSESSMENT. Determining the value of a man's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual.

Laying a tax.

Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received.

The term is used in this latter sense in New York, distinguishing some kinds of local taxation, whereby a peculiar benefit arises to the parties, from general taxation. 11 Johns. N. Y. 77; 3 Wend. N. Y. 263; 4 Hill, N. Y. 76; 4 N. Y. 419.

Of Damages. Fixing the amount of damages to which the prevailing party in a suit is entitled.

It may be done by the court through its proper officer, the clerk or prothonotary, where the assessment is a mere matter of calculation, but must be by a jury in other cases. See DAMAGES.

In Insurance. An apportionment made in general average upon the various articles and interests at risk, according to their value at the time and place of being in safety for contribution for damage and sacrifices purposely made, and expenses incurred for escape from impending common peril. 2 Phillips, Ins. c. xv.

It is also made upon premium-notes given by the members of mutual fire-insurance companies, constituting their capital, and being a substitute for the investment of the paid-up stock of a stock company; the liability to such assessments being regulated by the charter and the by-laws. 1 Phillips, Ins. §§ 24, 523, 637, 1795 *a*; 14 Barb. N. Y. 374; 21 *id.* 605; 12 N. Y. 477; 9 Cush. Mass. 140; 3 Gray, Mass. 208, 210; 6 *id.* 77, 288; 13 Minn. 135; 36 N. H. 252.

ASSESSORS. Those appointed to make assessments.

In Civil and Scotch Law. Persons skilled in law, selected to advise the judges of the inferior courts. Bell, Dict.; Dig. 1. 22; Cod. 1. 51.

ASSETS (Fr. *assez*, enough).

All the stock in trade, cash, and all available property belonging to a merchant or company.

The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Assets enter mains. Assets in hand. Such property as at once comes to the executor or other trustee, for the purpose of satisfying claims against him as such. *Termes de la Ley.*

Equitable assets. Such as can be reached

only by the aid of a court of equity, and which are to be divided, *pari passu*, among all the creditors. 2 Fonblanque, 401 *et seq.*; Willis, Trust. 118.

Legal assets. Such as constitute the fund for the payment of debts according to their legal priority.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors. 2 Williams, Ex. 1011.

Personal assets. Goods and personal chattels to which the executor or administrator is entitled.

Real assets. Such as descend to the heir, as, an estate in fee simple.

2. In the United States, generally, by statute, all the property of the deceased, real and personal, is liable for his debts, and, in equity, is to be applied as follows, when no statute prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: *first*, the personal estate not specifically bequeathed; *second*, real estate devised or ordered to be sold for the payment of debts; *third*, real estate descended but not charged with debts; *fourth*, real estate devised, charged generally with the payment of debts; *fifth*, general pecuniary legacies pro rata; *sixth*, real estate devised, not charged with debts. 4 Kent, Comm. 421; 2 White & T. Lead. Cas. 72.

3. With regard to the distinction between realty and personalty in this respect, growing crops go to the administrator, 7 Mass. 34; 6 N. Y. 597; so do nurseries, though not trees in general, 1 Metc. Mass. 423; 4 Cush. Mass. 380; as do bricks in a kiln, 22 Pick. Mass. 110; so do buildings held as personal property by consent of the land-owner, 9 Gill & J. Md. 171; so do chattels real, as interests for years and mortgages; and hence the administrator must bring the action if the mortgagor die before foreclosing, 3 A. K. Marsh. Ky. 249; so does rent, provided the intestate dies before it is due. Fixtures go to the heir, 2 Smith, Lead. Cas. 99; 11 Hurlst. & G. Exch. 114; 2 Pet. 137; 6 Me. 167; 20 Wend. N. Y. 628; 9 Conn. 67. And see FIXTURES as to what are fixtures. In copy-rights and patents the administrator has right enough to get them extended and beyond the customary time. 4 How. 646, 712. The wife's paraphernalia he cannot take from her, in England, for the benefit of the children and heirs, but he may for that of creditors. In the United States, generally, the wearing-apparel of widows and minors is retained by them, and is not assets. So among things reserved is the widow's quarantine, *i.e.* forty days of food and clothing. 5 N. H. 495; 10 Pick. Mass. 430.

4. Where the assets consist of two or more funds, and at law a part of the creditors can resort to either fund, but the others can resort to one only, there courts of equity exercise the authority to marshal (as it is called) the assets, and by compelling the more favored creditors to exhaust first the fund upon which they have the exclusive claim, or, if they have been satisfied without the observance of this rule, by permitting the others to stand in their place, thus enable such others to receive more complete satisfaction. 1 Story, Eq. Jur. § 558 *et seq.*; Adams, Eq. 263, 590; Williams, Exec. 1457; 4 Johns. Ch. N. Y. 17; 1 P. Will Ch. 679; 1 Ves. Ch. 312; 5 Cranch, R. 35; 1 Johns. Ch. N. Y. 412; 19 Ga. 513; 1 Wisc. 43. See MARSHALLING OF ASSETS. See, generally, Williams, Ex. Index; Toller, Ex. Index; 2 Blackstone, Comm. 510, 511; 3 Viner, Abr. 141; 11 *id.* 239; Gordon, Decedents, Index; Ram, Assets.

ASSEVERATION. The proof which a man gives of the truth of what he says, by appealing to his conscience as a witness.

It differs from an oath in this, that by the latter he appeals to God as a witness of the truth of what he says, and invokes him, as the avenger of falsehood and perfidy, to punish him if he speak not the truth. See AFFIRMATION; OATH.

ASSIGN. To make or set over to another. Cowel; 2 Blackstone, Comm. 326; 5 Johns. N. Y. 391.

To appoint; to select; to allot. 3 Blackstone, Comm. 58.

To set forth; to point out: as, to assign errors. Fitzherbert, Nat. Brev. 19.

ASSIGNATION. In Scotch Law. Assignment, which see.

ASSIGNEE. One to whom an assignment has been made.

Assignee in fact is one to whom an assignment has been made in fact by the party having the right.

Assignee in law is one in whom the law vests the right: as, an executor or administrator. See ASSIGNMENT.

ASSIGNMENT (Law Lat. *assignatio*, from *assigno*,—*ad* and *signum*,—to mark for; to appoint to one; to appropriate to).

In Contracts. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

A transfer by writing, as distinguished from one by delivery.

The transfer of the interest one has in *lands* and *tenements*, and more particularly applied to the unexpired residue of a term or estate for life or years. Cruise, Dig. tit. xxxii. (Deed) c. vii. § 15; 2 Wooddeson Lect. 170, 171; 1 Stephen, Comm. 485. The deed by which the transfer is made is also called an assignment. Comyns, Dig.; Bacon, Abr.; Viner, Abr.; Nelson, Abr.; La. Civ. Code, art. 2612; Angell, Assign.; 1 Hare & W. Sel. Dec. 78–85; 4 Cruise, Dig. 160.

2. *What may be assigned.* Every demand connected with a right of property, real or personal, is assignable. Every estate and interest in lands and tenements may be assigned, as also every present and certain estate or interest in incorporeal hereditaments, even though the interest be future, including *a term of years* to commence at a

subsequent period; for the interest is vested *in præsenti*, though only to take effect *in futuro*, Perkins, s. 91; Coke, Litt. 46 *b; rent* to grow due (but not that in arrear, 8 Cow. N. Y. 206); *a right of entry* where the breach of the condition *ipso facto* terminates the estate, 2 Gill & J. Md. 173; 4 Pick. Mass. 1; *a right to betterments*, 9 Me. 62; the *right to cut trees*, which have been sold on the grantor's land, Hob. 173; 1 Greenleaf, Ev. § 27; Cruise, Dig. tit. 1, § 45, n.; 7 N. H. 522; 6 Me. 81, 200; 18 Pick. Mass. 569; 1 Metc. Mass. 313; 4 *id.* 580; 9 Leigh, Va. 548; 11 Ad. & E. 34; *a right in lands* which may be perfected by *occupation*. 4 Yerg. Tenn. 1; 1 Cooke, Tenn. 67. But no right of entry or re-entry can be assigned, 2 Yerg. Tenn. 84; Littleton, § 347; 2 Johns. N. Y. 1; 1 Cranch, 423–430; 1 Dev. & B. No. C. 319; nor *a naked power;* though it is otherwise where it is coupled with an interest. 2 Mod. 317.

3. To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment. 7 Ohio St. 432. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present, actual, or potential existence, but rest in mere possibility only, 2 Story, Eq. Jur. 630–639; Fearne, Cont. Rem. 527; as an heir's possibility of inheritance. 4 Sneed, Tenn. 258. The assignment of personal property is chiefly interesting in regard to choses in action and as to its effect in cases of insolvency and bankruptcy. Assignments by debtors for the benefit of creditors are regulated by statute in nearly all the states of the United States. A chose in action cannot be transferred at common law. 1 Fonblanque, Eq. b. 1, c. 4, § 2, n. 9; 10 Coke, 48; Coke, Litt. 266 *a;* Chitty, Bills, 6; Comyns, Dig. *Chancery* (2 H); 3 Cow. N. Y. 623; 2 Johns. N. Y. 1; 15 Mass. 388; 1 Cranch, 367; 5 Wisc. 17; 5 Halst. N. J. 20. But the assignee may sue in the assignor's name, and the assignment will be considered valid in equity. See §§ **10–12**.

4. In equity, as well as law, some choses in action are not assignable: for example, *an officer's pay* or commission, 2 Anstr. 533; 1 Ball & B. Ch. Ir. 387; 1 Swanst. Ch. 74; 3 Term, 681; 2 Beav. Rolls, 544; Turn. & R. 459; see 7 Metc. Mass. 335; 13 Mass. 290; 15 Ves. Ch. 139; or *the salary of a judge*, 10 Humphr. 342; or *claims for fishing* or other bounties from the government; or *rights of action for fraud* or tort, or any rights *pendente lite*. 1 Pet. 193, 213; 6 Cal. 456; 3 E. D. Smith, N. Y. 246; 22 Barb. N. Y. 110; 26 *id.* 635; 2 N. Y. 293; 3 Litt. Ky. 41; 9 Serg. & R. Penn. 244; 6 Madd. Ch. 59; 2 Mylne & K. 592. Nor can *personal trusts* be assigned; as the *right of a master* in his apprentice, 11 B. Monr. Ky. 60; 1 Mass. 172; 8 *id.* 299; 8 N. H. 472, or *the duties of a testamentary guardian*. 12 N. H. 437; 1 Hill, N. Y. 375.

5. The assignment of bills of exchange and promissory notes by general or special endorsement constitutes an exception to the law of transfer of choses in action. When negotiable (*i.e.* made payable to order), they were made transferable by the statute of 3 & 4 Anne; they may then be transferred by endorsement; the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut off. Parsons, Contr. 402–406; Chitty, Bills, Perkins ed. 1854, 8, 11, 225, 229, n. (3) and cases cited; 11 Barb. N. Y. 637, 639; Burrill, Ass. 2d ed. 3, nn. 1, 2; 26 Miss. 577; Hard. Ky. 562.

6. The most extensive class of assignments are the general assignments in trust made by insolvent and other debtors for the discharge of their debts. In most of the states of the United States these are regulated by state statutes (*q. v.*). 3 Sumn. C. C. 345; 10 Paige, Ch. N. Y. 445; 1 N. Y. 101; 20 Ga. 44.

Independently of bankrupt and insolvent laws, priorities and preferences in favor of particular creditors are allowed. Such preference is not considered generally unequitable, or a stipulation that the creditors taking under it shall release and discharge the debtor from all further claims. 4 Mass. 206; 5 *id.* 153; 6 *id.* 342; 5 Me. 245; 41 *id.* 277; 9 Ind. 88; 6 *id.* 176; 4 Wash. C. C. 232; 13 Serg. & R. Penn. 132; 4 Dall. Penn. 76, 85; 2 Dutch. N. J. 23; 4 Zabr. N. J. 162; 2 Cal. 107; 16 Ill. 435; 17 Ga. 430; 2 Paine, C. C. 180; 3 Du. N. Y. 1; 15 Johns. N. Y. 571; 11 Wend. N. Y. 187; 7 Md. 88, 381; 5 Gill & J. Md. 187; 3 Ala. 86; 5 *id.* 139; 29 *id.* 266; 5 N. H. 113; 7 Pet. 608; 11 Wheat. 78; 6 Conn. 277; 8 *id.* 505; 26 Miss. 423; 6 Fla. 62.

7. *How made.* It used to be held that the instrument of assignment must be of as high a character and nature as the instrument transferred; but now a parol (usually written) assignment may transfer a deed, if the deed be at the same time delivered. 1 Dev. No. C. 354; 2 Jones, No. C. 224; 13 Mass. 304; 15 *id.* 481; 2 Me. 234; 3 *id.* 346; 26 *id.* 448; 17 Johns. N. Y. 284, 292; 19 *id.* 342; 1 E. D. Smith, N. Y. 414; 5 Ad. & E. 107; 4 Taunt. 326; 1 Ves. Sen. Ch. 332, 348; 2 *id.* 6; 1 Madd. Ch. 53; 2 Rosc. Bank. 271; 1 Harr. & J. Md. 114, 274; 2 Ohio, 56, 221; 11 Tex. 273; 26 Ala. N. S. 292. See 5 Halst. N. J. 156. When the transfer of personal chattels is made by an instrument as formal as that required in the assignment of an interest in lands, it is commonly called a *bill of sale* (which see). 2 Stephen, Comm. 104. In most cases, however, personal chattels are transferred by mere note or memorandum, or, as in the case of negotiable paper, by mere endorsement. 3 E. D. Smith, N. Y. 555; 6 Cal. 247; 28 Miss. 56; 15 Ark. 491.

8. The *proper technical* and *operative* words in assignment are "assign, transfer, and set over;" but "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will work an assignment. Watkins, Conv., Preston ed. b. 2, c. ix.

No consideration is necessary to support

the assignment of a term. 1 Mod. 263; 3 Munf. Va. 556; 2 E. D. Smith, N. Y. 469. Now all assignments, by the statute of frauds, of chattels *real*, must be made by deed or note in writing, signed by the assigning party or his agent thereunto lawfully authorized by writing. 1 Bos. & P. 270. If a tenant assigns the whole or a part of an estate for a part of the time, it is a sub-lease, and not an assignment. 1 Gray, Mass. 325; 2 Paige, Ch. N. Y. 68; 2 Ohio, 369; 1 Washburn, Real, Prop. 327.

9. *Effect of.* During the continuance of the assignment, the assignee is liable on all covenants running with the land, but may rid himself of such continuing liability by transfer to a mere beggar. 2 H. Blackst. 133; 5 Coke, 16; 3 Burr. 1271; 1 Bos. & P. 21; 2 Bridgman, Eq. Dig. 138; 1 Vern. Ch. 87; 2 *id.* 103; 8 Ves. Ch. 95; 1 Schoales & L. Ch. Jr. 310; 1 Ball & B. Ch. Jr. 238; Dougl. 56, 183. By the assignment of a right all its accessories pass with it: for example, the collateral security, or a lien on property, which the assignor of a bond had, will pass with it when assigned. 1 Stockt. N. J. 592; 5 Litt. Ky. 248; 3 Bibb, Ky. 291; 4 B. Monr. Ky. 529; 2 Dan. Ky. 98; 1 Penn. St. 454; 1 Penn. 280; 5 Watts, Penn. 529; 9 Cow. N. Y. 747; 2 Yerg. Tenn. 84. So, also, what belongs to the thing by the right of accession is assigned with it. 7 Johns. Cas. N. Y. 90; 6 Pick. Mass. 360; 31 N. H. 562.

10. The assignee of a chose in action in a court of law must bring the action in the name of the assignor in whose place he stands; and every thing which might have been shown in defence against the assignor may be used against the assignee. 18 Eng. L. & Eq. 82; 8 Me. 77; 29 *id.* 9; 42 *id.* 221; 6 Ga. 119; 1 Barb. N. Y. 114, 131; 15 *id.* 506; 2 Johns. Ch. N. Y. 441; 9 Cow. N. Y. 34; 3 N. H. 82, 539; 2 Wash. Va. 233; 4 Rand. Va. 266; 5 Mass. 201, 214; 6 Pick. Mass. 316; 10 Cush. Mass. 92; 2 Miss. 96; 11 *id.* 488; 28 *id.* 56; 13 Ill. 486; 1 Stockt. N. J. 146; 1 Dutch. N. J. 506; 2 South. N. J. 817; Coxe, N. J. 177; 3 Day, Conn. 364; 7 Conn. 399; 4 Litt. Ky. 435; 9 Ala. 60; Harp. So. C. 17; 2 Cranch, 342; 1 Wheat. 236; 7 Pet. 608; 1 Dall. 268; 2 Penn. 361, 463; 1 Bay, So. C. 173; 1 M'Cord, So. C. 219; 5 Mas. C. C. 215; 1 Paine, C. C. 525; 3 McLean, C. C. 147; 3 Hayw. Tenn. 199; 1 Humphr. Tenn. 155; 11 Md. 251. But in a court of equity the assignee may sue in his own name, but can only go into equity when his remedy at law fails. Freem. Ch. 145; 1 Ves. Ch. 331, 409; 3 Mer. Ch. 86; 2 Vern. Ch. 692; 1 Younge & C. Ch. 481; 1 Pick. Mass. 485–493; 4 Mass. 508, 511; 4 Rand. Va. 392; 30 Me. 419; 32 *id.* 203, 342; 2 Johns. Ch. N. Y. 441; 8 Wheat. 268. Such an assignment is considered as a declaration of trust. 10 Humphr. Tenn. 342; 3 P. Will. Ch. 199; 2 *id.* 603; 1 Ves. Ch. 411; 5 Pet. 597; 1 Wheat. 235; 5 *id.* 277; see 5 Paige, Ch. N. Y. 539; 6 *id.* 583; 6 Cranch, 335; but all the equitable defences exist. 3 Yeates, Penn. 327; 1 Binn. Penn. 429; 8 Wheat. 268.

11. A valid assignment of a policy of insurance in the broadest legal sense, by consent of the underwriters, by statute, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, not being negotiable in its character, is assignable only in equity, and not even so if it has, as it sometimes has, a condition to the contrary. 1 Phillips, Ins. c. 1, sect. x.; 3 Md. 244, 341; 8 Cush. Mass. 393; 10 *id.* 350; 15 Barb. N. Y. 413; 16 *id.* 511; 20 *id.* 339; 23 *id.* 623; 28 *id.* 116; 17 N. Y. 391; 5 Du. N. Y. 101; 25 Ala. N. S. 353; 30 N. H. 231; 3 Sneed, Tenn. 565; 42 Me. 221; 26 Conn. 165; 31 Penn. St. 438; 18 Eng. L. & Eq. 427; 22 *id.* 590. A debtor making an assignment for the benefit of his creditors may legally choose his own trustees, and the title passes out of him to them. 21 Barb. N. Y. 65; 1 Binn. Penn. 514; 18 Ark. 85, 123; 24 Conn. 180. The assent of creditors will ordinarily be presumed. 29 Ala. N. S. 112; 4 Mass. 183, 206; 5 *id.* 153; 8 Pick. Mass. 113; 2 Conn. 633; 9 Serg. & R. Penn. 244; 8 Me. 411. In some states the statutes provide that the assignment shall be for the benefit of all creditors equally.

12. Assignments are peculiarly the objects of equity jurisdiction, 2 Bligh, 171, 189; 1 Ventr. 128; 9 Barnew. & C. 300; 7 Wheat. 556; 11 *id.* 78; 4 Johns. Cas. N. Y. 529; 1 *id.* 205; 1 *id.* 119, 129; and bona fide assignments will in most cases be upheld in equity courts, 8 Me. 17; Paine, C. C. 525; 1 Wash. C. C. 424; 14 Serg. & R. Penn. 137; T. U. P. Charlt. Ga. 230; 12 Johns. N. Y. 343; 1 Paige, Ch. N. Y. 41; 22 Barb. N. Y. 550; but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as in law, and fraud will defeat an assignment. By some of the state statutes regulating assignments, the assignee may bring an action in his own name in a court of law, but the equities in defence are not excluded. Among these states are New York, Maryland, Ohio, Missouri, Arkansas, Mississippi, Louisiana, California. See 6 Ohio, 271; 6 Yerg. Tenn. 572; 3 Dan. Ky. 142; 2 Pet. 239; 1 Miss. 69.

ASSIGNMENT OF DOWER. The act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her.

The assignment may be made *in pais* by the heir or his guardian, or the devisee or other persons seised of the lands subject to dower, 2 Penn. N. J. 521; 19 N. H. 240; 23 Pick. Mass. 80, 88; 4 Ala. N. S. 160; 4 Me. 67; 2 Ind. 388; Tudor, Lead. Cas. 51; or it may be made after a course of judicial proceedings, where a voluntary assignment is refused. In this case the assignment will be made by the sheriff, who will set off her share by metes and bounds. 2 Blackstone, Comm. 136; 1 Washburn, Real Prop. 229. The assignment should be made within forty days after the death of the husband, during which time the widow shall remain in her husband's capital mansion-house. See 20 Ala. N. S.

662; 7 T. B. Monr. 337; 5 Conn. 462; 1 Washburn, Real Prop., 222, n., 227. The share of the widow is usually one-third of all the real estate of which the husband has been seised during coverture; and no writing or livery is necessary in a valid assignment, the dowress being *in*, according to the view of the law, of the seisin of her husband. The remedy of the widow, when the heir or guardian refuses to assign dower, is by a writ of dower *unde nihil habet*. 4 Kent, Comm. 63. If the guardian of a minor heir assign more than he ought, the heir on coming of age may have the writ of admeasurement of dower. 2 Ind. 336; 1 Pick. Mass. 314; Coke, Litt. 34, 35; Fitzherbert, Nat. Brev. 148; Finch, 314; Stat. Westm. 2 (13 Edw. I.), c. 7; 1 Washburn, Real Prop. 222–250; 1 Kent, Comm. 63, 69; 2 Bouvier, Inst. n. 1743.

ASSIGNMENT OF ERRORS. In Practice. The statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of.

It corresponds with the declaration in an ordinary action. 2 Tidd, Pract. 1168; 3 Stephen, Comm. 644. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them. 18 Ala. 186; 15 Conn. 83; 4 Miss. 77.

ASSIGNOR. One who makes an assignment; one who transfers property to another.

2. In general, the assignor can limit the operation of his assignment, and impose whatever condition he may think proper; but when he makes a general assignment in trust for the use of his creditors, he can impose no condition whatever which will deprive them of any right, 14 Pick. Mass. 123; 2 *id.* 129; 15 Johns. N. Y. 151; 20 *id.* 442; 7 Cow. N. Y. 735; 5 *id.* 547; nor any condition forbidden by law, as giving preference when the law forbids it.

ASSIGNS. Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators, and assigns."

ASSISA (Lat. *assidere*). A kind of jury or inquest. *Assisa vertitur in juratum.* The assize has been turned into a jury.

A writ: as, an assize of *novel disseisin*, assize of common pasture.

An ordinance: as, *assisa panis.* Spelman, Gloss.; Littleton, § 234; 3 Sharswood, Blackst. Comm. 402.

A fixed specific time, sum, or quantity. A tribute; tax fixed by law; a fine. Spelman, Gloss.

Assisa armorum. A statute ordering the keeping arms.

Assisa cadere. To be nonsuited. Cowel; 3 Blackstone, Comm. 402.

Assisa continuanda. A writ for the continuation of the assize to allow the production of papers. Reg. Orig. 217.

Assisa de foresta. Assize of the forest, which see.

Assisa mortis d'ancestoris. Assize of *mort d'ancestor*, which see.

Assisa panis et cerevisiæ. Assize of bread and ale; a statute regulating the weight and measure of these articles.

Assisa proroganda. A writ to stay proceedings where one of the parties is engaged in a suit of the king. Reg. Orig. 208.

Assisa ultimæ præsentationis. Assize of *darrein presentment.*

Assisa venalium. Statutes regulating the sale of certain articles. Spelman, Gloss.

ASSISORS. In Scotch Law. Jurors.

ASSIZE (Lat. *assidere*, to sit by or near, through the Fr. *assisa*, a session).

In English Law. A writ directed to the sheriff for the recovery of immovable property, corporeal or incorporeal. Cowel; Littleton, § 234.

The action or proceedings in court based upon such a writ. Magna Charta, c. 12; Stat. 13 Edw. I. (Westm. 2) c. 25; 3 Blackstone, Comm. 57, 252; Sellon, Pract. Introd. xii.

Such actions were to be tried by special courts, of which the judicial officers were justices of assize. See COURTS OF ASSIZE AND NISI PRIUS. This form of remedy is said to have been introduced by the parliament of Northampton (or Nottingham, A.D. 1176), for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown than before the suitors in the county court or the king's justiciars in the Aula Regis. The action is properly a mixed action, whereby the plaintiff recovers his land and damages for the injury sustained by the disseisin. The value of the action as a means for the recovery of land led to its general adoption for that purpose, those who had suffered injury not really amounting to a disseisin alleging a disseisin to entitle themselves to the remedy. The scope of the remedy was also extended so as to allow the recovery of incorporeal hereditaments, as franchises, estovers, etc. It gave place to the action of ejectment, and is now abolished, having been previously almost, if not quite, entirely disused. Stat. 3 & 4 Will. IV. c. 27, § 36. Stearns, Real Act. 187.

A jury summoned by virtue of a writ of assize.

Such juries were said to be either *magna* (grand), consisting of sixteen members and serving to determine the right of property, or *parva* (petite), consisting of twelve and serving to determine the right to possession. Mirror of Just. lib. 2.

This sense is said by Littleton and Blackstone to be the original meaning of the word. Littleton, § 234; 3 Blackstone, Comm. 185. Coke explains it as denoting originally a *session* of justices; and this explanation is sanctioned by the etymology of the word. Coke, Litt. 153 *b*. It seems, however, to have been early used in all the senses here given. The recognitors of assize (the jurors) had the power of deciding, upon their own knowledge, without the examination of witnesses, where the issue was joined on the very point of the assize; but collateral matters were tried either by a jury or by the recognitors acting as a jury, in which latter case it was said to be turned into a jury (*assisa vertitur in juratum*). Booth, Real Act. 213; Stearns, Real Act. 187; 3 Blackstone, Comm. 402. The term is no longer used, in England, to denote a jury.

The verdict or judgment of the jurors or recognitors of assize. 3 Blackstone, Comm. 57, 59.

A court composed of an assembly of knights

and other substantial men, with the baron or justice, in a certain place, at an appointed time. Grand Coutum. cc. 24, 25.

An ordinance or statute. Littleton, § 234; Reg. Orig. 239. Any thing reduced to a certainty in respect to number, quantity, quality, weight, measure, etc. 2 Sharswood, Blackst. Comm. 42; Cowel; Spelman, Gloss. *Assisa.* See the articles immediately following.

In Scotch Law. The jury, consisting of fifteen men, in criminal cases tried in the court of justiciary. Paterson, Comp.; Bell, Dict.

ASSIZE OF DARREIN PRESENTMENT. A writ of assize which formerly lay for a person who had himself, or whose ancestors had upon the last preceding avoidance, presented a clerk to a benefice where a stranger presented a clerk for the purpose of obtaining a writ commanding the bishop to institute the patron's clerk, and to obtain damages for the interference. 3 Sharswood, Blackst. Comm. 245; Stat. 13 Edw. I. (Westm. 2) c. 5. It has given way to the remedy by *quare impedit.*

ASSIZE OF FRESH FORCE. A writ of assize which lay where the disseisin had been committed within forty days. Fitzherbert, Nat. Brev. 7.

ASSIZE OF MORT D'ANCESTOR. A writ of assize which lay to recover possession of lands against an abator or his alienee.

It lay where the ancestor from whom the claimant derived title died seised. Cowel; Spelman, Gloss.; 3 Sharswood, Blackst. Comm. 185.

ASSIZE OF NOVEL DISSEISIN. A writ of assize which lay where the claimant had been lately disseised. The action must have been brought subsequent to the next preceding session of the eyre or circuit of justices, which took place once in seven years. Coke, Litt. 153; Booth, Real Act. 210.

ASSIZE OF NUISANCE. A writ of assize which lay where a nuisance had been committed to the complainant's freehold.

The complainant alleged some particular fact done which worked an injury to his freehold (*ad nocumentum liberi tenementi sui*), and, if successful, recovered judgment for the abatement of the nuisance and also for damages. Fitzherbert, Nat. Brev. 183; 3 Sharswood, Blackst. Comm. 221; 9 Coke, 55.

ASSIZE OF UTRUM. A writ of assize which lay for a parson to recover lands which his predecessor had improperly allowed the church to be deprived of. 3 Blackstone, Comm. 257.

ASSIZES. Sessions of the justices or commissioners of assize.

These assizes are held twice in each year in each of the various shires of England, with some exceptions, by virtue of several commissions, for the trial of matters of fact in issue in both civil and criminal cases. They still retain the ancient name in popular language, though the commission of assize is no longer issued. 3 Stephen, Comm. 424, n. See ASSIZE; NISI PRIUS; COMMISSION OF ASSIZE; COURTS OF ASSIZE AND NISI PRIUS.

ASSIZES DE JERUSALEM. A code of feudal law prepared at a general assembly of lords after the conquest of Jerusalem.

It was compiled principally from the laws and customs of France. It was reduced to form by Jean d'Iblin, *Comte de Japhe et Ascalon*, about the year 1290. 1 Fournel, *Hist. des Av.* 49; 2 Dupin, *Prof. des Av.* 674–680; Stephen, Plead. App. xi.

ASSOCIATION (Lat. *ad*, to, and *sociare*, —from *socius*, a companion).

The act of a number of persons in uniting together for some purpose.

The persons so joining.

In English Law. A writ directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Sharswood, Blackst. Comm. 59.

ASSOIL (spelled also *assoile*, *assoilyie*). To set free; to deliver from excommunication. Stat. 1 Hen. IV. c. 7; Cowel.

ASSUMPSIT (Lat. *assumere*, to assume, to undertake; *assumpsit*, he has undertaken).

In Contracts. An undertaking, either express or implied, to perform a parol agreement. 1 Lilly, Reg. 132.

Express assumpsit is an undertaking made orally by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made any express promise.

2. The law presumes such an undertaking to have been made, on the ground that everybody is supposed to have undertaken to do what is, in point of law, just and right. Such an undertaking is never implied where the party has made an express one, 2 Term, 100; 10 Mass. 192; 20 Am. Jur. 7; nor ordinarily against the express declaration of the party to be charged, 1 Me. 125; 13 Pick. Mass. 165; nor will it be implied unless there be a request or assent by the defendant shown, 20 N. H. 490; 1 Greenleaf, Ev. § 107, though such request or assent may be inferred from the nature of the transaction, 1 Dowl. & L. 984; 15 Conn. 52; 28 Vt. 401; 2 Dutch. N. J. 49, or from the silent acquiescence of the defendant, 22 Am. Jur. 2–11; Metc. Yelv. 41, n.; 14 Johns. N. Y. 378; 2 Blatchf. C. C. 343, or even contrary to fact on the ground of legal obligation. 1 H. Blackst. 90; 3 Campb. 298; 6 Mod. 171; 14 Mass. 227; 10 Pick. Mass. 156; 4 Me. 258; 20 Am. Jur. 9; 22 *id.* 2; 13 Johns. N. Y. 480.

3. In Practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract. 7 Term, 351; 3 Johns. Cas. N. Y. 60.

It differs from *debt*, since the amount claimed need not be liquidated (see DEBT), and from *covenant*, since

it does not require a contract under seal to support it. See COVENANT. See 4 Coke, 91; 4 Burr. 1008; 14 Pick. 428; 2 Metc. 181. Assumpsit is one of the class of actions called actions upon the case, and in the older books is called action upon the case upon assumpsit. Comyns, Dig.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. See 2 Smith, Lead. Cas. 5th Am. ed. 14.

4. *The action should be brought by* the party from whom the consideration moved, 1 Ventr. 318; 3 Bos. & P. 149, n.; 14 East, 582; Metc. Yelv. 1, 25, n.; 4 Barnew. & C. 664; 17 Mass. 404, 575; 3 Pick. Mass. 83, 92; 8 Johns. 58; 13 *id.* 497; 1 Pet. C. C. 169; 22 Am. Jur. 1–19, or by the person for whose benefit it was paid, 15 Me. 285, 443; 1 Rich. So. C. 268; 5 Blackf. Ind. 179; 17 Ala. 333, against the party who made the undertaking; suing the principal to recall money paid to the agent. See 4 Burr. 1984; 1 Sumn. C. C. 277, 317. It lies for a corporation, 2 Lev. 252; 1 Campb. 466; and against it, in the United States, 7 Cranch, 297; 9 Pet. 541; 3 Serg. & R. Penn. 117; 4 *id.* 16; 12 Johns. N. Y. 231; 14 *id.* 118; 2 Bay, So. C. 109; 1 D. Chipm. Vt. 371, 456; 1 Ark. 180; 10 Mass. 397; 3 Halst. N. J. 182; 3 Serg. & R. Penn. 117; 4 *id.* 16; but not in England, unless by express authority of some legislative act. 1 Chitty, Plead. 98.

A promise or undertaking on the part of the defendant, either expressly made by him or implied by the law from his actions, constitutes the gist of the action. A sufficient consideration for the promise must be averred and shown, 21 Am. Jur. 258, 283; though it may be implied by the law, 7 Johns. 29, 321; 14 Pick. Mass. 210; 21 Am. Jur. 258, 283; as in case of negotiable promissory notes and bills, where a consideration is presumed to exist till its absence is shown. 6 Vt. 165; Story, Prom. Notes.

The action lies for—

5. *Money had and received* to the plaintiff's use, including all cases where one has money, or that which the parties have agreed to treat as money, 1 Greenleaf, Ev. § 117; 2 N. H. 333; 6 Cow. N. Y. 297; 8 Gill & J. Md. 333, in his hands, which in equity and good conscience he is bound to pay over; including bank-notes, 13 East, 20, 130; 17 Mass. 560; 7 Cow. N. Y. 662; 32 Ala. N. S. 523; promissory notes, 3 Mass. 405; 9 Pick. Mass. 293; 16 Me. 285; 7 Johns. N. Y. 132; 11 N. H. 218; 6 Blackf. Ind. 378; notes payable in specific articles, 7 Wend. N. Y. 311; and some kinds of evidences of debt, 3 Campb. 199; 8 Wend. N. Y. 641; 17 Mass. 560; 4 Pick. Mass. 71; but not goods, except under special agreement, 2 Burr. 2589; 1 East, 1; 7 Serg. & R. Penn. 246; 8 Term, 687; 3 Bos. & P. 559; 1 Younge & J. Exch. 380; 1 Dougl. 117; whether delivered to the defendant for a particular purpose to which he refuses to apply it, 14 East, 590, n.; 3 Price, Exch. 68; 3 Day, Conn. 252; 4 Cow. N. Y. 607; 3 Johns. N. Y. 183; 1 D. Chipm. Vt. 101; 1 Harr. Del. 446; see 2 Bingh. 7; 17 Mass. 575; or obtained by him through fraud, 1 Salk. 28; 4 Mass. 488; 4 Conn. 350; 30 Vt. 277; 4 Ind. 43, or by tortious seizure and conversion of the plaintiff's property, 5 Pick. Mass. 285; 10 *id.* 161; and see Cowp. 414; 1 Campb. 285; 8 Bingh. 43; see § 7, beyond; or by duress, imposition, or undue advantage or other involuntary and wrongful payment, 2 Barnew. & C. 729; 6 Q. B. 276; 5 *id.* 526; 7 Mann. & G. 586; 2 N. H. 238; 3 *id.* 508; 9 Johns. N. Y. 370; 20 *id.* 290; 7 Me. 135; 17 Mass. 461; 12 Pick. Mass. 206; 26 Barb. N. Y. 23; 4 Ind. 43; 6 Conn. 223; 24 *id.* 88; 10 Pet. 137; 28 Vt. 370; see 2 Jac. & W. Ch. 249; 7 Term, 265; 9 Bingh. 644; or for a security which turns out to be a forgery, under some circumstances, 3 Taunt. 127; 6 *id.* 76; 3 Barnew. & C. 428; 4 Bingh. 253; 26 Conn. 23; 30 Penn. St. 527; 4 Ohio St. 628; or paid under a mistake of facts, 9 Bingh. 647; 6 Mass. 84; 12 *id.* 36; 15 *id.* 208; 1 Wend. N. Y. 355; 3 *id.* 412; 6 Yerg. Tenn. 483; 26 Barb. N. Y. 423; 4 Gray, Mass. 388; see 2 Term, 648; 15 Me. 45; 20 Wend. 174; 18 B. Monr. Ky. 793; or upon a consideration which has failed, 1 Strange, 407; 1 Term, 732; 8 *id.* 516; 3 Bos. & P. 181; 6 Mass. 182; 14 *id.* 425; 17 *id.* 1; 2 Johns. N. Y. 455; 5 *id.* 85; 15 *id.* 504; 20 *id.* 24; 15 N. Y. 9; 9 Cal. 338; 4 Gill and J. Md. 463; 13 Serg. & R. Penn. 259; 4 Conn. 350; 9 Ind. 1; 10 *id.* 172; 15 Tex. 224; see 18 B. Monr. Ky. 523; or under an agreement which has been rescinded without partial performance. 2 Carr. & P. 514; 3 *id.* 407; 1 Vt. 159; 30 *id.* 432; 5 Ohio, 286; 13 Mass. 139; 15 *id.* 319; 5 Johns. N. Y. 85; 12 *id.* 363; Mart. & Y. Tenn. 20, 203; 2 Nott & M'C. So. C. 65; 20 N. H. 102.

6. *Money paid for the use of another*, including negotiable securities, 9 Mass. 553; 4 Pick. Mass. 444; 3 N. H. 366; 3 Johns. N. Y. 206; 5 Rawle, Penn. 91, 98; 2 Vt. 213; 6 Me. 331; see 6 Me. 80; 7 *id.* 355; 1 Wend. N. Y. 424; 7 Serg. & R. Penn. 238; 11 Johns. N. Y. 464, where the plaintiff can show a previous request, 20 N. H. 490; or subsequent assent, 12 Mass. 11; 1 Greenleaf, Ev. § 113; see *before*, § 2; or that he paid it for a reasonable cause, and not officiously, 4 Taunt. 190; 1 H. Blackst. 90, 93; 5 Esp. 171; 8 Term, 310; 3 Mees. & W. Exch. 607; 16 Mass. 40; but a mere voluntary payment of another's debt will not make the person paying his creditor. 1 N. Y. 472; 1 Gill & J. Md. 433, 497; 5 Cow. N. Y. 603; 3 Ala. 500; 4 N. H. 138; 20 *id.* 490.

Money lent, including negotiable securities of such a character as to be essentially money, 11 Jur. 157, 289; 6 Mass. 189; 12 Pick. Mass. 126; 15 *id.* 212; 9 Metc. Mass. 278, 417; 2 Johns. N. Y. 235; 12 *id.* 90; 5 Wend. N. Y. 490; 7 *id.* 311; 3 Gill & J. Md. 369; 11 N. H. 218; 18 Me. 296; 3 J. J. Marsh. Ky. 37; 21 Ga. 384; see 10 Johns. N. Y. 418; 1 Hawks. Tenn. 195; 9 Ohio, 5;

16 Mees. & W. Exch. 449, actually loaned by the plaintiff to the defendant himself. 1 Dane, Abr. 196.

7. *Money found to be due upon an account stated*, called an *insimul computassent*, for the balance so found to be due, without regard to the nature of the evidences of the original debt. 1 Ventr. 268; 2 Term, 479; 3 Barnew. & C. 196; 4 Price, Exch. 260; 3 Carr & P. 170; 1 Johns. N. Y. 36; 12 *id.* 227; 6 Mass. 358; 6 Metc. Mass. 127; 7 Watts, Penn. 100; 11 Leigh, Va. 471; 10 N. H. 532.

Goods sold and delivered either in accordance with a previous request, 9 Conn. 379; 6 Harr. & J. Md. 273; 1 Bosw. N.Y. 417; 32 Penn. St. 506; 35 N. H. 477; 28 Vt. 666; or where the defendant receives and uses them, 6 J. J. Marsh. Ky. 441; 12 Mass. 185; 41 Me. 565; although tortiously. 3 N. H. 384; 1 Mo. 430, 643. See 5 Pick. Mass. 285. See TROVER.

8. *Work performed*, 11 Mass. 37; 14 *id.* 176; 19 Ark. 671; 1 Hempst. C. C. 240, and materials furnished, 7 Pick. Mass. 181, with the knowledge of the defendant, 20 Johns. N. Y. 28; 2 Cons. So. C. 348; 1 M'Cord, So. C. 22; 19 Ark. 671, so that he derives benefit therefrom, 27 Mo. 308; 11 Ired. 84, whether there be an express contract or not. As to whether any thing can be recovered where the contract is to work a specified time and the labor is performed during a portion of that time only, see 29 Vt. 219; 25 Conn. 188; 2 E. D. Smith, N. Y. 192; 6 Ohio St. 505; 1 Sneed, Tenn. 622; 24 Barb. N. Y. 174; 23 Mo. 228.

Use and occupation of the plaintiff's premises under a parol contract express or implied, 7 J. J. Marsh. 6; 1 Yeates, Penn. 576; 13 Johns. N. Y. 240; 4 Day, Conn. 28; 11 Pick. Mass. 1; 4 Hen. & M. Va. 161; 1 Munf. Va. 407; 3 Harr. N. J. 214; 1 How. 153; 30 Vt. 277; 31 Ala. N. S. 412; 41 Me. 446; 3 Cal. 196; 4 Gray, Mass. 329; but not if it be tortious, 2 Nott & M'C. So. C. 156; 3 Serg. & R. Penn. 500; 2 Gill & J. Md. 326; 10 *id.* 149; 6 N. H. 298; 6 Ohio, 371; 14 *id.* 244; 10 Vt. 502; see 20 Me. 525; or where defendant enters under a contract for a deed. 6 Johns. 46; 3 Conn. 203; 4 Ala. 294; 7 Pick. Mass. 301; 2 Dan. Ky. 295. The relation of landlord and tenant must exist expressly or impliedly. 1 Dutch. N. J. 293; 6 Ind. 412; 19 Ga. 313.

9. *And in many other cases*, as, for instance, for a breach of promise of marriage, 2 Mass. 73; 2 Overt. Tenn. 233; to recover the purchase-money for land sold, 14 Johns. N. Y. 162, 210; 20 *id.* 338; 3 M'Cord, So. C. 421; and, specially, upon wagers, 2 Chitty, Plead. 114; feigned issues, 2 Chitty, Plead. 116; upon foreign judgments, Dougl. 1; 3 East, 221; 11 *id.* 124; 3 Term, 493; 8 Mass. 273; 5 Johns. N. Y. 132; but not on a judgment obtained in a sister state, 1 Bibb, Ky. 361; 19 Johns. N. Y. 162; 11 Me. 94; 14 Vt. 92; 2 Rawle, Penn. 431; and see 2 Brev. No. C. 99; money due under an award, 9 Mass. 198; 21 Pick. Mass. 247; where the defendant has obtained possession of the plaintiff's property by a tort for which trespass or case would lie, 10 Pick. Mass. 161; 3 Dutch. N. J. 43; 5 Harr. Del. 38; 21 Ga. 526; or, having rightful possession, has tortiously sold the property, 4 Pick. Mass. 452; 5 *id.* 285; 12 *id.* 120; 1 J. J. Marsh. Ky. 543; 3 Watts, Penn. 277; 4 Binn. Penn. 374; 3 Dan. Ky. 552; 1 N. H. 151; 4 Call. Va. 451; 2 Gill & J. Md. 326; 3 Wisc. 649; or converted it to his own beneficial use. W. Blackst. 827; 1 Dougl. 167, n.; 4 Term, 211; 3 Maule & S. 191; Cowp. 372; 10 Mass. 436; 13 *id.* 454; 2 Pick. Mass. 285, n.; 7 *id.* 133; 10 Metc. 231; 1 N. H. 451; 3 *id.* 384; 5 Me. 323; 41 *id.* 565; 29 Ala. N. S. 332; 41 Me. 565; 1 Hempst. C. C. 240; 3 Sneed, Tenn. 454; 3 Iowa, 599.

The action may be brought for a sum specified in the promise of the defendant, or for the definite amount of money ascertained by computation to be due, or for as much as the services, etc. were worth (called a *quantum meruit*), or for the value of the goods, etc. (called a *quantum valebant*).

10. The *form* of the action, whether general or special, depends upon the nature of the undertaking of the parties, whether it be express or implied, and upon other circumstances. In many cases where there has been an express agreement between the parties, the plaintiff may neglect the special contract and sue in general assumpsit. He may do this: *first*, where the contract is executed, Fitzg. 303; 2 Dougl. 651; 4 Bos. & P. 355; 1 Bingh. 34; 5 Barnew. & C. 628; 7 Johns. N. Y. 132; 18 *id.* 451; 10 Mass. 287; 19 Pick. Mass. 496; 8 Metc. Mass. 16; 11 Wheat. 237; 3 T. B. Monr. Ky. 405; 7 Vt. 228; 5 Harr. & G. Md. 45; 3 M'Cord, So. C. 421; 18 Ga. 364, and is for the payment of money, 2 Munf. Va. 344; 6 *id.* 506; 1 J. J. Marsh. Ky. 394; 3 T. B. Monr. Ky. 405; 1 Bibb, Ky. 395; 4 Gray, Mass. 292; though, if a time be fixed for its payment, not until the expiration of that time, 1 Stark. 229: *second*, where the contract, though only partially executed, has been abandoned by mutual consent, 7 Term, 181; 2 East, 145; 12 Johns. N. Y. 274; 16 Wend. N. Y. 632; 12 *id.* 334; 15 *id.* 87; 16 Me. 283; 11 Rich. So. C. 42; 7 Cal. 150; see 29 Penn. St. 82, or extinguished and rescinded by some act of the defendant, 11 Me. 317; 2 Blackf. Ind. 167; 2 Speers, So. C. 148; 20 N. H. 457; see 4 Cranch, 239: *third*, where that which the plaintiff has done has been performed under a special agreement, but not in the time or manner agreed, but yet has been beneficial to the defendant and has been accepted and enjoyed by him. 1 Bingh. 34; 13 Johns. N. Y. 94; 4 Cow. N. Y. 564; 14 Mass. 282; 1 Sandf. N. Y. 206; 5 Gill & J. Md. 240; 8 Yerg. Tenn. 411; 12 Vt. 625; 7 Mo. 530; 23 *id.* 228; 3 Ind. 59, 72; 5 Mich. 449; 3 Iowa, 90; 3 Wisc. 323. See 1 Greenleaf, Ev. § 104; 2 Smith, Lead. Cas. 14, 15; 31 Penn. St. 218.

A surety who has paid money for his prin-

cipal may recover upon the common counts, though he holds a special agreement of indemnity from the principal. 1 Pick. Mass. 118. But in general, except as herein stated, if there be a special agreement, special assumpsit must be brought thereon. 14 B. Monr. Ky. 177; 22 Barb. N. Y. 239; 2 Wisc. 34; 14 Tex. 414.

11. *The declaration* should state the contract in terms, in case of a special assumpsit; but, in general, assumpsit contains only a general recital of a consideration, promise, and breach. Several of the common counts are frequently used to describe the same cause of action. Damages should be laid in a sufficient amount to cover the real amount of the claims. See 4 Pick. Mass. 194; 2 Cons. So. C. 339; 4 Munf. Va. 95; 5 *id.* 23; 2 N. H. 289; 1 Ill. 286; 4 Johns. N. Y. 280; 6 Cow. N. Y. 151; 1 Hall, N. Y. 201; 5 Serg. & R. Penn. 519; 11 *id.* 27; 6 Conn. 176; 9 *id.* 508; 2 Bibb, Ky. 429.

Non assumpsit is the usual plea under which the defendant may give in evidence most matters of defence. Comyns, Dig. *Pleader* (2 G 1). Where there are several defendants, they cannot plead the general issue severally, 6 Mass. 444; nor the same plea in bar severally. 13 Mass. 152. The plea of not guilty is defective, but is cured by verdict. 8 Serg. & R. Penn. 541; 4 Call. Va. 451. See, generally, Bacon, Abr.; Comyns, Dig. *Action upon the case upon assumpsit;* Dane, Abr.; Viner, Abr.; 1 Chitty, Plead.; Lawes, Assump.; 1 Greenleaf, Ev.; Bouvier, Inst. Index; COVENANT DEBT; JUDGMENT.

ASSURANCE. **In Conveyancing.** Any instrument which confirms the title to an estate.

Legal evidence of the transfer of property. 2 Blackstone, Comm. 294.

The term *assurances* includes, in an enlarged sense, all instruments which dispose of property, whether they be the grants of private persons, or not; such are fines and recoveries, and private acts of the legislature. Eunom. Dial. 2, s. 5.

In Commercial Law. Insurance.

ASSURED. A person who has been insured by some insurance company, or underwriter, against losses or perils mentioned in the policy of insurance.

The party whom the underwriters agree to indemnify in case of loss. 1 Phillips, Ins. sect. 2. He is sometimes designated in maritime insurance by description, and not by name, as in a policy "for whom it may concern." 3 Rich. Eq. So. C. 274; 40 Me. 181; 10 Cush. Mass. 87; 6 Gray, Mass. 192; 27 Penn. St. 268; 33 N. H. 9; 12 Md. 315, 348.

ASSURER. An insurer; an underwriter.

ASSYTHEMENT. **In Scotch Law.** Damages awarded to the relative of a murdered person from the guilty party, who has not been convicted and punished. Paterson, Comp.

The action to recover it lies for the personal representatives, 26 Scott. Jur. Sc. 156; and may be brought by collateral relations. 27 Scott. Jur. Sc. 450.

ASTRICT. **In Scotch Law.** To assign to a particular mill.

Used of lands the occupants of which were bound to grind at a certain mill. Bell, Dict.; Paterson, Comp. n. 290; Erskine, Inst. 2. 9. 18, 32.

ASTRIHILTET. **In Saxon Law.** A penalty for a wrong done by one in the king's peace. The offender was to replace the damage twofold. Spelman, Gloss.

AT LAW. According to the course of the common law. In the law.

ATAMITA (Lat.). **In Civil Law.** A great-great-great-grandfather's sister.

ATAVUNCULUS (Lat.). **In Civil Law.** A great-great-great-grandfather's brother.

ATAVUS. **In Civil Law.** The male ascendant in the fifth degree.

ATHA. **In Saxon Law.** (Spelled also *Atta, Athe, Atte.*) An oath. Cowel; Spelman, Gloss.

Athes, or *Athaa*, a power or privilege of exacting and administering an oath in certain cases. Cowel; Blount.

ATHEIST. One who does not believe in the existence of a God.

Such persons are, at common law, incapable of giving testimony under oath, and, therefore, incompetent witnesses. Buller, Nisi P. 292. See 1 Atk. Ch. 21; 2 Cow. N. Y. 431, 433, n.; 5 Mas. C. C. 18; 13 Vt. 362. To render a witness competent, there must be superadded a belief that there will be a punishment for swearing falsely, either in this world or the next. 14 Mass. 184; 1 Greenleaf, Ev. § 370. See 7 Conn. 66; 18 Johns. N. Y. 98; 17 Wend. N. Y. 460; 2 Watts & S. Penn. 262; 10 Ohio, 121. The disability resulting from atheism has been wholly or partly removed in many of the states of the United States. 1 Greenleaf, Ev. § 369, note.

ATILIUM (Lat.). Tackle; the rigging of a ship; plough-tackle. Spelman, Gloss.

ATMATERTERA (Lat.). **In Civil Law.** A great-great-great-grandmother's sister.

ATTACHMENT. Taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it.

A writ for the accomplishment of this purpose. This is the more common sense of the word.

Of Persons. A writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers, 3 Sharswood, Blackst. Comm. 280; 4 *id.* 283, or disregard of its authority in refusing to do what is enjoined, 1 Term, 266; Comp. 394, or by openly insulting the court. Saunders, Pl. Cr. 73 *b;* 4 Sharswood, Blackst. Comm. 283; 3 *id.*

17. It is to some extent in the nature of a criminal process. Strange, 441. See 5 Halst. N. J. 63; 1 Cow. N. Y. 121, n.; 1 Term, 266; Cowp. 394; Willes, 292.

2. Of Property. A writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.

In General.

The original design of this writ was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge. 3 Blackst. Comm. 280.

By an extension of this principle, in the New England states, property attached remains in the custody of the law after an appearance, until final judgment in the suit. See 7 Mass. 127.

In some states attachments are distinguished as foreign and domestic,—the former issued against a non-resident of the state, the latter against a resident. Where this distinction is preserved, the foreign attachment enures solely to the benefit of the party suing it out; while the avails of the domestic attachment may be shared by other creditors, who come into court and present their claims for that purpose.

3. In the New England states the attachment of the defendant's property, rights, and credits is an incident of the summons in all actions *ex contractu*. Elsewhere throughout the country the writ issues only upon cause shown by affidavit. And in most of the states its issue must be preceded by the execution by or on behalf of the plaintiff of a cautionary bond to pay the defendant all damage he may sustain by reason of the attachment. The grounds upon which the writ may be obtained vary in the different states. Wherever an affidavit is required as the basis of the attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ.

4. The remedy by attachment is allowed in general only to a *creditor*. In some states, under special statutory provisions, damages arising *ex delicto* may be sued for by attachment; but the almost universal rule is otherwise. The claim of an attaching creditor, however, need not be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. It is sufficient if the demand arise on contract, and that the contract furnish a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it. 3 Caines, N. Y. 323; 2 Wash. C. C. 382; 8 Gill, Md. 192; 1 Leigh, Va. 285; 11 Ala. N. s. 941; 4 Mart. La. 517; 2 Ark. 415; 2 Ind. 374; 3 Mich. 277.

5. In some states an attachment may, under peculiar circumstances, issue upon a debt not yet due and payable; but in such cases the debt must possess an actual character to become due *in futuro*, and not be merely possible and dependent on a contingency which may never happen. 15 Ala. 455; 13 La. 62.

6. Corporations, like natural persons, may be proceeded against by attachment. 9 N. H. 394; 15 Serg. & R. Penn. 173; 1 Rob. Va. 573; 5 Ga. 531; 14 La. 415; 4 Humphr. Tenn. 369; 9 Mo. 421.

7. Representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment. 1 Johns. Cas. N. Y. 372; 9 Wend. N. Y. 465; 4 Day, Conn. 87; 3 Halst. N. J. 179; 3 Green, N. J. 183; 2 Dall. 73, 97; 1 Harp. So. C. 125; 23 Ala. N. s. 369; 1 Mart. N. s. La. 202, 380; 1 Cranch, C. C. 352, 469.

8. The levy of an attachment does not change the estate of the defendant in the property attached. 1 Pick. Mass. 485; 7 Mass. 505; 3 McLean, C. C. 354; 1 Rob. La. 443; 31 Me. 177; 32 *id.* 233; 6 Humphr. Tenn. 151; 1 Swan, Tenn. 208; 3 B. Monr. Ky. 579. Nor does the attaching plaintiff acquire any property thereby. 1 Pick. Mass. 485; 3 Brev. So. C. 23; 2 Serg. & R. Penn. 221; 2 Harr. & J. Md. 96; 9 N. H. 488; 2 Penn. N. J. 997. Nor can he acquire through his attachment any higher or better rights to the property attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights are impaired. 31 Me. 177.

9. The levy of an attachment constitutes a lien on the property or credits attached. 1 M'Cord, So. C. 480; 8 Miss. 658; 18 *id.* 348; 16 Pick. Mass. 264; 10 Metc. Mass. 320; 10 Johns. N. Y. 129; 3 Ark. 509; 17 Conn. 278; 14 Penn. 326; 12 Leigh, Va. 406; 10 Gratt. Va. 284; 12 Ala. 433; 2 La. Ann. 311; 11 Humphr. Tenn. 569; Cooke, Tenn. 254; 1 Swan, Tenn. 208; 1 Ind. 296; 4 Ill. 139; 7 *id.* 468; 6 *id.* 187; 23 Me. 60; 14 N. H. 509; 1 Zabr. N. J. 214; 21 Vt. 599, 620; 1 Day, Conn. 117. But, as the whole office of an attachment is to seize and hold property until it can be subjected to execution, this lien is of no value unless the plaintiff obtain judgment against the defendant and proceed to subject the property to execution.

10. Where two or more separate attachments are levied simultaneously on the same property, they will be entitled each to an aliquot part of the proceeds of the property. 13 Mass. 529; 14 Pick. Mass. 414; 17 *id.* 289; 19 *id.* 544; 2 Cush. Mass. 111; 1 Cow. N. Y. 215; 3 B. Monr. Ky. 201. Where several attachments are levied successively on the same property, a junior attaching creditor may impeach a senior attachment, or judgment thereon, for fraud, 4 N. H. 319; 7 *id.* 594; 24 *id.* 384; 4 Rich. So. C. 561; 6 Gratt. Va. 96; 3 Ga. 140; 4 Abb. Pract. N. Y. 393; 3 Mich. 531; but not on account of irregularities. 3 M'Cord, So. C. 201, 345; 4 Rich. So. C. 561; 2 Bail. So. C. 209; 9 Mo. 393; 5 Pick. Mass. 503; 13 Barb. N. Y. 412; 9 La. Ann. 8.

11. By the levy of an attachment upon personalty the officer acquires a special pro-

perty therein, which continues so long as he remains liable therefor, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner upon the attachment being dissolved, but no longer. 6 Johns. N. Y. 195; 12 *id.* 403; 2 Mass. 514; 15 *id.* 310; 1 N. H. 289; 36 Me. 322; 28 Vt. 546; 16 *id.* 9. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass, and replevin. 9 Mass. 104; 16 *id.* 465; 1 Pick. Mass. 232, 389; 5 Vt. 181; 10 *id.* 165; 23 N. H. 46; 2 Me. 270.

12. As it would often subject an officer to great inconvenience and trouble to keep attached property in his possession, he is allowed in the New England states to deliver it over, during the pendency of the suit, to some responsible person, who will give an accountable receipt for it, and who is usually styled a receipter or bailee, and whose possession is regarded as that of the officer, and, therefore, as not discharging the lien of the attachment. This practice is not authorized by statute, but has been so long in vogue in the states where it prevails as to have become a part of their systems, and to have given rise to a large mass of judicial decisions.

13. In many states provisions exist, authorizing the defendant to retain possession of the attached property by executing a bond with sureties for the delivery thereof, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. This bond, like the bailment of attached property, does not discharge the lien of the attachment. 20 Miss. 622; 12 Ala. 138; 6 Ala. N. s. 45; 7 Mo. 411; 7 Ill. 468; 10 Pet. 400; 10 Humphr. Tenn. 434. Property thus bonded cannot be seized under another attachment, or under a junior execution. 6 Ala. N. s. 45; 7 B. Monr. Ky. 651; 4 La. 304.

14. Provisions also exist in many states for the dissolution of an attachment by the defendant's giving bond and security for the payment of such judgment as the plaintiff may recover. This is, in effect, merely Special Bail. From the time it is given, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons. 2 Bibb, Ky. 221; 7 Ill. 468; 3 M'Cord, So. C. 347; 19 Ga. 436.

15. An attachment is dissolved by a final judgment for the defendant. 4 Mass. 99; 23 Pick. Mass. 465; 2 Aik. Vt. 299. It may be dissolved, on motion, on account of defects in the plaintiff's proceedings, apparent on their face; but not for defects which are not so apparent. 17 Miss. 516. Every such motion must precede a plea to the merits. 2 Dev. & B. No. C. 502; Harp. So. C. 38, 156; 7 Mart. La. 368; 4 Jones, No. C. 241; 26 Ala. N. s. 670. The death of the defendant *pendente lite* is held in some states to dissolve the attachment. 10 Metc. Mass. 320; 4 Serg. & R. Penn. 557; 7 Mo. 421; 5 Cranch, C. C. 507. And so the civil death of a corporation. 8 Watts & S. Penn. 207; 11 Ala. N. s. 472. Not so, however, the bankruptcy of the defendant. 21 Vt. 599; 23 Me. 60; 14 N. H. 509; 10 Metc. Mass. 320; 1 Zabr. N. J. 214; 18 Miss. 348.

16. In those states where under a summons property may be attached if the plaintiff so directs, the defendant has no means of defeating the attachment except by defeating the action; but in some states, where an attachment does not issue except upon stated grounds, provision is made for the defendant's contesting the validity of the alleged grounds; while in other states it is held that he may do so, as a matter of right, without statutory authority. 3 Caines, N. Y. 257; 1 Wend. N. Y. 66; 3 *id.* 424; 7 Barb. N. Y. 656; 12 *id.* 265; 1 Dall. 165; 1 Yeates, Penn. 277; 1 Green, N. J. 131, 250; 3 Harr. N. J. 287; 3 Harr & M'H. Md. 535; 2 Nott & M'C. So. C. 130; 3 Sneed, Tenn. 536; Hard. Ky. 65; 6 Blackf. Ind. 232; 1 Ill. App. 25.

17. *As by custom of London.*

This writ reached the effects of the defendant in the hands of third persons. Its effect is simply to arrest the payment of a debt due the defendant, to him, and to compel its payment to the plaintiff, or else to reach personal property in the hands of a third person. It is known in England and in most of the states of the United States as *garnishment*, or the garnishee process; but in some, as the trustee process and factorizing, with the same characteristics. As affects the garnishee, it is in reality a suit by the defendant in the plaintiff's name. 22 Ala. N. s. 831; Hempst. Dist. Ct. 662.

18. Garnishment is an effectual attachment of the defendant's effects in the garnishee's hands. 6 Cranch, 187; 8 Mass. 436; 14 N. H. 129; Busb. No. C. 3; 5 Ala. N. s. 514; 21 Miss. 284; 6 Ark. 391; 4 McLean, C. C. 535. It is essentially a legal remedy; and through it equities cannot be settled between the defendant and the garnishee. 5 Ala. N. s. 442; 19 *id.* 135; 13 Vt. 129; 15 Ill. 89. The plaintiff, through it, acquires no greater rights against the garnishee than the defendant has, except in cases of fraud; and he can hold the garnishee only so long as he has, in the attachment suit, a right to enforce his claim against the defendant. 3 Ala. 132; 1 Litt. Ky. 274. No judgment can be rendered against the garnishee until judgment against the defendant shall have been recovered. 3 Ala. N. s. 114; 5 Mart. N. s. La. 307.

19. The basis of a garnishee's liability is either an indebtedness to the defendant, or the possession of personal property of the defendant capable of being seized and sold under execution. 7 Mass. 438; 3 Me. 47; 2 N. H. 93; 9 Vt. 295; 11 Ala. N. s. 273. The existence of such indebtedness, or the possession of such property, must be shown affirmatively, either by the garnishee's answer or by evidence *aliunde*. 9 Cush. Mass. 530; 1 Dutch. N. J. 625; 2 Iowa, 154; 9 Ind. 537; 21 Mo. 30. The demand of the defendant against the garnishee, which will justify a judgment in favor of the plaintiff against the garnishee, must be such as would sustain an

action of debt, or *indebitatus assumpsit.* 11 Ala. N. s. 273; 19 *id.* 135; 20 *id.* 334; 27 *id.* 414.

20. A non-resident of the state in which the attachment is obtained cannot be held as garnishee, unless he have in that state property of the defendant's in his hands, or be bound to pay the defendant money, or to deliver him goods, at some particular place in that state. 10 Mass. 343; 21 Pick. Mass. 263; 3 *id.* 302; 15 *id.* 445; 6 N. H. 497; 6 Vt. 614; 4 Abb. Pract. N. Y. 72; 2 Cranch, C. C. 622.

21. No person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority. 8 Mass. 246. Hence it has been held that an administrator cannot, in respect of moneys in his hand as such, be charged as garnishee of a creditor of his intestate, 11 Me. 185; 2 Harr. Del. 349; 5 Ark. 55, 188; unless he have been, by a proper tribunal, adjudged and ordered to pay a certain sum to such creditor. 5 N. H. 374; 3 Harr. Del. 267; 10 Mo. 374. Nor is an executor chargeable as garnishee in respect of a legacy bequeathed by his testator. 7 Mass. 271; 1 Conn. 385; 3 N. H. 67; 2 Whart. Penn. 332; 4 Mas. C. C. 443. Nor is a guardian. 4 Metc. Mass. 486; 6 N. H. 399. Nor is a sheriff, in respect of money collected by him under process. 3 Mass. 289; 7 Gill & J. Md. 421; 1 Bland, Ch. Md. 443; 1 Murph. So. C. 47; 2 Speers, So. C. 34, 378; 2 Ala. N. s. 253; 1 Swan, Tenn. 208; 9 Mo. 378; 3 Cal. 363; 4 Me. 532. Nor is a clerk of a court, in respect of money in his hands officially. 1 Dall. 354; 2 Hayw. No. C. 171; 3 Ired. No. C. 365; 7 Humphr. Tenn. 132; 7 Gill & J. Md. 421; 3 Hill, So. C. 12; Bail. Eq. So. C. 360. Nor is a trustee of an insolvent, or an assignee of a bankrupt. 5 Mass. 183; 7 Gill & J. Md. 421. Nor is a government disbursing officer. 7 Mass. 259; 3 Penn. St. 368; 7 T. B. Monr. Ky. 439; 3 Sneed, Tenn. 379; 4 How. 20.

22. A debt not due may be attached in the hands of the garnishee, but he cannot be required to pay the same until it becomes due. 6 Me. 263; 1 Yeates, Penn. 255; 4 Mass. 235; 1 Harr. & J. Md. 536; 3 Murph. So. C. 256; 1 Ala. N. s. 396; 17 Ark. 492.

23. In most of the states, the garnishee responds to the proceedings against him by a sworn answer to interrogatories propounded to him; which in some states is held to be conclusive as to his liability, but generally may be controverted and disproved, though in the absence of contradictory evidence always taken to be true. In order to charge the garnishee upon his answer alone, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant. 2 Miles, Penn. 243; 22 Ga. 52; 2 Ala. 9; 6 La. Ann. 122; 19 Miss. 348; 7 Humphr. Tenn. 112; 3 Wisc. 300; 2 Greene, Iowa, 125; 12 Ill. 358; 2 Cranch, C. C. 543; 9 Cush. Mass. 530; 1 Dutch. N. J. 625; 9 Ind. 537; 21 Mo. 30.

24. Whatever defence the garnishee could set up against an action by the defendant for the debt in respect of which it is sought to charge the garnishee, he may set up in bar of a judgment against him as a garnishee. If his debt to the defendant be barred by the statute of limitation, he may take advantage of the statute. 2 Humphr. Tenn. 137; 10 Mo. 557; 9 Pick. Mass. 144. He may set up a failure of consideration, Wright, 724; 2 Cons. So. C. 456; 1 Murph. So. C. 468; 7 Watts, Penn. 12; and may plead a set-off against the defendant. 7 Pick. Mass. 166; 25 N. H. 369; 19 Vt. 644.

25. If by a court having jurisdiction a judgment be rendered against a garnishee, and he satisfy the same under execution, it is a full defence to an action by the defendant against him for the property or debt in respect of which he was charged as garnishee; though the judgment may have been irregular, and reversible on error. 3 B. Monr. Ky. 502; 4 Zabr. N. J. 674; 12 Ill. 358; 1 Iowa, 86; 2 Ala. 180.

26. An attachment plaintiff may be sued for a malicious attachment; and the action will be governed by the principles of the common law applicable to actions for malicious prosecution. 3 Call. Va. 446; 17 Mass. 190; 9 Conn. 309; 1 Penn. N. J. 631; 4 Watts & S. Penn. 201; 9 Ohio, 103; 4 Humphr. Tenn. 169; 3 Hawks. No. C. 545; 9 Rob. La. 418; 14 Tex. 662.

ATTACHMENT OF PRIVILEGE. In English Law. A process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs; and who has the privilege to answer there.

A writ issued to apprehend a person in a privileged place. Termes de la Ley.

ATTAINDER. That extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony receives sentence of death for his crime. 1 Stephen, Comm. 408; 1 Bishop, Crim. Law, § 641.

Attainder by confession is either by pleading guilty at the bar before the judges, and not putting one's self on one's trial by a jury, or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.

Attainder by verdict is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.

Attainder by process or *outlawry* is when the party flies, and is subsequently outlawed. Coke, Litt. 391.

The effect of attainder upon a felon is, in general terms, that all his estate, real and personal, is forfeited; that his blood is corrupted, and so nothing passes by inheritance to, from, or through him, 1 Wms. Saund. 361, n.; 6 Coke, 63 *a*, 68 *b*; 2 Rob. Eccl. 547; 24

Eng. L. & Eq. 598; that he cannot sue in a court of justice. Coke, Litt. 130 *a*. See 2 Gabbett, Crim. Law; 1 Bishop, Crim. Law, § 641.

ATTAINT. Attainted, stained, or blackened.

A writ which lies to inquire whether a jury of twelve men gave a false verdict. Bracton, l. 4, tr. 1, c. 134; Fleta, l. 5, c. 22, § 8.

This latter was a trial by jury of twenty-four men empanelled to try the goodness of a former verdict. 3 Blackstone, Comm. 351; 3 Gilbert, Ev. Lofft ed. 1146. See ASSIZE.

ATTEMPT (Lat. *ad*, to, *tentare*, to strive, to stretch).

In Criminal Law. An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. 5 Cush. Mass. 367.

An intent to do a thing combined with an act which falls short of the thing intended. 1 Bishop, Crim. Law, § 510; 14 Ga. 55; 14 Ala. N. S. 411.

To constitute an attempt, there must be an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences, 3 Harr. Del. 571; 18 Ala. N. S. 532; 1 Park, Cr. Cas. N. Y. 327; 9 Humphr. Tenn. 455; 7 Carr. & P. 518; 8 *id.* 541; 1 Crawf. & D. Cr. Cas. 156, 186; 1 Bishop, Crim. Law, §§ 513–515; an act apparently adapted to produce the result intended, 11 Ala. 57; 12 Pick. Mass. 173; 5 Cush. Mass. 365; 18 Ohio, 32; 4 Wash. C. C. 733; 2 Va. Cas. 356; 6 Carr. & P. 403; 5 *id.* 126; 9 *id.* 79; 2 Mood. & R. 39; 1 Bishop, Crim. Law, § 519; and see 6 Gratt. Va. 706; 24 Me. 71; 2 Brown, Just. Sc. 366; 2 Cox, Cr. Cas. 285; 9 Carr. & P. 483, 523; 1 Leach, Cr. Cas. 4th ed. 19; including solicitations of another, 2 East, 5; 4 Hill, N. Y. 133; 7 Conn. 216, 266; 3 Pick. Mass. 26; 2 Dall. Penn. 384; 1 Bishop, Crim. Law, § 313; in combination, 1 Bishop, Crim. Law, §§ 312, 314; and the crime intended must be at least a misdemeanor. 1 Crawf. & D. Cr. Cas. 149; 1 Carr. & M. 661, n.; 1 Dall. Penn. 39; 1 Bishop, Crim. Law, § 528.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. Termes de la Ley.

ATTENDANT TERMS. Long leases or mortgages so arranged as to protect the title of the owner.

Thus, to raise a portion for younger children, it was quite common to make a mortgage to trustees. The powers of these trustees were generally to take possession of the estate, or to sell a part of the term if the portions were not duly paid. If the deed did not become *ipso facto* void, upon payment of the portion, a release was necessary from the trustees to discharge the mortgage. If this was not given, the term became an outstanding satisfied term. The purchaser from the heir then procured an assignment of the term to trustees for his benefit, which then became a satisfied term to attend the inheritance, or an attendant term. These terms were held attendant by the courts, also, without any assignment, and operated to defeat intermediate alienations to some extent. There were other ways of creating outstanding terms besides the method by mortgage; but the effect and general operation of all these were essentially the same. 1 Washburn, Real Prop. 311; 4 Kent, Comm. 86–93.

ATTENTAT. Any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo*, pending an appeal. Used in the civil and canon law. 1 Add. Eccl. 22, note; Ayliffe, Parerg. 100.

ATTERMINARE (Lat.). To put off to a succeeding term; to prolong the time of payment of a debt. Stat. Westm. 2, c. 4; Cowel; Blount.

ATTERMINING. The granting a time or term for the payment of a debt.

ATTERMOIEMENT. In Canon Law. A making terms; a composition, as with creditors. 7 Low. C. 272, 306.

ATTESTATION (Lat. *ad*, to, *testari*, to witness).

The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. 3 P. Will. 254; 2 Ves. Ch. 454; 1 Ves. & B. Ch. Ir. 362; 3 A. K. Marsh. Ky. 146; 17 Pick. Mass. 373.

Deeds, at common law, do not require attestation in order to be valid, 1 Wood, Conv. 239; 2 Blackstone, Comm. 307; 3 Dane, Abr. 354; Cheves, So. C. 273; 12 Metc. Mass. 157; and there are several states where it is not necessary. 1 Serg. & R. Penn. 73; 1 Hayw. No. C. 205; 13 Ala. 321; 12 Metc. Mass. 157. In Alabama, Arkansas, Illinois, Indiana, New Jersey, and New York, attestation or acknowledgment before a proper officer is required. Lalor, Real Est. 238; 5 Ark. 693; Thornton, Conv. 66, 161, 187, 373. Where there are statutory regulations on the subject, they must be complied with. In Mississippi, one witness is sufficient, 17 Miss. 325; in Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, New Hampshire, Ohio, South Carolina, Tennessee, and Vermont, two are required. 3 Conn. 35; 8 *id.* 289; 2 A. K. Marsh. Ky. 429; 2 N. H. 529; 13 *id.* 38; 6 Wheat. 527; 1 McLean, C. C. 520; 5 Ohio, 119; M'Mull. 373; 2 Greenleaf, Ev. § 275, n.; 4 Kent, Comm. 457. The requisites are not the same in all cases as against the grantor and as against purchasers. 2 A. K. Marsh. Ky. 529. See 3 N. H. 234; 13 *id.* 38.

The attesting witness need not see the grantor write his name: if he sign in the presence of the grantor, and at his request, it is sufficient. 2 Bos. & P. 217. *Wills* must be attested by *competent* or *credible* witnesses, 2 Greenleaf, Ev. § 691; 9 Pick. Mass. 350; 1 Burr. 414; 4 Burn, Eccl. Law, Phill. ed. 116, who must subscribe their names attesting in the presence of the testator. 7 Harr. & J. Md. 61; 3 Harr. & M'H. Md. 457; 1 Leigh, Va. 6; 1 Maule & S. 294; 2 Curt. Eccl. 320; 3

id. 118; Carth. 79; 2 Greenleaf, Ev. § 678. And see 13 Gray, Mass. 103; 12 Cush. Mass. 342; 1 Ves. Ch. 11; 2 Washburn, Real Prop. 682. In the attestation of wills conveying land, *three* witnesses are requisite in Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, North Carolina, Rhode Island, South Carolina, Vermont, and Wisconsin; *two* are sufficient in Alabama, Arkansas, California, Delaware, Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, New York, Ohio, Tennessee, Texas, and Virginia. An exception to the general rule exists in case of *holograph* wills in Arkansas, Kentucky, Mississippi, Texas, and Virginia. 2 Washburn, Real Prop. 683.

ATTESTATION CLAUSE. That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.

The usual attestation clause to a will is in the following formula, to wit: "Signed, sealed, published, and declared by the above-named A B, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as the witnesses thereto, in the presence of the said testator and of each other." That of deeds is generally in these words: "Sealed and delivered in the presence of us."

ATTESTING WITNESS. One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. 3 Campb. 232.

ATTORN. To turn over; to transfer to another money or goods; to assign to some particular use or service. Kennet, Paroch. Antiq. 283.

Used of a lord's transferring the homage and service of his tenant to a new lord. Bract. 81, 82; 1 Sullivan, Lect. 227.

To transfer services or homage.

Used of the part taken by the tenant in a transfer of lands. 2 Sharswood, Blackst. Comm. 288; Littleton, § 551. Now used of assent to such a transfer. 1 Washburn, Real Prop. 28. The lord could not alien his land without the consent of the tenant, nor could the tenant assign without the consent of his lord. 2 Blackstone, Comm. 27; 1 Spence, Eq. Jur. 137; 1 Washburn, Real Prop. 28, n. Attornment is abolished by various statutes. 1 Washburn, Real Prop. 336.

ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. Spelman, Gloss.; Termes de la Ley.

One who acts for another by virtue of an appointment by the latter. Attorneys are of various kinds.

2. *Attorney in fact.* A person to whom the authority of another, who is called the constituent, is by him lawfully delegated.

This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bacon, Abr. *Attorney;* Story, Ag. § 25.

3. All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes coverts, may act as attorneys of others. Coke, Litt. 52 *a;* 1 Esp. 142; 2 *id.* 511.

4. *Attorney-at-law.* An officer in a court of justice, who is employed by a party in a cause to manage the same for him.

Appearance by an attorney has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon the party's right to appear by attorney is reported, Y. B. 17 Edw. III., p. 8, case 23. In France such appearances were first allowed by letters patent of Philip le Bel, A.D. 1290. 1 Fournel, *Hist. des Avocats*, 42, 43, 92, 93; 2 Loisel, *Coutumes*, 14, 15. It results from the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy. Farr. 47. The name of attorney is given to those officers who practise in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty and in the English ecclesiastical courts.

5. In some courts, as in the supreme court of the United States, advocates are divided into counsellors-at-law and attorneys. The business of attorneys is to carry on the practical and formal parts of the suit. 1 Kent, Comm. 307. See, as to their powers, 2 Supp. to Ves. Jr. 241, 254; 3 Chitty, Blackst. Comm. 23, 338; Bacon, Abr. *Attorney;* 3 Penn. 74; 3 Wils. 374; 16 Serg. & R. Penn. 368; 14 *id.* 307; 7 Cranch, 452; 1 Penn. 264. In general, the agreement of an attorney-at-law, within the scope of his employment, binds his client, 1 Salk. 86, as to amend the record, 1 Binn. Penn. 75; to refer a cause, 1 Dall. Penn. 164; 6 Binn. Penn. 101; 7 Cranch, 436; 3 Taunt. 486; not to sue out a writ of error, 1 H. Blackst. 21, 23; 2 Saund. 71 *a*, *b;* 1 Term, 388; to strike off a *non pros.*, 1 Binn. Penn.; to waive a judgment by default. 1 Archbold, Pract. 26. But the act must be within the scope of his authority. He cannot, for example, without special authority, purchase lands for the client at sheriff's sale. 2 Serg. & R. Penn. 21; 11 Johns. N. Y. 464.

6. The principal duties of an attorney are —to be true to the court and to his client; to manage the business of his client with care, skill, and integrity, 4 Burr. 2061; 1 Barnew. & Ald. 202; 2 Wils. 325; 1 Bingh. 347; to keep his client informed as to the state of his business; to keep his secrets confided to him as such.

And he is privileged from disclosing such secrets when called as a witness. 29 Vt. 701; 4 Mich. 414; 16 N. Y. 180; 21 Ga. 201; 40 Eng. L. & Eq. 353; 38 Me. 581. See CLIENT; CONFIDENTIAL COMMUNICATION. For a violation of his duties an action will, in general, lie, 3 Cal. 308; 2 Greenleaf, Ev. §§ 145, 146; and in some cases he may be punished by attachment. Official misconduct may be in-

quired into in a summary manner, and the name of the offender stricken from the roll. 18 B. Monr. Ky. 472.

ATTORNEY'S CERTIFICATE. In English Law. A certificate of the commissioners of stamps that the attorney therein named has paid the annual duty. This must be renewed yearly; and the penalty for practising without such certificate is fifty pounds. Stat. 37 Geo. III. c. 90, §§ 26, 28, 30. See also 7 & 8 Vict. c. 73, §§ 21–26; 16 & 17 Vict. c. 63.

ATTORNEY-GENERAL. In English Law. A great officer, under the king, made by letters patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the exchequer in any matter concerning the king's revenue. Others may bring bills against the king's attorney. 3 Sharswood, Blackst. Comm. 27; Termes de la Ley.

In American Law. In each state there is an attorney-general, or similar officer, who appears for the people, as in England he appears for the crown.

ATTORNEY-GENERAL OF THE UNITED STATES. An officer appointed by the president.

His duties are to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and give his advice upon questions of law when required by the president, or when requested by the heads of any of the departments, touching matters that may concern their departments. Act of 24th Sept. 1789.

ATTORNMENT. See ATTORN.

AU BESOIN (Fr. in case of need. "*Au besoin chez Messieurs* —— *à* ——." "In case of need, apply to Messrs. —— at ——").

A phrase used in the direction of a bill of exchange, pointing out the person to whom application may be made for payment in case of failure or refusal of the drawee to pay. Story, Bills, § 65.

AUBAINE. See DROIT D'AUBAINE.

AUCTION. A public sale of property to the highest bidder.

The manner of conducting an auction is immaterial, whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders. In a case where a woman continued silent during the whole time of the sale, but whenever any one bid she gave him a glass of brandy, and, when the sale broke up, the person who received the last glass of brandy was taken into a private room and he was declared to be the purchaser, this was adjudged to be an auction. 1 Dowl. Bail. 115.

Auctions are generally conducted by a person licensed for that purpose. Bidders may be employed by the owner, if it be done *bonâ fide* and to prevent a sacrifice of the property under a given price, 1 Hall, N. Y. 655; 11 Paige, Ch. N. Y. 431; 3 Stor. C. C. 622; but where bidding is fictitious and by combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. 8 How. 134; 3 Stor. C. C. 611; 11 Ill. 254; 2 Dev. No. C. 126; 3 Metc. Mass. 384; 3 Gilm. Va. 529. And see 6 J. B. Moore, 316; 3 Brod. & B. 116; 3 Bingh. 368; 15 Mees. & W. Exch. 367; 13 La. 287; 23 N. H. 360; 6 Ired. Eq. No. C. 278, 430; 14 Penn. St. 446. Unfair conduct on the part of the purchaser will avoid the sale. 6 J. B. Moore, 216; 3 Brod. & B. 116; 3 Stor. C. C. 623; 20 Mo. 290; 2 Dev. No. C. 126. See 3 Gilm. Va. 529; 11 Paige, Ch. N. Y. 431; 7 Ala. N. S. 189. Error in description of real estate sold will avoid the sale if it be material, 4 Bingh. N. C. 463; 8 Carr. & P. 469; 1 Younge & C. Ch. 658; 3 Jones & L. Ch. Ir. 506; but an immaterial variation merely gives a case for deduction from the amount of purchase-money. 2 Kent, Comm. 437; 6 Johns. N. Y. 38; 11 *id.* 525; 2 Bay, So. C. 11; 3 Cranch, 270. A bid may be retracted before acceptance has been signified. 3 Term, 148; 4 Bingh. 653. See 13 Price, Exch. 103. Consult 2 Kent, Comm. 536; 1 Parsons, Contr. 415; 1 Bouvier, Inst. n. 976.

AUCTIONARIUS (Lat.). A seller; a regrator; a retailer; one who bought and sold; an auctioneer, in the modern sense. Spelman, Gloss. One who buys poor, old, worn-out things to sell again at a greater price. Ducange.

AUCTIONEER. A person authorized by law to sell the goods of others at public sale; one who conducts a public sale or auction. 5 Mass. 505; 19 Pick. Mass. 482. He is the agent of the seller, 3 Term, 148; 2 Rich. So. C. 464; 1 Parsons, Contr. 418; and of the buyer, for some purposes at least. 4 Ad. & E. 792; 7 East, 558; 2 Taunt. 38; 3 Ves. & B. Ch. 57; 4 Johns. Ch. N. Y. 659; 16 Wend. N. Y. 28; 4 Me. 1, 258; 6 Leigh, Va. 16; 2 Kent, Comm. 539. He has a special property in the goods, and may bring an action for the price, 1 H. Blackst. 81; 7 Taunt. 237; 19 Ark. 566; 5 Serg. & R. Penn. 19; 1 Ril. So. C. 287; 16 Johns. N. Y. 1; 1 E. D. Smith, N. Y. 590; see 5 Mees. & W. Exch. 645; 3 Carr. & P. 352; 5 Barnew. & Ad. 568; and has a lien upon them for the charges of the sale, his commission, and the auction-duty. 15 Mo. 184; 2 Kent, Comm. 536. He must obtain the best price he fairly can, and is responsible for damages arising from a failure to pursue the regular course of business, or from a want of skill, 3 Barnew. & Ald. 616; Cowp. 395; 2 Wils. 325; and where he sells goods as the property of one not the owner, is liable for their value to the real owner. 7 Taunt. 237; 5 Esp. 103; 20 Wend. N. Y. 21; 22 *id.* 285; 5 Mo. 323. And see 2 Harr. Del. 179.

AUCTOR. In Roman Law. An auctioneer.

In auction-sales, a spear was fixed upright in the forum, beside which the seller took his stand: hence goods thus sold were said to be sold *sub hasta* (under the spear). The catalogue of goods was on tablets called *auctionariæ*.

AUDIENCE (Lat. *audire*, to hear). A hearing.

It is usual for the executive of a country to whom a minister has been sent, to give such minister an audience. And after a minister has been recalled, an *audience of leave* usually takes place.

AUDIENCE COURT. In English Law. A court belonging to the archbishop of Canterbury, and held by him in his palace for the transaction of matters of form only, as the confirmation of bishops, elections, consecrations, and the like. This court has the same authority with the court of arches, but is of inferior dignity and antiquity. The dean of the arches is the official auditor of the audience. The archbishop of York has also his audience court. Termes de la Ley.

AUDITA QUERELA (Lat.).

In Practice. A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise. 12 Mass. 270.

It is a regular suit, in which the parties appear and plead, 17 Johns. N. Y. 484; 12 Vt. 56, 435; 30 *id.* 420; 8 Miss. 103, and in which damages may be recovered if execution was issued improperly, Brooke, Abr. *Damages*, 38; but the writ must be allowed in open court, and is not of itself a *supersedeas*. 2 Johns. N. Y. 227.

It is a remedial process, equitable in its nature, based upon facts, and not upon the erroneous judgments or acts of the court. 2 Wms. Saund. 148, n.; 10 Mass. 103; 14 *id.* 448; 17 *id.* 159; 1 Aik. Vt. 363; 24 Vt. 211; 2 Johns. Cas. N. Y. 227; 1 Overt. Tenn. 425. And see 7 Gray, Mass. 206.

2. It lies where an execution against A has been taken out on a judgment acknowledged by B without authority, in A's name, Fitzherbert, Nat. Brev. 233; and see Croke, Eliz. 233; and generally for any matters which work a discharge occurring after judgment entered, Croke, Car. 443; 2 Root, Conn. 178; 10 Pick. Mass. 439; 25 Me. 304; see 5 Coke, 86 *b;* and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fraud of the plaintiff. 4 Mass. 485; 5 Rand. Va. 639; 2 Johns. Cas. N. Y. 258.

It may be brought after the day on which judgment might have been entered, although it has not been, 1 Rolle, Abr. 306, 431, pl. 10; 1 Mod. 111; either before or after execution has issued. Kirb. Conn. 187.

It does not lie for matter which might have been, or which may be, taken advantage of by a writ of error, 1 Vt. 433, in answer to a *scire facias* of the plaintiff, 1 Salk. 264, or where there is or has been a remedy by plea or otherwise. T. Raym. 89; 12 Mass. 270; 13 *id.* 453; 11 Cush. Mass. 35; 6 Vt. 243. See 17 Mass. 158.

3. In modern practice it is usual to grant the same relief upon motion which might be obtained by *audita querela*, 4 Johns. N. Y. 191; 11 Serg. & R. Penn. 274; and in some of the states the remedy by motion has entirely superseded the ancient remedy, 5 Rand. Va. 639; 2 Hill, So. C. 298; 6 Humphr. Tenn. 210; 18 Ala. 778; 13 B. Monr. Ky. 256; 3 Mo. 129; while in others *audita querela* is of frequent use as a remedy recognized by statute. 17 Vt. 118; 7 Gray, Mass. 206.

AUDITOR (Lat. *audire*, to hear). An officer of the government, whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority. Acts of Congress, April 3, 1817, Feb. 24, 1819, 3 Story, Laws U. S. 1630, 1722; Coke, 4th Inst. 107; 46 Geo. III. c. 1.

In Practice. An officer (or officers) of the court, assigned to state the items of debit and credit between the parties in a suit where accounts are in question, and exhibit the balance. 1 Metc. Mass. 218.

They may be appointed by courts either of law or equity. They are appointed at common law in actions of account, Bacon, Abr. *Accompt*, F, and in many of the states in other actions, under statute regulations. 6 Pick. Mass. 193; 14 N. H. 427; 3 R. I. 60.

2. They have authority to hear testimony, 4 Pick. Mass. 283; 5 Metc. Mass. 373; 5 Vt. 363; 2 Bland, Ch. Md. 45; 17 Conn. 1; in their discretion, 27 N. H. 244, in some states, to examine witnesses under oath, 6 N. H. 508; 11 *id.* 501; 1 Bland, Ch. Md. 463; to examine books, 19 Pick. Mass. 81; 17 Conn. 1; see 14 Vt. 214; and other vouchers of accounts. 11 Metc. Mass. 297.

The auditor's report must state a special account, 4 Yeates, Penn. 514; 2 Root, Conn. 12; 4 Wash. C. C. 42; giving items allowed and disallowed, 5 Vt. 70; 1 Ark. 355; 15 Tex. 7; but it is sufficient if it refer to the account, 2 South. N. J. 791; but see 27 Vt. 673; and are to report exceptions to their decision of questions taken before them to the court, 2 South. N. J. 791; 5 Vt. 546; 5 Binn. Penn. 433; and exceptions must be taken before them, 4 Cranch, 308; 5 Vt. 546; 7 Pet. 625; 1 Miss. 43; 15 Tex. 7; 22 Barb. N. Y. 39; unless apparent on the face of the report. 5 Cranch, 313.

3. In some jurisdictions, the report of auditors is final as to facts, Kirb. Conn. 353; 2 Vt. 369; 1 Miss. 43; 13 Penn. St. 188; 5 R. I. 338; 15 Tex. 7; 40 Me. 337; unless impeached for fraud, misconduct, or very evident error, 5 Penn. St. 413; 40 Me. 337; but subject to any examination of the principles of law in which they proceeded. 2 Day, Conn. 116. In others it is held *prima facie* evidence for the jury, 12 Mass. 412; 8 Metc. Mass. 434; 6 Gray, Mass. 376; 5 Rawle, Penn. 323; 1 La. Ann. 380; 14 N. H. 427; 21 *id.* 188, that evidence may be introduced to show its incorrectness, 1 La. Ann. 380; 24 Miss. 83; 13 Ark. 609; and in others it is held to be of no effect till sanctioned by the court. 1 Bland, Ch. Md. 463; 12 Ill. 111.

4. When the auditor's report is set aside in whole or in part, it may be referred back,

4 B. Monr. Ky. 71; 4 Pick. Mass. 283; 5 Vt. 363; 26 *id.* 722; 1 Litt. Ky. 124; 12 Ill. 111; 24 N. H. 198, or may be rectified by the court, 1 Smedes & M. Ch. 543, or accepted if the party in favor of whom the wrong decision was made remits the item.

Where two or more are appointed, all must act, 20 Conn. 331; unless the parties consent that a part act for all. 1 Tyl. Conn. 407.

AUGMENTATION. The increase arising to the crown's revenues from the suppression of monasteries and religious houses and the appropriation of their lands and revenues.

A court erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

The court was dissolved in the reign of Mary; but the office of augmentations remained long after. Cowel.

A share of the great tithes temporarily granted to the vicars by the appropriators, and made perpetual by statute 29 Car. II. c. 8.

The word is used in a similar sense in the Canadian law.

AULA REGIA (called frequently *Aula Regis*). The king's hall or palace.

In English Law. A court established in England by William the Conqueror in his own hall.

It was the "great universal" court of the kingdom; from the dismemberment of which are derived the present four *superior courts* in England, viz.: the High court of Chancery, and the three *superior courts of common law*, to wit, the Queen's Bench, Common Pleas, and Exchequer. It was composed of the king's great officers of state resident in his palace and usually attendant on his person; such as the lord high constable and lord marescal (who chiefly presided in matters of honor and of arms), the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor (whose peculiar duty it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority), and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. These, in their several departments, transacted all secular business, both civil and criminal, and all matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. This court was bound to follow the king's household in all his expeditions; on which account the trial of common causes in it was found very burdensome to the people, and accordingly the 11th chapter of *Magna Charta* enacted that "*communia placita non sequantur curiam regis, sed teneantur in aliquo certo loco,*" which certain place was established in Westminster Hall (where the *aula regis* originally sat, when the king resided in that city), and there it has ever since continued, under the name of Court of Common Pleas, or Common Bench. It was under the reign of Edward I. that the other several officers of the chief justiciar were subdivided and broken into distinct courts of judicature. A court of chivalry, to regulate the king's domestic servants, and an august tribunal for the trial of delinquent peers, were erected; while the barons reserved to themselves in parliament the right of reviewing the sentences of the other courts in the last resort; but the distribution of common justice between man and man was arranged by giving to the court of chancery jurisdiction to issue all original writs under the great seal to other courts; the exchequer to manage the king's revenue, the common pleas to determine all causes between private subjects, and the court of king's bench retaining all the jurisdiction not cantoned out to the other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes. 3 Stephen, Comm. 397–400, 405; 3 Blackstone, Comm. 38–40; Bracton, l. 3. tr. 1, c. 7; Fleta, Abr. 2, cc. 2, 3; Gilbert, Hist. C. Pleas, Introd. 18; 1 Reeve, Hist. Eng. Law, 48.

AUNCEL WEIGHT. An ancient manner of weighing by means of a beam held in the hand. Termes de la Ley; Cowel.

AUNT. The sister of one's father or mother: she is a relation in the third degree. See 2 Comyn, Dig. 474; Dane, Abr. c. 126, a. 3, § 4.

AUTER. Another.

This word is frequently used in composition: as, *auter droit, auter vie, auter action*, &c. See AUTER ACTION PENDANT.

AUTHENTIC ACT. In Civil Law. An act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 73, c. 2; Cod. 7. 52, 6. 4. 21; Dig. 22. 4.

An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses, if the party be blind. La. Civ. Code, art. 2231. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. La. Civ. Code, art. 2231. The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery. *Id.* art. 2233. See Merlin, *Répert.*

AUTHENTICATION. In Practice. A proper or legal attestation.

Acts done with a view of causing an instrument to be known and identified.

Under the constitution of the United States, congress has power to provide a method of authenticating copies of the records of a state with a view to their production as evidence in other states. For the various statutes on the subject, see FOREIGN JUDGMENT; RECORDS.

AUTHENTICS. A collection of the Novels of Justinian, made by an unknown person.

They are *entire*, and are distinguished by their name from the epitome made by Julian. See 1 Mackeldy, Civ. Law, § 72.

A collection of extracts made from the Novels by a lawyer named Irnier, and which he inserted in the code at the places to which they refer. These extracts have the reputation of not being correct. Merlin, Répert. *Authentique.*

AUTHORITIES. Enactments and opinions relied upon as establishing or declaring the rule of law which is to be applied in any case.

The opinion of a court, or of counsel, or of a text-writer upon any question, is usually fortified by a citation of authorities. In respect to their general relative weight, authorities are entitled to precedence in the order in which they are here treated.

2. The authority of the constitution and of the statutes and municipal ordinances are paramount; and if there is any conflict among these the constitution controls, and courts declare a statute or ordinance which conflicts with the former to be so far forth of no authority. See CONSTITUTIONAL LAW; STATUTES.

The decisions of courts of justice upon similar cases are the authorities to which most frequent resort is to be had; and although in theory these are subordinate to the first class, in practice they do continually explain, enlarge, or limit the provisions of enactments, and thus in effect largely modify them. The word authorities is frequently used in a restricted sense to designate citations of this class.

3. An authority may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption. As to the considerations which affect the weight of an adjudged case as an authority, see PRECEDENT; OPINION.

The opinions of legal writers. Of the vast number of treatises and commentaries which we have, comparatively few are esteemed as authorities. A very large number are in reality but little more than digests of the adjudged cases arranged in treatise form, and find their chief utility as manuals of reference. Hence it has been remarked that when we find an opinion in a text-writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers; and if on examination of those authorities they are found not to establish it, his opinion is disregarded. 3 Bos. & P. 301. Where, however, the writer declares his own opinion as founded upon principle, the learning and ability of the writer, together with the extent to which the reason he assigns commend themselves to the reader, determine the weight of his opinion. A distinction has been made between writers who have and who have not held judicial station. Ram, Judgments, 93. But this, though it may be borne in mind in estimating the learning and ability of an author, is not a just test of his authority. See 3 Term, 64, 241.

4. The opinions of writers on moral science, and the codes and laws of ancient and foreign nations, are resorted to in the absence of more immediate authority, by way of ascertaining those principles which have commended themselves to legislators and philosophers in all ages. See CODE. Lord Coke's saying that common opinion is good authority in law, Coke, Litt. 186 *a*, is not understood as referring to a mere speculative opinion in the community as to what the law upon a particular subject is; but to an opinion which has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and upon which course of action important individual rights have been acquired or depend. 3 Barb. Ch. N. Y. 528, 577. As to the mode of citing authorities, see ABBREVIATIONS; CITATION OF AUTHORITIES.

AUTHORITY. In Contracts. The lawful delegation of power by one person to another.

Authority coupled with an interest is an authority given to an agent for a valuable consideration, or which forms part of a security.

Express authority is that given explicitly, either in writing or verbally.

General authority is that which authorizes the agent to do every thing connected with a particular business. Story, Ag. § 17.

It empowers him to bind his employer by all acts within the scope of his employment; and it cannot be limited by any private order or direction not known to the party dealing with him. Paley, Ag. 199, 200, 201.

Limited authority is that where the agent is bound by precise instructions.

Special authority is that which is confined to an individual transaction. Story, Ag. § 19; 15 East, 400, 408; 6 Cow. N. Y. 354.

Such an authority does not bind the employer, unless it is strictly pursued; for it is the business of the party dealing with the agent to examine his authority; and therefore, if there be any qualification or express restriction annexed to it, it must be observed; otherwise, the principal is discharged. Paley, Ag. 202.

Naked authority is that where the principal delegates the power to the agent wholly for the benefit of the former.

A naked authority may be revoked; an authority coupled with an interest is irrevocable.

Unlimited authority is that where the agent is left to pursue his own discretion.

2. *Delegation of.* An authority may be delegated by deed for any purpose whatever; for whenever an authority by parol would be sufficient, one by deed will be equally so. When the authority is to do something which must be performed through the medium of a deed, then the authority must also be by deed, and executed with all the forms necessary to render the instrument perfect; unless, indeed, the principal be present, and verbally or impliedly authorize the agent to fix his name to the deed; as, if a man be authorized to convey a tract of land, the letter of attorney must be by deed. 1 Livermore, Ag. 35;

Paley, Ag. Lloyd ed. 157; Story, Ag. §§ 49, 51; 3 Chitty, Comm. Law, 195; 5 Binn. Penn. 613; 14 Serg. & R. Penn. 331; 2 Pick. Mass. 345; 5 Mass. 11; 1 Wend. N. Y. 424; 9 *id.* 54, 68; 12 *id.* 525; 11 Ohio, 223. But a written authority is not required to authorize an agent to sign an unsealed paper, or a contract in writing not under seal, even where a statute makes it necessary that the contract, in order to bind the party, shall be in writing, unless the statute positively requires that the authority shall also be in writing. Paley, Ag. Lloyd ed. 161; 2 Kent. Comm. 613, 614; Story, Ag. § 50; 1 Chitty, Comm. Law, 213; 6 Ves. Ch. 250; 8 Ired. No. C. 74.

3. For most purposes, the authority may be either in writing not under seal, or verbally, or by the mere employment of the agent; or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. Paley, Ag. 2, 161. The exigencies of commercial affairs render such an appointment indispensable. Story, Ag. § 47; Dig. 3. 3. 1. 1; Pothier, *Pand.* 3. 3. n. 3; Domat, 1. 15, § 1. art. 5; 3 Chitty, Comm. Law, 5, 194, 195; 7 Term, 350. The authority given must have been possessed by the person who delegates it, or it will be void; and it must be of a thing lawful, and be otherwise capable of being delegated, or it will not justify the person to whom it is given. Dig. 102; Kielw. 83; 5 Coke, 80.

An authority is to be so construed as to include not only all the necessary and proper means of executing it with effect, but also all the various means which are justified or allowed by the usages of trade. Story, Ag. §§ 58, 60; 1 Livermore, Ag. 103, 104; 6 Serg. & R. Penn. 146; 10 Wend. N. Y. 218; 11 Ill. 177.

4. *Exercise of.* An agent who has bare power or authority from another to do an act must execute it himself, and cannot delegate his authority to a sub-agent; for the confidence being personal, it cannot be assigned to a stranger. Story, Ag. § 13; 1 Livermore, Ag. 54–66; 2 Kent, Comm. 633. But the principal may, in direct terms, authorize his agent to delegate the whole or any portion of his authority to another. Or the power to appoint a sub-agent may be implied, either from the terms of the original authority, from the ordinary custom of trade, or from the fact that it is indispensable in order to accomplish the end. 1 Livermore, Ag. 55; Paley, Ag. Dunlop ed. 175; Story, Ag. § 14; 9 Ves. Ch. 234, 251, 252. See DELEGATION.

5. When the authority is particular, it must, in general, be strictly pursued, or it will be void, unless the variance be merely circumstantial. Coke, Litt. 49 *b*, 181 *b*, 303 *b*; 6 Term, 591; 2 H. Blackst. 623. As if it be to do an act upon condition, and the agent does it absolutely, it is void; and *vice versa*. If a person do less than the authority committed to him, the act is void; but if he does that which he is authorized, and more, it is good for that which is warranted, and void for the rest. Both of these rules, however, may have many exceptions and limitations. Paley, Ag. 178, 179. An authority given by the act of the principal to two or more persons cannot be executed by one, though one die or refuse, Paley, Ag. 177; Coke, Litt. 112 *b*, 181 *b*; it being in such case construed strictly, and understood to be joint and not several. Story, Ag. § 42; 3 Pick. Mass. 232; 2 *id.* 345; 6 *id.* 198; 12 Mass. 185; 6 Johns. N. Y. 39; 23 Wend. N. Y. 324; 10 Vt. 532; 12 N. H. 226; 9 Watts & S. Penn. 56. And an authority given to three *jointly and severally* is not, in general, well executed by two; but it must be done by one, or by all. Coke, Litt. 181 *b*; Bacon, Abr. *Authority*, C; 1 Bos. & P. 229, 234; 3 Term. 592. These rules apply to an authority of a private nature, saving in commercial transactions, which form an exception. Where, however, the authority is of a public nature, it may be executed by a majority. 24 Pick. Mass. 13; 9 Watts, Penn. 466; 9 Serg. & R. Penn. 99.

6. As to the form to be observed in the execution of an authority, where an agent is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him. Story, Ag. § 146; 3 Merch. R. 237; 1 Younge & J. Exch. 387; 9 Mer. Ch. 235, 251, 252. It is a rule that an act done under a power of attorney must be done in the name of the person who gives the power, and not merely in the attorney's name, though the latter be described as attorney in the instrument. Story, Ag. § 147; 11 Mass. 27, 29; 12 *id.* 173, 175; 16 Pick. Mass. 347, 350; 22 *id.* 158, 161; 8 Metc. Mass. 442; 7 Wend. N. Y. 68; 10 *id.* 87, 271; 9 N. H. 263, 269, 270. But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal. "For A B" (the principal), "C D" (the attorney), has been held to be sufficient. Story, Ag. § 153; 6 B. Monr. Ky. 612; 3 Blackf. Ind. 55; 7 Cush. Mass. 215. The strict rule of law in this respect applies, however, only to sealed instruments; and the rule is further modified, even in such cases, where the seal is not essential to the validity of the instrument. Story, Ag. §§ 148, 154; Paley, Ag. Dunlop ed. 183, note; 8 Pick. Mass. 56; 17 Pet. 161. An authority must be executed within the period to which it is limited. 4 Campb. 279; Russell, Fact. & Brok. 315.

7. *Destruction of.* In general, an authority is revocable from its nature, unless it is given for a valuable consideration, is part of a security, or coupled with an interest. Story, Ag. §§ 476, 477; 2 Livermore, Ag. 308, 309; Paley, Ag. 184, 185; 2 Kent, Comm. 643; 2 Mas. C. C. 244, 342. It may generally be revoked at any moment before the actual exercise of it. 3 Chitty, Comm. Law, 223; Paley, Ag. 185; Story, Ag. §§ 463, 465. The revocation may be express, as by the direct countermand of the principal, or it may be implied. See AGENCY.

8. The authority may be renounced by the agent before any part of it is executed, or when it is in part executed. Story, Ag. §

478; Story, Bailm. § 202. If by the express terms of the commission the authority of the agent be limited to a certain period, it will manifestly cease so soon as that period has expired. The authority of the agent is *ipso facto* determined by the completion of the purpose for which it was given.

See, generally, 3 Viner, Abr. 416; Bacon, Abr.; 1 Salk. 95; Comyns, Dig. this title and the titles there referred to; 1 Rolle, Abr. 330; 2 *id.* 9; Bouvier, Inst. Index; and the articles ATTORNEY, AGENCY, AGENT, PRINCIPAL.

In Governmental Law. The right and power which an officer has, in the exercise of a public function, to compel obedience to his lawful commands. A judge, for example, has authority to enforce obedience to his lawful orders.

AUTOCRACY. A government where the power of the monarch is unlimited by law.

AUTONOMY (Greek, *ἀυτονομία*). The state of independence.

The autonomos was he who lived according to his own laws,—who was free. The term was chiefly used of communities or states, and meant those which were independent of others. It was introduced into the English language by the divines of the seventeenth century, when it and its translation —self-government—were chiefly used in a theological sense. Gradually its translation received a political meaning, in which it is now employed almost exclusively. Of late the word autonomy has been revived in diplomatic language in Europe, meaning independence, the negation of a state of political influence from without or foreign powers. See Lieber, Civ. Lib.

AUTER ACTION PENDANT (L. Fr. another action pending).

In Pleading. A plea that another action is already pending.

This plea may be made either at law or in equity. 1 Chitty, Plead. 393; Story, Eq. Plead. § 736.

2. The second suit must be for the same cause, 2 Dick. Ch. 611; 5 Cal. 48; 8 *id.* 207; 2 Dutch. N. J. 461; 18 Ga. 604; 25 Penn. St. 314; 26 Vt. 673; 4 Blackf. Ind. 156; but a writ of error may abate a suit on the judgment, 2 Johns. Cas. N. Y. 312; and if in equity, for the same purpose, 2 Mylne & C. Ch. 602; see 1 Conn. 154; and in the same right. Story, Eq. Plead. § 739.

The suits must be such in which the same judgment may be rendered. 17 Pick. Mass. 510; 19 *id.* 523. They must be between the same parties. 26 Ala. N. s. 720; 13 B. Monr. Ky. 197; 18 Vt. 138; in person or interest. 21 N. H. 570; 1 Grant, Cas. Penn. 359; 2 Bail. So. C. 362; 2 J. J. Marsh. Ky. 281. The parties need not be precisely the same. 5 Wisc. 151.

A suit for labor is not abated by a subsequent proceeding *in rem* to enforce a lien. 4 Ill. 201. See 1 B. Monr. Ky. 257. A suit in trespass is temporarily barred by a previous proceeding *in rem* to enforce for forfeiture. 3 Wheat. 314.

3. The prior action must have been in a domestic court, 3 Atk. Ch. 589; 4 Ves. Ch. 357; 1 Sim. & S. Ch. 491; 9 Johns. N. Y. 221; 12 *id.* 9; 2 Curt. C. C. 559; 22 Conn. 485; 8 Tex. 351; 13 Ill. 486; see 10 Pick. Mass. 470; 3 M'Cord, So. C. 338; but a foreign attachment against the same subject-matter may be shown, 5 Johns. N. Y. 101; 9 *id.* 221; 7 Ala. N. s. 151; 1 Penn. 442; 5 Litt. Ky. 349; see 8 Mass. 456; 7 Vt. 124; 1 Hall, N. Y. 137; and of the same character, 22 Eng. L. & Eq. 62; 10 Ala. N. s. 887; Story, Eq. Plead. 736; thus a suit at law is no bar to one in equity, 8 B. Monr. Ky. 428; but the plaintiff may elect, and equity will enjoin him from proceeding at law if he elect to proceed in equity. Story, Eq. Plead. § 742. A suit in the circuit court having jurisdiction will abate a suit in the state court, 22 N. H. 21, if in the same state. 12 Johns. N. Y. 99. So will a suit in a state court abate one in the circuit court, 4 McLean, C. C. 233; but not unless jurisdiction is shown. 1 Curt. C. C. 494; 3 McLean, C. C. 221; 3 Sumn. C. C. 165.

4. A suit pending in equity will not abate a suit at law, 22 Conn. 485; 16 Vt. 234; 3 Watts & S. Penn. 395; 7 Metc. Mass. 570; see 1 Rich. So. C. 438, and of equal or superior jurisdiction, Cooper, Eq. Plead. 274; 5 Coke, 62; 2 Wils. 87, 280; 2 Ld. Raym. 1102; 17 Ala. N. s. 430; but it is sufficient if the inferior court have jurisdiction. 4 Hen. & M. Va. 487.

In general, the plea must be in abatement, 1 Grant, Cas. Penn. 359; 20 Ill. 637; 5 Wisc. 151; 3 McLean, C. C. 221; but in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty. 1 Chitty, Plead. 443; 1 Penn. 442; 2 J. J. Marsh. Ky. 281.

5. It must be pleaded in abatement of the subsequent action in order of time. 1 Wheat. 215; 20 Ill. 637; 5 Wisc. 151; 1 Hempst. C. C. 708; 3 Gilm. Va. 498; 17 Pick. Mass. 510; 19 *id.* 13; 21 Wend. N. Y. 339.

It must show an action pending or judgment obtained at the time of the plea, 2 Dutch. N. J. 461; 11 Tex. 259; 1 Mich. 254; but it is sufficient to show it pending when the second suit was commenced, 5 Mass. 79; 1 *id.* 495; 2 N. H. 36; 3 Rawle, Penn. 320; for the rule where both suits are commenced at the same time, see 9 N. H. 545; 8 Conn. 71; 3 Wend. N. Y. 258; 4 Halst. N. J. 58; 7 Vt. 124; and the plaintiff cannot avoid such a plea by discontinuing the first action subsequently to the plea. 1 Salk. 329; 2 Ld. Raym. 1014; 5 Mass. 174; 3 Dan. Ky. 157; *contra*, 1 Johns. Cas. N. Y. 397; 26 Vt. 673; 15 Ga. 270. And a prior suit discontinued before plea pleaded in the subsequent one will not abate such suit. 13 B. Monr. Ky. 197; 7 Ala. N. s. 601. It may be pleaded in abatement of the action in the inferior court, and must aver appearance, or at least service of process. 1 Vern. Ch. 318. Suing out a writ is said to be sufficient at common law. 1

Hempst. C. C. 213; 7 Ala. N. s. 601. See Lis Pendens.

6. It must be shown that the court entertaining the first suit has jurisdiction. 17 Ala. N. s. 430; 22 N. H. 21; 1 Curt. C. C. 494.

It must be proved by the defendant by record evidence. 1 Hempst. C. C. 213; 22 N. H. 21; 2 *id.* 361; 17 Ala. 469; 5 Mass. 174. It is said that if the first suit be so defective that no recovery can be had, it will not abate the second. 15 Ga. 270; 5 Tex. 127; 20 Conn. 510; 1 Root, Conn. 335; 21 Vt. 362; 3 Penn. St. 434; 8 Mass. 456. See 5 Blackf. Ind. 84.

A prior indictment pending does not abate a second for the same offence. 5 Ind. 533; 3 Cush. Mass. 279; Thach. Crim. Cas. Mass. 513. See 1 Hawks. No. C. 78.

When a defendant is arrested pending a former suit or action in which he was held to bail, he will not, in general, be held to bail if the second suit be for the same cause of action. Graham, Pract. 98; Troubat & H. Pract. 44; 4 Yeates, Penn. 206. Pendency of one attachment will abate a second in the same county. 15 Miss. 333.

But under special circumstances, in the discretion of the court, a second arrest will be allowed. 2 Miles, Penn. 99, 100, 141; 14 Johns. N. Y. 347.

See, generally, Gould, Stephen, and Chitty on Pleading; Story, Mitford, and Beames on Equity Pleading; Bacon, Abr. *Abatement, Bail in Civil Cases.*

AUTREFOIS ACQUIT (Fr. formerly acquitted).

In Criminal Pleading. A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

To be a bar, the acquittal must have been on trial, 5 Rand. Va. 669; 11 N. H. 156; 4 Blackf. Ind. 156; 6 Mo. 645; 5 Harr. Del. 488; 14 Tex. 260; see 1 Hayw. No. C. 241; 14 Ohio, 295, and by verdict of a jury on a valid indictment. 4 Blackstone, Comm. 335; 1 Johns. N. Y. 66; 1 Va. Cas. 312; 6 Ala. 341; 4 Mo. 376; 26 Penn. St. 513; 6 Md. 400.

There must be an acquittal of the offence charged in law and in fact, 1 Va. Cas. 188, 288; 5 Rand. Va. 669; 13 Mass. 457; 2 *id.* 172; 29 Penn. St. 323; 6 Cal. 543; but an acquittal is conclusive. 6 Humphr. Tenn. 410; 3 Cush. Mass. 212; 16 Conn. 54; 7 Ga. 422; 8 Blackf. Ind. 533; 3 Brev. No. C. 421; 6 Mo. 644; 7 Ark. 169; 1 Bail. So. C. 651; 2 Halst. N. J. 172; 11 Miss. 751; 3 Tex. 118; 1 Den. N. Y. 207. See 1 N. H. 257.

The constitution of the United States, Amend. art. 5, provides that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. As to whether this means more than the common-law provision, see 5 How. 410; 9 Wheat. 579; 2 Gall. C. C. 364; 2 Sumn. C. C. 19; 2 McLean, C. C. 114; 4 Wash. C. C. 408; 9 Mass. 494; 2 Pick. Mass. 521; 2 Johns. Cas. N. Y. 301; 18 Johns. N. Y. 187; 5 Litt. Ky. 240; 1 Miss. 184; 4 Halst. N. J. 256. See 6 Serg. & R. Penn. 577; 1 Hayw. No. C. 241; 13 Yerg. Tenn. 532; 16 Ala. 188; Wharton, Crim. Law, 205–215.

The plea must set out the former record, and show the identity of the offence and of the person by proper averments. Hawkins, Pl. Cr. b. 2, c. 36; 1 Chitty, Crim. Law, 462; 16 Ark. 568; 24 Conn. 57; 6 Dan. Ky. 295; 5 Rand. Va. 669; 17 Pick. Mass. 400.

The true test by which the question whether a plea of autrefois acquit or autrefois convict is a sufficient bar in any particular case may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. 2 Leach, Cr. Cas. 4th ed. 708; 1 Brod. & B. 473; 3 Barnew. & C. 502; 2 Conn. 54; 12 Pick. Mass. 504; 13 La. Ann. 243. Thus, if a prisoner indicted for burglariously breaking and entering a house and stealing therein certain goods of A is acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house and stealing other goods of B. Per Buller, J., 2 Leach, Cr. Cas. 4th ed. 718, 719.

The plea in the celebrated case of Regina *v.* Bird, 5 Cox, Cr. Cas. 12; Templ. & M. Cr. Cas. 438; 2 Den. Cr. Cas. 224, is of peculiar value as a precedent. See Train & H. Prec. Ind. 481.

AUTREFOIS ATTAINT (Fr. formerly attainted). **In Criminal Pleading.** A plea that the defendant has been attainted for one felony, and cannot, therefore, be criminally prosecuted for another. 4 Blackstone, Comm. 336; 12 Mod. 109; Russ. & R. Cr. Cas. 268. This is not a good plea in bar in the United States, or in England in modern law. 1 Bishop, Crim. Law, § 692; 3 Chitty, Crim. Law, 464; Stat. 7 & 8 Geo. IV. c. 28, § 4. See Mart. & Y. Tenn. 122; 10 Ala. 475; 1 Bay, So. C. 334.

AUTREFOIS CONVICT (Fr. formerly convicted). **In Criminal Pleading.** A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

This plea is substantially the same in form as the plea of *autrefois acquit*, and is grounded on the same principle, viz.: that no man's life or liberty shall be twice put in jeopardy for the same offence. 1 Bishop, Crim. Law, §§ 651–680; 1 Green, N. J. 362; 1 McLean, C. C. 429; 7 Ala. 610; 2 Swan, Tenn. 493.

A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence. 3 Carr. & K. 190. But a prior conviction by judgment before a justice of the peace, and a performance of the sentence pursuant to the judgment, constitute a bar to an indictment for the same offence, although the complaint on which the justice proceeded

was so defective that his judgment might have been reversed for error. 3 Metc. Mass. 328; 8 *id.* 532.

AUXILIUM (Lat.). An aid; tribute or services paid by the tenant to his lord. *Auxilium ad filium militum faciendum, vel ad filium maritandam.* (An aid for making the lord's son a knight, or for marrying his daughter). Fitzherbert, Nat. Brev. 62.

AUXILIUM CURIÆ. An order of the court summoning one party, at the suit and request of another, to appear and warrant something. Kennett, Par. Ant. 477.

AUXILIUM REGIS. A subsidy paid to the king. Spelman.

AUXILIUM VICE COMITI. An ancient duty paid to sheriffs. Cowel; Whishaw.

AVAIL OF MARRIAGE. In Scotch Law. A certain sum due by the heir of a deceased ward vassal, when the heir became of marriageable age. Erskine, Inst. l. 2, t. 5, § 18.

AVAL. In Canadian Law. An act of suretyship or guarantee on a promissory note. 1 Low. C. 221; 9 *id.* 360.

AVARIA, AVARIE. Average; the loss and damage suffered in the course of a navigation. Pothier, Marit. Louage, 105.

AVENTURE. A mischance causing the death of a man, as by drowning, or being killed suddenly without felony. Coke, Litt. 391; Whishaw.

AVER. To assert. See AVERMENT.

To make or prove true; to verify.

The defendant will offer to *aver*. Cowel; Coke, Litt. 362 *b*.

Cattle of any kind. Cowel, *Averia;* Kelham.

Aver et tenir. To have and to hold.

Aver corn. A rent reserved to religious houses, to be paid in corn. Corn drawn by the tenant's cattle. Cowel.

Aver-land. Land ploughed by the tenant for the proper use of the lord of the soil. Blount.

Aver-penny. Money paid to the king's averages to be free therefrom. Termes de la Ley.

Aver-silver. A rent formerly so called. Cowel.

AVERAGE. In Insurance. Is general, particular, or petty.

GENERAL AVERAGE (also called gross) consists of expense purposely incurred, sacrifice made, or damage sustained for the common safety of the vessel, freight, and cargo, or the two of them, at risk, and is to be contributed for by the several interests in the proportion of their respective values exposed to the common danger, and ultimately surviving, including the amount of expense, sacrifice, or damage so incurred in the contributory value. 2 Phillips, Ins. § 1269 *et seq.*; and see *Code de Com.* tit. xi.; Aluzet, Trait. des Av. CXX.; 2 Curt. C. C. 59; 9 Cush. Mass. 415; Bailey, Gen. Av.; 2 Parsons, Mar. Law, ch. xi.; Stevens, Av.; Benecke, Av.; Pothier, Av.; Lex Rhodia, Dig. 14. 2. 1.

2. Indemnity for general average loss is usually stipulated for in policies against the risks in navigation, subject, however, to divers modifications and conditions. 2 Phillips, Ins. §§ 1275, 1279, 1408, 1409. Under maritime policies in the ordinary form, underwriters are liable for the contributions made by the insured subject, for loss by jettison of cargo, sacrifice of cables, anchors, sails, spars, and boats, expense of temporary repairs, voluntary stranding, compromise with pirates, delay for the purpose of refitting. 2 Phillips, Ins. c. xv. sect. ii.

Average particular (also called partial loss) is a loss on the ship, cargo, or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and, if not total, it is also called a partial loss. 2 Phillips, Ins. c. xvi.; Stevens, pt. 1, c. 2; Arnould, Mar. Ins. 953; *Code de Com.* l. 2, t. 11, a. 403; Pothier, Ass. 115; Benecke & S. Av. Phill. ed. 341.

3. It is insured against in marine policies in the usual forms on ship, cargo, or freight, when the action of peril is extraordinary, and the damage is not mere wear and tear; and, on the ship, covers loss by sails split or blown away, masts sprung, cables parted, spars carried away, planks started, change of shape by strain, loss of boat, breaking of sheathing or upper works or timbers, damage by lightning or fire, by collision or stranding, or in defence against pirates or enemies, or by hostile or piratical plunder. 2 Phillips, Ins. c. xvi.; 21 Pick. Mass. 456; 11 *id.* 90; 7 *id.* 159; 7 Carr. & P. 597; 3 *id.* 323; 1 Conn. 239; 9 Mart. La. 276; 18 La. 77; 5 Ohio, 306; 6 *id.* 70, 456; 3 Cranch, 218; 1 Cow. N. Y. 265; 4 *id.* 222; 5 *id.* 63; 4 Wend. N. Y. 255; 11 Johns. N. Y. 315.

Particular average on freight may be by loss of the ship, or the cargo, so that full freight cannot be earned; but not if the goods, though damaged, could have been carried on to the port of destination. 2 Phillips, Ins. c. xvi. sect. iii.; 9 *id.* 21; 15 Mass. 341; 23 Pick. Mass. 405; 2 McLean, 423; 1 Story, C. C. 342; 2 Gill, Md. 410; 12 Johns. N. Y. 107; 18 *id.* 205, 208; 1 Binn. Penn. 547.

Particular average on goods is usually adjusted at the port of delivery on the basis of the value at which they are insured, viz.: the value at the place of shipment, unless it is otherwise stipulated in the policy. 2 Phillips, Ins. §§ 145, 146; 2 Wash. C. C. 136; 2 Burr. 1167; 2 East, 581; 12 *id.* 639; 3 Bos. & P. 308; 3 Johns. Ch. N. Y. 217; 4 Wend. N. Y. 45; 1 Caines, N. Y. 543; 1 Hall, N. Y. 619; 20 Penn. St. 312; 36 Eng. L. & Eq. 198. See SALVAGE; LOSS.

4. A particular average on profits is, by the English custom, adjusted upon the basis of the profits which would have been realized at the port of destination. In the United States the adjustment is usually at the same rate as on the goods the profits on which are the subject of the insurance. 2 Phillips, Ins. §§ 1773, 1774; 2 Johns. Cas. N. Y. 36; 3 Day, Conn. 108; 1 Johns. N. Y. 433; 3 Pet. 222; 1 Sumn. C. C. 451; 8 Miss. 63; 1 Serg. & R. Penn. 115.

PETTY AVERAGE consists of small charges which were formerly assessed upon the cargo, viz.: pilotage, towage, light-money, beaconage, anchorage, bridge toll, quarantine, piermoney. Le Guidon, c. 5, a. 13; Weyt, de Av. 3, 4; Weskett, art. Petty Av.; 2 Phillips, Ins. § 1269, n. 1.

AVERIA (Lat.). Cattle; working cattle. *Averia carucæ* (draft-cattle) are exempt from distress. 3 Blackstone, Comm. 9; 4 Term, 566.

AVERIIS CAPTIS IN WITHERNAM. In English Law. A writ which lies in favor of a man whose cattle have been unlawfully taken by another, and driven out of the county where they were taken, so that they cannot be replevied.

It issues against the wrong-doer to take his cattle for the plaintiff's use. *Reg. Brev.* 82.

AVERMENT. In Pleading. A positive statement of facts, as opposed to an argumentative or inferential one. Cowp. 683; Bacon, Abr. *Pleas*, B.

Averments were formerly said to be general and particular; but only particular averments are found in modern pleading. 1 Chitty, Plead. 277.

Particular averments are the assertions of particular facts.

There must be an averment of every substantive material fact on which the party relies, so that it may be replied to by the opposite party.

Negative averments are those in which a negative is asserted.

Generally, under the rules of pleading, the party asserting the affirmative must prove it; but an averment of illegitimacy, 2 Selwyn, Nisi P. 709, or criminal neglect of duty, must be proven. 2 Gall. C. C. 498; 19 Johns. N. Y. 345; 1 Mass. 54; 10 East, 211; 3 Campb. 10; 3 Bos. & P. 302; 1 Greenleaf, Ev. § 80; 3 Bouvier, Inst. n. 3089.

Immaterial and *impertinent averments* (which are synonymous, 5 Dowl. & R. 209) are those which need not be made, and, if made, need not be proved. The allegation of deceit in the seller of goods in action on the warranty is such an averment. 2 East, 446; 17 Johns. N. Y. 92.

Unnecessary averments are statements of matters which need not be alleged, but which, if alleged, must be proved. Carth. 200.

2. Averments must contain not only matter, but form. General averments are always of the same form. The most common form of making particular averments is in express and direct words, for example: And the party *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, or *being*, &c. But they need not be in these words; for any words which necessarily imply the matter intended to be averred are sufficient.

See, in general, 3 Viner, Abr. 357; Bacon, Abr. *Pleas*, B 4; Comyns, Dig. *Pleader*, C 50, C 67, 68, 69, 70; 1 Wms. Saund. 235 *a*, n. 8; 3 *id.* 352, n. 3; 1 Chittys, Plead. 308; Archbold, Civ. Plead. 163; 3 Bouvier, Inst. n. 2835–40.

AVERSIO (Lat.). An averting; a turning away. A sale in gross or in bulk.

Letting a house altogether, instead of in chambers. 4 Kent, Comm. 517.

Aversio periculi. A turning away of peril. Used of a contract of insurance. 3 Kent, Comm. 263.

AVERUM (Lat.). Goods; property. A beast of burden. Spelman, Gloss.

AVET. In Scotch Law. To abet or assist. Tomlin, Dict.

AVIATICUS (Lat.). **In Civil Law.** A grandson.

AVIZANDUM. In Scotch Law. To make *avizandum* with a process is to take it from the public court to the private consideration of the judge. Bell, Dict.

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when a benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See CONFESSION and AVOIDANCE.

AVOIRDUPOIS. The name of a weight.

This kind of weight is so named in distinction from the Troy weight. One pound avoirdupois contains seven thousand grains Troy; that is, fourteen ounces, eleven pennyweights and sixteen grains Troy; a pound avoirdupois contains sixteen ounces; and an ounce, sixteen drachms. Thirty-two cubic feet of pure spring-water, at the temperature of fifty-six degrees of Fahrenheit's thermometer, make a ton of two thousand pounds avoirdupois, or two thousand two hundred and forty pounds net weight. Dane, Abr. c. 211, art. 12, § 6. The avoirdupois ounce is less than the Troy ounce in the proportion of 72 to 79; though the pound is greater. Encyc. Amer. *Avoirdupois.* For the derivation of this phrase, see Barrington, Stat. 206. See the Report of Secretary of State of the United States to the Senate, February 22, 1821, pp. 44, 72, 76, 79, 81, 87, for a learned exposition of the whole subject.

AVOUCHER. See VOUCHER.

AVOW. In Practice. To acknowledge the commission of an act and claim that it was done with right. 3 Blackstone, Comm. 150.

To make an avowry. For example, when replevin is brought for a thing distrained and the party taking claims that he had a right to make the distress, he is said to avow. See Fleta, l. 1, c. 4, § 4; Cunningham, Dict.; AVOWRY; JUSTIFICATION.

AVOWANT. One who makes an avowry.

AVOWEE. In Ecclesiastical Law. An advocate of a church benefice.

AVOWRY. In Pleading. The answer of the defendant in an action of replevin brought to recover property taken in distress, in which he acknowledges the taking, and, setting forth the cause thereof, claims a right in himself or his wife to do so. Lawes, Plead. 35; 4 Bouvier, Inst. n. 3571.

A justification is made where the defendant shows that the plaintiff had no property by showing either that it was the defendant's or some third person's, or where he shows that he took it by a

right which was sufficient at the time of taking though not subsisting at the time of answer. The avowry admits the property to have been the plaintiff's, and shows a right which had then accrued, and still subsists, to make such caption. See Gilbert, Distr. 176–178; 2 W. Jones, 25.

2. An avowry is sometimes said to be in the nature of an action or of a declaration, so that privity of estate is necessary. Coke, Litt. 320 *a;* 1 Serg. & R. Penn. 170. There is no general issue upon an avowry; and it cannot be traversed cumulatively. 5 Serg. & R. Penn. 377. Alienation cannot be replied to it without notice; for the tenure is deemed to exist for the purposes of an avowry till notice be given of the alienation. Hamm. Part. 131.

The object of an avowry is to secure the return of the property, that it may remain as a pledge, see 2 W. Jones, 25; and to this extent it makes the defendant a plaintiff. It may be made for rents, services, tolls, 3 Dev. No. C. 478; for cattle taken, damage feasant, and for heriots, and for such rights wherever they exist. See Gilbert, Distr. 176 *et seq.;* 1 Chitty, Plead, 436; Comyns, Dig. *Pleader*, 3 K.

AVOWTERER. In English Law. An adulterer with whom a married woman continues in adultery. Termes de la Ley.

AVOWTRY. In English Law. The crime of adultery.

AVULSION (Lat. *avellere*, to tear away). The removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. 2 Washburn, Real Prop. 452.

In such case, the property belongs to the first owner. Bracton, 221; Hargrave, Tract. *de jure mar.;* Schultes, Aq. Rights, 115–138.

AVUNCULUS. In Civil Law. A mother's brother. 2 Sharswood, Blackst. Comm. 230.

AWAIT. To lay in wait; to waylay.

AWARD (Low Latin, *awarda, awardum*, Old French, *agarda*, from *à garder*, to keep, preserve, to be guarded, or kept: so called because it is imposed on the parties to be observed or kept by them. Spelman, Gloss.).

The judgment or decision of arbitrators, or referees, on a matter submitted to them.

The writing containing such judgment. Cowel; Termes de la Ley; Jenk. Cent. Cas. 137; Billings, Aw. 119; Watson, Arb. 174; Russell, Arb. 234; 3 Bouvier, Inst. n. 2402 *et seq.*

2. *Requisites of.* To be conclusive, the award should be consonant with and follow the submission, and affect only the parties to the submission; otherwise, it is an assumption of power, and not binding. Lutw. 530 (Onyons *v.* Cheese); Strange, 903; 1 Ch. Cas. 186; Rep. *temp.* Finch, 141; 24 Eng. L. & Eq. 346; 8 Beav. 361; 5 Barnew. & Ad. 295; 13 Johns. N. Y. 27, 268; 11 *id.* 133; 17 Vt. 9; 3 N. H. 82; 13 Mass. 396; 11 *id.* 447; 22 Pick. Mass. 144; 11 Cush. Mass. 37; 18 Me. 251; 40 *id.* 194; 25 Conn. 71; 3 Harr. Del. 22; 1 Binn. Penn. 109; 5 Penn. St. 274; 12 Gill & J. Md. 156, 456; Litt. Cas. Ky. 83; 13 Miss. 172; 25 Ala. 351; 7 Cranch, 599. See 7 Sim. 1; 2 Q. B. 256; 11 Johns. N. Y. 61; 1 Call. Va. 500; 7 Penn. St. 134.

It must be final and certain, 1 Burr. 275; 5 Ad. & E. 147; 2 Sim. & S. Ch. 130; 2 Vern. 514; 2 Bulstr. 260; 3 Serg. & R. Penn. 340; 2 Penn. St. 206; 1 *id.* 395; 9 Johns. N. Y. 43; 13 *id.* 187; 22 Wend. 125; 23 Barb. N. Y. 187; 3 Sandf. N. Y. 405; 7 Metc. Mass. 316; 4 Cush. Mass. 317, 396; 1 Gray, Mass. 418; 13 Vt. 53; 40 Me. 194; 2 Green, N. J. 333; 2 Halst. N. J. 90; 1 Dutch. N. J. 281; 2 *id.* 175; 3 Harr. & J. Md. 383; 2 Harr. & G. Md. 67; 6 Md. 135; 4 Md. Ch. Dec. 199; 1 Gilm. Va. 92; 2 Patt. & H. Va. 442; 3 Ohio, 266; 5 Blackf. Ind. 128; 4 *id.* 489; 1 Ired. No. C. 466; Busb. No. C. 173; 3 Cal. 431; 1 Ark. 206; 4 Ill. 428; 2 Fla. 157; 13 Miss. 712; Charlt. Ga. 289; 2 M'Cord, So. C. 279; 5 Wheat. 394; 11 *id.* 446; 12 *id.* 377; and see 4 Conn. 50; 6 Johns. N. Y. 39; 6 Mass. 46; conclusively adjudicating *all* the matters submitted, 6 Md. 135; 1 M'Mull. So. C. 302; 2 Cal. 299; and stating the decision in such language as to leave no doubt of the arbitrator's intention, or the nature and extent of the duties imposed by it on the parties. 2 Cal. 299, and cases above. An award reserving the determination of future disputes, 6 Md. 135, an award directing a bond without naming a penalty, 5 Coke, 77; Rolle, Abr. *Arbitration*, 2, 4, an award that one shall give security for the performance of some act or payment of money, without specifying the kind of security, are invalid. Viner, Abr. *Arbit.* 2, 12; Bacon, Abr. *Arbit.* E 11; and cases above.

3. It must be possible to be performed, and must not direct any thing to be done which is contrary to law. 1 Ch. Cas. 87; 5 Taunt. 454; 12 Mod. 585; 2 Barnew. & Ald. 528; Kirb. Conn. 253; 1 Dall. Penn. 364; 4 *id.* 298; 4 Gill & J. Md. 298. It will be void if it direct a party to pay a sum of money at a day past, or direct him to commit a trespass, felony, or an act which would subject him to an action, 2 Chitt. 594; 1 Mees. & W. 572; or if it be of things nugatory and offering no advantage to either of the parties. 6 J. B. Moore, 713.

It must be without palpable or apparent mistake. 2 Gall. C. C. 61; 3 Bos. & P. 371; 1 Dall. Penn. 487; 6 Metc. Mass. 131. For if the arbitrator acknowledges that he made a mistake, or if an error (in computation, for instance) is apparent on the face of the award, it will not be good, 4 Zabr. N. J. 647; 2 Stockt. N. J. 45; 2 Dutch. N. J. 130; 32 N. H. 289; 11 Cush. Mass. 549; 18 Barb. N. Y. 344; 2 Johns. Ch. N. Y. 399; 27 Vt. 241; 8 Md. 208; 4 Cal. 345; 5 *id.* 430; for, although an arbitrator may decide contrary to law, yet if the award attempts to follow the law, but fails to do so from the mistake of the arbitrator, it will be void. 3 Md. 353; 15

Ill. 421; 26 Vt. 416, 630; 4 N. J. 647; 17 How. 344.

4. An award may be in part good and in part void, in which case it will be enforced so far as valid, if the good part is separable from the bad. 10 Mod. 204; 12 *id.* 587; Croke, Jac. 664; 2 Leon. 304; 3 Lev. 413; Godb. 164; 8 Taunt. 697; 1 Wend. N. Y. 326; 5 Cow. N. Y. 197; 13 Johns. N. Y. 264; 2 Caines, N. Y. 235; 1 Me. 300; 13 *id.* 173; 18 *id.* 255; 42 *id.* 83; 7 Mass. 399; 19 Pick. Mass. 300; 11 Cush. Mass. 37; 6 Green, N. J. 247; 1 Dutch. N. J. 281; 1 Rand. Va. 449; 1 Hen. & M. Va. 67; Hard. Ky. 318; 5 Dan. Ky. 492; 26 Vt. 345; 2 Swan, Tenn. 213; 2 Cal. 74; 4 Ind. 248; 6 Harr. & J. Md. 10; 5 Wheat. 394.

5. As to *form*, the award should, in general, follow the terms of the submission, which frequently provides the time and manner of making and publishing the award. It may be by parol (oral or written), or by deed. 3 Bulstr. 311; 20 Vt. 189. It should be signed by *all* the arbitrators in the presence of each other. See ARBITRATOR.

An award will be sustained by a liberal construction, *ut res magis valeat quam pereat.* 2 N. H. 126; 2 Pick. Mass. 534; 4 Wisc. 181; 8 Md. 208; 8 Ind. 310; 17 Ill. 477; 29 Penn. St. 251; Reed, Aw. 170.

6. *Effect of.* An award is a final and conclusive judgment between the parties on all the matters referred by the submission. It transfers property as much as the verdict of a jury, and will prevent the operation of the statute of limitations. 3 Blackstone, Comm. 16; 1 Freem. Ch. 410; 4 Ohio, 310; 5 Cow. N. Y. 383; 15 Serg. & R. 166; 1 Cam. & N. No. C. 93. A parol award following a parol submission will have the same effect as an agreement of the same form directly between the parties. 37 Me. 72; 15 Wend. N. Y. 99; 27 Vt. 241; 16 Ill. 34; 5 Ind. 220; 1 Ala. 278; 6 Litt. Ky. 264; 2 Coxe, N. J. 369; 7 Cranch, 171.

The right of real property cannot thus pass by mere award; but no doubt an arbitrator may award a conveyance or release of land and require deeds, and it will be a breach of agreement and arbitration bond to refuse compliance; and a court of equity will sometimes enforce this specifically. 1 Ld. Raym. 115; 3 East, 15; 6 Pick. Mass. 148; 4 Dall. Penn. 120; 16 Vt. 450, 592; 15 Johns. N. Y. 197; 5 Wend. N. Y. 268; 2 Caines, N. Y. 320; 4 Rawle, Pa. 411, 430; 7 Watts, Pa. 311; 11 Conn. 240; 18 Me. 251; 28 Ala. N. S. 475.

7. Arbitrament and award may be regularly pleaded at common law or equity to an action concerning the same subject-matter, and will bar the action. Watson, Arb. 256; 12 N. Y. 9; 41 Me. 355. To an action on the award at common law, in general, nothing can be pleaded dehors the award; not even fraud. 23 Barb. N. Y. 187; 28 Vt. 81, 776; *contra*, 9 Cush. Mass. 560. Where an action has been referred under rule of court and the reference fails, the action proceeds.

8. *Enforcement of.* An award may be enforced by an action at law, which is the only remedy for disobedience when the submission is not made a rule of court and no statute provides a special mode of enforcement. 6 Ves. 815; 17 *id.* 232; 19 *id.* 431; 1 Swanst. 40; 2 Chitt. 316; 5 East, 266; 5 Barnew. & Ald. 507; 4 Barnew. & C. 103; 1 Dowl. & R. 106; 3 C. B. 745. Assumpsit lies when the submission is not under seal, 33 N. H. 27; and *debt* on an award of money and on an arbitration bond, 18 Ill. 437, *covenant* where the submission is by deed for breach of any part of the award, and *case* for the non-performance of the duty awarded. *Equity* will enforce specific performance when all remedy fails at common law. Comyns, Dig. *Chancery*, 2 K; Story, Eq. Jur. § 1458; 2 Hare, Ch. 198; 4 Johns. Ch. N. Y. 405; 9 *id.* 405; 4 Ill. 453; 3 P. Will. 137; 1 Atk. 62; 2 Vern. 24; 1 Brown, Parl. Cas. 411. But see 1 Turn. & R. 187; 5 Ves. 846.

An award under a rule of court may be enforced by the court issuing execution upon it as if it were a verdict of a jury, or by attachment for contempt. 7 East, 607; 1 Strange, 593. By the various state statutes regulating arbitrations, awards, where submission is made before a magistrate, may be enforced and judgment rendered thereon.

9. *Amendment and setting aside.* A court has no power to alter or amend an award, 1 Dutch. N. J. 130; 5 Cal. 179; 12 N. Y. 9; 41 Me. 355; but may recommit to the referee, in some cases. 11 Tex. 18; 39 Me. 105; 26 Vt. 361. See the statutes of the different states, and stat. 1 & 2 Vict. c. 110; 9 & 10 Vict. c. 95, § 77; 17 & 18 Vict. c. 125.

An award will not be disturbed except for very cogent reasons. It will be set aside for *misconduct*, corruption, or irregularity of the arbitrator, which has or may have injured one of the parties, 2 Eng. L. & Eq. 184; 5 Barnew. & Ad. 488; 1 Hill & D. N. Y. 103; 13 Gratt. Va. 535; 14 Tex. 56; 28 Penn. St. 514; 29 Vt. 72; for *error* in fact, or in attempting to follow the law, apparent on the face of the award; see § **3**; ARBITRATOR, § **3**; for *uncertainty* or inconsistency; for an *exceeding* his authority by the arbitrator, 22 Pick. Mass. 417; 4 Den. N. Y. 191; when it is *not final* and conclusive, without reserve; when it is a *nullity;* when a party or witness has *been at fault*, or has made a mistake; or when the arbitrator acknowledges that he has made a mistake or error in his decision.

10. Equity has jurisdiction to set aside an award, on any of the enumerated grounds, when the submission cannot be made a rule of a common-law court.

In general, in awards under statutory provisions as well as in those under rules of court, questions of law may be reserved for the opinion of the court, and facts and evidence reported for their opinion and decision.

AWAY-GOING CROP. A crop sown before the expiration of a tenancy, which

cannot ripen until after its expiration, to which, however, the tenant is entitled. Broom, Max. 306. See EMBLEMENTS.

AWM. An ancient measure used in measuring Rhenish wines. Termes de la Ley. Its value varied in the different cities. Spelled also *Aume*. Cowel.

AYANT CAUSE. In French Law. This term, which is used in Louisiana, signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee. An *ayant cause* differs from an heir who acquires the right by inheritance. 8 Toullier, n. 245.

AYUNTAMIENTO. In Spanish Law. A congress of persons; the municipal council of a city or town. 1 White, Coll. 416; 12 Pet. 442, notes.

B.

B. The second letter of the alphabet.

It is used to denote the second page of a folio, and also as an abbreviation. See A; ABBREVIATIONS.

BACK-BOND. A bond of indemnification given to a surety.

In Scotch Law. A declaration of trust; a defeasance; a bond given by one who is apparently absolute owner, so as to reduce his right to that of a trustee or holder of a bond and disposition in security. Paterson, Comp.

BACK-WATER. That water in a stream which, in consequence of some obstruction below, is detained or checked in its course, or re-flows.

The term is usually employed to designate the water which is turned *back*, by a dam erected in the stream below, upon the wheel of a mill above, so as to retard its revolution.

2. Every riparian proprietor is entitled to the benefit of the water in its natural state. Another such proprietor has no right to alter the level of the water, either where it *enters* or where it *leaves* his property. If he claims either to throw the water back above, or to diminish the quantity which is to descend below, he must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or an uninterrupted enjoyment for twenty years. If he cannot maintain his claim in either of these ways, he is liable to an action on the case for damages in favor of the injured party, or to a suit in equity for an injunction to restrain his unlawful use of the water. 1 Sim. & S. Ch. 203; 1 Barnew. & Ad. 874; 9 Coke, 59; 1 Barnew. & Ald. 258; 1 Wils. 178; 6 East, 203; 5 Gray, Mass. 460; 2 *id.* 137; 7 Pick. Mass. 198; 11 Metc. Mass. 517; 25 Penn. St. 519; 20 *id.* 85; 1 Rawle, Penn. 218; 7 Watts & S. Penn. 9; 4 Day, Conn. 244; 24 Conn. 15; 7 Cow. N. Y. 266; 2 Johns. Ch. N. Y. 162; 5 N. H. 232; 9 *id.* 502; 2 Gilm. Va. 285; 4 Ill. 432; 3 Green, N. J. 116; 3 Vt. 308; 4 Eng. L. & Eq. 265; 4 Mas. C. C. 400.

3. An action on the case to recover damages for flowing land is local, and must, therefore, be brought in the county where the land lies. 25 N. H. 525; 23 Wend. N. Y. 484; 2 East, 497.

In Massachusetts and some other of the states, acts have been passed giving to the owners of mills the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed, which process is substituted for all other judicial remedies. Angell, Wat. Cour. c. xii.; 12 Pick. Mass. 467; 23 *id.* 216; 11 Mass. 364; 4 Cush. Mass. 245; 4 Gray, Mass. 581; 5 Ired. No. C. 333; 11 Ala. 472; 39 Me. 246; 41 *id.* 291; 42 *id.* 150; 3 Wisc. 603. These statutes, however, confer no authority to flow back upon existing mills. 22 Pick. Mass. 312; 23 *id.* 216. See DAMAGES; INUNDATION; WATERCOURSE.

BACKADATION. A consideration given to keep back the delivery of stock when the price is lower for time than for ready money. Wharton, Dict. 2d Lond. ed.

BACKBEREND (Sax.). Bearing upon the back or about the person.

Applied to a thief taken with the stolen property in his immediate possession. Bracton, l. 3, tr. 2, c, 32. Used with *handhabend*, having in the hand.

BACKING. Indorsement. Indorsement by a magistrate.

Backing a warrant becomes necessary when it is desired to serve it in a county other than that in which it was first issued. In such a case the indorsement of a magistrate of the new county authorizes its service there as fully as if first issued in that county. The custom prevails in England, Scotland, and some of the United States.

BACKSIDE. A yard at the back part of or behind a house, and belonging thereto.

The term was formerly much used both in conveyances and in pleading, but is now of infrequent occurrence except in conveyances which repeat an ancient description. Chitty, Pract. 177; 2 Ld. Raym. 1399.

BADGE. A mark or sign worn by some persons, or placed upon certain things, for the purpose of designation.

Some public officers, as watchmen, policemen, and the like, are required to wear badges that they may

be readily known. It is used figuratively when we say, possession of personal property by the seller is a badge of fraud.

BAGGAGE. Such articles of apparel, ornament, &c. as are in daily use by travellers, for convenience, comfort, or recreation.

This term has been held to include jewelry carried as baggage, and which formed a part of female attire, the plaintiff being on a journey with his family. 4 Bingh. 218; 3 Penn. St. 451; Redfield, Railw. 313. A watch, carried in one's trunk, is proper baggage, 10 Ohio, 145; 1 Newb. Adm. 494; but see 9 Humphr. Tenn. 621; books for reading or amusement, 6 Ind. 242; a harness-maker's tools, valued at ten dollars; and a rifle. 10 How. Pract. N. Y. 330; Redfield, Railw. 313. From analogy to the foregoing articles, it will be obvious that the term baggage must comprehend an almost infinite number and variety of articles not enumerated here.

But it has been held not to include specie beyond what the traveller might fairly expect to require for his expenses and necessary purchases for himself and family, including the replenishing of the wardrobe, and calculating reasonably for such contingencies of sickness or accident as might fairly be considered not altogether improbable. 11 Humphr. Tenn. 419; 20 Mo. 513; 9 Wend. N. Y. 85; 19 *id.* 534; 6 Cush. Mass. 69; 1 Abb. Pr. N. Y. 325; 6 Ind. 242; Redfield, Railw. 313, 314.

It is well settled that merchandise which one carries in a trunk without the knowledge of the carrier is not protected as baggage, and, if lost without the express fault of the carrier, he is not liable. 9 Eng. L. & Eq. 477; Redfield, Railw. 313, 314; 10 Cush. Mass. 506.

But if a carrier know that merchandise is included among baggage, and do not object, he is liable to the same extent as for other goods taken in the due course of his business. 3 E. D. Smith, N. Y. 571; Redfield, Railw. 313, 314. And see COMMON CARRIERS.

BAIL (Fr. *bailler*, to deliver).

In Practice. Those persons who become sureties for the appearance of the defendant in court.

The delivery of the defendant to persons who, in the manner prescribed by law, become securities for his appearance in court.

The word is used both as a substantive and a verb, though more frequently as a substantive, and in civil cases, at least, in the first sense given above. In its more ancient signification, the word includes the delivery of property, real or personal, by one person to another. Bail in actions was first introduced in favor of defendants, to mitigate the hardships imposed upon them while in the custody of the sheriff under arrest, the security thus offered standing to the sheriff in the place of the body of the defendant. Taking bail was made compulsory upon the sheriffs by the statute 23 Hen. VI. c. 9, and the privilege of the defendant was rendered more valuable and secure by successive statutes, until by statute 12 Geo. I. c. 29, made perpetual by 21 Geo. II. c. 3, and 19 Geo. III. c. 70, it was provided that arrests should not be made unless the plaintiff make *affidavit* as to the amount due, and this amount be indorsed on the writ; and for this sum and no more the sheriff might require bail.

In the King's Bench, bail above and below were both exacted as a condition of releasing the defendant from the *custody* in which he was held from the time of his arrest till his final discharge in the suit. In the Common Bench, however, the origin of bail above seems to have been different, as the *capias* on which bail might be demanded was of effect only to bring the defendant to court, and after appearance he was theoretically in *attendance*, but not in *custody*. The failure to file such bail as the emergency requires, although no arrest may have been made, is, in general, equivalent to a default.

In some of the states the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below. 1 Me. 336; 1 N. H. 172; 2 *id.* 360; 2 Mass. 484; 13 *id.* 94; 2 Nott & M'C. So. C. 569; 2 Hill, So. C. 336; 4 Dev. No. C. 40; 18 Ga. 314. And see 2 South. N. J. 811. In criminal law the term is used frequently in the second sense given, and is allowed except in cases where the defendant is charged with the commission of the more heinous crimes.

2. *Bail above.* Sureties who bind themselves either to satisfy the plaintiff his debt and costs, or to surrender the defendant into custody, provided judgment be against him in the action and he fail to do so. Sellon, Pract. 137.

Bail to the action. Bail above.

Bail below. Sureties who bind themselves to the sheriff to secure the defendant's appearance, or his putting in bail to the action on the return-day of the writ. It may be demanded by the sheriff whenever he has arrested a defendant on a bailable process, as a prerequisite to releasing the defendant.

Civil bail. That taken in civil actions.

Common bail. Fictitious sureties formally entered in the proper office of the court.

It is a kind of bail above, similar in form to special bail, but having fictitious persons, John Doe and Richard Roe, as sureties. Filing common bail is tantamount to entering an appearance.

Special bail. Responsible sureties who undertake as bail above.

3. *Requisites of.* A person to become bail must, in England, be a freeholder or housekeeper, 2 Chitt. Bail, 96; 5 Taunt. 174; Lofft, 148; must be *subject to process* of the court, and not privileged from arrest either temporarily or permanently, 4 Taunt. 249; 1 Dowl. & R. 127; 15 Johns. N. Y. 535; 20 *id.* 129; Kirb. Conn. 209; see 3 Rich. So. C. 49; must be *competent* to enter into a *contract*, excluding infants, married women, etc.; must be *able to pay* the amount for which he becomes responsible, but the property may be real or personal if held in his own right, 2 Chitt. Bail, 97; 11 Price, Exch. 158, and liable to ordinary legal process. 4 Burr. 2526. And see 1 Chitt. 286, n.

Persons not excepted to as appearance bail cannot be objected to as bail above, 1 Hen. & M. Va. 22; and bail, if of sufficient ability, should not be refused on account of the personal character or opinions of the party proposed. 4 Q. B. 468; 1 Bennett & H. Lead. Crim. Cas. 236.

4. *When it may be given or required.* In civil actions the defendant may give bail in all cases where he has been arrested, 7 Johns. N. Y. 137; and bail below, even, may be demanded in some cases where no arrest is made. 1 Harr. & J. Md. 538; 2 M'Cord, So. C. 250.

Bail above is required under some restrictions in many of the states in all actions for considerable amounts, 2 M'Cord, So. C. 385; either *common*, 2 Yeates, Penn. 429; 1 Spenc. N. J. 494; 13 Ill. 551, which may be filed by the plaintiff, and judgment taken by default against the defendant if he neglects to file proper bail, after a certain period, 8 Johns. N. Y. 359; 4 Cow. N. Y. 61; 2 South. N. J. 684; 4 Wash. C. C. 127; or *special*, which is to be filed of course in some species of action and may be demanded in others, 1 M'Cord, So. C. 472; 17 Mass. 176; 1 Yeates, Penn. 280; 13 Johns. N. Y. 305, 425; 1 Wend. N. Y. 303; 4 Harr. & M'H. Md. 155; 2 Brev. So. C. 218; but in many cases only upon special cause shown. Coxe, N. J. 277; 3 Halst. N. J. 311; 2 Caines, N. Y. 47; 1 Browne, Penn. 297; 3 Binn. Penn. 283; 4 Rand. Va. 152.

5. The existence of a debt and the amount due, 8 Serg. & R. Penn. 61; 2 Whart. Penn. 499; 1 Mo. 346; 1 Leigh, Va. 476; 1 Penn. N. J. 46; 1 Blackf. Ind. 112; 2 Johns. Cas. N. Y. 105; 3 Ga. 128; 10 Mo. 273, in an action for debt, and, in some forms of action, other circumstances, must be shown by affidavit to prevent a discharge on common bail. 5 Halst. N. J. 331; 7 Cow. N. Y. 518; 1 Barb. N. Y. 247; 1 Blackf. Ind. 112; 8 Leigh, Va. 411; 16 Ohio, 304; 13 Ga. 357; see 1 Pet. C. C. 352; 2 Wash. C. C. 198; 4 *id.* 325. It is a general rule that a defendant who has been once held to bail in a civil case cannot be held a second time for the same cause of action, Tidd, Pract. 184; 8 Ves. Ch. 594; 4 Yeates, Penn. 206; 2 Rich. So. C. 336; but this rule does not apply where the second holding is in another state. 14 Johns. N. Y. 346; 2 Cow. N. Y. 626; 3 N. H. 43; 2 Dall. C. C. 330; 4 M'Cord, So. C. 485. See 1 Halst. N. J. 131. And see also 1 Dall. Penn. 188; 2 Wash. C. C. 157; 1 Pet. C. C. 404; 3 Conn. 523; 3 Gill & J. Md. 54, as to the effect of a discharge in insolvency.

6. *In criminal cases* the defendant may in general claim to be set at liberty upon giving bail, except when charged with the commission of a capital offence, 4 Sharswood, Blackst. Comm. 297; 6 Mo. 640; 1 M'Mull. So. C. 456; 3 Strobh. So. C. 272; 18 Ala. 390; 9 Dan. Ky. 38; 9 Ark. 222; and even in capital offences a defendant may be bailed in the discretion of the court, in the absence of constitutional or statutory provisions to the contrary. 6 Gratt. Va. 705; 11 Leigh, Va. 665; 19 Ohio, 139; 8 Barb. N. Y. 158; 19 Ala. N. S. 561; 1 Cal. 9; 30 Miss. 673; 16 Mass. 423; 8 B. Monr. Ky. 3.

For any crime or offence against the United States, not punishable by death, any justice or judge of the United States, or any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or any justice of the peace or magistrate of any state, where the offender may be found, may take bail, Act Sept. 24, 1789, § 33, Mar. 2, 1793, § 4, and, after commitment by a justice of the supreme or judge of district court of the United States, any judge of the supreme or superior court of any state (there being no judge of the United States in the district to take such bail) may admit the person to bail if he offer it.

When the punishment by the laws of the United States is death, bail can be taken only by the supreme or circuit court, or by a judge of the district court of the United States.

As to the principle on which bail is granted or refused in cases of capital offences in the Queen's Bench, see 1 Ell. & B. 1, 8; Dearsl. Cr. Cas. 51, 60.

7. *The proceedings* attendant on giving bail are substantially the same in England and all the states of the United States. An application is made to the proper officer, 4 Rand. Va. 498, and the bond or the names of the bail proposed filed in the proper office, and notice is given to the opposite party, who must except within a limited time, or the bail justify and are approved. If exception is taken, notice is given, a hearing takes place, the bail must *justify*, and will then be approved unless the other party oppose successfully; in which case other bail must be added or substituted. A formal application is, in many cases, dispensed with, but a notification is given at the time of filing to the opposite party, and, unless exceptions are made and notice given within a limited time, the bail justify and are approved. If the sum in which the defendant is held is too large, he may apply for mitigation of bail.

The bail are said to enter into a recognizance when the obligation is one of record, which it is when government or the defendant is the obligee; when the sheriff is the obligee, it is called a bail bond. See BAIL BOND; RECOGNIZANCE.

8. *Mitigation* of excessive bail may be obtained by simple application to the court, 13 Johns. N. Y. 425; 1 Wend. N. Y. 107; 3 Yeates, Penn. 83; and in other modes. 17 Mass. 116; 1 N. H. 374. Exacting excessive bail is against the constitution of the United States, and was a misdemeanor at common law. U. S. Const. Amend. art. 8; 1 Brev. So. C. 14.

The liability of bail is limited by the bond, 9 Pet. 329; 2 Va. Cas. 334; 5 Watts, Penn. 539; 2 N. J. 533; by the *ac etiam*, 1 Cow. N. Y. 601; see 5 Conn. 588; 5 Watts, Penn. 539; by the amount for which judgment is rendered, 2 Speers, So. C. 664; and special circumstances in some cases. 1 Nott & M'C. So. C. 64; 1 M'Cord, So. C. 128; 4 *id.* 315; 2 Hill, So. C. 336. And see BAIL BOND; RECOGNIZANCE.

9. The powers of the bail over the defendant are very extensive. As they are supposed to have the custody of the defendant,

they may, when armed with the bail piece, arrest him, though out of the jurisdiction of the court where they became bail, and in a different state, 1 Baldw. C. C. 578; 3 Conn. 84, 421; 8 Pick. Mass. 138; 7 Johns. N. Y. 145; may take him while attending court as a suitor, or at any time, even on Sunday, 4 Yeates, Pa. 123; 4 Conn. 170; may break open a door if necessary, 7 Johns. N. Y. 145; 4 Conn. 166; may command the assistance of the sheriff and his officers, 8 Pick. Mass. 138; and may depute their power to others. 3 Harr. N. J. 568.

To refuse or delay to bail any person is an offence against the liberty of the subject, both at common law and by statutes, but does not entitle the person refused to an action unless malice be shown. 4 Q. B. 468; 13 *id.* 240; 1 N. H. 374.

In Canadian Law. A lease. See Merlin, Répert. *Bail.*

Bail emphyteotique. A lease for years, with a right to prolong indefinitely. 5 Low. C. 381. It is equivalent to an alienation. 6 Low. C. 58.

BAIL BOND. In Practice. A specialty by which the defendant and other persons become bound to the sheriff in a penal sum proportioned to the damages claimed in the action, and which is conditioned for the due appearance of such defendant to answer to the legal process therein described, and by which the sheriff has been commanded to arrest him.

The defendant usually binds himself as principal with two sureties; but sometimes the bail alone bind themselves as principals, and sometimes also one surety is accepted by the sheriff. The bail bond may be said to stand in the place of the defendant so far as the sheriff is concerned, and, if properly taken, furnishes the sheriff a complete answer to the requirement of the writ, directing him to take and produce the body of the defendant. A bail bond is given to the sheriff, and can be taken only where he has custody of the defendant on process other than final, and is thus distinguished from recognizance, which see.

The sheriff can take the bond only when he has custody of the defendant's body on process other than final.

2. When a bail bond, with sufficient securities and properly prepared, is tendered to the sheriff, he must take it and discharge the defendant. Stat. 23 Hen. VI. c. 10, § 5.

The *requisites* of a bail bond are that it should be under seal, 1 Term, 418; 7 *id.* 109; 2 Hayw. No. C. 16; 3 T. B. Monr. Ky. 80; 6 Rand. Va. 101; should be to the sheriff by the name of the office, 1 Term, 422; 4 M'Cord, So. C. 175; 1 Ill. 51; 4 Bibb, Ky. 505; 4 Gray, Mass. 300; conditioned in such manner as that performance is possible, 3 Lev. 74; 3 Campb. 181; 1 South. N. J. 319; for a proper amount, 2 Va. Cas. 334; 2 Penn. N. J. 707; for the defendant's appearance at the place and day named in the writ, 1 Term, 418; 1 Ala. 289; 4 Me. 10; 4 Halst. N. J. 97; 2 Munf. Va. 448; 2 Brev. So. C. 394; see BAIL, **1**; and should describe the action in which the defendant is arrested with sufficient accuracy to distinguish it, Hard. Ky. 501; 10 Mass. 20; 5 *id.* 542; 9 Watts, Penn. 43; but need not disclose the nature of the suit. 6 Term, 702. The sureties must be two or more in number to relieve the sheriff, 2 Bingh. 227; 9 Mass. 482; 12 *id.* 129; 1 Wend. N. Y. 108; see 5 Rich. So. C. 347; and he may insist upon three, or even more, subject to statutory provisions on the subject, 5 Maule & S. 223; but the bond will be binding if only one be taken. 2 Metc. Mass. 490; 8 Johns. N. Y. 358; 2 Ov. Tenn. 178; 2 Pick. Mass. 284.

3. *Putting in bail* to the action, 5 Burr. 2683, and waiver of his right to such bail by the plaintiff, 5 Serg. & R. Penn. 419; 11 *id.* 9; 7 Ohio, 210; 4 Johns. N. Y. 185; 6 Rand. Va. 165; 2 Day, Conn. 199, or a surrender of the person of the defendant, constitute a performance or excuse from the performance of the condition of the bond, 5 Term, 754; 7 *id.* 123; 1 East, 387; 1 Bos. & P. 326; 1 Baldw. C. C. 148; 1 Johns. Cas. N. Y. 329, 334; 2 *id.* 403; 9 Serg. & R. Penn. 24; 14 Mass. 115; 2 Strobh. So. C. 439; 6 Ark. 219; see 4 Wash. C. C. 317, 333; as do many other matters which may be classed as changes in the circumstances of the defendant abating the suit, 1 Barr. 244; Dougl. 45; 6 Term, 50; 7 *id.* 517; 3 Dev. No. C. 155; 1 Nott & M'C. So. C. 215; 2 Mass. 485; 1 Ov. Tenn. 224; including a discharge in insolvency, 2 Bail. So. C. 492; 1 Harr. & J. Md. 156; 2 Johns. Cas. N. Y. 403; 2 Mass. 481; 1 Harr. N. J. 367, 466; 3 Gill & J. Md. 64; see 1 Pet. C. C. 484; 4 Wash. C. C. 317; matters arising from the negligence of the plaintiff, 2 East, 305; 2 Bos. & P. 358; 6 Term, 363; or from irregularities in proceeding against the defendant. 2 Tidd, Pract. 1182; 3 Sharswood, Blackst. Comm. 292; 3 Yeates, Penn. 389; 4 Yerg. Tenn. 181; 1 Green, N. J. 209; 1 Harr. Del. 134.

4. In those states in which the bail bond is conditioned to abide the judgment of the court as well as to appear, some of the acts above mentioned will not constitute performance. See RECOGNIZANCE. The plaintiff may demand from the sheriff an assignment of the bail bond, and may sue on it for his own benefit. Stat. 4 Anne, c. 16, § 20; Watson, Sher. 99; 1 Sellon, Pract. 126, 174; 6 Serg. & R. Penn. 545; 2 Jones, No. C. 353; see 3 M'Cord, So. C. 274; 1 Bibb, Ky. 434; 3 Munf. Va. 121; unless he has waived his right so to do, 1 Caines, N. Y. 55; or has had all the advantages he would have gained by entry of special bail. 4 Binn. Penn. 344; 2 Serg. & R. Penn. 284; 5 *id.* 50. See 1 Browne, Penn. 238, 250.

As to the court in which suit must be brought, see 4 M'Cord, So. C. 370; 1 Hill, So. C. 604; 13 Johns. N. Y. 424; 9 *id.* 80; 6 Serg. & R. Penn. 543; 1 Ga. 315.

The remedy is by *scire facias* in Massachusetts, New Hampshire, North Carolina, South Carolina, Tennessee, Texas, and Vermont. 15 Pick. Mass. 339; 2 N. H. 359; 2 Hayw. No. C. 223; 9 Yerg. Tenn. 223; 2 Brev. So. C. 84, 318; 21 Vt. 409; 22 *id.* 249; 6 Tex. 337.

BAIL COURT (now called the Practice Court). **In English Law.** A court auxiliary to the court of Queen's Bench at Westminster, wherein points connected more particularly with pleading and practice are argued and determined.

It hears and determines ordinary matters, and disposes of common motions. Holthouse, Law Dict.; Wharton, Law Dict. 2d Lond. ed.

BAIL PIECE. A certificate given by a judge or the clerk of a court, or other person authorized to keep the record, in which it is certified that the bail became bail for the defendant in a certain sum and in a particular case. It was the practice, formerly, to write these certificates upon small pieces of parchment, in the following form:—

In the Court of ————, of the Term of ———, in the year of our Lord ——,

City and County of ————, ss.

Theunis Thew is delivered to bail, upon the taking of his body, to Jacobus Vanzant, of the city of ——, merchant, and to John Doe, of the same city, yeoman.

SMITH, JR. { At the suit of
Attor'y for Deft. { PHILIP CARSWELL.

Taken and acknowledged the — day of —, A.D. ——, before me. D. H.

See 3 Blackstone, Comm. App.; 1 Sellon, Pract. 139.

BAILABLE ACTION. An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer.

BAILABLE PROCESS. Process under which the sheriff is directed to arrest the defendant and is required by law to discharge him upon his tendering suitable bail as security for his appearance. A *capias ad respondendum* is bailable; not so a *capias ad satisfaciendum.*

BAILEE. Contracts. One to whom goods are bailed; the party to whom personal property is delivered under a contract of bailment.

2. His duties are to act in good faith, and perform his undertaking, in respect to the property intrusted to him, with the diligence and care required by the nature of his engagement.

When the bailee alone receives benefit from the bailment, as where he borrows goods or chattels for use, he is bound to exercise extraordinary care and diligence in preserving them from loss or injury. Story, Bailm. § 237; Edwards, Bailm. 164.

When the bailment is mutually beneficial to the parties, as where goods or chattels are hired or pledged to secure a debt, the bailee is bound to exercise ordinary diligence in preserving the property. Edwards, Bailm. 223, 312; Story, Bailm. §§ 398, 399.

3. When the bailee receives no benefit from the bailment, as where he accepts goods, chattels, or money to keep without recompense, or undertakes gratuitously the performance of some commission in regard to them, he is answerable only for the use of the ordinary care which he bestows upon his own property of a similar nature. Edwards, Bailm. 66–74, 102–108; Story, Bailm. §§ 65–67, 174–186.

The bailee is bound to redeliver or return the property, according to the nature of his engagement, as soon as the purpose for which it was bailed shall have been accomplished.

He cannot dispute his bailor's title. Edwards, Bailm. 288, 289, 305, 535.

4. The bailee has a special property in the goods or chattels intrusted to him, sufficient to enable him to defend them by suit against all persons but the rightful owner. The depositary and mandatary acting gratuitously, and the finder of lost property, have this right. Edwards, Bailm. 55, 57, 61.

A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury amounting to a trespass done while he was in the actual possession of the thing. 4 Bouvier, Inst. n. 3608.

5. In bailments which are beneficial to both of the parties to the contract, the bailee has a right to retain the thing bailed until the object of the bailment has been accomplished. *Id.* 201, 309, 310, 355.

A bailee for work, labor, and services, such as a mechanic or artisan who receives chattels or materials to be repaired or manufactured, has a lien upon the property for his services. *Id.* 353–355. Other bailees, innkeepers, common carriers, and warehousemen, also, have a lien for their charges. *Id.* 307–309, 411–414, 547–552.

BAILIE. In Scotch Law. An officer appointed to give infeftment.

In certain cases it is the duty of the sheriff, as king's bailie, to act: generally, any one may be made bailie by filling in his name in the precept of sasine.

A magistrate possessing a limited criminal and civil jurisdiction. Bell, Dict.

BAILIFF. A person to whom some authority, care, guardianship, or jurisdiction is delivered, committed, or intrusted. Spelman, Gloss.

A sheriff's officer or deputy. 1 Blackstone, Comm. 344.

A magistrate, who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton.

There are still bailiffs of particular towns in England; as, the bailiff of Dover Castle, &c.; otherwise, bailiffs are now only officers or stewards, &c.; as, *bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, &c.; *bailiffs errant or itinerant*, appointed to go about the country for the same purpose; *sheriff's bailiffs*, sheriff's officers to execute writs; these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office; *bailiffs of court-baron*, to summon the court, &c.; *bailiffs of husbandry*, appointed by private persons to collect their rents and manage their estates; *water bailiffs*, officers in port towns for searching ships, gathering tolls, &c. Bacon, Abr.

In account render. A person who has by delivery the custody and administration of lands or goods for the benefit of the owner or bailor, and is liable to render an account thereof. Coke, Litt. 271; 2 Leonh. 245; Story, Eq. Jur. § 446.

The word is derived from the old French *bailler*, to deliver, and originally implied the delivery of real estate, as of land, woods, a house, a part of the fish in a pond, Ow. 20; 2 Leon. 194; Keilw. 114 *a*, *b*; 37 Edw. III. c. 7; 10 Hen. VII. c. 30; but was afterwards extended to goods and chattels. Every bailiff is a receiver, but every receiver is not a bailiff. Hence it is a good plea that the defendant never was receiver, but as bailiff. 18 Edw. III. 16. See Croke, Eliz. 82, 83; 2 And. 62, 63; 96, 97; Fitzherbert, Nat. Brev. 134 F; 8 Coke, 48 *a*, *b*.

2. From a bailiff are required administration, care, management, skill. He is, therefore, entitled to allowance for the expense of administration, and for all things done in his office according to his own judgment without the special direction of his principal, and also for casual things done in the common course of business, 1 Rolle, Abr. 125, §§ 1, 7; Coke, Litt. 89 *a*; Comyns, Dig. E 12; Brooke, Abr. Acc. 18; but not for things foreign to his office. Brooke, Abr. Acc. 26, 88; Plowd. 282 *b*, 14; Comyns, Dig. Acc. E 13; Coke, Litt. 172. Whereas a mere receiver, or a receiver who is not also a bailiff, is not entitled to allowance for any expenses. Brooke, Abr. Acc. 18; 1 Rolle, Abr. 119; Comyns, Dig. E 13; 1 Dall. Penn. 340.

3. A bailiff may appear and plead for his principal in an assize; "and his plea commences" thus: "J. S., bailiff of T. N., comes," &c., not "T. N., by his bailiff J. S., comes," &c. Coke, 2d Inst. 415; Keilw. 117 *b*. As to what matters he may plead, see Coke, 2d Inst. 414.

BAILIWICK. The jurisdiction of a sheriff or bailiff. 1 Blackstone, Comm. 344.

A liberty or exclusive jurisdiction which was exempted from the sheriff of the county, and over which the lord appointed a bailiff, with such powers within his precinct as the under-sheriff exercised under the sheriff of the county. Whishaw, Lex.

BAILLEW DE FONDS. In Canadian Law. The unpaid vendor of real estate.

His claim is subordinate to that of a subsequent hypothecary creditor claiming under a conveyance of prior registration, 1 Low. C. 1, 6; but is preferred to that of the physician for services during the last sickness. 9 Low. C. 497. See 7 Low. C. 468; 9 *id.* 182; 10 *id.* 379.

BAILMENT (Fr. *bailler*, to put into the hands of; to deliver).

A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Prof. *Joel Parker*, MS. Lect. Dane Law School, Harvard Coll. 1851.

The right to hold may terminate, and a duty of restoration may arise, before the accomplishment of the purpose; but that does not necessarily enter into the definition, because such duty of restoration was not the original purpose of the delivery, but arises upon a subsequent contingency. The party delivering the thing is called the bailor; the party receiving it, the bailee.

Various attempts have been made to give a precise definition of this term, upon some of which there have been elaborate criticisms, see Story, Bailm. 4th ed. § 2, n. 1, exemplifying the maxim, "*Omnis definitio in lege periculosa est;*" but the one above given is concise, and sufficient for a general definition. Prof. Joel Parker, *ubi supra*.

Some of these definitions are here given as illustrating more completely than is possible in any other way the elements considered necessary to a bailment by the different authors cited.

A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. § 2. See Merlin, *Répert. Bail.*

A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Blackstone, Comm. 451. See *id.* 395.

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purposes of the bailment shall be answered. 2 Kent, Comm. 559.

A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered. Jones, Bailm. 1.

A delivery of goods in trust on a contract, either expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. Jones, Bailm. 117.

According to Story, the contract does not necessarily imply an undertaking to redeliver the goods; and the first definition of Jones here given would seem to allow of a similar conclusion. On the other hand, Blackstone, although his definition does not include the return, speaks of it in all his examples of bailments as a duty of the bailee; and Kent says that the application of the term to cases in which no return or delivery or redelivery to the owner or his agent is contemplated, is extending the definition of the term beyond its ordinary acceptation in the English law. A consignment to a factor would be a bailment for sale, according to Story; while according to Kent it would not be included under the term bailment.

2. Sir William Jones has divided bailments into five sorts, namely: *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignori acceptum*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another. Jones, Bailm. 36. See these several titles.

A better general division, however, for practical purposes, is into three kinds. *First*, those bailments which are for the benefit of the bailor, or of some person whom he represents. *Second*, those for the benefit of the bailee, or some person represented by him. *Third*, those which are for the benefit of both parties.

There are three degrees of care and diligence required of the bailee, and three degrees of the negligence for which he is responsible, according to the purpose and object of the bailment, as shown in those three classes; and the class serves to designate the degree of care, and of the negligence for which he is responsible. Thus, in the first class the bailee is required to exercise only slight care, and is responsible, of course, only for gross neglect. In the second he is required to exercise great care, and is responsible even for slight neglect. In the third he is required to exercise ordinary care, and is responsible for ordinary neglect.

There is a supplementary class, founded upon the policy of the law, in which the bailee is responsible for loss without any neglect on his part, being as it were, with certain exceptions, an insurer of the safety of the thing bailed. Prof. Joel Parker, MS. Lect. in the Law School of Harv. Coll. 1851.

3. When a person receives the goods of another to keep without recompense, and he acts in good faith, keeping them as his own, he is not answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence. Edwards, Bailm. 35, 67–74; 17 Mass. 479; 11 Mart. La. 462; 38 Me. 55; 3 Mas. C. C. n.; 2 C. B. 877; 4 Nev. & M. 170; 2 Ld. Raym. 913. See Story, Bailm. § 64; 6 C. Rob. Adm. 316. But this obligation may be enlarged or decreased by a special acceptance, 2 Kent, Comm. 565; Story, Bailm. § 33; Willes, 118; 2 Ld. Raym. 910; 3 Hill, N. Y. 9; 7 *id.* 533; and a spontaneous offer on the part of the bailee increases the amount of care required of him. 2 Kent, Comm. 565. Knowledge by the bailee of the character of the goods, Jones, Bailm. 38, and by the bailor of the manner in which the bailee will keep them, 38 Me. 55, are important circumstances.

So when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another, he is only liable for its injury or loss through his gross negligence. It is enough if he keep or carry it as he does his own property. 6 C. Rob. Adm. 141; 3 Mas. C. C. 132; 6 N. H. 537; 1 Cons. So. C. 117; Edwards, Bailm. 102–108.

As to the amount of skill such bailee must possess and exercise, see 2 Kent, Comm. 509; Story, Bailm. §§ 174–178; 11 Mees. & W. Exch. 113; 5 Term, 143; 2 Ad. & E. 256; 8 B. Monr. Ky. 415; 4 Johns. N. Y. 84; 11 Wend. N. Y. 25; 7 Mart. La. 460; 20 *id.* 77; 3 Fla. 27; and more skill may be required in cases of voluntary offers or special undertakings. 2 Kent, Comm. 573.

4. The borrower, on the other hand, who receives the entire benefit of the bailment, must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect. Edwards, Bailm. 138; 7 La. 253.

He must apply it only to the very purpose for which it was borrowed, 2 Ld. Raym. 915; Story, Bailm. §§ 232, 233; cannot permit any other person to use it, 1 Mod. 210; cannot keep it beyond the time limited, Story, Comm. § 257; 5 Mass. 104; and cannot keep it as a pledge for demands otherwise arising against the bailor. 2 Kent, Comm. 574; Edwards, Bailm. 141.

In the third class of bailments under the division here adopted, the benefits derived from the contract are reciprocal: it is advantageous to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and services, as when one person delivers materials to another to be manufactured, the bailee is paid for his services and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed. Edwards, Bailm. 38, 39; 13 Johns. N. Y. 211; 9 Wend. N. Y. 60; 5 Bingh. 217. See HIRE; PLEDGE.

5. The depositary or mandatary has a right to the possession as against everybody but the true owner, Story, Bailm. § 93; 6 Whart. Penn. 418; 1 Dev. N. Y. 79; 2 *id.* 327; 12 Ired. No. C. 74; 4 Eng. L. & Eq. 438; see 12 Penn. St. 229; but is excused if he delivers it to the person who gave it to him, supposing him the true owner, 17 Ala. 216, and may maintain an action against a wrong-doer. 3 Atk. Ch. 44; 1 Wils. 8; 2 Bulstr. 311; 1 Barnew. & Ald. 59; 2 Barnew. & Ad. 817. A borrower has no property in the thing borrowed, but may protect his possession by an action against the wrong-doer. 2 Bingh. 173; 7 Cow. N. Y. 752. As to the property in case of a pledge, see PLEDGE.

In bailments for storage, for hire, the bailee acquires a right to defend the property as against third parties and strangers, and is answerable for loss or injury occasioned through his failure to exercise ordinary care. See TRESPASS; TROVER.

As to the lien of warehousemen and wharfingers for their charges on the goods stored with them, see LIEN, and Edwards, Bailm. 284, 297, 307.

The hire of things for use transfers a special property in them for the use agreed upon. The price paid is the consideration for the use: so that the hirer becomes the temporary proprietor of the things bailed, and has the right to detain them from the general owner for the term or use stipulated for. It is a contract of letting for hire, analogous to a lease of real estate for a given term. Edwards, Bailm. 309–338. See HIRE.

6. In a general sense, the hire of labor and

services is the essence of every species of bailment in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The contracts of warehousemen, carriers, forwarding and commission merchants, factors, and other agents who receive goods to deliver, carry, keep, forward, or sell, are all of this nature, and involve a hiring of services. In a more limited sense, a bailment for labor and services is a contract by which materials are delivered to an artisan, mechanic, or manufacturer to be made or wrought into some new form. The title to the property here remains in the party delivering the goods, and the workman acquires a lien upon them for his services bestowed upon the property. Cloth delivered to a tailor to be made up into a garment, a gem or plate delivered to a jeweller to be set or engraved, a watch to be repaired, may be taken as illustrations of the contract. The owner, who does not part with his title, may come and take his property after the work has been done; but the workman has his lien upon it for his reasonable compensation.

The duties and liabilities of common carriers and innkeepers, under the contract implied by law, are regulated upon principles of public policy, and are usually considered by themselves. 5 Bingh. 217; 3 Hill, N. Y. 488.

Consult Jones, Edwards, Story on *Bailments;* 2 Kent, Comm. 559 *et seq.;* Parsons, Contracts.

BAILOR. He who bails a thing to another.

The bailor must act with good faith towards the bailee, Story, Bailm. §§ 74, 76, 77; permit him to enjoy the thing bailed according to contract; and in some bailments, as hiring, warrant the title and possession of the thing hired, and, probably, keep it in suitable order and repair for the purpose of the bailment. Story, Bailm. §§ 388–392.

BAIR-MAN. In Scotch Law. A poor insolvent debtor.

BAIRN'S PART. In Scotch Law. Children's part; a third part of the defunct's free movables, debts deducted, if the wife survive, and a half if there be no relict.

BALÆNA. A large fish, called by Blackstone a whale. Of this the king had the head and the queen the tail as a perquisite whenever one was taken on the coast of England. Prynne, Ann. Reg. 127; 1 Blackstone, Comm. 221.

BALANCE. The amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts.

In the case of mutual debts, the balance only can be recovered by the assignee of an insolvent or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator.

The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands for work or labor done, or money expended in relation to those and other goods of the debtor. 3 Bos. & P. 485; 3 Esp. 268.

BALANCE SHEET. A statement made by merchants and others to show the true state of a particular business. A balance sheet should exhibit all the balances of debits and credits, also the value of merchandise, and the result of the whole.

BALDIO. In Spanish Law. Vacant land having no particular owner, and usually abandoned to the public for the purposes of pasture. The word is supposed to be derived from the Arabic *Bald*, signifying a thing of little value. For the legislation on this subject, see Escriche, Dicc. Raz.

BALIUS. In Civil Law. A teacher; one who has the care of youth; a tutor; a guardian. DuCange, *Bajultis;* Spelman, Gloss.

BALIVA (spelled also *Balliva*). Equivalent to *Balivatus*. *Balivia*, a bailiwick; the jurisdiction of a sheriff; the whole district within which the trust of the sheriff was to be executed. Cowel. Occurring in the return of the sheriff, *non est inventus in balliva mea* (he has not been found in my bailiwick); afterwards abbreviated to the simple *non est inventus*. 3 Blackstone, Comm. 283.

BALIVO AMOVENDO (L. Lat. for removing a bailiff). A writ to remove a bailiff out of his office.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil. 2 Chitty, Comm. Law, 16.

BALNEARII (Lat.). Those who stole the clothes of bathers in the public baths. 4 Blackstone, Comm. 239; Calvinus, Lex.

BAN. In Old English and Civil Law. A proclamation; a public notice; the announcement of an intended marriage. Cowel. An excommunication; a curse, publicly pronounced. Proclamation of silence made by a crier in court before the meeting of champions in combat. Cowel. A statute, edict, or command; a fine, or penalty.

An open field; the outskirts of a village; a territory endowed with certain privileges.

A summons: as, *arriere ban*. Spelman, Gloss.

In French Law. The right of announcing the time of mowing, reaping, and gathering the vintage, exercised by certain seignorial lords. Guyot, *Rép. Univ.*

BANALITY. In Canadian Law. The right by virtue of which a lord subjects his vassals to grind at his mill, bake at his oven, etc. Used also of the region within which this right applied. Guyot, *Rép. Univ.* It prevents the erection of a mill within the seignorial limits, 1 Low. C. 31, whether steam or water. 3 Low. C. 1.

BANC (Fr. bench). The seat of judgment: as, *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas.

The meeting of all the judges, or such as may form a quorum: as, the court sit in *banc.* Cowel. See BANK.

BANCI NARRATORES. In Old English Law. Advocates; countors; serjeants. Applied to advocates in the common pleas courts. 1 Blackstone, Comm. 24; Cowel.

BANCUS (Lat.). A bench; the seat or bench of justice; a stall or table on which goods are exposed for sale. Often used for the court itself.

A full bench, when all the judges are present. Cowel; Spelman, Gloss.

The English court of common pleas was formerly called *Bancus.* Viner, Abr. *Courts* (M). See BENCH; COMMON BENCH.

BANCUS REGIS (Lat.). The king's bench; the supreme tribunal of the king after parliament. 3 Sharswood, Blackst. Comm. 41.

In banco regis, in or before the court of king's bench.

The king has several times sat in his own person on the bench in this court, and all the proceedings are said to be *coram rego ipso* (before the king himself). Still, James I. was not allowed to deliver an opinion although sitting *in banco regis.* Viner, Abr. *Courts* (H L); 3 Blackstone, Comm. 41; Coke, Litt. 71 C.

BANDIT. A man outlawed; one under ban.

BANE. A malefactor. Bracton, l. 1, t. 8, c. 1.

BANISHMENT. In Criminal Law. A punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life. See 4 Dall. Penn. 14.

BANK (Anglicized form of *bancus,* a bench). The bench of justice.

Sittings in bank (or *banc*). An official meeting of four of the judges of a common-law court. Wharton, Lex. 2d Lond. ed.

Used of a court sitting for the determination of law points, as distinguished from *nisi prius* sittings to determine facts. 3 Sharswood, Blackst. Comm. 28, n.

Bank le Roy. The king's bench. Finch, 198.

In Commercial Law. A place for the deposit of money.

An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes,—usually known by the name of bank notes,—or to perform some one or more of these functions.

It was the custom of the early money-changers to transact their business in public places, at the doors of churches, at markets, and, among the Jews, in the temple (Mark xi. 15). They used tables or benches for their convenience in counting and assorting their coins. The table so used was called *banche,* and the traders themselves, bankers, or benchers. In times still more ancient, their benches were called *cambii,* and they themselves were called *cambiators.* DuCange, *Cambii.*

Banks are said to be of three kinds, viz.: of *deposit,* of *discount,* and of *circulation:* they generally perform all these operations. See U. S. Dig.

BANK ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.

The statement of the amount deposited and drawn, which is kept in duplicate, one in the depositor's bank book and the other in the books of the bank.

BANK NOTE. A promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes.

2. For many purposes they are not looked upon as common promissory notes, and as such mere evidences of debt, or security for money. In the ordinary transactions of business they are recognized by general consent as cash. The business of issuing them being regulated by law, a certain credit attaches to them, that renders them a convenient substitute for money. 2 Hill, N. Y. 241; 1 *id.* 13.

The practice is, therefore, to use them as money; and they are a good tender, unless objected to. 9 Pick. Mass. 542; 7 Johns. N. Y. 476; 8 Ohio, 169; 11 Me. 475; 5 Yerg. Tenn. 199; 6 Ala. N. s. 226. See 3 Halst. N. J. 172; 4 N. H. 296; 4 Dev. & B. No. C. 435. They pass under the word "money" in a will, and, generally speaking, they are treated as cash. 19 Johns. N. Y. 115; 7 *id.* 476; 6 Hill, N. Y. 340. When payment is made in bank notes, they are treated as cash and receipts are given as for cash. 1 Ohio, 189, 524; 15 Pick. Mass. 177; 5 Gill & J. Md. 158; 3 Hawks. Tenn. 328; 5 J. J. Marsh. Ky. 643; 12 Johns. N. Y. 200; 9 *id.* 120; 19 *id.* 144; 1 Johns. Ch. N. Y. 231; 1 Schoales & L. Ch. Ir. 318, 319; 11 Ves. Ch. 662; 1 Roper, Leg. 3. It has been held that the payment of a debt in bank notes discharges the debt. 1 Watts & S. Penn. 92; 11 Ala. 280. See 13 Wend. N. Y. 101; 11 Vt. 516; 9 N. H. 365; 2 Hill, So. C. 509; Story, Notes; Edwards, Bills. See PAYMENT. The weight of authority is against the doctrine of the extinguishment of a debt by the delivery of bank notes which are not paid, when duly presented, in reasonable time. But it is undoubtedly the duty of the person receiving them to ascertain as soon as possible their value, by presenting them for payment. 11 Wend. N. Y. 9; 13 Wend. N. Y. 101; 11 Vt. 516; 9 N. H. 365; 10 Wheat. 333; 6 Mass. 182; 18 Barb. N. Y. 545.

Bank notes are governed by the rules applicable to other negotiable paper. They are assignable by delivery. Rep. *temp.* Hardw. 53; 9 East, 48; 4 *id.* 510; Dougl. 236. The holder of a note is entitled to payment, and cannot be affected by the fraud of a former holder, unless he is proved privy to the fraud. 1 Burr. 452; 4 Rawle, Penn. 185; 13 East, 135; Dane, Abr. Index; Powell, Mort. Index; U. S. Dig.; Bouvier, Inst. The *bona*

fide holder who has received them for value is protected in their possession even against a real owner from whom they have been stolen. Payment in forged bank notes is a nullity. 2 Hawks, No. C. 326; 3 *id.* 568; 3 Penn. St. 330; 5 Conn. 71. But where the bank itself receives notes purporting to be its own, and they are forged, it is otherwise. 10 Wheat. 333. See 6 Barnew. & C. 373. If a note be cut in two for transmission by mail, and one half be lost, the *bonâ fide* holder of the other half can recover the whole amount of the note. 6 Wend. N. Y. 378; 6 Munf. Va. 166; 4 Rand. Va. 186.

3. At common law, as choses in action, bank notes could not be taken on execution. Cunningham, Bills, 537; Hardw. Cases, 53; 1 Archbold, Pract. 258; 9 Croke, Eliz. 746. The statute laws of the several states have modified the common law in this respect, and in many of them they can be taken on execution. This is the case in New York; but they are not to be sold. 10 Barb. N. Y. 157, 596. Consult Story, *Bills;* Story, *Notes;* Parsons, *Notes and Bills;* Byles, *Bills*, Sharswood's edition.

BANKABLE. In Mercantile Law. Bank notes, checks, and other securities for money received as cash by the banks in the place where the word is used.

Thus, the banks of New York City receive on deposit, or in payment of bills and notes, all the bank notes issued by the various banks of the city, and also those of the neighboring county banks which have provided for the redemption of their notes in the city, as the banks in Brooklyn, Jersey City, and, with few exceptions, those of the Hudson River towns. They also receive checks drawn on the city banks. This description of currency is, therefore, said to be bankable or current, to distinguish it from the notes of distant banks, which are said to be uncurrent. See CURRENT AND UNCURRENT. It is usual in interior cities for the banks to treat as current funds other than the issues of the banks of their own place. Thus, in Cincinnati the notes of all Ohio banks, as well as those of Kentucky and Indiana, are treated as bankable funds. The word is also sometimes applied to promissory notes and bills of exchange in high credit, thereby denoting that they will be discounted by the banks.

BANKER'S NOTE. A promissory note given by a private banker or banking institution not incorporate, but resembling a bank note in all other respects. 6 Mod. 29; 3 Chitty, Comm. Law, 590; 1 Leigh, Nisi P. 338.

BANKRUPT. A trader who secretes himself or does certain other acts tending to defraud his creditors. 2 Blackstone, Comm. 471.

A person who has done or suffered to be done some act to be which is by law declared to be an act of bankruptcy.

A broken-up or ruined trader. 3 Stor. C. C. 453.

As employed in the English law, the bankrupt must have been a trader. As used in American law, the distinction between a bankrupt and an insolvent is not generally regarded, and was expressly abrogated by the act of Congress, Aug. 19, 1841. But see 5 Hill, N. Y. 329-371; 4 N. Y. 283; 2 Kent, Comm. 390-394. See INSOLVENCY.

BANKRUPT LAWS. Laws relating to bankruptcy.

2. The English Bankrupt Laws, which originated with the statute 34 & 35 Henry VIII. c. 4, were first mainly directed against the criminal frauds of traders. The bankrupt was treated as a criminal offender; and, formerly, the not duly surrendering his property under a commission of bankruptcy, when summoned, was a capital felony. The bankrupt laws are now, and have for some time past been, regarded as a connected system of civil legislation, having the double object of enforcing a complete discovery and equitable distribution of the property of an insolvent trader, and of conferring on the trader the reciprocal advantage of security of person and a discharge from all claims of his creditors. By the General Bankrupt Act (6 Geo. IV. c. 16) the former statutes were consolidated and many important alterations introduced. A subsequent statute, 1 & 2 Will. IV. c. 56, changed the mode of proceeding by constituting a Court of Bankruptcy, and removing the jurisdiction of bankrupt cases in the first instance from the Court of Chancery to that of Bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence; and other important alterations were introduced. This statute was followed by the 5 & 6 Will. IV. c. 29, and by the 5 & 6 Vict. c. 122, which further modified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the Bankrupt Law Consolidation Act (1849); and this has been amended in a few particulars by the 15 & 16 Vict. c. 77, and by the Bankruptcy Act, 1854. These three acts embody the actual law applicable directly to bankrupts and to their estates. Eng. Cyc. Div. Arts & Sc. h. t.

3. By the Scotch system, as modified in 1783, the management of the estate is given to the creditors upon sequestration, and it is only where they require the aid of the court, or an appeal is taken from their determinations, that resort is had to judicial proceedings. By recent amendments of the law (1856), the remedy is extended to apply to every class of debtors. There is also a remedy given the debtor to obtain a discharge from liability of the person upon relinquishing his property.

The French Bankrupt Law (law of 1838) declares that all traders who stop payment are in a state of insolvency. Traders are required immediately to register the fact that they have stopped payment in the Tribunal of Commerce, and file their balance sheet; and a decree of insolvency is declared by the tribunal upon the trader's declaration or on application of creditors. Prior voluntary conveyances and mortgages, pledges, &c. for antecedent debts, are void, and all subsequent deeds to those having notice are voidable. The former French law (Code of 1807) is still important, as being the basis of the system in many other continental nations. See INSOLVENCY.

BANKRUPTCY. The state or condition of a bankrupt. See INSOLVENCY.

BANLEUCA. A certain space surrounding towns or cities, distinguished by peculiar privileges. Spelman, Gloss. It is the same as the French *banlieue.*

BANLIEU. In Canadian Law. See BANLEUCA.

BANNERET. A degree of honor next after a baron's, when conferred by the king; otherwise, it ranks after a baronet. 1 Blackstone, Comm. 403.

BANNITUS. One outlawed or banished. Calvinus, Lex.

BANNUM. A ban.

BANS OF MATRIMONY. Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Pothier, Du Mariage, p. 2, c. 2.

BAR. To Actions. A perpetual destruction of the action of the plaintiff.

It is the *exceptio peremptoria* of the ancient authors. Coke, Litt. 303 *b*; Stephen, Plead. App. xxviii. It is always a perpetual destruction of the *particular action* to which it is a *bar*, *Doctrina Plac.* xxiii. § 1, p. 129; and it is set up only by a plea to the action, or in chief. But it does not always operate as a permanent obstacle to the plaintiff's right of action. He may have good cause for an action, though not for the action which he has brought: so that, although that particular action, or any one like it in nature and based on the same allegations, is forever barred by a well-pleaded bar, and a decision thereon in the defendant's favor, yet where the plaintiff's difficulty really is that he has misconceived his action, and advantage thereof be taken under the general issue (which is in bar), he may still bring his proper action for the same cause. Gould, Plead. c. v. § 137; 6 Coke, 7, 8. Nor is final judgment on a demurrer, in such a case, a bar to the proper action, subsequently brought. Gould, Plead. c. ix. § 46. And where a plaintiff in one action fails on demurrer, from the omission of an essential allegation in his declaration, which allegation is supplied in the second suit, the judgment in the first is no bar to the second; for the merits shown in the second declaration were not decided in the first. Gould, Plead. c. ix. § 45; c. v. § 158.

Another instance of what is called a temporary bar is a plea (by executor, &c.) of *plene administravit*, which is a bar until it appears that more goods come into his hands; and then it ceases to be a bar to that suit, if true before its final determination, or to a new suit of the same nature. *Doctrina Plac.* c. xxiii. § 1, p. 130; 4 East, 508.

2. Where a person is bound in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred, that is, debarred, as to that or any other action of the like nature or degree, from the same thing forever. But the *effect* of such a bar is different in personal and real actions.

In personal actions, as in debt or account, trover, replevin, and for torts generally (and *all* personal actions), a recovery by the plaintiff is a perpetual bar to another action for the same matter. He has had one recovery. *Doctrina Plac.* c. lxviii. § 1, p. 412. So where a defendant has judgment against the plaintiff, it is a perpetual bar to another action of *like nature* for the same cause (*like nature* being here used to save the cases of a misconceived action or an omitted averment, where, as above stated, the bar is *not* perpetual). And inasmuch as, in personal actions, all are of the *same degree*, a plaintiff against whom judgment has passed cannot, for the subject thereof, have an action of a *higher nature*: therefore he generally has in such actions no remedy (no manner of avoiding the bar of such a judgment) except by taking the proper steps to *reverse* the very judgment itself (by writ of error, or by appeal, as the case may be), and thus taking away the bar by taking away the judgment. 6 Coke, 7, 8. (For occasional exceptions to this rule, see authorities above cited.)

3. *In real actions*, if the plaintiff be barred as above by judgment on a verdict, demurrer, confession, etc., he may still have an action of a higher nature, and try the same right again. Lawes, Plead. 39, 40; Stearns, Real Act. See, generally, Bacon, Abr. *Abatement*, n.; *Plea in bar*; 3 East, 346–366.

In Practice. A particular part of the court-room.

As thus applied, and secondarily in various ways, it takes its name from the actual bar, or enclosing rail, which originally divided the bench from the rest of the room, as well as from that bar, or rail, which then divided, and now divides, the space including the bench, and the place which lawyers occupy in attending on and conducting trials, from the body of the court-room. Those who, as advocates or counsellors, appeared as *speakers* in court, were said to be "called to the bar," that is, called to appear in presence of the court, as *bar*risters, or persons who stay or attend at the bar of court. Richardson, Dict. *Barrister*. By a natural transition, a secondary use of the word was applied to *the persons* who were so called, and the advocates were, as a class, called "the bar." And in this country, since attorneys, as well as counsellors, appear in court to conduct causes, the members of the legal profession, generally, are called the bar.

The court, in its strictest sense, sitting in *full term*.

Thus, a civil case of great consequence was not left to be tried at *nisi prius*, but was tried at the "bar of the court itself," at Westminster. 3 Blackstone, Comm. 352. So a criminal trial for a capital offence was had "at bar," 4 Blackstone, Comm. 351; and in this sense the term at bar is still used. It is also used in this sense, with a shade of difference (as not distinguishing *nisi prius* from full term, but as applied to *any* term of the court), when a person indicted for crime is called "the prisoner at the bar," or is said to stand at the bar to plead to the indictment. See Merlin, *Répert. Barreau*; 1 Dupin, *Prof. d'Av.* 451.

In Contracts. An obstacle or opposition. Thus, relationship within the prohibited degrees, or the fact that a person is already married, is a *bar* to marriage.

BAR FEE. In English Law. A fee taken by the sheriff, time out of mind, for every prisoner who is acquitted. Bacon, Abr. *Extortion*.

BARAGARIA (Span.). A concubine.

BARBICANAGE. Money paid to support a barbican or watch-tower.

BARGAIN AND SALE. A contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell land to another person, called the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. 2 Washburn, Real Prop. 128.

This is a very common form of conveyance in the United States. In consequence of the consideration paid, and the bargain made by the vendor, of which the conveyance was evidence, a use was raised at once in the bargainee. To this use the

statute of uses transferred and annexed the seisin, whereby a complete estate became vested in the bargainee. 2 Washburn, Real Prop. 128 *et seq.*

2. All things, for the most part, that may be granted by any deed may be granted by bargain and sale, and an estate may be created in fee, for life or for years. 2 Coke, 54; Dy. 309.

There must have been a valuable consideration, 2 Washburn, Real Prop. 130; 5 Ired. No. C. 30; 7 Vt. 522; 13 B. Monr. Ky. 30; 9 Ala. 410; 1 Harr. & J. Md. 527; 1 Watts & S. Penn. 395; 16 Johns. N. Y. 515; 1 Cow. N. Y. 622; Croke, Car. 529; 1 Cruise, Dig. 107; though it need not be expressed. 10 Johns. N. Y. 456. See 2 Washburn, Real Prop. 134; 1 Sandf. Ch. N. Y. 259; 4 Den. N. Y. 201; 19 Wend. N. Y. 339; 7 Vt. 522; 1 Penn. 486; 1 Mo. 553; 2 Ov. Tenn. 261.

The proper and technical words to denote a bargain and sale are *bargain and sell;* but any other words that are sufficient to raise a use upon a valuable consideration are sufficient, 2 Wood, Conv. 15; as, for example, *make over and grant*, 3 Johns. N. Y. 484; *release and assign.* 8 Barb. N. Y. 463. See 2 Washburn, Real Prop. 620; Sheppard, Touchst. 222.

3. As to whether an estate *in futuro* may be conveyed by deed of bargain and sale, see 18 Pick. Mass. 397; 22 *id.* 376; 32 Me. 329; 1 *id.* 271; 1 Conn. 354; 15 N. H. 381; 23 Vt. 600; 5 Ired. No. C. 31; 1 Johns. Cas. N. Y. 96; 2 Smith, Lead. Cas. 5th Hare & W. ed. 451; Gilbert, Uses, Sugd. ed. 163; 2 Washburn, Real Prop. 123, 124.

Consult Gilbert on Uses, Sugden's edition; Washburn on Real Property; Cruise, Digest, Greenleaf's ed.

BARGAINEE. The grantee of an estate in a deed of bargain and sale. The person to whom property is tendered in a bargain.

BARGAINOR. The person who makes a bargain; he who is to deliver the property and receive the consideration.

BARO. A man, whether slave or free.

Si quis homicidium perpetraverit in barone libro seu servo, if any one shall have perpetrated a murder upon any man, slave or free. A freeman or freedman; a strong man; a hired soldier; a vassal; a feudal client.

Those who held of the king immediately were called barons of the king.

A man of dignity and rank; a knight.

A magnate in the church.

A judge in the exchequer (*baro scaccarii*).

The first-born child.

A husband.

The word is said by Spelman to have been used more frequently in its latter sense. Spelman, Gloss.

It is quite easy to trace the history of *baro*, from meaning simply man, to its various derived significations. Denoting a man, one who possessed the manly qualities of courage and strength would be desirable as a soldier, or might misuse them as a robber. One who possessed them in an eminent degree would be *the* man; and hence *baro*, in its sense of a title of dignity or honor, particularly applicable in a warlike age to the best soldier. See, generally, Bacon, Abr.; Comyns, Dig.; Spelman, Gloss., *Baro.*

BARON. A general title of nobility, 1 Blackstone, Comm. 398; a particular title of nobility, next to that of viscount. A judge of the exchequer. Cowel; 1 Blackstone, Comm. 44.

A husband.

In this sense it occurs in the phrase *baron et feme* (husband and wife), 1 Blackstone, Comm. 432; and this is the only sense in which it is used in the American law, and even in this sense it is now but seldom found.

A freeman.

Especially applied to the inhabitants of the Cinque Ports,—Romney, Sandwich, Hastings, Rotherhithe, and Dover, and the two later-constituted ports of Winchelsea and Rye.

It has essentially the same meanings as *Baro*, which see.

BARON ET FEMME. Man and woman; husband and wife.

It is doubtful if the words had originally in this phrase more meaning than man and woman. The vulgar use of *man* and *woman* for husband and wife suggests the change of meaning which might naturally occur from man and woman to husband and wife. Spelman, Gloss.; 1 Blackstone, Comm. 442.

BARONET. An English title of dignity. It is an hereditary dignity, descensible, but not a title of nobility. It is of very early use. Spelman, Gloss.; 1 Blackstone, Comm. 403.

BARONS OF THE CINQUE PORTS. Members of parliament from these ports; freemen resident in these ports, viz.: Sandwich, Romney, Hastings, Hithe, and Dover, Winchelsea, and Rye.

BARONS OF THE EXCHEQUER. The judges of the exchequer. See EXCHEQUER.

BARONY. The dignity of a baron; a species of tenure; the territory or lands held by a baron. Spelman, Gloss.

BARRATOR. One who commits barratry.

BARRATRY (Fr. *barat, baraterie*, robbery, deceit, fraud).

In Criminal Law. The offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Blackstone, Comm. 134; Coke, Litt. 368.

An indictment for this offence must charge the offender with being a common barrator, 1 Sid. 282; Train & H. Prec. 55; and the proof must show at least three instances of offending. 15 Mass. 227; 1 Cush. Mass. 2, 3; 1 Bail. So. C. 379.

An attorney is not liable to indictment for maintaining another in a groundless action. 1 Bail. So. C. 379. See 1 Bishop, Crim. Law, §§ 401, 645, 646; 2 *id.* §§ 57–61; Bacon, Abr.; 8 Coke, 36 *b;* 9 Cow. N. Y. 587; 15 Mass. 229; 11 Pick. Mass. 432; 13 *id.* 362; 1 Bail. So. C. 379.

In Maritime Law and Insurance. An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners

of a vessel in violation of their duty as such, and directly prejudicial to the owner, and without his consent. 1 Phillips, Ins. c. xiii.; Roccus, h. t.; Abbott, Ship. 167, n.; 2 Strange, 581; 2 Ld. Raym. 349; 1 Term, 252; 6 *id.* 379; 8 *id.* 320; 2 Caines, N. Y. 67, 222; 3 *id.* 1; 1 Johns. N. Y. 229; 11 *id.* 40; 13 *id.* 451; 2 Binn. Penn. 274; 8 Cranch, 139; 5 Day, Conn. 1; 3 Wheat. 163; 4 Dall. 294; 2 Maule & S. 172; Cowp. 143; 8 East, 126; 5 Barnew. & Ald. 597; 1 Campb. 434. The grossest barratries, as piratically or feloniously seizing or running away with the vessel or cargo, or voluntarily delivering the vessel into the hands of pirates, or mutiny, are capital offences by the laws of the United States. Act of Congress, April 30, 1790, 1; Story's Laws U. S. 84. Barratry is one of the risks usually insured against in marine insurance. See INSURABLE INTEREST.

BARREL. A measure of capacity, equal to thirty-six gallons.

BARREN MONEY. A debt which bears no interest.

BARRENNESS. The incapacity to produce a child.

This, when arising from impotence which existed at the time the relation was entered into, is a cause for dissolving a marriage. 1 Foderé, Méd. Lég. § 254.

BARRISTER. In English Law. A counsellor admitted to plead at the bar.

Inner barrister. A serjeant or king's counsel who pleads within the bar.

Ouster barrister. One who pleads ouster or without the bar.

Vacation barrister. A counsellor newly called to the bar, who is to attend for several long vacations the exercise of the house.

Barristers are called *apprentices, apprentitii ad legem,* being looked upon as learners, and not qualified until they obtain the degree of serjeant. Edmund Plowden, the author of the Commentaries, a volume of elaborate reports in the reigns of Edward VI., Mary, Philip and Mary, and Elizabeth, describes himself as an apprentice of the common law.

BARTER. A contract by which parties exchange goods for goods.

It differs from a sale in that a barter is always of goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not.

There must be a delivery of goods to complete the contract.

If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of the goods in return shall be made on the cost of those given in barter, adding all charges. Weskett, Ins. 42. See 3 Barnew. & Ald. 616; 3 Campb. 351; Cowp. 118; 1 Dougl. 24, n.; 4 Bos. & P. 151; Troplong, *De l'Échange.*

BARTON. In Old English Law. The demesne land of a manor; a farm distinct from the mansion.

BAS CHEVALIERS. Knights by tenure of a base military fee, as distinguished from bannerets, who were the chief or superior knights. Kennett, Paroch. Ant.; Blount.

BASE FEE. A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires.

A grant to A and his heirs, tenants of Dale, continues *only* while they are such tenants. 2 Blackstone, Comm. 109.

The proprietor of such a fee has all the rights of the owner of a fee simple until his estate is determined. Plowd. 557; 1 Washburn, Real Prop. 62; 1 Preston, Est. 431; Coke, Litt. 1 *b.*

BASE SERVICES. Such services as were unworthy to be performed by the nobler men, and were performed by the peasants and those of servile rank. 2 Blackstone, Comm. 62; 1 Washburn, Real Prop. 25.

BASILICA. An abridgment of the Corpus Juris Civilis of Justinian, translated into Greek and first published in the ninth century.

The emperor Basilius, finding the Corpus Juris Civilis of Justinian too long and obscure, resolved to abridge it, and under his auspices the work was commenced A. D. 867, and proceeded to the fortieth book, which, at his death, remained unfinished. His son and successor, Leo Philosophus, continued the work, and published it, in sixty books, about the year 880. Constantine Porphyro-genitus, younger brother of Leo, revised the work, rearranged it, and republished it, A. D. 947. From that time the laws of Justinian ceased to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XIII., the last of the Greek emperors, under whom, in 1453, Constantinople was taken by Mahomet the Turk, who put an end to the empire and its laws. Histoire de la Jurisprudence; Etienne, Intr. à l'Etude du Droit Romain, § 53. The Basilica were translated into Latin by J. Cujas (Cujacius), Professor of Law in the University of Bourges, and published at Lyons, 22d of January, 1566, in one folio volume.

BASTARD (*bas* or *bast*, abject, low, base, *aerd*, nature).

One born of an illicit connection, and before the lawful marriage of its parents.

One begotten and born out of lawful wedlock. 2 Kent, Comm. 208.

One born of an illicit union. La. Civ. Code, art. 29, 199.

The second definition, which is substantially the same as Blackstone's, is open to the objection that it does not include with sufficient certainty those cases where children are born during wedlock but are not the children of the mother's husband.

2. A man is a bastard if born before the marriage of his parents, but he is not a bastard if born after marriage, although begotten before. 1 Blackstone, Comm. 455, 456; 8 East, 210, 211; 13 Ired. No. C. 502. By the civil law and statute law of many of the states, a subsequent marriage of the parents legitimates children born prior thereto. The rule prevails substantially in Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Ohio, Pennsylvania, Vermont, and Virginia, with somewhat varying provisions in the different states. 2 Kent, Comm. 210. See HEIR.

A man is a bastard if born during coverture under such circumstances as to make it impossible that the husband of his mother can be his father, 6 Binn. Penn. 283; 1 Browne, Penn. App. xlvii.; 19 Mart. La. 548; Hard. Ky. 479; 6 How. 550; 8 East, 193; Strange, 940; 4 Term, 356; 2 Mylne & K. 349; but a strong moral impossibility, or such improbability as to be beyond a reasonable doubt, is held sufficient. 2 Brock. C. C. 256; 3 Paige, Ch. N. Y. 139; 15 Ga. 160; 13 Ired. No. C. 502. As to who may be admitted to prove non-access, see 3 Eng. L. & Eq. 100; 2 Munf. Va. 442; 15 Barb. N. Y. 286; 15 N. H. 45; 29 Penn. St. 420. See 1 Burge, Col. Law, 57–92; 1 Sharswood, Blackst. Comm. 458; Gardner Peerage Case, Le Marchant's report; 5 Clark & F. Hou. L. 163; 12 La. Ann. 853.

A man is a bastard if born beyond a competent time after the coverture has determined. Coke, Litt. 123 *b*, Hargrave & B. note; 2 Kent, Comm. 210.

3. The principal right which bastard children have is that of maintenance from their parents, 1 Blackstone, Comm. 458; La. Civ. Code, §§ 254–262; which may be secured by the public officers who would be charged with the support of the child, by a peculiar process, or in some cases by the mother. 2 Kent, Comm. 215. A bastard has no inheritable blood at common law; but he may take by devise if described by the name he has gained by reputation. 1 Roper, Leg. 76; 1 Ves. & B. Ch. 423; 1 Atk. Ch. 410; 3 Dan. Ky. 233; 4 Pick. Mass. 93; 4 Des. So. C. 434. See 5 Ves. Ch. 530; 6 *id.* 43; 2 Roper, Leg. 2d ed. 199. See HEIR.

BASTARD EIGNE. Bastard elder.

By the old English law, when a man had a bastard son, and he afterwards married the mother, and by her had a legitimate son, the first was called a bastard eigné, or, as it is now spelled, aîné, and the second son was called puisné, or since born, or sometimes he was called mulier puisné. See 2 Blackstone, Comm. 248.

BASTARDA. A female bastard. Calvinus, Lex.

BASTARDY. The offence of begetting a bastard child. The condition of a bastard.

BASTARDY PROCESS. The statutory mode of proceeding against the putative father of a bastard to secure a proper maintenance for the bastard.

BASTON. In Old English Law. A staff or club.

In some old English statutes the servants or officers of the wardens of the fleet are so called, because they attended the king's courts with a red staff.

BATTEL. Trial by combat.

It was called also wager of battel or battaile, and could be claimed in appeals of felony. It was of frequent use in affairs of chivalry and honor, and in civil cases upon certain issues. Coke, Litt. § 294. It was not abolished in England till the enactment of stat. 59 Geo. III. c. 46. See 1 Barnew. & Ald. 405; 3 Sharswood, Blackst. Comm. 339; 4 *id.* 347; APPEAL. This mode of trial was not peculiar to England. The emperor Otho, A.D. 983, held a diet at Verona, at which several sovereigns and great lords of Italy, Germany, and France were present. In order to put a stop to the frequent perjuries in judicial trials, this diet substituted in all cases, even in those which followed the course of the Roman law, proof by combat for proof by oath. Henrion de Pansey, *Auth. Judic.* Introd. c. 3. And for a detailed account of this mode of trial, see Herbert, Inns of Court, 119–145.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bishop, Crim. Law, § 62; 17 Ala. 540; 9 N. H. 491.

2. It must be either wilfully committed, or proceed from want of due care. Strange, 596; Hob. 134; Plowd. 19; 3 Wend. N. Y. 391. Hence an injury, be it never so small, done to the person of another in an angry, spiteful, rude, or insolent manner, 9 Pick. Mass. 1, as by spitting in his face, 6 Mod. 172, or on his body, 1 Swint. 597, or any way touching him in anger, 1 Russell, Crimes, 751, or violently jostling him, see 4 Hurlst. and N. Exch. 481, are batteries in the eye of the law. 1 Hawkins, Pl. Cr. 263. See 1 Selwyn, Nisi P. 33. And any thing attached to the person partakes of its inviolability: if, therefore, A strikes a cane in the hands of B, it is a battery. 1 Dall. Penn. 114; 1 Penn. 380; 1 Hill, So. C. 46; 4 Den. N. Y. 453; 4 Wash. C. C. 534; 1 Baldw. C. C. 600.

3. A battery may be justified on various accounts.

As a salutary mode of correction. A parent may correct his child, a master his apprentice, a schoolmaster his scholar, 24 Edw. IV.; 4 Gray, Mass. 36; 2 Dev. & B. No. C. 365; and a superior officer, one under his command. Keilw. 136; Buller, Nisi P. 19; Bee, Adm. 161; 1 Bay, So. C. 3; 14 Johns. N. Y. 119; 15 Mass. 365. And see Cowp. 173; 15 Mass. 347; 3 Carr. & K. 142.

As a means of preserving the peace, in the exercise of an office, under process of court, and in aid of an authority at law. See ARREST.

4. *As a necessary means of defence of the person* against the plaintiff's assaults in the following instances: in defence of himself, his wife, 3 Salk. 46, his child, and his servant. Ow. 150. But see 1 Salk. 407. So, likewise, the wife may justify a battery in defending her husband, Ld. Raym. 62; the child its parent, 3 Salk. 46; and the servant his master. In these situations, the party need not wait until a blow has been given; for then he might come too late, and be disabled from warding off a second stroke or from protecting the person assailed. Care, however, must be taken that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil which might otherwise overwhelm the party, and not as a punishment or retaliation for the injurious attempt. Strange, 593; 1 Cons. So. C. 34; 4 Vt. 629; 4 J. J. Marsh. Ky. 578; 2 Bishop, Crim. Law, § 561. The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the

assailant; but with this limitation any degree is justifiable. 1 Ld. Raym. 177; 2 Salk. 642; 11 Humphr. Tenn. 200; 4 Barb. N. Y. 460; 2 N. Y. 193; 1 Ohio St. 66; 23 Ala. N. S. 17, 28; 14 B. Monr. Ky. 614; 18 *id.* 49; 16 Ill. 17; 5 Ga. 85.

5. A battery may likewise be justified in the necessary defence of one's property. If the plaintiff is in the act of entering peaceably upon the defendant's land, or, having entered, is discovered, not committing violence, a request to depart is necessary in the first instance, 2 Salk. 641; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close, and for this purpose may use, if necessary, any degree of force short of striking the plaintiff, as by thrusting him off. Skinn. 28. If the plaintiff resists, the defendant may oppose force to force. 8 Term, 78; 2 Metc. Mass. 23. But if the plaintiff is in the act of forcibly entering upon the land, or, having entered, is discovered subverting the soil, cutting down a tree, or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff. 8 Term, 78. A man may justify a battery in defence of his *personal* property without a previous request, if another forcibly attempt to take away such property. 2 Salk. 641. As to the rights of railroad-superintendents over the station-houses of the company in this respect, see 7 Metc. Mass. 596; 12 *id.* 482; 4 Cush. Mass. 608; 6 Cox, Cr. Cas. 461.

BATTURE (Fr. shoals, shallows). An elevation of the bed of a river *under* the surface of the water; but it is sometimes used to signify the same elevation when it has risen *above* the surface. 6 Mart. La. 19, 216.

The term battures is applied principally to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

BAWDY-HOUSE. A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes.

It must be reputed of ill-fame, 17 Conn. 467; but see 4 Cranch, C. C. 338, 372; may be a single room, 1 Salk. 382; 2 Ld. Raym. 1197; and more than one woman must live or resort there. 5 Ired. No. C. 603. It need not be kept for lucre. 21 N. H. 345; 2 Gray, Mass. 357; 18 Vt. 70. Such a house is a common nuisance, 1 Russell, Crimes, 299; Bacon, Abr. *Nuisances;* and the keeper may be indicted, and, if a married woman, either alone or with her husband. 1 Metc. Mass. 151. One who assists in establishing such a house is guilty of an indictable misdemeanor, 2 B. Monr. Ky. 417; including a lessor who has knowledge. 3 Pick. Mass. 26; 6 Gill, Md. 425. A charge of keeping a bawdy-house is actionable, because it is an offence which is indictable at common law as a common nuisance, and it clearly involves moral turpitude. 13 Johns. N. Y. 275; 5 Mees. & W. Exch. 249.

BAY. An enclosure, or other contrivance, to keep in the water for the supply of a mill, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19.

BAYOU. A stream which is the outlet of a swamp near the sea. Applied to the creeks in the lowlands lying on the Gulf of Mexico.

BEACONAGE. Money paid for the maintenance of a beacon. Comyns, Dig. *Navigation* (H).

BEADLE (Sax. *beodan*, to bid). A church servant chosen by the vestry, whose business it is to attend the vestry, to give notice of its meetings, to execute its orders, to attend upon inquests, and to assist the constables.

BEARER. One who bears or carries a thing.

If a bill or note be made payable to bearer, it will pass by delivery only, without indorsement; and whoever fairly acquires a right to it may maintain an action against the drawer or acceptor.

It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the eleventh section of the judiciary act of 1789, c. 20, limiting the jurisdiction of the circuit court. 3 Mas. C. C. 308.

BEARERS. Such as bear down or oppress others; maintainers.

BEARING DATE. Words frequently used in pleading and conveyancing to introduce the date which has been put upon an instrument.

When in a declaration the plaintiff alleges that the defendant *made* his promissory note on such a day, he will not be considered as having alleged that it *bore date* on that day, so as to cause a variance between the declaration and the note produced bearing a different date. 2 Greenleaf, Ev. § 160; 2 Dowl. & L. 759.

BEASTS OF THE CHASE. Properly, the buck, doe, fox, martin, and roe, but in a common and legal sense extending likewise to all the beasts of the forest, which beside the others are reckoned to be the hind, hare, bear, and wolf, and, in a word, all wild beasts of venery or hunting. Coke, Litt. 233; 2 Sharswood, Blackst. Comm. 39.

BEASTS OF THE FOREST. See BEASTS OF THE CHASE.

BEASTS OF THE WARREN. Hares, coneys, and roes. Coke, Litt. 233; 2 Sharswood, Blackst. Comm. 39.

BEAUPLEADER (L. Fr. fair pleading). A writ of prohibition directed to the sheriff or other, directing him not to take a fine for beaupleader.

There was anciently a fine imposed called a fine for beaupleader, which is explained by Coke to have been originally imposed for bad pleading. Coke, 2d Inst. 123. It was set at the will of the judge of the court, and reduced to certainty by consent, and annually paid. Comyns, Dig. *Prero-*

gative (D 52). The statute of Marlebridge (52 Hen. III.), c. 11, enacts. that neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading;* namely, for not pleading fairly or aptly to the purpose. Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it. New Nat. Brev. 596; Fitzherbert, Nat. Brev. 270 *a;* Hall, Hist. Comm. Law, c. 7. Mr. Reeve explains it as a fine paid for the privilege of a fair hearing. 2 Reeve, Eng. Law, 70. This latter view would perhaps derive some confirmation from the connection in point of time of this statute with Magna Charta, and the resemblance which the custom bore to the other customs against which the clause in the charter of *nulli vendemus, etc.* was directed. See Comyns, Dig. *Prerogative* (D 51, 52); Cowel; Coke, 2d Inst. 122, 123; Crabb, Eng. Law, 150.

BED. The channel of a stream; the part between the banks worn by the regular flow of the water. See 13 How. 426.

The phrase divorce from *bed* and *board* (*a mensa et thoro*) contains a legal use of the word synonymous with its popular use.

BEDEL. In English Law. A crier or messenger of court, who summons men to appear and answer therein. Cowel. An inferior officer in a parish or liberty. See BEADLE.

BEDELARY. The jurisdiction of a *bedel*, as a bailiwick is the jurisdiction of a bailiff. Coke, Litt. 234 *b;* Cowel.

BEDEREPE. A service which certain tenants were anciently bound to perform, as to reap their landlord's corn at harvest. Said by Whishaw to be still in existence in some parts of England. Blount; Cowel; Whishaw.

BEES are animals *feræ naturæ* while unreclaimed. 3 Binn. Penn. 546; 13 Miss. 333. See Inst. 2. 1. 14; Dig. 41. 1. 5. 2; 7 Johns. N. Y. 16; 2 Blackstone, Comm. 392. If while so unreclaimed they take up their abode in a tree, they belong to the owner of the soil, but not so if reclaimed and they can be identified. 15 Wend. N. Y. 550. See 1 Cow. N. Y. 243; 2 Dev. No. C. 162.

BEGGAR. One who obtains his livelihood by asking alms. The laws of several of the states punish begging as an offence.

BEHAVIOR. Manner of having, holding, or keeping one's self; carriage of one's self, with respect to propriety, morals, and the requirements of law. Surety to be of good behavior is a larger requirement than surety to keep the peace. Dalton, c. 122; 4 Burns, Just. 355.

BEHETRIA (Arabic, without nobility or lordship).

In Spanish Law. Lands situated in districts and manors in which the inhabitants had the right to select their own lords.

Behetrias were of two kinds: *Behetrias de entre parientes*, when the choice was restricted to a relation of the deceased lord; and *Behetrias de mar a mar*, when the choice was unrestricted.

The lord, when elected, enjoyed various privileges, called *Yantar, Conducho, Martiniego, Marzadga, Infurcion*, &c., which see. These contributions were intended for his maintenance, the construction of his dwelling, the support of his family and his followers, &c. Escriche, Dicc. Raz.; Sempere y Guarinos, *Vinculos y Mayorazgos*, p. 67, &c. See also on this subject *Fuero Viejo de Castilla*, b. 1, tit. 8; *Las Partidas*, tit. 25, p. 4; *El Ordenamiento de Acalá* in different laws in tit. 32. See likewise book 6, tit. 1, of the Novisima Recopilacion.

BEHOOF (Sax.). Use; service; profit; advantage. It occurs in conveyances.

BELIEF. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others.

Belief may evidently be stronger or weaker according to the weight of evidence adduced in favor of the proposition to which belief is granted or refused. 4 Serg. & R. Penn. 137; 1 Greenleaf, Ev. §§ 7–13. See 1 Starkie, Ev. 41; 2 Powell, Mortg. 555; 1 Ves. Ch. 95; 12 *id.* 80; Dy. 53; 2 W. Blackst. 881; 8 Watts, Penn. 406.

BELLIGERENT. Actually at war.

Applied to nations. Wheaton, Int. Law, 380 *et seq.;* 1 Kent, Comm. 89.

BELOW. Inferior; preliminary. The court below is the court from which a cause has been removed. See BAIL.

BENCH. A tribunal for the administration of justice.

The judges taken collectively, as distinguished from counsellors and advocates, who are called the bar.

The term, indicating originally the seat of the judges, came to denote the body of judges taken collectively, and also the tribunal itself. The *jus banci*, says Spelman, properly belongs to the king's judges, who administer justice in the last resort. The judges of the inferior courts, as of the barons, are deemed to judge *plano pede*, and are such as are called in the civil law *pedanei judices*, or by the Greeks χαμαιδικασται, that is, *humi judicantes*. The Greeks called the seats of their higher judges βηματα, and of their inferior judges βαθρα. The Romans used the word *sellæ* and *tribunalia* to designate the seats of their higher judges, and *subsellia* to designate those of the lower. See Spelman, Gloss., *Bancus;* 1 Reeve, Eng. Law, 40, 4to ed.

"The court of Common Pleas in England was formerly called *Bancus*, the *Bench*, as distinguished from *Bancus Regis*, the King's Bench. It was also called *Communis Bancus*, the Common Bench; and this title is still retained by the reporters of the decisions in the court of Common Pleas. Mention is made in the Magna Charta '*de justiciariis nostris de Banco*,' which all men know to be the justices of the court of Common Pleas, commonly called the Common Bench, or the Bench." Viner, Abr. *Courts* (n. 2).

BENCH WARRANT. An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found.

BENCHER. A senior in the Inns of Court, intrusted with their government or direction.

The benchers have the absolute and irresponsible power of punishing a barrister guilty of misconduct, by either admonishing

or rebuking him, by prohibiting him from dining in the hall, or even by expelling him from the bar, called disbarring. They might also refuse admission to a student, or reject his call to the bar. Wharton, Lex. 2d Lond. ed.

BENEFICE. An ecclesiastical preferment. In its more extended sense, it includes any such preferment; in a more limited sense, it applies to rectories and vicarages only. See BENEFICIUM.

BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract.

BENEFICIARY. A term suggested by Judge Story as a substitute for *cestui que trust*, and adopted to some extent. 1 Story, Eq. Jur. § 321.

BENEFICIO PRIMO (more fully, *beneficio primo ecclesiastico habendo*). A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the king's gift, above or under a certain value, upon a particular and certain person. *Reg. Orig.* 307.

BENEFICIUM (Lat. *beneficere*). A portion of land or other immovable thing granted by a lord to his followers for their stipend or maintenance.

A general term applied to ecclesiastical livings. 4 Blackstone, Comm. 107; Cowel.

In the early feudal times, grants were made to continue only during the pleasure of the grantor, which were called *munera;* but soon afterwards these grants were made for life, and then they assumed the name of *beneficia.* Dalrymple, Feud. Pr. 192. Pomponius Laetus, as cited by Hotoman, *De Feudis*, c. 2, says, "That it was an ancient custom, revived by the Emperor Constantine, to give lands and villas to those generals, prefects, and tribunes who had grown old in enlarging the empire, to supply their necessities as long as they lived, which they called *parochial* parishes, &c. But between (*feuda*) fiefs or feuds and (*parochias*) parishes there was this difference, that the latter were given to old men, veterans, &c., who, as they deserved well of the republic, were sustained the rest of their life (*publico beneficio*) by the public benefaction; or, if any war afterwards arose, they were called out not so much as soldiers as leaders (*magistri militum*). Feuds (*feuda*), on the other hand, were usually given to robust young men who could sustain the labors of war. In later times, the word *parochia* was appropriated exclusively to ecclesiastical persons, while the word *beneficium* (*militare*) continued to be used in reference to military fiefs or fees."

In Civil Law. Any favor or privilege.

BENEFICIUM CLERICALE. Benefit of clergy, which see.

BENEFICIUM COMPETENTIÆ. In Scotch Law. The privilege of retaining a competence belonging to the obligor in a gratuitous obligation. Such a claim constitutes a good defence in part to an action on the bond. Paterson, Comp.

In Civil Law. The right which an insolvent debtor had, among the Romans, on making cession of his property for the benefit of his creditors, to retain what was required for him to live honestly according to his condition. 7 Toullier, n. 258.

BENEFICIUM DIVISIONIS. In Scotch and Civil Law. A privilege whereby a co-surety may insist upon paying only his share of the debt along with the other sureties. In Scotch law this is lost if the cautioners (sureties) bind themselves "conjunctly and severally." Erskine, Inst. lib. 3, tit. 3, § 63.

BENEFICIUM ORDINIS. In Scotch and Civil Law. The privilege of the surety allowing him to require that the creditor shall take complete legal proceedings against the debtor to exhaust him before he calls upon the surety. 1 Bell, Comm. 347.

BENEFIT OF CESSION. In Civil Law. The release of a debtor from future imprisonment for his debts, which the law operates in his favor upon the surrender of his property for the benefit of his creditors. Pothier, *Procéd. Civ.* 5ème part. c. 2, § 1.

This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not the goods he may acquire afterwards. See BANKRUPT; CESSIO BONORUM; INSOLVENT.

BENEFIT OF CLERGY. In English Law. An exemption of the punishment of death which the laws impose on the commission of certain crimes, on the culprit demanding it. By modern statutes, benefit of clergy was rather a substitution of a more mild punishment for the punishment of death.

A clergyman was exempt from capital punishment *toties quoties*, as often as, from acquired habit, or otherwise, he repeated the same species of offence; the laity, provided they could read, were exempted only for a first offence; for a second, though of an entirely different nature, they were hanged. Among the laity, however, there was this distinction: peers and peeresses were discharged for their first fault without reading, or any punishment at all; commoners, if of the male sex and readers, were branded in the hand. Women commoners had no benefit of clergy. It occasionally happened, in offences committed jointly by a man and a woman, that the law of gavelkind was parodied,—

"The woman to the bough,
The man to the plough."

Kelyng reports, "At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all; and yet the bishop's clerk, upon the demand of '*legit?*' or *non legit?*' answered, '*legit.*' And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, '*legit.*' Then I bid the clerk of assizes not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he con-

fessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks." An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse*. In the very curious collection of *prolegomena* to Coryat's Crudities are commendatory lines by Inigo Jones, whose fame was in building palaces and churches, and not the "lofty rhyme." The famous architect wrote,

"Whoever on *this* book with scorn would look,
May he at sessions crave, and want *his* book."

This section is taken from Ruins of Time exemplified in Hale's Pleas of the Crown, by Amos, p. 24. And see, further, 1 Salk. 61.

Benefit of clergy was lately granted, not only to the clergy, as was formerly the case, but to all persons. The benefit of clergy seems never to have been extended to the crime of high treason, nor to have embraced misdemeanors inferior to felony. See 1 Chitty, Cr. Law, 667–668; 4 Blackstone, Comm. ch. 28; 1 Bishop, Crim. Law, §§ 622–624. But this privilege improperly given to the clergy, because they had more learning than others, is now abolished, by stat. 7 Geo. IV. c. 28, s. 6.

By the act of congress of April 30, 1790, it is provided, § 30, that the benefit of clergy shall not be used or allowed upon conviction of any crime for which, by any statute of the United States, the punishment is, or shall be declared to be, death.

BENEFIT OF DISCUSSION. **In Civil Law.** The right which a surety has to cause the property of the principal debtor to be applied in satisfaction of the obligation in the first instance. La. Civ. Code, art. 3014–3020.

BENEFIT OF DIVISION. **In Civil Law.** The right of one of several joint sureties, when sued alone, to have the whole obligation apportioned amongst the solvent sureties, so that he need pay but his share. La. Civ. Code, art. 3014–3020. See 2 Bouvier, Inst. n. 1414.

BENEFIT OF INVENTORY. **In Civil Law.** The privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier, *des Success.* c. 3, s. 3, a. 2. See also Paterson, Comp. as to the Scotch law upon this subject.

BENEVOLENCE. A voluntary gratuity given by the subjects to the king. Cowel.

Benevolences were first granted to Edward IV.; but under subsequent monarchs they became any thing but voluntary gifts, and in the Petition of Rights (3 Car. I.) it is made an article that no benevolence shall be extorted without the consent of parliament.

The illegal claim and collection of these benevolences was one of the prominently alleged causes of the rebellion of 1640. 1 Blackstone, Comm. 140; 4 *id.* 436; Cowel.

BEQUEATH. To give personal property by will to another. 13 Barb. N. Y. 106. The word may be construed *devise*, so as to pass real estate. Wigram, Wills, 11.

BEQUEST. A gift by will of personal property. See DEVISE.

BERCARIA. A sheep-fold. A tan-house or heath-house, where barks or rinds of trees are laid to tan. Domesday; Coke, Litt. 56.

BERCARIUS, BERCATOR. A shepherd.

BESAILE, BESAYLE. The great-grandfather, *proavus*. 1 Blackstone, Comm. 186.

BEST EVIDENCE. Means the best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing to be proved admits of: *e.g.* a copy of a deed is not the best evidence; the deed itself is better. Gilbert, Ev. 15; Starkie, Ev. 437; 2 Campb. 605; 3 *id.* 236; 1 Esp. 127; 1 Pet. 591; 6 *id.* 352; 7 *id.* 100.

The rule requiring the best evidence to be produced is to be understood of the best *legal* evidence. 2 Serg. & R. Penn. 34; 3 Blackstone, Comm. 368, note 10, by Christian. It is relaxed in some cases, as, *e.g.* where the words or the act of the opposite party avow the fact to be proved. A tavern-keeper's sign avows his occupation; taking of tithes avows the clerical character; so, addressing one as "The Reverend T. S." 2 Serg. & R. Penn. 440; 1 Saunders, Plead. 49. And see 1 Greenleaf, Ev. §§ 82, 83.

BETROTHMENT. A contract between a man and a woman, by which they agree that at a future time they will marry together.

2. The contract must be mutual; the promise of the one must be the consideration for the promise of the other. It must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither. 1 Salk. 24; Carth. 467; 5 Mod. 411; 1 Freem. 95; 3 Kebl. 148; Coke, Litt. 79 *a*, *b*.

3. The parties must be able to contract. If either be married at the time of betrothment, the contract is void; but the married party cannot take advantage of his own wrong, and set up a marriage or previous engagement as an answer to the action for the breach of the contract, because this disability proceeds from the defendant's own act. 1 Ld. Raym. 387; 3 Inst. 89; 1 Sid. 112; 1 Blackstone, Comm. 432.

4. The performance of this engagement, or completion of the marriage, must be accomplished within a reasonable time. Either party may, therefore, call upon the other to fulfil the engagement, and, in case of refusal or neglect to do so within a reasonable time after request made, may treat the betrothment as at an end, and bring action for the breach of the contract. 2 Carr. & P. 631. For a breach of the betrothment without a just cause, an action on the case may be maintained for the recovery of damages. It

may be maintained by either party. Carth. 467; 1 Salk. 24.

BETTER EQUITY. The right which, in a court of equity, a second incumbrancer has who has taken securities against subsequent dealings to his prejudice, which a prior incumbrancer neglected to take although he had an opportunity. 1 Chanc. Prec. 470, n.; 4 Rawle, Penn. 144. See 3 Bouvier, Inst. n. 2462.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as have been made to the estate which render it better than mere repairs. 11 Me. 482; 23 *id.* 110; 24 *id.* 192; 13 Ohio, 308; 10 Yerg. Tenn. 477; 13 Vt. 533; 17 *id.* 109. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc.

BEYOND SEA. Out of the kingdom of England; out of the state; out of the United States.

The courts of Pennsylvania, also, have decided that the phrase means "out of the United States." 9 Serg. & R. Penn. 288; 2 Dall. Penn. 217; 1 Yeates, Penn. 329. In Massachusetts, Maryland, Georgia, and South Carolina, it has been decided to mean out of the state. 1 Pick. Mass. 263; 1 Harr. & J. Md. 350; 2 M'Cord, So. C. 331; 3 Bibb, Ky. 510; 3 Litt. Ky. 148. See also 1 Johns. Cas. N. Y. 76.

In the various statutes of limitation the term "out of the state" is now generally used.

BIAS. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object.

Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.

There is, however, one kind of bias which the courts suffer to influence them in their judgments: it is a bias favorable to a class of cases, or persons, as distinguished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience. 1 Ves. Sen. Ch. 13, 14; 3 Atk. Ch. 524. It is also felt in favor of the heir at law, as when there is an heir on one side and a mere volunteer on the other. Willes, Ch. 570; 1 W. Blackst. 256; Ambl. 645; 1 Ball & B. Ch. 309; 1 Wils. 310. On the other hand, the court leans against double portions for children, M'Clell. 356; 13 Price, Exch. 599; against double provisions, and double satisfactions, 3 Atk. Ch. 421; and against forfeitures. 3 Term, 172. See, generally, 1 Burr. 419; 1 Bos. & P. 614; 3 *id.* 456; 2 Ves. Ch. 648; 1 Turn. & R. 350.

BID. An offer to pay a specified price for an article about to be sold at auction.

BIDDER. One who offers to pay a specified price for an article offered for sale at a public auction. 11 Ill. 254.

2. The bidder has a right to withdraw his bid at any time before it is accepted, which acceptance is generally manifested by knocking down the hammer, 3 Term, 148; Hard. Ky. 181; 3 Johns. Cas. N. Y. 29; 6 Johns. N. Y. 194; 8 *id.* 444; Sugden, Vend. 29; Babington, Auct. 30, 42; see 38 Me. 302; 2 Rich. So. C. 464; or the bid may be withdrawn by implication. 6 Penn. St. 486; 8 *id.* 408.

The bidder is required to act in good faith; and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself. 3 Brod. & B. 116; 5 Rich. So. C. 541.

3. But there is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder. 6 Watts & S. Penn. 122; 3 Gilm. Va. 529; 11 Paige, Ch. N. Y. 431; 15 How. 494. See 3 Stor. C. C. 623.

BIENS (Fr. goods). Property of every description, except estates of freehold and inheritance. Sugden, Vend. 495; Coke, Litt. 118 *b*; Dane, Abr.

In the French law, this term includes all kinds of property, real and personal. Biens are divided into *biens meubles*, movable property; and *biens immeubles*, immovable property. This distinction between movable and immovable property is recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies. Story, Confl. of Laws, § 13, note 1.

BIGAMUS. In Civil Law. One who had been twice married, whether both wives were alive at the same time or not. One who had married a widow.

Especially used in ecclesiastical matters as a reason for denying benefit of the clergy. Termes de la Ley.

BIGAMY. The wilfully contracting a second marriage when the contracting party knows that the first is still subsisting.

The state of a man who has two wives, or of a woman who has two husbands, living at the same time.

When the man has more than two wives, or the woman more than two husbands, living at the same time, then the party is said to have committed polygamy; but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russell, Crimes, 187.

According to the canonists, bigamy is threefold, viz.: (*vera, interpretativa, et similitudinaria*), real, interpretative, and similitudinary. The first consisted in marrying two wives successively (virgins they may be), or in once marrying a widow; the second consisted, not in a repeated marriage, but in marrying (v. g. *meretricem vel ab alio corruptam*) a harlot; the third arose from two marriages, indeed, but the one metaphorical or spiritual, the other carnal. This last was confined to persons initiated in sacred orders, or under the vow of continence. Deferriere's Tract. Juris Canon. tit. xxi. See also Bacon, Abr. *Marriage*.

2. In England this crime is punishable by the stat. 1 Jac. I. c. 11, which makes the offence felony; but it exempts from punishment the party whose husband or wife shall

continue to remain absent for seven years before the second marriage without being heard from, and persons who shall have been legally divorced. The statutory provisions in the United States against bigamy or polygamy are in general similar to, and copied from, the statute of 1 Jac. I. c. 11, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes; but the punishment of the offence is different in many of the states. 2 Kent, Comm. 69.

3. If a woman, who has a husband living, marries another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard of for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead. 7 Metc. Mass. 472. On the trial of a woman for bigamy whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held that upon this finding the conviction could not be supported. 1 Dearsl. & B. Cr. Cas. 98. If a man is prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant. T. Raym. 1; 2 Taylor, Ev. § 1228.

4. Where the first marriage was made abroad, it must be shown to have been valid where made. 5 Mich. 349. Reputation is not sufficient to establish the fact of the first marriage. 1 Park. Cr. Cas. N. Y. 378. See 13 Ired. No. C. 289. If the second marriage be in a foreign state, it is not bigamy, 2 Park. Cr. Cas. N. Y. 195; except by statute. 36 Eng. L. & Eq. 614. The second marriage need not be a valid one. 1 Carr. & K. 144.

BILAN. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due to them. A balance sheet. 3 Mart. N. s. La. 446.

The term is used in Louisiana, and is derived from the French. 5 Mart. N. s. La. 158.

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfil obligations reciprocally towards each other. *Leç. Elém.* § 781. See CONTRACT.

BILINE. Collateral.

BILINGUIS. Using two languages.

A term formerly applied to juries half of one nation and half of another. Plowd. 2.

BILL (Lat. *billa*).

In Chancery Practice. A complaint in writing addressed to the chancellor, containing the names of the parties to the suit, both complainant and defendant, a statement of the facts on which the complainant relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and proper process.

2. Its office in a chancery suit is the same as a declaration in an action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill usually consists of nine parts, which contain,—*the address*, which must be to the chancellor, court, or judge acting as such; *the names* of the plaintiffs and their descriptions, but the statement of the parties in this part of the bill merely is not sufficient, 2 Ves. & B. Ch. Ir. 327; *the statement* of the plaintiff's case, called *the stating part*, which should contain a distinct though general statement of every material fact to which the plaintiff means to offer evidence, 1 Brown, Ch. 94; 3 Swanst. Ch. 472; 3 P. Will. 276; 2 Atk. Ch. 96; 1 Vern. Ch. 483; 11 Ves. Ch. 240; 2 Hare, Ch. 264; 6 Johns. N. Y. 565; 1 Woodb. & M. C. C. 34; Story, Eq. Plead. § 265 *a*; *a general charge* of confederacy; *the allegations* of the defendant's pretences, and charges in evidence of them; *the clause* of jurisdiction, and an averment that the acts complained of are contrary to equity; *a prayer* that the defendant may *answer* the interrogatories, usually called the interrogatory part; *the prayer for relief; the prayer for process*. 2 Madd. Ch. 166; 4 Halst. Ch. N. J. 143; 1 Mitford, Chanc. Plead. 41.

3. By the twenty-first of the Rules of Practice for the Courts of Equity of the United States, promulgated by the supreme court Jan. 1842, it is provided that the plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, avowing a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law. By the rule the 4th, 5th, and 6th parts of the bill as above stated are dispensed with. And see Story, Eq. Plead. §§ 29–34. And this seems to be now the more common practice, except where fraud and combination are to be specifically charged. 27 N. H. 506.

4. The facts contained in the bill, so far as known to the complainant, must in some cases be sworn to be true, Mitford, Chanc. Plead. 54; and such as are not known to him he must swear he believes to be true, and it must be signed by counsel. 2 Maddock, Chanc. Pract. 167; 4 Halst. Ch. N. J. 136; Story, Eq. Plead. § 288.

Bills are said to be original; not original, or in the nature of original bills.

Original bills are those which do, and which do not, pray for relief.

Those which pray for relief are either *bills* praying the decree or order touching some right claimed by the party exhibiting the

bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, which is the most common kind of bill, Mitford, Chanc. Plead. Jerem. ed. 34–37; *bills of interpleader;* or *bills of certiorari.*

5. Those which do not pray for relief are either to perpetuate testimony; to examine witnesses *de bene esse;* or for discovery.

Bills not original are either supplemental; of *revivor;* or of *revivor and supplement.*

Those of revivor and supplement are either a *cross bill;* a *bill of review;* a *bill to impeach* a decree; *to suspend* the operation, or *avoid the decree* for subsequent matter; *to carry a decree* into effect; *or partaking* of the qualities of some one or all of them. See Mitford, Eq. Pl. 35–37; Story, Eq. Pl. §§ 18–21.

For an account of these bills, consult the various articles which follow.

As a Contract. An obligation; a deed, whereby the obligor acknowledges himself to owe unto the obligee a certain sum of money or some other thing, in which, besides the names of the parties, are to be considered the sum or thing due, the time, place, and manner of payment or delivery thereof. It may be indented or poll, and with or without a penalty. West, Symb. §§ 100, 101.

6. This signification came to include all contracts evidenced by writing, whether specialties or parol, but is no longer in use except in phrases, such as bill payable, bill of lading.

In Legislation. A special act passed by the legislature in the exercise of a quasi judicial power. Thus, bills of attainder, bills of pains and penalties, are spoken of. See BILL OF ATTAINDER; BILL OF PAINS AND PENALTIES.

The draft of a law submitted to the consideration of a legislative body for its adoption. 26 Penn. St. 450. By the constitution of the United States, all bills for raising revenue must originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. Every bill, before it becomes a law, must be approved by the president of the United States, or within ten days returned, with his objections, to the house in which it originated. Two-thirds of each house may then enact it into a law. These provisions are copied in the constitutions of most of the states. U. S. Const. art. 1, § 7. As to the mode of passing bills in congress, see Shepherd, Const. Text-Book, 94; 2 Story, Const. § 893 *et seq.*

In Mercantile Law. The creditor's written statement of his claim, specifying the items.

It differs from an account stated in this, that a bill is the creditor's statement; an account stated is a statement which has been assented to by both parties.

7. In England it has been held that a bill thus rendered is conclusive against the party making it out against an increase of charge on any of the items contained in it; and strong evidence against items. 1 Bos. & P. 49. But in New York it has been held that merely presenting a bill, no payment or agreement as to the amount being shown, does not conclude the party from suing for a larger sum. 16 N. Y. 389.

BILL OF ADVENTURE. A writing signed by a merchant, ship-owner, or master to testify that goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce.

BILL OF ADVOCATION. In Scotch Law.

A petition in writing, by which a party to a cause applies to the supreme court to call the action out of the inferior court to itself.

BILL TO CARRY A DECREE INTO EXECUTION. In Equity Practice. One which is filed when, from the neglect of parties or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, Chanc. Pract. 68.

BILL OF CERTIORARI. In Equity Practice. One praying for a writ of certiorari to remove a cause from an inferior court of equity. Cooper, Eq. 44. Such a bill must state the proceedings in the inferior court, and the incompetency of such court by suggestion of the reason why justice is not likely to be done,—as, distance of witnesses, lack of jurisdiction, etc.,—and must pray a writ of certiorari to remove the record and the cause to the superior court. Wyatt, Pract. Reg. 82; Harrison, Chanc. Pract. 49; Story, Eq. Plead. § 298. It is rarely used in the United States.

BILL CHAMBER. In Scotch Law. A department of the court of session in which petitions for suspension, interdict, etc. are entertained. It is equivalent to sittings in chambers in the English and American practice. Paterson, Comp.

BILL OF CONFORMITY. In Equity Practice. One filed by an executor or administrator, who finds the affairs of the deceased so much involved that he cannot safely administer the estate except under the direction of a court of chancery. This bill is filed against the creditors generally, for the purpose of having all their claims adjusted, and procuring a final decree settling the order of payment of the assets. 1 Story, Eq. Jur. 440.

BILL OF COSTS. In Practice. A statement of the items which form the total amount of the costs of a suit or action. It must be taxed by the proper officer of the court, and is demandable as a matter of right before the payment of the costs. See COSTS; TAXING COSTS.

Consult, for the English rules, 7 C. B. 742; 8 *id.* 331; 6 Dowl. & L. 691; 13 Q. B. 308; 13 Lond. Jur. 680; 14 *id.* 14, 65.

BILL OF CREDIT. Paper issued by the authority of a state on the faith of the state, and designed to circulate as money. 11 Pet. 257.

Promissory notes or bills issued by a state government, exclusively, on the credit of the state, and intended to circulate through the community for its ordinary purposes as money, redeemable at a future day, and for the payment of which the faith of the state is pledged. 4 Kent, Comm. 408.

The constitution of the United States provides that no state shall emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. U. S. Const. art. 1, § 10. This prohibition, it seems, does not apply to bills issued by a bank owned by the state but having a specific capital set apart, 2 M'Cord, So. C. 12; 4 Ark. 44; 11 Pet. 257; 13 How. 12; but see 4 Pet. 410; 2 Ill. 87; nor does it apply to notes issued by corporations or individuals which are not made legal tender. 4 Kent, Comm. 408, and notes. See 2 Pet. 318; 4 Dall. xxiii.; Story, Const. §§ 1362–1364.

In Mercantile Law. A letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Comyns, Dig. *Merchant*, F 3; 3 Burr. 1667; 13 Miss. 491; 4 Ark. 44; R. M. Charlt. Ga. 151.

BILL OF DEBT. An ancient term including promissory notes and bonds for the payment of money. Comyns, Dig. *Merchant*, F 2.

BILL OF DISCOVERY. In Equity Practice. One which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power. Hinde, Chanc. Pract. 20; Blake, Chanc. Pract. 37.

It does not seek for relief in consequence of the discovery (and this constitutes its characteristic feature), though it may ask for a stay of proceedings till discovery is made, 2 Story, Eq. Jur. § 1483; and such relief as does not require a hearing before the court, it is said, may be part of the prayer. Eden, Inj. 78; 19 Ves. Ch. 376; 4 Madd. Ch. 247; 5 *id.* 218; 1 Schoales & L. Ch. Jr. 316; 1 Sim. & S. Ch. 83.

2. It is commonly used in aid of the jurisdiction of a court of law, to enable the party who prosecutes or defends a suit at law to obtain a discovery of the facts which are material to such prosecution or defence. Hare, Discov. 119; 9 Paige, Ch. N. Y. 580, 622, 637.

The plaintiff must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant. 2 Ves. Ch. 445. See Blake, Chanc. Pract. 45; Mitford, Chanc. Plead. 52; Cooper, Eq. Plead. 58; 1 Maddock, Chanc. Pract. 196; Hare, Disc. *passim*; Wigram, Disc. *passim*.

3. The bill must show a present and vested title and interest in the plaintiff, and what that title and interest are, 8 Metc. Mass. 395; 1 Vern. Ch. 105; with reasonable certainty, 3 Ves. 343; must state a case which will constitute a just ground for a suit or a defence at law, 3 Johns. Ch. N. Y. 47; 2 Paige, Ch. N. Y. 601; 1 Brown, Ch. 96; 3 *id.* 155; 2 Anstr. 504; 13 Ves. Ch. 240; 3 Mylne & C. Ch. 407; must describe the deeds and acts with reasonable certainty, 3 Ves. Ch. 343; 17 Ala. N. s. 794; Story, Eq. Pl. § 320; must state that a suit is brought, or about to be, and the nature thereof must be given with reasonable certainty, 5 Madd. Ch. 18; 8 Ves. Ch. 398; must show that the defendant has some interest, 2 Atk. Ch. 394; 1 Ves. & B. Ch. 550; 3 Barb. Ch. N. Y. 484; and, where the right arises from privity of estate, what that privity is, Mitford, Chanc. Plead. Jerem. ed. 189; it must show that the matter is material, and how, 9 Paige, Ch. N. Y. 188, 580, 622; 3 Rich. Eq. So. C. 148; and must set forth the particulars of the discovery sought. 2 Caines, Cas. N. Y. 296; 1 Younge & J. Exch. 577. And see Story, Eq. Plead. § 17 *et seq.*

It will not lie in aid of a criminal prosecution, a mandamus, or suit for a penalty. 2 Ves. Ch. 398; 2 Paige, Ch. N. Y. 399; Story, Eq. Jur. § 1494.

BILL OF EXCEPTIONS. A written statement of objections to the decision of the court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision.

The object of a bill of exceptions is to put the decision objected to upon record for the information of the court having cognizance of the cause in error. Bills of exceptions are authorized by statute Westm. 2d (13 Edw. I.), c. 31, the principles of which have been adopted in all the states of the Union, though the statute has been held to be superseded in some, by their own statutes. It provides for compelling the judges to sign such bills, and for securing the insertion of the exceptions upon the record. They may be brought by either plaintiff or defendant.

2. *Where it lies.* In the trial of civil causes, wherever the court, in making a decision, is supposed by the counsel against whom the decision is made to have mistaken the law, such counsel may tender exceptions to the ruling, and require the judge to authenticate the bill, 3 Blackstone, Comm. 372; 3 Cranch, 300; 7 Gill & J. Md. 335; 24 Me. 420; 3 Jones, No. C. 185; 19 N. H. 372; including the receiving improper and the rejecting proper evidence, 1 Ill. 162; 9 Mo. 166; 6 Gray, Mass. 479; 17 Tex. 62; 41 Me. 149; and a failure to call the attention of the jury to material matter of evidence, after request, 2 Cow. N. Y. 479; and including a refusal to charge the jury in a case proper for a charge, 4 Cranch, 60, 62; 2 Aik. Vt. 115; 2 Blatchf. C. C. 1; 5 Gray, Mass. 101; but not including a failure to charge the jury on points of law when not requested, 2 Pet. 15; 6 Wend. N. Y. 274; 1 Halst. N. J. 132; 4 *id.* 153; 2 Blatchf. C. C. 1; 11 Cush. Mass. 123; 38 Me. 227; and including a refusal to order a special verdict in some cases. 1 Call. Va. 105.

3. An exception cannot be taken to the decision of the court upon matters resting in its discretion, 34 Me. 300; 15 *id.* 345; 5 Vt. 28; 7 *id.* 92; 13 *id.* 459; 6 Wend. N. Y. 277; 4 Pick. Mass. 302; 22 *id.* 394; 3 Ill. 78; 17 *id.* 339; 8 Miss. 164; 19 Vt. 457; 20 N. H. 121; 5 R. I. 138; nor in cases where there is

a right of appeal. 4 Pick. Mass. 93; 10 *id.* 34; 13 Vt. 430; 1 Me. 291. See 19 Pick. Mass. 191.

In *criminal* cases, at common law, judges are not required to authenticate exceptions, 1 Chitty, Crim. Law, 622; 13 Johns. N. Y. 90; 20 Barb. N. Y. 567; 1 Va. Cas. 264; 2 Watts, Penn. 285; 2 Sumn. C. C. 19; 16 Ala. 187; but statutory provisions have been made in several states authorizing the taking of exceptions in criminal cases. Graham, Pract. 768, n.; 2 Va. Cas. 60; 1 Leigh, Va. 598; 14 Pick. Mass. 370; 7 Metc. Mass. 467; 20 Barb. N. Y. 567; 4 Ohio, 348; 6 *id.* 16; 7 *id.* 214; 2 Dutch. N. J. 463; 5 Mich. 36; 29 Penn. St. 429.

4. *When to be taken.* The bill must be tendered at the time the decision is made, 6 Johns. N. Y. 279; 9 *id.* 345; 5 N. H. 336; 2 Me. 336; 5 Watts, Penn. 69; 6 J. J. Marsh. Ky. 247; 2 Harr. N. J. 291; 1 Ark. 349; 2 *id.* 14; 8 Mo. 234, 656; 2 Miss. 572; 12 La. Ann. 113; 4 Iowa, 504; 4 Tex. 170; and it must, in general, be taken before the jury have delivered their verdict. 8 Serg. & R. Penn. 211; 10 Johns. N. Y. 312; 5 T. B. Monr. Ky. 177; 11 N. H. 251; 9 Mo. 291, 355; 3 Ind. 107; 17 Ill. 166. See 7 Wend. N. Y. 34; 9 Conn. 545.

In practice, however, the point is merely noted at the time, and the bill is afterwards settled, Buller, Nisi P. 315; T. Raym. 405; Salk. 288; 8 Serg. & R. Penn. 216; 11 *id.* 270; 5 N. H. 336; 3 Cow. N. Y. 32; 7 *id.* 102; 5 Miss. 272; 2 Swan, Tenn. 77; 21 Mo. 122; see 13 Ill. 664; 3 A. K. Marsh. Ky. 360; 1 Ala. 66; 2 Dutch. N. J. 463; but in general before the close of the term of court, 3 Humphr. Tenn. 372; 8 Mo. 727; 1 Watts & S. Penn. 480; 6 How. 260; see 18 Ala. 441; 9 Ill. 443; 5 Ohio St. 51; and then must appear on its face to have been signed at the trial. 9 Wheat. 651; 2 Sumn. C. C. 19; 6 Wend. N. Y. 258; 3 Ark. 451. A bill may be sealed by the judge after the record has been removed, and even after the expiration of his term. 1 Iowa, 364. See 4 Pick. Mass. 228; 7 Mo. 250.

5. *Formal proceedings.* The bill must be signed by the judge or a majority of the judges who tried the cause, 8 Cow. N. Y. 746; 2 Harr. & J. Md. 345; 3 Hen. & M. Va. 219; 4 J. J. Marsh. Ky. 543; 2 Me. 336; 2 Ala. 269; Wright, Ohio, 73; 29 Vt. 187; 22 Ga. 168; upon notice of time and place when and where it is to be done. Buller, Nisi P. 316; 3 Cow. N. Y. 32; 8 *id.* 766; 1 Ind. 389; 2 Ga. 211, 262. As to the course to be pursued in case of the death of the judge before authentication, see 7 Dowl. & L. 252; 2 Du. N. Y. 607.

Facts not appearing on the bill are not presumed. 11 Ala. 29; 4 Monr. Ky. 126; 5 Rand. Va. 666; 3 Rawle, Penn. 101; 1 Pick. Mass. 37; 2 Miss. 315; 5 Fla. 457; 7 Cranch, 270. For decisions as to the requisite statements of fact and law, see 1 Aik. Vt. 210; 2 *id.* 26; 3 Jones, No. C. 407; 2 Harr. & J. Md. 376; 7 *id.* 279; 2 Leigh, Va. 340; 4 Hen. & M. Va. 270; 5 Ala. 71; 29 Ala. N. S. 322; 4 Ohio, 79; 7 Ohio St. 22; 20 Ga. 135; 4 Mich. 478; 4 Iowa, 349; 17 Ill. 234; 22 Mo. 321; 2 Pet. 15; 7 Cranch, 270; 9 Wheat. 651; 4 How. 4.

6. *Effect of.* The bill when sealed is conclusive evidence as to the facts therein stated as between the parties, 3 Burr. 1765; 3 Dall. Penn. 38; 6 Wend. N. Y. 276, in the suit to which it relates, but no further, 23 Miss. 156; see 1 T. B. Monr. Ky. 6; and all objections not appearing by the bill are excluded. 8 East, 280; 2 Binn. Penn. 168; 7 Halst. N. J. 160; 1 Pick. Mass. 37; 7 *id.* 136; 14 *id.* 370; 1 Wend. N. Y. 418; 10 *id.* 254; 2 Me. 337; 25 *id.* 79; 1 Leigh, Va. 86; 10 Conn. 146; 11 *id.* 159; 6 Watts & S. Penn. 343; 8 Miss. 671; 10 *id.* 510; 12 Gill & J. Md. 64; 10 Vt. 255; 7 Mo. 288; 11 Wheat. 199; 3 How. 553. And see 17 Ala. 689; 18 *id.* 716; 2 Ark. 506; 10 Yerg. Tenn. 499; 30 Vt. 233. But see 4 Hen. & M. Va. 200.

It draws in question only the points to which the exception is taken. 5 Johns. N. Y. 467; 8 *id.* 495; 1 Green, N. J. 216; 10 Conn. 75, 146. It does not of itself operate a stay of proceedings. 18 Wend. N. Y. 509; 19 Ga. 588. See 5 Hill, N. Y. 510.

BILL OF EXCHANGE. A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named. Byles, Bills, 1.

A bill of exchange may be negotiable or non-negotiable. If negotiable, it may be transferred either before or after acceptance.

The person making the bill, called the drawer, is said to draw upon the person to whom it is directed, and undertakes impliedly to pay the amount with certain costs if he refuse to comply with the command. The drawee is not liable on the bill till after acceptance, and then becomes liable as principal to the extent of the terms of the acceptance; while the drawer becomes liable to the payee and indorsees conditionally upon the failure of the acceptor to pay. The liabilities between indorsers and indorsees are subject to the same rules as those of indorsers and indorsees on promissory notes. Regularly, the drawee is the person to become acceptor; but other parties may accept, under special circumstances.

2. A *foreign* bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other. In this respect the states of the United States are held foreign as to each other. 2 Pet. 589; 10 *id.* 572; 12 Pick. Mass. 483; 15 Wend. N. Y. 527; 3 A. K. Marsh. Ky. 488; 1 Const. So. C. 400; 1 Hill, So. C. 44; 4 Leigh, Va. 37; 15 Me. 136; 18 *id.* 292; 20 *id.* 139; 8 Dan. Ky. 133; 9 N. H. 558; 4 Wash. C. C. 148. But see 5 Johns. N. Y. 384; 17 Ala. 247.

An *inland* bill is one of which the drawer and drawee are residents of the same state or country. 25 Miss. 143. As to whether a bill is considered as foreign or inland when made partly in one place and partly in another, see 5 Taunt. 529; 8 *id.* 679; Gow. 56; 1 Maule & S. 87.

The distinction between inland and foreign bills becomes important with reference to the question whether protest and notice are to be given in case of non-acceptance. See 3 Kent, Comm. 95; PROTEST.

3. The *parties* to a bill of exchange are the drawer, the drawee, the acceptor, and the payee. Other persons connected with a bill in case of a transfer as parties to the transfer are the indorser, indorsee, and holder. See those titles. It sometimes happens that one or more of the apparent parties to a bill are fictitious persons. The rights of a *bonâ fide* holder are not thereby prejudiced where the payee and indorser are fictitious, 2 H. Blackst. 78; 3 Term, 174, 481; 1 Campb. 130; 19 Ves. Ch. 311; or even where the drawer and payee are both fictitious, 10 Barnew. & C. 468; and all the various parties need not be different persons. 18 Ala. 76; 1 Story, C. C. 22. The qualifications of parties who are to be made liable by the making or transfer of bills are the same as in case of other contracts. See PARTIES.

4. The bill must be *written*. 1 Pardessus, 344; 2 Strange, 955.

It must be properly *dated*, both as to place and time of making. Beawes, Lex Merc. pl. 3; 2 Pardessus, n. 333; 1 Barnew. & C. 398. See 30 Vt. 11.

The *superscription* of the sum for which the bill is payable will aid an omission in the bill, but is not indispensable. 2 East, Pl. Cr. 951; 1 R. I. 398.

The *time* of payment should be expressed; but if no time is mentioned it is considered as payable on demand. 7 Term, 427; 2 Barnew. & C. 157.

The *place* of payment may be prescribed by the drawer, Beawes, Lex Merc. pl. 3; 8 C. B. 433; or by the acceptor on his acceptance, Chitty, Bills, 172; 3 Jur. 34; 7 Barb. N. Y. 652; but is not as a general practice, in which last case the bill is considered as payable and to be presented at the usual place of business of the drawee, 11 Penn. St. 456, at his residence, where it was made, or to him personally anywhere. 10 Barnew. & C. 4; Mood. & M. 381; 4 Carr. & P. 35.

Such an *order* or request to pay must be made as demands a right, and not as asks a favor, Mood. & M. 171; and it must be absolute, and not contingent. 8 Mod. 363; 4 Ves. Ch. 372; 1 Russ. & R. Cr. Cas. 193; 2 Barnew. & Ald. 417; 5 Term, 482; 4 Wend. N. Y. 275; 11 Mass. 14; 13 Ala. 205; 3 Halst. N. J. 262; 6 J. J. Marsh. Ky. 170; 1 Ohio, 272; 9 Miss. 393; 5 Ark. 401; 1 La. Ann. 48; 10 Tex. 155. Mere civility in the terms does not alter the legal effect of the instrument.

5. The word *pay* is not necessary; *deliver* is equally operative, 2 Ld. Raym. 1397; 8 Mod. 364; as well as other words, 9 C. B. 570; but they must be words requiring *payment*, 10 Ad. & E. 98: "*il vous* plaira *de payer*" is, in France, the proper language of a bill. Pailliet, Man. 841.

Each of the duplicate or triplicate (as the case may be) bills of a set of foreign exchange contains a provision that the particular bill is to be paid only if the others remain at the time unpaid, see 2 Pardessus, n. 342; and all the parts of the set constitute but one bill. 7 Johns. N. Y. 42; 2 Dall. Penn. 134. A bill should *designate the payee*, 26 Eng. L. & Eq. 404; 36 *id.* 165; 11 Barb. N. Y. 241; 13 Ga. 55; 30 Miss. 122; 16 Ill. 169; and see 1 E. D. Smith, N. Y. 1; 8 Ind. 18; but when no payee is designated, the holder by indorsement may fill the blank with his own name, 2 Maule & S. 90; 4 Campb. 97; see 6 Ala. N. S. 86; and if payable to the bearer it is sufficient. 3 Burr. 1526.

6. To make it negotiable, it must be payable to the order of the payee or to the bearer, or must contain other equivalent and operative words of transfer. 1 Salk. 132; Ld. Raym. 1545; 6 Term, 123; 9 Barnew. & C. 409; 1 Deac. & C. 275; 1 Dall. Penn. 194; 3 Caines, N. Y. 137; 2 Gill, Md. 348; 1 Harr. Del. 32; 3 Humphr. Tenn. 612; 1 Ga. 236; 1 Ohio, 272; otherwise in some states of the United States by statute, and in Scotland, Va. Rev. Stat. 1849, c. 144, § 7; 10 B. Monr. Ky. 286; 1 Bell, Comm. 401. But in England and the United States negotiability is not essential to the validity of a bill, 3 Kent, Comm. 78; 6 Term, 123; 6 Taunt. 328; 9 Johns. N. Y. 217; 10 Gill & J. Md. 299; 31 Penn. St. 506; though it is otherwise in France. Code de Comm. art. 110, 188; 2 Pardessus, n. 339.

7. The *sum* for which the bill is drawn should be written in full in the body of the instrument, as the words in the body govern in case of doubt. 5 Bingh. N. C. 425; 8 Blackf. Ind. 144; 1 R. I. 398.

The amount must be fixed and certain, and not contingent. 2 Salk. 375; 2 Miles, Penn. 442. It must be payable in money, and not in merchandise, 7 Johns. N. Y. 321, 461; 4 Cow. N. Y. 452; 11 Me. 398; 6 N. H. 159; 7 Conn. 110; 1 Nott & M'C. So. C. 254; 3 Ark. 72; 8 B. Monr. Ky. 168; see 7 Miss. 52; and is not negotiable if payable in bank bills or in *currency* or other substitutes for legal money of similar denominations. 2 McLean, C. C. 10; 3 *id.* 106; 3 Wend. N. Y. 71; 7 Hill, N. Y. 359; 11 Vt. 268; 3 Humphr. Tenn. 171; 6 *id.* 303; 7 Mo. 595; 5 Ark. 481; 13 *id.* 12; held otherwise in 15 Ohio, 118; 16 *id.* 5; 17 Miss. 457; 9 Mo. 697; 6 Ark. 255; 1 Tex. 13, 246, 503; 4 Ala. N. S. 88, 140.

8. *Value received* is often inserted, but is not of any use in a negotiable bill. 2 McLean, C. C. 213; 3 Metc. Mass. 363; 15 Me. 131; 3 Rich. So. C. 413; 5 Wheat. 277; 4 Fla. 47; 31 Penn. St. 506.

A *direction* to place to the account of some one, drawer, drawee, or third person, is often added, but is unnecessary. Comyns, Dig. *Merchant*, F 5; 1 Barnew. & C. 398.

As per advice, inserted in a bill, deprives the drawee of authority to pay the bill until advised.

It should be *subscribed* by the drawer, though it is sufficient if his name appear in the body of the instrument, 2 Ld. Raym. 1376; 1 Strange, 609; 1 Iowa, 231; 27 Ala. N. S. 515; see 12 Barb. N. Y. 27; and should be *addressed* to the drawee by the Christian name and surname, or by the full style of the firm. 2 Pardessus, n. 335; Beawes, Lex Merc. pl. 3; Chitty, Bills, 186.

9. Provision may be made by the drawer, and inserted as a part of the bill, for applying to another person, for a return without protest, or for limiting the damages for re-exchange, expense, etc., in case of the failure or refusal of the drawee to accept or to pay. Chitty, Bills, 188.

See INDORSEMENT; INDORSER; INDORSEE; ACCEPTANCE; PROTEST; DAMAGES.

Consult Bayley; Byles; Chitty; Cunningham; Edwards; Kyd; Marius; Parsons; Pothier; Story on *Bills;* 3 Kent, Comm. 75–128; 1 Ves. Jr. 86, 514, Supp.; Merlin, Répertoire, *Lettre et Billet de Change;* Bouvier, Institutes, Index.

BILL FOR FORECLOSURE. In Equity Practice. One which is filed by a mortgagee against the mortgagor, for the purpose of having the estate sold, thereby to obtain the sum mortgaged on the premises, with interest and costs. 1 Maddock, Chanc. Pract. 528. See FORECLOSURE.

BILL OF GROSS ADVENTURE. In French Maritime Law. Any written instrument which contains a contract of bottomry, respondentia, or any other kind of maritime loan. There is no corresponding English term. Hall, Marit. Loans, 182, n. See BOTTOMRY; GROSS ADVENTURE; RESPONDENTIA.

BILL OF HEALTH. In Commercial Law. A certificate, properly authenticated, that a certain ship or vessel therein named comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper.

It is generally found on board ships coming from the Levant, or from the coasts of Barbary where the plague prevails, 1 Marshall, Ins. 408, and is necessary whenever a ship sails from a suspected port, or where it is required at the port of destination. Holt, 167; 1 Bell, Comm. 5th ed. 553.

In Scotch Law. An application of a person in custody to be discharged on account of ill health. Where the health of a prisoner requires it, he may be indulged, under proper regulations, with such a degree of liberty as may be necessary to restore him. 2 Bell, Comm. 5th ed. 549; Paterson, Comp. § 1129.

BILL IMPEACHING A DECREE FOR FRAUD. In Equity Practice. This must be an original bill, which may be filed without leave of court. 1 Schoales & L. Ch. Ir. 355; 2 *id.* 576; 1 Ves. Ch. 120; 3 Brown, Ch. 74; 1 Turn. & R. Ch. 178.

It must state the decree, the proceedings which led to it, and the ground on which it is impeached. Story, Eq. Plead. § 428.

The effect of the bill, if the prayer be granted, is to restore the parties to their former situation, whatever their rights. See Story, Eq. Plead. § 426 *et seq.;* Mitford, Chanc. Plead. 84.

BILL OF INDICTMENT. In Practice. A written accusation of one or more persons of a crime or misdemeanor, lawfully presented to a grand jury. If twelve or more members of the jury are satisfied that the accused ought to be tried, the return is made, A true bill; but when no sufficient ground is shown for putting the accused on trial, a return is made, Not a true bill, or, Not found; anciently, *Ignoramus.* See TRUE BILL.

BILL OF INFORMATION. In Equity Practice. One which is instituted by the attorney-general or other proper officer in behalf of the state or of those whose rights are the objects of its care and protection.

If the suit immediately concerns the right of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information and is termed the relator. In case a relator is concerned, the officers of the state are not further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. Blake, Chanc. Plead. 50. See Harrison, Chanc. Pract. 151; INFORMATION.

BILL OF INTERPLEADER. In Equity Practice. One in which the person exhibiting it claims no right in opposition to the rights claimed by the person against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Hinde, Chanc. Pract. 20; Cooper, Eq. Plead. 43; Mitford, Chanc. Plead. 32; 24 Barb. N. Y. 154; 19 Ga. 513.

A bill exhibited by a third person, who, not knowing to whom he ought of right to render a debt or duty or pay his rent, fears he may be hurt by some of the claimants, and therefore prays he may interplead, so that the court may judge to whom the thing belongs, and he be thereby safe on the payment. Pract. Reg. 78; Harrison, Chanc. Pract. 45; Edwards, Inj. 393; 2 Paige, Ch. N. Y. 199, 570; 6 Johns. Ch. N. Y. 445; 3 Jones, No. C. 83.

2. A bill of the former character may, in general, be brought by one who has in his possession property to which two or more lay claim. 31 N. H. 354; 24 Barb. N. Y. 154; 11 Ga. 103; 19 *id.* 513; 23 Conn. 544; 12 Gratt. Va. 117; 15 Ark. 389; 18 Mo. 380.

Such a bill must contain the plaintiff's statement of his rights, negativing any interest in the thing in controversy, 3 Story, Eq. Jur. § 821; and see 3 Sandf. Ch. N. Y. 571: but showing a clear title to maintain the bill, 3 Madd. Ch. 277; 5 *id.* 47, and also the claims of the opposing parties, 4 Paige, Ch. N. Y. 384; 8 *id.* 339; 7 Hare, Ch. 57; must have annexed the affidavit of the plaintiff that there is no collusion between him and either of the parties, 31 N. H. 354; must contain an offer to bring money into court if any is due, the bill being demurrable, if there is failure, unless it is offered or else

actually produced, Mitford, Chanc. Plead. 49; Barton, Suit in Eq. 47, n. 1; must show that there are persons in being capable of interpleading and setting up opposite claims. 18 Ves. Ch. 377.

3. It should pray that the defendants set forth their several titles, and interplead, settle, and adjust their demands between themselves. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and in this case the bill should offer to bring the money into court; and the court will not, in general, act upon this part of the prayer unless the money be actually brought into court. 4 Paige, Ch. N. Y. 384; 6 Johns, Ch. N. Y. 445.

In the absence of statutes, such a bill does not ordinarily lie, except where there is privity of some sort between all the parties, and where the claim by all is of the same nature and character. 2 Ves. Ch. 304; 3 Anstr. 798; 7 Sim. Ch. 391; 3 Beav. Rolls, 579; Story, Eq. Jur. §§ 807–821; 24 Vt. 639; 2 Ind. 469.

The decree for interpleader may be obtained, after a hearing is reached, in the usual manner, 1 Turn. & R. Ch. 30; 1 Cox, Ch. 425; 4 Brown, Ch. 297; 2 Paige, Ch. N. Y. 570; or without a hearing, if the defendants do not deny the statements of the bill. 16 Ves. Ch. 203; Story, Eq. Plead, § 297 *a.*

A bill in the nature of a bill of interpleader will lie in many cases by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons. Story, Eq. Plead, § 297 *b;* 2 Paige, Ch. N. Y. 199; 3 Jones, No. C. 83. See INTERVENTIO.

BILL OF LADING. In Common Law. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. *Loughborough*, J., 1 H. Blackst. 359.

A memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the seas excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same. 1 Term, 745; Abbott, Shipp. 216; Code de Comm. art. 281.

A similar acknowledgment made by a carrier by land.

2. It should contain the name of the shipper or consignor; the name of the consignee; the names of the vessel and her master; the places of shipment and destination; the price of the freight, and, in the margin, the marks and numbers of the things shipped. Jacobsen, Sea Laws.

It is usually made in three or more original parts, one of which is sent to the consignee with the goods, one or more others are sent to him by different conveyances, one is retained by the merchant or shipper, and one should be retained by the master. Abbott, Shipp. 217.

3. It is assignable by indorsement, and the assignee is entitled to the goods, subject to the shipper's right of stoppage in transitu in some cases, and to various liens. See LIEN; STOPPAGE IN TRANSITU. It is considered to partake of the character of a written contract, and also of that of a receipt. In so far as it admits the character, quality, or condition of the goods at the time they were received by the carrier, it is a mere receipt, and the carrier may explain or contradict it by parol; but as respects the agreement to carry and deliver, it is a contract, and must be construed according to its terms. 6 Mass. 422; 7 *id.* 297; 3 N. Y. 322; 9 *id.* 529; 25 Barb. N. Y. 16; 5 Du. N. Y. 538; 1 Abb. Adm. 209, 397.

4. Under the Admiralty Law of the United States, contracts of affreightment, entered into with the master in good faith and within the apparent scope of his authority as master, bind the vessel to the merchandise for the performance of such contracts in respect to the property shipped on board, irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner; but bills of lading for property not shipped, and designed to be instruments of fraud, create no lien on the interest of the general owner, although the special owner was the perpetrator of the fraud. 18 How. 182. And see 19 How. 82; 2 West. Law. Monthly, 456. Mr. Justice Clifford held that a vessel was liable *in rem* for the loss of goods caused by the explosion of the boiler of a lighter employed by the master in conveying goods to the vessel. 23 Bost. Law Rep. 277.

5. Under a bill of lading in the usual form, having no stipulation that the goods shipped are to be carried on deck, there is a contract implied that the goods shall be carried under the deck; and parol evidence to the contrary will not be received. 14 Wend. N. Y. 26; 3 Gray, Mass. 97. But evidence of a well-known and long-established usage is admissible, and will justify the carriage of goods in that manner. Ware, Dist. Ct. 322, 327.

BILL TO MARSHAL ASSETS. See MARSHALLING ASSETS.

BILL TO MARSHAL SECURITIES. See MARSHALLING SECURITIES.

BILL IN NATURE OF A BILL IN REVIEW. In Equity Practice. One which is brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not an interest sufficient to render the decree against him binding upon some person claiming after him.

Relief may be obtained against error in the decree by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review, except

that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require. 1 Harrison, Chanc. Pract. 145.

BILL IN NATURE OF A BILL OF REVIVOR. In Equity Practice. One which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery; as, in the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor. 1 Chanc. Cas. 123, 174; 3 Chanc. Rep. 39; Mosel. 44.

In such cases, an original bill, upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by bill of revivor. 1 Vern. Ch. 427; 2 *id.* 548, 672; 2 Brown, Parl. Cas. 529; 1 Eq. Cas. Abr. 83; Mitford, Eq. Plead. 71.

BILL IN NATURE OF A SUPPLEMENTAL BILL. In Equity Practice. One which is filed when the interest of the plaintiff or defendant, suing or defending, wholly determines, and the same property becomes vested in another person not claiming under him. Hinde Chanc. Pract. 71; Blake, Chanc. Pract. 38.

The principal difference between this and a supplemental bill seems to be that a supplemental bill is applicable to such cases only where the same parties or the same interests remain before the court; whereas an original bill in the nature of a supplemental bill is properly applicable where new parties, with new interests, arising from events occurring since the institution of the suit, are brought before the court. Cooper, Eq. Plead. 75; Story, Eq. Plead. § 345. For the exact distinction between a bill of review and a supplemental bill in the nature of a bill of review, see 2 Phill. Ch. 705; 1 Macn. & G. Ch. 397; 1 Hall & T. Ch. 437.

BILL FOR A NEW TRIAL. In Equity Practice. One filed in a court of equity praying for an injunction after a judgment at law when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could, was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitford, Chanc. Plead. Jerem. ed. 131; 2 Story, Eq. § 887. Of late years, bills of this description are not countenanced. 1 Johns. Ch. N. Y. 432; 6 *id.* 479.

BILL OBLIGATORY. A bond absolute for the payment of money. It is called, also, a single bill, and differs from a promissory note only in having a seal. 2 Serg. & R. Penn. 115. See Read, Plead. 236; West, Symb.

BILL OF PAINS AND PENALTIES. A special act of the legislature which inflicts a punishment less than death upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Wooddeson, Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. It has been thought by some that the clause in the constitution prohibiting bills of attainder includes bills of pains and penalties. 6 Cranch, 138; Story, Const. § 1338.

BILL OF PARCELS. An account containing in detail the names of the items which compose a parcel or package of goods. It is usually transmitted with the goods to the purchaser, in order that if any mistake have been made it may be corrected.

BILL OF PARTICULARS. In Practice. A detailed informal statement of a plaintiff's cause of action, or of the defendant's set-off. It is an account of the items of the claim, and shows the manner in which they arose.

The plaintiff is required, under statutory provisions, which vary widely in the different states, to file a bill of particulars, either in connection with his declaration, 2 Penn. N. J. 636; 3 Pick. Mass. 449; 1 Gray, Mass. 466; 4 Rand. Va. 488; 11 Conn. 302; 4 Miss. 46; 1 Speers, So. C. 298; Dudl. Ga. 16; 2 Iowa, 595; or subsequently to it, upon request of the other party, 2 Bail. So. C. 416; 4 Dan. Ky. 219; 5 Ark. 197; 3 Ill. 217; 5 Blackf. Ind. 316; 3 McLean, C. C. 289; 1 Cal. 437; upon an order of the court, in some cases, 3 Johns. N. Y. 248; 19 *id.* 268; 1 N. J. 436; in others, without such order.

He need not give particulars of matters which he does not seek to recover, 4 Exch. 486; nor of payments admitted. 4 Abb. Pr. N. Y. 289. See 6 Dowl. & L. 656.

The plaintiff is concluded by the bill when filed. 9 Gill, Md. 146.

The defendant, in giving notice or pleading set-off, must give a bill of particulars; failing to do which, he will be precluded from giving any evidence in support of it at the trial. 17 Wend. N. Y. 20; 7 Blackf. Ind. 462; 8 Gratt. Va. 557.

The bill must be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information, 16 Mees. & W. Exch. 773; but need not be as special as a count on a special contract. The object is to prevent surprise. 9 Pet. 541; 5 Wend. N. Y. 51; 5 Ark. 197; 3 Green, N. J. 178. See 3 Pick. Mass. 449; 5 Penn. St. 41.

BILL PAYABLE. In Mercantile Law. A bill of exchange accepted, or a promissory note made, by a merchant, whereby he has engaged to pay money. It is so called as being payable by him. An account is usually kept of such bills in a book with that title, and also in the ledger. See Parsons, Notes and Bills.

BILL OF PEACE. In Equity Prac-

tice. One which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions.

In such a case, the court will prevent a multiplicity of suits by directing an issue to determine the right, and ultimately grant an injunction. 1 Maddock, Chanc. Pract. 166; Blake, Chanc. Pract. 48; 2 Story, Eq. Jur. §§ 852–860; Jeremy, Eq. Jur. 343; 2 Johns. Ch. N. Y. 281; 8 Cranch, 426.

Such a bill may also be brought when the plaintiff, after repeated and satisfactory trials, has established his right at law, and is still in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation, courts of equity, under such circumstances, will interfere, and grant a perpetual injunction. 2 Johns. Ch. N. Y. 281; 3 *id.* 529; 8 Cranch, 462; Mitford, Chanc. Plead. Jerem. ed. 143; Eden, Inj. 356.

BILL PENAL. In Contracts. A written obligation by which a debtor acknowledges himself indebted in a certain sum, and binds himself for the payment thereof, in a larger sum.

Bonds with conditions have superseded such bills in modern practice. Stephen, Plead. 265, n. They are sometimes called bills obligatory, and are properly so called; but every bill obligatory is not a bill penal. Comyns, Dig. *Obligations*, D; Croke, Car. 515. See 2 Ventr. 106, 198.

BILL TO PERPETUATE TESTIMONY. In Equity Practice. One which is brought to secure the testimony of witnesses with reference to some matter which is not in litigation, but is liable to become so.

It differs from a bill to take testimony *de bene esse*, inasmuch as the latter is sustainable only when there is a suit already depending. It is demurrable to if it contain a prayer for relief. 1 Dick. Ch. 98; 2 P. Will. 162; 2 Ves. Ch. 497; 2 Madd. Ch. 37. And see 1 Schoales & L. Ch. Ir. 316.

2. It must show the subject-matter touching which the plaintiff is desirous of giving evidence, Rep. *temp.* Finch, 391; 4 Madd. Ch. 8, 10; that the plaintiff has a positive interest in the subject-matter, which may be endangered if the testimony in support of it be lost, as a mere expectancy, however strong, is not sufficient, 6 Ves. Ch. 260; 1 Vern. Ch. 105; 15 Ves. Ch. 136; Mitford, Eq. Pl. by Jeremy, 51; Cooper, Eq. Pl. 52; that the defendant has, or pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony, Cooper, Plead. 56; Story, Eq. Plead. § 302; and some ground of necessity for perpetuating the evidence. Story, Eq. Plead. § 303; Mitford, Eq. Plead. by Jeremy, 52, 148, n.; Cooper, Eq. Plead. 53.

The bill should describe the right in which it is brought with reasonable certainty, so as to point the proper interrogations on both sides to the true merits of the controversy, 1 Vern. Ch. 312; Cooper, Eq. Plead. 56; and should pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated. Mitford, Eq. Plead. 52.

BILL OF PRIVILEGE. In English Law. The form of proceeding against an attorney of the court, who is not liable to arrest. Brooke, Abr. *Bille;* 12 Mod. 163.

It is considered a privilege for the benefit of clients, 4 Burr. 2113; 2 Wils. 44; Dougl. 381; and is said to be confined to such as practise. 2 Maule & S. 605. But see 1 Bos. & P. 4; 2 Lutw. 1667. See, generally, 3 Sharswood, Blackst. Comm. 289, n.

BILL OF PROOF. In English Practice. The claim made by a third person to the subject-matter in dispute between the parties to a suit in the court of the mayor of London. 2 Chitty, Pract. 492; 1 Marsh. 233.

BILL QUIA TIMET. In Equity Practice. One which is filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable or even possible, to happen or be occasioned by the neglect, inadvertence, or culpability of another.

Upon a proper case being made out, the court will, in one case, secure the property for the use of the party (which is the object of the bill), by compelling the person in possession of it to give a proper security against any subsequent disposition or wilful destruction; and, in the other case, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it. 1 Maddock, Chanc. Pract. 218; Blake, Chanc. Pract. 37, 47; 2 Story, Eq. Jur. §§ 825, 851. See 9 Gratt. Va. 398; 11 Ga. 570; 8 Tex. 337; 2 Md. Ch. Dec. 157, 442; 4 Edw. Ch. N. Y. 228; Bouvier, Inst.

BILL RECEIVABLE. In Mercantile Law. A promissory note, bill of exchange, or other written security for money payable at a future day, which a merchant holds. So called because the amounts for which they are given are receivable by the merchant. They are entered in a book so called, and are charged to an account in the ledger under the same title, to which account the cash, when received, is credited. See Parsons, Notes and Bills.

BILL OF REVIEW. In Equity Practice. One which is brought to have a decree of the court reviewed, altered, or reversed.

It is only brought after enrolment, 1 Chanc. Cas. 54; 3 P. Will. 371; 5 Rich. Eq. So. C. 421; 1 Story, Eq. Plead. § 403; and is thus distinguished from a bill in the nature of a bill in review, or a supplemental bill in the nature of a bill in review. 5 Mas. C. C. 303; 2 Sandf. Ch. N. Y. 70; Gilbert, For. Rom. c. 10, p. 182.

It must be brought either for error in point of law, 2 Johns. Ch. N. Y. 488; Cooper, Eq. Plead. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been dis-

covered before. 2 Johns. Ch. N. Y. 488; Cooper, Eq. Plead. 94. See 3 Johns. N. Y. 124; 1 Hempst. Ark. 118; 27 Vt. 638; 25 Miss. 207; Cooper, Eq. Plead. 94. It cannot be filed without leave of court, 6 Rich. Eq. So. C. 364; which is not granted as of course. 1 Jones, Eq. No. C. 10.

BILL OF REVIVOR. In Equity Practice. One which is brought to continue a suit which has abated before its final consummation, as, for example, by death, or marriage of a female plaintiff.

It must be brought by the proper representatives of the person deceased, with reference to the property which is the subject-matter. 4 Sim. Ch. 318; 2 Paige, Ch. N. Y. 358; Story, Eq. Plead. § 354 *et seq.*

BILL OF REVIVOR AND SUPPLEMENT. In Equity Practice. One which is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. 5 Johns. Ch. N. Y. 334; Mitford, Chanc. Plead. 32, 74.

BILL OF SALE In Contracts. A written agreement under seal, by which one person transfers his right to or interest in goods and personal chattels to another.

It is in frequent use in the transfer of personal property, especially that of which immediate possession is not or cannot be given.

In England a bill of sale of a ship at sea or out of the country is called a *grand bill of sale;* but no distinction is recognized in this country between grand and ordinary bills of sale. 4 Mass. 661. The effect of a bill of sale is to transfer the property in the thing sold.

By the maritime law, the transfer of a ship must generally be evidenced by a bill of sale, 1 Mas. C. C. 306; and by act of congress, every sale or transfer of a registered ship to a citizen of the United States must be accompanied by a bill of sale, setting forth, at length, the certificate of registry. Act Jan. 14, 1793, 1 Story, U. S. Laws, 276.

A contract to sell, accompanied by delivery of possession, are, however, sufficient. 16 Mass. 336; 8 Pick. Mass. 86; 16 *id.* 401; 7 Johns. N. Y. 308. See 4 Johns. N. Y. 54; 4 Mas. C. C. 515; 1 Wash. C. C. 226; 16 Pet. 215.

BILL OF SIGHT. A written description of goods, supposed to be inaccurate, but made as nearly exact as possible, furnished by an importer or his agent to the proper officer of the customs, to procure a landing and inspection of the goods. It is allowed by an English statute where the merchant is ignorant of the real quantity and quality of goods consigned to him, so as to be unable to make a proper entry of them. The entry must be perfected within three days after landing the goods. Stat. 3 & 4 Will. IV. c. 52, § 24.

BILL, SINGLE. In Contracts. A written unconditional promise by one or more persons to pay to another person or other persons, therein named, a sum of money at a time therein specified. It is usually under seal, and may then be called a bill obligatory. 2 Serg. & R. Penn. 115. It has no condition attached, and is not given in a penal sum. Comyns, Dig. *Obligation*, C. See 3 Hawks. Tenn. 10, 465.

BILL OF SUFFERANCE. In English Law. A license granted to a merchant, permitting him to trade from one English port to another without paying customs.

BILL TO SUSPEND A DECREE. In Equity Practice. One brought to avoid or suspend a decree under special circumstances. See 1 Ch. Cas. 3, 61; 2 *id.* 8; Mitford, Chanc. Plead. 85, 86.

BILL TO TAKE TESTIMONY DE BENE ESSE. In Equity Practice. One which is brought to take the testimony of witnesses to a fact material to the prosecution of a suit at law which is actually commenced, where there is good cause to fear that the testimony may otherwise be lost before the time of trial. See 1 Sim. & S. Ch. 83; 2 Story, Eq. Jur. § 1813, n.

It lies, in general, where witnesses are aged or infirm, Cooper, Eq. Plead. 57; Ambl. Ch. 65; 13 Ves. Ch. 56, 261, propose to leave the country, 2 Dick. Ch. 454; Story, Eq. Plead. § 308, or there is but a single witness to a fact. 1 P. Will. Ch. 97; 2 Dick. Ch. 648.

BILLA VERA (Lat.). A true bill.

In Practice. The form of words indorsed on a bill of indictment, when proceedings were conducted in Latin, to indicate the opinion of the grand jury that the person therein accused ought to be tried. See TRUE BILL.

BILLA CASSETUR (Lat. that the bill be quashed or made void). A plea in abatement concluded, when the pleadings were in Latin, *quod billa cassetur* (that the bill be quashed). 3 Blackstone, Comm. 303; Graham, Pract. 611.

BILLA EXCAMBII. A bill of exchange.

BILLA EXONERATIONIS. A bill of lading.

BILLET DE CHANGE. In French Law. A contract to furnish a bill of exchange. A contract to pay the value of a bill of exchange already furnished. Guyot, *Répert. Univ.*

Where a person intends to furnish a bill of exchange (*lettre de change*), and is not quite prepared to do so, he gives a *billet de change*, which is a contract to furnish a *lettre de change* at a future time. Guyot, *Répert. Univ.;* Story, Bills, § 2.

BINDING OUT. A term applied to the contract of apprenticeship.

The contract must be by deed, to which the infant, as well as the parent or guardian, must be a party, or the infant will not be bound. 8 East, 25; 3 Barnew. & Ald. 584; 8 Johns. N. Y. 328; 2 Yerg. Tenn. 546; 4 Leigh, Va. 493; 4 Blackf. Ind. 437; 12 N. H. 438. See also 18 Conn. 337; 13 Barb. N. Y.

286; 10 Serg. & R. Penn. 416; 1 Mass. 172; 1 Vt. 69; 1 Ashm. Penn. 267; 1 Mas. C. C. 78.

BINDING OVER. The act by which a magistrate or court hold to bail a party accused of a crime or misdemeanor.

The binding over may be to appear at a court having jurisdiction of the offence charged, to answer, or to be of good behavior, or to keep the peace.

BIPARTITE. Of two parts. This term is used in conveyancing; as, this indenture bipartite, between A, of the one part, and B, of the other part.

BIRRETUM, BIRRETUS. A cap or coif used formerly in England by judges and sergeants at law. Spelman, Gloss.; Cunningham, Law Dict.

BIRTH. The act of being wholly brought into the world.

The conditions of live birth are not satisfied when a part only of the body is born. The whole body must be brought into the world and detached from that of the mother, and after this event the child must be alive. 5 Carr. & P. 329; 7 *id.* 814. The circulating system must also be changed, and the child must have an independent circulation. 5 Carr. & P. 539; 9 *id.* 154.

But it is not necessary that there should have been a separation of the umbilical cord. That may still connect the child with its mother, and yet the killing of it will constitute murder. 7 Carr. & P. 814; 9 *id.* 25. See 1 Beck, Med. Jur. 478; 1 Chitty, Med. Jur. 438; GESTATION; LIFE.

BISAILE. See BESAILE.

BISHOP. An ecclesiastical officer, who is the chief of the clergy of his diocese, and is the archbishop's assistant. No such officer is recognized by law in the United States.

BISHOP'S COURT. In English Law. An ecclesiastical court held in the cathedral of each diocese, the judge of which is the bishop's chancellor.

BISHOPRIC. In Ecclesiastical Law. The extent of country over which a bishop has jurisdiction; a see; a diocese.

BISSEXTILE. The day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun.

It is called *bissextile*, because in the Roman calendar it was fixed on the *sixth* day before the calends of March (which answers to the twenty-fourth day of February), and this day was counted *twice:* the first was called *bissextus prior*, and the other *bissextus posterior;* but the latter was properly called bissextile or intercalary day.

BLACK ACRE. A term used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a full description.

It is a mere name of convenience, adopted, as "A" and "B" are, to distinguish persons or things under similar circumstances.

BLACK ACT. In English Law. The act of parliament 9 Geo. II. c. 22.

This act was passed for the punishment of certain marauders who committed great outrages disguised and with faces blackened. It was repealed by 7 & 8 Geo. IV. c. 11. See 4 Sharswood, Blackst. Comm. 245.

BLACK BOOK OF THE ADMIRALTY. An ancient book compiled in the reign of Edward III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognizable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts. 2 Gall. C. C. 404. It is said by Selden to be not ancienter than the reign of Henry VI. Selden, *de Laud. Leg. Ang.* c. 32. By other writers it is said to have been composed earlier.

BLACK BOOK OF THE EXCHEQUER. The name of a book kept in the English exchequer, containing a collection of treaties, conventions, charters, etc.

BLACK MAIL. Rents reserved, payable in work, grain, and the like.

Such rents were called black mail (*reditus nigri*) in distinction from white rents (*blanche firmes*), which were rents paid in silver.

A yearly payment made for security and protection to those bands of marauders who infested the borders of England and Scotland about the middle of the sixteenth century and laid the inhabitants under contribution. Hume, Hist. of Eng. vol. i. p. 473; vol. ii. App. No. 8; Cowel.

BLACK RENTS. Rents reserved in work, grain, or baser money than silver. Whishaw.

BLADA. Growing crops of grain. Spelman, Gloss. Any annual crop. Cowel. Used of crops, either growing or gathered. Reg. Orig. 94 *b;* Coke, 2d Inst. 81.

BLANCHE FIRME. A rent reserved, payable in silver.

BLANCH HOLDING. In Scotch Law. A tenure by which land is held.

The duty is generally a trifling one, as a peppercorn. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Stair, Inst. sec. iii. lib. 3, § 33. See Paterson, Comp. 15; 2 Sharswood, Blackstone, Comm. 42.

BLANK. A space left in writing, to be filled up with one or more words to complete sense.

When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument which was made professedly to record a fact is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof. 1 Phillipps, Ev. 475; 1 Wils. 215; 7 Vt. 522; 6 *id.*

411. Hence a blank left in an award for a name was allowed to be supplied by parol proof. 2 Dall. Penn. 180. But where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts. 1 Barnew. & Ald. 101.

It is said that a blank may be filled by consent of the parties and the instrument remain valid, Croke, Eliz. 626; 1 Ventr. 185; 11 Mees. & W. Exch. 468; 1 Me. 34; 5 Mass. 538; 19 Johns. N. Y. 396; though not, it is said, where the blank is in a part material to the operation of the instrument as an instrument of the character which it purports to be, 6 Mees. & W. Exch. 200; 2 Dev. No. C. 379; 1 Yerg. Tenn. 69; 2 Nott & M'C. So. C. 125; 1 Ohio, 365; 6 Gill & J. Md. 250; 2 Brock. C. C. 64; at least, without a new execution. 2 Parsons, Contracts, 229. But see 17 Serg. & R. Penn. 438; 22 Penn. St. 12; 7 Cow. N. Y. 484; 22 Wend. N. Y. 348; 2 Ala. 517; 2 Dan. Ky. 142; 4 M'Cord, So. C. 239; 2 Wash. Va. 164; 9 Cranch, 28; 4 Bingh. 123. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy. Molloy, b. 2, c. 7, s. 14; Park. Ins. 22; Weskett, Ins. 42.

BLANK BAR. See COMMON BAR.

BLANK INDORSEMENT. An indorsement which does not mention the name of the person in whose favor it is made.

Such an indorsement is generally effected by writing the indorser's name merely on the back of the bill. Chitty, Bills, 170. A note so indorsed is transferable by delivery merely, so long as the indorsement continues blank; and its negotiability cannot be restricted by subsequent special indorsements. 1 Esp. 180; Peake, 225; 15 Penn. 268. See 3 Campb. 239; 1 Parsons, Contr. 212; INDORSEMENT.

BLASPHEMY. In Criminal Law. To attribute to God that which is contrary to his nature and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God. Emlyn's Pref. to vol. 8, St. Tr.; 20 Pick. Mass. 244.

In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such. 20 Pick. Mass. 211, 212, *per Shaw*, C. J.

2. The offence of publishing a blasphemous libel, and the crime of blasphemy, are in many respects technically distinct, and may be differently charged: yet the same act may, and often does, constitute both. The latter consists in blaspheming the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world; and this may be done by language orally uttered, which would not be a libel. But it is not the less blasphemy if the same thing be done by language written, printed, and published; although when done in this form it also constitutes the offence of libel. 20 Pick. Mass. 213, *per Shaw*, C. J.; Heard, Lib. & Sland. § 336.

3. In most of the United States, statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offence, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative and the common law is not taken away. And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen. Heard, Lib. & Sland. § 343; 20 Pick. Mass. 206; 11 Serg. & R. Penn. 394; 8 Johns. N. Y. 290; 4 Sandf. N. Y. 156; 2 Harr. Del. 553; 2 How. 127.

4. In England, all blasphemies against God, the Christian religion, the Holy Scriptures, and malicious revilings of the established church, are punishable by indictment. 1 East, Pl. Cr. 3; 1 Russell, Crimes, 217; 5 Jur. 529. See 7 Cox, Cr. Cas. 79; 1 Barnew. & C. 26; 2 Lew. Cr. Cas. 237.

5. In France, before the 25th of September, 1791, it was a blasphemy, also, to speak against the holy virgin and the saints, to deny one's faith, to speak with impiety of holy things, and to swear by things sacred. Merlin, *Répert.* The law relating to blasphemy in that country was totally repealed by the code of 25th of September, 1791; and its present penal code, art. 262, enacts that any person who, by words or gestures, shall commit any outrage upon objects of public worship, in the places designed or actually employed for the performance of its rites, or shall assault or insult the ministers of such worship in the exercise of their functions, shall be fined from sixteen to five hundred francs, and be imprisoned for a period not less than fifteen days nor more than six months.

6. The civil law forbade the crime of blasphemy; such, for example, as to swear by the hair or the head of God; and it punished its violation with death. *Si enim contra homines* factæ blasphemiæ *impunitæ* non *relinquuntur*, *multo magis qui ipsum Deum blasphemant*, *digni sunt supplicia sustinere* (For if slander against men is not left unpunished, much more do those deserve punishment who blaspheme God). Nov. 77. 1. § 1.

7. In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. Senen Vilanova y Mañes, Materia Criminal, forense, Observ. 11, cap. 3, n. 1. See CHRISTIANITY.

BLIND. One who is deprived of the faculty of seeing.

Persons who are blind may enter into contracts and make wills like others. Carth. 53; Barnes, 19, 23; 3 Leigh, 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead. 1 Starkie, Ev. 341. But before proving his handwriting the witness must be produced, if within the jurisdiction of the court, and examined. 1 Ld. Raym. 734; 1 Mood. & R. 258; 2 *id.* 262.

BLOCKADE. In International Law. The actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested.

2. National sovereignty confers the right of declaring war; and the right which nations at war have of destroying or capturing each other's citizens, subjects, or goods imposes on neutral nations the obligation not to interfere with the exercise of this right within the rules prescribed by the law of nations. A declaration of a siege or blockade is an act of sovereignty, 1 C. Rob. Adm. 146; but a direct declaration by the sovereign authority of the besieging belligerent is not always requisite; particularly when the blockade is on a distant station; for its officers may have power, either expressly or by implication, to institute such siege or blockade. 6 C. Rob. Adm. 367.

In case of civil war, the government may blockade its own ports. Wheaton, Int. Law, 365; 3 Binn. Penn. 252; 3 Wheat. 365; 7 *id.* 306; 4 Cranch, 272; 3 Scott, 225; 24 Bost. Law Rep. 276, 335.

3. To be sufficient, the blockade must be effective and made known. By the convention of the Baltic powers of 1780, and again in 1801, and by the ordinance of congress of 1781, it is required that there should be a number of vessels stationed near enough to the port to make the entry apparently dangerous. The government of the United States has uniformly insisted that the blockade should be made effective by the presence of a competent force stationed and present at or near the entrance of the port. 1 Kent, Comm. 145, and the authorities by him cited. And see 1 C. Rob. Adm. 80; 4 *id.* 66; 1 Act. Prize Cas. 64–5; and Lord Erskine's speech, 8th March, 1808, on the orders in council, 10 Cobbett, Parl. Debates, 949, 950. But "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension and the reason of the suspension are known), that will be sufficient in law to remove a blockade." 1 C. Rob. Adm. 86, 154. But negligence or remissness on the part of the cruisers stationed to maintain the blockade may excuse persons, under certain circumstances, for violating the blockade. 3 C. Rob. Adm. 156; 1 Act. Prize Cas. 59.

4. To involve a neutral in the consequences of violating the blockade, it is indispensable that he should have due notice of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact. 6 C. Rob. Adm. 367; 2 *id.* 110, 111, n.; *id.* 128; 1 Act. Prize Cas. 61. Formal notice is not required; any authentic information is sufficient. 1 C. Rob. Adm. 334; 5 *id.* 77–81, 286–289; Edw. Adm. 203; 3 Phillimore, Int. Law, 397; 24 Bost. Law Rep. 276.

5. A violation may be either by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. Also placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent. 6 C. Rob. Adm. 30, 101, 182; 7 Johns. N. Y. 47; 1 Edw. Adm. 202; 4 Cranch, 185. The sailing for a blockaded port, knowing it to be blockaded, is, it seems, such an act as may charge the party with a breach of the blockade. 5 Cranch, 335; 9 *id.* 440, 446; 1 Kent, Comm. 150; 3 Phillimore, Int. Law, 397; 24 Bost. Law Rep. 276. See 4 Cranch, 185; 6 *id.* 29; 10 Moore, Priv. Counc. 58.

6. When the ship has contracted guilt by a breach of the blockade, she may be taken at any time before the end of her voyage; but the penalty travels no further than the end of her return voyage. 2 C. Rob. Adm. 128; 3 *id.* 147. When taken, the ship is confiscated; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners, rests with them. 1 C. Rob. Adm. 67, 130; 3 *id.* 173; 4 *id.* 93; 1 Edw. Adm. 39. See, generally, 2 Brown, Civ. & Adm. Law, 314; Chitty, Com. Law, Index, h. t.; Chitty, Law of Nations, 128 to 147; 1 Kent, Comm. 143 to 151; Marshall, Ins. Index, h. t. See also the declaration respecting Maritime Law, signed by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, at Paris, April 16, 1856; Appendix to Phillimore on International Law, 850; Wheaton, Int. Law; Vattel, Law of Nations.

BLOOD. Relationship; stock; family. 1 Roper, Leg. 103; 1 Belt, Suppl. Ves. 365. Kindred. Bacon, Max. Reg. 18.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half-blood if they have only one parent in common. 5 Whart. Penn. 477.

BLOODNIT. An amercement for bloodshed. Cowel. The privilege of taking such amercements. Skene.

A privilege or exemption from paying a fine or amercement assessed for bloodshed. Cowel; Kennett, Paroch. Ant.; Termes de la Ley.

BOARDER. One who, being an inhabitant of a place, makes a special contract with

another person for board, including food and lodging. 7 Cush. Mass. 424. To be distinguished from a guest. Story, Bailm. § 477; 26 Vt. 343; 26 Ala. N. s. 371; 7 Cush. Mass. 417.

BOARD OF SUPERVISORS. A county board, under a system existing in some of the northern states, to whom the fiscal affairs of the county are intrusted,—composed of delegates representing the several organized towns or townships of the county.

This system originated in the state of New York, and has been adopted in Michigan, Illinois, Wisconsin, and Iowa. The board, when convened, forms a deliberative body, usually acting under parliamentary rules. It performs the same duties and exercises like authority as the COUNTY COMMISSIONERS OF BOARD OF CIVIL AUTHORITY in other states. See, generally, Haines's Township Laws of Mich., and Haines's Town Laws of Ill. & Wis.

BOAT. A boat does not pass by the sale of a ship and appurtenances. Molloy, b. 2, c. 1, § 8; Beawes, Lex Merc. 56; 2 Root, Conn. 71; Park, Ins. 8th ed. 126. But see 17 Mass. 405; 2 Marsh. 727. Insurance on a ship covers her boats. 24 Pick. Mass. 172; 1 Mann. & R. 392; 1 Parsons, Marit. Law, 72, n.

BOC (Sax.). A writing; a book. Used of the *land-bocs*, or evidences of title among the Saxons, corresponding to modern deeds. These *bocs* were destroyed by William the Conqueror. 1 Spence, Eq. Jur. 22; 1 Washburn, Real Prop. 17, 21.

BOC HORDE. A place where books, evidences, or writings are kept. Cowel. These were generally in monasteries. 1 Spence, Eq. Jur. 22.

BOC LAND. Allodial lands held by written evidence of title.

Such lands might be granted upon such terms as the owner should see fit, by greater or less estate, to take effect presently, or at a future time, or on the happening of any event. In this respect they differed essentially from feuds. 1 Washburn, Real Prop. 17; 4 Kent, Comm. 441.

BODY. A person. Used of a natural body, or of an artificial one created by law, as a corporation.

A collection of laws; that is, the embodiment of the laws in one connected statement or collection.

In practice, when the sheriff returns *cepi corpus* to a capias, the plaintiff may obtain a rule, before special bail has been entered, to bring in the body; and this must be done either by committing the defendant or entering special bail. See DEAD BODY.

BODY CORPORATE. A corporation. This is an early and undoubtedly correct term to apply to a corporation. Coke, Litt. 250 *a*; Ayliffe, Par. 196; Angell, Corp. § 6.

BONA (Lat. *bonus*). Goods; personal property; chattels, real or personal; real property.

Bona et catalla (goods and chattels) includes all kinds of property which a man may possess. In the Roman law it signified every kind of property, real, personal, and mixed; but chiefly it was applied to *real estate*, chattels being distinguished by the words *effects*, *movables*, etc. Bona were, however, divided into *bona mobilia* and *bona immobilia*. It is taken in the civil law in nearly the sense of *biens* in the French law.

BONA CONFISCATA. Goods confiscated or forfeited to the imperial *fisc* or treasury. 1 Sharswood, Blackst. Comm. 299.

BONA FIDES. Good faith, honesty, as distinguished from *mala fides* (bad faith).

Bonâ fide. In good faith.

A purchaser *bonâ fide* is one who actually purchases in good faith. 2 Kent, Comm. 512. The law requires all persons in their transactions to act with good faith; and a contract where the parties have not acted *bonâ fide* is void at the pleasure of the innocent party. 8 Johns. N. Y. 446; 12 *id.* 320; 2 Johns. Ch. N. Y. 35. If a contract be made with good faith, subsequent fraudulent acts will not vitiate it; although such acts may raise a presumption of antecedent fraud, and thus become a means of proving the want of good faith in making the contract. 2 Miles, Penn. 229. And see, also, Roberts, Fraud. Conv. 33, 34; Inst. 2. 6; Dig. 41. 3. 10. 44; *id.* 41. 1. 48; Code, 7. 31; 9 Coke, 11; Wingate, Maxims, max. 37; Lane, 47; Plowd. 473; 9 Pick. Mass. 265; 12 *id.* 545; 8 Conn. 336; 10 *id.* 30; 3 Watts, Penn. 25; 5 Wend. N. Y. 20, 566.

BONA FORISFACTA. Forfeited goods. 1 Blackstone, Comm. 299.

BONA GESTURA. Good behavior.

BONA GRATIA. Voluntarily; by mutual consent. Used of a divorce obtained by the agreement of both parties.

BONA MOBILIA. In Civil Law. Movables. Those things which move themselves or can be transported from one place to another; which are not intended to make a permanent part of a farm, heritage, or building.

BONA NOTABILIA. Chattels or goods of sufficient value to be accounted for.

Where a decedent leaves goods of sufficient amount (*bona notabilia*) in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators. 2 Blackstone, Comm. 509; Rolle, Abr. 908; Williams, Ex. Index. The value necessary to constitute property *bona notabilia* has varied at different periods, but was finally established at £5, in 1603.

BONA PATRIA. In Scotch Law. An assize or jury of countrymen or good neighbors. Bell, Dict.

BONA PERITURA. Perishable goods. An executor, administrator, or trustee is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping. Bacon, Abr. *Executors;* 1 Rolle, Abr. 910; 5 Coke, 9; Croke, Eliz. 518; 3 Munf. Va. 288; 1 Beatt. Ch. Ir. 5, 14; Dane, Abr. Index.

BONA VACANTIA. Goods to which no one claims a property, as shipwrecks, treasure trove, etc.; vacant goods.

These *bona vacantia* belonged, under the common law, to the finder, except in certain instances, when

they were the property of the king. 1 Sharswood, Blackst. Comm. 298, n.

BONA WAVIATA. Goods waived or thrown away by a thief in his fright for fear of being apprehended. Such goods belong to the sovereign. 1 Blackstone, Comm. 296.

BOND. An obligation in writing and under seal. 2 Serg. & R. Penn. 502; 11 Ala. 19; 1 Harp. So. C. 434; 1 Blackf. Ind. 241; 6 Vt. 40; 1 Baldw. C. C. 129.

2. It may be single,—*simplex obligatio*,—as where the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day named, or it may be *conditional* (which is the kind more generally used), that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee with interest, which principal sum is usually one-half of the *penal* sum specified in the bond.

3. There must be proper parties; and no person can take the benefit of a bond except the parties named therein, Hob. 9; 14 Barb. N. Y. 59; except, perhaps, in some cases of bonds given for the performance of their duties by certain classes of public officers. 4 Wend. N. Y. 414; 8 Md. 287; 4 Ohio. N. s. 418; 7 Cal. 551; 1 Grant, Cas. Penn. 359; 3 Ind. 431. A man cannot be bound to himself even in connection with others. 5 Cow. N. Y. 688. See 3 Jones, Eq. No. C. 311. If the bond run to several persons jointly, all must join in suit for a breach, though it be conditioned for the performance of different things for the benefit of each. 2 N. Y. 388.

4. The instrument must be in writing and sealed, 1 Baldw. C. C. 129; 6 Vt. 40; but a sealing sufficient where the bond is made is held sufficient though it might be an insufficient sealing if it had been made where it is sued on. 2 Caines, N. Y. 362. The signature and seal may be in any part of the instrument. 7 Wend. N. Y. 345.

5. It must be delivered by the party whose bond it is, to the other. 13 Md. 1; 5 Gray, Mass. 440; 11 Ga. 286. See 37 N. H. 306; Bacon, Abr. *Obligations*, C. But the delivery and acceptance may be by attorney. 10 Ind. 1. The date is not considered of the substance of a deed; and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved. 2 Blackstone, Comm. 304; Comyns, Dig. *Fait*, B 3; 3 Call. Va. 309.

6. The condition is a vital part of a conditional bond, and generally limits and determines the amount to be paid in case of a breach, 7 Cow. N. Y. 224; but interest and costs may be added. 12 Johns. N. Y. 350; 2 Johns. Cas. N. Y. 340; 1 E. D. Smith, N. Y. 250; 1 Hempst. C. C. 271. The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. So far as interest is payable by the terms of the contract, and until default made, it is limited by the penalty; but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation. 18 N. Y. 35. And see CONDITION.

7. On the *forfeiture* of the bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interfered, and would not permit a man to take more than in conscience he ought, viz.: his principal, interest, and expenses in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge. 2 Blackstone, Comm. 340.

If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir, Sheppard, Touchst. 369; for the law will not imply the obligation upon the heir. Coke, Litt. 209 *a*.

8. If a bond lie *dormant* for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it. 1 Burr. 434; 4 *id.* 1963. And in some cases, under particular circumstances, even a less time may found a presumption. 1 Term, 271; Cowp. 109. The statute as to the presumption of payment after twenty years is in the nature of a statute of limitations. It is available as a bar to an action to recover on the instrument, but not where the party asks affirmative relief based upon the fact of payment. 12 N. Y. 409; 14 *id.* 477.

BONDAGE. Is a term which has not obtained a juridical use distinct from the vernacular, in which it is either taken as a synonym with *slavery*, or as applicable to any kind of personal servitude which is involuntary in its continuation.

2. The propriety of making it a distinct juridical term depends upon the sense given to the word *slavery*. If *slave* be understood to mean, exclusively, a natural person who, in law, is known as an object in respect to which legal persons may have rights of possession or property, as in respect to domestic animals and inanimate things, it is evident that any one who is regarded as a legal person, capable of rights and obligations in other relations, while bound by law to render service to another, is not a slave in the same sense of the word. Such a one stands in a legal relation, being under an obligation correlative to the right of the person who is by law entitled to his service, and, though not an object of property, nor possessed or owned as a chattel or thing, he is a person bound to the

other, and may be called a *bondman*, in distinction from a *slave* as above understood. A greater or less number of rights may be attributed to persons bound to render service. Bondage may subsist under many forms. Where the rights attributed are such as can be exhibited in very limited spheres of action only, or are very imperfectly protected, it may be difficult to see wherein the condition, though nominally that of a legal person, differs from chattel slavery. Still, the two conditions have been plainly distinguishable under many legal systems, and even as existing at the same time under one source of law. The Hebrews may have held persons of other nations as slaves of that chattel condition which anciently was recognized by the laws of all Asiatic and European nations; but they held persons of their own nation in bondage only as legal persons capable of rights, while under an obligation to serve. Cobb's Hist. Sketch, ch. 1. When the serfdom of feudal times was first established, the two conditions were co-existent in every part of Europe (ibid. ch. 7), though afterwards the bondage of serfdom was for a long period the only form known there until the revival of chattel slavery, by the introduction of negro slaves into European commerce, in the sixteenth century. Every villein under the English law was clearly a legal person capable of some legal rights, whatever might be the nature of his services. Coke, Litt. 123 *b*; Coke, 2d Inst. 4, 45. But at the first recognition of negro slavery in the jurisprudence of England and her colonies the slave was clearly a natural person, known to the law as an object of possession or property for others, having no legal personality, who therefore, in many legal respects, resembled a thing or chattel. It is true that the moral responsibility of the slave and the duty of others to treat him as an accountable human being and not as a domestic animal were always more or less clearly recognized in the criminal jurisprudence. There has always been in his condition a mingling of the qualities of person and of thing, which has led to many legal contradictions. But while no rights or obligations, in relations between him and other natural persons such as might be judicially enjorced by or against him, were attributed to him, there was a propriety in distinguishing the condition as *chattel slavery*, even though the term itself implies that there is an essential distinction between such a person and natural things, of which it seems absurd to say that they are either free or not free. The phrases *instar rerum, tanquam bona*, are aptly used by older writers. The bondage of the villein could not be thus characterized; and there is no historical connection between the principles which determined the existence of the one and those which sanctioned the other. The law of English villenage furnished no rules applicable to negro slavery in America. 5 Rand. Va. 680, 683; 2 Hill, Ch. So. C. 390; 9 Ga. 561; 1 Hurd, Law of Freedom and Bondage, c. 4, 5. Slavery in the colonies was entirely distinct from the condition of those white persons who were held to service for years, which was involuntary in its continuance, though founded in most instances on contract. These persons had legal rights, not only in respect to the community at large, but also in respect to the person to whom they owed service.

3. In the American slaveholding states, the moral personality of those held in the customary slavery has been recognized by jurisprudence and statute to an extent which makes it difficult to say whether, there, slaves are now by law regarded as things and not legal persons (though subject to the laws which regulate the title and transfer of property), or whether they are still things and property in the same sense and degree in which they were so formerly. Compare laws and authorities in Cobb's Law of Negro Slavery, ch. iv., v. If it is difficult to show wherein the existing condition is otherwise different from the older slavery than by being juristically distinguishable as the condition of a legal person, the distinction is of little importance under the internal law of those states. But in international private law it may be important to discriminate whether this servile condition is the effect of law peculiar to those states, or of doctrines of universal jurisprudence like those which, operating in the law of international exchange, sustained in the colonies, if not in England also, at one period, the slavery of negroes imported from Africa in the seventeenth and eighteenth centuries. 1 Hurd, Law of Freedom and Bondage, § 201. For the chattel condition recognized in the law of the Roman empire and revived in the inception of modern negro slavery is the only form of servitude which was ever thus distinguishable as a condition recognized by universal jurisprudence; and it is, besides, the only form which can be so recognized, because it is the only servile status which, wherever recognized, is one and the same; for bondage of legal persons necessarily varies in different jurisdictions, by being connected with various local circumstances. Ibid. § 112.

If a servile condition, existing in these states, is now distinguishable as bondage of legal persons, it is thereby proved to be based on the particular law of those states. But, indeed, if the contrary be true, and if in those states slaves have been or are things in law, as are inanimate chattels or domestic animals, yet on passing from these states into other jurisdictions they could be held to be such only so long as they may have been so regarded by the universal jurisprudence of the commercial world. So long only, if ever before, could they be said to be *property* beyond the limits of those states. The dictum that slavery is the creature of positive law, 20 How. St. Tr. 1; 18 Pick. Mass. 212, can mean only that slavery rests on the particular law of the countries wherein it exists. Hence, when slaves are carried out of the slaveholding states they are not *property*, unless brought into some jurisdiction which by its particular law recognizes them as property; elsewhere they are legal persons, even where they may be regarded as persons in bondage whose obligation to service may still be enforced. Hence, whatever may be the nature of slavery in those states, the slave who has escaped into another is known only as a legal person, in bondage, to the national law which requires his being delivered up on claim. Const. art. iv. § 2, p. 3. So, when carried into a territory of the United States, he is not *property* there, as was the negro slave imported into the American colony from Africa in the seventeenth and eighteenth centuries, unless there be a law particular to that territory declaring him to be property.

4. Whether such slave, when brought into a territory wherein there is no local law, ascertained from statute or precedent, for or against slavery, will continue in a condition of bondage, is not as yet determined by judicial decision. In the absence of authoritative legislation, it should be determined by those general international rules which determine in any one place whether the master's right and the correlative obligation of the bondman shall continue, when they may have come thither from the jurisdiction which had before supported the relation between them. A general principle in favor of the recognition of any relation created by foreign law, provided the local law does not attribute to every person some right inconsistent with the rights and obligations existing in that relation (the principle generally called international comity, 1 Hurd's Freedom, &c. § 88), would support the relation between such master and bondman in any jurisdiction wherein the local law does not attribute liberty universally, *i.e.* to every natural

person. (See FREEDOM.) In the non-slaveholding states of the Union this universal attribution of liberty prevents the judicial recognition of the master's right, under any circumstances not coming within the intent of some clause of the second section of the fourth article of the constitution. In the territories of the United States it would be necessary to ascertain the political source of law for the territory, to know whether liberty is or is not there in like manner universally attributed. It has been held that congress had no power to pass the act of 1820 prohibiting slavery in the northern portion of Louisiana Territory. 19 How. 393. But whether this is a consequence of covenants in the treaty ceding that particular territory, or of the extra-state efficacy of the laws of the slaveholding states, or of a recognition of slaves in the constitution of the United States, as being property protected against legislative action by the fifth article of the amendments, was not settled by a majority of the court. If the power to exclude slavery be held by congress, or by some other political personality having a local existence in the territory, yet until the power should be exercised in a positive prohibition the general principle of international private law might support it there, unless, as is claimed by some, there be a principle in the national law of the United States by which liberty is attributed to every natural person whose status is not determined by the authority of some one of the organized states of the Union. So, too, the dogma that slavery or involuntary servitude cannot lawfully subsist anywhere without previous positive enactment (a doctrine contradictory to history) would prevent the judicial recognition in the territories of any servile condition, unless established by legislation.

5. If the right of such master and the obligation of such slave could, by the application of these principles, be recognized in any case whatever in a territory thus vacant of a particular local law, the relation between them would continue therein irrespective of change of domicil, so that a condition of bondage as an effect of internal law would thereafter be recognized by the incipient, unwritten jurisprudence of the territory. But, since it had not therein been recognized as the status attributed to universal jurisprudence (*i.e.* the ancient chattel slavery), the master's right should not be judicially regarded as a right in respect to a thing, nor be protected against legislative power under constitutional guarantees of property, like that in the fifth article of the amendments. But see, *contra*, Taney, Ch. J. 19 How. 451.

Some claim that the universal attribution of liberty in non-slaveholding states does not affect the relation of master and slave being in such state for temporary visit merely; that judges may in such cases support the claim of mastership by dispensing an international comity in the state's behalf; or that the doctrine that the law of personal status accompanies the person is the controlling principle. Cobb's Law of Negro Slav. c. vii. Some hold that the courts must recognize and dispense a peculiar inter-state comity, going beyond the demands of a similar comity between distinct nations. Some maintain that such an inter-state comity is recognized and made judicially applicable to private persons, irrespective of either national or state legislation, by the article of the constitution above cited. Ibid. ch. x., xi. And see opinions and arguments in Lemmon case, 20 N. Y. 562. See SLAVE; SLAVERY; SLAVE-TRADE; SERVUS.

BONIS NON AMOVENDIS. A writ addressed to the sheriff, when a writ of error has been brought, commanding that the person against whom judgment has been obtained be not suffered to remove his goods till the error be tried and determined. Reg. Orig. 131.

BONO ET MALO. A special writ of jail delivery, which formerly issued of course for each particular prisoner. 4 Blackstone, Comm. 270.

BONUS. A premium paid to a grantor or vendor.

A consideration given for what is received. Extraordinary profit accruing in the operations of a stock company or private corporation. 10 Ves. Ch. 185; 7 Sim. Ch. 634; 2 Spence, Eq. Jur. 569.

An additional premium paid for the use of money beyond the legal interest. 2 Parsons, Contr. 391.

In its original sense of good, the word was formerly much used. Thus, a jury was to be composed of twelve good men (*boni homines*), 3 Blackstone, Comm. 349; *bonus judex* (a good judge). Coke, Litt. 246.

BOOK. A general name given to every literary composition which is printed, but appropriately to a printed composition bound in a volume. See COPYRIGHT.

BOOK-LAND. In English Law. Land, also called charter-land, which was held by deed under certain rents and fee services, and differed in nothing from free socage land. 2 Blackstone, Comm. 90. See 2 Spelman, English Works, 233, tit. *Of Ancient Deeds and Charters;* BOC-LAND.

BOOK OF ACTS. The records of a surrogate's court.

BOOK OF ADJOURNAL. In Scotch Law. The records of the court of justiciary.

BOOK OF RATES. An account or enumeration of the duties or tariffs authorized by parliament. 1 Sharswood, Blackst. Comm. 316; Jacob, Law Dict.

BOOK OF RESPONSES. In Scotch Law. An account which the director of the Chancery keeps particularly to note a seizure when he gives an order to the sheriff in that part to give it to an heir whose service has been returned to him. Wharton, Lex. 2d Lond. ed.

BOOKS. Merchants, traders, and other persons who are desirous of understanding their affairs, and of explaining them when necessary, keep a day-book, a journal, a ledger, a letter-book, an invoice-book, a cash-book, a bill-book, a bank-book, and a check-book. See these several articles.

It is a cause for refusing a discharge under the insolvent laws, in some of the states, that merchants have not kept suitable books.

BOOKS OF SCIENCE. In Evidence. Medical books, even of received authority, are not admissible in evidence. 12 Cush. Mass. 193; 1 Gray, Mass. 337; 5 Carr. & P. 74. See 2 Ind. 617; 1 Jones, No. C. 386; 1 Chandl. Wisc. 178; 1 Cox, Cr. Cas. 94; 1 Townsend, State Tr. 357, 358.

2. The house of lords have determined, in accordance with a decision of the Court of Queen's Bench, that whenever foreign written

law is to be proved, proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law. 11 Clark & F. Hou. L. 85, 114–117; 8 Q. B. 208, 250–267. Still, the witness may refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence *per se*, but as part and parcel of his testimony. Sussex, Peer.; 11 Clark & F. Hou. L. 114–117; 8 Beav. Rolls, 527; 2 Taylor, Ev. § 1280. See 2 Carr. & K. 269.

BOON-DAYS. Certain days in the year on which copyhold tenants were bound to perform certain services for the lord. Called, also, due-days. Whishaw.

BOOTY. The capture of personal property by a public enemy on land, in contradistinction to prize, which is a capture of such property by such an enemy on the sea.

After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bonâ fide* into the hands of a neutral. 1 Kent, Comm. 110. The right to the booty, Pothier says, belongs to the sovereign; but sometimes the right of the sovereign, or of the public, is transferred to the soldiers, to encourage them. Pothier, *Droit de Propriété*, p. 1, c. 2, a. 1, § 2; 2 Burlamaqui, Nat. & Pol. Law, pt. 4, c. 7, n. 12.

BORDAGE. A species of base tenure by which *bord-lands* were held. The tenants were called *bordarii*. These bordarii would seem to have been those tenants of a less servile condition, who had a cottage and land assigned to them on condition of supplying their lord with poultry, eggs, and such small matters for his table. Whishaw; Cowel.

BORDLANDS. The demesnes which the lords keep in their hands for the maintenance of their bord or table. Cowel.

BORDLODE. The rent or quantity of food which the *bordarii* paid for their lands. Cowel.

BORG (Sax.). Suretyship.

Borgbriche (violation of a pledge or suretyship) was a fine imposed on the *borg* for property stolen within its limits.

A tithing in which each one became a surety for the others for their good behavior. Spelman, Gloss.; Cowel; 1 Blackstone, Comm. 115.

BOROUGH. A town; a town of note or importance. Cowel. An ancient town. Littleton, § 164. A town which sends burgesses to parliament, whether corporate or not. 1 Blackstone, Comm. 115; Whishaw.

A corporate town that is not a city. 1 Mann. & G. 1; Cowel. In its more modern English acceptation, it denotes a town or city organized for purposes of government. 3 Stephen, Comm. 191; 1 *id.* 116.

It is impossible to reconcile the meanings of this word given by the various authors cited, except upon the supposition of a change of requirements necessary to constitute a borough at different periods. The only essential circumstance which underlies all the meanings given would seem to be that of a number of citizens bound together for purposes of joint action, varying in the different boroughs, but being either for representation or for municipal government.

In American Law. In Pennsylvania, the term denotes a part of a township having a charter for municipal purposes; and the same is true of Connecticut. 23 Conn. 128.

In Scotch Law. A corporation erected by charter from the crown. Bell, Dict.

BOROUGH COURTS. In English Law. Private courts of limited jurisdiction held in particular districts by prescription, charter, or act of parliament, for the prosecution of petty suits. 19 Geo. III. c. 70; 3 Will. IV. c. 74; 3 Blackstone, Comm. 80.

BOROUGH ENGLISH. A custom prevalent in some parts of England, by which the younger son inherits the estate in preference to his older brothers. 1 Blackstone, Comm. 75.

The custom is said by Blackstone to have been derived from the Saxons, and to have been so called in distinction from the Norman rule of descent. 2 Blackstone, Comm. 83. A reason for the custom is found in the fact that the elder children were usually provided for during the life of the parent as they grew up, and removed, while the younger son usually remained. See, also, Bacon, Abr.; Comyns, Dig. *Borough English*; Termes de la Ley; Cowel. The custom applies to socage lands. 2 Blackstone, Comm. 83.

BORROWER. He to whom a thing is lent at his request.

In general, he has the right to use the thing borrowed, himself, during the time and for the purpose intended between the parties. He is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper condition at the proper time. See BAILMENT; Story, Bailm. § 268; 2 Kent, Comm. 446–449; 1 Bouvier, Inst. 1078–1090.

BOSCAGE. That food which wood and trees yield to cattle.

To be quit of boscage is to be discharged of paying any duty of wind-fall wood in forest. Whishaw; Manwood, For. Laws.

BOSCUS. Wood growing; wood; both high wood or trees, and underwood or coppice. The high wood is properly called *saltus*. Cowel; Spelman, Gloss.; Coke, Litt. 5 *a*.

BOTE. A recompense or compensation. The common word *to boot* comes from this word. Cowel. The term is applied as well to making repairs in houses, bridges, etc. as to making a recompense for slaying a man or stealing property. *House bote*, materials which may be taken to repair a house; *hedge bote*, to repair hedges; *brig bote*, to repair bridges; *man bote*, compensation to be paid by a murderer. Bote is known to the English law also under the name of Estover.

1 Washburn, Real Prop. 99; 2 Blackstone, Comm. 35.

BOTTOMRY. In Maritime Law. A contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified voyage, or for a definite period, pledges the ship (or the keel or *bottom* of the ship, *pars pro toto*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time, by any of the perils enumerated in the contract, the lender shall also lose his money. 2 Hagg. Adm. 48, 53; 2 Sumn. C. C. 157; Abbott, Shipp. 117–131.

Bottomry differs materially from an ordinary loan. Upon a simple loan the money is wholly at the risk of the borrower, and must be repaid at all events. But in bottomry the money, to the extent of the enumerated perils, is at the risk of the lender during the voyage on which it is loaned, or for the period specified. Upon an ordinary loan only the usual legal rate of interest can be reserved; but upon *bottomry* and *respondentia* loans any rate of interest, not grossly extortionate, which may be agreed upon, may be legally contracted for.

When the loan is not made upon the ship, but on the goods laden on board and which are to be sold or exchanged in the course of the voyage, the borrower's personal *responsibility* is deemed the principal security for the performance of the contract, which is therefore called respondentia, which see. And in a loan upon respondentia the lender must be paid his principal and interest though the ship perish, provided the goods are saved. In most other respects the contracts of *bottomry* and of *respondentia* stand substantially upon the same footing. See, further, 10 Jur. 845; 4 Thornt. 285, 512; 2 W. Rob. Adm. 83–85; 3 Mas. C. C. 225.

2. Bottomry bonds may be given by a master appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master, as *hæres necessarius*, on the death of the appointed master. 1 Dods. Adm. 278; 3 Hagg. Adm. 18.

The owner of the vessel may borrow upon bottomry in the vessel's home port, and whether she is in port or at sea; and it is not necessary to the validity of a bond made by the owner that the money borrowed should be advanced for the necessities of the vessel or her voyage. 2 Sumn. C. C. 157; 1 Paine, C. C. 671. But it may well be doubted whether when money is thus borrowed by the owner for purposes other than necessities or uses of the ship, and a bottomry bond in the usual form is given, a court of admiralty has jurisdiction to enforce the lien. As a contract made and to be performed on land, and having no necessary connection with the business of navigation, it is probable that it would not now be deemed a maritime contract, but would take effect and be enforced as a common-law mortgage. See Abbott, Shipp. 119, 120, 121, and Perkins's notes; 1 Wash. C. C. 293; 2 *id.* 145; 20 How. 393; Bee, Adm. 433; 1 Swab. Adm. 269. But see 1 Paine, C. C. 671; 1 Pet. Adm. 295.

3. If the bond be executed by the master of the vessel, it will be upheld and enforced only upon proof that there was a necessity for the loan, and also for pledging the credit of the ship; as the authority of the master to borrow money on the credit of the vessel rests upon the necessity of the case, and only exists under such circumstances of necessity as would induce a prudent owner to hypothecate his ship to raise money for her use. 3 Hagg. Adm. 66, 74; 3 Sumn. C. C. 228; 1 Wheat. 96; 1 Paine, C. C. 671; Abbott, Shipp. 156.

If the master could have obtained the necessary supplies or funds on the personal credit of himself or of his owner, and this fact was known to the lender, the bond will be held invalid. And if the master borrows on bottomry without apparent necessity, or when the owner is known to be accessible enough to be consulted upon the emergency, the bond is void, and the lender can look only to the personal responsibility of the master. 3 W. Rob. Adm. 243, 265. And moneys advanced to the master without inquiry as to the necessity of the advance, or seeing to the proper application, have been disallowed. 33 Eng. L. & Eq. 602. It may be given after the advances have been made, in pursuance of a prior agreement. 8 Pet. 538. If given for a larger sum than the actual advances, in fraud of the owners or underwriters, it vitiates the bond and avoids the bottomry lien even for the sum actually advanced. 18 How. 63; 1 Curt. C. C. 341. See 1 Wheat. 96; 8 Pet. 538.

4. The contract of bottomry is usually, in form a bond (termed a bottomry bond) conditioned for the repayment of the money lent, with the interest agreed upon, if the ship safely accomplishes the specified voyage or completes in safety the period limited by the contract. Sometimes it is in that of a bill of sale, and sometimes in a different shape; but it should always specify the principal lent and the rate of maritime interest agreed upon; the names of the lender and borrower; the names of the vessel and of her master; the subject on which the loan is effected, whether of the ship alone, or of the ship and freight; whether the loan is for an entire or specific voyage or for a limited period, and for what voyage or for what space of time; the risks the lender is contented to bear; and the period of repayment. It is negotiable. 5 C. Rob. Adm. 102.

In case a highly extortionate or wholly unjustifiable rate of interest be stipulated for in a bottomry bond, courts of admiralty will enforce the bond for only the amount fairly due, and will not allow the lender to recover an unconscionable rate of interest. But in mitigating an exorbitant rate of interest they will proceed with great caution. For the course pursued where the amount of interest was accidentally omitted, see 1 Swab. Adm. 240. Fraud will induce a court of equity to

set aside a bottomry bond, in England. 8 Sim. Ch. 358; 3 Mylne & C. Ch. 451, 453, n.

5. Not only the ship, her tackle, apparel, and furniture (and the freight, if specifically pledged), are liable for the debt in case the voyage or period is completed in safety, but the borrower is also, in that event, personally responsible. See 2 Blackstone, Comm. 457, 458; Marshall, Ins. b. 2, c. 1; Code de Comm. art. 311.

The borrower on bottomry is affected by the doctrines of seaworthiness and deviation, 3 Kent, Comm. 360; Phillips, Ins. sec. 988, 989; and if, before or after the risk on the bottomry bond has commenced, the voyage or adventure is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage or adventure, or by a deviation or otherwise, the maritime risks terminate, and the bond becomes presently payable. 2 Sumn. C. C. 157; 3 Kent, Comm. 360. But maritime interest is not recoverable if the risk has not commenced.

6. But in England and America the established doctrine is that the owners are not personally liable, except to the extent of the fund pledged which has come into their hands. 8 Pet. 538, 554; 1 Hagg. Adm. 1, 13. If the ship or cargo be lost, not by the enumerated perils of the sea, but by the fraud or fault of the borrower or master, the hypothecation bond is forfeited and must be paid.

7. The risks assumed by the lender are usually such as are enumerated in the ordinary policies of marine insurance. If the ship be wholly lost in consequence of these risks, the lender, as before stated, loses his money; but the doctrine of constructive total loss does not apply to bottomry contracts. 1 Arnould, Ins. 115.

It is usual in bottomry bonds to provide that, in case of damage to the ship (not amounting to a total loss) by any of the enumerated perils, the lender shall bear his proportion of the loss, viz.: an amount which will bear the same proportion to the whole damage that the amount lent bears to the whole value of the vessel prior to the damage. Unless the bond contains an express stipulation to that effect, the lender is not entitled to take possession of the ship pledged, even when the debt becomes due; but he may enforce payment of the debt by a proceeding *in rem*, in the admiralty, against the ship; under which she may be arrested, and, in pursuance of a decree of the court, ultimately sold for the payment of the amount due. And this is the ordinary and appropriate remedy of the lender upon bottomry.

8. In entering a decree in admiralty upon a bottomry bond, the true rule is to consider the sum lent and the maritime interest as the principal, and to allow *common interest* on that sum from the time such principal became due. 3 Mas. C. C. 255; 2 Arnould, Ins. 1340. Where money is necessarily taken up on bottomry to defray the expenses of repairing a partial loss, against which the vessel is insured, the underwriter (although he has nothing to do with the bottomry bond) is liable to pay his share of the extra expense of obtaining the money, in that mode, for the payment of such expenses. 12 Pet. 378.

9. The lien or privilege of a bottomry-bond holder, like all other maritime liens, has, ordinarily, preference of all prior and subsequent common-law and statutory liens, and binds all prior interests centring in the ship. It holds good (if reasonable diligence be exercised in enforcing it) as against subsequent purchasers and common-law incumbrancers; but the lien of a bottomry bond is not indelible, and, like other admiralty liens, may be lost by unreasonable delay in asserting it, if the rights of purchasers or incumbrancers have intervened. 9 Wheat. 409; 16 Bost. Law Rep. 264; 17 *id.* 93, and authorities there cited; 2 Woodb. & M. C. C. 48; 1 Swab. Adm. 269. The rules under which courts of admiralty marshal assets claimed to be applicable to the payment of bottomry and other maritime liens and of common-law and statutory liens, will be more properly and fully considered in the article Maritime Liens, which see. But it is proper here to state that, as between the holders of two bottomry bonds upon the same vessel in respect to different voyages, the later one, as a general rule, is entitled to priority of payment out of the proceeds of the vessel. 1 Dods. Adm. 201; Olc. Adm. 55; 17 Bost. Law Rep. 93; 1 Paine, C. C. 671.

10. Seamen have a lien, prior to that of the holder of the bottomry bond, for their wages for the voyage upon which the bottomry is founded, or any subsequent voyage; but the owners are also personally liable for such wages, and if the bottomry-bond holder is compelled to discharge the seamen's lien, he has a resulting right to compensation over against the owners, and has been held to have a lien upon the proceeds of the ship for his reimbursement. 8 Pet. 538; 1 Abb. Adm. 150; 1 Hagg. Adm. 62. And see 1 Swab. Adm. 261; 1 Dods. Adm. 40.

The act of congress of July 29, 1850, declaring bills of sale, mortgages, hypothecations, and conveyances of vessels invalid against persons other than the grantor or mortgagor, his heirs and devisees, not having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled, expressly provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of that act. See Parsons, Maritime Law; Abbott, Shipping, with Story and Perkins's notes; Hall's translation of Emerigon's Essay on Maritime Loans, with the Appendix; Marshall, Insurance, book 2; 1 Bouvier, Insti-

tutes, 504–509; 3 Kent, Comm. Lec. 49; 8 Pet. 538; 1 Hagg. Adm. 179; 2 Pet. Adm. 295.

BOUGHT NOTE. A written memorandum of a sale, delivered, by the broker who effects the sale, to the vendee. Story, Ag. § 28; 11 Ad. & E. 589; 8 Mees. & W. Exch. 834.

Bought and sold notes are made out usually at the same time, the former being delivered to the vendee, the latter to the vendor. When the broker has not exceeded his authority, both parties are bound thereby. 4 Esp. 114; 2 Campb. 337; 1 Carr. & P. 388; 5 Barnew. & C. 436; 6 *id.* 117; 1 Bell, Comm. 4th ed. 347, 477. Where the same broker acts for both parties, the notes must correspond. 1 Holt, Nisi P. 172; 5 Barnew. & C. 436; 4 Q. B. 737; 17 *id.* 103; 3 Wend. N. Y. 459; 2 Sandf. N. Y. 133. As to the rule where different brokers are employed, see 10 Exch. 323, 330. Whether a memorandum in the broker's books will cure a disagreement, see 9 Mees. & W. Exch. 802; 13 *id.* 746; 5 Taunt. 786; 1 Mood. & M. 43; 1 Mood. & R. 368; 1 Hurlst. & N. Exch. 484.

BOUND BAILIFF. A sheriff's officer, who serves writs and makes arrests. He is so called because bound to the sheriff for the due execution of his office. 1 Blackstone, Comm. 345.

BOUNDARY. Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation.

A *natural* boundary is a natural object remaining where it was placed by nature.

A river or stream is a natural boundary, and the centre of the stream is the line. 12 Johns. N. Y. 252; 20 *id.* 91; 6 Cow. N. Y. 579; 1 Rand. Va. 417; 3 *id.* 33; 4 Pick. Mass. 268; 1 Halst. N. J. 1; 4 Mas. C. C. 349; 9 N. H. 461; 1 Tayl. No. C. 136; 11 Miss. 366; 5 Harr. & J. Md. 195, 245. And see 2 Conn. 481; 17 Johns. N. Y. 195; 4 Ill. 510; 3 Ohio, 495; 4 Pick. Mass. 199; 14 Serg. & R. Penn. 71; 11 Ala. 436; 4 Mo. 343; 1 M'Cord, So. C. 580; 11 Ohio, 138. As to the rule where a pond is the boundary, see 13 Pick. Mass. 261; 9 N. H. 461; 10 Me. 224; 13 *id.* 198; 16 *id.* 257; where the seashore, see 2 Johns. N. Y. 362; 5 Gray, Mass. 335; 13 *id.* 254.

An *artificial* boundary is one erected by man.

The ownership, in case of such boundaries, must, of course, turn mainly upon circumstances peculiar to each case, 5 Taunt. 20; 3 *id.* 138; 8 Barnew. & C. 259; generally extending to the centre. 4 Hill, N. Y. 309; 6 Conn. 471. A tree standing directly on the line is the joint property of both proprietors, 12 N. H. 454; otherwise, where it only stands so near that the roots penetrate. 1 Mood. & M. 112; 2 Rolle, 141; 2 Greenleaf, Ev. § 617. Land bounded on a highway extends to the centre, though a private street, 8 Cush. Mass. 595; 1 Sandf. N. Y. 323, 344; unless the description excludes the highway. 15 Johns. N. Y. 454; 11 Conn. 60; 1 All. Mass. 443; 2 Washburn, Real Prop. 635.

2. Boundaries are frequently denoted by monuments fixed at the angles. In such case the connecting lines are always presumed to be straight, unless described to be otherwise. 16 Pick. Mass. 235; 6 T. B. Monr. Ky. 179; 3 Ohio, 382; 1 McLane, C. C. 519; 2 Washburn, Real Prop. 632.

The following is the order of marshalling boundaries: *first*, the highest regard is had to natural boundaries; *second*, to lines actually run and corners marked at the time of the grant; *third*, if the lines and courses of an adjoining tract are called for, the lines will be extended, if they are sufficiently established, and no other departure from the deed is required, preference being given to marked lines; *fourth*, to courses and distances. 1 Greenleaf, Ev. § 301, n. See 3 Murph. So. C. 82; 4 Hen. & M. Va. 125; 6 Wheat. 582; 8 Me. 61; 1 McLean, C. C. 518; 3 Rob. La. 171.

3. Parol evidence is often admissible to identify and ascertain the locality of monuments called for by a description, 13 Pick. Mass. 267; 19 *id.* 445; and where the description is ambiguous, the practical construction given by the parties may be shown. 1 Metc. Mass. 378; 7 Pick. Mass. 274. Common reputation may be admitted to identify monuments, especially if of a public or quasi-public nature. 2 Washburn, Real Prop. 636; 1 Greenleaf, Ev. § 145; 1 Hawks, Tenn. 116; 1 McLean, C. C. 45, 518; 10 N. H. 43; 4 *id.* 214; 2 A. K. Marsh. Ky. 158; 9 Dan. Ky. 322, 465; 1 Dev. No. C. 340; 6 Pet. 341; 8 Leigh, Va. 697; 3 Ohio, 282. And see 3 Dev. & B. No. C. 49; 10 Serg. & R. Penn. 281; 10 Johns. N. Y. 377; 12 Pick. Mass. 532; 7 Gray, Mass. 174; 5 Ell. & B. 166; 6 Litt. Ky. 9.

Consult 2 Washburn, Real Prop. 630–638; 1 Greenleaf, Ev. §§ 145, 301; 4 Bouvier, Inst. n. 3923.

BOUNDED TREE. A tree marking or standing at the corner of a field or estate.

BOUNTY. An additional benefit conferred upon, or a compensation paid to, a class of persons.

It differs from a reward, which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be part of a contract. Thus, the bounty offered a soldier would seem to be part of the consideration for his services. The bounty paid to fishermen is not a consideration for any contract, however.

BOUWERYE. A farm.

BOUWMASTER. A farmer.

BOVATA TERRÆ. As much land as one ox can cultivate. Said by some to be thirteen, by others eighteen, acres in extent. Skene; Spelman, Gloss.; Coke, Litt. 5 *a*.

BOZERO. In Spanish Law. An advocate; one who pleads the causes of others, either suing or defending. Las Partidas, part. 3, tit. v. l. 1–6.

Called also *abogadas*. Amongst other classes of persons excluded from this office are minors under seventeen, the deaf, the dumb, friars, women, and infamous persons. White, New Rec. 274.

BRANCH. A portion of the descendants

of a person, who trace their descent to some common ancestor, who is himself a descendant of such person.

The whole of a genealogy is often called the *genealogical tree;* and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then great-grandchildren, etc. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out into as many smaller branches as John and James have children; from these others proceed, till the whole family is represented on the tree. Thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BRANDING. An ancient mode of punishment by inflicting a mark on an offender with a hot iron. It is generally disused in civil law, but is a recognized punishment for some military offences.

BRANKS. An instrument of punishment formerly made use of in some parts of England for the correction of scolds, which it was said to do so effectually and so very safely that it was looked upon by Dr. Plotts, in his History of Staffordshire, p. 389, "as much to be preferred to the ducking-stool, which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip, to neither of which is this liable; it brings such a bridle for the tongue as not only quite deprives them of speech, but brings shame for the transgression and humiliation thereupon before it is taken off."

BREACH. In Contracts. The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a breach are repeated at brief intervals. F. Moore, 242; 1 Leon. 62; 1 Salk. 141; Holt, 178; 2 Ld. Raym. 1125.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

2. It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

3. In debt, the breach or cause of action complained of must proceed only for the non-payment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of —— dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff —— dollars, and therefore he brings suit," &c.

4. The breach must obviously be governed by the nature of the stipulation: it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect. Comyns, Dig. *Pleader*, C 45–49; 2 Wms. Saund. 181 *b*, *c;* 6 Cranch, 127. And see 5 Johns. N. Y. 168; 8 *id.* 111; 7 *id.* 376; 4 Dall. Penn. 436; 2 Hen. & M. Va. 446.

5. When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other. 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

BREACH OF CLOSE. Every unwarrantable entry upon the soil of another is a breach of his close. 3 Blackstone, Comm. 209.

BREACH OF COVENANT. A violation of, or a failure to perform the conditions of, a bond or covenant. The remedy is in some cases by a writ of covenant; in others, by an action of debt. 3 Blackstone, Comm. 156.

BREACH OF THE PEACE. A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace. The remedy for this offence is by indictment.

BREACH OF PRISON. An unlawful escape out of prison. This is of itself a misdemeanor. 1 Russell, Crimes, 378; 4 Blackstone, Comm. 129; 2 Hawkins, Pl. Cr. c. 18, s. 1; 7 Conn. 752. The remedy for this offence is by indictment. See ESCAPE.

BREACH OF TRUST. The wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence.

The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. 15 Serg. & R. Penn. 93, 97. It has been adjudged that when the owner of goods parts with the *possession* for a particular purpose, and the person who receives them avowedly for that purpose has at the time a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny; but if the owner part with the *property*, although fraudulent means have been used to obtain it, the act of conversion is not larceny. Alison, Princ. c. 12, p. 354.

In the Year Book 21 Hen. VII. 14, the distinction is thus stated:—"*Pigot.* If I deliver a jewel or money to my servant to keep, and he flees or goes from me with the jewel, is it felony? *Cutler* said, Yes: for so long as he is with me or in my house, that which I have delivered to him is adjudged to be in my possession; as my butler, who has my plate in keeping, if he flees with it, it is felony. Same law, if he who keeps my horse goes away with him. The reason is, they are always in my possession. But if I deliver a horse to my servant to ride to

market or the fair, and he flee with him, it is no felony; for he comes lawfully to the possession of the horse by delivery. And so it is if I give him a jewel to carry to London, or to pay one, or to buy a thing, and he flee with it, it is not felony; for it is out of my possession, and he comes lawfully to it. *Pigot.* It can well be; for the master in these cases has an action against him, viz.: Detinue, or Account." See this point fully discussed in Stamford, Pl. Cr. lib. 1. See also Year B. Edw. IV. fol. 9; 52 Hen. III. 7; 21 Hen. VII. 15.

Cases of the description commonly called cases of "breaking bulk" exhibit an attempt to reach, by the device of a constructive theft, breaches of trust. The case in Year B. 13 Edw. IV. fol. 9, is an authority upon this point. A carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton; but he carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use. If that were felony, or not, was the question. A majority of the judges were of opinion that if the party had sold the entire bales it would not have been felony, "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony. This construction involves the absurd consequence of its being felony to steal *part* of a package, but a breach of trust to steal the *whole*.

BREAKING. Parting or dividing by force and violence a solid substance, or piercing, penetrating, or bursting through the same.

In cases of burglary and housebreaking, the removal of any part of the house, or of the fastenings provided to secure it, with violence and a felonious intent.

2. The breaking is actual, as in the above case; or constructive, as when the burglar or housebreaker gains an entry by fraud, conspiracy, or threats. 2 Russell, Crimes, 2; 2 Chitty, Crim. Law, 1092; 1 Hale, Pl. Cr. 553; Alison, Princ. 282, 291. In England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house. 1 Mood. Cr. Cas. 178. No reasons are assigned. It is difficult to conceive, if this case be law, what further opening will amount to a breaking. But see 1 Moody, Cr. Cas. 327, 377; 1 Bennett & H. Lead. Crim. Cas. 524–540; BURGLARY.

It was doubted, under the ancient common law, whether the breaking out of a dwelling-house in the night-time was a breaking sufficient to constitute burglary. Sir M. Hale thinks that this was not burglary, because *fregit et exivit, non fregit et intravit.* 1 Hale, Pl. Cr. 554. It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates: they may exclaim, with Cicero of Catiline, *Magno me metu liberabis, dummodo inter me atque te murus intersit.* But this breaking was made burglary by the statute 12 Anne, c. 1, § 7 (1713). The getting the head out through a skylight has been held to be a sufficient breaking out of a house to complete the crime of burglary. 1 Jebb, Cr. Cas. 99. The statute of 12 Anne is too recent to be binding as a part of the common law in all of the United States. 2 Bishop, Crim. Law, § 86; 1 Bennett & H. Lead. Crim. Cas. 540–544.

BREAKING BULK. In Criminal Law. The doctrine of breaking bulk proceeds upon the ground of a determination of the privity of the bailment by the wrongful act of the bailee. Thus, where a carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton, but carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use, the majority of the judges held that if the party had sold the entire bales it would not have been felony; "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony. 13 Edw. IV. fol. 9. If a miller steals part of the meal, "although the corn was delivered to him to grind, nevertheless if he steal it it is felony, being taken from the rest." 1 Rolle, Abr. 73, pl. 16; 1 Pick. Mass. 375.

2. In an early case in Massachusetts, it was decided that if a wagon-load of goods, consisting of several packages, is delivered to a common carrier to be transported in a body to a certain place, and he, with a felonious intent, separates one entire package, whether before or after the delivery of the other packages, this is a sufficient breaking of bulk to constitute larceny, without any breaking of the package so separated. 4 Mass. 580. But this decision is in direct conflict with the English cases. Thus, where the master and owner of a ship steals a package out of several packages delivered him to carry, without removing any thing from the particular package, 1 Russ. & R. Cr. Cas. 92; or where a letter-carrier is intrusted with two directed envelopes, each containing a 5*l.* note, and delivers the envelopes, having previously taken out the two notes, 1 Den. Cr. Cas. 215; or where a drover separates one sheep from a flock intrusted to him to drive a certain distance, 1 Jebb, Cr. Cas. 51; this is not a breaking of bulk sufficient to terminate the bailment and to constitute larceny.

BREAKING DOORS. Forcibly removing the fastenings of a house so that a person may enter. See ARREST.

BREATH. In Medical Jurisprudence. The air expelled from the chest at each expiration.

Breathing, though a usual sign of life, is not conclusive that a child was *wholly* born alive; as breathing may take place before the whole delivery of the mother is complete. 5 Carr. & P. 329. See BIRTH; LIFE; INFANTICIDE.

BREHON LAW. The ancient system of Irish law; so named from the judges, called Brehons, or Breitheamhuin. Its existence has been traced from the earliest period of Irish history down to the time of the Anglo-Norman invasion. It is still a subject of antiquarian research. An outline of the system will be found in Knight's English Cyclopædia, and also in the Penny Cyclopædia.

BREPHOTROPHI. In Civil Law. Persons appointed to take care of houses destined to receive foundlings. Clef des Lois Rom., *Administrateurs.*

BRETTS AND SCOTTS, LAWS OF THE. A code or system of laws in use among the Celtic tribes of Scotland down to the beginning of the fourteenth century, and then abolished by Edward I. of England. A fragment only is now extant. See Acts of Parl. of Scotland, vol. 1, pp. 299–301, Edin. 1844. It is interesting, like the Brehon laws of Ireland, in a historical point of view.

BRETHWALDA. The leader of the Saxon heptarchy.

BREVE (Lat. *brevis, breve*, short). A writ. An original writ. Any writ or precept issuing from the king or his courts.

It is the Latin term which in law is translated by "writ." In the Roman law these *brevia* were in the form of letters; and this form was also given to the early English *brevia*, and is retained to some degree in the modern writs. Spelman, Gloss. The name *breve* was given because they stated briefly the matter in question (*rem quæ est breviter narrat*). It was said to be "shaped in conformity to a rule of law" (*formatum ad similitudinem regulæ juris*); because it was requisite that it should state facts against the respondent bringing him within the operation of some rule of law. The whole passage from Bracton is as follows:—"*Breve quidem, cum sit formatum ad similitudinem regulæ juris quia breviter et paucis verbis intentionem proferentes exponit, et explanat sicut regula juris, rem quæ est breviter narrat. Non tamen ita breve esse debent, quin rationem et vim intentionis contineat.*" Bracton, 413 *b*, § 2. It is spelled *briefe* by Brooke. Each writ soon came to be distinguished by some important word or phrase contained in the brief statement, or from the general subject-matter; and this name was in turn transferred to the form of action, in the prosecution of which the writ (or *breve*) was procured. Stephen, Plead. 9. See WRIT. It is used perhaps more frequently in the plural (*brevia*) than in the singular, especially in speaking of the different classes of writs. See BREVIA.

Consult Cowel; Bracton, 108, 413 *b;* Fleta; Fitzherbert, *Natura Brevium;* Stephen, *Pleading;* Sharswood's Blackstone.

BREVE INNOMINATUM. A writ containing a general statement only of the cause of action.

BREVE NOMINATUM. A writ containing a statement of the circumstances of the action.

BREVE ORIGINALE. An original writ.

BREVE DE RECTO. A writ of right. The writ of right patent is of the highest nature of any in the law. Cowel; Fitzherbert, Nat. Brev.

BREVE TESTATUM. A written memorandum introduced to perpetuate the tenor of the conveyance and investiture of lands. 2 Blackstone, Comm. 307.

It was prepared after the transaction, and depended for its validity upon the testimony of witnesses, as it was not sealed. Spelman, Gloss.

In Scotch Law. A similar memorandum made out at the time of the transfer, attested by the *pares curiæ* and by the seal of the superior. Bell, Dict.

BREVET. In French Law. A warrant granted by government to authorize an individual to do something for his own benefit.

Brevet d'invention. A patent.

In American Law. A commission conferring on a military officer a degree of rank specified in the commission, without, however, conveying a right to receive corresponding pay.

BREVIA (Lat.). Writs. The plural of *breve*, which see.

BREVIA ANTICIPANTIA (Lat.). Writs of prevention. See QUIA TIMET.

BREVIA DE CURSU (Lat.). Writs of course. See BREVIA FORMATA.

BREVIA FORMATA (Lat.). Certain writs of approved and established form which were granted of course in actions to which they were applicable, and which could not be changed but by consent of the great council of the realm. Bracton, 413 *b.*

All original writs, without which an action could not anciently be commenced, issued from the chancery. Many of these were of ancient and established form, and could not be altered; others admitted of variation by the clerks according to the circumstances of the case. In obtaining a writ, a præcipe was issued by the party demandant, directed to the proper officer in chancery, stating the substance of his claim. If a writ already in existence and enrolled upon the Register was found exactly adapted to the case, it issued as of course (*de cursu*), being copied out by the junior clerks, called *cursitors.* If none was found, a new writ was prepared by the chancellor and subjected to the decision of the grand council, their assent being presumed in some cases if no objection was made. In 1250 it was provided that no new writs should issue except by direct command of the king or the council. The clerks, however, it is supposed, still exercised the liberty of adapting the old forms to cases new only in the *instance*, the council, and its successor (in this respect, at least), parliament, possessing the power to make writs new in principle. The strictness with which the common-law courts, to which the writs were returnable, adhered to the ancient form, gave occasion for the passage of the stat. Westm. 2, c. 24, providing for the formation of new writs. Those writs which were contained in the Register are generally considered as preeminently *brevia formata.*

Consult 1 Reeve, Eng. Law, 319; 2 *id.* 203; 1 Spence, Eq. Jur. 226, 239; Wooddeson, Lect.; 8 Coke, Introd.; 9 *id.* Introd.; Coke, Litt. 73 *b*, 304; Bracton, 105 *b*, 413 *b;* Fleta, lib. 2, c. 2, c. 13; 3 Term, 63; 17 Serg. & R. Penn. 194, 195.

BREVIA JUDICIALIA (Lat.). Judicial writs. Subsidiary writs issued from the court during the progress of an action, or in execution of the judgment.

They were said to vary according to the variety of the pleadings and responses of the parties to the action. Bracton, 413 *b;* Fleta, lib. 2, c. 13, § 3; Coke, Litt. 54 *b*, 73 *b.* The various forms, however, became long since fixed beyond the power of the courts to alter them. 1 Rawle, Penn. 52. Some of these judicial writs, especially that of *capias* by a fiction of the issue of an original writ,

came to supersede original writs entirely, or nearly so. See ORIGINAL WRIT.

BREVIA MAGISTRALIA. Writs framed by the masters in chancery. They were subject to variation according to the diversity of cases and complaints. Bracton, 413 *b*; Fleta, lib. 2, c. 13, § 4.

BREVIA TESTATA. See BREVE TESTATUM.

BREVIARIUM ALARICIANUM. A compilation made by order of Alaric II. and published for the use of his Roman subjects in the year 506.

BREVIATE. An abstract or epitome of a writing. Holthouse.

BREVIBUS ET ROTULUS LIBERANDIS. A writ or mandate directed to a sheriff, commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrances, and other things belonging to his office.

BRIBE. In Criminal Law. The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration for preferring one person to another, in the performance of a legal act.

BRIBERY. In Criminal Law. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Coke, 3d Inst. 149; 1 Hawkins, Pl. Cr. c. 67, s. 2; 4 Blackstone, Comm. 139; 1 Russell, Crimes, 156.

The term bribery now extends further, and includes the offence of giving a bribe to many other officers. The offence of the giver and of the receiver of the bribe has the same name. For the sake of distinction, that of the former—viz.: the briber—might be properly denominated active bribery; while that of the latter—viz.: the person bribed—might be called passive bribery.

2. Bribery at elections for members of parliament has always been a crime at common law, and punishable by indictment or information. It still remains so in England, notwithstanding the stat. 24 Geo. II. c. 14. 3 Burr. 1340, 1589. To constitute the offence, it is not necessary that the person bribed should in fact vote as solicited to do, 3 Burr. 1236; or even that he should have a right to vote at all: both are entirely immaterial. 3 Burr. 1590.

An attempt to bribe, though unsuccessful, has been holden to be criminal, and the offender may be indicted. 2 Dall. Penn. 384; 4 Burr. 2500; Coke, 3d Inst. 147; 2 Campb. 229; 2 Wash. Va. 88; 1 Va. Cas. 138; 2 *id.* 460.

BRIBOUR. One that pilfers other men's goods; a thief. See Stat. 28 Edw. II. c. 1.

BRIDGE. A structure erected over a river, creek, stream, ditch, ravine, or other place, to facilitate the passage thereof; including by the term both arches and abutments. 3 Harr. N. J. 108; 15 Vt. 438.

Bridges are either public or private. Public bridges are such as form a part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll, 2 East, 342; though their use may be limited to particular occasions, as to seasons of flood or frost. 2 Maule & S. 262; 4 Campb. 189. They are established either by legislative authority or by dedication.

2. *By legislative authority.* By the Great Charter (9 Hen. III. c. 15), in England, no town or freeman can be compelled to make new bridges where never any were before, but by act of parliament. Under such act, they may be erected and maintained by corporations chartered for the purpose, or by counties, or in whatever other mode may be prescribed. Woolrych, Ways, 196. In this country it is the practice to charter companies for the same purpose, with the right to take tolls for their reimbursement, 4 Pick. Mass. 341; or to erect bridges at the state's expense; or by general statutes to impose the duty of erection and maintenance upon towns, counties, or districts. 2 Watts & S. Penn. 495; 5 Gratt. Va. 241; 2 Ohio, 508; 23 Conn. 416; 14 B. Monr. Ky. 92; 5 Cal. 426; 1 Mass. 153; 12 N. Y. 52; 2 N. H. 513. For their erection the state may take private property, upon making compensation, as in case of other highways, Angell, Highways, § 81 *et seq.*; the rule of damages for land so taken being not its mere value for agricultural purposes, but its value for a bridge site, minus the benefits derived to the owner from the erection. 17 Ga. 30. The right to erect a bridge upon the land of another may also be acquired by mere parol license, which, when acted upon, becomes irrevocable. 11 N. H. 102; 14 Ga. 1. But see 4 R. I. 47. The franchise of a toll bridge or ferry may be taken, like other property, for a free bridge, 6 How. 507; 23 Pick. Mass. 360; 4 Gray, Mass. 474; 28 N. H. 195; and, when vested in a town or other public corporation, may be so taken without compensation. 10 How. 511.

3. A new bridge may be erected, under legislative authority, so near an older bridge or ferry as to impair or destroy its value, without compensation, unless the older franchise be protected by the terms of its grant, 11 Pet. 420; 7 Pick. Mass. 344; 6 Paige, Ch. N. Y. 554; 1 Barb. Ch. N. Y. 547; 3 Sandf. Ch. N. Y. 625; but, unless authorized by statute, a new bridge so erected is unlawful, and may be enjoined as a nuisance. 3 Blackstone, Comm. 218, 219; 4 Term, 566; 2 Crompt. M. & R. Exch. 432; 6 Cal. 590; 3 Wend. N. Y. 610; 3 Ala. 211; 11 Pet. 261, Story, J. And if the older franchise, vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge or ferry, even under legislative authority, is unconstitutional, as an act impairing the obligations of contract. 7 N. H. 35; 17 Conn. 40; 10 Ala. N. S. 37. The entire expense of a bridge erected within a particular town or

district may be assessed upon the inhabitants of such town or district. 10 Ill. 405; 23 Conn. 416. A state has the right to erect a bridge over a navigable river within its own limits, 4 Pick. Mass. 460; 1 N. H. 467; 5 McLean, C. C. 425; 35 Me. 325; 22 Conn. 198; 27 Penn. St. 303; 15 Wend. N. Y. 113; but, in exercising this right, care must be taken to interrupt navigation as little as possible, 43 Me. 198; 3 Hill, N. Y. 621; 22 Eng. L. & Eq. 240; 4 Harr. Del. 544; 4 Ind. 36; 2 Gray, Mass. 339; since for any unnecessary interruption the proprietors of the bridge will be liable in damages to the persons specially injured thereby, or to have the bridge abated as a nuisance, by injunction, though not by indictment; such bridge, although authorized by state laws, being in contravention of rights secured by acts of congress regulating commerce. 13 How. 518; 1 Woodb. & M. C. C. 401; 5 McLean, C. C. 425; 6 *id.* 70, 237.

4. *Dedication.* The dedication of bridges depends upon the same principles as the dedication of highways, except that their acceptance will not be presumed from mere use, until they are proved to be of public utility. Angell, High. 111; 5 Burr. 2594; 2 W. Blackst. 685; 2 East, 342; 2 N. H. 513; 18 Pick. Mass. 312; 23 Wend. N. Y. 466; 6 Mass. 458; 13 East, 220; 3 Maule & S. 526. See HIGHWAYS.

Reparation. At common law, all public bridges are *primâ facie* reparable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges. 5 Burr. 2594; 13 East, 95; 14 Eng. L. & Eq. 116; Bacon, Abr. *Bridges*, p. 533. In this country, the common law not prevailing, the duty of repair is imposed by statute, generally, upon towns or counties, 9 Conn. 32; 10 *id.* 329; 2 N. H. 513; 12 N. Y. 52; 2 Ind. 147; 18 Penn. St. 66; 6 Ill. 567; 15 Vt. 438; 3 Ired. No. C. 402; 13 Pick. Mass. 60; except that bridges owned by corporations or individuals are repairable by their proprietors, 4 Pick. Mass. 341; 9 *id.* 142; 1 Spenc. N. J. 323; 6 Johns. N. Y. 90; 24 Conn. 491; and that where the necessity for a bridge is created by the act of an individual or corporation in cutting a canal, ditch, or railway through a highway, it is the duty of the author of such necessity to make and repair the bridge. 6 Mass. 458; 23 Wend. N. Y. 466; 14 *id.* 58; 6 Hill, N. Y. 516; Woolrych, Ways, 202. The parties chargeable must constantly keep the bridge in such repair as will make it safe and convenient for the service for which it is required. Hawkins, Pl. Cr. c. 77, s. 1; 9 Dan. Ky. 403; 6 Johns. N. Y. 189; 1 Aik. Vt. 74; 8 Vt. 189; 6 *id.* 496; 23 Wend. N. Y. 254.

5. *Remedies for non-reparation.* If the parties chargeable with the duty of repairing neglect so to do, they are liable to indictment. Hawkins, Pl. Cr. c. 77, s. 1; Angell, High. § 275; 1 Hill, N. Y. 50; 28 N. H. 195; 6 Hill, N. Y. 516; 9 Pick. Mass. 142; 3 Ired. No. C. 411. It has also been held that they may be compelled to repair by mandamus. 5 Call. Va. 548, 556; 1 Hill, N. Y. 50; 14 B. Monr. Ky. 92; 3 Zabr. N. J. 214. But see 12 Ad. & E. 427; 3 Campb. 222. If a corporation be charged with the duty by charter, they may be proceeded against by *quo warranto* for the forfeiture of their franchise, 23 Wend. N. Y. 254; or by action on the case for damages in favor of any person specially injured by reason of their neglect. 1 Spenc. N. J. 323; 18 Conn. 32; 6 Johns. N. Y. 90; 6 Vt. 496; 6 N. H. 147; 4 Pick. Mass. 341. And in this country a similar action is given by statute, in many states, against public bodies chargeable with repair. 14 Conn. 475; 3 Harr. N. J. 108; 10 N. H. 173; Angell, High. § 286 *et seq.*

6. *Tolls.* The law of travel upon bridges is the same as upon highways, except when burdened by tolls. See HIGHWAY. The payment of tolls can be lawfully enforced only at the gate or toll-house. 15 Me. 402. Where by the charter of a bridge company certain persons are exempted from payment, such exemption is to be liberally construed. 10 Johns. N. Y. 467; 7 Cow. N. Y. 33; 2 Murph. No. C. 372; 2 Cow. N. Y. 419; 4 Rich, Eq. So. C. 459.

Bridges, when owned by individuals, are real estate, 4 Watts, Penn. 341; 1 R. I. 165; and also when owned by the public: yet the freehold of the soil is in its original owner. Coke, 2d Inst. 705. The materials of which they are formed belong to the parties who furnished them, subject to the public right of passage. 6 East, 154; 6 Serg. & R. Penn. 229.

A *private* bridge is one erected for the use of one or more private persons. Such a bridge will not be considered a public bridge although it may be occasionally used by the public. 12 East, 203–4; 3 Sandf. Ch. N. Y. 625; 1 Rolle, Abr. 368, *Bridges*, pl. 2. The builder of a private bridge over a private way is not indictable for neglect to repair though it be generally used by the public. 3 Hawks, Tenn. 193. See 7 Pick. Mass. 344; 1 *id.* 432; 11 Pet. 539; 6 Hill, N. Y. 516; 23 Wend. N. Y. 466; 4 Johns. Ch. N. Y. 150.

BRIEF (Lat. *brevis*, L. Fr. *briefe*, short).

In Ecclesiastical Law. A papal rescript sealed with wax. See BULL.

In Practice. A writ. It is found in this sense in the ancient law authors.

An abridged statement of the party's case. It should contain a *statement* of the *names of the parties*, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action; an abridgment of all the pleadings; a regular, chronological, and methodical *statement* of the *facts*, in plain common language; a *summary* of the *points* or *questions* in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or, if there be written evidence, an abstract of such evidence; the *personal character* of the witnesses, whether the moral character is good or bad, whether they are

naturally timid or over-zealous, whether firm or wavering; of the *evidence* of the *opposite party*, if known, and such facts as are adapted to oppose, confute, or repel it.

This statement should be perspicuous and concise. The object of a brief is to inform the person who tries the case of the facts important for him to know, to present his case properly where it has been prepared by another person,—as is the general practice in England, and to some extent in this country,—or as an aid to the memory of the person trying a case when he has prepared it himself. In some of the state courts and in the supreme court of the United States it is customary or requisite to prepare briefs of the case for the perusal of the court. These are written or printed. Of course the requisites of briefs will vary somewhat according to the purposes they are to subserve.

BRIEF OF TITLE. *In Practice.* An abridged and orderly statement of all matters affecting the title to a certain portion of real estate.

It should give the effective parts of all patents, deeds, indentures, agreements, records, and papers relating to such estate, with sufficient fulness to disclose their full effect, and should mention incumbrances existing, whether acquired by deed or use. All the documents of title should be arranged in chronological order, noticing particularly, in regard to deeds, the date, names of parties, consideration, description of the property, and covenants. See 1 Chitty, Pract. 304, 463; ABSTRACT OF TITLE.

BRIGBOTE (Sax.). A contribution to repair a bridge.

BRINGING MONEY INTO COURT. The act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty, or of an interpleader. See PAYMENT INTO COURT.

BROCAGE. The wages or commissions of a broker. His occupation is also sometimes called brocage.

BROCARIUS, BROCATOR. A broker; a middle-man between buyer and seller; the agent of both transacting parties. Used in the old Scotch and English law. Bell, Dict.; Cowel.

BROCELLA. A thicket, or covert, of bushes and brushwood. *Browse* is said to be derived hence. Cowel.

BROKERAGE. The trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS. Those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Paley, Agency, 13. See Comyns, Dig. *Merchant*, C.

A broker is, for some purposes, treated as the agent of both parties; but, in the first place, he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled, as to the terms, between the principals. Paley, Ag. Lloyd ed. 171, note p; 1 Younge & J. Exch. 387; 13 Metc. Mass. 463.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

They are paid a commission by the seller of the securities; and it is not their custom to disclose the names of their principals. There is an implied warranty that what they sell is what they represent it to be; and should a bill or note sold by them turn out to be a forgery, they are held to be responsible; but it would appear that by showing a payment over to their principals, or other special circumstances attending the transaction proving that it would be inequitable to hold them responsible, they will be discharged. Edwards, Bills, 291; 4 Du. N. Y. 79.

Exchange Brokers negotiate bills of exchange drawn on foreign countries, or on other places in this country.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities; although, as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business.

Insurance Brokers procure insurance, and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it, as factors have.

Pawnbrokers lend money in small sums, on the security of personal property, at usurious rates of interest. They are licensed by the authorities, and excepted from the operation of the usury laws.

Real Estate Brokers. Those who negotiate the sale or purchase of real property. They are a numerous class, and, in addition to the above duty, sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands.

Ship Brokers negotiate the purchase and sale of ships, and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.

Stock Brokers. Those employed to buy and sell shares of stocks in incorporated companies, and the indebtedness of governments.

In the larger cities, the stock brokers are associated together under the name of the *Board of Brokers*. See STOCK EXCHANGE. This Board is an association admission to membership in which is guarded with jealous care. Membership is forfeited for default in carrying out contracts, and rules are prescribed for the conduct of the business, which are enforced on all members. The purchases and sales are made at sessions of the Board, and are all officially recorded and published by an officer of the association. Stock brokers charge commission to both the buyers and sellers of stocks.

See Story, Ag. §§ 28–32; Malynes, Lex Merc. 143; Livermore, Ag.; Chitty, Com. Law.

BROTHEL. A bawdy-house; a common habitation of prostitutes.

Such places have always been deemed common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII. they were licensed in England, when that lascivious prince suppressed them. See Coke, 2d Inst. 205; BAWDY-HOUSE. For the history of these pernicious places, see Merlin, *Rép.* mot *Bordel;* Parent Duchatellet, *De la Prostitution dans la Ville de Paris*, c. 5, § 1; *Histoire de la Législation sur les Femmes publiques, etc.*, par M. Sabatier.

BROTHER. He who is born from the same father and mother with another, or from one of them only.

Brothers are of the whole blood when they are born of the same father and mother, and of the half-blood when they are the issue of one of them only. In the civil law, when they are the children of the same father and mother, they are called *brothers germain;* when they descend from the same father but not the same mother, they are *consanguine brothers;* when they are the issue of the same mother, but not the same father, they are *uterine brothers.* A *half-brother* is one who is born of the same father or mother, but not of both; one born of the same parents before they were married, a *left-sided brother;* and a bastard born of the same father or mother is called a *natural brother.* See BLOOD; HALF-BLOOD; LINE; Merlin, Répert. *Frère;* Dict. de Jurisp. *Frère;* Code, 3. 28. 27; Nov. 84, præf.; Dane, Abr. Index.

BROTHER-IN-LAW. The brother of a wife, or the husband of a sister.

There is no *relationship,* in the former case, between the husband and the brother-in-law, nor in the latter, between the brother and the husband of the sister: there is only *affinity* between them. See Vaugh. 302, 329.

BRUISE. In Medical Jurisprudence. An injury done with violence to the person, without breaking the skin: it is nearly synonymous with *contusion* (*q. v.*). 1 Chanc. Pract. 38. See 4 Carr. & P. 381, 487, 558, 565.

BUBBLE ACT. The name given to the statute 6 Geo. I. c. 18, which was passed in 1719, and was intended "for restraining several extravagant and unwarrantable practices therein mentioned." See 2 P. Will. 219.

BUGGERY. See SODOMY.

BUILDING. An edifice, erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is, therefore, real estate: it belongs to the owner of the soil. Cruise, Dig. tit. 1, s. 46. See 1 Chitty, Pract. 148, 171; Salk. 459; Hob. 131; 1 Metc. Mass. 258; Broom, Max. 172.

BULK. Merchandise which is neither counted, weighed, nor measured.

A sale by bulk is a sale of a quantity of goods such as they are, without measuring, counting, or weighing. La. Civ. Code, art. 3522, n. 6.

BULL. A letter from the pope of Rome, written on parchment, to which is attached a leaden seal impressed with the images of Saint Peter and Saint Paul.

There are three kinds of apostolical rescripts, —the *brief,* the *signature,* and the *bull;* which last is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patent of secular princes: when the bull grants a favor, the seal is attached by means of silken strings; and when to direct execution to be performed, with flax cords. Bulls are written in Latin, in a round and Gothic hand. Ayliffe, Par. 132; Ayliffe, Pand. 21; Merlin. *Répert.*

BULLETIN. An official account of public transactions on matters of importance. In France, it is the registry of the laws.

BULLION. The term bullion is commonly applied to uncoined gold and silver, in the mass or lump.

2. It includes, *first,* grains of gold, whether large or small, the former being called lumps, or nuggets, the latter, gold dust; *second,* amalgams, in which quicksilver has been used as an agent to collect or segregate the metals; silver thus collected, and from which the quicksilver has been expelled by pressure and heat, is called *plata pura; third,* bars and cakes; *fourth,* plate, in which is included all articles for household purposes made of gold or silver; *fifth,* jewelry, or personal ornaments, composed of gold or silver, or both. The term bullion also includes—*sixth,* foreign coins; for, as foreign coins are not a legal tender, or, in other words, not *money,* it follows that they are only pieces or lumps of gold or silver at the mint. Such coins, when received on deposit, are treated as other deposits of gold or silver: they are weighed, and their fineness is ascertained by assay, and their value determined by their weight and fineness.

3. When bullion is brought to the mint for coinage, it is weighed by the treasurer, in the presence of the depositor when practicable, and a receipt given, which states the description and weight of the bullion. And from every parcel of bullion deposited for coinage a sufficient portion is delivered to the assayer, which officer, after making an analysis or assay of the metal, reports the quality or fineness of the bullion; and from the report of the assayer and the weight of the bullion the treasurer estimates the whole value of the deposit,—also, the amount of charges or deductions, if any; of all which he gives a detailed statement to the depositor, and a certificate of the net value of the deposit, to be paid in coins of the same species of bullion as that deposited. When the coins which are the equivalent of any deposit of bullion are ready for delivery, they are paid to the depositor or his order by the treasurer, on a warrant from the director; and the payments shall be made, if demanded, in the order in which the bullion shall have been brought to the mint, giving priority according to priority of deposit only; and in the denomination of coins delivered, the treasurer shall comply with the wishes of the depositor, unless when impracticable or inconvenient to do so; in which case the denominatien shall be designated by the director. Act of Congress, Jan. 18, 1837, secs. 15, 16, 17, 19, and 30. See 5 U. S. Stat. at Large, ss. 138, 139, 140. Applied to branch mints at New Orleans, Charlotte, and Dahlonega, by act of March 3, 1835, sec. 5, 4 U. S. Stat. at Large, 775; and to branch mint at San Francisco by act of July 3, 1852, § 5, see 10 U. S. Stat. at Large, 12; and to assay office at New York by act of March 3, 1853, §§ 11 and 13, 10 U. S. Stat. at Large, 212. For refining of

gold bullion at the mint and its branches, see act of January 18, 1837, § 18, 5 U. S. Stat. at Large, 139, and act of March 3, 1853, § 5, 10 U. S. Stat. at Large, 212. As to the assay of bullion not intended for coinage, see act of May 19, 1828, 4 U. S. Stat. at Large, 278.

BULLION FUND. A deposit of public money at the mint and its branches. The object of this fund is to enable the mint to make returns of coins to private depositors of bullion without waiting until such bullion is actually coined. If the bullion fund is sufficiently large, depositors are paid as soon as their bullion is melted and assayed and the value ascertained. It thus enables the mint to have a stock of coin on hand to pay depositors in advance. Such bullion becomes the property of the government, and, being subsequently coined, is available as a means of prompt payment to other depositors. Act of May 23, 1850, 9 U. S. Stat. at Large, 436.

BUOY. A piece of wood, or an empty barrel, or other thing, moored at a particular place and floating on the water, to show the place where it is shallow, to mark the channel, or to indicate the danger there is to navigation.

The act of congress approved the 28th September, 1850, enacts "that all buoys along the coast, in bays, harbors, sounds, or channels, shall be colored and numbered, so that, passing up the coast or sound, or entering the bay, harbor, or channel, red buoys, with even numbers, shall be passed on the starboard hand, black buoys, with uneven numbers, on the port hand, and buoys with red and black stripes on either hand. Buoys in channel-ways to be colored with alternate white and black perpendicular stripes."

BURDEN OF PROOF. The duty of proving the facts in dispute on an issue raised between the parties in a cause.

Burden of proof is to be distinguished from *primâ facie* evidence or a *primâ facie* case. Generally, when the latter is shown, the duty imposed upon the party having the burden will be satisfied; but it is not necessarily so. 6 Cush. Mass. 364; 11 Metc. Mass. 460; 22 Ala. 20; 7 Blackf. Ind. 427; 1 Gray, Mass. 61; 7 Bost. Law Rep. 439.

2. The burden of proof lies upon him who substantially asserts the affirmative of the issue, 1 Greenleaf, Ev. § 74; 7 Eng. L. & Eq. 508; 3 Mees. & W. Exch. 510; but where the plaintiff grounds his case on negative allegations, he has the burden. 1 Term, 141; 6 *id.* 559; 2 Maule & S. 395; 5 *id.* 206; 1 Campb. 199; 1 Carr. & P. 220; 5 Barnew. & C. 758; 1 Me. 134; 4 *id.* 226; 2 Pick. Mass. 103; 4 *id.* 341; 5 Rich, So. C. 57; 1 Greenleaf, Ev. § 81.

3. In criminal cases, on the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall, in criminal proceedings, on the prosecuting party, though in order to convict he must necessarily have recourse to negative evidence. 1 Taylor, Ev. § 344; 12 Wheat. 460. The burden of proof is throughout on the government, to make out the whole case; and when a *primâ facie* case is established, the burden of proof is not thereby shifted upon the defendant, and he is not bound to restore himself to that presumption of innocence in which he was at the commencement of the trial. 1 Bennett & H. Lead. Crim. Cas. 352. See 9 Metc. Mass. 93; 5 Cush. Mass. 296; 2 Gratt. Va. 594; 1 Wright, Ohio, 20; 5 Yerg. Tenn. 340; 16 Miss. 401.

BUREAU (Fr.). A place where business is transacted.

In the classification of the ministerial officers of government, and the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet.

BURGAGE. A species of tenure, described by old law writers as but tenure in socage, where the king or other person was lord of an *ancient borough*, in which the tenements were held by a rent certain.

Such boroughs had, and still have, certain peculiar customs connected with the tenure, which distinguished it from the ordinary socage tenure. These customs are known by the name of Borough-English; and they alter the law in respect of descent, as well as of dower, and the power of devising. By it the youngest son inherits the lands of which his father died seised. A widow, in some boroughs, has dower in respect to all the tenements which were her husband's; in others, she has a moiety of her husband's lands so long as she remains unmarried; and with respect to devises, in some places, such lands only can be devised as were acquired by purchase; in others, estates can only be devised for life. 2 Blackstone, Comm. 82; Glanville, b. 7, c. 3; Littleton, § 162; Croke, Car. 411; 1 Salk. 243; 2 Ld. Raym. 1024; 1 P. Will. 63; Fitzherbert, Nat. Brev. 150; Croke, Eliz. 415.

BURGATOR. One who breaks into houses or enclosed places, as distinguished from one who committed robbery in the open country. Spelman, Gloss. *Burglaria.*

BURGESS. A magistrate of a borough. Blount. An officer who discharges the same duties for a borough that a mayor does for a city. The word is used in this sense in Pennsylvania.

An inhabitant of a town; a freeman; one legally admitted as a member of a corporation. Spelman, Gloss. A qualified voter. 3 Stephen, Comm. 192. A representative in parliament of a town or borough. 1 Blackstone, Comm. 174.

BURGESS ROLL. A list of those entitled to new rights under the act of 5 & 6 Will. IV. c. 74. 3 Stephen, Comm. 192 *et seq.*

BURGHMOTE. In Saxon Law. A court of justice held twice a year, or oftener, in a *burg*. All the thanes and free owners above the rank of ceorls were bound to attend without summons. The bishop or lord held the court. Spence, Eq. Jur.

BURGLAR. One who commits burglary. He that by night breaketh and entereth

into the dwelling-house of another. Wilmot, Burgl. 3.

BURGLARIOUSLY. In Pleading. A technical word which must be introduced into an indictment for burglary at common law.

No other word at common law will answer the purpose, nor will any circumlocution be sufficient. 4 Coke, 39; 5 *id.* 121; Croke, Eliz. 920; Bacon, Abr. *Indictment* (G, C). But there is this distinction: when a statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named, at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, an indictment which charges the statute crime of burglary is sufficient, without averring that the crime was committed "burglariously." 4 Metc. Mass. 357.

BURGLARY. In Criminal Law. The breaking and entering the house of another in the night-time, with intent to commit a felony therein, whether the felony be actually committed or not. Coke, 3d Inst. 63; 1 Hale, Pl. Cr. 549; 1 Hawkins, Pl. Cr. c. 38, s. 1; 4 Blackstone, Comm. 224; 2 East, Pl. Cr. c. 15, s. 1, p. 484; 2 Russell, Crimes, 2; Roscoe, Crim. Ev. 252; 1 Coxe, N. J. 441; 7 Mass. 247.

2. *In what place a burglary can be committed.* It must, in general, be committed in a mansion-house, actually occupied as a dwelling; but if it be left by the owner *animo revertendi*, though no person resides in it in his absence, it is still his mansion. Fost. 77; 3 Rawle, Penn. 207; 10 Cush. Mass. 478. See Dwelling-House. But burglary may be committed in a church, at common law. 3 Cox, Cr. Cas. 581; Coke, 3d Inst. 64. It must be the dwelling-house of another person. 1 Bishop, Crim. Law, § 91; 2 East, Pl. Cr. 502. See 4 Dev. & B. No. C. 422; 12 N. H. 42; 1 Russ. & R. Cr. Cas. 525; 1 Mood. Cr. Cas. 42.

3. *At what time it must be committed.* The offence must be committed in the night; for in the day-time there can be no burglary. 4 Blackstone, Comm. 224; 1 Carr. & K. 77; 16 Conn. 32; 10 N. H. 105. For this purpose it is deemed night when by the light of the sun a person cannot clearly discern the face or countenance of another. 1 Hale, Pl. Cr. 550; Coke, 3d Inst. 63; 1 Carr. & P. 297; 7 Dane, Abr. 134. This rule, it is evident, does not apply to moonlight. 4 Blackstone, Comm. 224; 2 Russell, Crimes, 32; 10 N. H. 105; 6 Miss. 20. See 2 Cush. Mass. 582. The breaking and entering need not be done the same night, 1 Russ. & R. 417; but it is necessary the breaking and entering should be in the night-time; for if the breaking be in day-light and the entry in the night, or *vice versâ*, it is said, it will not be burglary. 1 Hale, Pl. Cr. 551; 2 Russell, Crimes, 32. But *quære*, Wilmot, Burgl. 9. See Comyns, Dig. *Justices* (P. 2); 2 Chitty, Crim. Law, 1092.

4. *The means used.* There must be both a *breaking* and an *entry* or an *exit*. An *actual breaking* takes place when the burglar breaks or removes any part of the house, or the fastenings provided for it, with violence. 1 Bishop, Crim. Law, § 190. Breaking a window, taking a pane of glass out, by breaking or bending the nails or other fastenings, 1 Carr. & P. 300; 9 *id.* 44; 1 Russ. & R. 341, 499; 1 Leach, Cr. Cas. 406; cutting and tearing down a netting of twine nailed over an open window, 8 Pick. Mass. 354, 384; raising a latch, where the door is not otherwise fastened, 1 Strange, 481; 8 Carr. & P. 747; Coxe, N. J. 439; 1 Hill, N. Y. 336; 4 *id.* 437; 25 Me. 500; picking open a lock with a false key; putting back the lock of a door, or the fastening of a window, with an instrument; lowering a window fastened only by a wedge or weight, 1 Russ. & R. 355, 451; turning the key when the door is locked in the inside, or unloosening any other fastening which the owner has provided; lifting a trap-door, 1 Mood. Cr. Cas. 377, but see 4 Carr. & P. 231, are several instances of actual breaking. But removing a loose plank in a partition wall was held not a breaking. 1 Mass. 476. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking. Alison, Pract. 284. See 1 Swint. Just. Sc. 433. *Constructive breakings* occur when the burglar gains an entry by fraud, 1 Crawf. & D. Cr. Cas. 202; Hob. 62; 18 Ohio, 308; 9 Ired. No. C. 463; by conspiracy, or threats. 1 Russell, Crimes, Graves ed. 792; 2 *id.* 2; 2 Chitty, Crim. Law, 1093. The breaking of an inner door of the house will be sufficient to constitute a burglary. 1 Hale, Pl. Cr. 553; 1 Strange, 481; 8 Carr. & P. 747; 1 Hill & D. N. Y. 63; 2 Bishop, Crim. Law, § 84.

5. Any the least *entry*, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offence. Coke, 3d Inst. 64; 4 Blackstone, Comm. 227; Bacon, Abr. *Burglary* (B); Comyns, Dig. *Justices* (P 4). But the introduction of an instrument, in the act of breaking the house, will not be sufficient entry unless it be introduced for the purpose of committing a felony. 1 Leach, Cr. Cas. 4th ed. 406; 1 Mood. Cr. Cas. 183; 1 Gabbett, Crim. Law, 174. The whole physical frame need not pass within. 1 Bishop, Crim. Law, §§ 81–83; 1 Gabbett, Crim. Law, 176. See 1 Russ. & R. Cr. Cas. 417; 7 Carr. & P. 432; 9 *id.* 44; 4 Ala. N. s. 643.

There was, at common law, doubt whether breaking out of a dwelling-house would constitute burglary, 4 Blackstone, Comm. 227; 1 Bennett & H. Lead. Crim. Cas. 540; but it was declared to be so by stat. 12 Anne, c. 7, § 3, and 7 & 8 Geo. IV. c. 29, § 11. As to what acts constitute a breaking out, see 1 Jebb, Cr. Cas. 99; 8 Carr. & P. 747; 4 *id.* 231; 1 Russell, Crimes, Graves ed. 792; 1 Bennett & H. Lead. Crim. Cas. 540–544.

6. *The intention.* The intent of the break-

ing and entry must be felonious: if a felony, however, be committed, the act will be *primâ facie* evidence of an intent to commit it. 1 Gabbett, Crim. Law, 192. If the breaking and entry be with an intention to commit a trespass, or other misdemeanor, and nothing further is done, the offence will not be burglary. 7 Mass. 245; 16 Vt. 551; 1 Hale, Pl. Cr. 560; East, Pl. Cr. 509, 514, 515; 2 Russell, Crimes, 33. Consult Bishop; Chitty; Gabbett; Russell on Criminal Law; Bennett & Heard, Leading Criminal Cases; Wilmot, Digest of Burglary.

BURGOMASTER. In Germany, this is the title of an officer who performs the duties of a mayor.

BURIAL. The act of interring the dead.

No burial is lawful unless made in conformity with the local regulations; and when a dead body has been found, it cannot be lawfully buried until the coroner has holden an inquest over it. In England it is the practice for coroners to issue warrants to bury, after a view. The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325.

BURLAW COURTS. In Scotch Law. Assemblages of neighbors to elect burlaw men, or those who were to act as rustic judges in determining disputes in their neighborhood. Skene; Bell, Dict.

BURNING. See ACCIDENT; FIRE.

BURNING IN THE HAND. When a layman was admitted to benefit of the clergy he was burned in the hand, "in the brawn of the left thumb," in order that he might not claim the benefit twice. This practice was finally abolished by stat. 19 Geo. III. c. 74; though before that time the burning was often done with a cold iron. 12 Mod. 448; 4 Blackstone, Comm. 267 *et seq.*

BURYING-GROUND. A place appropriated for depositing the dead; a cemetery. In Massachusetts, burying-grounds cannot be appropriated to roads without the consent of the owners. Mass. Gen. Stat. 244.

BUSHEL. The Winchester bushel, established by the 13 Will. III. c. 5 (1701), was made the standard of grain. A cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel: the capacity is 2145.42 cubic inches. The bushel established by the 5 & 6 Geo. IV. c. 74, is to contain 2218.192 cubic inches. This measure has been adopted in many of the United States. In New York the heaped bushel is allowed, containing 2815 cubic inches. The exceptions, as far as known, are Connecticut, where the bushel holds 2198 cubic inches; Kentucky, 2150¾; Indiana, Ohio, Mississippi, and Missouri, where it contains 2150.4 cubic inches. Dane, Abr. c. 211, a. 12, s. 4. See the whole subject discussed in report of the Secretary of State of the United States to the Senate, Feb. 22, 1821.

BUSINESS HOURS. The time of the day during which business is transacted. In respect to the time of presentment and demand of bills and notes, business hours generally range through the whole day down to the hours of rest in the evening, except when the paper is payable at a bank or by a banker. 2 Hill, N. Y. 835. See 15 Me. 67; 17 *id.* 230.

BUTLERAGE. A certain portion of every cask of wine imported by an alien, which the king's butler was allowed to take.

Called also prisage. 2 Bulstr. 254. Anciently, it might be taken also of wine imported by a subject. 1 Blackstone, Comm. 315; Termes de la Ley; Cowel.

BUTT. A measure of capacity, equal to one hundred and eight gallons. See MEASURE.

BUTTALS. The bounding lines of land at the end; abuttals, which see.

BUTTS. The ends or short pieces of arable lands left in ploughing. Cowel.

Butt also denotes a measure of land, Jac. Dict.; Cowel; and a measure of quantity, equal to one hundred and eight gallons. See MEASURE.

BUTTS AND BOUNDS. The lines bounding an estate. The angles or points where these lines change their direction. Cowel; Spelman, Gloss. See ABUTTALS.

BUYING TITLES. The purchase of the rights of a disseisee to lands of which a third person has the possession.

When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, as a general rule of the common law, the sale is void: the law will not permit any person to sell a quarrel, or, as it is commonly termed, a pretended title. Such a conveyance is an offence at common law and by a statute of Hen. VIII. This rule has been generally adopted in the United States, and is affirmed by express statute in some of the states. 2 Washburn, Real Prop. In the following states the act is unlawful, and the parties are subject to various penalties in the different states: in *Connecticut*, 4 Conn. 575; *Indiana*, 1 Ind. 127; 8 Blackf. Ind. 366; *Kentucky*, 1 Dan. Ky. 566; 2 *id.* 374; see 2 Litt. Ky. 225, 393; 4 Bibb, Ky. 424; *Maine*, 1 Me. 238; 29 *id.* 128; *Massachusetts*, 5 Pick. Mass. 356; 6 Metc. Mass. 407; *Michigan*, 1 Dougl. Mich. 546; *New Hampshire*, 12 N. H. 291; *New York*, 24 Wend. N. Y. 87; see 4 Wend. N. Y. 474; 7 *id.* 53, 152; 8 *id.* 629; 11 *id.* 442; *North Carolina*, 1 Murph, No. C. 114; 4 Dev. No. C. 495; *Ohio*, Walker, Am. Law, 297, 351; *South Carolina; Vermont*, 6 Vt. 198.

In *Illinois*, Ill. Rev. Laws, 130; *Missouri*, Rev. Stat. 119; *Pennsylvania*, 2 Watts, Penn. 272, such sales are valid.

BY-BIDDING. Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained.

By-bidders are also called *puffers*, which see. The practice is probably allowable if it be done fairly, with an intention only to prevent a sale at an unduly low price. 6 B. Monr. Ky. 630; 11 Paige, Ch. N. Y. 439; 3 Story, C. C. 622; 15 Mees. & W. Exch. 371; 1 Parsons, Contr. 418. See BID; AUCTION.

BY BILL. Actions commenced by *capias* instead of by original writ were said to be *by bill*. 3 Blackstone, Comm. 285, 286.

The usual course of commencing an action in the King's Bench is by a bill of Middlesex. In an action commenced *by bill* it is not necessary to notice the form or nature of the action. 1 Chitty, Plead. 283.

BY ESTIMATION. A term used in conveyances. In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres *by estimation*, or so many acres, *more or less*. When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief. 2 Freem. 106. See 1 Call. Va. 301; 4 Hen. & M. Va. 184; 6 Binn. Penn. 106; 1 Serg. & R. Penn. 166; 2 Johns. N. Y. 37; 5 *id.* 508; 15 *id.* 471; 3 Mass. 380; 5 *id.* 355; 1 Root, Conn. 528. The meaning of these words has never been precisely ascertained by judicial decision. See Sugden, Vend. 231–236; Wolffius, Inst. § 658; and the cases cited under the articles CONSTITUTION; MORE OR LESS; SUBDIVISION.

BY-LAWS. Rules and ordinances made by a corporation for its own government.

2. The power to make by-laws is usually conferred by express terms of the charter creating the corporation; though, when not expressly granted, it is given by implication, and it is incident to the very existence of a corporation. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication. 2 Kyd, Corp. 102; 2 P. Will. 207; Angell, Corp. 177. The power of making by-laws is to be exercised by those persons in whom it is vested by the charter; but if that instrument is silent on that subject, it resides in the members of the corporation at large. 1 Harr. & G. Md. 324; 4 Burr. 2515, 2521; 6 Brown, Parl. Cas. 519.

3. The constitution of the United States, and acts of congress made in conformity to it, the constitution of the state in which a corporation is located, and acts of the legislature constitutionally made, together with the common law as there accepted, are of superior force to any by-law; and such by-law, when contrary to either of them, is therefore void whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than they themselves possess. 7 Cow. N. Y. 585, 604; 5 *id.* 538. See, generally, Angell, Corp. c. 9; Willcox, Corp. c. 2, § 3; Bacon, Abr.; 4 Viner, Abr. 301; Dane, Abr. Index; Comyns, Dig.

BY-LAW MEN. In an ancient deed, certain parties are described as "yeomen and *by-law men* for this present year in Easinguold." 6 Q. B. 60.

They appear to have been men appointed for some purpose of limited authority by the other inhabitants, as the name would suggest, under by-laws of the corporation appointing.

BY THE BYE. In Practice. Without process. A declaration is said to be filed by the bye when it is filed against a party already in the custody of the court under process in another suit. This might have been done, formerly, where the party was under arrest and technically in the custody of the court; and even giving common bail was a sufficient custody in the King's Bench. 1 Sellon, Pract. 228; 1 Tidd, Pract. 419. It is no longer allowed. Archbold, New Pract. 293.

C.

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See **A.**

CABALLERIA. In Spanish Law. A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49; 12 Pet. 444, n.; Escriche, Dicc. Raz.

CABINET. Certain officers who, taken collectively, form a council or advisory board; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the attorney-general, and the postmaster-general.

2. These officers are the advisers of the president. They are also the heads of their respective departments; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their

respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president, who presides over its deliberations and directs its proceedings. No record of its doings is kept; and it has, as a body, no legal authority. Its action is advisory merely; and the president and heads of departments in the execution of their official duties are entitled to disregard the advice of the cabinet and take the responsibility of independent action.

3. In England, the king, under its constitution, is irresponsible; or, as the phrase is, the king can do no wrong. The real responsibility of government in that country, therefore, rests with his ministers, who constitute his cabinet. The king may dismiss his ministers if they do not possess his confidence; but they are seldom dismissed by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

The first lord of the treasury, the lord chancellor, the principal secretaries of state, and the chancellor of the exchequer, are always of the cabinet; but in regard to the other great officers of state the practice is not uniform, as at times they hold and at others do not hold seats in the cabinet. The British cabinet usually consists of from ten to fifteen persons. See Knight's Pol. Dict. title CABINET.

CACICAZGOS. **In Spanish Law.** Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. 12 Pet. 428, n.; 3 Am. St. Pap. 679.

CADERE (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa*, or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratum* (the assize has become a jury). Calvinus, Lex.; Smith, Lat. Dict.

CADET. A younger brother. One trained for the army.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall).

In Civil Law. An inheritance; an escheat; every thing which falls to the legal heir by descent.

By some writers *bona caduca* are said to be those to which no heir succeeds, equivalent to escheats. DuCange.

CÆTERORUM (Lat. of the rest).

In Practice. Administration granted as to the residue of an estate, which cannot be administered under the limited power already granted. 1 Williams, Ex. 357; 2 Hagg. 62; 4 Hagg. Eccl. 382, 386; 4 Mann. & G. 398; 1 Curt. Eccl. 286.

It differs from administration *de bonis non* in this, that in *cæterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised. See ADMINISTRATION.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six,—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See BISSEXTILE. This period of time exceeds the solar year by eleven minutes or thereabouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S.) of that year being reckoned as the 14th day of September (N. S.).

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments.

CALIFORNIA. One of the new states of the United States of America.

It is situated on the coast of the Pacific Ocean, its northern boundary being the forty-second degree of north latitude, and its southern boundary being the division-line between the United States and Mexico. It was formerly a department of Mexico, and was acquired by the United States by conquest and the treaty of Guadalupe Hidalgo of 1848.

Congress not having provided for the organization of a territorial government in California, Brevet Brigadier-General Riley, acting as civil governor, on the 3d of June, 1849, issued a proclamation recommending the election of delegates to a convention to frame a state constitution or a plan for a territorial government. In accordance with this recommendation, the people elected delegates to a convention which met at Monterey, September 1, 1849, and on the 13th of October, 1849, adopted a constitution for the state. This constitution, with the exception of a change as to the mode of making amendments, remains unaltered to the present time. It was submitted to a vote of the people on the 13th of November, 1849, and was by them ratified. At the same time an election was held to fill the offices of governor and lieutenant-governor, and for members of the legislature, and for two members of congress. The legislature chosen under the constitution assembled at San Jose on the 15th of December, 1849, and in a few days thereafter two United States senators were elected and the new government was fully organized. From that time it exercised within the limits of the state an undisputed authority. In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

2. On the 9th of September, 1850, congress passed an act admitting the state into the Union on an

equal footing with the original states, and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby the title of the United States to any right to dispose of the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

3. Congress passed an act, March 3, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon. From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

4. By an act passed on the 28th of September, 1850, congress declared all laws of the United States, not locally inapplicable, in force within the state of California; created two district courts, dividing the state into two judicial districts, the line of division being the thirty-seventh parallel of north latitude; conferred upon each of the district judges the same jurisdiction and powers which were by law given to the judge of the southern district of New York, and, in addition thereto, invested the two district courts within the limits of their respective districts with all the jurisdiction and powers in all civil cases then exercised by the circuit courts of the United States.

This jurisdiction as a circuit court was taken away by an act passed by congress March 2, 1855, which established in California a circuit court of the United States for the districts of California, and conferred upon it the ordinary jurisdiction of such a court, both original and appellate. This act also gives to the circuit judge the right and power to form part of and preside over either of the district courts when exercising appellate jurisdiction over cases brought from the board of land commissioners.

5. The constitution enjoins upon the legislature the creation of a system of common schools, and devotes to their support the proceeds of all lands that may be granted by the United States for the support of schools, and the five hundred thousand acres of land granted to the new states under the act of congress distributing the proceeds of the public lands among the several states, and the estates of all deceased persons who may have died without leaving any will or heir.

In the broadest terms it secures freedom of religious opinion and the liberty of speech and the press, and contains provisions that no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud; that foreigners who are or may hereafter become *bonâ fide* residents of the state shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens; that slavery and involuntary servitude, unless for the punishment of crimes, shall never be tolerated in the state; that the credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, or corporation, nor shall the state, directly or indirectly, become a stockholder in any association or corporation; that all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws are also to be passed providing for the registration of the wife's separate property; that a certain portion of the homestead and other property of all heads of families shall be exempted from forced rate. Under the latter provision the law exempts the homestead of the head of the family, not exceeding in value the sum of five thousand dollars.

6. *The Legislative Power* is vested in a senate and assembly. The sessions of the legislature are annual, and commence on the first Monday of January, unless convened before that day by the governor. The senators must be electors of the district they represent, citizens and inhabitants of the state one year, and of the district from which they are chosen six months, next before the election. They are chosen for the term of two years. Their number is to be not less than one-half that of the members of the assembly; and, as nearly as possible, one-half of the whole number are to be elected each year. The lieutenant-governor presides over the senate, but has only a casting vote.

Members of the assembly must be qualified electors of their counties.

They are chosen annually.

The assembly has the sole power of impeachment; and all impeachments are tried by the senate. The governor, lieutenant-governor, secretary of state, comptroller, treasurer, attorney-general, justices of the supreme court, and judges of the district court are liable to impeachment for any misdemeanor in office; but the judgment in such cases extends only to removal from office and disqualification to hold any office of honor, trust, or profit under the state.

Members of the legislature are to receive a compensation, to be fixed by law and paid out of the public treasury; but no increase of compensation shall take effect during the term for which the members of either house shall have been elected.

7. No senator or member of assembly can, during the term for which he was elected, be appointed to any civil office of profit under the state which has been created or the emoluments of which have been increased during his term, except such offices as may be filled by election by the people.

The legislature is prohibited from granting any divorce, or allowing the sale of lottery-tickets, from granting any charter for banking purposes, and from creating any corporation by special act, except for municipal purposes.

In respect to the creation of debts, the constitution provides as follows: "The legislature shall not, in any manner, create any debt or debts, liability or liabilities, which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection, unless the same shall be authorized

by law for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years from the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until at a general election it shall have been submitted to the people and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each judicial district, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people."

The Executive Power.

8. *The Governor* is elected by the qualified electors, at the time and place of voting for members of the assembly; and his term of office is two years from the time of his installation, and until the qualification of his successor. No person is eligible to the office of governor who has not been a citizen of the United States and a resident of the state two years next preceding the election, and attained the age of twenty-five years at the time of his election; nor can he exercise the office of governor if he holds any office under the United States, or any other office under the state.

In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of his office, resignation, or absence from the state, the powers and duties of the office devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease.

He is the commander-in-chief of the militia; is to see that the laws are executed; has power to call out the militia to execute the laws, suppress insurrections, or repel invasions; may adjourn the legislature in case of disagreement between the two houses on the subject, and has a qualified veto upon all laws, a majority of two-thirds of each house being required to pass a law notwithstanding his objections.

The Lieutenant-Governor is elected at the same time and place, for the same term, and must possess the same qualifications, as the governor.

The Judicial Power.

9. *The Supreme Court* consists of a chief justice and two associate justices, any two of whom constitute a quorum.

The justices of the supreme court are elected at the general election, by the qualified electors of the state, and hold their offices for six years from the 1st of January after their election. They are so classified that one goes out of office every two years. The senior justice in commission is the chief justice.

This court has appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, where the legality of any tax, toll, impost, or municipal fine, is in question, and in all criminal cases amounting to felony on questions of law alone.

The District Courts have original jurisdiction, in law and equity, in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts, their jurisdiction is unlimited.

The state is divided by the legislature into fifteen judicial districts, for each of which a district judge is elected by the electors of the district and holds his office for six years.

Three terms are held in each county annually.

10. *A County Court* is held in each county each alternate month, by a judge elected by the people of the county for the term of four years. This court has jurisdiction of appeals from justices', mayors', and recorders' courts, and has original jurisdiction of cases of mechanics' lien, of process against ships where the voyages are partly out of the state, of insolvency proceedings, and to remove or abate nuisances. It regulates the internal police of the county, has the supervision of roads, bridges, etc. Comp. Laws, 744.

The Court of Sessions is composed of a county judge and two justices, selected by the justices of the county from their number as associate judges. Terms are held in each county of this court every second month, alternating with the county court. It has a general criminal jurisdiction in cases where a fine less than five hundred dollars may be inflicted, and, in San Francisco, over all crimes for which the penalty is less than death.

A Probate Court is held by the county judge of each county. It has the common jurisdiction, including care of the estates of decedents, guardianship of orphans, lunatics, probate of wills, and similar matters. Comp. Laws, 748.

11. *The Superior Court* for the city of San Francisco is composed of one chief and two associate justices, elected for the term of three years by the voters of the city. Either judge may hold court, or all may hold at the same time in different places. Terms are to be held monthly. It has the jurisdiction generally of a district court within the limits of the city of San Francisco. Laws 1850–53, p. 160; Comp. Laws, 743; Laws 1850, p. 97.

Recorders' and *Mayors' Courts* exist in the various cities, with jurisdiction over offences against the city laws.

Justices of the Peace are elected, two or more in each township, by the voters thereof, for the term of two years. They have a limited jurisdiction in actions to recover money, foreclose personal mortgages, or enforce liens on personal property, and to recover specific property, the limit being two hundred dollars of value.

The justices of the supreme court and district judges are ineligible to any office during the term for which they are elected.

No judicial officer, except a justice of the peace, can receive to his own use any fees or perquisites of office. The justices of the supreme court and the district and county judges are to receive, at stated times, a compensation, which cannot be increased nor diminished during the term for which they are elected.

Judges cannot charge juries with respect to matters of fact, but may state the testimony and declare the law.

CALLING THE PLAINTIFF. In Practice. A formal method of causing a non-suit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become non-suited, he withdraw shimself; whereupon the crier is ordered to call the plaintiff, and on his failure to appear he becomes non-suited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Sharswood, Blackst. Comm. 376; 2 Carr. & P. 403; 5 Mass. 236; 7 *id.* 257; 4 Wash. C. C. 97.

CALLING TO THE BAR. Conferring the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

CALUMNIÆ JUSJURANDUM (Lat.) The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility. Bishop, Marr. & Div. § 353. A somewhat similar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. In Civil Law. Persons who accuse others, whom they know to be innocent, of having committed crimes.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIUM. Change; exchange. Applied in the civil law to exchange of lands, as well as of money or debts. DuCange.

Cambium reale or *manuale* was the term generally used to denote the technical common-law exchange of lands; *cambium locale, mercantile, or trajectitium*, was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change*, n. 12; Story, Bills, § 2 *et seq.*

CAMERA REGIS (Lat. the chambers of the king). A term formerly applied especially to harbors, and generally to all the harbors or ports of the kingdom. Cowel.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius;* 1 Perr. & D. 243.

CAMINO. In Spanish Law. A road or highway. Las Partidas, pt. 3, tit. 2, l. 6.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. Champerty.

CAMPERTUM. A cornfield; a field of grain. Cowel; Whishaw.

CAMPUS (Lat. a field). A share or division of land; a division of that which would otherwise be in gross. Champerty. Blount; Cowel.

CANADA. The name of one of the British possessions in North America.

The eastern part of Canada was discovered by Gaboto, while in the English service, in 1497; but the country was first taken actual possession of by the French, to which power it was formally assigned in 1632. It remained in French possession till 1759, when it was conquered by the British, to whom it was formally ceded by the treaty of Paris, February 10, 1763. Canada was governed as one province, under the title of the province of Quebec, until the year 1791, when the two provinces were divided, under the provisions of the act of 31 Geo. III. c. 31. In the year 1840, under the act 3 & 4 Vict. c. 35, the two provinces were reunited, and continue to form one province.

2. The first frame of government was constructed under the provisions of the royal proclamation of Oct. 7, 1763. This established, among other matters, the common law of England as the law of the province. In 1775, under the act 14 Geo. III. c. 83, the provisions of this proclamation, so far as the same related to the province of Quebec and all ordinances made by the governor and council relative to the civil government and administration of justice in the province, were repealed. The criminal law of England, however, was reserved from the effect of this repeal, and, with the modifications introduced by provincial statutes, is still in force. Provision was expressly made that resort should be had to Canadian laws as they had existed, until they should be altered by imperial or provincial legislation, for the determination of all questions relating to property and civil rights. But these provisions were not to apply to lands which had been or might be granted by his Majesty in free and common socage. For the construction given to the clauses containing these provisions, and the act 6 Geo. IV. c. 59, limiting the application of the English law in the lower province to conveyances, inheritances, and dower, see 1 Low. C. 221; 2 *id.* 369; 3 *id.* 309; 8 *id.* 34.

3. By a series of enactments, provisions were made for changing the tenure of lands from the feudal system as under the French law into a tenure by free and common socage. The change is said to be complete in the upper province, but is only partially so in the lower.

The system of laws and of administration of justice in the upper province is substantially that of England, while in the lower province the civil law, though much modified by local enactments and approaching to the common law in many points, is the basis of the system of jurisprudence.

The constitution of the province is to be found in the various acts of the British parliament, the royal commissions and instructions to the governors, the orders in council, and the acts of the provincial parliaments. The most important of the acts of the British parliament are given in the collection of statutes prepared by authority and called the "Consolidated Laws." Consult Mills, Colonial Constitutions, and stat. 14 Geo. III. c. 83 (1774); 18 Geo. III. c. 12 (1778); 31 Geo. III. c. 31 (1791); 6 Geo. IV. c. 59; 3 & 4 Vict. c. 35 (1840); 11 Vict. c. 56 (1848); 17 & 18 Vict. c. 118 (1854); Prov. Act 16 Vict. cc. 152–154.

4. The frame of government is modelled after that of England, the power being vested in a governor, who represents the king, a parliament, composed of two bodies, and courts, which are entirely distinct in the two provinces.

Any male person twenty-one years of age, a subject of her Majesty by birth or naturalization, and not disqualified by law, may vote for members of the legislative council and assembly, if he be enrolled on the last assessment-roll, as revised, corrected, and in force, as owner, tenant, or occupant of real property of the assessed value of three hundred dollars clear of incumbrances, or of the annual clear value of thirty dollars, situated within the limits of the town or city for municipal purposes, or as possessed of property to the clear value of two hundred dollars, or clear annual value of twenty dollars, situated within the limits of any township, parish, or place within the limits of such town or city for representative, but not for municipal, purposes; or if

enrolled on such roll, in any parish, township, town, village, or place not within the limits of a town or city entitled to send a member to the legislative assembly, as owner, tenant, or occupant of property of the clear assessed value of two hundred dollars, or the clear annual value of twenty dollars, situated in the district in which such town, etc. is included. Judges of all courts holding fixed sessions, and officers of such courts, as sheriffs and the like, under a penalty of two thousand dollars, officers of the customs, returning officers of elections, and all who have been employed by any candidate in assisting or forwarding his election, are prohibited voting.

5. It is declared that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so that the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all her Majesty's subjects within the same. Consol. Can. Laws, 857.

The Legislative Power.

The legislative council is composed of two classes of members. One class is of those who were appointed by commission from the crown, and who retain the office for life. In addition to this class, who were all appointed prior to July 14, 1856, by statute of this latter date the council is to consist of forty-eight members, elected from as many electoral districts, twenty-four of which are in the upper and twenty-four in the lower province, for the term of eight years, by the qualified electors. The order of elections is so arranged that one-fourth the whole number go out of office every second year.

6. A councillor must be a British subject by birth or naturalization, a resident in Canada, of the full age of thirty years. He must be legally or equitably seised as of freehold, for his own use and benefit, of lands or tenements held in free and common soccage, or in *fief, francallen*, or roture, in the province, of the value of eight thousand dollars over and above all debts, charges, and dues; and in case of the elective councillors such lands must be within the district for which they are respectively elected. Generally, with some specified exceptions, no person holding an office of profit under the crown is eligible as a member of either branch of parliament. No person may be a member of both houses; but a councillor may be speaker of the assembly. No member can take his seat until he has filed a declaration of qualifications and taken the oath of allegiance.

This council constitutes a co-ordinate branch of the legislative authority, with a class of powers resembling those of the English house of peers and the senates of the United States and the various states.

7. *The legislative assembly* is composed of one hundred and thirty members, elected by the qualified electors of the various towns, cities, counties, or ridings which constitute the electoral districts into which the province is divided. Sixty-five members are returned from each province. No person holding an office of profit under the crown, with a few specified exceptions, is eligible. The speaker is appointed by the governor from among the members of the council. In case of any vacancies arising by death or otherwise, the governor issues a warrant to the clerk of the crown in chancery, who thereupon issues a writ for a new election.

One session of parliament is to be held annually, so that twelve months shall not intervene between the close of one session and the commencement of the next. Each parliament is to last for four years, unless sooner prorogued, and no longer. No parliament is to determine by demise of the crown merely.

The parliament of the province is empowered to make laws for the peace, welfare, and good government thereof; and all such laws so passed and assented to by her Majesty, or her heirs and successors, or in her Majesty's name by the governor, lieutenant-governor, or person administering government, are declared binding to all intents and purposes. When a bill has passed parliament, it is submitted to the governor, who, in his discretion, under the statute and his private instructions, is to declare that he assents or withholds his assent in her Majesty's name, or that he reserves such bill for the signification of her Majesty's pleasure. A copy of each bill assented or reserved is transferred to the queen in council, who at any time within two years may disallow the bill, and the disallowance, with the governor's signification to parliament or proclamation, makes the bill void from the date of the signification. No bill reserved is of any force till proclamation, or speech, or message to parliament by the governor announces the assent of her Majesty to the same. If such assent is not given within two years from the day the bill is presented to the governor, it has no force whatever.

The Executive Power.

8. *The governor* is appointed by the crown, and commissioned under the great seal. The appointment is understood to last for six years, unless he is sooner recalled. His commission, with the instructions annexed, form an important part of the constitution of the province. He is the supreme executive power, and represents the crown. He has the prerogative of summoning, adjourning, proroguing, and dissolving all legislative assemblies; of veto on all their bills; of reprieving and pardoning, under certain restrictions; of suspending for misconduct all officers, civil, naval, or military, in the province. He has the appointment to many salaried offices, it being understood that all under three hundred pounds sterling a year will be left to him, while his recommendations are generally followed as to others. He is custodian of the public seal of the colony. Process is issued by him and tested in his name. He has the general superintendence of education. The moneys to be expended for the public service are issued under his warrant. Mills, Col. Const. 25.

The governor is styled the "Governor-General of British North America, and Captain-General and Governor-in-Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the island of Prince Edward, and Vice-Admiral of the same."

9. *The Executive Council* has usually consisted of eleven members, including the president, secretary, inspector-general, law officers, commissioners of public works, and other ministers, who are deemed "responsible" to the people, and liable to be displaced upon vote of the house of assembly.

District Councils were established in 1840, composed of representatives of a certain number of townships, elected by the householders. The qualifications of a district councillor are property to the value of five hundred pounds sterling. These councils are presided over by wardens, appointed by the crown. They meet quarterly for the management of all local affairs.

The Judicial Power.

This is lodged in two distinct systems of courts in the two provinces. That in the upper province is modelled quite closely upon the English system, and was organised mainly under the acts 34 Geo. III. c. 2, and 12 Vict. c. 63. See also Consol. Laws Upp. C. 31. That in the lower province is organized mainly under the provincial act 12 Vict. cc. 37–39. See Prov. Laws 1849, p. 245.

In Upper Canada.

10. *The Court of Errors and Appeals* is composed of the justices of the courts of Queen's Bench, Common Pleas, and Chancery, with such additional members as the governor may from time to time appoint from among the retired judges of these superior courts. It is presided over by the chief justice of the Queen's Bench, and, in his absence, by the chief justice of the Common Pleas. Seven members must be present to constitute a quorum. It has appellate civil and criminal jurisdiction of cases brought from the three superior courts in Upper Canada. It holds its sessions at Toronto, the second Thursday next after the Hilary, Easter, and Michaelmas terms, and may adjourn from time to time to meet again.

The Court of Impeachments consists of the chief justices of three superior courts, viz.: Queen's Bench, Common Pleas, and Chancery. It sits at Toronto.

12. *The Court of Queen's Bench* consists of one chief and two puisne judges, appointed by the queen by commission, under the great seal, to hold office during good behavior, subject to removal. It has, concurrently with the Common Pleas, original jurisdiction of all civil and criminal cases at law, may hold pleas of all manner of actions and suits, as well civil as criminal, which arise or happen in the province, and is to determine all matters of law, and, by aid of a jury, all matters of fact, as fully as may be done by the court of Queen's Bench, Common Pleas, or Exchequer in England. Writs are to issue alternately from each court. Four terms a year of each court are to be held, at Toronto, viz.: Hilary term, commencing the first Monday in February; Easter term, the third Monday in May; Trinity term, the Monday next after the twenty-first of August; and Michaelmas term, the third Monday in November. Trials at bar may be had as of right where the crown is interested, and in other cases where the court think proper, and a time is to be appointed for trial, which may be in vacation.

The Court of Common Pleas consists of a chief and two puisne judges, appointed in the same manner and for the same term as those of the Queen's Bench. Its jurisdiction is concurrent with that of the Queen's Bench.

13. *A Practice Court* is held by one of the justices of the above-described courts, sitting apart from his brethren, for deciding all questions as to adding to and justifying bail, discharging insolvent debtors, administering oaths, and hearing and determining matters which are subjects for motions.

Courts of Assize and Nisi Prius are held in vacation, between Hilary and Easter and between Trinity and Michaelmas terms, by one of the judges of the Queen's Bench or Common Pleas, in each county or union of counties, with or without commissions, as the governor may determine, for the purpose of trying all issues of fact before those courts in actions arising in the district in which the court is held. In the union of counties including Toronto, the court is held three times a year. It may also be held by some one of the barristers of the court by request of the judge, or by commission of the governor.

14. *A Court of Oyer and Terminer and General Gaol Delivery* is held at the same time and in the same manner as the court of Assize and Nisi Prius. No associate justices are required to be present at this court. A special commission for the trial of offenders is to be issued by the governor when he sees fit.

The Court of Chancery consists of one chancellor and two vice-chancellors, appointed by the crown, by commission, to hold office during good behavior, subject to removal by the governor, upon address of the two legislative houses, with a right to appeal to the queen in council. It has the same general jurisdiction as the court of Chancery in England in cases of fraud, accident, or mistake, matters relating to trusts and fiduciary relations generally, to stay waste, compel specific performance of contracts, for discovery of papers, to prevent multiplicity of suits, stay proceedings at law, regulate letters patent, try the validity of wills, grant alimony, etc.

Commissioners are appointed by the chief justice and one of the associate judges of the Queen's Bench or Common Pleas, or, in the absence of the chief from the province, by the two associate justices of those courts, to take evidence, which is to be of the same value as if taken in open court. They are also to take acknowledgments of deeds, wills, etc., which are to be recorded in the other province.

15. *A County Court* sits four times a year in each county or union of counties. It consists of a judge, or a judge and a junior judge, appointed by the governor from among the barristers of five years' standing, by commission, under the great seal of the province, to hold office during good behavior, subject to removal by the governor, with the assent of the Court of Impeachment. It has jurisdiction over personal actions where the debt or damages do not exceed two hundred dollars, actions of debt, covenant, and contract to the amount of four hundred dollars, where the damages have been liquidated by the parties or by instrument signed by the defendant, on bail bonds and recognisances to any amount, and over actions brought by a landlord to recover possession where the tenant's term has expired, or his rent is in arrear sixty days or more. It has no jurisdiction where the title to land is brought in question, where the validity of a devise, bequest, or limitation under a will is in dispute, or of actions for libel, slander, criminal conversation, or seduction, or for misbehavior by a justice of the peace.

The Surrogate's Court is held by the senior county judge, who is surrogate, *ex officio*, in his county. There are four terms a year. It has jurisdiction of the probate of wills, grant of letters testamentary and of administration, the appointment and control of guardians for minors, lunatics, etc., subject to a right of appeal to the court of Chancery.

16. *A Divisionary Court* is held by the county judge in each division, of which there are to be not

less than three nor more than twelve in each county. They are not courts of record. The proceedings are summary, and extend to all personal actions where the debt or damages claimed are not over forty dollars, all cases of debt, account, breach of contract or covenant, or money demand, where the amount or balance claimed does not exceed one hundred dollars. The exceptions to the jurisdiction are the same as to the jurisdiction of the county courts, and, in addition, actions for gambling debts and actions on undertakings for which the consideration is liquor drunk in taverns. A jury may, in certain specified cases, be demanded.

Justices of the Peace are appointed by commission by the crown, and for certain remote districts by the governor. They must have a property of the clear value of twelve hundred dollars. No attorney, solicitor, or proctor in any court may be an attorney, except in certain specified cases. Their duties refer mainly to the preservation of the peace, and the arrest and commitment of offenders. They may issue search-warrants.

In Lower Canada.

17. *The Court of Queen's Bench* consists of one chief and three puisne judges, appointed by the queen by letters patent under the great seal of the province. The justices must have been justices of the court of Queen's Bench, or judges of the superior or circuit courts, or advocates of at least ten years' standing. They must reside either at Quebec or Montreal, and one at least in each city. It exercises jurisdiction as a court of errors and appeals, and has the jurisdiction of the old provincial court of appeals. Two terms are held annually at Quebec and two at Montreal. Three judges constitute a quorum, and three must concur in reversing any judgment. Whenever, from any cause, two or more justices are disqualified or absent from the province, others may be appointed by the governor for the emergency (*ad hoc*). Criminal terms are held twice a year in each of the seven districts, except Gaspé. Prov. Act 12 Vict. c. 37.

18. *The Superior Court* consists of one chief and nine puisne judges, appointed in the same manner and possessing the same qualifications as the justices of the Queen's Bench. This court has original civil jurisdiction throughout Lower Canada, with full power and authority to take cognizance of, hear, try, and determine in the first instance, and in due course of law, all civil pleas, causes, and matters whatsoever, except those of purely admiralty jurisdiction. It has a general supervisory power over all courts, persons, and corporations except the Queen's Bench. Three terms of the court are held annually in each of the larger districts, by not less than two nor more than three judges; and two constitute a quorum. Sittings to give judgment (*en delibéré*) are held the first two juridical days of each week, except in August. Single judges may hold sittings in vacation for jury trials. A jury must be called for in the declaration, if desired. An appeal lies to the Queen's Bench. In Gaspé, Ottawa, and Kamomaska, the powers of the superior court are exercised by judges of the circuit court, except during the term of the superior court in those districts.

19. *The Circuit Court* is held by one of the judges of the superior or one of the judges of the circuit court. Of the latter class there are not to be more than nine in all, and in case of vacancies the governor, in his discretion, is to appoint from among the advocates of five years' standing. These judges are *ex officio* justices of the peace and chairmen of general quarter sessions.

This court has cognizance of all civil suits for less than fifty pounds, and where the amount is not over fifteen pounds may decide in a summary manner, and, if the amount be not over five shillings and sixpence, according to equity and good conscience. A jury may be demanded if the question refers to land; and the defendant may in such case evoke the cause to the superior court. This court may issue writs of habeas corpus, and hear and determine the same. Three or more terms of this court are held annually in each circuit, of which there are several in each judicial district.

In the province of Gaspé the superior court has the criminal jurisdiction of the court of Queen's Bench. The court for this purpose may be held by the number of superior and circuit judges necessary to make a quorum, of whom not more than two are to be circuit judges.

The Court of General or Quarter Sessions may be held by any circuit judge or two justices of the peace, of whom he shall be one, or by two or more justices of the peace in his absence. Two terms are held annually, and in Quebec, Montreal, and Three Rivers four.

20. *The Notaries* of the province are incorporated into boards, with presidents and other officers, and power to admit and control the conduct of members. Their powers and duties are substantially those of the French notaries. Each of them is to number all deeds passed by him, and take and preserve full notes of the same; and his repertory, minutes, and index are to be transmitted to the board of notaries at his death, interdiction, or removal from office or the province.

A Vice-Admiralty Court exists in each province, held by an admiralty judge. It has the jurisdiction of the English courts of admiralty.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation.

2. Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself, acting through the agency of commissioners, or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver. 8 Blackf. Ind. 246. Such payment need not precede or be cotemporaneous with the taking, 20 Johns. N. Y. 735; 4 Zabr. N. J. 587; 8 Blackf. Ind. 266; though, if postponed, the proprietor of the land taken is entitled to interest. 5 Den. N. Y. 401; 1 Md. Ch. Dec. 248. The following cases relate to the rules to be observed in estimating the amount of damage to be awarded for private property taken or injured by the construction of canals. 7 Blackf. Ind. 209; 5 *id.* 384–543; 6 *id.* 483; 1 Watts & S. Penn. 346; 1 Penn. St. 462; 15 Barb. N. Y. 457, 627; 24 *id.* 362; 4 Wend. N. Y. 647; 1 Spenc. N. J. 249; 14 Conn. 146; 16 *id.* 98; 1 Sneed, Tenn. 239; 1 Sumn. C. C. 46.

3. After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto. 19 Barb. N. Y. 263, 370; 4 Wend. N. Y. 647; 20 Johns. N. Y. 735; 7 Johns. Ch. N. Y. 314; 19 Penn. St.

456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation. 4 Den. N. Y. 356; 26 Wend. N. Y. 485; 1 Sumn. C. C. 46; 2 Dow. 519; Coop. Ch. 77. Appraisers appointed to assess damages for land taken have no authority to entertain claims not presented in the mode and within the time prescribed by statute. 9 Barb. N. Y. 496; 11 N. Y. 314. But though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action. 24 Barb. N. Y. 159; 5 Cow. N. Y. 163; 16 Conn. 98. But see, to the contrary, 12 Mass. 466; 1 N. H. 339. The legislature have the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review their determination in that respect. 9 Barb. N. Y. 350; 8 Blackf. Ind. 266.

4. In navigating canals, it is the duty of the canal-boats to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages. 19 Wend. N. Y. 399; 8 *id.* 469; 6 Cow. N. Y. 698; 1 Penn. St. 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions. 7 Mass. 189; 7 Metc. Mass. 276; 13 Gratt. Va. 541; 8 Dan. Ky. 161; 7 Ind. 462; 20 Barb. N. Y. 620; 4 Kill. N. Y. 630; 11 Ad. & E. 223. In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public. 2 Barnew. & Ad. 792; 2 *id.* 58; 2 Mann. & G. 134; 9 How. 172; 6 Cow. N. Y. 567; 21 Penn. St. 131. For other cases relating to various points arising under statutes in regard to canals, see 8 Blackf. Ind. 352; 12 Mass. 403; 7 B. Monr. Ky. 160; 4 Zabr. N. J. 62, 555; 11 Penn. 202; 2 *id.* 217; 1 Binn. Penn. 70; 1 Gill, Md. 222; 6 Watts & S. Penn. 560; 17 Barb. N. Y. 193; 19 *id.* 657; 25 Wend. N. Y. 692. See RAILWAY.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Blackstone, Comm. 46; Cowel.

CANCELLARIUS. A chancellor. A janitor, or one who stood at the door of the court and was accustomed to carry out the commands of the judges. A scribe. A notary. DuCange.

2. It was under the reign of the Merovingian kings that the *cancellarii* first obtained the dignity corresponding with that of the English chancellor, and became keepers of the king's seal. DuCange. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church,—acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

In this latter sense only of keeper of the seal the word chancellor, derived hence, seems to have been used in the English law. 4 Blackst. Comm. 46. It is said by Ingulphus that Edward the Elder appointed Torquatel his chancellor, so that whatever business of the king, spiritual or temporal, required a decision should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable. Spence, Eq. Jur. 78, n.

3. The origin of the word has been much disputed; but it seems probable that the meaning assigned by DuCange is correct, who says that the *cancellarii* were originally the keepers of the gate of the king's tribunal and who carried out the commands of the judges. In the civil law their duties were very various, giving rise to a great variety of names, as *notarius, a notis, abactis, secretarius, a secretis, a cancellis, a responsis*, generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See DuCange; Spelman, Gloss.; Spence, Eq. Jur. 78; 4 Blackstone, Comm. 46.

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument. 1 Eq. Cas. Abr. 409; Roberts, Wills, 367, n.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete, 3 Barnew. & Ald. 489; 2 W. Blackst. 1043; 4 Mass. 462; 2 Nott & M'C. So. C. 472; 5 Conn. 168; 4 Serg. & R. Penn. 567; but must be by the testator or in his presence and by his direction and consent. 1 Greenleaf, Ev. § 273; 1 Jarman, Wills, Perkins ed. c. 7, § 2, n. It must be done *animo revocandi;* and evidence is admissible to show with what intention the act was done. 7 Johns. N. Y. 394; 4 Wend. N. Y. 474, 485; 9 Mass. 307; 4 Conn. 550; 5 *id.* 262; 8 Vt. 373; 1 N. H. 1; 4 *id.* 191; 2 Dall. Penn. 266; 4 Serg. & R. Penn. 297; 3 Hen. & M. Va. 502; 1 Harr. & M'H. Md. 162; 4 Kent, Comm. 531.

As to the effect of cancelling an unrecorded deed, see Gilbert, Ev. 109; Greenleaf, Ev. § 265; 1 Me. 78; 10 Mass. 403; 11 *id.* 337; 9 Pick. Mass. 105; 4 N. H. 191; 2 Johns. N. Y. 87; 4 Conn. 450; 5 *id.* 86, 262; 4 Yerg. Tenn. 375. And see, generally, on this subject, 4 Bouvier, Inst. §§ 3917–3922; Jarman; Roberts on Wills; Gilbert; Greenleaf on Evidence; 4 Kent, Comm. 531.

CANDIDATE (Lat. *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now to be entitled *canons*, in England. 3 Stephen, Comm. 67, n.; 1 Blackstone, Comm. 382.

CANON LAW. A body of ecclesiasti-

cal law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

2. A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

Though this system of law is of primary importance in Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

3. The *Corpus Juris Canonici* is drawn from various sources,—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III., in the middle of the twelfth century, when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum.* These are generally known as *Decretum Gratiani.*

4. The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni.* A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium.* The Clementine Constitution, or decrees of Clement V., were in like manner authenticated in 1317 by his successor, John XXII., who also published twenty constitutions of his own, called the *Extravagantes Joannis,* so called because they were in addition to, or beyond the boundary of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes.* And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici,* or body of the Roman canonlaw. 1 Blackstone, Comm. 82; Encyclopédie, *Droit Canonique, Droit Public Ecclésiastique;* Dict. de Jur. *Droit Canonique;* Erskine, Inst. b. 1. t. 1. s. 10. See, in general, Ayliffe, Par. Jur. Can. Ang.; Shelford, Marr. & D. 19; Preface to Burn, Eccl. Law, Tyrwhitt ed. 22; Hale, Civ. L. 26–29; Bell's Case of a Putative Marriage, 203; Dict. du Droit Canonique; Stair, Inst. b. 1. t. 1. 7.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANTRED. A hundred; a district containing a hundred villages. Used in Wales in the same sense as hundred in England. Cowel; Termes de la Ley.

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *primâ facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial. 8 Cow. N. Y. 102; 20 Wend. N. Y. 14; 1 Dougl. Mich. 59; 1 Mich. 362; 15 Ill. 492.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to grant or convey lands; or to take and hold lands; to make a contract, and the like. 2 Comyns, Dig. 294; Dane, Abr.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ touching a plea of lands and tenements. The writs which bear this name are of two kinds,—namely, *cape magnum,* or grand cape, and *cape parvum,* or petit cape. The petit cape is so called not so much on account of the smallness of the writ as of the letter. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 *c, d;* Fleta, l. 6, c. 55, § 40.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, Lex Merc. 230.

CAPIAS (Lat. *capere,* to take; *capias,* that you take). **In Practice.** A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

Consult Sellon, *Practice,* Introd.; Spence, Eq. Jur.; BAIL; BREVE; ARREST; 3 Bouvier, Inst. n. 2794.

CAPIAS AD AUDIENDUM JUDICIUM. **In Practice.** A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he is not present when called. 4 Sharswood, Blackst. Comm. 368.

CAPIAS AD COMPUTANDUM. **In Practice.** A writ which issued in the action of account render upon the judgment *quod computet,* when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon his process, be delivered on mainprize, or, in default of finding mainpernors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium, 38, 39, 40; Coke, *Entries*, 46, 47; Rastell, *Entries*, 14 *b*, 15.

CAPIAS PRO FINE. **In Practice.** A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for the public misdemeanor, coupled with the remedy for the private injury sustained, in all cases of forcible torts, 11 Coke, 43; 5 Mod. 285; falsehood in denying one's own deed, Coke, Litt. 131; 8 Coke, 60; unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ or the express prohibition of any statute, 8 Coke, 60. It is now abolished. 3 Sharswood, Blackst. Comm. 398.

CAPIAS AD RESPONDENDUM. **In Practice.** A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of capias which is generally intended by the use of the word capias, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus*, bail bond); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archbold, Pract. 67.

CAPIAS AD SATISFACIENDUM. **In Practice.** A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a rule at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa.*

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See ESCAPE. And payment to the sheriff is held in England not to be sufficient to authorize a discharge.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See EXECUTION.

Consult Archbold; Chitty; Sellon, *Practice;* 3 Sharswood, Blackstone, Comm. 414.

CAPIAS UTLIGATUM. **In Practice.** A writ directing the arrest of an outlaw.

If *general*, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If *special*, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Sharswood, Blackst. Comm. 284; 4 *id.* 320.

CAPIAS IN WITHERNAM. **In Practice.** A writ directing the sheriff to take other goods of a distrainor equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainor *eloigned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken *in withernam* are irrepleviable till the original distress be forthcoming. 3 Blackstone, Comm. 148.

CAPITA (Lat.). By heads.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (*e.g.* when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (*e.g.* some the children, others the grandchildren or the great-grandchildren, of the deceased), those more remote take *per stirpem*, or *per stirpes*, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Reeve, Descent, Introd. xxvii.; also, 1 Roper, Leg. 126, 130. See PER CAPITA; PER STIRPES; STIRPES.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far his right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid. 1 Sandf. Ch. N. Y. 280; Walford, Railw. 252; 4 Zabr. N. J. 195; Angell & A. Corp. §§ 151, 556.

CAPITALIS JUSTICIARIUS. The chief justiciary; the principal minister of state, and guardian of the realm in the king's absence.

This office originated under William the Conqueror; but its power was greatly diminished by Magna Charta, and finally distributed among several courts by Edward I. Spelman, Gloss.; 8 Blackstone, Comm. 38.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A.D. 1264. Spelman, Gloss. *Capitaneus, Admiralius.*

CAPITATION (Lat. *caput*, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, thereinbefore directed to be taken." Art. 1, s. 9, n. 4. See 3 Dall. Penn. 171; 5 Wheat. 317.

CAPITE. See CAPITA.

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to ecclesiastical law also. DuCange.

CAPITULA CORONIS. Specific and minute schedules, or *capitula itineris.*

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDÆIS. A register of mortgages made to the Jews. 2 Blackstone, Comm. 343; Crabb, Eng. Law, 130 *et seq.*

CAPITULARY. In French Law. A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors.

The execution of these capitularies was intrusted to the bishops, courts, and *missi regis;* and many copies were made. The best edition of the Capitularies is said by Butler to be that of Baluze, 1677. Coke, Litt. 191 *a*, Butler's note, 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in the ceremony of saying mass. DuCange.

CAPITULATION. The treaty which determines the conditions under which a fortified place is abandoned to the commanding officer of the army which besieges it.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally. 2 Dall. 8.

In Civil Law. An agreement by which the prince and the people, or those who have the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITUR PRO FINE. See CAPIAS PRO FINE.

CAPTAIN (Lat. *capitaneus;* from *caput*, head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master*, which title see. In foreign laws and languages he is frequently styled *patron.*

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate.

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. *capere*, to take). A

taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returns an indictment into the King's Bench, it is annexed to the caption, then called a schedule, and the caption concludes with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment are returned on separate parchments. 1 Wms. Saund. 309, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as a part of their presentment in each particular case; and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term. 3 Gray, Mass. 454; 4 *id.* 5; 6 Cush. Mass. 174.

For some decisions as to the forms and requisites of captions, see 1 Murph. No. C. 281; 1 Brev. So. C. 169; 8 Yerg. Tenn. 514; 1 Hawks, Tenn. 354; 6 Mo. 469; 2 Ill. 456; 6 Blackf. Ind. 299; 6 Miss. 20; in depositions, 37 N. H. 316, 494; 33 *id.* 52; 30 Vt. 29; 24 Ga. 384; 22 *id.* 541; 32 Ala. N. S. 645; 29 *id.* 320; 41 Me. 105, 332; 1 Hempst. C. C. 563, 701; 24 Conn. 507; 2 Cal. 383. The caption is no part of an indictment. 3 Gray, Mass. 454; 36 N. H. 359; 37 *id.* 196. And see 7 Gray, Mass. 492; 5 *id.* 478; 5 Wisc. 329.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. One who has taken property from an enemy: this term is also employed to designate one who has taken an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio*. 1 C. Rob. Adm. 93, 96. See 2 Gall. C. C. 374; 1 *id.* 274; 1 Pet. Adm. 116; 1 Mas. C. C. 14.

CAPTURE. The taking of property by one belligerent from another.

To make a good capture of a ship, it must be subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.

Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is the capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy lawfully commissioned and according to the laws of war, and unlawful, when it is against the rules established by the law of nations. Marshall, Ins. b. 1, c. 12, s. 4. All captures *jure belli* are made for the government. 10 Wheat. 306; 1 Kent, Comm. 100. See 1 Curt. C. C. 266.

See, generally, Lec, Captures; 1 Kent, Comm. 100 *et seq.*; Bouvier, Inst.; Story, Const. §§ 1168–1177; Wheaton, Int. Law; Phillimore, Int. Law; PRIZE; 2 Caines, Cas. N. Y. 158; 7 Johns. N. Y. 449; 13 *id.* 161; 14 *id.* 227; 6 Mass. 197; 4 Cranch, 43; 11 Wheat. 1; 2 How. 210; Paine, C. C. 129.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

2. According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr. Cooper, and all the other English translators of the Institutes, as follows:—"Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is, "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

3. *Civitas*—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus, hostis, barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of pater familias, the members of the family were bound together by religious rites and sacrifices,—*sacra familiæ*.

4. The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio*; the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio*; when there was a change of condition by adoption or adrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences: all obligations merely civil were extinguished; those purely na-

tural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis deminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Usufruct was extinguished by the diminution of the head: *amittitur usufructus capitis deminutione.* D. 3. 6. § 28. It also annulled the testament: *"Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminutus sit."* Gaius, 2, § 143. *Capitis deminutio* means that the family, to which the person whose *status* has been lost or changed belongs, has lost a head, or one of its members.

At Common Law. A head.

Caput comitatis (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowel. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowel.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them. 4 Blackstone, Comm. 320. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process; and this power, even, has long since disappeared, the process of outlawry being resorted to merely as a means of compelling an appearance. Coke, Litt. 128 *b*; 3 Blackstone, Comm. 284.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss; Cowel.

CARAT. A weight equal to three and one-sixth grains, in diamonds and the like. Jacob, Law Dict.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARDINAL. In Ecclesiastical Law. The title given to one of the highest dignitaries of the court of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Eccléa.* liv. xxxv. n. 17, li. n. 19; Thomassin, part ii. liv. i. c. 53, part iv. liv. i. cc. 79, 80; Loiseau, *Traité des Ordres*, c. 3. n. 31; André, *Droit Canon.*

CARDS. In Criminal Law. Small rectangular pasteboards, generally of a fine quality, on which are painted figures of various colors, and used for playing certain games. The playing of cards for amusement is not forbidden; but gaming for money is unlawful.

CARETA (spelled, also, *Carreta* and *Carecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts (*careta*) without paying the ancient livery therefor.

CARGO. In Maritime Law. The entire load of a ship or other vessel. Abbott, Shipp.; 1 Dall. Penn. 197; Merlin, *Répert.*; 2 Gill & J. Md. 136.

This term is usually applied to *goods* only, and does not include human beings. 1 Phillips, Ins. 185; 4 Pick. Mass. 429. But in a more extensive and less technical sense it includes persons: thus, we say, A cargo of emigrants. See 7 Mann. & G. 729, 744.

CARNAL KNOWLEDGE. Sexual connection. The term is generally, if not exclusively, applied to the act of the male.

CARNALLY KNEW. In Pleading. A technical phrase essential in an indictment to charge the defendant with the crime of rape.

No other words nor circumlocution will answer. Comyns, Dig. *Indictment;* 1 Hale, Pl. Cr. 632; 1 Chitty, Crim. Law, 243; Coke, Litt. 137. Their omission renders an indictment bad on demurrer, but is cured by a verdict. 1 Russ. Cr. Cas. 686; 1 East, Pl. Cr. 448.

CARRIER. One who undertakes to transport goods from one place to another. 1 Parsons, Contr. 632.

They are either *common* or *private.* Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire. Story, Bailm. § 495; 13 Barb. N. Y. 481; 1 Wend. N. Y. 272; 1 Hayw. No. C. 14; 2 Dan. Ky. 430; 4 Taunt. 787; 6 *id.* 577; 2 Bos. & P. 417; 2 C. B. 877. See COMMON CARRIER.

CARRYING AWAY. In Criminal Law. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit.* Hence the word "away," or some other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning. 7 Gray, Mass. 45.

Any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient. 2 Bishop, Crim. Law, § 699; 1 Mood. Cr. Cas. 14; 1 Dearsl. Cr. Cas. 421; Coxe, N. J. 439. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair, 1 Leach, Cr. Cas. 320; to remove sheets from a bed and carry them into an adjoining room, 1 Leach, Cr. Cas. 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away, *id.* to remove a package from one part of a wagon to another, with a view to steal it, 1 Leach, Cr. Cas. 236; have respectively been holden to be felonies. But nothing less than such a severance will be sufficient. 2 East, Pl. Cr. 556; 1 Leach, Cr. Cas. 4th ed. 236, 321; 1 Hall, Pl. Cr. 508; 1 Ry. & M. Cr. Cas. 14; 4 Sharswood, Blackst. Comm. 231; 2 Russell, Crimes, 96.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute. 22 Ala. N. s. 621.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Blackstone, Comm. 35.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. Las Partidas, pt. 3, t. 18, l. 30.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized. 6 Mart. La. 707. See Chitty, Bills, 70; 2 Penn. 200.

CARTEL. An agreement between two belligerent powers for the delivery of prisoners or deserters, and also a written challenge to a duel.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers: she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. 4 C. Rob. Adm. 357. See Merlin, *Répert.*; Dane, Abr. c. 40, a. 6, § 7; 1 Kent, Comm. 68, 69; 3 Phillimore, Int. Law, 161–163; 1 Pet. C. C. 106; 3 C. Rob. Adm. 141; 6 *id.* 336; 1 Dods. Adm. 60.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers. 3 Carr. & K. 61; Story, Bailm. § 496. And see 2 Wend. N. Y. 327; 2 Nott & M'C. So. C. 88; 1 M'Cord, So. C. 444; 2 Bail. So. C. 421; 2 Vt. 92; 1 Murph. No. C. 417; Bacon, Abr. *Carriers*, A.

CARUCAGE. A taxation of land by the *caruca* or *carue*.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plough (*caruca*). *Carucage*, *carugage*, or *caruage* was the tribute paid for each *caruca* by the *carucarius*, or tenant. Spelman, Gloss.; Cowel.

CARUCATA. A certain quantity of land used as the basis for taxation. As much land as may be tilled by a single plough in a year and a day. Skene, *de verb. sig.* A team of cattle. A cartload.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *soca*, but has a much more extended signification. Spelman, Gloss.; Blount; Cowel.

CASE. In Practice. A question contested before a court of justice. An action or suit at law or in equity. 1 Wheat. 352.

A case arising under a treaty (U. S. Const. art. 3, sect. 2) is a suit where is drawn in question the construction of a treaty and the decision is against the title set up by either party under such treaty. *Story*, J.; 1 Wheat. 356. And see also 6 Cranch, 286; 9 Wheat. 819; 11 How. 529; 12 *id.* 111.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Stephen, Plead. 15.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover*, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata*, are collected in the *Registrum Brevium*.

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 24, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *malfeasance*, *misfeasance*, or *nonfeasance*, apparently for the purpose of enabling an action on the case to be brought in the King's Bench. It thus includes actions on the case for breach of a parol undertaking, now called assumpsit, see ASSUMPSIT, and actions based upon a finding and subsequent unlawful conversion of property, now called trover, see TROVER, as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant*, in that it is not founded upon any contract, express or implied; from *trover*, which lies only for unlawful conversion; from *detinue* and *replevin*, in that it lies only to recover damages; and from *trespass*, in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects. See 3 Reeves, Eng. Law, 84; 1 Spence, Eq. Jur. 237–243; 1 Chitty, Plead. 123; 3 Blackstone, Comm. 41.

A similar divison existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

2. *The action lies for;*

Torts not committed with force, actual or implied, 2 Ired. No. C. 38; 2 Gratt. Va. 366; 20 Vt. 151; 8 Ga. 190; as, for malicious prosecution, 6 Munf. Va. 27, 113; 11 Gill & J. Md. 80; 7 B. Monr. Ky. 545; 21 Ala. N. S. 491; see MALICIOUS PROSECUTION; fraud in purchases and sales. 5 Yerg. Tenn. 290; 1 T. B. Monr. Ky. 215; 17 Wend. N. Y. 193; 7 Ala. 185; 22 *id.* 501; 11 Metc. Mass. 356; 3 Cush. Mass. 407; 17 Penn. St. 293; 4 Strobh. So. C. 69; 15 Ark. 109; 18 Ill. 299.

Torts committed forcibly where the matter affected was *not tangible*, 2 Conn. 529; 2 Vt. 68; as, for obstructing a private way, 14 Johns,

383; 5 Harr. & J. Md. 467; 18 Pick. Mass. 110; 4 Penn. St. 486; 23 *id.* 348; 2 Dutch. N. J. 308; disturbing the plaintiff in the use of a pew, 1 Chitty, Plead. 43; injury to a franchise.

3. *Torts committed forcibly* when the injury is consequential merely, and not immediate, 6 Serg. & R. Penn. 348; 6 Harr. & J. Md. 230; 4 Dev. & B. No. C. 146; as, special damage from a public nuisance, Willes, 71; 5 Blackf. Ind. 35; 1 Rich. So. C. 444; 3 Barb. N. Y. 42; 3 Cush. Mass. 300; 4 McLean, C. C. 333; 12 Penn. St. 81; 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff. Strange, 634; 2 Green, N. J. 472; 21 Pick. Mass. 378; 8 Cush. Mass. 595; 7 Monr. Ky. 325; 8 B. Monr. Ky. 453; 18 Me. 32; 35 *id.* 271; 2 Barb. N. Y. 165; 2 N. Y. 159, 163; 17 Ohio, 489; 18 *id.* 229; 1 N. J. 5; 10 Ill. 425; 12 *id.* 20; 22 Vt. 38; 21 Conn. 213; 3 Md. 431. See 20 Vt. 302; 4 N. Y. 195; 5 Rich. So. C. 583.

Injuries to the relative rights, 1 Halst. N. J. 322; 1 M'Cord, So. C. 207; 3 Serg. & R. Penn. 215; 2 Murph. No. C. 61; 7 Ala. 169; 6 T. B. Monr. Ky. 296; 7 Blackf. Ind. 578; 3 Den. N. Y. 361; enticing away servants and children, 1 Chitty, Plead. 137; 4 Litt. Ky. 25; 15 Barb. N. Y. 489; seduction of daughters or servants. 5 Me. 546; 2 Greene, Iowa, 520. See 6 Munf. Va. 587; 1 Gilm. Va. 33; SEDUCTION.

Injuries which result from *negligence*, 7 Mass. 169; 1 Cush. Mass. 475; 23 Me. 371; 1 Den. N. Y. 91; 2 Ired. No. C. 138; 9 *id.* 73; 18 Vt. 620; 21 *id.* 102; 2 Strobh. So. C. 356; 4 Rich. So. C. 228; 9 Ark. 85; 24 Miss. 93; 20 Penn. St. 387; 13 B. Monr. Ky. 219; 15 Ill. 366; 3 Ohio St. 172; see 3 Den. N. Y. 232; 5 *id.* 255; 20 Vt. 529; 19 Conn. 507; 29 Me. 307; 16 Penn. St. 463; 2 Mich. 259; though the direct result of actual force. 10 Bingh. 112; 4 Barnew. & C. 223; 14 Johns. N. Y. 432; 17 *id.* 92; 17 Barb. N. Y. 94; 3 N. H. 465; 11 Mass. 137; 2 Harr. Del. 443; 2 Ired. No. C. 206; 18 Vt. 605; 7 Blackf. Ind. 342; 1 R. I. 474.

4. *Wrongful acts* done under a legal process regularly issuing from a court of competent jurisdiction. 2 Conn. 700; 3 *id.* 537; 9 *id.* 141; 11 Mass. 500; 6 Me. 421; 1 Bail. So. C. 441; 19 Ala. 760; 21 *id.* 491; 2 Litt. Ky. 234; 6 Dan. Ky. 321; 3 Gill & J. Md. 377; 13 Ga. 260; 6 Cal. 399. See 3 Serg. & R. Penn. 142; 12 *id.* 210.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible. 17 Mass. 246; 1 Pick. Mass. 66; 3 Cush. Mass. 300; 8 Wend. N. Y. 474; 9 Humphr. Tenn. 757; 13 B. Monr. Ky. 219; 2 Ohio St. 536; 17 Ill. 580.

Rights given by statutes. 15 Conn. 526; 7 Mass. 169; 23 Me. 371; 9 Vt. 411; 2 Woodb. & M. C. C. 337.

Injuries committed to property of which the plaintiff has the *reversion* only, 8 Pick. Mass. 235; 4 Gray, Mass. 197; 7 Conn. 328; 24 *id.* 15; 2 Green, N. J. 8; 1 Johns. N. Y. 511; 3 Hawks, No. C. 246; Busb. No. C. 30; 2 Murph. No. C. 61; 2 N. H. 430; 3 *id.* 103; 5 Penn. St. 118; 8 *id.* 523; 2 Dougl. Mich. 184; 4 Harr. Del. 181; 21 Vt. 108; 1 Dutch. N. J. 97, 255; 41 Me. 104; see 1 N. Y. 528; as where property is in the hands of a bailee for hire. 3 Campb. 187; 3 East, 593; 3 Hawks, No. C. 246; 8 B. Monr. Ky. 515.

5. As to the effect of intention as distinguishing case from trespass, see 1 M'Mull. So. C. 364; 7 Blackf. Ind. 342; 4 Den. N. Y. 464; 4 Barb. N. Y. 225; 30 Me. 173; 13 Ired. No. C. 50; 26 Ala. N. S. 633. In some states the distinction is expressly abolished by statute. 25 Me. 86; 8 Blackf. Ind. 119; 3 Sneed, Tenn. 20; 1 Wisc. 352.

The declaration must not state the injury to have been committed *vi et armis*, 3 Conn. 64; yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage, Harp. So. C. 122, and should not conclude *contra pacem*. Comyns, Dig. *Action on the Case* (C 3).

Damages not resulting necessarily from the acts complained of must be specially stated. 3 Strobh. So. C. 373; 32 Me. 378; 5 Cush. Mass. 104; 9 Ga. 160; 4 Chandl. Wisc. 20. Evidence which shows the injury to be trespass will not support case. 5 Mass. 560; 16 *id.* 451; 3 Johns. N. Y. 468; 4 Barb. N. Y. 596; 3 Md. 431. See 2 Rand. Va. 440; 8 Blackf. Ind. 119.

6. *The plea* of not guilty raises the general issue. 2 Ashm. Penn. 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; and the rule is modified in actions for slander and a few other instances. 1 Wms. Saund. 130, n. 1; Willes, 20.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration, 2 Ired. No. C. 221; 18 Vt. 620; 18 Conn. 494; with costs.

CASE STATED. In Practice. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as there agreed upon and mentioned. 3 Whart. Penn. 143.

Some process of this kind exists, it is presumed, in all the states, for the purpose of enabling parties who agree upon the facts to dispense with a formal trial, to ascertain what is already known and secure a decision upon the law involved merely. These agreements are called also agreed cases, cases agreed on, agreed statements, etc. In chancery, also, when a question of mere law comes up, it is referred to the King's Bench or Common Pleas, upon a case stated for the purpose. 3 Sharswood, Blackst. Comm. 453, n.; 6 Term, 313.

2. The jury in such case find a general verdict for the plaintiff or defendant, subject to the decision of the court upon the law-questions involved. 3 Blackstone, Comm. 378.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated, Dane, Abr. c. 137,

art. 4, § 7, it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict.

In that case, a writ of error lies on the judgment which may be rendered upon it. And a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it. 8 Serg. & R. Penn. 529.

CASH. That which circulates as money, including bank bills, but not mere bills receivable.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices.

CASH-BOOK. A book in which a merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

2. The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He need not be a stockholder: indeed, some bank charters prohibit him from owning stock in the bank. He always gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer of the condition of the bank, as provided by law; and false statements are punished, and render the cashier liable for any damage resulting to third parties therefrom. Bank Mag. July, 1860.

3. In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied. 1 Pet. 46, 70; 8 Wheat. 300, 361; 5 *id.* 326; 3 Mas. C. C. 505; 1 Ill. 45; 1 T. B. Monr. Ky. 179. But the bank is not bound by a declaration of the cashier not within the scope of his authority: as if, when a note is about to be discounted by the bank, he tells a person that he will incur no risk nor responsibility by becoming an indorser on such note. 6 Pet. 51; 8 *id.* 12. See 17 Mass. 1; Story, Ag. §§ 114, 115; 3 Halst. N. J. 1; 12 Wheat. 183; 1 Watts & S. Penn. 161.

In Military Law. To deprive a military officer of his office. See Art. of War, art. 14.

CASSARE. To quash; to render void; to break.

CASSATION. In French Law. A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is broken or annulled. See COUR DE CASSATION.

CASSETUR BREVE (Lat. that the writ be quashed). **In Practice.** A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process. 3 Blackstone, Comm. 340. See Gould, Plead. c. 5, § 139; 3 Bouvier, Inst. n. 2913, 2914; 5 Term, 634.

CASTELLAIN, CASTELLANUS. The keeper or captain of a fortified castle; the constable of a castle. Spelman, Gloss.; Termes de la Ley; Blount.

CASTELLORUM OPERATIO. In Old English Law. Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas*, 1 Blackstone, Comm. 263, from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest. Kennett, Paroch. Ant. 114; Cowel.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes called the trebucket, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States. 12 Serg. & R. Penn. 225.

CASTRATION. In Criminal Law. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it. 2 Bishop, Crim. Law, §§ 842, 847. By the ancient law of England the crime was punished by retaliation, *membrum pro membro*. Coke, 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment. The civil law punished it with death. Dig. 48. 8. 4. 2. For the French law, vide Code Pénal, art. 316. The consequences of castration, when complete, are impotence and sterility. 1 Beck, Med. Jur. 72.

CASU PROVISO (Lat. in the case provided for). **In Practice.** A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (13 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu*.

The writ is now practically obsolete. Fitzherbert, Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. In Practice. The person supposed to perform the fictitious

ouster of the tenant of the demandant in an action of ejectment. See EJECTMENT.

CASUALTIES OF SUPERIORITY. In Scotch Law. Certain emoluments arising to the superior lord in regard to the tenancy.

They resemble the *incidents* to the feudal tenure at common law. They take precedence of a creditor's claim on the tenant's land, and constitute a personal claim also against the vassal. Bell, Dict. They have very generally disappeared. Paterson, Comp. 29.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm, § 240; 1 Parsons, Contr. 543–547.

CASUS FŒDERIS (Lat.). **In International Law.** A case within the stipulations of a treaty.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis*. Grotius, b. 2, c. 25; Vattel, b. 2, c. 12, § 168.

See 1 Kent, Comm. 49.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent, Comm. 217, 300.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. 1 Curt. C. C. 148. The happening of a *casus fortuitus* excuses ship-owners from liability for goods conveyed. 3 Kent, Comm. 216.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs. 5 Coke, 38; 11 East, 1; 2 Binn. Penn. 279; 2 Sharswood, Blackst. Comm. 260; Brown, Max. 37. A casus omissus may occur in a contract as well as in a statute. 2 Sharswood, Blackst. Comm. 260.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plough, *averia carucæ*, and sheep. 3 Sharswood, Blackst. Comm. 9; Bracton, 217 *b*.

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fees and freeholds. Cowel; DuCange.

CATANEUS. A tenant *in capite*. A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expctancy at an inadequate price.

2. In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption. 1 Vern. Ch. 167, 320, n.; 2 *id.* 121; 2 Cox, 80; 2 Chanc. Cas. 136; 2 Freem. 111; 2 Ventr. Ch. 329; 1 P. Will. 312; 3 *id.* 290, 293, n.; 1 Croke, Car. 7; 2 Atk. Ch. 133; 2 Swanst. Ch. 147, and the cases cited in the note; 1 Fonblanque, Eq. 140; 1 Belt, Supp. Ves. Jr. 66; 2 *id.* 361. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of decisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. 2 Swanst. Ch. 148, n. See 1 Chanc. Pract. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation. Minshew.

CATER COUSIN. A very distant relation. Blackstone, Law Tracts, 6.

CATHEDRAL. In Ecclesiastical Law. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedræ*, cathedrals, *sees*, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC CREDITOR. In Scotch Law. A creditor whose debt is secured on several parts or all of his creditor's property. Such a creditor is bound to take his payment with reference to the rights of the secondary creditors, or, if he disregards their rights, must assign over to them his claims. This rule applies where he collects his debts of a cautioner (surety). Bell, Dict.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. cc. 7. This act relieves from disabilities and restores all civil rights to Catholics, except that of holding ecclesiastical offices and certain high state offices. 3 Stephen, Comm. 109.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 Eng. L. & Eq. 511; 1 Term, 137.

CAUSA (Lat.). A cause; a reason.

A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec aliam causam* (not a hog, not a lamb, nor other thing). DuCange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

In its general sense, *causa* denotes any thing operating to produce an effect. Thus, it is said, *causa causantis causa est causati* (the cause of the thing causing is the cause of the thing caused). 4 Gray, Mass. 398; 4 Campb. 284. In law, however, only the direct cause is considered. See CAUSA PROXIMA; 9 Coke, 50; 12 Mod. 639.

CAUSA JACTITATIONIS MARITAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Blackstone, Comm. 93.

CAUSA MATRIMONII PRÆLOCUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowel. Now obsolete. 3 Blackstone, Comm. 183, n.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not the remote cause is considered.

Important questions have arisen as to which, in the chain of acts tending to the production of a given state of things, is to be considered the cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in order of causation, which is adequate without any efficient concurring cause to produce the result, may be considered the direct cause. The rule is thus stated by *Thomas*, J., in 4 Gray, Mass. 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of, the first, shall be found to intervene between it and the result." See other statements of the rule by *Bacon*, Max. Reg. 1; *Phillips*, Ins. vol. 2, §§ 1097, 1131, 1132; *Story*, J., 14 Pet. 99.

The principle is of frequent application in fire and marine insurance, 2 Arnould, Ins. § 284; 1 Phillips, Ins. § 1132; Broom, Max. 166; 12 East, 648; 6 Exch. 451; 6 Bingh. 716; 14 Pet. 99; 14 How. 487; 2 Sumn. C. C. 218; 13 Mass. 354; 8 Cush. Mass. 477; 1 Du. N. Y. 159; 2 *id.* 301; 11 N. Y. 9; 32 Penn. St. 351; 13 B. Monr. Ky. 311; 16 *id.* 427; 14 How. 351; and in cases of injuries sustained in consequence of negligence, 2 Taunt. 314; 5 Carr & P. 190; 1 Q. B. 29; 4 Bingh. 607; 3 Cush. Mass. 300; 9 Metc. Mass. 1; 4 Den. N. Y. 464, or tortious acts of the defendant. 2 W. Blackst. 892.

CAUSA REI (Lat.). **In Civil Law.** Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. DuCange; 1 Mackeldy, Civ. Law, 55.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. *causa*). **In Civil Law.** The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4.

In Pleading. Reason; motive.

In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong and *without the cause* by him, etc., where the word *cause* comprehends all the facts alleged as an excuse or reason for doing the act. 8 Coke, 67; 11 East, 451; 1 Chitty, Plead. 585.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law, 301.

CAUSE OF ACTION. In Practice. Matter for which an action may be brought.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it. 3 Barnew. & Ald. 288, 626; 5 Barnew. & C. 259; 4 Carr. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action. 5 Barnew. & C. 360; 8 Dowl. & R. 346; 4 Bingh. 686.

CAUTIO, CAUTION. In Civil Law. Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. DuCange.

CAUTIO PIGNORATITIA. A pledge by deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe. In nearly all the countries of Europe, a foreign plaintiff, whether resident there or not, is required to give caution *pro expensis*; that is, security for costs. In some states this requisition is modified, and, when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Fœlix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Erskine, Inst. 2. 9. 59.

CAUTION JURATORY. Security given

by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Erskine, Pract. 4. 3. 6; Paterson, Comp.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). **In Practice.** A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission to probate of wills, the granting letters of administration, etc.

1 Bouvier, Inst. 71, 534; 1 Burn, Eccl. Law, 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, Parerg.; 3 Blackstone, Comm. 246; 2 Chitty, Pract. 502, note *b;* Poph. 133; 1 Sid. 371; 3 Binn. Penn. 314; 3 Halst. N. J. 139.

In Patent Law. A legal notice not to issue a patent of a particular description to any other person without allowing the caveator an opportunity to establish his priority of invention.

It is filed in the patent-office under statutory regulations. The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing.

Upon the filing of such caveat and the payment of a fee of twenty dollars, the law provides that no similar patent shall be granted to another person on any application made within one year thereafter without first giving the caveator due notice and allowing him an opportunity to show that he himself was the first to make the invention. If before the expiration of the year another fee of twenty dollars is paid to the office, it renews the caveat for another year; and so on from year to year as long as the caveator continues to make such annual payments. If an application for a patent for the invention is afterwards made by the caveator, one caveat fee of twenty dollars is credited to him towards his patent fee, but no more.

As to the form of the caveat, it need contain nothing more than simply an intelligible description of any invention which the caveator claims to have made. This is filed in the confidential archives of the office and preserved in strict secrecy. It amounts in effect to a notice to the office not to grant a patent for the same time to another without giving the caveator an opportunity to show his better title to the same. Act of 1836, § 12. See PATENTS.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received, 2 Sugden, Vend. 425; Coke, Litt. 384 *a*, Butl. note; Dougl. 665; 1 Salk. 211; 2 Freem. Ch. 1; 3 Swanst. Ch. 651; 1 Coke, 1; 17 Pick. Mass. 475; 10 Ga. 311; 1 Serg. & R. Penn. 52; unless there be fraud on the part of the vendor. 3 Bos. & P. 162; 14 Me. 133; 30 *id.* 266; 2 Caines, N. Y. 192; 2 Johns. Ch. N. Y. 519; 5 *id.* 79; 9 N. Y. 36; 24 Penn. St. 142; 4 Gill, Md. 300; 3 Md. Ch. Dec. 351; 1 Spenc. N. J. 353; 4 Ill. 334; 11 *id.* 146; 8 Leigh, Va. 658; 7 Gratt. Va. 238; 15 B. Monr. Ky. 627; Freem. Ch. Miss. 134, 276; 3 Ired. Eq. No. C. 408; 3 Humphr. Tenn. 347; 5 Iowa, 293; and consult Rawle's extremely valuable work on Covenants for Title, 3d ed. 611–634.

In sales of personal property, substantially the same rule applies, and is thus stated by Story (Sales, 3d ed. § 348). The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale. 1 Pet. C. C. 301; 4 Johns. N. Y. 421; 20 *id.* 196; 1 Wend. N. Y. 185; 11 Metc. Mass. 559. See MISREPRESENTATION; CONCEALMENT.

Consult Rawle, *Covenants for Title;* Story, *Sales;* 2 Kent, *Comm.* 478; 1 Story, *Equity;* Sugden (Ld. St. Leonards), *Vendors & P.;* 1 Bouvier, *Inst.* 954, 955.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowel.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowel; Spelman, Gloss.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CENEGILD. In Saxon Law. A pecuniary mulct or fine paid to the relations of

a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we cannot allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. In Canadian Law. An annual payment or due reserved to a seignor or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive;* the tenant is a *censitaire.* It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the rentes. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver. 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowel.

CENSUS (Lat. *censere*, to reckon). An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the provisions of the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods. U. S. Const. art. 1, § 2; 1 Story, U. S. Laws, 73, 722, 751; 2 *id.* 1134, 1139, 1169, 1194; 3 *id.* 1776; 4 Sharswood, U. S. Laws, 2179.

CENT (Lat. *centum*, one hundred). A coin of the United States, weighing seventy-two grains, and composed of eighty-eight per centum of copper and twelve of nickel. Act of Feb. 21, 1857, sect. 4. See 11 U. S. Stat. at Large, 163, 164.

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1792, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven pennyweights, or 264 grains; the half-cent in proportion. Afterwards, namely, on the 14th of January, 1793, it was reduced to 208 grains; the half-cent in proportion. 1 U. S. Stat. at Large, 299. In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 8, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 168 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1857. The same act directs that the coinage of half-cents shall cease. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which were the so-called Washington cents of those years, now so much sought for by collectors of coins.

CENTESIMA (Lat. *centum*). **In Roman Law.** The hundredth part.

Usuriæ centesimæ. Twelve *per cent. per annum;* that is, a hundredth part of the principal was due each month,—the month being the unit of time from which the Romans reckoned interest. 2 Blackstone, Comm. 462, n.

CENTRAL CRIMINAL COURT. In English Law. A court which has jurisdiction of all cases of treason, murder, felony, or misdemeanor committed within the city of London and county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey, and also of all serious offences within the former jurisdiction of the admiralty court.

This court was erected in 1834, and received the jurisdiction of the court of sessions, as far as concerned all the more serious offences, by virtue of the act 4 & 5 Will. IV. c. 36; and by virtue of the same act, and the subsequent acts 7 Will. IV. and 1 Vict. cc. 84–89, received the entire criminal jurisdiction of the court of admiralty.

2. The court consists of the lord mayor, the lord chancellor, the judges of the three superior courts at Westminster, the judges in bankruptcy, the judges of the admiralty, the dean of the arches, the aldermen, recorder, and common serjeant of London, and the judges of the sheriff's court.

Twelve sessions at least are held every year, at the Sessions House in the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the superior courts at Westminster. The less important cases are tried by either the recorder or common serjeant, or a judge from the sheriff's court commissioned for that purpose,—on every occasion the lord mayor or some of the aldermen being also present on the bench. Two sessions of the court adjoin each other and sit simultaneously.

See 9 & 10 Vict. c. 24; 14 & 15 Vict. c. 55; 19 & 20 Vict. c. 16.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumvirales causæ*) required the judgment of all the judges. 3 Blackstone, Comm. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into hundreds.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of churl. Cowel; Spelman, Gloss.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus et* B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and

it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPI CORPUS (Lat. I have taken the body). The return of an officer who has arrested a person upon a capias. 3 Bouvier, Inst. n. 2804.

CEPIT (Lat. *capere*, to take; *cepit*, he took, or has taken).

In Civil Practice. A form of replevin which is brought for carrying away goods merely. 3 Hill, N. Y. 282. *Non detinet* is not the proper answer to such a charge. 17 Ark. 85. And see 3 Wisc. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property. 5 Wisc. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person. 8 Gill, Md. 133.

In Criminal Practice. Took. A technical word necessary in an indictment for larceny. The charge must be that the defendant took the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Blackstone, Comm. 231.

CEPIT IN ALIO LOCO (Lat. he took in another place). **In Pleading.** A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration. 1 Chitty, Plead. 490; 2 *id.* 558; Rastell, Entr. 554, 555; Willes, 475. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return. 4 Bouvier, Inst. n. 3569.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum letæ* (leet money). Cowel.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12. 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3522, no. 8; 5 Coke, 121.

2. If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, 5 Barnew. & C. 583, or parol evidence cannot supply the defect, then neither at law nor in equity can effect be given to it. 1 Russ. & M. 116; 1 Chanc. Pract. 123.

It is a maxim of law, that that is certain which may be made certain: *certum est quod certum reddi potest.* Coke, Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. §§ 240–256; Mitford, Eq. Pl. Jeremy ed. 41; Cooper, Eq. Plead. 5; Wigram, Disc. 77.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. Cowp. 682; Hob. 295; 13 East, 107; 2 Bos. & P. 267; Coke, Littleton, 303; Comyns, Dig. *Pleader*, c. 17.

3. *Certainty to a common intent* is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Blackst. 530.

Certainty to a certain intent in general is attained when the meaning of the statute may be understood upon a fair and reasonable construction, without recurrence to possible facts which do not appear. 1 Wms. Saund. 49; 9 Johns. N. Y. 317; 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary. Lawes, Plead. 54, 55.

4. The last description of certainty is required in estoppels, Coke, Litt. 303; 2 H. Blackst. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy. 8 Term, 167; 6 Binn. Penn. 247. See 10 Johns. N. Y. 70; 1 Rand. Va. 270. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary," Croke, Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed. 2 Burr. 1127.

These decisions, which have been adopted from Lord Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party. 8 East, 85; 13 *id.* 112; 3 Maule & S. 14; 13 Johns. N. Y. 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement. 2 Wms. Saund. 117, n. 1; *id.* 411, n. 4. See, generally, 1 Chitty, Plead.

CERTIFICATE. In Practice. A writing made in any court, and properly authenticated, to give notice to another court of any thing done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned, or *voluntary*, which are given of the mere motion of the party giving them, and are in no case evidence. Comyns, Dig. *Chancery* (T 5); 1 Greenleaf, Ev. § 498; 2 Willes, 549, 550.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Comyns, Dig. *Certificate*.

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized. 1 Maule & S. 599; 3 Pet. 12, 29; 4 How. 522; 13 Pick. Mass. 172; 14 *id.* 442; 1 Dall. Penn. 406; 6 Serg. & R. Penn. 324; 3 Murph. No. C. 331; Rob. La. 307. See RETURN; NOTARY.

CERTIFICATE OF ASSIZE. In Practice. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzherbert, Nat. Brev. 181. It is now entirely obsolete. 3 Sharswood, Blackst. Comm. 389. Consult, also, Comyns, Dig. *Assize* (B 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent, Comm. 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel. 1 Parsons, Marit. Law, 48. The English statute makes such a transfer void. Stat. 3 & 4 Will. IV. c. 54.

The registry is not a document required by the law of nations as expressive of a ship's national character, 4 Taunt. 367, and is at most only *primâ facie* evidence of ownership, 2 Hall, Adm. N. Y. 1; 2 Wall. Jr. C. C. 264; 23 Penn. St. 76; 1 Cal. 481; 33 Eng. L. & Eq. 204; 14 East, 226; 16 *id.* 169. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy. 3 Kent, Comm. 149.

CERTIFICATION. In Scotch Law. A notice to a party in a suit that, if he fail to do something, certain consequences will follow. Paterson, Comp.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition.

Certification of a check is usually accomplished by writing the name of the officer authorized to bind the bank in that manner across the face of the check. See CHECK; Sewall, Bank.

CERTIORARI. In Practice. A writ issued by a superior to an inferior court of record, requiring the latter to send in to the former some proceeding therein pending, or the records and proceedings in some cause already terminated in cases where the procedure is not according to the course of the common law.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the United States Supreme Court, upon a suggestion of any defect in the transcript of the record sent up into that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully. 3 Dall. 411; 7 Cranch, 288; 3 How. 553. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect *record*, and not merely a more perfect *copy* or *transcript*, it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

2. The writ lies in most of the states of the United States to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision, 2 Mass. 89; 11 *id.* 466; 13 Pick. Mass. 195; 8 Me. 293; 5 Binn. Penn. 27; 5 Serg. & R. Penn. 174; 3 Halst. N. J. 123; 7 *id.* 368; 2 Dutch. N. J. 49; 4 Hayw. Tenn. 100; 2 Yerg. Tenn. 173; 1 Gill & J. Md. 196; 8 Vt. 271; 1 Ohio, 383; 2 Va. Cas. 270; 16 Johns. N. Y. 50; 20 *id.* 300; 1 Ala. 95; 8 Cal. 58; 6 Mich. 137; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds. 1 Hayw. No. C. 302; 2 Ark. 73. In England, 13 Eng. L. & Eq. 129; 1 Barnew. & C. 142; 3 Salk. 78, and in some states of the United States, 3 Harr. & M'H. Md. 115; Coxe, N. J. 287; 1 South. N. J. 40; 2 *id.* 539; 7 Cow. N. Y. 141; 2 Yerg. Tenn. 173; 2 Whart. Penn. 117; 2 Va. Cas. 268; 2 Murph. No. C. 100; 1 Ala. 95; 5 R. I. 385, the writ may also be issued to remove criminal causes to a superior court. But see 10 Ohio, 345.

3. It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers. 3 Dall. Penn. 413; 7 Cranch, 288; 9 Wheat. 526; 3 Johns. N. Y. 23; 2 Cow. N. Y. 38; 2 South. N. J. 270, 551; 7 Halst. N. J. 85; 1 Blackf. Ind. 32; 3 Ind. 316; 3 Dev. No. C. 117; 1 Dev. & B. No. C. 382; 11

Mass. 414; 2 Munf. Va. 229; 2 T. B. Monr. Ky. 371; 16 B. Monr. Ky. 472; 2 Ala. 499.

4. It does not lie to enable the superior court to revise a decision upon matters of fact, 6 Wend. N. Y. 564; 4 Halst. N. J. 209; 2 Dutch. N. J. 303; 2 Green, N. J. 74, 141; 10 Pick. Mass. 358; 40 Me. 389; 18 Ill. 324; 5 Wisc. 191; 3 *id.* 736; see 2 Ohio, 27; nor matters resting in the discretion of the judge of the inferior court, 9 Metc. Mass. 423; 1 Dutch. N. J. 173; unless by special statute, 6 Wend. N. Y. 564; 10 Pick. Mass. 358; 4 Halst. N. J. 209; or where palpable injustice has been done. 1 Miss. 112; 1 Wend. N. Y. 288; 8 *id.* 47; 2 Mass. 173, 489; 3 *id.* 188, 229.

It does not lie where the errors are formal merely, and not substantial, 8 Ad. & E. 413; 4 Mass. 567; 17 *id.* 351; 1 Metc. Mass. 122; 6 Miss. 578; 42 Me. 395; nor where substantial justice has been done though the proceedings were informal. 24 Me. 9; 20 Pick. Mass. 71; 24 *id.* 181; 13 Tex. 18.

5. It is granted or refused in the discretion of the superior court, Colby, Pract. 351; 8 Me. 293; 24 *id.* 9; 2 Mass. 445; 17 *id.* 352; 2 N. H. 210; 15 Wend. N. Y. 198; 2 Hill, N. Y. 9, 14; 26 Barb. N. Y. 437; 4 T. B. Monr. Ky. 420; 1 Miss. 112; 16 Vt. 446; 24 Ga. 379; and the application must disclose a proper case upon its face. 8 Ad. & E. 43; 17 Mass. 351; 2 Hawks, No. C. 102; 1 Ashm. Penn. 51, 215; 2 Harr. Del. 459; Wright, Ohio, 130; 4 Jones, No. C. 309; 18 Ark. 449; 17 Ill. 31; 4 Tex. 1; 2 Swan, Tenn. 176.

6. The judgment is either that the proceedings below be quashed or that they be affirmed, 8 Yerg. Tenn. 102, 218; 5 Mass. 423; 11 *id.* 466; 12 Gill & J. Md. 329; see 35 N. H. 315, either wholly or in part. 5 Mass. 420; 13 *id.* 433; 13 Pick. Mass. 195; 4 Ohio, 200; 13 Johns. N. Y. 461; 15 *id.* 195. See, also, 1 Overt. Tenn. 58; 2 Hayw. No. C. 38; 4 Ala. 357. The costs are discretionary with the court, 16 Vt. 426; 6 Ind. 367; but at common law neither party recovers costs, 8 Johns. N. Y. 321; 12 Wend. N. Y. 262; 11 Mass. 465; 3 N. H. 44; 4 Ohio, 200; and the matter is regulated by statute in some states. 4 Watts, Penn. 451; 1 Spenc. N. J. 271. See MANDAMUS; PROCEDENDO. Consult 4 Sharswood, Blackst. Comm. 262, 265; Redfield, Railways; and the authorities on the practice of the several states.

CERVISARII (*cervisiæ*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowel; Domesday.

CERVISIA. Ale. *Cervisarius.* An ale-brewer; an ale-house keeper. Cowel; Blount.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIUM (Lat. he has ceased for two years). **In Practice.** An obsolete writ, which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzherbert, Nat. Brev. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Blackstone, Comm. 232.

CESSET EXECUTIO (Lat. let execution stay). **In Practice.** The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSET PROCESSUS (Lat. let process stay). **In Practice.** The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627.

CESSIO BONORUM (Lat. a transfer of property). **In Civil Law.** An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. And see La. Civ. Code, 2166; 2 Mart. La. 112; 2 La. 354; 11 *id.* 531; 2 Mart. La. N. S. 108; 5 *id.* 299; 4 Wheat. 122.

CESSION (Lat. *cessio*, a yielding).

In Civil Law. An assignment. The act by which a party transfers property to another.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dispensation, the first benefice becomes void by a legal cession or surrender. Cowel.

In Governmental Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236–2250.

CESSIONARY. In Scotch Law. An assignee. Bell, Dict.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of personal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Washburn, Real Prop. 163.

He may be said to be the equitable owner, Williams, Real Prop. 135; 1 Spence, Eq. Jur. 497; 1 Ed. Ch. 223; 2 Pick. Mass. 29; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust, 1 Spence, Eq. Jur. 507; 2 Washburn, Real Prop. 195; may defend his title in the name of his trustee, 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate, 2 Ves. Sen. Ch. 472; 16 C. B. 652; 1 Washburn, Real Prop. 88; and may be removed from possession in

an action of ejectment by his own trustee. Lewin, Trust. 475; Hill, Trust. 274; 3 Dev. No. C. 425; 2 Pick. Mass. 508. See TRUST.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof. Tudor, Lead. Cas. 252; 2 Blackstone, Comm. 330. See 2 Washburn, Real Prop. 95; USE.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washburn, Real Prop. 88.

CHACEA. A station for game, more extended than a park, less so than a forest; the liberty of hunting within such limits. Cowel.

The driving or hunting animals; the way along which animals are driven. Spelman, Gloss.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chaufe*) the wax.

CHAFFERS. Anciently signified wares and merchandise: hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly.

CHALLENGE. In Criminal Law. A request by one person to another to fight a duel.

It may be oral or written. 6 Blackf. Ind. 20. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace. Hawkins, Pl. Cr. b. 1, c. 3, § 3; 3 East, 581; 6 *id.* 464; 1 Dan. Ky. 524; 1 South. N. J. 40; 2 M'Cord, So. C. 334; 1 Const. So. C. 107; 1 Hawks, No. C. 487; 2 Ala. 506; 6 Blackf. Ind. 20; 9 Leigh, Va. 603; 3 Rog. N. Y. 133; 3 Wheel. Cr. Cas. N. Y. 245. He who carries a challenge is also punishable by indictment. 3 Cranch, C. C. 178. In most of the states, this barbarous practice is punishable by special laws. 2 Bishop, Crim. Law, §§ 270–273.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future. Aso & M. Inst. b. 2, t. 19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russell, Crimes, 275; 2 Bishop, Crim. Law, § 270; 6 J. J. Marsh. Ky. 120; 1 Const. So. C. 107; 1 Munf. Va. 468.

2. In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial.

An exception to those who have been returned as jurors. Coke, Litt. 155 *b*.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest, 2 Binn. Penn. 454; 4 *id.* 349, and to the sheriff for favor as well as affinity. Coke, Litt. 158 *a*; 10 Serg. & R. Penn. 336; 11 *id.* 303.

3. Challenges are of the following classes:

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally, Colby, Pract. 235; 2 Blatchf. C. C. 435, the same end being attained by a motion addressed to the court, but are in some states. 33 Penn. St. 338; 12 Tex. 252; 24 Miss. 445; 1 Mann. Mich. 451; 20 Conn. 510; 1 Zabr. N. J. 656.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon the existence and character of the reason assigned.

4. *To the favor.* Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge. Coke, Litt. 147 *a*, 157 *a*; Bacon, Abr. *Juries*, E 5; 3 Wisc. 823. Such challenges are at common law decided by triors, and not by the court. See TRIORS; 16 N. Y. 501.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five, 4 Blackstone, Comm. 354, but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital, 2 Blatchf. C. C. 470; 10 B. Monr. Ky. 125; 8 Ohio St. 98; 25 Mo. 167; see 5 Wisc. 324; 1 Jones, No. C. 289; 16 Ohio, 354; while in civil cases the right is not allowed at all, 2 Blatchf. C. C. 470; or, if allowed, only to a very limited extent. 5 Harr. Del. 245; 7 Ohio St. 155; 9 Barb. N. Y. 161; 20 Conn. 510.

5. *To the poll.* Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging. Coke, Litt. 156 *b*. See 3 Blackstone, Comm. 363; 4 *id.* 353. They may be either to the array or to the poll. Coke, Litt. 156 *a*, *b*.

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of chal-

lenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary. See TRIORS.

6. The *causes* for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy. Coke, Litt. 155 *b et seq.*

These causes include, amongst others, *incapacity* resulting from age, lack of statutory qualifications, 10 Gratt. Va. 767; *partiality* arising from near relationship, 19 N. H. 372; 19 Penn. St. 95; 10 Gratt. Va. 690; Busb. No. C. 330; 32 Me. 310; 20 Conn. 87; 2 Barb. Ch. N. Y 331; see 38 Me. 44; 19 N. H. 351, an interest in the result of the trial, 11 Ind. 234; 8 Cush. Mass. 69; 21 N. H. 438; 1 Zabr. N. J. 656; 11 Mo. 247, conscientious scruples as to finding a verdict of conviction in a capital case, 1 Baldw. C. C. 78; 16 Tex. 206, 445; 7 Ind. 338; 2 Cal. 257; 3 Ga. 453; 17 Miss. 115; 16 Ohio, 364; 13 N. H. 536; see 13 Ark. 568; 14 Ill. 433; 5 Cush. Mass. 295, membership of societies, under some circumstances, 5 Cal. 347; 4 Gray, Mass. 18, or indicated by declarations of wishes or opinions as to the result of the trial, 1 Zabr. N. J. 196; 19 Ohio, 198; see 6 Ind. 169, or opinions formed or expressed as to the guilt or innocence of one accused of crime. 19 Ark. 156; 30 Miss. 627; 2 Wall. Jr. C. C. 333; 10 Humphr. Tenn. 456; 13 Ill. 685; 2 Greene, Iowa, 404; 19 Ohio, 198; 5 Ga. 85. See 1 Dutch. N. J. 566; 15 Ga. 498; 18 *id.* 383; 7 Ind. 332; 2 Swan, Tenn. 581; 16 Ill. 364; 1 Cal. 379; 5 Cush. Mass. 295; 7 Gratt. Va. 593; 12 Mo. 223; 18 Conn. 166.

7. *Who may challenge.* Both parties, in civil as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see 6 B. Monr. Ky. 15; 3 Wisc. 823; 2 Park. Cr. Cas. N. Y. 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other. 32 Miss. 389.

The time to make a challenge is between the appearance and swearing of the jurors. 8 Gratt. Va. 637; 3 Jones, No. C. 443; 3 Iowa, 216; 23 Penn. St. 12; 8 Gill, Md. 487; 8 Blackf. Ind. 194; 3 Ga. 453. See 1 Curt. C. C. 23. It is a general rule at common law that no challenge can be made till the appearance of a full jury, 4 Barnew. & Ald. 476; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll; and the right to the former is waived by making the latter. Coke, Litt. 158 *a;* Bacon, Abr. *Juries*, E 11; 6 Cal. 214. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily. 4 Blackstone, Comm. 356; 6 Term, 531; 4 Barnew. & Ald. 476. See 5 Cush. Mass. 295.

8. *Manner of making.* Challenges to the array must be made in writing, 1 Mann. Mich. 451; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenged," or, "I challenge," or, "We challenge." 1 Chitty, Crim. Law, 533–541; 4 Hargrave, St. Tr. 740; Trials per Pais, 172; Croke, Car. 105. See 43 Me. 11; 25 Penn. St. 134.

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house, 1 Term, 701; Coke, Litt. 48 *b;* 4 Mass. 576; 1 Metc. Mass. 538; 10 Conn. 318; and ejectment will lie for a deprivation of possession, 1 Term, 701; 9 Pick. Mass. 293, though the owner thereof does not thereby acquire any interest in the land. 11 Metc. Mass. 448. See Brooke, Abr. *Demand*, 20; 6 N. H. 555; 3 Watts, Penn. 243; 3 Leon. 210.

Consult Washburn; Preston, *Real Property.*

CHAMBER OF ACCOUNTS. In French Law. A sovereign court, of great antiquity, in France, which took cognizance of and registered the accounts of the king's revenue: nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERS. In Practice. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers.* The act may be an official one, and the hearing may be in the court-room; but if the court is not in session it is still said to be done *in chambers.*

CHAMPART. In French Law. The grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. In Criminal Law. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

CHAMPERTY. A bargain with a plaintiff or defendant, in a suit for a portion of the land or other matter sued for, in case of a successful termination of the suit which

the champertor undertakes to carry on at his own expense.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it, 16 Ala. 488; 24 Ala. N. S. 472; 9 Metc. Mass. 489; 1 Jones, Eq. No. C. 100; 5 Johns. Ch. N. Y. 44; 4 Litt. Ky. 117; while in simple maintenance the question of compensation does not enter into the account. 2 Bishop, Crim. Law, § 111.

The offence was indictable at common law, 4 Blackstone, Comm. 135; 1 Pick. Mass. 415; 5 T. B. Monr. Ky. 413; 1 Swan, Tenn. 393; 8 Mees. & W. Exch. 691; see 1 Ohio, 132; 3 Greene, Iowa, 472; 18 Ill. 449; 28 Vt. 490; 6 Tex. 275, and in some of the states of the United States by statute. See 37 Me. 196; 14 N. Y. 289; 18 Ill. 449; 15 B. Monr. Ky. 64; 14 Conn. 12. A common instance of champerty is where an attorney agrees with a client to collect by suit a particular claim or claims in general, receiving a certain proportion of the money collected, 9 Ala. N. S. 755; 17 *id.* 305; 1 Ohio, 132; 4 Dowl. Pl. Cr. 304, or a percentage thereon. 17 Ala. N. S. 206; 9 Metc. Mass. 489; 2 Bishop, Crim. Law, § 112. And see 3 Pick. Mass. 79; 4 Du. N. Y. 275; 1 Pat. & H. Va. 48; 18 Ill. 449; 15 B. Monr. Ky. 64; 29 Ala. N. S. 676; 6 Dan. Ky. 479; 17 Ark. 608; 4 Mich. 535. The doctrine of champerty does not apply to judicial sales. 10 Yerg. Tenn. 460; 5 N. Y. 320.

CHAMPION. He who fights for another, or takes his place in a quarrel. One who fights his own battles. Bracton, l, 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. In Criminal Law. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as happens in defending oneself. 4 Blackstone, Comm. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, his chancellor, the principal judge of his consistory. When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal. See CANCELLARIUS.

2. An officer bearing this title is to be found in most countries of Europe, and is generally invested with extensive authority. The title and office of chancellor came to us from England. Many of our state constitutions provide for the appointment of this officer, who is by them and by the laws of the several states invested with power as they provide. See 1 Spence, Eq. Jur.; Encyc. Am.; 4 Viner, Abr. 374; Wooddeson, Lect. 95.

CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES. In English Law. Courts of local jurisdiction in and for the two universities of Oxford and Cambridge in England.

These courts have jurisdiction of all civil actions or suits, except those in which a right of freehold is involved, and of all criminal offences and misdemeanors, under the degree of treason, felony, or mayhem, at Oxford when a scholar or privileged person is one of the parties, and at Cambridge when both parties are scholars or privileged persons and the cause of action arose within the town of Cambridge or its suburbs. 3 Sharswood, Blackst. Comm. 83, n.; Stat. 19 & 20 Vict. c. 17, § 18, c. 88; Rep. *temp.* Hardw. 241; 2 Wils. 406; 12 East, 12; 13 *id.* 635; 15 *id.* 634. The judge of the chancellor's court at Oxford is a vice-chancellor, with a deputy or assessor. An appeal lies from his sentence to delegates appointed by the congregation, thence to delegates appointed by the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery. 3 Stephen, Comm. 453, 455.

They are now governed by the common and statute law of the realm. Stat. 17 & 18 Vict. c. 81, § 45; 18 & 19 Vict. c. 36; 19 & 20 Vict. cc. 31, 95; 20 & 21 Vict. c. 25.

CHANCELLOR OF THE EXCHEQUER. A minister of state who presides in the exchequer and takes care of the interests of the crown, in addition to his other parliamentary duties. With the lord-treasurer he leases the crown-lands; and the two offices are often granted to the same person. Wharton, Dict. 2d Lond. ed. In addition to his duties in reference to the treasury of the king, the chancellor also sat as one of the judges in the equity court. 3 Blackstone, Comm. 45.

CHANCERY. See COURT OF CHANCERY.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. Termes de la Ley; Cowel.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. Termes de la Ley; Cowel.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels *of ease*, which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control.

CHAPTER. In Ecclesiastical Law. A congregation of clergymen.

Such an assembly is termed *capitulum*, which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him. 3 Serg. & R. Penn. 336; 3 Mass. 192; 3 Esp. 236.

2. The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases: *first*, to afford a presumption that a particular party has not been guilty of a criminal act; *second*, to affect the damages in particular cases, where their amount depends on the character and conduct of any individual; and, *third*, to impeach or confirm the veracity of a witness.

3. Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience,—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character. *Per Shaw*, C. J., 5 Cush. Mass. 325. See 5 Esp. 13; 1 Campb. 460; 3 *id.* 519; 2 Strange, 925; 2 State Tr. 1038; 1 Coxe, N. J. 424; 5 Serg. & R. Penn. 352; 2 Bibb, Ky. 286; 3 *id.* 195; 5 Day, Conn. 260; 7 Conn. 116; 14 Ala. 382; 6 Cow. N. Y. 673; 3 Hawks, No. C. 105.

4. In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant. Buller, Nisi P. 27, 296; 12 Mod, 232; 3 Esp. 236. See 5 Munf. Va. 10.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it. Stone *v.* Varney, 7 Metc. Mass. 86, where the decisions are collected and reviewed; 11 Cush. Mass. 241; 3 Pick. Mass. 378; 4 Den. N. Y. 509; 20 Vt. 232; 6 Penn. St. 170; 2 Nott & M'C. So. C. 511; 1 *id.* 268; Heard, Lib. & Sland. § 299. See 1 Johns. N. Y. 46; 11 *id.* 38. When evidence is admitted touching the general character of a party, it is manifest that it is to be confined to matters in reference to the nature of the charge against him. 2 Wend. N. Y. 352.

5. The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct. Buller, Nisi P. 296. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted. 3 Carr. & P. 589. And see 17 Conn. 467; 18 Me. 372; 14 Mass. 387; 5 Cox, Cr. Cas. 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath. 4 State Tr. 693; 4 Esp. 102. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own. 2 Stark. 151, 241; Starkie, Ev. pt. 4, 1753 to 1758; 1 Phillipps, Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist. 9 Watts, Penn. 124. Consult Greenleaf: Phillipps;

Starkie on Evidence; Roscoe, Crim. Evidence; Bouvier, Institutes.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particular purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

2. In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. Termes de la Ley.

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner of an estate, which binds the estate for its performance. Comyns, Dig. *Rent*, c. 6; 2 Ball & B. Ch. Ir. 223.

3. In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised.

Where the charge is personal, the devisee will generally take the fee of the estate devised, 4 Kent, Comm. 540; 2 Sharswood, Blackst. Comm. 108; 3 Term, 356; 6 Johns. N. Y. 185; 9 Mass. 161; 24 Pick. Mass. 139; but he will take only a life estate if it be upon the estate generally, 5 Term, 558; 4 East, 496; 14 Mees. & W. Exch. 698; 3 Mas. C. C. 209; 10 Wheat. 231; 10 Johns. N. Y. 148; 18 *id.* 35; 18 Wend. N. Y. 200; 7 Paige, Ch. N. Y. 481; 15 Me. 436; 5 Harr. & J. Md. 177; 8 *id.* 208; 9 Mass. 161; unless the charge be greater than a life estate will satisfy. 6 Coke, 16; 4 Term, 93; 12 Eng. Jur. Rep. 197; 1 Barb. N. Y. 102; 12 Pick. Mass. 27; 24 *id.* 138; 1 Washburn, Real Prop. 59. A charge is not an interest in, but a lien upon, lands. 3 Mas. C. C. 768; 12 Wheat. 498; 4 Metc. Mass. 523.

Consult Washburn, *Real Property;* Kent, *Commentaries;* Preston, *Estates;* Roper, *Legacies.*

4. In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. Story, Eq. Plead. § 31.

It is frequently omitted, and this the more properly as all matters material to the plaintiff's case should be fully stated in the stating part of the bill. Cooper, Eq. Plead. 11; 11 Ves. Ch. 574; 2 Anstr. 543. See 2 Hare, Ch. 264.

5. In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to the jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey. 10 Metc. Mass. 285–287; 13 N. H. 536; 21 Barb. N. Y. 566; 2 Blackf. Ind. 162; 1 Leigh, Va. 588; 3 *id.* 761; 3 J. J. Marsh. Ky. 150; 21 How. St. Tr. 1039. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge at once to those of the moderator of a small-sized town-meeting and of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. The charge frequently and usually includes a *summing up* of the evidence, given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge.

6. It should be a clear and explicit statement of the law applicable to the condition of the facts, 4 Hawks, No. C. 61; 1 A. K. Marsh. Ky. 76; 1 Dan. Ky. 35; 1 Bail. So. C. 482; 4 Conn. 356; 3 Wend. N. Y. 75; 10 Metc. Mass. 14, 263; 1 Mo. 97; 22 Me. 450; 24 *id.* 289; 16 Vt. 679; 3 Green, N. J. 32; 5 Blackf. Ind. 296; 5 Watts & S. Penn. 60; 6 *id.* 488; 23 Penn. St. 76; 1 Gill, Md. 127; adding such comments on the evidence as are necessary to explain its application, 8 Me. 42; 1 Const. So. C. 216; 1 Watts & S. Penn. 68; 22 Ga. 385; and may include an opinion on the weight of evidence, 10 Pick. Mass. 262; 34 N. H. 460; 8 Conn. 431; 5 Cow. N. Y. 243; 28 Vt. 223; 5 Jones, No. C. 393; see 9 Cal. 565; 17 Tex. 372; 33 Miss. 389; but should not undertake to decide the facts, 7 J. J. Marsh. Ky. 410; 2 Dan. Ky. 221; 3 *id.* 66; 7 Cow. N. Y. 29; 17 Mass. 249; 11 Pick. Mass. 140, 368; 12 Ala. 43; 10 Ala. N. S. 599; 7 Gill & J. Md. 44; 10 *id.* 346; 4 Cal. 260; 5 R. I. 295, unless in the entire absence of opposing proof. 5 Gray, Mass. 440; 7 Wend. N. Y. 160; 17 Vt. 176; 26 Mo. 523; 1 Penn. St. 68; 28 Ala. N. S. 675. And see 3 Dan. Ky. 566.

7. For the effect of an omission or refusal to charge on important points of law, see 1 Wash. C. C. 198; 4 Halst. N. J. 149; 1 Mo. 97; 10 *id.* 354; 5 Ohio, 375; 15 *id.* 123; 5 Wend. N. Y. 289; 12 Conn. 219; 11 N. H. 547; 4 Jones, No. C. 23; 10 Miss. 268; 5 Penn. St. 490; 6 *id.* 61; 17 Ga. 351. Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial, 5 Mass. 365; 1 Pick. Mass. 206; 12 *id.* 177; 9 Conn. 107; 4 Hawks, No. C. 64, even though on hypothetical questions, 11 Wheat. 59; 14 Tex. 483; 6 Cal. 214, on which no opinion can be required to be given, 5 Ohio, 88; 11 Gill & J. Md. 388; 2 Ired. No. C. 61; 3 *id.* 470; 5 Jones, No. C. 388; 5 Ala. N. S. 383; 28 *id.* 100; 3

Humphr. Tenn. 466; 6 *id.* 317; 6 Mo. 6; 20 N. H. 354; 16 Me. 171; 23 *id.* 246; 5 Cal. 478; 5 Blackf. Ind. 112; 16 Miss. 401; 9 Tex. 536; 16 *id.* 229; 3 Iowa, 509; 18 Ga. 411; but the rule does not apply where the instructions could not prejudice the cause. 11 Conn. 342; 1 McLean, C. C. 509; 2 How. 457.

CHARGE DES AFFAIRES, CHARGE D'AFFAIRES. In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister. 1 Kent, Comm. 39, n.; 4 Dall. Penn. 321. The first form of the phrase here given is the one used in the act of congress of May 1, 1810, by which the president is authorized to allow such officer a sum not greater than at the rate of four thousand five hundred dollars per annum, as a compensation for his personal services and expenses. 2 Story, U. S. Laws, 1171.

CHARGE TO ENTER HEIR. In Scotch Law. A writ commanding a person to enter heir to his predecessor within forty days, otherwise an action to be raised against him as if he had entered.

The heir might appear and renounce the succession, whereupon a decree *cognitionis causa* passed, ascertaining the creditor's debt. If the heir did not appear, he then became personally liable to the creditor. A charge was either general, or special, or general-special. Charges are now abolished, by 10 & 11 Vict. c. 48, § 16, and a summons of constitution against the unentered heir substituted.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the *charges* incurred for his benefit must be paid by a hirer; the defendant must pay the *charges* of a suit. In relation to actions, the term includes something more than the costs, technically so called.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Ambl. 651; 2 Sneed, Tenn. 305.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intendment. Boyle, Charity, 17.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. i. 3, *De Episc. et Cler.*; Domat, b. 2, t. 2, § 6, 1, b. 4, t. 2, § 6, 2; 1 Eq. Cas. Abr. 96; Mr. Binney's argument on the Girard Will, p. 40; Chastel on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex donationem piarum, passim.* Under that system, donations for pious uses which had not a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if the legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. It should seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions. F. Moore, 882, 890; Duke, Char. Uses, 72, Bridgem. ed. 362; 1 Vern. Ch. 224, note; 1 Eq. Cas. Abr. 96, pl. 8; 1 Ves. Sen. Ch. 225; Hob. 136; 1 Am. Law Reg. 545. The main purpose of the stat. 43 Eliz. c. 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application. Shelford, Mortm. 89, 103. This statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many charities were upheld which would otherwise have been void. Shelford, Mortm. 278, 279, and notes; 3 Leigh, Va. 470; Nelson, Lex Test. 137; Boyle, Char. 18 *et seq.*; 1 Burn, Eccl. Law, Phillimore, ed. 317 *a*.

2. There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation. Boyle, Char. 23.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest, 33 Penn. St. 9; 2 Sneed, Tenn. 305; 4 Wheat. 518; 1 Sumn. C. C. 276; 10 Penn. St. 23; 35 N. H. 445; 28 Penn. St. 23; for every description of college and school, and their instructors and pupils, where nothing contrary to the fundamental doctrine of Christianity is taught; to all institutions for the advancement of the Christian religion, 7 B. Monr. Ky. 351, 481; 4 Ired. Eq. No. C. 19; 30 Penn. St. 425; to all churches, 10 Cush. Mass. 129; 7 Serg. & R. Penn. 559; 4 Iowa, 180, chapels, hospitals, orphan-asylums, 33 Penn. St. 9; 12 La. Ann. 301; 8 Rich. Eq. So. C. 190, dispensaries, 27 Barb. N. Y. 260, and the like, 2 Sandf. Ch. N. Y. 46; to general public purposes, 30 Penn. St. 437, as supplying water or light to towns, building roads and bridges, keeping them in repair, etc., 24 Conn. 350; and to other charitable purposes general in their character. 4 R. I. 414; 12 La. Ann. 301; 5 Ohio St. 237; 33 Penn. St. 415; 5 Ind. 465.

3. Before the recent acts, charities in England were interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patriæ*. Spence, Eq. Jur. 439, 441; 12 Mass. 537. The subject has since been regulated by various statutes. The Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by 18 & 19 Vict. c. 124; 20 & 21 Vict. c. 76; Tudor's Charitable Trust Act, *passim*. Roman Catholics share in their benefits, 2 & 3 Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2. The stat. 43 Eliz. c. 4 has not been re-enacted or generally followed in the United States. In some of them it has been adopted by usage; but, with several striking exceptions, the decisions

of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in that statute. Boyle, Char. 18 *et seq.*

4. In Virginia and New York, that statute, with all its consequences, seems to have been repudiated. 3 Leigh, Va. 450; 22 N. Y. 70, & App. So in North Carolina, Connecticut, and Maryland. 1 Dev. Eq. No. C. 276; 1 Hawks, No. C. 96; 4 Ired. Ch. No. C. 26; 6 Conn. 293; 22 *id.* 31; 5 Harr. & J. Md. 392; 6 *id.* 1; 8 Md. 551. In Georgia, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on. 8 Blackf. Ind. 15; 18 B. Monr. Ky. 635; 4 Ga. 404; 4 Iowa, 252; 16 Pick. Mass. 107; 4 R. I. 414; 12 La. Ann. 301; 7 Vt. 211, 241; 4 Wheat. 1; 2 How. 127; 17 *id.* 369; 24 *id.* 465. See 16 Ill. 225; 19 Ala. N. s. 814; 1 Swan, Tenn. 348.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference; although such was the doctrine of the civil law. Nor are they in the United States, except by special statute.

See, generally, 2 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent, Comm. 10th ed. 361–365; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. Ch. 88; 24 Penn. St. 84; 3 Rawle, Penn. 170; 1 Penn. 49; 17 Serg. & R. Penn. 88; 2 Dan. Ky. 170; 9 Cow. N. Y. 437; 9 Wend. 394; 1 Sandf. Ch. 439; 9 Barb. N. Y. 324; 17 *id.* 104; 27 *id.* 376; 30 *id.* 124; 9 N. Y. 554; 9 Ohio, 203; 5 Ohio St. 237; 24 Conn. 350; 6 Pet. 435; 9 *id.* 566; 9 Cranch, 331; 2 How. 127; 20 Miss. 165; 16 Ill. 225; 2 Strobh. Eq. So. C. 379.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distinguish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Coke, Litt. 229. See DEED POLL.

CHARTA DE FORESTA. A collection of the laws of the forest, made in the 9th Hen. III., and said to have been originally a part of Magna Charta.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowel.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Blackstone, Comm. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowel. Any conveyance of lands. Any sealed instrument. Spelman. See Coke, Litt. 6; 1 Coke, 1; F. Moore, 687.

The act of legislature creating a corporation. Dane, Abr. *Charter.*

CHARTER-LAND. In English Law. Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Blackstone, Comm. 90.

CHARTER-PARTY. A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly written on a card, and afterwards the card was cut into two parts from top to bottom, and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented.

It is in writing not generally under seal, in modern usage, 1 Parsons, Marit. Law, 231; but may be by parol. 16 Mass. 336; 5 Pick. Mass. 422; 12 *id.* 425; 16 *id.* 401; 9 Metc. Mass. 233; Ware, Dist. Ct. 263; 3 Sumn. C. C. 144. It should contain, *first*, the name and tonnage of the vessel, see 14 Wend. N. Y. 195; 7 N. Y. 262; *second*, the name of the captain, 2 Barnew. & Ald. 421; *third*, the names of the letter to freight and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight, 2 Gall. C. C. 61; *sixth*, the demurrage or indemnity in case of delay, 9 Carr. & P. 709; 10 Mees. & W. Exch. 498; 17 Barb. N. Y. 184; Abb. Adm. 548; 4 Binn. Penn. 299; 9 Leigh, Va. 532; 5 Cush. Mass. 18; *seventh*, such other conditions as the parties may agree upon. 13 East, 343; 20 Bost. Law Rep. 669; Bee, Adm. 124.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 2 Brod. & B. 410; 10 Bingh. 345; 8 Ad. & E. 835; 4 Wash. C. C. 110; 1 Cranch, 214; 23 Me. 289; 4 Cow. N. Y. 470; 17 Barb. N. Y. 191; 1 Sumn. C. C. 551; 2 *id.* 589; 1 Paine, C. C.

358. When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships. 1 Marshall, Ins. 407.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting oneself and keeping protected against all other persons beasts of the chase within a specified district, without regard to the ownership of the land. 2 Blackstone, Comm. 414–416.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the *forest* laws. 2 Blackstone, Comm. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. Termes de la Ley. But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *feræ naturæ* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his property. 4 Toullier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent. 14 East, 249; Pothier, *Propriété*, pt. 1, c. 2, a. 2.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence. 7 Conn. 266. See 14 Penn. St. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable. 2 Chitty, Pract. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law and of a character to degrade, disgrace, and exclude her from society. 2 Conn. 707; 8 Pick. Mass. 384; 5 Gray, Mass. 2, 5; 2 N. H. 194; Heard, Lib. & Sland. § 36.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coustumier* of Normandy it is described as a mere movable, but is set in opposition to a fief or *feud*; so that not only goods, but whatever was not a *feud* or fee, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Blackstone, Comm. 385.

2. Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and every thing else that can be put in motion and transferred from one place to another. 2 Kent, Comm. 340; Coke, Litt. 48 *a*; 4 Coke, 6; 5 Mass. 419; 1 N. H. 350.

3. Chattels, whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chancellor Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond, go with the inheritance, as heir-looms, to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances. See FIXTURES; 2 Kent, Comm. 342; Coke, Litt. 20 *a*, 118; 12 Price, Exch. p. 163; 11 Coke, 50 *b*; 1 Chitty, Pract. 90; 8 Viner, Abr. 296; 11 *id.* 166; 14 *id.* 109; Bacon, Abr. *Baron*, etc. C 2; Dane, Abr. Index; Comyns, Dig. *Biens*, A; Bouvier, Inst. Index.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent, Comm. 342.

There may be a chattel interest in real property, as in case of a lease. Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. See the subject fully treated in 1 Washburn, Real Prop. 310 *et seq.*

CHATTEL MORTGAGE. A mortgage of personal property. 2 Kent, Comm. 516 *et seq.*

CHAUD-MEDLEY (Fr. *chaud*). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 3 Blackstone, Comm. 184. The distinction is said to be, however, of no great importance. 1 Russell, Crimes, 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden rencounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or *endeavoring* to defraud another of his known right, by some *wilful device*, contrary to the plain rules of common honesty." Hawkins, Pl. Cr. b. 2, c. 23, § 1. "The fraudu-

lent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public."

2. In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do. 2 East, Pl. Cr. 817; 1 Gabbett, Crim. Law, 199; 1 Deacon, Crim. Law, 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay for them, 6 Mass. 72; or to violate his contract, however fraudulently it be broken, 1 Mass. 137; or fraudulently to deliver a less quantity of amber than was contracted for and represented, 2 Burr. 1125; 1 W. Blackstone, 273; or to receive good barley to grind, and to return instead a musty mixture of barley and oatmeal, 4 Maule & S. 214. See 1 Gabbett, Crim. Law, 205; 2 East, Pl. Cr. 816; 7 Johns. N. Y. 201; 14 *id.* 371; 9 Cow. N. Y. 588; 9 Wend. N. Y. 187; 2 Mass. 138; 1 Me. 387; 1 Yerg. Tenn. 76; 1 Dall. Penn. 47; 1 Bennett & H. Lead. Crim. Cas. 1.

3. To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial. 1 Gabbett, Crim. Law, 201; 3 Greenleaf, Ev. § 86; 6 Mass. 72. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and whose provisions have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names. 6 Mass. 72; 12 Johns. N. Y. 292; 3 Greenleaf, Ev. § 86. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some additional credit and confidence might be gained to the party using them. 2 East, Pl. Cr. 826, 827; 1 Gabbett, Crim. Law, 206.

4. The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business. Heard, Lib. & Sland. §§ 16, 28, 48; 6 Cush. Mass. 185; 2 Chitt. Bail, 657; 2 Penn. St. 187. See FALSE PRETENCES; TOKEN; ILLITERATE.

CHECK. **Contracts.** A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named, or bearer, or to such person, or order, a named sum of money.

The chief differences between checks and bills of exchange are—*First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties. 3 Johns. Cas. N. Y. 5, 9; 9 Barnew. & C. 388; Chitty, Bills, 8th ed. 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto*. 6 Cow. N. Y. 484; Kent, Comm. Lec. 44, 5th ed. p. 104, note; 3 Johns. Cas. N. Y. 5, 259; 10 Wend. N. Y. 306; 2 Hill, N. Y. 425. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties. 3 Mann. & G. 571–573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace. 25 Wend. N. Y. 672; 6 Hill, N. Y. 174.

2. Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand. 21 Wend. N. Y. 372; 20 *id.* 205; 10 *id.* 306; 2 Stor. C. C. 502, 512.

They ought to be drawn within the state where the bank is situated, because if not so drawn they become foreign bills of exchange, subject to the law merchant. This law requires that they be protested, and that due diligence be used in presenting them, in order to hold the drawer and indorsers. It is not necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay. 2 Pet. 586; 2 Hill, N. Y. 425; 3 Johns. Cas. N. Y. 2; 1 Ga. 304; 2 Mood. & Rob. 401; 3 Scott, N. R. 555; 3 Kent, Comm. 5th ed. 104, n.; Story, Prom. Notes, § 492.

3. In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bonâ fide* holder for value to collect the money without regard to the previous history of the paper. 16 Pet. 1; 5 Johns. Ch. N. Y. 54; 20 Johns. N. Y. 637; 3 Kent, Comm. 81.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid.

Checks, being payable on demand, are not to be accepted, but presented at once for payment. There is a practice, however, of mark-

ing checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance. Such a marking is called certifying; and checks so marked are called certified checks.

Giving a check is no payment unless the check is paid. 1 Hall, N. Y. 56, 78; 4 Johns. N. Y. 296; 7 Serg. & R. Penn. 116; 2 Pick. Mass. 204. See 3 Rand. Va. 481. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender. 3 Bouvier, Inst. n. 2436.

A check cannot be the subject of a *donatio mortis causâ*, unless it is presented and paid during the life of the donor; because his death revokes the banker's authority to pay. 4 Brown, Ch. 286. But in such a case a check has been considered as of a testamentary character. 3 Curt. Eccl. 650.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction. Story, Prom. Notes, § 499. See, generally, Sewell, Bank.; Shaw, Checks; 4 Johns. N. Y. 304; 7 *id.* 26; 6 Wend. N. Y. 445; 13 *id.* 133; 10 *id.* 304; 2 Nott & M'C. So. C. 251; 1 Blackf. Ind. 104; 1 Litt. Ky. 194; 2 *id.* 299; 4 Harr. & J. Md. 276; 7 *id.* 381; 15 Mass. 74; 7 Serg. & R. Penn. 116; 9 *id.* 125; 4 Yerg. Tenn. 210; 30 N. H. 256; 2 Stor. C. C. 502; 5 Barnew. & C. 750; 10 Ad. & E. 449; 4 Bingh. 253.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin, called by merchants a *stump*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law Latin *via regia*. Often spelled *Chimin*. Termes de la Ley; Cowel; Spelman, Gloss.

CHEMIS. In Old Scotch Law. A mansion-house.

CHEVAGE. A sum of money paid by villeins to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also for permission to remain without the dominion of the lord. When paid to the king, it was called subjection. Termes de la Ley; Coke, Litt. 140 *a*; Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit. See CHEVISANCE.

CHEVISANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHICKASAW NATION, THE. Within certain limits established by treaty between the United States, the Choctaw and the Chickasaw Indians, signed at Washington, June 22, 1855, the Chickasaw nation has exclusive control and jurisdiction.

The following treaties have been made, establishing the rights of this nation:—Between the United States and the Chickasaws, concluded October 20, 1832, ratified March 1, 1833; one concluded May 24, 1834, ratified July 1, 1834; one between the United States, the Choctaws, and the Chickasaws, concluded January 17, 1837, ratified March 24, 1837; one between the United States and the Chickasaws, concluded June 22, 1852, ratified February 24, 1853; one between the United States, the Choctaws, and the Chickasaws, concluded June 22, 1855, ratified March 4, 1856. This nation has a printed constitution, prefaced by a declaration of rights, which is substantially as follows, viz.: that all political power inheres in the people; that all men should be free to worship God according to the dictates of their conscience, and not be compelled to attend, erect, or support any ministry against their consent; that there should be freedom of speech; that there should be security from unreasonable searches of property or person; that every person accused of crime should have a speedy trial.

The more important provisions of the constitution are as follows:

All free males nineteen years old or more, who are Chickasaws by birth or adoption, may vote. But no idiot, or insane person, or person convicted of an infamous crime, may vote.

The Legislative Power.

The Senate is to be composed of not less than one-third nor more than two-thirds the number of representatives, elected by the people for the term of two years. The present number of senators is twelve, elected in each of the four districts of the *state*, each district being also a county. A senator must be thirty years of age at least, must be a Chickasaw by birth or adoption, and must have been a resident of the nation for one year, and for the last six months a citizen of the county from which he is chosen.

The House of Representatives consists of eighteen members, elected by the people of the counties for one year. A representative must be twenty-one years old, and otherwise possess the same qualifications as a senator. Constitution, art. iv.

The Executive Power.

The Governor is elected for two years by the people of the nation. He must be a Chickasaw by birth or adoption, thirty years of age, and must have resided in the nation for one year next before his election. He is to execute the laws; may convene the legislature at unusual times; is to give information and recommend measures to the legislature; may adjourn the legislature in case of disagreement as to the time of adjournment, not beyond the next session.

The Judicial Power.

The Supreme Court is composed of one chief and two assistant justices, elected by the legislature for the term of four years. A judge must be thirty years old. This court has appellate jurisdiction only, coextensive with the limits of the nation. It may issue the writs necessary to enforce its jurisdiction, and compel any judge of the district court to proceed to trial.

The Circuit Court is held in each of the four

counties of the nation. It has original jurisdiction of all criminal cases, and exclusive jurisdiction of all crimes amounting to felony, as well as of all civil cases not cognizable by the county court, and has original jurisdiction of all actions of contract where the amount involved is more than fifty dollars. One circuit judge for the nation is elected by the legislature. He rides four circuits a year, holding court each time in each of the four counties in the state.

A County Court is held in each county by a single judge, elected by the people of the county for the term of two years. It has a civil jurisdiction in all actions where the amount involved is more than fifty dollars. It has also jurisdiction of the probate of wills, the settlement of estates of decedents, the appointment and control of guardians. A probate term is held each month.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pract. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenleaf, Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washburn, Real Prop. 19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Blackstone, Comm. 44.

CHIEF CLERK IN THE DEPARTMENT OF STATE. An officer appointed by the secretary of state, whose duties are to attend to the business of the office under the superintendence of the secretary, and, when the secretary is removed from office by the president, or in any other case of vacancy, during such vacancy to take the charge and custody of all records, books, and papers appertaining to the department.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICIAR. Under the early Norman kings, the highest officer in the kingdom next to the king.

He was guardian of the realm in the king's absence. His power was diminished under the reign of successive kings, and, finally, completely distributed amongst various courts in the reign of Edward I. 3 Blackstone, Comm. 28. The same as *Capitalis Justiciarius.*

CHIEF LORD. The immediate lord of the fee. Burton, Real Prop. 317.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

2. Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts as satisfy a jury to the contrary. 3 Carr. & P. 215, 427; 12 East, 550; 13 Ves. Ch. 58; 3 Paige, Ch. N. Y 139; 6 Binn. Penn. 286; 3 Dev. No. C. 548. Those born out of lawful wedlock follow the condition of the mother. The father is bound to maintain his children, and to educate them and to protect them from injuries. See FATHER. Children are not liable at common law for the support of infirm and indigent parents, 16 Johns. N. Y. 281; but generally they are bound by statutory provisions to maintain their parents who are in want, when they have sufficient ability to do so. 2 Kent, Comm. 208; Pothier, *Du Mariage*, n. 384, 389; 2 Root, Conn. 168; 5 Cow. N. Y. 284. The child may justify an assault in defence of his parent. 3 Blackstone, Comm. 3. The father, in general, is entitled to the custody of minor children; but, under certain circumstances, the mother will be entitled to them when the father and mother have separated. 5 Binn. Penn. 520. See FATHER; MOTHER. Children are liable to the reasonable correction of their parents. See CORRECTION.

3. The term children does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally; yet sometimes that meaning is affixed to it in cases of necessity. 6 Coke, 16. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, etc. to take under it. 1 Ves. Sen. Ch. 196; Ambl. 555, 661; 3 Ves. Ch. 258; 3 Ves. & B. Ch. 69; 7 Paige, Ch. N. Y. 328; 1 Bail. Eq. So. C. 7; 4 Watts, Penn. 82; 3 Greenleaf, Cruise, Dig. 213, note. When legally construed, the term children is confined to legitimate children, 7 Ves. Ch. 458; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included. 1 Ves. & B. Ch. 422, 469; 1 Madd. Ch. 234; 9 Paige, Ch. N. Y. 88; 1 Russ. & M. 581; 4 Kent, Comm. 346, 414, 419, and notes. The civil code of Louisiana, art. 2522, n. 14, enacts that "under the name of children are comprehended not only children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

4. Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him. 2 Greenleaf, Cruise, Dig. 135; 4 Kent, Comm. 412. See 2 Washburn, Real Prop. 412, 439, 699.

In Pennsylvania, and in some other states, Laws of Penn. 1836, p. 250; R. I. Rev. Stat. tit. xxiv. c. 154, § 10; 3 Gray, Mass. 367, the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law. 3 Binn. Penn. 498. See, as to the law of Virginia on this subject, 3 Munf. Va. 20, and article IN VENTRE SA MERE. As to their competency as witnesses, see 1 Greenleaf, Ev. § 367; 2 Starkie, Ev. 699.

See, generally, 8 Viner, Abr. 318; 8 Comyns, Dig. 470; Bouvier, Inst. Index; 2 Kent, Comm. 172; 4 *id.* 408; 1 Roper, Leg. 45–76; 1 Belt, Supp. to Ves. Jr. 44; 2 *id.* 158.

CHILDNIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childnit. Cowel.

CHILTERN HUNDREDS. A range of hills in England, formerly much infested by robbers.

To exterminate the robbers, a steward of the Chiltern Hundreds was appointed. The office long since became a sinecure, and is now used to enable a member of parliament to resign, which he can do only by the acceptance of some office within the gift of the chancellor. 2 Stephen, Comm. 403; Wharton, Dict. 2d Lond. ed.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium*. Cowel. See Coke, Litt. 56 *a*; Spelman, Gloss.; Termes de la Ley.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowel.

CHINESE INTEREST. Interest for money charged in China. In a case where a note was given in China, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month from the expiration of the eighteen months. 2 Watts & S. Penn. 227, 264.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount.

CHIRGEMOTE (spelled, also, *Chirchgemote, Circgemote, Kirkmote;* Sax. *circgemote*, from *circ, ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelman, Gloss.; LL. Hen. I. cc. 4, 8; Coke, 4th Inst. 321; Cunningham, Law Dict.

CHIROGRAPH. In Conveyancing. A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counterpart; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Blackstone, Comm. 296. This method of preventing counterfeiting, or of detecting counterfeits, is now used, by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied. Cruise, Dig. t. 35, c. 2, s. 52.

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these *charta* should be verified by the seal of the signer with the attestation of three or four witnesses. DuCange; Cowel.

In Scotch Law. A written voucher for a debt. Bell, Dict. The possession of this instrument by the debtor raises a presumption of payment by him. Bell, Dict.; Erskine, Inst. l. 2, t. 4, § 5.

CHIVALRY, TENURE BY. Tenure by knight-service. Coke, Litt.

CHOCTAW NATION, THE. By treaty with the United States, a portion of territory is set apart, over which the Choctaw Indians have exclusive jurisdiction.

They have a printed constitution, prefaced by a bill of rights. The bill of rights declares, among other things, that political power is inherent in the people; that there shall be religious freedom; that there shall be freedom of speech and of the press; that the person and property shall be secure from unreasonable searches; that there shall be trial by jury; that no person shall be arrested except for offences defined by the laws; that excessive bail shall not be required in any case.

By the constitution, every free male citizen twenty-one years old, and who has been a citizen of the nation six months and who has lived in the county one month, is entitled to vote.

The Legislative Power.

The Senate is composed of not less than one-third nor more than one-half the number of representatives, elected by the people for the term of four years. They are so classified that one-half the number go out of office every two years. A senator must be thirty years old, and have been a resident of the district for which he is chosen at least one year and of the nation two years preceding his election.

The House of Representatives is composed of not less than seventeen nor more than thirty-five members, apportioned among the counties, and elected by the people for the term of two years.

There are the provisions customary in the constitutions of the various states of the United States for organizing the two houses; making each the judge of the qualification of its members; making each regulate the conduct of its members; providing for the continuance of sessions, for open sessions, for keeping a journal of proceedings, etc. Members are privileged from arrest, except for treason, felony, or breach of the peace, during the session, and going to and returning from the same, allowing one day for each twenty miles the member has to travel.

The Executive Power.

The Governor is elected by the people for the term of two years. He must be thirty years old, and a free and acknowledged citizen of the Choctaw nation, and must have lived in the nation five years. He is eligible for four years only out of any term of six years. He possesses powers substantially the same as those of the governors of the various states.

The Judicial Power.

The Supreme Court consists of three circuit court judges. It holds two sessions each year, at the capital. It sits as a court of errors and appeals only.

The Circuit Court is composed of three judges, elected by the people, one from each of the districts into which the nation is divided for the purposes of this court. It has original jurisdiction in all criminal cases, and in all civil cases where the amount involved exceeds fifty dollars, except those cases of minor offences where a justice of the peace has exclusive jurisdiction. Two terms a year, at least, must be held in each county.

The Probate Court is held by a judge elected in each county by the people for the term of two years. It has the regulation of the settlement of estates of decedents, the appointment and control of guardians of minors, lunatics, etc., and the probate of wills.

Justices of the Peace are chosen by the electors of each county for the term of two years. They have a civil jurisdiction in all cases where the amount involved is less than fifty dollars. They constitute a board of police for the county, and have charge of the highways, bridges, etc.

CHOSE (Fr. *thing*). Personal property.

Choses in possession. Personal things of which one has possession.

Choses in action. Personal things of which the owner has not the possession, but merely a right of action for their possession. 2 Blackstone, Comm. 389, 397; 1 Chitty, Pract. 99.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. *Biens;* Chitty, Eq. Dig.

2. It is one of the qualities of a chose in action that at common law it is not assignable, 10 Coke, 47, 48; 2 Johns. N. Y. 1; 12 Wend. N. Y. 297; 1 Cranch, 367; but in equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the assignee to use his name for the purpose of recovery, and, consequently, enforce its specific performance, unless contrary to public policy. 1 P. Will. Ch. 381; Freem. Ch. 145; 1 Ves. Sen. Ch. 412; 2 Stor. C. C. 660; 2 Ired. Eq. No. C. 54; 1 Wheat. 236; 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment. 4 Term, 340; 1 Hill, N. Y. 483; 4 Ala. N. S. 184; 14 Conn. 123; 29 Me. 9; 13 N. H. 230; 10 Cush. Mass. 93; 20 Vt. 25. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then, in the United States, be entitled to sue in his own name, 10 Mass. 316; 3 Metc. Mass. 66; 5 Pet. 597; 2 R. I. 146; 7 Harr. & J. Md. 213; 2 Barb. N. Y. 349, 420; 27 N. H. 269; but without such express promise the assignee, except under peculiar circumstances, must proceed, even in equity, in the name of the assignor. 2 Barb. Ch. N. Y. 596; 1 Johns. Ch. N. Y. 463; 7 Gill & J. Md. 114; 2 Wheat. 373.

3. But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half-pay or full pay of an officer in the army, 2 Anstr. 533; 1 Ball & B. Ch. Ir. 389; or of a right of entry or action for land held adversely, 2 Ired. Eq. No. C. 54; or of a part of a right in controversy, in consideration of money or services to enforce it, 16 Ala. 488; 4 Dan. Ky. 173; 2 Dev. & B. Eq. No. C. 24. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person. 19 Wend. N. Y. 73; 4 Serg. & R. Penn. 19; 13 N. Y. 322; 6 Cal. 456. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned. 3 E. D. Smith, N. Y. 246; 12 N. Y. 622; 15 *id.* 432; 2 Barb. N. Y. 110; 4 Du. N. Y. 74, 660.

4. The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, although without notice, in general takes it subject to all the equities which subsist against the assignor. 1 P. Will. Ch. 496; 4 Price, Exch. 161; 1 Johns. N. Y. 522; 7 Pet. 608; 11 Paige, Ch. N. Y. 467; 2 Stockt. N. J. 146; 2 Wad. Va. 233. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual. 3 Day, Conn. 364; 10 Conn. 444; 3 Binn. Penn. 394; 4 Metc. Mass. 594.

5. To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent, 15 Mass. 485; 16 Johns. N. Y. 51; 19 *id.* 342; 1 Hill, N. Y. 583; 13 Sim. Ch. 469; 1 Mylne & C. 690; and therefore the mere delivery of the written evidence of debt, 2 Jones, No. C. 224; 28 Mo. 56; 24 Miss. 260; 13 Mass. 304; 5 Me. 349; 17 Johns. N. Y. 284; 7 Penn. St. 251, or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties. 7 Ves. Ch. 28; 1 Caines, Cas. N. Y. 18; 19 Wend. N. Y. 73.

6. Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal as well as equitable right passes to the transferee. See BILL OF EXCHANGE. In some

states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable. 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted. 4 Du. N. Y. 74.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania, 11 Serg. & R. Penn. 394; 5 Binn. Penn. 555; of New York, 8 Johns. N. Y. 291; of Connecticut, 2 Swift, System, 321; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See 20 Pick. Mass. 206. To write or speak contemptuously and maliciously against it is an indictable offence. Cooper, Libel, 59, 114. See 5 Jur. 529; 8 Johns. N. Y. 290; 20 Pick. Mass. 206; 2 Lew. Cr. Cas. 237.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land;' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says a late accomplished writer (Townsend, St. Tr. vol. ii. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as well as the courts spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanctions for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its mainstay and pillar,—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief-Justice Hale cannot be expressed more plainly than in his own words. An information was exhibited against one Taylor, for uttering blasphemous expressions too horrible to repeat. Hale, C. J., observed that "such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For, to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and to *reproach* the Christian religion is to speak in subversion of the law." Ventr. 293. To remove all possibility of further doubt, the English commissioners on criminal law, in their sixth report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage:—"The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense, Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used against it; for it is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws." If blasphemy mean a railing accusation, then it is, and ought to be, forbidden. Heard, Lib. & Sland. § 338. See 2 How. 127, 197–201; 11 Serg. & R. Penn. 394; 8 Johns. N. Y. 290; 10 Ark. 259; 2 Harr. Del. 553, 569.

CHURCH. A society of persons who profess the Christian religion. 7 Halst. N. J. 206, 214; 10 Pick. Mass. 193; 3 Penn. St. 282; 31 *id.* 9.

The place where such persons regularly assemble for worship. 3 Tex. 288.

The term church includes the chancel, aisles, and body of the church. Hammond, Nisi P. 204; 3 Tex. 288. By the English law, the terms church or chapel, and church-yard, are expressly recognized as in themselves correct and technical descriptions of the building and place, even in criminal proceedings. 8 Barnew. & C. 25; 1 Salk. 256; 11 Coke, 25 *b*; 2 Esp. 5, 28.

Burglary may be committed in a church, at common law. 3 Cox, Cr. Cas. 581. The church of England is not deemed a corporation aggregate; but the church in any particular place is so considered, for the purposes at least of receiving a gift of lands. 9 Cranch, 292; 2 Conn. 287; 3 Vt. 400; 2 Rich. Eq. So. C. 192. See 9 Mass. 44; 11 Pick. Mass. 495; 10 *id.* 97; 1 Me. 288; 3 *id.* 400; 4 Iowa, 252; 3 Tex. 288; 2 Md. Ch. Dec. 143.

As to the right of succession to glebe lands, see 9 Cranch, 43, 292; 9 Wheat. 468; or other church property, see 18 N. Y. 395. As to the power of a church to make by-laws, etc. under local statutes, see 5 Serg. & R. Penn. 510; 3 Penn. St. 282; 4 Des. So. C. 578; 30 Vt. 595; 5 Cush. Mass. 412.

With regard to the possession of church property in case of the withdrawal of a part of the members, see 5 Ohio, 283; 16 Mass. 488; 10 Pick. Mass. 172; 11 *id.* 495; 2 Sandf.

Ch. N. Y. 186; 6 Penn. St. 201; 9 *id.* 321; 2 Rich. Eq. So. C. 192; 5 M'Lean, C. C. 369; 7 B. Monr. Ky. 481; 8 *id.* 70. See 2 Den. N. Y. 292; 1 Strobh. Eq. So. C. 197.

CHURCH RATE. A tribute by which the expenses of the church are to be defrayed. They are to be laid by the parishioners, in England, and may be recovered before two justices, or in the ecclesiastical court. Wharton, Dict. 2d Lond. ed.

CHURCH-WARDEN. An officer whose duty it is to take care of or guard the church,

They are taken to be a kind of corporation in favor of the church for some purposes: they may have, in that name, property in goods and chattels, and bring actions for them for the use and benefit of the church, but may not waste the church property, and are liable to be called to account. 3 Stephen, Comm. 90; 1 Blackstone, Comm. 394; Cowel.

2. These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church. Bacon, Abr. By the common law, the capacity of church-wardens to hold property for the church is limited to personal property. 9 Cranch, 43.

CHURL. See CEORL.

CINQUE PORTS. The five ports of England which lie towards France.

These ports, on account of their importance as defences to the kingdom, early had certain privileges granted them, and in recompense were bound to furnish a certain number of ships and men to serve on the king's summons once in each year. "The service that the barons of the Cinque Ports acknowledge to owe; upon the king's summons, if it shall happen, to attend with their ships fifteen days at their own cost and charges, and so long as the king pleases, at his own charge." Cowel, *Quinque Portus.* The Cinque Ports are Dover, Sandwich, Hastings, Hithe, and Romney. Winchelsea and Rye are reckoned parts of Sandwich; and the other of the Cinque Ports have ports appended to them in like manner. The Cinque Ports have a lord-warden, who had a peculiar jurisdiction, sending out writs in his own name, and who is also constable of Dover Castle. The jurisdiction was abolished by 18 & 19 Vict. c. 48; 20 & 21 Vict. c. 1. The representatives in parliament and the inhabitants of the Cinque Ports are each termed barons. Brande; Cowel; Termes de la Ley.

CIRCUIT. A division of the country, appointed for a particular judge to visit for the trial of causes or for the administration of justice. See 3 Blackstone, Comm. 58; 3 Bouvier, Inst. n. 2532.

Courts are held in each of these circuits, at stated periods, by judges assigned for that purpose. 3 Stephen, Comm. 321. The United States are divided into nine circuits. 1 Kent, Comm. 301.

The term is oftener applied, perhaps, to the periodical journeys of the judges through their various circuits. The judges, or, in England, commissioners of assize and *nisi prius*, are said *to make their circuit.* 3 Blackstone, Comm. 57. The custom is of ancient origin. Thus, in A.D. 1176, justices in *eyre* were appointed, with delegated powers from the *aula regis*, being held members of that court, and directed to make the circuit of the kingdom once in seven years.

The custom is still retained in some of the states, as well as in England, as, for example, in Massachusetts, where the judges sit in succession in the various counties of the state, and the full bench of the supreme court, by the arrangement of law terms, makes a complete circuit of the state once in each year. See, generally, 3 Stephen, Comm. 221 *et seq.*; 1 Kent, Comm. 301.

CIRCUIT COURTS. In American Law. Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction extends.

The term is applied distinctively to a class of the federal courts of the United States, of which terms are held in two or more places successively in the various circuits into which the whole country is divided for this purpose, see 1 Kent, Comm. 301–303; COURTS OF THE UNITED STATES, 31–66; and, in some of the states, to courts of general jurisdiction of which terms are held in the various counties or districts of the state. Such courts sit in some instances as courts of nisi prius, in others, either at nisi prius or in banc. They may have an equity as well as a common-law jurisdiction, and may be both civil and criminal courts. The systems of the various states are widely different in these respects; and reference must be had to the articles on the different states for an explanation of the system adopted in each. The term is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

CIRCUITY OF ACTION. Indirectly obtaining, by means of a subsequent action, a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits. 1 Term, 441; 4 Cow. N. Y. 682.

CIRCUMDUCTION. In Scotch Law. A closing of the period for lodging papers, or doing any other act required in a cause. Paterson, Comp.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary and probable or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was made manifest by the bloody mark of a *left* hand visible on her *left* arm. 14 How. St. Tr. 1324. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, Is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw

the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited, 1 Starkie, Ev. 505; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIBUS. See TALES.

CIRCUMVENTION. In Scotch Law. Any act of fraud whereby a person is reduced to a deed by decreet. Tech. Dict. It has the same sense in the civil law. Dig. 50. 17. 49. 155; *id.* 12. 6. 6. 2; *id.* 41. 2. 34.

CITACION. In Spanish Law. The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. In Civil Law. The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION (Lat. *citare*, to call, to summon). **In Practice.** A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promovert, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law, 453, 454; Ayliffe, Parerg. xliii. 175; Hall, Adm. Pract. 5; Merlin, Rép.

The process issued in courts of probate or surrogate's courts. It is usually the original process in any proceeding, and is in that respect analogous to the writ of capias or summons at law, and the subpœna in chancery.

In Scotch Practice. The calling of a party to an action done by an officer of the court under a proper warrant.

The service of a writ or bill of summons. Paterson, Comp.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being statements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

In the United States, the laws of the general government are generally cited by their date: as, Act of Sept. 24, 1789, § 35; or, Act of 1819, c. 170, 3 Story, U. S. Laws, 1722. The same practice prevails in Pennsylvania, and in most of the other states, when the date of the statute is important. Otherwise, in most of the states, reference is made to the revised code of laws or the official publication of the laws: as, Va. Rev. Code, c. 26; N. Y. Rev. Stat. 4th ed. 400. Books of reports and textbooks are generally cited by the number of the volume and page: as, 2 Washburn, Real Prop. 350; 4 Penn. St. 60. Sometimes, however, the paragraphs are numbered, and reference is made to the paragraphs: as, Story, Bailm. § 494; Gould, Plead. c. 5, § 30.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter—which is a careless mode of writing the Greek letter π, the first letter of the word πανδεχται—signifies Pandects; and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the Collation, the title, chapter, and paragraph, as follows: *In Authentico, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator, Codice ad legem fascidiam.* See Mackeldy, Civ. Law, § 65; Domat, Civ. Law, Cush. ed. Index.

In view of the diverse and distracting *modes* of citation adopted by authors (they are generally neither methods nor systems), the editor has been induced to give here the outlines of the system, as well as a list of citations of reports, which he has adopted in the revision of the present edition of this book. The difficulties in the way of the creation of a system of reference lie in so adjusting it as to meet the needs of the student and the convenience of practitioners, both of which require fulness of citation, and, at the same time, to secure such compactness as will prevent an undue increase of the

size of those books in which, from their nature, many citations must be made. If the principles here suggested should be found to be easily remembered, of convenient and common application, and should come to be generally applied, or if they should suggest a better system which may meet with general adoption, a great saving of time and perplexity would be made, much to the relief of those who cannot well spare the time, or who lack the experience, needed in guessing out the meaning of the ingenious contractions which conceal the authorities mentioned in the text-books, and thus hinder the use of those books in the respect in which they are mainly useful.

Statutes of the various states will be cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c. 96, § 2.

Text-books are referred to by giving the number of the volume (where there are more volumes than one), the name of the author in full, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where two or more persons have written a book in company, the full name which stands first on the title-page, and the initial letter of the following name or names, are given: thus, Gale & W. Easem.

Reference is made to the *page* of the *first* edition, except where a different course is indicated. Sections or paragraphs, when numbered from the beginning of the book, are referred to, in preference to pages.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp. Lothrop ed. 96; Smith, Lead. Cas. 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name in full, and preceding the title of the book: thus, Sharswood, Blackst. Comm.; Coleridge, Blackst. Comm.

Reports of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cranch, 96; 5 East, 241. In a few instances, however, common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted: as, Term; C. B.; Exch.

The references to the reports of the circuit courts of the United States have C. C. added to the reporter's name: thus, 2 Sumn. C. C. 155; and the reports of the district courts are distinguished by the addition of Dist. Ct.: thus, Ware, Dist. Ct.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Penn. St. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167.

Otherwise, the reporter's name is used, and the name of the state added: thus, 11 Pick. Mass. 23. This rule extends also to the provincial reports; and the principle is applied to decisions of Scotch and Irish cases.

Abbreviations are always used in citing reports, as follows: *First*, the geographical abbreviations of the names of the various states are used; as, Mass., Cal., Ga.; and Ir., Sc., and Fr. are used to denote respectively Irish, Scotch, and French reports. *Second*, the first syllable of the reporter's name is used: as, Dev. No. C.; adding the initial consonant or consonants of the second, in case it begins with a consonant: as, Tayl. No. C.; H. Blackst. In a very few cases it may be necessary to add another syllable of the name, to prevent ambiguity: as, Robins, Hou. L.; Roberts, Hou. L. Where the name is a monosyllable, it is given in full: as, Ware; East.

Where two or more persons are authors of the same book of reports, the name standing first on the title-page is given, and the initial letter of subsequent names: as, Ad. & E.; using the second name, however, abbreviated, or even in full, when it is necessary to avoid ambiguity: as, Drur. & Warr.; Drur. & Walsh; Barnew. & Ad.; Barnew. & Ald.

Where the reports are of decisions in courts of peculiar jurisdiction, an additional abbreviation indicates the fact: thus, 3 Paige, Ch. N. Y. 87.

A few instances of double abbreviation seem desirable: as, 1 Wms. Saund. 85; Metc. Yelv. 43.

The following list is believed to include all the terms made use of in this book in the citation of reports, and is intended to embrace all the printed reports. For a complete list of reporters, and much valuable information relative thereto, see REPORTS.

Abb. Adm. Abbott, Admiralty.
Abb. Pr. N. Y. Abbott, New York Practice.
Act. Prize Cas. Acton, Prize Cases.
Ad. & E. Adolphus and Ellis.
Add. Eccl. Addams, Ecclesiastical.
Add. Penn. Addison, Pennsylvania.
Aik. Vt. Aiken, Vermont.
Al. Aleyn.
Ala. Alabama.
Ala. N. S. Alabama, new series.
Ald. Penn. Alden, Pennsylvania.
Alc. Reg. Cas. Ir. Alcock, Irish Registration Cases.
Alc. & N. Ir. Alcock and Napier, Irish.
All. Mass. Allen, Massachusetts.
All. New Br. Allen, New Brunswick.
Am. Law Mag. American Law Magazine.
Am. Jur. American Jurist.
Am. Railw. Cas. American Railway Cases.
Ambl. Ch. Ambler, Chancery.
And. Anderson.
Andr. Andrews.
Anstr. Anstruther, Exchequer.
Anth. N. Y. Anthon, New York.
Ark. Arkansas.
Arkl. Just. Sc. Arkley, Scotch Justiciary.
Armstr. M. & O. Ir. Armstrong, Macartney and Ogle, Irish.
Arn. Arnold.
Arn. & H. Bail. Arnold and Hodges, Bail.
Ashm. Penn. Ashmead, Pennsylvania.
Atk. Ch. Atkyns, Chancery.
Bail. So. C. Bailey, South Carolina.
Bail. Eq. So. C. Bailey, South Carolina Equity.
Bail, Ct. Cas. Bail, Court Cases.
Baldw. C. C. Baldwin, Circuit Court.
Ball & B. Ch. Ir. Ball and Beatty, Irish Chancery.
Barb. N. Y. Barbour, New York.
Barb. Ch. N. Y. Barbour, New York Chancery.
Barn. Barnardiston.
Barn. Ch. Barnardiston, Chancery.
Barnes. Barnes.
Barnew. & Ad. Barnewall and Adolphus.
Barnew. & Ald. Barnewall and Alderson.
Barnew. & C. Barnewall and Cresswell.
Barr. & Arn. El. Cas. Barron and Arnold, Election Cases.

Barr. & Aust. El. Cas. Barron and Austin, Election Cases.
Batt. Ir. Batty, Irish.
Bay, So. C. Bay, South Carolina.
Beasl. Ch. N. J. Beasley, New Jersey Chancery.
Beatt. Ch. Ir. Beatty, Irish Chancery.
Beav. Rolls. Beavan, Rolls.
Bee, Adm. Bee, Admiralty.
Bell. Bellewe.
Bell, Hou. L. Sc. Bell, House of Lords, Scotch Cases.
Bell, Cr. Cas. Bell, Crown Cases.
Belt, Suppl. Ves. Belt, Supplement to Vesey.
Bendl. Bendloe, or New Benloe.
Benl. Old Benloe.
Benl. in Ashe. Benloe in Ashe.
Benl. in Keilw. Benloe in Keilwey.
Bert. New Br. Berton, New Brunswick.
Bibb, Ky. Bibb, Kentucky.
Bingh. Bingham.
Bingh. N. C. Bingham, new cases.
Binn. Penn. Binney, Pennsylvania.
Black. Black.
Blackf. Ind. Blackford, Indiana.
Blackh. D. & O. Ir. Blackham, Dundas and Osborne, Irish.
H. Blackst. Henry Blackstone.
W. Blackst. Sir William Blackstone.
Bland, Ch. Md. Bland, Chancery Maryland.
Blatchf. C. C. Blatchford, Circuit Court.
Blatchf. & H. Adm. Blatchford and Howland, Admiralty.
Bligh, Hou. L. Bligh, House of Lords.
Bligh, Hou. L. N. S. Bligh, House of Lords, new series.
Bloomf. Cas. N. J. Bloomfield, New Jersey Cases.
Bos. & P. Bosanquet and Puller.
Bos. & P. N. R. Bosanquet and Puller, new reports.
Bost. Law Rep. Boston Law Reporter.
Bosw. N. Y. Bosworth, New York.
Bott, Settl. Cas. Bott, Settlement Cases.
Bradf. Surr. N. Y. Bradford, New York Surrogate.
Brayt. Vt. Brayton, Vermont.
Brev. So. C. Brevard, South Carolina.
J. Bridgm. Sir J. Bridgman.
O. Bridgm. Sir Orlando Bridgman.
Brightl. Penn. Brightly, Pennsylvania.
Brock. C. C. Brockenbrough, Circuit Court.
Brod. & B. Broderip and Bingham.
Brooke. Brooke.
Broun, Just. Sc. Broun, Scotch Justiciary.
Brown, Ch. Brown, Chancery.
Brown, Parl. Cas. Brown, Parliamentary Cases.
Browne, Penn. Browne, Pennsylvania.
Brownl. Brownlow.
Brownl. & G. Brownlow and Goldesborough.
Bruce, Sess. Sc. Bruce, Scotch Sessions.
Buck, Bank. Buck, Bankruptcy.
Bulstr. Bulstrode.
Bunb. Exch. Bunbury, Exchequer.
Burn. Wisc. Burnett, Wisconsin.
Burr. Burrow.
Burr. Settl. Cas. Burrow, Settlement Cases.
Busb. No. C. Busbee, North Carolina.
Busb. Eq. No. C. Busbee, North Carolina Equity.
C. B. Common Bench.
C. B. N. S. Common Bench, new series.
Caines, N. Y. Caines, New York.
Caines, Cas. N. Y. Caines, New York Cases.
Cal. California.
Cald. Caldecott.
Caldw. Settl. Cas. Caldwell, Settlement Cases.
Call, Va. Call, Virginia.
Calth. Calthorp.
Cam. & N. No. C. Cameron and Norwood, North Carolina.
Campb. Campbell.
Car. Ch. Cary, Chancery.
Car. Law Rep. Carolina Law Repository.
Carpm. Pat. Cas. Carpmael, Patent Cases.
Carr. H. & A. Mag. Cas. Carrow, Hamerton and Allen, Magistrate Cases.
Carr. & K. Carrington and Kirwan.
Carr. & M. Carrington and Marshman.
Carr. & P. Carrington and Payne.
Cart. Carter.
Carth. Carthew.
Cas. temp. Finch. Cases *tempore* Finch.
Cas. temp. Hardw. Cases *tempore* Hardwick.
Cas. temp. Holt. Cases *tempore* Holt.
Cas. temp. King. Cases *tempore* King.
Cas. temp. Plunk. Cases *tempore* Plunket.
Cas. temp. Sugd. Cases *tempore* Sugden.
Cas. temp. Talb. Cases *tempore* Talbot.
Cawl. Cawley.
Chanc. Cas. Cases in Chancery.
Chandl. Wisc. Chandler, Wisconsin.
R. M. Charlt. Ga. R. M. Charlton, Georgia.
T. U. P. Charlt. Ga. T. U. P. Charlton, Georgia.
Cheves, So. C. Cheves, South Carolina.
Cheves, Eq. So. C. Cheves, South Carolina Equity.
D. Chipm. Vt. D. Chipman, Vermont.
N. Chipm. Vt. N. Chipman, Vermont.
Chitt. Bail. Chitty, Bail.
Choyce, Ch. Cas. Choyce, Chancery Cases.
Clark & F. Hou. L. Clark and Finelly, House of Lords.
Clark & F. Hou. L. N. S. Clark and Finelly, House of Lords, new series.
Clarke, Ch. N. Y. Clarke, New York Chancery.
Clayt. Clayton.
Cockb. & R. El. Cas. Cockburn and Rowe, Election Cases.
Code, N. Y. Code, New York.
Code Rep. New York Code Reporter.
Coke. Coke.
Colem. N. Y. Coleman, New York.
Colem. & C. N. Y. Coleman and Caines, New York.
Coll. Parl. Cas. Colles, Cases in Parliament.
Colly. Ch. Collyer, Chancery.
Com. Comyns.
Comb. Comberbach.
Conn. Connecticut.
Conn. & L. Ch. Ir. Connor and Lawson, Irish Chancery.
Const. So. C. South Carolina Constitutional.
Const. N. S. So. C. South Carolina Constitutional, new series.
Cook & A. Ir. Cook and Alcock, Irish.
Cooke, Dist. Ct. Cooke, District Court.
Coop. Cas. Cooper, Cases.
Coop. Ch. Cooper, Chancery.
Corb. & D. El. Cas. Corbett and Daniell, Election Cases.
Cow. N. Y. Cowen, New York.
Cowp. Cowper.
Cox, Ch. Cox, Chancery.
Cox, Cr. Cas. Cox, Criminal Cases.
Coxe, N. J. Coxe, New Jersey.
Crabbe, Dist. Ct. Crabbe, District Court.
Craig & P. Ch. Craig and Phillips, Chancery.
Craig. & S. Hou. L. Sc. Craigie and Stewart, House of Lords, Scotch.
Cranch. Cranch.
Cranch, C. C. Cranch, Circuit Court.
Crawf. & D. Cas. Ir. Crawford and Dix, Irish Cases.
Crawf. & D. Abr. Cas. Ir. Crawford and Dix, Abridged Irish Cases.
Croke Car. Croke Charles.
Croke Eliz. Croke Elizabeth.
Croke Jac. Croke James.
Crompt. & J. Exch. Crompton and Jervis, Exchequer.

Crompt. & M. Exch. Crompton and Meeson, Exchequer.
Crompt. M. & R. Exch. Crompton, Meeson and Roscoe, Exchequer.
Curt. C. C. Curtis, Circuit Court.
Curt. Eccl. Curtis, Ecclesiastical.
Cush. Mass. Cushing, Massachusetts.
Cush. Mass. El. Cas. Cushing, Massachusetts Election Cases.
Dal. Dalison.
Dall. Penn. Dallas, Pennsylvania.
Dalr. Sess. Sc. Dalrymple, Scotch Sessions.
Dan. Ky. Dana, Kentucky.
Dan. Eq. Daniell, Equity.
Danes & L. Cas. Danson and Loyd, Mercantile Cases.
Dav. Dist. Ct. Davels, District Court.
Dav. Ir. Davies, Irish.
Dav. & M. Davison and Merivale.
Day, Conn. Day, Connecticut.
Deac. Bank. Deacon, Bankruptcy.
Deac. & C. Bank. Deacon and Chitty, Bankruptcy.
Deane, Eccl. Deane, Ecclesiastical.
Dearsl. Cr. Cas. Dearsly, Crown Cases.
Dearsl. & B. Cr. Cas. Dearsly and Bell, Crown Cases.
Deas & A. Sess. Sc. Deas and Anderson, Scotch Sessions.
De Gex, Bank. De Gex, Bankruptcy.
De Gex, F. & J. Ch. De Gex, Fisher and Jones, Chancery.
De Gex & J. Ch. De Gex and Jones, Chancery.
De Gex, M. & G. Ch. De Gex, Macnaghten and Gordon, Chancery.
De Gex & S. Ch. De Gex and Smale, Chancery.
Del. El. Cas. Delane, Election Cases.
Den. Cr. Cas. Denison, Crown Cases.
Den. N. Y. Denio, New York.
Des. Eq. So. C. Desaussure, South Carolina Equity.
Dev. Ct. Cl. Devereux, Court of Claims.
Dev. No. C. Devereux, North Carolina.
Dev. Eq. No. C. Devereux, North Carolina Equity.
Dev. & B. No. C. Devereux and Battle, North Carolina.
Dev. & B. Eq. No. C. Devereux and Battle, North Carolina Equity.
Dick. Ch. Dickens, Chancery.
Dirl. Sess. Sc. Dirleton, Scotch Sessions.
Dods. Adm. Dodsley, Admiralty.
Dougl. Douglas.
Dougl. El. Cas. Douglas, Election Cases.
Dougl. Mich. Douglass, Michigan.
Dow, Parl. Cas. Dow, Cases in Parliament.
Dow & C. Hou. L. Dow and Clark, House of Lords.
Dowl. Bail. Dowling, Bail.
Dowl. N. S. Bail. Dowling, Bail, new series.
Dowl. & L. Dowling and Lowndes.
Dowl. & R. Dowling and Ryland.
Dowl. & R. Mag. Cas. Dowling and Ryland, Magistrate Cases.
Drewr. Ch. Drewry, Chancery.
Drewr. & S. Ch. Drewry and Smale, Chancery.
Drur. Ch. Ir. Drury, Irish Chancery.
Drur. & Walsh, Ch. Ir. Drury and Walsh, Irish Chancery.
Drur. & Warr. Ch. Ir. Drury and Warren, Irish Chancery.
Du. N. Y. Duer, New York.
Dudl. Ga. Dudley, Georgia.
Dudl. So. C. Dudley, South Carolina.
Dudl. Eq. So. C. Dudley, South Carolina Equity.
Dur. Sess. Sc. Durie, Scotch Sessions.
Dutch. N. J. Dutcher, New Jersey.
Dy. Dyer.
Eagl. Eagle.
Eagl. & Y. Cas. Eagle and Younge, Cases.
East. East.
Ed. Ch. Eden, Chancery.
Ed. Suppl. Ves. Eden, Supplement to Vesey.
Edg. Sess. Sc. Edgar, Scotch Sessions.
Edw. Adm. Edwards, Admiralty.
Edw. Ch. N. Y. Edwards, New York Chancery.
Elch. Sess. Sc. Elchie, Scotch Sessions.
Ell. & B. Ellis and Blackburn.
Ell. B. & E. Ellis, Blackburn and Ellis.
Ell. B. & S. Ellis, Best and Smith.
Ell. & E. Ellis and Ellis.
Eng. L. & Eq. English Law and Equity.
Eq. Cas. Abr. Equity Cases, Abridged.
Esp. Espinasse.
Exch. Exchequer.
Fac. Adv. Sess. Sc. Faculty of Advocates, Scotch Sessions.
Falc. Sess. Sc. Falconer, Scotch Sessions.
Falc. & F. El. Cas. Falconer and Fitzherbert, Election Cases.
Ferg. Cons. Sc. Ferguson, Scotch Consistory.
Finch, Ch. Finch, Chancery.
Fitzg. Fitzgibbon.
Fla. Florida.
Flan. & K. Rolls Ir. Flanagan and Kelly, Irish Rolls.
Fol. Cas. Foley, Cases.
Fonbl. Bank. Cas. Fonblanque, Bankruptcy Cases.
Forbes, Sess. Sc. Forbes, Scotch Sessions.
Forr. Exch. Forrest, Exchequer.
Fort. Fortesque.
Fost. Cr. Cas. Foster, Crown Cases.
Fost. & F. Cr. Cas. Foster and Finlason, Crown Cases.
Fount. Sess. Sc. Fountainhall, Scotch Sessions.
Fox & S. Ir. Fox and Smith, Irish.
Fras. El. Cas. Fraser, Election Cases.
Freem. Freeman.
Freem. Ch. Freeman, Chancery.
Freem. Ch. Miss. Freeman, Mississippi Chancery.
Fyfe & R. Cas. Fyfe and Rettie, Cases.
Ga. Georgia.
Ga. Dec. Georgia Decisions.
Gale, Exch. Gale, Exchequer.
Gale & D. Gale and Davison.
Gall. C. C. Gallison, Circuit Court.
Giff. Ch. Giffard, Chancery.
Gilb. Gilbert.
Gilb. Eq. Gilbert, Equity.
Gill, Md. Gill, Maryland.
Gill & J. Md. Gill and Johnson, Maryland.
Gilm. Va. Gilmer, Virginia.
Gilm. & F. Sess. Sc. Gilmour and Falconer, Scotch Sessions.
Gilp. Dist. Ct. Gilpin, District Court.
Glanv. El. Cas. Glanville, Election Cases.
Glassc. Ir. Glasscock, Irish.
Godb. Godbolt.
Gosf. Sc. Gosford, Scotch.
Gouldsb. Gouldsborough.
Gow. Gow.
Grant, Cas. Penn. Grant, Pennsylvania Cases.
Grant, Ch. Upp. C. Grant, Upper Canada Chancery.
Gratt. Va. Grattan, Virginia.
Gray, Mass. Gray, Massachusetts.
Green, N. J. Green, New Jersey.
Green, Ch. N. J. Green, New Jersey Chancery.
Greene, Iowa. Greene, Iowa.
Gwill. Cas. Gwillim, Cases.
Hadd. Sess. Sc. Haddington, Scotch Sessions.
Hagg. Adm. Haggard, Admiralty.
Hagg. Cons. Haggard, Consistory.
Hagg. Eccl. Haggard, Ecclesiastical.
Hailes, Sess. Sc. Hailes, Scotch Sessions.
Hall, Law Journ. Hall, Law Journal.

Hall, N. Y. Hall, New York.
Hall & T. Ch. Hall and Twells, Chancery.
Halst. N. J. Halsted, New Jersey.
Halst. Ch. N. J. Halsted, New Jersey Chancery.
Ham. A. & O. Mag. Cas. Hamerton, Allen and Otter, Magistrate Cases.
Hand. Ohio. Handy, Ohio.
Hanm. Hanmer.
Harcr. Sess. Sc. Harcrease, Scotch Sessions.
Hard. Ky. Hardin, Kentucky.
Hardr. Hardres.
Hare, Ch. Hare, Chancery.
Harp. So. C. Harper, South Carolina.
Harp. Eq. So. C. Harper, South Carolina Equity.
Harr. Del. Harrington, Delaware.
Harr. Ch. Mich. Harrington, Michigan Chancery.
Harr. N. J. Harrison, New Jersey.
Harr. & G. Md. Harris and Gill, Maryland.
Harr. & J. Md. Harris and Johnson, Maryland.
Harr. & M'H. Md. Harris and M'Henry, Maryland.
Harr. & W. Harrison and Wollaston.
Hawaii. Hawaii.
Hawks, No. C. Hawks, North Carolina.
Hayes, Exch. Ir. Hayes, Irish Exchequer.
Hayes & J. Exch. Ir. Hayes and Jones, Irish Exchequer.
Hayw. No. C. Haywood, North Carolina.
Hayw. Tenn. Haywood, Tennessee.
Head, Tenn. Head, Tennessee.
Hempst. C. C. Hempstead, Circuit Court.
Hen. & M. Va. Hening and Munford, Virginia.
Hetl. Hetley.
Hill, N. Y. Hill, New York.
Hill, So. C. Hill, South Carolina.
Hill, Ch. So. C. Hill, South Carolina Chancery.
Hill, Tenn. Hill, Tennessee.
Hill & D. N. Y. Hill and Denio, New York.
Hilt. N. Y. Hilton, New York.
Hob. Hobart.
Hoffm. Ch. N. Y. Hoffman, New York Chancery.
Hog. Rolls Ir. Hogan, Irish Rolls.
Holt. Holt.
Holt, N. P. Holt, Nisi Prius.
Home, Sess. Sc. Home, Scotch Sessions.
Hopk. Ch. N. Y. Hopkins, New York Chancery.
Hopk. Adm. Hopkinson, Admiralty.
Horn & H. Exch. Horn and Hurlstone, Exchequer.
Hou. L. Cas. House of Lords Cases.
Hov. Suppl. Ves. Hovenden, Supplement to Vesey.
How. Howard.
How. Cas. N. Y. Howard, New York Cases.
How. Pop. Cas. Ir. Howard, Irish Popery Cases.
How. Pr. N. Y. Howard, New York Practice.
How. St. Tr. Howell, State Trials.
Huds. & B. Ir. Hudson and Brooke, Irish.
Hughes, Ky. Hughes, Kentucky.
Hume, Sess. Sc. Hume, Scotch Sessions.
Humphr. Tenn. Humphreys, Tennessee.
Hutt. Hutton.
Ill. Illinois.
Ind. Indiana.
Iowa. Iowa.
Ir. Ch. Irish Chancery.
Ir. Ch. N. S. Irish Chancery, new series.
Ir. Law. Irish Law.
Ir. Law. N. S. Irish Law, new series.
Ired. No. C. Iredell, North Carolina.
Ired. Eq. No. C. Iredell, North Carolina Equity.
Irv. Just. Sc. Irvine, Scotch Justiciary.
Jac. Ch. Jacob, Chancery.
Jac. & W. Ch. Jacob and Walker, Chancery.
Jebb, Cr. Cas. Ir. Jebb, Irish Crown Cases.
Jebb & B. Ir. Jebb and Bourke, Irish.
Jebb & S. Ir. Jebb and Symes, Irish.
Jeff. Va. Jefferson, Virginia.
Jenk. Exch. Jenkins, Exchequer.
Johns. N. Y. Johnson, New York.
Johns. Cas. N. Y. Johnson, New York Cases.
Johns. Ch. N. Y. Johnson, New York Chancery.
Johns. Ch. Johnson, Chancery.
Johns. & H. Ch. Johnson and Hemming, Chancery.
Jones, No. C. Jones, North Carolina.
T. Jones. T. Jones.
W. Jones. W. Jones.
Jones, Upp. C. Jones, Upper Canada.
Jones, Eq. No. C. Jones, North Carolina Equity.
Jones, Exch. Ir. Jones, Irish Exchequer.
Jones & C. Exch. Ir. Jones and Carey, Irish Exchequer.
Jones & L. Ch. Ir. Jones and Latouche, Irish Chancery.
Jur. Jurist.
Jur. N. S. Jurist, new series.
K. B. Upp. C. King's Bench, Upper Canada.
K. B. O. S. *Upp. C.* King's Bench, old series, Upper Canada.
Kames, Dec. Sc. Kames, Scotch Decisions.
Kames, Rem. Dec. Sc. Kames, Remarkable Scotch Decisions.
Kames, Sel. Dec. Sc. Kames, Select Scotch Decisions.
Kay, Ch. Kay, Chancery.
Kay & J. Ch. Kay and Johnson, Chancery.
Keane & G. Reg. Cas. Keane and Grant, Registration Cases.
Kebl. Keble.
Keen, Rolls. Keen, Rolls.
Keilw. Keilwey.
Kel. Kelynge.
Kel. Ch. Kelynge, Chancery.
Ld. Keny. Lord Kenyon.
Kilk. Sc. Kilkerran, Scotch.
Kirb. Conn. Kirby, Connecticut.
Knapp, Priv. Coun. Knapp, Privy Council.
Knapp & O. El. Cas. Knapp and Ombler, Election Cases.
Ky. Kentucky.
Ky. Dec. Kentucky Decisions.
La. Louisiana.
La. Ann. Louisiana Annual.
Lal. Suppl. Hill & D. N. Y. Lalor, Supplement to Hill and Denio, New York.
Lane, Exch. Lane, Exchequer.
Lans. N. Y. Cas. Lansing, New York Cases.
Latch. Latch.
Law Journ. Law Journal.
Law Mag. Law Magazine.
Law Rec. Ir. Irish Law Recorder.
Law Rev. Law Review.
Law Times. Law Times.
Leach, Cr. Cas. Leach, Crown Cases.
Lee, Cons. Lee, Consistory.
Leg. Obs. Legal Observer.
Leg. Int. Legal Intelligencer.
Leigh, Va. Leigh, Virginia.
Leigh & C. Cr. Cas. Leigh and Cave, Crown Cases.
Leon. Leonard.
Lev. Levins.
Lew. Cr. Cas. Lewin, Crown Cases.
Ley. Ley.
Lill. Lilly.
Litt. Littleton.
Litt. Ky. Littell, Kentucky.
Litt. Sel. Cas. Ky. Littell, Select Cases, Kentucky.
Lloyd & W. Cas. Lloyd and Welsby, Commercial Cases.
Lofft. Lofft.
Longf. & T. Exch. Ir. Longfield and Townsend, Irish Exchequer.
Low. C. Lower Canada.
Lowndes & M. Bail. Lowndes and Maxwell, Bail.
Lowndes, M. & P. Bail. Lowndes, Maxwell and Pollock, Bail.
Lud. El. Cas. Luder, Election Cases.

Luml. Cas. Lumley, Cases.
Lush. Adm. Lushington, Admiralty.
Lutw. Lutwyche.
Lutw. Reg. Cas. Lutwyche, Registration Cases.
M'Clel. Exch. M'Cleland, Exchequer.
M'Clel. & Y. Exch. M'Cleland and Younge, Exchequer.
M'Cord, So. C. M'Cord, South Carolina.
M'Cord, Eq. So. C. M'Cord, South Carolina Equity.
M'Mull. So. C. M'Mullan, South Carolina.
M'Mull. Eq. So. C. M'Mullan, South Carolina Equity.
Mac Farl. Sc. Mac Farlane, Scotch.
Macl. & R. Hou. L. Sc. Maclean and Robinson, House of Lords, Scotch.
Macn. Cas. Macnaghten, Cases in the Court of Nizamut Adawlut.
Macn. & G. Ch. Macnaghten and Gordon, Chancery.
Macq. Hou. L. Sc. Macqueen, House of Lords, Scotch.
Macr. Pat. Cas. Macrory, Patent Cases.
Madd. Ch. Maddock, Chancery.
Mann. & G. Manning and Granger.
Mann. & R. Manning and Ryland.
Mann. & R. Mag. Cas. Manning and Ryland, Magistrate Cases.
March. March.
Marr. Adm. Marriott, Admiralty.
Marsh. Marshall.
A. K. Marsh. Ky. A. K. Marshall, Kentucky.
J. J. Marsh. Ky. J. J. Marshall, Kentucky.
Mart. No. C. Martin, North Carolina.
Mart. La. Martin, Louisiana.
Mart. N. S. La. Martin, Louisiana, new series.
Mart. & Y. Tenn. Martin and Yerger, Tennessee.
Mas. C. C. Mason, Circuit Court.
Mass. Massachusetts.
Maule & S. Maule and Selwyn.
McAll. C. C. McAllister, Circuit Court.
McLean, C. C. McLean, Circuit Court.
Md. Maryland.
Md. Ch. Dec. Maryland Chancery Decisions.
Me. Maine.
Mees. & W. Exch. Meeson and Welsby, Exchequer.
Meigs, Tenn. Meigs, Tennessee.
Mer. Ch. Merivale, Chancery.
Metc. Mass. Metcalfe, Massachusetts.
Metc. Ky. Metcalf, Kentucky.
Mich. Michigan.
Midd. Sitt. Middlesex Sittings.
Miles, Penn. Miles, Pennsylvania.
Milw. Eccl. Ir. Milward, Irish Ecclesiastical.
Minn. Minnesota.
Miss. Mississippi.
Mo. Missouri.
Mod. Modern.
Mol. Cas. Molyneux, Cases.
Moll. Ch. Ir. Molloy, Irish Chancery.
Monr. Act. Canc. Monro, *Acta Cancellaria.*
B. Monr. Ky. B. Monroe, Kentucky.
T. B. Monr. Ky. T. B. Monroe, Kentucky.
Mont. Bank. Montagu, Bankruptcy.
Mont. & A. Bank. Montagu and Ayrton, Bankruptcy.
Mont. & B. Bank. Montagu and Bligh, Bankruptcy.
Mont. & C. Bank. Montagu and Chitty, Bankruptcy.
Mont. D. & De G. Bank. Montagu, Deacon and De Gex, Bankruptcy.
Mont. & M. Bank. Montagu and Macarthur, Bankruptcy.
Mood, Cr. Cas. Moody, Crown Cases.
Mood & M. Moody and Malkin.
Mood. & R. Moody and Robinson.
F. Moore. F. Moore.
J. B. Moore. J. B. Moore.
Moore, Priv. Coun. Moore, Privy Council.
Moore, Ind. App. Moore, India Appeals.
Moore & P. Moore and Payne.
Moore & S. Moore and Scott.
Morr. Iowa. Morris, Iowa.
Mosel. Ch. Mosely, Chancery.
Munf. Va. Munford, Virginia.
Murph. No. C. Murphy, North Carolina.
Murph. & H. Exch. Murphey and Hurlstone, Exchequer.
Murr. Sc. Murray, Scotch.
Mylne & C. Ch. Mylne and Craig, Chancery.
Mylne & K. Ch. Mylne and Keen, Chancery.
N. H. New Hampshire.
N. Y. New York.
Nels. Ch. Nelson, Chancery.
Nev. & M. Nevile and Manning.
Nev. & M. Mag. Cas. Nevile and Manning, Magistrate Cases.
Nev. & P. Nevile and Perry.
Nev. & P. Mag. Cas. Nevile and Perry, Magistrate Cases.
New Br. New Brunswick.
Newb. Adm. Newberry, Admiralty.
No. C. North Carolina.
Nol. Settl. Cas. Nolan, Settlement Cases.
Nott & M'C. So. C. Nott and M'Cord, South Carolina.
Nov. Sc. Nova Scotia.
Noy. Noy.
Ohio. Ohio.
Ohio St. Ohio State.
Olc. Dist. Ct. Olcott, District Court.
Ov. Tenn. Overton, Tennessee.
Ow. Owen.
Paige, Ch. N. Y. Paige, New York Chancery.
Paine, C. C. Paine, Circuit Court.
Palm. Palmer.
Park. Cr. Cas. N. Y. Parker, New York Criminal Cases.
Park. Exch. Parker, Exchequer.
Pars. Eq. Cas. Penn. Parsons, Pennsylvania Equity Cases.
Pat. Hou. L. Sc. Paton, House of Lords, Scotch.
Patt. & H. Va. Patton and Heath, Virginia.
Peake. Peake.
Peake, Add. Cas. Peake, Additional Cases.
Pearce, Cr. Cas. Pearce, Crown Cases.
Peck, Tenn. Peck, Tennessee.
Peckw. El. Cas. Peckwell, Election Cases.
Penn. N. J. Pennington, New Jersey.
Penn. Pennsylvania.
Penn. St. Pennsylvania State.
Penn. Law Journ. Pennsylvania Law Journal.
Perr. Or. Cas. Perry, Oriental Cases.
Perr. & D. Perry and Davison.
Perr. & K. El. Cas. Perry and Knapp, Election Cases.
Pet. Peters.
Pet. Adm. Peters, Admiralty.
Pet. C. C. Peters, Circuit Court.
Phill. Ch. Phillips, Chancery.
Phill. Eccl. Phillimore, Ecclesiastical.
Pick. Mass. Pickering, Massachusetts.
Pig. & R. Reg. Cas. Pigott and Rodwell, Registration Cases.
Plowd. Plowden.
Poll. Pollexfen.
Poph. Popham.
Pow. R. & D. El. Cas. Power, Rodwell and Dew, Election Cases.
Pract. Reg. Practical Register.
Prat. Cas. Prater, Cases.
Prec. Chanc. Precedents in Chancery.
Prer. Court. Prerogative Court.
Price, Exch. Price, Exchequer.
Q. B. Queen's Bench.

Q. B. Upp. C. Queen's Bench, Upper Canada.
Quinc. Mass. Quincy, Massachusetts.
R. I. Rhode Island.
Railw. & Can. Cas. Railway and Canal Cases.
Rand. Va. Randolph, Virginia.
Rawle, Penn. Rawle, Pennsylvania.
Ld. Raym. Lord Raymond.
T. Raym. T. Raymond.
Rayn. Cas. Rayner, Cases.
Rep. temp. Holt. Reports *tempore* Holt.
Rice, So. C. Rice, South Carolina.
Rice, Eq. So. C. Rice, South Carolina Equity.
Rich. So. C. Richardson, South Carolina.
Rich. Eq. So. C. Richardson, South Carolina Equity.
Ridgw. App. Ir. Ridgeway, Irish Appeal Cases.
Ril. So. C. Riley, South Carolina.
Ril. Ch. So. C. Riley, South Carolina Chancery.
C. Rob. Adm. C. Robinson, Admiralty.
W. Rob. Adm. W. Robinson, Admiralty.
Rob. Eccl. Robertson, Ecclesiastical.
Rob. La. Robinson, Louisiana.
Rob. Va. Robinson, Virginia.
Rob. Pr. Upp. C. Robinson, Upper Canada Practice.
Rob. Pr. Cas. Upp. C. Robinson, Upper Canada Practice Cases.
Robb, Pat. Cas. Robb, Patent Cases.
Roberts. Hou. L. Sc. Robertson, House of Lords, Scotch.
Robins. Hou. L. Sc. Robinson, House of Lords, Scotch.
Rog. N. Y. Rogers, New York.
Rolle. Rolle.
Root, Conn. Root, Connecticut.
Rose, Bank. Rose, Bankruptcy.
Rowe, Cas. Rowe, Cases.
Russ. Ch. Russell, Chancery.
Russ. & M. Ch. Russell and Mylne, Chancery.
Russ. & R. Cr. Cas. Russell and Ryan, Crown Cases.
Ry. & M. Ryan and Moody.
Salk. Salkeld.
Sandf. N. Y. Sandford, New York.
Saund. Saunders.
Saund. Bail. Saunders, Bail.
Saund. & C. Bail. Saunders and Cole, Bail.
Sausse & S. Rolls Ir. Sausse and Scully, Irish Rolls.
Sav. Savile.
Saxt. Ch. N. J. Saxton, New Jersey Chancery.
Say. Sayer.
Schoales & L. Ch. Ir. Schoales and Lefroy, Irish Chancery.
Scott. Scott.
Scott, N. R. Scott, new reports.
Scott. Jur. Sc. Scottish Jurist.
Searle & S. Prob. Searle and Smith, Probate and Divorce.
Sel. Ch. Cas. Select Chancery Cases.
Serg. & R. Penn. Sergeant and Rawle, Pennsylvania.
Sess. Cas. Sessions Cases.
Sess. Cas. Sc. Scotch Sessions Cases.
Sess. Cas. N. S. *Sc.* Scotch Sessions Cases, new series.
Settl. Cas. Settlement Cases.
Shaw, Hou. L. Sc. Shaw, House of Lords, Scotch.
Shaw, Just. Sc. Shaw, Scotch Justiciary.
Shaw, Teind Sc. Shaw, Scotch Teind.
Shaw & M. Hou. L. Sc. Shaw and Murray, House of Lords, Scotch.
Shaw, W. & S. Hou. L. Sc. Shaw, Wilson and Shaw, House of Lords, Scotch.
Show. Shower.
Show. Parl. Cas. Shower, Parliament Cases.
Sid. Siderfin.
Sim. Ch. Simons, Chancery.
Sim. N. S. *Ch.* Simons, Chancery, new series.
Sim. & S. Ch. Simons and Stuart, Chancery.
Skinn. Skinner.
Smale & G. Ch. Smale and Giffard, Chancery.
Smedes & M. Ch. Miss. Smedes and Marshall, Mississippi Chancery.
Smith. Smith.
Smith, Ind. Smith, Indiana.
E. D. Smith, N. Y. E. D. Smith, New York.
Smith & B. Ir. Smith and Batty, Irish.
Smythe, Ir. Smythe, Irish.
Sneed, Tenn. Sneed, Tennessee.
South. N. J. Southard, New Jersey.
Speers, So. C. Speers, South Carolina.
Speers, Eq. So. C. Speers, South Carolina Equity.
Spenc. N. J. Spencer, New Jersey.
Spinks, Eccl. Spinks, Ecclesiastical.
Spott. Bank. Cas. Spottiswoode, Bankruptcy Cases.
Sprague, Dec. Dist. Ct. Sprague, Decisions District Court.
Stair, Sess. Sc. Stair, Scotch Sessions.
Star Chamb. Cas. Star Chamber Cases.
Stark. Starkie.
St. Tr. State Trials.
Stew. Adm. Low. C. Stewart, Admiralty Lower Canada.
Stockt. Ch. N. J. Stockton, New Jersey Chancery.
Stor. C. C. Story, Circuit Court.
Strange. Strange.
Strange, East Ind. Strange, East India.
Strobh. So. C. Strobhart, South Carolina.
Strobh. Eq. So. C. Strobhart, South Carolina Equity.
Stu. Low. C. Stuart, Lower Canada.
Style. Style.
Sumn. C. C. Sumner, Circuit Court.
Swab. Adm. Swabey, Admiralty.
Swab. & T. Prob. Swabey and Tristram, Probate.
Swan, Tenn. Swan, Tennessee.
Swanst. Ch. Swanston, Chancery.
Swint. Just. Sc. Swinton, Scotch Justiciary.
Syme, Just. Sc. Syme, Scotch Justiciary.
Taml. Rolls. Tamlyn, Rolls.
Tapp. Ohio. Tappan, Ohio.
Taunt. Taunton.
Tayl. No. C. Taylor, North Carolina.
Templ. & M. Cr. Cas. Temple and Mew, Crown Cases.
Term. Term.
Term Ir. Irish Term.
Tex. Texas.
Thach. Cr. Cas. Mass. Thacher, Massachusetts Criminal Cases.
Thoms. Nov. Sc. Thomson, Nova Scotia.
Thornt. Adm. Cas. Thornton, Admiralty Cases.
Tinw. Sc. Tinwald, Scotch.
Toml. Suppl. Brown Parl. Cas. Tomlin, Supplement to Brown, Parliament Cases.
Toth. Ch. Tothill, Chancery.
Tuck. Nd. Tucker, Newfoundland.
Turn. & R. Ch. Turner and Russell, Chancery.
Tyl. Vt. Tyler, Vermont.
Tyrwh. Exch. Tyrwhitt, Exchequer.
Tyrwh. & G. Exch. Tyrwhitt and Granger, Exchequer.
Va. Cas. Virginia Cases.
Van Ness, Dist. Ct. Van Ness, District Court.
Vaugh. Vaughan.
Vaux, Cr. Cas. Penn. Vaux, Pennsylvania Criminal Cases.
Ventr. Ventris.
Vern. Ch. Vernon, Chancery.
Vern. & S. Ir. Vernon and Scriven, Irish.
Ves. Ch. Vesey, Chancery.
Ves. Sen. Ch. Vesey, senior, Chancery.

Ves. & B. Ch. Ir. Vesey and Beames, Irish Chancery.
Vt. Vermont.
Walk. Ch. Mich. Walker, Michigan Chancery.
Wall. C. C. Wallace, Circuit Court.
H. E. Wall. Penn. H. E. Wallace, Pennsylvania.
Wall. Jr. C. C. Wallace, junior, Circuit Court.
Wall. Ch. Ir. Wallis, Irish Chancery.
Ware, Dist. Ct. Ware, District Court.
Wash. C. C. Washington, Circuit Court.
Wash. Va. Washington, Virginia.
Watts, Penn. Watts, Pennsylvania.
Watts & S. Penn. Watts and Sergeant, Pennsylvania.
Webst. Pat. Cas. Webster, Patent Cases.
Weekl. Rep. Weekly Reporter.
Welsh, Reg. Cas. Ir. Welsh, Irish Registry Cases.
Wend. N. Y. Wendell, New York.
West, Hou. L. West, House of Lords.
Whart. Penn. Wharton, Pennsylvania.
Whart. U. S. St. Tr. Wharton, United States State Trials.
Wheat. Wheaton.
Wheel. Cr. Cas. N. Y. Wheeler, New York Criminal Cases.
Wightw. Exch. Wightwicke, Exchequer.
P. Will. Ch. Peere Williams, Chancery.
Willes. Willes.
Willm. W. & H. Willmore, Wollaston and Hodges.
Willm. W. & D. Willmore, Wollaston and Davison.
Wilm. Wilmot.
Wils. Wilson.
Wils. Ch. Wilson, Chancery.
Wils. Exch. Wilson, Exchequer.
Wils. & S. Hou. L. Wilson and Shaw, House of Lords.
Winch. Winch.
Wisc. Wisconsin.
Wolf. & D. El. Cas. Wolferstan and Dew, Election Cases.
Wood, Cas. Wood, Cases.
Woodb. & M. C. C. Woodbury and Minot, Circuit Court.
Wordsw. El. Cas. Wordsworth, Election Cases.
Wright, Ch. Ohio. Wright, Ohio Chancery.
Wythe, Ch. Va. Wythe, Virginia Chancery.
Yates, Cas. N. Y. Yates, New York Cases.
Year B. Year Book.
Yeates, Penn. Yeates, Pennsylvania.
Yelv. Yelverton.
Yerg. Tenn. Yerger, Tennessee.
Younge, Exch. Younge, Exchequer.
Younge & C. Ch. Younge and Collier, Chancery.
Younge & C. Exch. Younge and Collier, Exchequer.
Younge & J. Exch. Younge and Jervis, Exchequer.
Zabr. N. J. Zabriskie, New Jersey.

CITIZEN. In English Law. An inhabitant of a city. 1 Rolle, 138. The representative of a city, in parliament. 1 Blackstone, Comm. 174.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people. Any white person born in the United States, or naturalized person born out of the same, who has not lost his right as such,—including men, women, and children.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. 19 How. 404.

2. Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president. The constitution provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." U. S. Const. art. 4, s. 2.

3. All natives are not citizens of the United States: the descendants of the aborigines, and those of African origin, are not entitled to the rights of citizens. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased. That constitution does not authorize any but white persons to become citizens of the United States; and it must therefore be presumed that no one is a citizen who is not white. 1 Litt. Ky. 334; 10 Conn. 340; 1 Meigs, Tenn. 331; 19 How. 393.

A citizen of the United States residing in any of the states of the Union is a citizen of that state. 6 Pet. 761; Paine, C. C. 594; 1 Brock. C. C. 391; 1 Paige, Ch. N. Y. 183. As to the citizenship of children born in foreign lands to citizens, see 10 Rich. Eq. So. C. 38; and see 26 Barb. N. Y. 383; 9 Md. 74. A person may be a citizen for some purposes and at the same time not so for others. 7 Md. 209.

Consult 3 Story, Const. § 1687; 2 Kent, Comm. 258; Bouvier, Inst.; Vattel, l. 1, c. 19, § 212.

CITY. An incorporated town or borough which is or has been the see of a bishop. Coke, Litt. 108; 1 Blackstone, Comm. 114; Cowel.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character, 1 Stephen, Comm. 115; 1 Blackstone, Comm. 114; and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government,—what the Romans called *civitas*, and the Greeks *polis*; whence the word *politeia, civitas seu reipublicæ status et administratio.* Toullier, Dr. Civ. Fr. l. 1, t. 1, n. 202; Henrion de Pansey, *Pouvoir Municipal*, pp. 36, 37.

CIVIL. In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government: thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government: thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*: thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war. Story, Const. § 789; 1 Blackstone, Comm. 6, 125, 251; Montesquieu, Sp. of Laws, b. 1, c. 3; Rutherforth, Inst. b. 2, c. 2; *id.* c. 3; *id.* c. 8, p. 359; Heineccius, Elem. Jurisp. Nat. b. 2, ch. 6.

CIVIL ACTION. In Practice.

In the Civil Law.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, Introd. *Gen. aux Cont.* 110.

At Common Law.—An action which has for its object the recovery of private or civil rights or compensation for their infraction.

In New York, all actions which are not criminal are said to be civil. 3 Bouvier, Inst. n. 2638. See Action.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marshall, Ins. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion.

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See Death.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum*.

2. In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatæ* are said to have been collected in the time of Tarquin, the last of the kings, by a *pontifex maximus* of the name of *Sextus* or *Publius Papirius*. This collection is known under the title of *Jus Civile Papirianum*; its existing fragments are few, and those of an apocryphal character. Mackeldy, § 21.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables*, in the year 300 of Rome. This law, framed by the decemvirs and adopted in the *comitia centuriata*, acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis*. *Id.* From this period the sources of the *jus scriptum* consisted in the *leges*, the *plebiscita*, the *senatusconsulta*, and the constitutions of the emperors, *constitutiones principum*; and the *jus non scriptum* was found partly in the *mores majorum*, the *consuetudo*, and the *res judicata*, or *auctoritas rerum perpetua similiter judicatorum*. The edicts of the magistrates, or *jus honorarium*, also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers,—*responsa prudentium*.

3. The few fragments of the twelve tables that have come down to us are stamped with the harsh features of their aristocratic origin. But the *jus honorarium* established by the prætors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes*, are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *exquæstor sacri palatii*, Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as in the later constitutions; to omit al obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labors. Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts. This Code of Justinian, which is now called *Codex vetus*, has been entirely lost.

4. After the completion of this code, Justinian ordered Tribonian, in 530, who was now invested with the dignity of *quæstor sacri palatii*, and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers: they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The natural consequence of this was, that the extracts did not always truly represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani*. This great work is called the Pandects, or Digest, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti*. The Pandects were published on the 16th December, 533, but they did not go into operation until the 30th of that month. In confirming the Pandects, Justinian prohibited further reference to the old jurists; and, in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

5. In preparing the Pandects, the compilers met very frequently with controversies in the writings of the jurists. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterwards embodied in the new code.

6. For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes, which should contain the elements of legal science. This work was founded on, and to a great extent copied from, the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript of some of the homilies of St. Jerome, in the Chapter Library of Verona. What had become obsolete in the commentaries was omitted in the Institutes, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his Institutes on the 21st November, 533, and they obtained the force of law at the same time with the Pandects, December 30, 533. Theophilus, one of the editors, delivered lectures on the Institutes in the Greek language, and from these lectures originated the valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum.* The Institutes consist of four books, each of which contains several titles.

7. After the publication of the Pandects and the Institutes, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions not included in the Old Code, and by which the law had been altered, amended, or modified. He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codex repetitæ prælectionis,* was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books, subdivided into appropriate titles.

8. During the interval between the publication of the *Codex repetitæ prælectionis,* in 535, to the end of his reign, in 565, Justinian issued, at different times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novellæ Constitutiones,* which are known to us as the Novels of Justinian. Soon after his death, a collection of one hundred and sixty-eight Novels was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis;* but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glossed *Corpus Juris Civilis,* in 1604. Since that time this title has been used in all the editions of Justinian's collections.

9. It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the Pandects at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his History of the Roman Law during the Middle Ages. Indeed, several years before the sack of Amalfi the celebrated Irnerius delivered lectures on the Pandects in the University of Bologna. The pretended discovery of a copy of the Digest at Amalfi, and its being given by Lothaire II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Irnerius, its great professor.

10. Even at the present time the Roman Law exercises dominion in every state in Europe except England. The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. Its influence in the formation of the common law of England cannot be denied by the impartial inquirer. It was publicly taught in England, by Roger Vacarius, as early as 1149; and all admit that the whole equity jurisprudence prevailing in England and the United States is mainly based on the civil law. See CODES; DIGESTS; INSTITUTES; NOVELS.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, Dict. 2d Lond. ed.

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, Obl. 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, Const. 213; 2 Story, Const. § 790.

The term occurs in the constitution of the United States, art. 2, sec. 4, which provides that the president, vice-president, and *civil officers* of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause in the constitution. Senate Journals, 10th January, 1799; 4 Tucker, Blackst. Comm. App. 57, 58; Rawle, Const. 213; Sergeant, Const. Law, 376; Story, Const. § 791.

CIVIL REMEDY. In Practice. The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrong-doer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of private policy, until after the prosecution of the wrong-doer for

the public wrong. 1 Hale, Pl. Cr. 546; 4 Sharswood, Blackst. Comm. 363; Bacon, Abr. *Trespass*, E 2; 12 East, 409; 2 Term, 751; Rep. *temp.* Hardw. 359; 1 Miles, Penn. 316; 1 N. H. 239. The law is otherwise in Massachusetts, except, perhaps, in case of felonies punishable with death, 15 Mass. 333; New York, 2 Rev. Stat. 292, § 2; North Carolina, 1 Tayl. No. C. 58; Ohio, 4 Ohio, 377; and Virginia. Va. Code, c. 199, § 6. At common law, in cases of homicide the civil remedy is *merged* in the public punishment. 1 Chitty, Pract. 10. See INJURIES; MERGER.

CIVILIAN. A doctor, professor, or student of the civil law.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have *intended* to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East, 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See 1 Dall. Penn. 444; 12 Serg. & R. Penn. 179.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bonâ fide* owner thereof, as a necessary preliminary to his making defence. 2 Conkling, Adm. 201–210.

A demand entered of record of a mechanic or material-man for work done or material furnished in the erection of a building, in certain counties in Pennsylvania.

The assertion of a liability to the party making it to do some service or pay a sum of money. See 16 Pet. 539.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of.

The land must be so marked out as to distinguish it from adjacent lands. 10 Ill. 273; 2 *id.* 185. Such claims are considered as personalty in the administration of decedents' estates, 8 Iowa, 463, are proper subjects of sale and transfer, 1 Morr. Iowa, 70, 80, 312; 8 Iowa, 463; 5 Ill. 531; 14 *id.* 171; the possessor being required to deduce a regular title from the first occupant to maintain ejectment, 5 Ill. 531, and a sale furnishing sufficient consideration for a promissory note. 1 Morr. Iowa, 80, 438; 1 Iowa, 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury. 2 Ill. 532.

CLAIM OF CONUSANCE. In Practice. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 2 Wils. 409; 3 Blackstone, Comm. 298. See COGNIZANCE.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property: thus, for example, thirty hogsheads of sugar. Brentyon Claimant *v.* Boyle, 9 Cranch, 191.

CLAMOR (Lat.). A suit or demand; a complaint. DuCange; Spelman, Gloss.

In Civil Law. A claimant. A debt; any thing claimed from another. A proclamation; an accusation. DuCange.

CLARE CONSTAT (Lat. it is clearly evident).

In Scotch Law. A deed given by a mesne lord (subject-superior) for the purpose of completing the title of the vassal's heir to the lands held by the deceased vassal under the grantor. Bell, Dict.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II. of England, at a parliament held at Clarendon, by which the king checked the power of the pope and his clergy, and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

2. This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the primate, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket. FitzStephen, 27; 2 Lingard, 59; 1 Hume, 382; Wilkins, 321; 4 Blackstone, Comm. 422.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees, 3 M'Cord, Ch. So. C. 440; of obligees in a bond, 3 Dev. No. C. 284; 4 *id.* 382; and of other collections of persons. 17 Wend. N. Y. 52; 16 Pick. Mass. 132.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence.

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ*

(open grant) or *literæ clausæ* (close grant). 2 Blackstone, Comm. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (4 Blackf. Ind. 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes. 1 Chitty, Plead. 174; 9 Cow. N. Y. 39; 12 Mass. 127; 6 East, 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as *a permission to sail*. The same term is also used to signify the act of clearing. Worcester, Dict.

2. The sixteenth section of the act of August 18, 1856, regulating the diplomatic and consular systems of the United States, makes it the duty of the collector of the customs, whenever any clearance is granted to any ship or vessel of the United States, duly registered as such, and bound on any foreign voyage, to annex thereto, in every case, a copy of the rates or tariff of fees which shall be allowed in pursuance of the provisions of that act. See the form of clearance and tariff of fees, Regulations under Revenue Laws, 1857, 90, 91, art. 123, 124, 125.

3. The act of congress of 2d March, 1799, section 93 (1 U. S. Stat. at Large, 698), directs that the master of any vessel bound to a foreign port or place shall deliver to the collector of the district from which such vessel shall be about to depart a manifest of all the cargo on board, and the value thereof, by him subscribed, and shall swear or affirm to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in such clearance, unless required by the master so to do. And if any vessel bound to any foreign place shall depart on her voyage to such foreign place without delivering such a manifest and obtaining a clearance, the master shall forfeit and pay the sum of five hundred dollars for every such offence: provided, that the collectors and other officers of the customs shall pay due regard to the inspection laws of the states in which they respectively act, in such manner that no vessel having on board goods liable to inspection shall be cleared out until the master or other person shall have produced such certificate, that all such goods have been duly inspected, as the laws of the respective states do or may require to be produced to the collector or other officer of the customs; and provided, that receipts for the payment of all legal fees which shall have accrued on any vessel shall, before any clearance is granted, be produced to the collector or other officer aforesaid.

The 11th section of the act of February 10, 1820 (3 U. S. Stat. at Large, 542) provides that, before a clearance shall be granted for any vessel bound to a foreign place, the owners, shippers, or consignors of the cargo on board of such vessel shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath or affirmation; and such manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of articles; and such oath or affirmation shall state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors respectively, and that the values of such articles are truly stated according to their actual cost or the values which they truly bear at the port and time of exportation. And, before a clearance shall be granted for any such vessel, the master of every such vessel, and the owners, shippers, and consignors of the cargo, shall state, upon oath or affirmation, to the collector, the foreign place or country in which such cargo is truly intended to be landed; and the said oath or affirmation shall be taken and subscribed in writing.

4. According to Boulay-Paty, Dr. Com. t. 2, p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS, and the Regulations under the Revenue Laws, above referred to, 88–98.

CLEARING-HOUSE. In Commercial Law. An office where bankers settle daily with each other the balances of their accounts.

The London clearing-house has been established for some years; and a similar office was opened in New York in 1853. The plan was found so efficient as to recommend it to bankers in all our large cities, and it is being generally introduced. The Clearing-House association of New York consists of fifty-four incorporated banks,—private bankers not being admitted, as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of an elliptical counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand fifty-four parcels, containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents,—until, having walked around the ellipse, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he has to pay into or receive from the clearing-house a balance in money. The clearing-house is under the charge of a superintendent and several clerks. Balances are paid in coin daily. In London the

practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks in coin. In this country, when a check is returned not good through the clearing-house, it is usually again presented at the bank; and no case has arisen to test the validity of a presentment through the clearing-house only.

See Sewell, *Banking;* Gilbart, *Banking;* Byles, *Bills;* Pulling, *Laws and Customs of London;* Cleveland, *Banking Laws of New York.*

CLEMENTINES. In Ecclesiastical Law. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., which happened in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque.*

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, ad ann. 319, § 30. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law, but each congregation or church may choose its own clergyman.

CLERGYABLE. In English Law. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Blackstone, Comm. 371 *et seq.*

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court.

An error, for example, in the teste of a *fi. fa.*, 4 Yeates, Penn. 185, 205; or in the teste and return of a *vend. exp.*, 1 Dall. 197; or in writing Dowell for McDowell. 1 Serg. & R. Penn. 120; 9 *id.* 284; 8 Coke, 162 *a.* An error is amendable where there is something to amend by, and this even in a criminal case. 2 Pick. Mass. 550; 1 Binn. 367; 2 *id.* 516; 12 Ad. & E. 217; 5 Burr. 2667; Dougl. 377; Cowp. 408. For the party ought not to be harmed by the omission of the clerk, 3 Binn. Penn. 102, even of his signature, if he affixes the seal. 1 Serg. & R. Penn. 97.

CLERICUS (Lat.). **In Civil Law.** Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. DuCange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. DuCange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Blackstone, Comm. 17. A freeman, generally. One who was charged with various duties in the king's household. DuCange.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chitty, Pract. 80; 2 Bouvier, Inst. n. 1287.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained. 1 Blackstone, Comm. 388. A clergyman. 4 Blackstone, Comm. 367.

In Offices. A person employed in an office, public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See DuCange.

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 Tidd, Pract. 61 *et seq.*

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See ATTORNEY-AT-LAW.

CLOSE. An interest in the soil, Doctor & Stud. 30; 6 East, 154; 7 *id.* 207; 1 Burr. 133; or in trees or growing crops. 4 Mass. 266; 9 Johns. N. Y. 113.

2. In every case where one man has a right to exclude another from his land, the law encircles it, if not already enclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary,—denominating the injurious act a breach of the enclosure. Hammond, N. P. 151; Doctor & Stud. dial. 1, c. 8, p. 30; 2 Whart. Penn. 430.

An ejectment will not lie for a close. 11 Coke, 55; 1 Rolle, 55; Salk. 254; Croke Eliz. 235; Adams, Eject. 24. See CLAUSUM.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Officie copies were to contain only a prescribed number of words on each sheet.

CLOSE ROLLS. Rolls containing the record of the close writs (*literæ clausæ*) and grants of the king, kept with the public records. 2 Blackstone, Comm. 346.

CLOSE WRITS. Writs directed to the

sheriff instead of to the lord. 3 Reeve, Hist. Eng. Law, 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 Blackstone, Comm. 346; Sewall, Sher. 372.

CO-ADMINISTRATOR. One who is administrator with one or more others. See ADMINISTRATOR.

CO-ASSIGNEE. One who is assignee with one or more others. See ASSIGNMENT.

CO-EXECUTOR. One who is executor with one or more others. See EXECUTOR.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 Coke, 56.

COAL NOTE. In English Law. A species of promissory note authorized by the stat. 3 Geo. II. c. 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," are to be protected and noted as inland bills of exchange.

COALITION. In French Law. An unlawful agreement among several persons not to do a thing except on some conditions agreed upon; a conspiracy.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, were held to form a part of the coast. 5 C. Rob. Adm. 385 *c*.

COCKET. A seal appertaining to the king's custom-house. Reg. Orig. 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants, as an evidence that their wares are customed. Cowel; Spelman, Gloss. See 7 Low. C. 116. The entry office in the custom-house itself. A kind of bread said by Cowel to be hard-baked; sea-biscuit.

CODE. A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subjects to which it relates.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes. The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. When it is considered how rapidly statutes accumulate as time passes, it is obvious that great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. But when the transposition of the statutes from a chronological to a scientific order is undertaken, more radical changes immediately propose themselves. These are of two classes:—*first*, amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; *second*, the introduction into the system of all other rules which are recognized as the unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

2. The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes or systematic statutes, accompanied by the amendments which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which before rested in the common or report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that however successfully a code might be supposed to embody all existing and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

3. These discussions have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code,—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used; and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisors generally adhered, and which they found of very great importance, was to confine each section to a single proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (Lond. 1845). The larger work of Gael (Legal Composition, Lond. 1840) is more especially adapted to the wants of the English profession.

4. The course which the discussion upon codification has taken in England has led to

the collection and revision of statutes upon particular subjects, not so much harmonizing the various branches with reference to each other, but only making specific changes, preserving, after all, those general and fundamental anomalies which make the statutory system of that realm so complex.

In this country the subject has presented obstacles of less magnitude, and the revisions have been more extensive. They may be briefly noted as follows:—

5. *Louisiana.* The most complete code which has been enacted in this country is that of Louisiana. This state was at one time a French, at another a Spanish, colony; and after its cession to the United States a radical revision of its law became necessary. The first code (1808) was superseded, together with all other previously existing laws, by that of 1824, the chief part in the compilation of which was the work of Mr. Edward Livingston. It is based on the Code Napoléon. It contains 3522 articles, numbered, like those of the French codes, in one series, for greater convenience of reference. It is divided into three books:—Book 1, Of Persons; Book 2, Of Things and the Modifications of Property; Book 3, The Different Modes of acquiring Property. It has been said that in the preparation of the code its authors mixed with positive legislation definitions seldom accurate, and points of doctrine always unnecessary,—that the legislature modified many provisions of positive legislation, but adopted definitions and doctrine without alteration; and from this circumstance, as well as from the inherent difficulty of the subject, the positive provisions are often at variance with the theoretical part. In such cases the court follow the former in preference to the latter. 13 La. 236.

The code was promulgated in both English and French. Where the expressions in the one text are found more comprehensive than in the other, the broader sense is adopted. 7 Mart. La. 298; 2 Mart. La. N. S. 582. A revised edition was published in 1853. A new revision of the statutes was completed in 1856.

6. *Massachusetts.* In 1835 the first revision of the statutes was completed and the result enacted, and, as in New York, a repealing act was passed enumerating the former statutes which it abrogated. In 1855 a commission was appointed to revise the statutes anew on the same general plan. The commissioners were directed to omit redundant enactments and those which had ceased to have effect on existing rights, to reject superfluous words and condense the provisions into as concise and comprehensive a form as consistent with full and clear expression. This revision was enacted in 1859. It is contained in one octavo volume.

7. *New York.* The early compilations of the statute law of New York are known respectively as the Revised Laws of 1802 and the Revised Laws of 1813. In 1825 a commission of three was constituted to prepare a revision of the statutes; and the results of their labors, enacted after elaborate consideration in special sessions of the legislature, became completed and in force, as the Revised Statutes, in 1830. It repealed nearly all the public and general statutes of the state, and declared the colonial and the English statutes to be no longer in force; but only to a limited extent did it embrace or modify the unwritten or report law. It is divided into four parts. 1. The limits, divisions, civil polity, and internal administration of the state. Except in the changes introduced by the constitution of 1846, this part has been but little modified, otherwise than by local acts required by the growth of various parts of the state, and regulations prescribed for corporations.

8. Part 2 concerns the acquisition, enjoyment, and transmission of property, the domestic relations, and other matters connected with private rights. This part has undergone considerable amendment, but mainly in some provisions respecting procedure. Part 3 relates to courts and ministers of justice, and proceedings in civil cases. This has been largely modified, and in part superseded, by radical changes in the system of civil remedies, instituted by the constitution of 1846 and carried out by the Code of Procedure (1848). Part 4 relates to crimes and punishments, and proceedings in criminal cases and prison-discipline. Many of the revisions of other states have been based to a greater or less extent upon this.

9. The Code of Procedure above referred to relates only to procedure in civil actions. All criminal procedure, and for the most part those remedies which are known as special proceedings, remain under the regulation of the previous law.

In 1857 a commission of three was appointed to reduce into a written and systematic code the whole body of the law of the state (excepting procedure), or so much and such parts thereof as should seem expedient. They were directed to divide their work into three portions: the political, the civil, and the penal codes, respectively. The first of these was reported complete to the legislature in 1860.

10. Revisions have also been made in Alabama, in 1852; Arkansas, 1858; California, 1853; Connecticut, 1821, 1838, 1849, 1854; Delaware, 1852; Indiana, 1852; Kansas, 1855; Kentucky, 1851–52; Maine, 1857; Maryland, 1860; Michigan, 1857; Minnesota, 1851; Missouri, 1856; North Carolina, 1836, 1854; Oregon, 1855; Rhode Island, 1857; Tennessee, 1858; Virginia, 1849; see the preface for an account of the revisals and codes of the state; Wisconsin, 1858. Codes of Procedure, on the basis of that of New York, have been enacted in several of the states. In some of the newer of the states above mentioned, the revised statutes are not so much a revision of their own laws as a copy *in extenso*, with some modifications, of the statutory system of another state.

11. AUSTRIAN. *The Civil Code* was pro-

mulgated in 1811,—the code of Joseph II. (1780) having been found wholly unsuited to the purpose and by his successor abrogated. It is founded in a great degree upon the Prussian. *The Penal Code* (1852) is said to adopt to some extent the characteristics of the French Penal Code.

BURGUNDIAN. *Lex Romana*, otherwise known in modern times as the *Papiniani Responsorum*. Promulgated A.D. 517.

It was founded on the Roman law; and its chief interest is the indication which, in common with the other Barbaric codes, it affords of the modifications of jurisprudence under the changes of society amidst which it arose.

12. CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

Its origin is not certainly known. It has been ascribed to the authority of the ancient kings of Arragon; but there is some reason for maintaining the theory that it was gradually collected and handed down as a digest of all the principal rules and usages established among the maritime nations of Europe from the twelfth to the fourteenth century. Since it was first printed at Barcelona in the fourteenth century it has been enlarged from time to time by the addition of various commercial regulations. Its doctrines are founded to a large extent on the Greek and Roman law. It seems to have been originally written in the dialect of Catalonia; but it has been translated into every language of Europe, except English. It is referred to at the present day as an authority in respect to the ownership of vessels, the rights and obligations thereto, to the rights and responsibilities of master and seamen, to the law of freight, of equipment and supply, of jettison and average, of salvage, of ransom, and of prize. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best.

13. FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1793, but it was not prepared till some years subsequently, and was finally thoroughly discussed in all its details by the court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1852 it was again displaced by that of Napoleon.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1, Of Persons and the enjoyment and privation of civil rights. Book 2, Property and its different modifications. Book 3, Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commentators on this code is Toullier, frequently cited in this work.

14. *Code de Procédure Civil.* That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace; the second, of inferior tribunals; the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is divided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction,—the organization, jurisdiction, and proceedings of commercial tribunals. This code is, in one sense, a supplement to the Code Napoléon, applying the principles of the latter to the various subjects of commercial law. The two contain much that is valuable upon commercial subjects. Pardessus is one of the most able of its expositors.

15. *Code d'Instruction Criminelle.* The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the administration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Pénal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offences against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

There is also a *Code Forestier;* and the name code has been inaptly given to some private compilations on other subjects.

16. GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It was made in the fourth century, and is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all of these collections is in their relation to their great successor the Justinian Code.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns.

It was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns, held at Lubec, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer*. It is not unfrequently referred to on subjects of maritime law.

17. HENRI (*French*). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both

formed the necessity and furnished the material for the Code Napoléon.

HENRI (*Haytien*). A very judicious adaptation from the Code Napoléon for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant.

INSTITUTES OF MENU. A code of Hindu law, of great antiquity, which still forms the basis of Hindu jurisprudence, Elphinstone's Hist. of India, p. 83, and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note 70.

The Institutes of Menu are ascribed to about the ninth century B.C. A translation will be found in the third volume of Sir William Jones's Works. See, also, HINDU LAW.

18. JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization which is of importance to the American lawyer is embodied in the compilations to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Codex Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the same authority; and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Hadrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the treaties and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been judged to bear obvious marks of the haste with which it was compiled; but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

19. Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or—stated according to the Roman method of computation—in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes,—a library perhaps as large as that which would be composed by a collection of the Federal statutes and reports and those of the state of Pennsylvania. The comparison, to be more exact, should take into account treatises and digests, which would add to the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend in substance as well as in form.

20. The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial authority was sufficient to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis*. Though the Code has lost its sanction, and the Pandects are of secondary value to the present age, the Institutes stand an undisturbed monument of the science. The masterly arrangement of the outline of the law there adopted is to this day a model for digests and commentaries. The familiar classification employed by Blackstone is based on this. So far as translation and modern illustration go, it is through the Institutes that the civil law is most accessible to the student.

21. Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841),—which is regarded as a very good one,—and that by Sanders (Lond. 1853), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

22. LIVINGSTON'S CODE. Mr. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented to Congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in the books as stating principles of criminal law.

23. MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B.C. 1491.

One of the peculiar characteristics of this code is the fact that whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done here was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles, thus divinely revealed and sanctioned, have given the Mosaic code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction. The commentaries of Michaelis and of Wines are valuable aids to its study.

24. ORDONNANCE DE LA MARINE. A code of maritime law enacted in the reign of Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is contained in the appendix to Peters's Admiralty Reports, vol. 1. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

25. OLERON, LAWS OF. A code of maritime law which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. The latter monarch, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. Some additions were made to it by king John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward III. It is most accessible to the American profession in the translation contained in the appendix to the first volume of Peters's Admiralty Reports. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer*. The subjects upon which it is now valuable are much the same as those of the Consolato del Mare.

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A.D. 500. It was founded on the Roman law.

PRUSSIAN. *Allgemeines Landrecht*. The former code of 1751 was not successful; but the attempt to establish one was resumed in 1780, under Frederic II.; and, after long and thorough discussion, the present code was finally promulgated in 1794. It is known also as the Code Frederic.

26. RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

THEODOSIAN. A code compiled by a commission of eight, under the direction of Theodosian the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 438, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroi). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

27. TWELVE TABLES. Laws of ancient Rome, compiled on the basis of those of Solon and other Greek legislators.

They first appeared in the year of Rome 303, inscribed on ten plates of brass. In the following year two others were added; and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained were the germ of the body of the Roman law, and enter largely into the modern jurisprudence of Europe. See a fragment of the law of the Twelve Tables, in Cooper's Justinian, 656; Gibbon's Rome, c. 44.

VISIGOTHIC. The *Lex Romani;* now known as *Breviarum Alaricianum*. Ordained by Alaric II. for his Roman subjects, A.D. 506.

28. WISBUY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisbuy."

The port of Wisbuy, now in ruins, was situated on the northwestern coast of Gottland, in the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the Laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. "*Lex Rhodia navalis,*" says Grotius, "*pro jure gentium in illo mare Mediterraneo vigebat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos, legis Wisbuenses. De Jure B.* lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in the appendix to the first volume of Peters's Admiralty Reports.

CODEX (Lat.). A volume or roll. The code of Justinian.

CODICIL. Some addition to, or qualification of, a last will and testament.

This term is derived from the Latin *codicillus*, which is a diminutive of *codex*, and in strictness imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. *De Codic.* art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinburne, Wills, pt. i. s. v. pl. 2. But the present definition of the term is that first given. Williams, Exrs. pt. i. b. i. c. ii. p. 8; Swinburne, Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, *omni exceptione majores*. Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinburne, Wills, pt. i. s. v. pl. 4; Godolph. pt. i. c. 1, s. 2; *id.* pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i.

In the Roman Civil Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causâ mortis* than any thing else now in use; the other, where a testament did exist, had relation to the testament, and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art. v. It is in this last sense that the term is now universally used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The

emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 25; Bowyer, Comm. 155, 156.

2. All codicils are part of the will, and are to be so construed. 4 Brown, Ch. 55; 17 Sim. Ch. 108; 16 Beav. Rolls, 510; 2 Ves. Sen. Ch. 242, by Lord Hardwicke; 3 Ves. Ch. 107, 110; 4 *id.* 610; 4 Younge & C. Ch. 160; 2 Russ. & M. 117; 8 Cow. N. Y. 56; 3 Sandf. Ch. N. Y. 11; 4 Kent, Comm. 531.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date. 4 Penn. St. 376; 4 Dane, Abr. c. 127, a. 1, § 11, p. 550; 14 B. Monr. Ky. 333; 1 Cush. Mass. 118; 3 Mylne & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will. 1 Hill, N. Y. 590; 7 *id.* 346; 3 Zabr. N. J. 447.

3. A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument. 3 B. Monr. Ky. 390; 6 Johns. Ch. N. Y. 374, 375; 14 Pick. Mass. 543; 16 Ves. Ch. 167; 7 *id.* 98; 1 Ad. & E. 423. See, also, the numerous cases cited by Mr. Perkins, Piggott *v.* Walker, 7 Ves. Ch. Sumner ed. 98; 1 Crompt. & M. Exch. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones. 3 Bingh. 614; 12 J. B. Moore, 2.

But in order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such as clearly to identify the paper. 4 N. Y. 140.

4. It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated. 2 Ves. Ch. 204; 12 *id.* 29; 2 Mylne & K. 765; 1 Ves. & B. Ch. 422, 445.

5. The form of devising by codicil is abolished in Louisiana, Code, 1563; and whether the disposition of the property be made by testament, under this title, or under that of institution of heir, of legacy, codicil, *donatio mortis causa*, or under any other name indicating the last will, provided it be clothed with the forms required for the validity of a testament, it is, so far as form is concerned, to be considered a testament. See 1 Brown, Civil Law, 292; Domat, *Lois Civ.* l. 4, t. 1, s. 1; *Leçons Elément. du Dr. Civ. Rom.* tit. 25. See WILLS.

COEMPTIO (Lat.). **In Civil Law.** The ceremony of celebrating marriage by solemnities.

The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *pater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coëmptio*. Boethius, *Coëmptio*; Calvinus, Lex.; Taylor, Law Gloss.

COERCION Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it.

Implied coercion exists where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will.

2. As will is necessary to the commission of a crime or the making of a contract, a person coerced into either has no will on the subject, and is not responsible. 1 East, Pl. Cr. 225; 5 Blackf. Ind. 73; 2 Dall. Penn. 86; 5 Q. B. 279; 1 Dav. & M. 367. The command of a superior to an inferior, 3 Wash. C. C. 209, 220; 12 Metc. Mass. 56; 1 Blatchf. C. C. 549; 13 How. 115; of a parent to a child, Broom, Max. 2d ed. 11; of a master to his servant, or a principal to his agent, 13 Mo. 246; 14 *id.* 137, 340; 3 Cush. Mass. 279; 11 Metc. Mass. 66; 5 Miss. 304; 14 Ala. 365; 22 Vt. 32; 2 Den. N. Y. 341; 14 Johns. N. Y. 119; may amount to coercion.

3. As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway-robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved. See 2 Carr. & K. 887, 903; Jebb, Cr. Cas. 93. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them. Jebb, Cr. Cas. 93; 1 Mood. Cr. Cas. 143. It seems that a married

woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him. 1 Dearsl. Cr. Cas. 184; 1 Den. Cr. Cas. 596. Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal. 1 Dearsl. & B. Cr. Cas. 553.

4. Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or to the offence of keeping a brothel. 2 Lew. Cr. Cas. 229; 8 Carr. & P. 19, 541; 2 Mood. Cr. Cas. 384; 10 Mod. 63; 1 Metc. Mass. 151; 10 Mass. 152. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony. 8 Carr. & P. 541; 2 Mood. Cr. Cas. 53; 1 Taylor, Ev. 152. The law upon the responsibility of married women for crime is fully stated in 1 Bennett & H. Lead. Crim. Cas. 76–87.

COFRADIA. The congregation or brotherhood entered into by several persons for the purpose of performing pious works. No society of this kind can be lawfully formed without license from the king and the bishop of the diocese.

COGNATES. In Civil and Scotch Law. Relations through females. 1 Mackeldy, Civ. Law, 137; Bell, Dict.

COGNATI. In Civil Law. Collateral heirs through females. Relations in the line of the mother. 2 Blackstone, Comm. 235.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the Prætorian succession, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 38. 8. See PATERFAMILIAS; Vicat; Biret, *Vocabulaire*.

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 38. 10.

Natural cognation is that which is alone formed by ties of blood: such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance* and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially.

Of Pleas Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. Termes de la Ley. It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The universities of Cambridge and Oxford possess this franchise. Willes, 233; 1 Sid. 103; 11 East, 543; 1 W. Blackst. 454; 10 Mod. 126; 3 Sharswood, Blackst. Comm. 298.

Claim of Cognizance (or of Conusance) is an intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wils. 409; 2 Sharswood, Blackst. Comm. 350, n.

It is a question of jurisdiction between the two courts, Fortesc. 157; 5 Viner, Abr. 588, and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conusance, or by his representative, and not by the defendant or his attorney. 1 Chitty, Plead. 403.

There are three sorts of conusance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when the plea is commenced in one court, of which conusance belongs to another. A conusance of exclusive jurisdiction: as, that no other court shall hold plea, etc. Hardr. 509; Bacon, Abr. *Courts*, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action,—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled. Lawes, Plead. 35, 36; 4 Bouvier, Inst. n. 3571. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of the complainant. 2 Sharswood, Blackst. Comm. 350.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family. The *agnomen* was added on account of

some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the prænomen, Cornelius is the nomen, Scipio the cognomen, and Africanus the agnomen. Vicat. These several terms occur frequently in the Roman laws. See Cas. *temp.* Hardw. 286; 6 Coke, 65; 1 Tayl. No. C. 148.

COGNOVIT ACTIONEM (Lat. he has confessed the action. *Cognovit* alone is in common use with the same significance).

In Pleading. A written confession of an action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

It is given after the action is brought to save expense, and differs from a warrant of attorney, which is given before the commencement of any action and is under seal. 3 Chanc. Pract. 664; 3 Bouvier, Inst. 3229.

COHABIT (Lat. *con* and *habere*). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, the occupying the same bed, 1 Hagg. Cons. 144; 4 Paige, Ch. N. Y. 425; though the word is popularly, and sometimes in statutes, used in this latter sense. 20 Mo. 210; Bishop, Marr. & Div. § 506, n.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house. 2 Vern. Ch. 323; Bishop, Marr. & Div. 506, n.

COIF. A head-dress.

In England there are certain serjeants at law who are called serjeants of the coif, from the lawn coif they wear on their heads under their thin caps when they are admitted to that order. It was anciently worn as a distinguishing badge. Spelman, Gloss.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowel.

COLLATERAL (Lat. *con*, with, *latus*, the side). That which is by the side, and not the direct, line. That which is additional to or beyond a thing.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Blackstone, Comm. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court having general jurisdiction of the subject. See 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain, *a priori*, whether a particular fact offered in evidence will or will not clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer; and he cannot, in general, contradict him by another witness. Roscoe, Crim. Ev. 139.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raise a collateral issue. 4 Blackstone, Comm. 396. And see 4 *id.* 338.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus, brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either *lineal* or *collateral*.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some *collateral* event: as, an estate to A till B shall go to Rome. Park, Dow. 163; 4 Kent, Comm. 128; 1 Washburn, Real Prop. 215.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement.

The property or securities thus conveyed are also called collateral securities. 1 Powell, Mortg. 393; 2 *id.* 666, n. 871; 3 *id.* 944, 1001.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question.

2. Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. Termes de la Ley.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton, § 709. The tenant in tail having discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washburn, Real Prop. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

3. By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By statute 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally the statute 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Coke, Litt. 373, Butler's note [328]; Stearns, Real Act. 135, 372.

4. It is doubtful if the doctrine has ever prevailed to a great extent in the United States. The statute of Anne has been reenacted in New York, 4 Kent, Comm. 3d ed. 460; and in New Jersey. 3 Halst. N. J. 106. It has been adopted and is in force in Rhode Island, 1 Sumn. C. C. 235; and in Delaware. 1 Harr. Del. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended. 1 Dan. Ky. 59. In Pennsylvania, collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted. 4 Dall. Penn. 168; 2 Yeates, Penn. 509; 9 Serg. & R. Penn. 275. See 2 Sharswood, Blackst. Comm. 301; 2 Washburn, Real Prop. 668–671.

COLLATERALES ET SOCII. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. In Civil Law. The supposed or real return to the mass of the succession, which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. La. Civ. Code, art. 1305.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem, non cogitur ad collationem.* La. Civ. Code, art. 1305–1367.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king. 1 Blackstone, Comm. 391. An advowson under such circumstances is termed collative. 2 Blackstone, Comm. 22.

In Practice. The comparison of a copy with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years, but removable at the pleasure of the president. Act of May 15, 1820, sect. 1, 3 Story, U. S. Laws, 1790.

The duties of a collector of the customs are described in general terms as follows:—"He shall receive all reports, manifests, and documents to be made or exhibited on the entry of any ship or vessel, according to the regulations of this act; shall record, in books to be kept for the purpose, all manifests; shall receive the entries of all ships or vessels, and of the goods, wares, and merchandise imported in them; shall, together with the naval officer, where there is one, or alone, where there is none, estimate the amount of duties payable thereupon, indorsing the said amounts upon the respective entries; shall receive all moneys paid for duties, and shall take bonds for securing the payment thereof; shall grant all permits for the unlading and delivery of goods; shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers, and inspectors, at the several ports within his district, and also, with the like approbation, provide, at the public expense, storehouses for the safe keeping of goods, and such scales, weights, and measures as may be necessary." Act of March 2, 1799, s. 21, 1 Story, U. S. Laws, 590. See, for other duties of collectors, 1 Story, U. S. Laws, 592, 612, 620, 632, 659, and vol. 3, 1650, 1697, 1759, 1761, 1791, 1811, 1848, 1854; 10 Wheat. 246.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never come together.

COLLEGIUM (Lat. *colligere*, to collect). **In Civil Law.** A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. DuCange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All collegia were *illicita* which were not ordained by a decree of the senate or of the emperor. 2 Kent, Comm. 269.

COLLISION. In Maritime Law. The act of ships or vessels striking together, or of one vessel running against or foul of another.

2. It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his

own loss. Pardessus, Droit Comm. p. 4, t. 2, c. 2, § 4; Story, Bailm. § 609; 1 Conkling, Adm. 306; 14 How. 352.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels. In such case, neither party has relief at common law, 3 Kent, Comm. 231; 3 Carr. & P. 528; 9 *id.* 613; 11 East, 60; 21 Wend. N. Y. 188, 615; 6 Hill, N. Y. 592; 12 Metc. Mass. 415; 26 Me. 39; but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels. 3 Kent, Comm. 232; 1 Conkling, Adm. 374–376; 16 Bost. Law Rep. 686; 17 How. 170; Gilp. Dist. Ct. 579, 584; Crabbe, Dist. Ct. 22. See 1 Swab. Adm. 60–101.

3. It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts adopt the rule of an equal division of the aggregate damage. Dav. Dist. Ct. 365; Flanders, Mar. Law. 296. But the English courts have refused a remedy in admiralty. 2 Hagg. Adm. 145; 6 Thornt. Adm. 240.

It may happen *by the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her, 1 Swab. Adm. 23, 173, 200, 211; 3 W. Rob. Adm. 283; 1 Blatchf. C. C. 211; 2 Wall. Jr. C. C. 52; 1 How. 28; 13 *id.* 101; although wilfully committed by the master. Crabbe, Dist. Ct. 22; 1 Wash. C. C. 13; 3 *id.* 262. But see 1 W. Rob. Adm. 399–406; 2 *id.* 502; 1 Hill, N. Y. 343; 19 Wend. N. Y. 343; 1 East, 106; 6 Jur. 443.

4. Full compensation is, in general, to be made in such cases for the loss and damage which the prosecuting party has sustained by the fault of the party proceeded against, 2 W. Rob. Adm. 279, including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act. 3 W. Rob. Adm. 7, 282; 11 Mees. & W. Exch. 228; 1 Swab. Adm. 200; 6 N. Y. Leg. Obs. 12; 1 Blatchf. C. C. 211; 2 Wall. Jr. C. C. 52; 1 How. 28; 13 *id.* 113; 17 *id.* 170.

The personal liability of the owners is, however, limited in some cases to the value of the vessel and freight. Code de Comm. art. 216; Stat. 17 & 18 Vict. c. 104 (Merchants' Shipping Act), pt. 9, § 503 *et seq.*; 9 U. S. Stat. at Large, 635; 10 *id.* 68, 72, 73; 3 W. Rob. Adm. 16, 41, 101; 1 Eng. L. & Eq. 637; 3 Hagg. Adm. 431; 15 Mees. & W. Exch. 391; 3 Stor. C. C. 465; Dav. Dist. Ct. 172; 16 Bost. Law Rep. 686; 2 Am. Law Reg. 157. See 5 Mich. 368. In maritime law the vessel itself is hypothecated as security for the injury done in such cases. 1 Swab. Adm. 1, 3; 22 Eng. L. & Eq. 62, 72; 15 Bost. Law Rep. 560; 14 How. 351; 16 *id.* 469.

5. For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain. 21 How. 372. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life. 1 W. Rob. Adm. 478, 485; 4 J. B. Moore, Priv. Coun. 314. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation, 1 W. Rob. Adm. 471, 478; 2 Wend. N. Y. 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation. 6 N. Y. Leg. Obs. 190; 6 Thornt. Adm. 600, 607; 7 *id.* 127; 15 Bost. Law Rep. 390. But a vessel is not required to depart from the rule when she cannot do so without danger. 6 N. Y. Leg. Obs. 190; 2 Curt. C. C. Rep. 363; 18 How. 581.

6. There must be a lookout properly *stationed and kept;* and the absence of such a lookout is *primâ facie* evidence of negligence. 10 How. 557; 12 *id.* 443; 18 *id.* 584; 21 *id.* 548; 23 *id.* 448; Dav. Dist. Ct. 359; 16 Bost. Law Rep. 433; 9 N. Y. Leg. Obs. 239. Lights also must be kept, in some cases; though the rule was and is otherwise by general maritime law in regard to vessels on the high seas. 2 W. Rob. Adm. 4; 3 *id.* 49; 2 Wall. Jr. 268. See NAVIGATION RULES; 12 How. 443; 17 *id.* 170; 18 *id.* 223, 581; 19 *id.* 56, 48, 201; 21 *id.* 1, 184, 372, 548; 22 *id.* 48, 461; 23 *id.* 287; Dav. Dist. Ct. 359; 1 Blatchf. C. C. 236, 370; Stu. Adm. Low. C. 222, 242; 21 Pick. Mass. 254; 6 Whart. Penn. 324; 11 Bost. Law Rep. 80; 16 *id.* 433; 19 *id.* 379; 6 N. Y. Leg. Obs. 374; 1 Thornt. Adm. 592; 2 *id.* 101; 4 *id.* 97, 161; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. Adm. 377; 3 *id.* 7, 49, 190; 1 Swab. Adm. 20, 233.

7. The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance, 4 Ad. & E. 420; 6 Nev. & M. 713; 14 Pet. 99; 14 How. 352; 8 Cush. Mass. 477; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured, 4 Ad. & E. 420: 7 Ellis & B. 172; 40 Eng. L. &

Eq. 54; 11 N. Y. 9; 14 How. 352, and cases cited; but some policies now provide that the insurer shall be liable for such a loss. 40 Eng. L. & Eq. 54; 7 Ellis & B. 172.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy. 14 Pet. 99.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent. 17 How. 152.

8. Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the steamer carries the mail and is under contract to convey it at a greater average speed than that complained of. 16 Bost. Law Rep. 433; 5 N. Y. Leg. Obs. 293; 11 *id.* 297; 3 Hagg. Adm. 414; 2 W. Rob. Adm. 2, 205; 18 How. 89, 223; 19 *id.* 108; 21 *id.* 1.

When a collision is occasioned solely by the error or unskilfulness of a pilot in charge of a vessel under the provisions of a law compelling the master to take such pilot and commit to him the management of his vessel, the pilot is solely responsible for the damage, and neither the master, his vessel, nor her owner is responsible. But the burden of proof is on the vessel to show that the collision is wholly attributable to the fault of the pilot. 1 How. 28; 1 Maule & S. 77; 1 W. Rob. Adm. 131, 171; 1 Swab. Adm. 69, 101, 127, 193.

9. A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of the Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court. 1 W. Rob. Adm. 471; 2 *id.* 225; 2 Chitty, Genl. Pract. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of expeperienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, *as experts*, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions. 2 Curt. C. C. 141, 363.

10. When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof, 1 W. Rob. Adm. 157, 182, 478; 6 Thornt. Adm. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions. 11 N. Y. Leg. Obs. 353, 355. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence, 5 Eng. L. & Eq. 556; and the masters and crew are admissible as witnesses. 2 Dods. Adm. 83; 2 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkling, Adm. 384.

As to the burden of proof in collision cases, see 9 Jur. 282, 670; 2 W. Rob. Adm. 30, 244, 504; 3 *id.* 7; 12 *id.* 131, 371; 2 Hagg. Adm. 356; 4 Thornt. Adm. Cas. 161, 356; 1 Conkling, Adm. 382, 383; 1 How. 28; 5 *id.* 441; 18 *id.* 570; Olc. Adm. 132; 6 Bost. Law Rep. 111; 8 *id.* 275.

11. The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them. 2 W. Rob. Adm. 213, 244; 5 Jur. 1067; 2 Conkling, Adm. 438; 1 *id.* 374.

The following cases are among the more important relating to this subject:—1 How. 89; 5 *id.* 441; 10 *id.* 557; 12 *id.* 443, 466; 13 *id.* 101, 283; 14 *id.* 532; 17 *id.* 152, 170, 178; 18 *id.* 89, 223, 570, 584; 19 *id.* 56, 108; 20 *id.* 296; 21 *id.* 184, 372, 451; 23 *id.* 209; 14 Bost. Law Rep. 669; 16 *id.* 433; 17 *id.* 384; 18 *id.* 181; 1 Blatchf. C. C. 365; 1 Blatchf. & H. Adm. 347; Olc. Adm. 38, 104, 132, 188, 246, 258, 304, 415, 428, 483; 2 Wall. Jr. C. C. 485; Abb. Adm. 73, 108, 202, 336; 2 Curt. C. C. 72, 141, 150, 363; 3 N. Y. Leg. Obs. 61; 6 *id.* 12; 9 *id.* 237, 321; 2 Wend. N. Y. 452; Stu. Adm. Low. C. 75, 190, 335, 344; 14 Pick. Mass. 1; 2 Dods. Adm. 83; 2 Hagg. Adm. 173; 3 *id.* 321, 414; 1 W. Rob. Adm. 157, 478, 484, 270; 2 *id.* 197, 236; 3 *id.* 27, 38, 75, 101, 152, 190, 283; 1 Swab. Adm. 28, 117.

The following cases relate to collisions in which tow-boats were concerned:—20 How. 543; 22 *id.* 461; 14 Pick. Mass. 1; 1 Blatchf. C. C. 365; 13 Wend. N. Y. 387; 1 Am. Law Jour. 436; 1 Gilp. C. C. 179; 6 N. Y. Leg. Obs. 402, 434; 9 *id.* 232; 1 W. Rob. Adm. 270; 3 *id.* 27; 1 Wall. Jr. C. C. 485; 18 Bost. Law Rep. 553; 1 Swab. Adm. 220, 298. And see Angell, Law of Carriers, §§ 666, 667; 3 Am. Law Reg. 337. Consult 2 Parsons, Mar. Law, 187–211; Conkling, Adm. 370–426; Flanders, Mar. Law, c. 9; Abbott, Shipp. Story & Perkins's notes.

COLLISTRIGIUM. The pillory.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation. 2 Low. C. 9, 139.

COLLOQUIUM. In Pleading. A general averment in an action for slander connecting the whole publication with the previous statement, 1 Starkie, Sland. 431; Heard, Lib. & Sland. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenleaf, Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves, 6 Term, 162; 16 Pick. Mass. 132; Croke Jac. 674; Heard, Lib. & Sland. § 212; 1 Greenleaf, Ev. § 417; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter. 2 Pick. Mass. 328; 13 *id.* 189; 16 *id.* 1; Heard, Lib. & Sland. §§ 212, 217; 11 Mees. & W. Exch. 287; 7 Bingh. 119.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them. Shaw, C. J., 16 Pick. Mass. 6.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was, under the circumstances thus set out, the meaning of the words used. *Per Shaw*, C. J.; 16 Pick. Mass. 6. See INNUENDO.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See Shelford, Marr. & Div. 415, 450; 3 Hagg. Eccl. 130, 133; 2 Greenleaf, Ev. § 51; Bousquet, Dict. *Abordage*.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the commencement of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition-state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm.

The dependencies of the British government are of two sorts,—those acquired by the occupation of vacant territory, and those acquired by cession or conquest. In the former class the colonists are deemed to carry the common law of England with them as their birthright. 2 P. Will. 75; Cowp. 206. In the other class the laws of the original inhabitants of the conquered or ceded country remain in force until the crown, by order in council, or parliament, makes other provision. Thus, the laws of Spain, Holland, and France are still in force, to a greater or less extent, in those colonies which have been acquired from those powers; and the Hindu and Mohammedan laws are still administered over the Hindus and Mohammedans, respectively, in British Hindostan. Mills, Colonial Const. c. 1. Consult Burge on Colonial and Foreign Law (1838), Clarke's Summary of Colonial Law (1834); Howard's Colonial Law (1827). The latter work refers only to the American colonies of Great Britain. Mills, Colonial Const. (1856).

COLONUS (Lat.). **In Civil Law.** A freeman of inferior rank, corresponding with the Saxon ceorl and the German rural slaves.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii*. 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. 3 Wash. C. C. 287.

The country occupied by the colonists.

A colony differs from a possession or a dependency. For a history of the American colonies, the reader is referred to Story, Const. b. 1; 1 Kent, Comm. 77–80; 1 Dane, Abr. Index. See DEPENDENCE.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action. 3 Sharswood, Blackstone, Comm. 309; 4 Barnew. & C. 547; 1 Moore & P. 307. To give color is to give the plaintiff credit for having an apparent or *primâ facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Sharswood, Blackst. Comm. 309, n.; 1 Chitty, Plead. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has in truth only an appearance or color of cause. Bacon, Abr. *Trespass*, I 4; 1 Chitty, Plead. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence: as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea. 1 Chitty, Plead. 528; Stephen, Plead. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which

would otherwise oblige him to plead the general issue. 3 Blackstone, Comm. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea. Comyns, Dig. *Pleading;* Keilw. 1036; 1 Chitty, Plead. 531; 4 Dane, Abr. 552; Archbold, Plead. 211.

Personal Relations. By the South Carolina act of 1740, all negroes and Indians (Indians in amity with the government, negroes, mulattoes, and mestizoes free at that time, excepted) are slaves and chattels personal. O'Neall, Dig. of Negro Law of S. C. 5, 6, §§ 1, 2, 3. Under this statute, color is *primâ facie* evidence of slavery, and it has been uniformly held that a negro, mulatto, or mestizo is a slave; but this rule does not apply in the case of Indians, who are regarded as free Indians in amity with the government. 2 Speers, So. C. 105; 1 Rich. So. C. 224; Dudl. So. C. 174. Whenever the African taint is so far removed that upon inspection a party may fairly be pronounced white, and such has been his previous reception in society and enjoyment of the privileges usually enjoyed by white people, the jury may rate and regard the party as white. The question of color may be decided without the intervention of a jury by the inspection of the judge. If the African blood be only one-eighth, the jury always find the party to be white; if between one-fourth and one-eighth, it is plainly debatable ground. O'Neall, Dig. of Negro Law of S. C. 6, §§ 7, 8, 9; 2 Hill, So. C. 615, 616; 1 Speers, So. C. 270; 3 Rich. So. C. 136–141; 2 Bail. So. C. 560. The burden of proof of freedom rests upon the negro, mulatto, or mestizo claiming to be free. O'Neall, Dig. § 21, p. 8; Dudl. So. C. 174, 176.

Cruelty to slaves is prohibited by the act of 1740. Owners must furnish them with sufficient clothing, wearing-apparel, and food. An owner cannot abandon his slave needing either medical treatment, care, food, or raiment. O'Neall, Dig. 20, 21; Acts of 1858, p. 738, s. 25; Acts of 1856, p. 593, s. 27; 2 Brev. So. C. 129; 2 Speers, So. C. 408.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East, 364.

COLORADO. One of the territories of the United States.

Congress, by an act approved February 28, 1861, erected so much of the territory of the United States as lies within the following boundaries—viz.: commencing on the thirty-seventh parallel of north latitude, where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north on the said meridian to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian to the north line of New Mexico; thence along the thirty-seventh parallel of north latitude to the place of beginning—into a separate territory, by the name of The Territory of Colorado, excepting, however, from the operation of the act all territory in which Indian rights exist which have not been extinguished by treaty. 12 U. S. Stat. at Large, 172.

The provisions of the organic act are substantially the same as those of the act erecting the territory of New Mexico. See NEW MEXICO.

COLORE OFFICII. Color of office.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law.

A union of different elements. A patent may be taken out for a new combination of existing machines. 2 Mas. C. C. 112.

COMBUSTIO DOMORUM. Arson. 4 Blackstone, Comm. 272.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C D, by E F, his attorney, *comes*, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea. 1 Chitty, Plead. 411; Stephen, Plead. 432.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the comites accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions. They acted in the character of assistant judges. Tac. *de Mor. Germ.* cap. 11, 12; Spence, Eq. Jur. 66; Spelman, Gloss. Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs. 1 Spence, Eq. Jur. 42. *Comitatus*, county, is derived from *comes*, the earl or earlderman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our *sheriff*). The *comitates* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine. See PALATINE; 1 Blackstone, Comm. 116. The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff (*vice-comes*). 1 Blackstone, Comm. 398.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Blackstone, Comm. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Ld. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 42, 66.

The retinue which accompanied a Roman proconsul to his province. DuCange. A body of followers; a prince's retinue. Spelman, Gloss.

COMITES. Persons who are attached to a public minister. As to their privileges, see 1 Dall. Penn. 117; Baldw. C. C. 240; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51. The votes of all citizens were equal in the *comitiæ*. 1 Kent, Comm. 518.

COMITIA CALATA. A session of the *comitia curiata* for the purposes of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of the *populus* (the original burgesses) by tribes. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 62; 1 Kent, Comm. 518.

COMITY. Courtesy; a disposition to accommodate.

Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens: as, for example, the discharge of a debtor under the insolvent laws of one state will be respected in another state, where there is a reciprocity in this respect.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested. Guyot, *Rép. Univ.*

The business being carried on in the name of some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, Limited Partn. cc. 3, 4.

The term includes a partnership containing *dormant* rather than *special* partners. Story, Partn. § 109 *et seq.*

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, Lim. Partn. c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch, 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. La. Civ. Code, 2810. A similar partnership exists in France. Code de Comm. 26, 33; Sirey, 12, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner *in commendam*. La. Civ. Code, art. 2811.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATUS. In Feudal Law. One who by voluntary homage put himself under the protection of a superior lord. Cowel; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Pardessus, Dr. Com. n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, Dr. Pub. liv. 1, tit. 7, s. 1, n. 2.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the In-

dian tribes. 1 Kent, Comm. 431; Story, Const. § 1052 *et seq.* The sense in which the word commerce is used in the constitution seems not only to include traffic, but intercourse and navigation. Story, Const. § 1057; 9 Wheat. 190, 191, 215, 229; 12 *id.* 419; 1 Tucker, Blackst. Comm. App. 249–252. See 17 Johns. N. Y. 488; 4 Johns. Ch. N. Y. 150; 5 *id.* 300; 6 *id.* 160; 3 Cow. N. Y. 713; 1 Halst. N. J. 236, 285; 1 Brock. C. C. 423; 11 Pet. 102; 6 *id.* 515; 3 Dan. Ky. 274; 13 Serg. & R. Penn. 205.

COMMERCIA BELLI. Compacts entered into by belligerent nations to secure a temporary and limited peace. 1 Kent, Comm. 159.

Contracts made between citizens of hostile nations in time of war. 1 Kent, Comm. 104.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his recent collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850–52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It was not unusual to restrict a sale upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the mean time, however, the property was the buyer's and at his risk. A debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent, Comm. 583. This was abolished by a law of Constantine. Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The act of April 14, 1818, s. 6, requires that the president, by and with the consent of the senate, shall appoint a commissary-general, with the rank, pay, and emoluments of colonel of ordnance, and as many assistants, to be taken from the subalterns of the line, as the service may require. The commissary-general and his assistants shall perform such duties, in the purchasing and issuing of rations to the armies of the United States, as the president may direct. The duties of these officers are further detailed in the subsequent sections of this act, and in the act of March 2, 1821.

By act of Aug. 3, 1861, four commissaries of subsistence, each with the rank, pay, and emoluments of a major of cavalry, and eight each with the rank, pay, and emoluments of a captain of cavalry are added to the subsistence department. 12 U. S. Stat. at Large, 287.

By act of Feb. 9, 1863, it is provided that there be added to the subsistence department of the army one brigadier-general, to be selected from the subsistence department, who shall be commissary-general of subsistence, and by regular promotion, one colonel, one lieutenant-colonel, and two majors; the colonels and lieutenant-colonels to be assistant commissaries-general of subsistence, and that vacancies in said grades shall be filled by regular promotions in said department. 12 U. S. Stat. at Large, 648.

COMMISSARY COURT. In Scotch Law. A court of general ecclesiastical jurisdiction. It was held before four commissioners, appointed by the crown from among the faculty of advocates.

It had a double jurisdiction: *first*, that exercised within a certain district; *second*, another, universal, by which it reviewed the sentences of inferior commissioners, and confirmed the testaments of those dying abroad or dying in the country without having an established domicil. Bell, Dict.

It has been abrogated, its jurisdiction in matters of confirmation being given to the sheriff, and the jurisdiction as to marriage and divorce to the court of Session. Paterson, Comp. See 4 Geo. IV. c. 47; 1 Will. IV. c. 69; 6 & 7 Will. IV. c. 41; 13 & 14 Vict. c. 36.

COMMISSION (Lat. *commissio;* from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed. Rutherforth, Inst. 105.

A body of persons authorized to act in a certain matter. 5 Barnew. & C. 850.

The act of perpetrating an offence. An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission. For a form of a commission to take depositions, see Gresley, Eq. Ev. 72.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee. 1 Cranch, 137; 2 Nott & M'C. So. C. 357; 1 M'Cord, So. C. 233, 238. See 1 Pet. C. C. 194; 2 Sumn. C. C. 299; 8 Conn. 109; 1 Penn. 297; 2 Const. So. C. 696; 2 Tyl. Vt. 235.

In Common Law. A sum allowed, usually a certain per cent. upon the value of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing

certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382 *et seq.*

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of Aug. 8, 1841.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office bureau. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk. See PATENT OFFICE, EXAMINERS IN.

For a fuller understanding of the duties of the commissioner of patents, see PATENTS; PATENT OFFICE.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highways within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. In English Law. A court of record of special jurisdiction in England.

It is a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re natâ* at the pleasure of the crown, but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers, 23 Hen. VIII. c. 5.

Its jurisdiction is to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and is confined to such county or particular district as the commission shall expressly name. The commissioners may take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They are also to assess and collect taxes for such repairs and for the expenses of the commission. They may proceed with the aid of a jury or upon their own view. Consult 7 Anne, c. 10; 4 & 5 Vict. c. 45; 11 & 12 Vict. c. 50; 18 & 19 Vict. c. 120; 3 & 4 Will. IV. cc. 10, 19–22; 3 Blackstone, Comm. 73, 74; Crabb, Hist. Eng. Law, 469.

In American Law. Commissioners have been appointed for the purpose of regulating the flow of water in streams. Their duties are discharged in the different states by county courts, county commissioners, etc.

COMMISSIONS. In Practice. Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

2. The *right* to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions. 7 Carr. & P. 584; 9 *id.* 559; 3 Smith, 440; Sugden, Vend. & P. Index, tit. *Auctioneer*. See the statutes of the various states. The right does not generally accrue till the completion of the services, 1 Carr. & P. 384; 4 *id.* 289; 7 Bingh. 99; and see 10 Barnew. & C. 438; does not then exist unless proper care, skill, and perfect fidelity have been employed, 3 Campb. 451; 1 Stark. 113; 3 Taunt. 32; 9 Bingh. 287; 12 Pick. Mass. 328; and the services must not have been illegal nor against public policy. 1 Campb. 547; 4 Esp. 179; 5 Taunt. 521; 3 Barnew. & C. 639; 11 Wheat. 258.

3. The *amount* of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business in which the agent is engaged, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage. 3 Chitty, Comm. Law, 221; 1 Parsons, Contr. 84, 85; Story, Ag. § 326. The amount which executors, etc. are to receive is generally fixed by statute, subject to modification in special cases by the proper tribunal. 12 Barb. N. Y. 671; Edwards, Receiv. 176, 302, 643. And see the statutes of the various states. In England, no commissions are allowed to executors or trustees. 1 Vern. Ch. 316; 4 Ves. Ch. 72, n.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made. Paley, Ag. 88 *et seq.*

COMMITMENT. In Practice. The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it. 2 R. I. 436; 3 Harr. & M'H. Md. 113; T. U. P. Charlt. Ga. 280; 3 Cranch, 448. See Harp. So. C. 313; Wright, Ohio, 690. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison. 2 Strange, 934; 1 Ld. Raym. 424. It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath, 14 Johns. N. Y. 371; 3 Cranch, 448; but see 2 Va. Cas. 504; 2 Bail. So. C. 290; and should mention with convenient certainty the particular crime charged against the prisoner. 3 Cranch, 448; 11 St. Tr. 304, 318; Hawkins, Pl. Cr. b. 2, c. 16, s. 16; 1 Chitty, Crim. Law, 110; 4 Md. 262; 1 Rob. Va. 744; 5 Ark. 104; 26 Vt. 205. See 17 Wend. N. Y. 181; 23 *id.* 638. It should point out the place of imprisonment, and not merely direct that the party be taken to prison. 2 Strange, 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable, see 3 Conn. 502; 29 Eng. L. & Eq. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

See, generally, 4 Cranch, 129; 2 Yerg. Tenn. 58; 6 Humphr. Tenn. 391; 9 N. H. 185; 5 Rich. So. C. 255.

COMMITTEE. In Legislation. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may investigate and examine into it and report to those who delegated this authority to them.

In Practice. A guardian appointed to take charge of the person or estate of one who has been found to be non compos.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other. Shelford, Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed. Shelford, Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him. See 1 Bouvier, Inst. n. 389–391.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parchment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXTION. In Civil Law. A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substances no longer remain distinct. The commixtion of liquids is called *confusion* (q. v.), and that of solids a mixture. Leç. Elém. du Dr. Rom. §§ 370, 371; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODATE. In Scotch Law. A loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Comm. 225.

Judge Story regrets that this term has not been adopted and naturalized, as mandate has been from *mandatum*. Story, Comm. § 221. Ayliffe, in his Pandects, has gone further, and terms the bailor the *commodant*, and the bailee the *commodatory*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost indispensable. Ayliffe, Pand. b. 4, t. 16, p. 517. Browne, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property."

COMMODATO. In Spanish Law. A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use.

COMMON. An incorporeal hereditament, which consists in a profit which one man has in connection with one or more others in the land of another. 12 Serg. & R. Penn. 32; 10 Wend. N. Y. 647; 11 Johns. N. Y. 498; 16 *id.* 14, 30, 10 Pick. Mass. 364; 3 Kent, Comm. 403.

2. *Common of estovers* is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the *act of the party* among several tenants, neither of them can take estovers, and the right is extinguished. 2 Blackstone, Comm. 34; Plowd. 381; 10 Wend. N. Y. 639; 1 Barb. N. Y. 592. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See ESTOVERS.

3. *Common of pasture* is the right of feeding one's beasts on another's land. It is either appendant, appurtenant because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Blackstone, Comm. 34. See FISHERY.

Common of shack. The right of persons occupying lands lying together in the same

common field, to turn out their cattle after harvest to feed promiscuously in that field. Wharton, Dict.; 2 Stephen, Comm. 6; 1 Barnew. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house. 4 Coke, 37; 3 Atk. Ch. 189; Noy. 145; 7 East, 127.

4. The taking seaweed from a beach is a commonable right in Rhode Island. 2 Curt. C. C. 571; 1 R. I. 106; 2 *id.* 218. The constitution of Illinois provides for the continuance of certain commons in that state. Ill. Const. art. 8, § 8. In Virginia it is declared by statute that all unappropriated lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and used as common, shall, etc. Va. Code, c. 62, § 1.

5. In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership. 3 Vt. 521; 10 Pick. Mass. 310; 4 Day, Conn. 328; 1 Ired. No. C. 144; 7 Watts, Penn. 394. And see 14 Mass. 440; 2 Pick. Mass. 475; 12 Serg. & R. Penn. 32; 6 Vt. 355.

6. Common Appendant. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom. 1 Rolle, Abr. 396; 6 Coke, 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage: as, horses and oxen to plough the land, and cows and sheep to manure it. 2 Greenleaf, Cruise, Dig. 4. 5; 10 Wend. N. Y. 647. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land to which it is appendant. 8 Term, 396; 5 *id.* 46; 2 Mood. & R. 205; 2 Dane, Abr. 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate. Willes, 227; 4 Coke, 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land, by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right. 25 Penn. St. 161; 16 Johns. N. Y. 14; Croke Eliz. 592. Common of estovers or of piscary, which may also be appendant, cannot be apportioned. 8 Coke, 78. But see 2 R. I. 218.

7. Common Appurtenant. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant; it may be commenced by grant; and an uninterrupted usage for twenty years is evidence of a grant. In most other respects commons appendant and appurtenant agree. 2 Greenleaf, Cruise, Dig. 5; Bouvier, Inst. n. 1650; 30 Eng. L. & Eq. 176; 15 East, 108.

8. Common because of Vicinage. The right which the inhabitants of two or more contiguous townships or vills have of intercommoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant* and *couchant* upon the lands to which the right is annexed; and cannot exist except between *adjoining* townships, where there is no intermediate land. Coke, Litt. 122 *a;* 4 Coke, 38 *a;* 7 *id.* 5; 10 Q. B. 581, 589, 604; 19 *id.* 620; 18 Barb. N. Y. 523.

9. Common in Gross. A right of common which must be claimed by deed or prescription. It has no relation to land, but is annexed to a man's person, and may be for a certain or an indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descents, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross. Coke, Litt. 122 *a*, 164 *a;* 5 Taunt. 244; 16 Johns. N. Y. 30; 2 Blackstone, Comm. 34.

See, generally, Viner, Abr. *Common;* Bacon, Abr. *Common;* Comyns, Dig. *Common;* 2 Sharswood, Blackst. Comm. 34 *et seq.;* 2 Washburn, Real Prop. 4.

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties entered in the proper office of the court. See Bail; Arrest.

COMMON BAR. In Pleading. A plea to compel the plaintiff to assign the particular place where the trespass has been committed. Stephen, Pl. 256. It is sometimes called a blank bar.

COMMON BARRATRY. See BARRATRY.

COMMON BENCH. The ancient name for the court of common pleas. See BENCH; BANCUS COMMUNIS.

COMMON CARRIERS. Such as carry goods for hire indifferently for all persons.

2. The definition includes carriers by land and water. They are, on the one hand, stage-coach proprietors, railway-companies, truckmen, wagoners and teamsters, carmen and porters, and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt. Story, Bailm. §§ 494–496; 2 Kent, Comm. 598, 599; Redfield, Railw. § 124; 1 Salk. 249; 2 Ga. 348; 14 Ala. N. S. 261; 1 Bouvier, Inst. n. 1020. It has been doubted whether carmen, 8 Carr. & P. 207, and coasters, 6 Cow. N. Y. 266, were common carriers; but these cases stand alone, and are contradicted by many authorities. 19 Barb. N. Y. 577; 24 *id.* 533; 9 Rich. So. C. 193.

3. Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy. Angell, Carr. 70, § 67; 1 Term, 27; 2 Ld. Raym. 909, 918; 1 Wils. 281; 1 Salk. 18, and cases cited; 4 Bingh. N. C. 314; 25 Eng. L. & Eq. 595; 1 Term, 27; Story, Bailm. § 490; 2 Kent, Comm. 597, 598; 7 Yerg. Tenn. 340; 3 Munf. Va. 239; 1 Dev. & B. No. C. 273; 2 Bail. So. C. 157; 6 Johns. N. Y. 160; 21 Wend. N. Y. 190; 23 *id.* 306; 5 Strobh. So. C. 119; Rice, So. C. 108; 4 Zabr. N. J. 697; 2 *id.* 273; 1 Conn. 487; 12 *id.* 410; 4 N. H. 259; 11 Ill. 579. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency. 1 Term, 27; 21 Wend. N. Y. 192; 3 Esp. 127; 4 Dougl. 287.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable. Buller, Nisi P. 69; 2 Kent, Comm. 299, 300; Story, Bailm. § 492 *a*; 6 Watts, Penn. 424; Redfield, Railw. § 141.

4. Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to carry all which offer; and if they refuse, without just excuse, they are liable to an action. 2 Show. 332; 5 Term, 143; 4 Barnew. & Ald. 32; 8 Mees. & W. Exch. 372; 1 Pick. Mass. 50; 5 Mo. 36; 15 Conn. 539; 2 Sumn. C. C. 221; 6 Railw. Cas. 61; 6 Wend. N. Y. 335; 2 Stor. C. C. 16; 12 Mod. 484; 4 C. B. 555; 6 *id.* 775; 2 Ball & B. Ch. Ir. 54; 9 Price, Exch. 408. But any common carrier, whether a natural person or corporation, may restrict his business within such limits as he may deem expedient; and he is not bound to accept goods out of the line of his usual business. 23 Vt. 186; 14 Penn. St. 48; 10 N. H. 481; 30 Miss. 231; 4 Exch. 369; 12 Mod. 484. The carrier may require freight to be paid in advance; but in an action for not carrying it is only necessary to allege a readiness to pay freight. 2 Show. 81; 8 Mees. & W. Exch. 372; 18 Ill. 488; 14 Ala. N. S. 249. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight, 2 Ld. Raym. 752, and for advances made to other carriers. 6 Humphr. Tenn. 70; 16 Ill. 408; 18 *id.* 488; 16 Johns. N. Y. 356; 13 B. Monr. Ky. 243. The consignor is *primâ facie* liable for freight; but the consignee is often also liable. 1 Term, 659; 8 *id.* 330.

5. Common carriers may qualify their common-law responsibility by special contract. 4 Coke, 83; Angell, Carr. § 220; 1 Ventr. 238; Story, Bailm. § 549, and note 5. So, also, by notice brought home to the knowledge of the owner of the goods and assented to by him, the carrier may qualify his responsibility. 5 East, 507; 5 Bingh. 207; 8 Mees. & W. Exch. 243; 6 How. 344; 3 Me. 228; 11 *id.* 422; 11 N. Y. 491; 9 Watts, Penn. 87; 6 Watts & S. Penn. 495; 8 Penn. St. 479; 31 *id.* 209; 2 Rich. So. C. 286; 12 B. Monr. Ky. 63; 23 Vt. 186; 4 Harr. & J. Md. 317. But in New York the courts have dissented from this rule, or held it with such qualifications as to leave it very little force, 19 Wend. N. Y. 234; 26 *id.* 594; 2 Hill, N. Y. 623; 7 *id.* 533; 13 Barb. N. Y. 353; 14 *id.* 524; but not so as to excuse gross negligence. 8 Penn. St. 479; 23 *id.* 532; 31 *id.* 242; 9 Rich. So. C. 201.

The bill of lading, or carrier's acknowledgment of the receipt of the goods, is generally the written evidence of the contract between the parties, and is expected to contain all the exemption from general responsibility which it is competent for the carrier to claim. Parol evidence is not admissible to vary the contract of shipment thus evidenced. 4 Ohio, 334; 2 Sumn. C. C. 567; Angell, Carr. §§ 228, 229. But as between the immediate parties the bill of lading is not conclusive as to the quantity or condition of the goods at the time of shipment, especially when there was no opportunity to inspect them. 1 Mood. & R. 186; 7 Ad. & E. 29; 9 B. Monr. Ky. 112.

6. Railway-companies, steamboats, and other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of the goods for all loss or damage which occurs, without regard to the contract between them and such express carriers. 6 How. 344; 23 Vt. 186.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods; and such responsibility continues until the delivery of the same to the passenger or to his order. 1 C. B. 839; 2 Bos. & P. 416; 4 Bingh. 218; 6 Hill, N. Y. 586; 26 Wend. N. Y. 591; 10 N. H. 481; 7 Rich. So. C. 158. Where one company checks baggage through a succession of lines owned by different companies, each company becomes responsible for the whole route. 8 N. Y. 37; 2 E. D. Smith, N. Y. 184. The baggage-check given at the time of receiving such baggage is regarded as *primâ facie* evidence of the liability of the company. It stands in the place of a bill of lading. 7 Rich. So. C. 158; Redfield, Railw. § 128. Baggage will not include merchandise. 9 Eng. L. & Eq. 477; 25 Wend. N. Y. 459; 6 Hill, N. Y. 586; 12 Ga. 217; 10 Cush. 506. Jewelry and a watch in a trunk, being female attire, are regarded as proper baggage. 4 Bingh. 218; 3 Penn. St. 451. But money, except a reasonable amount for expenses, is not properly baggage. 9 Wend. N. Y. 85; 19 *id.* 554; 5 Cush. Mass. 69; 9 Humphr. Tenn. 621; 20 Mo. 513; 15 Ala. 242.

7. The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employees of the company in the usual course of business, is sufficient. 20 Conn. 534; 2 Carr. & K. 680; 2 Maule & S. 172; 16 Barb. N. Y. 383; Angell, Carr. §§ 129–147, and cases cited. But where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the mean time, only responsible as depositaries, 24 N. H. 71; and where goods are received as wharfingers, or warehousers, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence. 7 Cow. N. Y. 497. Where goods are so marked as to pass over successive lines of railway or other transportation having no partnership connection in the business of carrying, the successive carriers are only liable from the time of receiving the goods. 8 Rich. So. C. 246.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a sufficient time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in warehouse, and is only responsible for ordinary care. 10 Metc. Mass. 472; 27 N. H. 86; 4 Term, 581; 2 Maule & S. 172; 2 Kent, Comm. 591, 592; Story, Bailm. § 444. In carriage by water, the carrier is, as a general rule, bound to give notice to the consignee of the arrival of the goods. Redfield, Railw. § 130.

8. Carriers upon a continuous line of transportation are not held responsible beyond their own portion of the route, unless where there is such a business connection among the different carriers composing the route that each one is justified in giving bills of lading for the entire route. 23 Vt. 186; 6 Hill, N. Y. 158; 22 Conn. 502; 1 Gray, Mass. 502; 4 Am. Law Reg. 234. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only. Hodges, Railw. 615; 8 Mees. & W. Exch. 421; 3 Eng. L. & Eq. 497; 18 *id.* 553, 557. In some cases in this country it has been held that a railway-company has no power to contract to carry beyond its own route, such a contract being *ultra vires*. 22 Conn. 502; 23 *id.* 457; 24 *id.* 468.

9. The agents of corporations who are common carriers, such as railway and steamboat companies, will bind their principals to the full extent of the business intrusted to their control, whether they follow their instructions or not. 14 How. 468, 483. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions. 5 Du. N. Y. 193; Redfield, Railw. § 137, and cases cited in notes.

The contracts of common carriers, like all other contracts, are liable to be controlled and qualified by the known usages and customs and course of the business in which they are engaged; and all who do business with them are bound to take notice of such usages and customs as are uniform, of long standing, and generally known and understood by those familiar with such transactions. 25 Wend. N. Y. 660; 6 Hill, N. Y. 157; 23 Vt. 186, 211, 212; 21 Ga. 526.

10. The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, except such as result from inevitable accident, such as fire by lightning, and the like. 12 Barb. N. Y. 595.

The carrier is not bound unless he stipulate absolutely to deliver goods by a particular time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation. Story, Bailm. § 545 *a*; 5 Mann. & G. 551; 6 McLean, C. C. 296; 19 Barb. N. Y. 36; 12 N. Y. 245. What is a reasonable time is to be decided by the jury, from a consideration of all the circumstances. 7 Rich. So. C. 190, 409.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure. 1 Du. N. Y. 209; 12 N. Y. 99.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their value at the place of their destination; and this includes the profits of the adventure. 4 Whart. Penn. 204; 11 La. Ann. 324; Sedgwick, Dam. 356; 2 Barnew. & Ad. 932. See, also, 12 Serg. & R. Penn. 183; 1 Cal. 108.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from

the carrier as for a total loss. 5 Rich. So. C. 462; 12 N. Y. 509; 35 N. H. 390.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, Pand. lib. 4, t. 9; Domat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; Code Civil, art. 1782, 1786, 1952; Moreau & Carlton, Las Partidas, c. 5, t. 8, l. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Comm. 465; Abbott, Shipp. part 3, c. 3, § 3, note (l); 1 Voet, ad Pand. lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier;* Dict. de Police, *Voiture.*

Consult Angell on Carriers; Chitty & Temple on Carriers; Story on Bailments; Redfield on Railways; and articles COMMON CARRIERS OF PASSENGERS; RAILWAYS; BAGGAGE; LUGGAGE; BAILMENTS.

COMMON CARRIERS OF PASSENGERS. Such as carry persons for hire, and are bound to carry all who offer. 19 Wend. N. Y. 239; 10 N. H. 486; 15 Ill. 472; 2 Sumn. C. C. 221; 3 Brod. & B. 54; 9 Price, Exch. 408.

2. They may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But see Redfield, Railw. 344, § 155, and notes, and cases cited; Story, Bailm. § 591; 10 N. H. 486.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appliances for the conduct of their business: so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers. 2 Esp. 533; 17 Ill. 496.

The carrier is not excused because the passenger does not pay fare. 14 How. 483. But see 13 Ala. 234, in regard to slaves carried without hire. One who carries slaves as a common carrier is only responsible as a carrier of passengers. 2 Pet. 150; 4 M'Cord, So. C. 223; Angell, Carr. §§ 122, 522.

3. Passenger-carriers are responsible as common carriers for the baggage of their passengers. 13 Wend. N. Y. 626.

Where the servants of common carriers of passengers—as the drivers of stage-coaches, etc., the captains of steamboats, and the conductors of railway-trains—are allowed to carry parcels, the carriers are responsible for their safe delivery, although such servants are not required to account for what they receive by way of compensation. 2 Wend. N. Y. 327; 6 *id.* 351; 23 Vt. 186, 203; 2 Stor. C. C. 16; 2 Kent, Comm. 609.

The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained. 6 C. B. 775; Story, Bailm. § 591; 1 East, 203; 2 Kent, Comm. 598, 599, and note. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured his ticket before he had taken passage; and the law will imply payment according to such usages. 3 Penn. St. 451.

4. In regard to the particulars of the duty of carriers of passengers as to their entire equipment both of machinery and servants, the decisions are very numerous; but they all concur in the result that if there was any thing more which could have been done by the carrier to insure the safety of his passengers, and injury occurs in consequence of the omission, he is liable. The consequence of such a rule naturally is, that, after any injury occurs, it is more commonly discovered that it was in some degree owing to some possible omission or neglect on the part of the carrier or his servants, and that he is therefore held responsible for the damage sustained; but where the defect was one which no degree of watchfulness in the carrier will enable him to discover, he is clearly not liable. Redfield, Railw. § 149, notes; Angell, Carr. § 534; Story, Bailm. §§ 592–596; 2 Barnew. & Ad. 169; 3 Bingh. 319; 11 Gratt. Va. 697; 9 Metc. Mass. 1; 1 McLean, C. C. 540; 2 *id.* 157; 4 Gill, Md. 406.

The degree of speed allowable upon a railway depends upon the condition of the road. 5 Q. B. 747.

5. But passenger-carriers are not responsible where the injury resulted in any degree from the negligence of the passenger. 11 East, 60; 22 Vt. 213; Angell, Carr. 556 *et seq.*, and cases cited; Redfield, Railw. 330, § 150, and cases cited in notes.

Where there is intentional wrong on the part of the defendant, the plaintiff may recover, notwithstanding negligence on his part. 5 Hill, N. Y. 282. So, also, where the plaintiff's negligence contributed but remotely to the injury, and the defendant's culpable want of care was its immediate cause, a recovery may still be had. 10 Mees. & W. Exch. 564; 5 Carr. & P. 190. So, also, if the defendant is guilty of such a degree of negligence that the plaintiff could not have escaped its consequences, he may recover, notwithstanding there was want of prudence on his part. 3 Mees. & W. Exch. 244; 18 Ga. 679, 686; 1 Dutch. N. J. 556; Redfield, Railw. § 150, and cases cited in notes. Passengers leaping from cars or other vehicles, either by land or water, from any just sense of peril, may still recover. 9 La. Ann. 441; 15 Ill. 468; 17 *id.* 406; 23 Penn. St. 147, 150; 13 Pet. 181; Redfield, Railw. § 151, and cases cited.

6. Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business. 1 Campb. 167; Story, Bailm. § 600; 19 Wend. N. Y. 534; 8 Eng. L. & Eq. 362. But they are not bound to

carry persons of offensive and disorderly conduct, or those infected by contagion, or otherwise so offensive in character, health, or habits as to be unsuitable companions for other passengers. 2 Sumn. C. C. 221; 8 N. H. 523.

Passenger-carriers are liable for reasonable damages for a failure to deliver passengers in reasonable time, according to their public announcements. Hodges, Railw. 619; 8 Eng. L. & Eq. 362; 34 *id.* 154.

But they are not liable for such special damages as one may suffer by reason of not being able to meet his appointments with customers and being thereby compelled to be at extra expense in going to meet them. 38 Eng. L. & Eq. 335. But see Redfield, Railw. § 154, note 2, in regard to the authority of the last case.

7. The sale of through-tickets for an entire route composed of several successive companies of carriers having no partnership connection, does not render each company liable for injuries to passengers occurring on any part of the route. 22 Conn. 502; 29 Vt. 421; 2 E. D. Smith, N. Y. 184; 19 Barb. N. Y. 222; 26 Ala. N. Y. 733; Redfield, Railw. 359, § 158, and cases cited.

Where by statute (as Lord Campbell's Act, 9 & 10 Vict. ch. 93, and others similar) carriers of passengers are made liable to survivors where the death of a passenger occurs through their default, the same rule of responsibility applies as in the ordinary case of actions for injuries not fatal. *Lord Denman*, Ch. J., in 2 Carr. & K. 730. In such cases, according to the English decisions, no damages are to be given on account of the mental sufferings of the surviving party, but only such as are susceptible of a pecuniary estimate. 10 Eng. L. & Eq. 437. But a different rule seems to obtain, to some extent, in the American courts. 1 Cush. Mass. 451; 10 Barb. N. Y. 623; 3 E. D. Smith, N. Y. 103; 14 N. Y. 310. In 23 Penn. St. 526, 528; 6 La. Ann. 495; 6 Ohio, 105, the court say the jury are to estimate damages for the death as they would for an injury to health, by the probable accumulations of the deceased had he survived or not been injured. Redfield, Railw. § 152, and cases cited.

Where a passenger is injured by the culpable negligence of a carrier, he is entitled to recover not only the damages he has sustained up to the time of trial, but all prospective damages likely to accrue from the injury, as he can have but one action. 11 Add. & E. 301; 18 Vt. 252; 2 Barb. N. Y. 282; 10 La. Ann. 33.

8. Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not,—requiring more fare of the latter. 18 Ill. 460; 34 N. H. 230; 29 Vt. 160; 7 Metc. Mass. 596; 12 *id.* 482; 4 Zabr. N. J. 435; 29 Eng. L. & Eq. 143; Redfield, Railw. § 28, and notes; 24 Conn. 249. Passengers may be required to go through in the same train or forfeit the remainder of their tickets. 11 Metc. Mass. 121; 1 Am. Railw. Cas. 601. Where one procures a railway-ticket marked "good for this trip only," with a view to go in the next through-train, but is unexpectedly detained, he may lawfully claim to go upon the ticket on a subsequent day. 24 Barb. N. Y. 514.

Railway passengers, when required by the regulations of the company to surrender their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again. 22 Barb. N. Y. 130. A passenger is liable to be expelled from the cars for refusal to exhibit his ticket at the request of the conductor in compliance with the standing regulations of the company. 15 N. Y. 455.

Railway-companies may exclude merchandise from their passenger trains. The company are not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter." 5 Am. Law Reg. 364. See, also, upon the subject of by-laws to passengers on railways, Redfield, Railw. § 28, and notes.

9. Where a stage-coach is overturned when laden with passengers, it is regarded as *prima facie* evidence of negligence in the proprietor or his servants. 13 Pet. 181. And where any injury occurs to a passenger upon a railway, it has been considered *prima facie* evidence of the culpable neglect of the company. 5 Q. B. 747; 8 Penn. St. 483; 15 Ill. 471; 16 Barb. N. Y. 113, 356; 20 *id.* 282; Redfield, Railw. § 149, note 6, and cases cited.

The general rules above laid down, so far as they are applicable, *mutatis mutandis*, control the rights and duties of passenger-carriers both by land and water. There are many special regulations, both in regard to the conduct of sailing and steam vessels, which it is the duty of masters to observe in order to secure the safety of passengers, and which it will be culpable negligence to disregard; but they are too minute to be here enumerated. See Angell, Carr. § 633 *et seq.* And a pilot being on board and having the entire control of the vessel will not exonerate the owner from responsibility any more than if the master had charge of the vessel,—the pilot being considered the agent of the owner. 8 Pick. Mass. 22; 5 Bos. & P. 182. But in 1 How. 28, it was considered that the owner is not responsible, while a pilot licensed under the acts of parliament is directing the movements of his ship in the harbor of Liverpool, for an injury to another ship by collision.

10. By the act of congress of 2d March, 1819, 3 Story, U. S. Laws, 1722, it is enacted: 1. That no master of a vessel bound to or from the United States shall take more than two passengers for every five tons of the ship's custom-house measurement. 2. That the quantity of water and provisions, which shall be taken on board and secured under deck, by every ship bound from the United States to any port on the continent of Europe, shall be sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship-bread, for each passenger, besides the stores of the crew. The tonnage here mentioned is the measurement of the custom-house; and in estimating the number of

passengers in a vessel no deduction is to be made for children or persons not paying, but the crew is not to be included. Gilp. C. C. 334.

11. The act of congress of February 22, 1847, section 1, provides: "That if the master of any vessel owned in whole or in part by a citizen of the United States of America, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use, and unoccupied by stores or other goods, not being the personal luggage of such passengers; that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck if such vessel is not to pass within the tropics during such voyage, but, if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck; and on the orlop-deck (if any), one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same and bring the same or any number thereof within the jurisdiction of the United States aforesaid; or if any such master of a vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any circuit or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year: *Provided*, That this act shall not be construed to permit any ship or vessel to carry more than two passengers to five tons of such ship or vessel."

12. Children under one year of age not to be computed in counting the passengers, and those over one year and under eight are to be counted as two children for one passenger. Sect. 4. But this section is repealed, so far as authorizes shippers to estimate two children of eight years of age and under as one passenger, by the act of March 2, 1847, s. 2.

In New York, statutory regulations have been made in relation to their canal navigation. See 6 Cow. N. Y. 698. As to the conduct of carrier vessels on the ocean, see Story, Bailm. § 607 *et seq.*; Edwards, Bailm.; Marshall, Ins. b. 1, c. 12, s. 2.

And see, generally, 1 Viner, Abr. 219; Bacon, Abr.; 1 Comyns, Dig. 423; Petersdorf, Abr.; Dane, Abr. Index; 2 Kent, Comm. 464; 16 East, 247, note; Bouvier, Inst. Index.

COMMON COUNCIL. The more numerous house of the municipal legislative assembly, in some American cities.

The English parliament is the common council of the whole realm.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by the accidental variance of the evidence.

These are, in an action of assumpsit, counts founded on express or implied promises to pay money in consideration of a precedent debt, and are of four descriptions: the *indebitatus assumpsit*, the *quantum meruit*, the *quantum valebant*, and the account stated.

COMMON FISHERY. A fishery to which all persons have a right, such as the cod-fisheries off Newfoundland. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, Nisi P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted. 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient,—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts. Coke, Litt. 203 *a*; Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or Civil Law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent, Comm. 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

2. The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that in the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long-established custom and from the expression of the legislative power, gradually forms a system,—just, because it is the deliberate will of a free people,—stable, because it is the growth of centuries,—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

3. Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as dis-

tinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law. When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law: it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage: its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible. 1 Gray, Mass. 263; 1 Swan, Tenn. 42; 5 Cow. N. Y. 587, 628, 632.

4. It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

5. In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law, technically so called, in contradistinction to those of equity, administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

6. In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. See 1 Bishop, Crim. Law, § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state. 4 Den. N. Y. 305; 3 Abb. Pract. N. Y. 23. The term common law as thus used may be deemed to include the doctrine of equity, 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state. 1 Gall. C. C. 20; 1 Baldw. C. C. 554, 558; 3 Wheat. 223; 3 Pet. 446. The term is used in contradistinction to equity, admiralty, and maritime law. 3 Pet. 446; 1 Baldw. C. C. 554.

7. The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation. 2 Pet. 144; 8 *id.* 659; 9 Cranch, 333; 9 Serg. & R. Penn. 330; 1 Blackf. Ind. 66, 82, 206; 1 Kirb. Comm. 117; 5 Harr. & J. Md. 356; 2 Aik. Vt. 187; T. U. P. Charlt. Ga. 172; 1 Ohio, 243. See 5 Cow. N. Y. 628; 5 Pet. 241; 8 *id.* 658; 7 Cranch, 32; 1 Wheat. 415; 3 *id.* 223; 1 Dall. Penn. 67; 2 *id.* 297, 384; 1 Mass. 61; 9 Pick. Mass. 532; 3 Me. 162; 6 *id.* 55; 3 Gill & J. Md. 62; Sampson's Discourse before the N. Y. Hist. Soc.; 1 Gall. C. C. 489; 3 Conn. 114; 1 Blackf. Ind. 205; 5 Cow. N. Y. 628; 3 Ala. 362. In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197. See NUISANCE.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions as are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown*.

The Court of Common Pleas in England consists of one chief and four puisné (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis*, but is referred by Lord Coke to a much earlier period. 8 Coke, 289; Termes de la Ley; 3 Blackstone, Comm. 39. It exercises an exclusive original jurisdiction in many classes of civil cases. See 3 Sharswood, Blackst. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number, but is now thrown open to the bar generally. See 3 C. B. 537.

A court or courts of the same name exist in many states of the United States. See the articles on the states under their respective names.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates. 2 Blackstone, Comm. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted. 2 Bouvier, Inst. nn. 2092, 2096; 7 N. H. 9; 9 Serg. & R. Penn. 390; 2 Rawle, Penn. 168; 4 Yeates, Penn. 413; 1 Whart. Penn. 151; 6 Mass. 328.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent, Comm. 195–202.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bishop, Crim. Law, § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States. 12 Serg. & R. Penn. 220; 3 Cranch, C. C. 620. See 1 Term, 748; 6 Mod. 11; 4 Rog. N. Y. 90; 1 Russell, Crimes, 302; Roscoe, Crim. Ev. 665.

COMMON SEAL. The seal of a corporation.

It was an ancient and technical rule of the common law that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. 4 Kent, Comm. 288. This is said to be no longer law in the United States. 7 Cranch, 299; 9 Paige, Ch. N. Y. 188; 21 Vt. 343; 21 Miss. 408; 1 Smith, Ind. 98; 6 Ga. 166; 2 Kent, Comm. 289.

COMMON SENSE. Those perceptions, associations, and judgments, in relation to persons and things, which agree with those of the generality of mankind. When a particular individual differs from the generality of persons in these respects, he is said not to have common sense, or not to be in his senses. 1 Chitty, Med. Jur. 334.

COMMON SERJEANT A judicial officer of the city of London, who aids the recorder in disposing of the criminal business of the Old Bailey Sessions. Holthouse.

COMMON TRAVERSE. See TRAVERSE.

COMMON VOUCHEE. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the crier of the court usually performs the office of a common vouchee. 2 Blackstone, Comm. 358; 2 Bouvier, Inst. n. 2093.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc. in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A free state or republic having a republican form of government.

The English nation during the time of Cromwell was called a commonwealth. It is the legal title of the states of Kentucky, Massachusetts, Pennsylvania, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes, 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity.

Where several persons die by the same accident, in the lack of evidence there is no presumption as to who survived. Croke Eliz. 503; 1 Mer. Ch. 308; 5 Barnew. & Ad. 91; 2 Phill. Eccl. 261; Bacon, Abr. *Execution.* See SURVIVOR; DEATH.

COMMUNI DIVIDENDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNICATION. Information; consultation; conference.

It is a general rule, that such communings or conversations, and the propositions then made, are no part of the contract; for no parol evidence will be allowed to be given to contradict, alter, or vary a written instrument. 1 Serg. & R. Penn. 27, 464; Add. Penn. 361; 2 Dall. Penn. 172; 1 Yeates, Penn. 140; 12 Johns. N. Y. 77; 20 *id.* 49; 3 Conn. 9; 11 Mass. 30; 13 *id.* 443; 1 Bibb, Ky. 271; 4 *id.* 473; 3 Marsh. Ky. 333; 1 Maule & S. 21; 1 Esp. 53; 3 Campb. 57.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). **In Civil Law.** A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum.* Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis,* common).

In Civil Law. A corporation or body politic. Dig. 3. 4.

In French Law. A species of partner-

ship which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it. La. Civ. Code, 2393.

Legal community is that which takes place by virtue of the contract of marriage itself.

2. The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. 10 La. 146, 172, 181; 1 Mart. La. N. s. 325; 4 *id.* 212. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage. La. Civ. Code, 2375. See Pothier, Contr.; Toullier.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the executive authority in which the pardoning power resides.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, Obl. n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. b. 3, c. 3; Rutherforth, Inst. b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet. 1, 185; 8 Wheat. 1; Baldw. C. C. 60.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier, 97.

COMPARISON OF HANDWRITING. A mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question. 1 Greenleaf, Ev. § 578.

2. At common law, as a general rule, this manner of obtaining evidence was not allowed. Exceptions existed, however: *first*, where the writings were of such antiquity that living witnesses could not be procured, but were not old enough to prove themselves, 7 East, 282; 14 *id.* 328; Ry. & M. 143; 8 Wend. N. Y. 426; *second*, where other writings admitted to be genuine were already in the case. 1 Crompt. & J. Exch. 47; 1 Mood. & R. 133; 5 Ad. & E. 514; 7 Carr. & P. 548, 595; 2 Me. 33.

3. The rule on the subject of admitting documents irrelevant to the matter in issue for the purpose of instituting a comparison of handwriting is not settled uniformly. In England, such documents are not admissible. 5 Ad. & E. 514, 703; 11 *id.* 322; 7 Carr. & P. 548, 595; 8 Mees. & W. Exch. 123; 10 Clark & F. Hou. L. 193; 2 Mood. & R. 536. This rule is adopted in New York, North Carolina, Rhode Island, and Virginia. 9 Cow. 94, 112; 1 Dev. N. Y. 343; 1 Hawks, No. C. 6; 1 Ired. No. C. 16; 2 R. I. 319; 1 Leigh, Va. 216. In Connecticut, Massachusetts, and Maine, any documents are admissible to the jury for the above purpose. 11 Mass. 309; 17 Pick. Mass. 490; 21 *id.* 315; 2 Me. 33; 9 Conn. 55. In New Hampshire and South Carolina, they are admissible only for the purpose of turning the scale in doubtful cases. 3 N. H. 47; 5 *id.* 67; 3 M'Cord, So. C. 518; 2 Nott & M'C. So. C. 401. In Pennsylvania, such documents only are admissible as have been conceded to be genuine, 5 Binn. Penn. 340; 10 Serg. & R. Penn. 110; or concerning which there is no doubt. 6 Whart. Penn. 284. And see 3 Halst. N. J. 87; 2 Leigh, Va. 249; 25 Wend. N. Y. 469; 3 Humphr. Tenn. 47; 1 Cush. Mass. 189; 19 Ohio, 426.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; 2 Paige, Ch. N. Y. 108; 2 Dev. & B. No. C. 64; Bishop, Marr. & D. §§ 393, 394.

COMPENSATION (Lat. *compendere*, to balance). **In Chancery Practice.** Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, affects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it." 13 Ves. Ch. 287. See 10 *id.* 505; 13 *id.* 73, 81, 426; 6 *id.* 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio.* Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, Inst. n. 1407.

It may be *legal*, by *way of exception*, or by *reconvention*. 8 La. 158; Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, Suret. b. 2, c. 6, p. 181.

It takes place by mere operation of law and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in case, *first*, of a demand of restitution of a thing of which the owner has been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code, 2203–2208.

In Criminal Law. Recrimination, which see.

COMPERUIT AD DIEM (Lat. he appeared at the day).

In Pleading. A plea in bar to an action of debt on a bail bond. The usual replication to this plea is, *nul tiel record:* that there is not any such record of appearance of the said ——. For forms of this plea, see 5 Wentworth, 470; Lilly, Entr. 114; 2 Chitty, Plead. 527.

2. When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pract. 239. And see, generally, Comyns, Dig. *Pleader* (2 W 31); 7 Barnew. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment. 1 Greenleaf, Ev. § 426 *et seq.*

Primâ facie every person offered is a competent witness, and must be received, unless his incompetency appears. 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In Kentucky, Michigan, and Missouri, a will must be attested, for the purpose of passing lands, by competent witnesses; but, in Kentucky, if wholly written by the testator, it need not be so attested. See WITNESS.

COMPILATION. A literary production, composed of the works of others and arranged in a methodical manner.

When a compilation requires in its execution taste, learning, discrimination, and in-

tellectual labor, it is an object of copyright: as, for example, Bacon's Abridgment. Curtis, Copyr. 186.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate. 11 Pick. Mass. 436.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest: for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute.

2. This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessary. Hawkins, Pl. Cr. 125. A failure to prosecute for an assault with an intent to kill is not compounding a felony. 29 Ala. N. S. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence. 16 Mass. 91. The mere retaking by the owner of stolen goods is no offence, unless the offender is not to be prosecuted. Hale, Pl. Cr. 546; 1 Chitty, Crim. Law, 4.

3. The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law. 18 Pick. Mass. 440. But the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. 6 Q. B. 308; 9 *id.* 371; 2 Bennett & H. Lead. Crim. Cas. 258, 262.

4. In the United States, compounding a felony is an indictable offence, and no action can be supported on any contract of which such offence is the consideration in whole or in part. 16 Mass. 91; 18 Pick. Mass. 440; 5 Vt. 42; 9 *id.* 23; 5 N. H. 553; 2 South. N. J. 578; 13 Wend. N. Y. 592; 6 Dan. Ky. 338. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void. 11 Vt. 252.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in Las Partidas, part 3, tit. xviii. ll. 56 *et seq.*

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowel.

COMPRIRIGUI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Calvinus, Lex.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement made between two or more parties as a settlement of matters in dispute between them.

Such settlements are sustained at law, 2 Strobh. Eq. So. C. 258; 2 Mich. 145; 1 Watts, Penn. 216; 2 Penn. St. 531, and are highly favored. 6 Munf. Va. 406; 1 Bibb, Ky. 168; 2 *id.* 448; 4 Hawks, No. C. 178; 6 Watts, Penn. 321; 14 Conn. 12; 4 Metc. Mass. 270. See, also, 21 Eng. L. & Eq. 199; 6 T. B. Monr. Ky. 91; 2 Rand. Va. 442; 5 Watts, Penn. 259. The amount in question must, it seems, be uncertain. 2 Barnew. & Ad. 889; 1 Ad. & E. 106. And see 5 Pet. 114; 21 Penn. St. 237; 20 Mo. 102; 13 Pick. Mass. 284; 6 Bingh. N. C. 62; 3 Mees. & W. Exch. 648; 1 Bouvier, Inst. 798. There can be no compromise of a criminal charge. 1 Chitty, Pract. 17.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, Lois. Civ. liv. 1, t. 14.

COMPTROLLER. An officer of a state, or of the United States, who has certain du-

ties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there are two comptrollers. It is the duty of the *first* to examine all accounts settled by the first and fifth auditors, and certify the balances arising thereon to the register; to countersign all warrants drawn by the secretary of the treasury, other than those drawn on the requisitions of the secretaries of the war and navy departments, which shall be warranted by law; to report to the secretary the official forms to be issued in the different offices for collecting the public revenues, and the manner and form of stating the accounts of the several persons employed therein; to superintend the preservation of the public accounts subject to his revision; and to provide for the payment of all moneys which may be collected. Act of March 3, 1817, sect. 8; Act of Sept. 2, 1789, s. 2. To superintend the recovery of all debts due to the United States, to direct suits and legal proceedings, and to take such measures as may be authorized by the laws to enforce prompt payment of all such debts, Act of March 3, 1817, sect. 10; Act of Sept. 2, 1789, s. 2; to lay before congress annually, during the first week of their session, a list of such officers as shall have failed in that year to make the settlement required by law; and a statement of the accounts in the treasury, war, and navy departments which may have remained more than three years unsettled, or on which balances appear to have been due more than three years prior to the thirteenth day of September then last past, together with a statement of the causes which have prevented a settlement of the accounts, or the recovery of the balances due to the United States. Act of March 3, 1809, sect. 2.

Besides these, this officer is required to perform minor duties, which the plan of this work forbids to be enumerated here. His salary is three thousand five hundred dollars per annum. Act of Feb. 20, 1804, s. 1.

The duties of the *second* comptroller are to examine all accounts settled by the second, third, and fourth auditors, and certify the balances arising thereon to the secretary of the department in which the expenditure had been incurred; to countersign all warrants drawn by the secretary of the treasury upon the requisition of the secretaries of the war and navy departments, which shall be warranted by law; to report to the said secretaries the official forms to be issued in the different offices for disbursing public money in those departments, and the manner and form of keeping and stating the accounts of the persons employed therein; and to superintend the preservation of public accounts subject to his revision. His salary is three thousand dollars per annum. Act of March 3, 1817, ss. 9, 15.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act: as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction over the parties or the subject-matter, the act done by such compulsion would be void. See COERCION; DURESS.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Blackstone, Comm. 341.

Formerly, when a person was accused of a crime, or sued in some kinds of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, relations, or friends, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators.

The number of compurgators varied according to the nature of the charge and other circumstances. See DuCange, *Juramentum;* Spelman, Gloss. *Asarth;* Termes de la Ley; 3 Sharswood, Blackst. Comm. 341–348.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEALERS. Such as find out concealed lands; that is, lands privily kept from the king by common persons having nothing to show for them. They are called "*a troublesome, disturbant sort of men; turbulent persons.*" Cowel.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom application for insurance is made, whether the same are or are not material to the risk.

Concealment when fraudulent avoids the contract, or renders the party using it liable for the damage arising in consequence thereof. 7 Metc. Mass. 252; 16 Me. 30; 2 Ill. 344; 3 Barnew. & C. 605; 10 Clark & F. Hou. L. 934. But it must have been of such facts as the party is bound to communicate. 3 Eng. L. & Eq. 17; 3 Conn. 413; 5 Ala. N. s. 596; 1 Yeates, Penn. 307; 5 Penn. St. 467; 8 N. H. 463; 1 Dev. No. C. 351; 18 Johns. N. Y. 403; 6 Humphr. Tenn. 36. See REPRESENTATION; MISREPRESENTATION. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of

the party possessing them. 2 Wheat. 195; 1 Baldw. C. C. 331; 14 Barb. N. Y. 72; 2 Ala. N. s. 181. But see 1 Miss. 72; 1 Swan, Tenn. 54; 4 M'Cord, So. C. 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property. 6 Woodb. & M. C. C. 358; 3 Campb. 508; 3 Term, 759.

Where there is confidence reposed, concealment becomes more fraudulent. 9 Barnew. & C. 577; 4 Metc. Mass. 381. See, generally, 2 Kent, Comm. 482; MISREPRESENTATION; REPRESENTATION.

CONCESSI (Lat. I have granted). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like. 2 Saund. 96; Coke, Litt. 301, 302; Dane, Abr. Index; 5 Whart. Penn. 278.

It has been held in a feoffment or fine to imply no warranty. Coke, Litt. 384; Noke's Case, 4 Coke, 80; Vaughan's Argument in Hayes *v.* Bickersteth, Vaugh. 126; Butler's Note, Coke, Litt. 384. But see 1 Freem. 339, 414.

CONCESSIMUS (Lat. we have granted). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Coke, 16; 3 Kebl. 617; Bacon, Abr. *Covenant.*

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIUM. See CONSILIUM.

CONCILIUM REGIS. A tribunal which existed in England during the times of Edward I. and Edward II., composed of the judges and sages of the law. To them were referred cases of great difficulty. Coke, Litt. 304.

CONCLUSION (Lat. *con claudere*, to shut together). The close; the end.

In Pleading. IN DECLARATIONS. That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage* of the plaintiff, etc. Comyns, Dig. *Pleader*, c. 84; 10 Coke, 1156. And see 1 Maule & S. 236; DAMAGES.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his Exchequer, and therefore he brings his suit." 1 Chitty, Plead. 356–358. It is said to be mere matter of form, and not demurrable. 7 Ack. 282.

In Pleas. The conclusion is either *to the country*,—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted,—or by verification, which must be the case when new matter is introduced. See VERIFICATION. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England within the last few years.

In Practice. Making the last argument or address to the court or jury. The party on whom the *onus probandi* is cast, in general, has the conclusion.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is concluded by his return. See Plowd. 276 *b*; 3 Thomas, Coke, Litt. 600.

CONCLUSION TO THE COUNTRY. In Pleading. The tender of an issue for trial by a jury.

When the issue is tendered by the defendant, it is as follows:—"And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant. 10 Mod. 166.

When there is an affirmative on one side and a negative on the other, or *vice versâ*, the conclusion should be to the country. T. Raym. 98; Carth. 87; 2 Saund. 189; 2 Burr. 1022; 16 Johns. N. Y. 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto. Coke, Litt. 126 *a*; Yelv. 137; 1 Saund. 103; 1 Chitty, Plead. 592; Comyns, Dig. *Pleader*, E 32.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenleaf, Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant.

In the civil law, such presumptions are said to be *juris et de jure.*

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands, in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of the complainant; and from the acknowledgment or admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Blackstone, Comm. 350; Cruise, Dig. tit. 35, c. 2, § 33; Comyns, Dig. *Fine* (E 9).

CONCORDAT. A convention; a pact;

an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

CONCUBINAGE. A species of marriage which took place among the ancients, and which is yet in use in some countries. See CONCUBINATUS.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law, 80; Merlin, Rép.; Dig. 32. 49. 4; 7. 1. 1; Code, 5. 27. 12.

CONCUBINATUS. A natural marriage, as contradistinguished from the *justæ nuptiæ*, or *justum matrimonium*, the civil marriage.

The *concubinatus* was the only marriage which those who did not enjoy the *jus connubii* could contract. Although this natural marriage was authorized and regulated by law, yet it produced none of those important rights which flowed from the civil marriage,—such as the paternal power, etc.; nor was the wife entitled to the honorable appellation of *mater-familias*, but was designated by the name of *concubina*. After the exclusive and aristocratic rules relative to the *connubium* had been relaxed, the *concubinatus* fell into disrepute; and the law permitting it was repealed by a constitution of the Emperor Leo the Philosopher, in the year 886 of the Christian era. See PATER-FAMILIAS.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. In Louisiana. To claim a part of the estate of an insolvent along with other claimants, 6 Mart. La. N. S. 460: as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights, or privilege which several persons have over the same thing: as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. Dict. de Jur.

CONCURRENT. Running together; having the same authority: thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

CONCUSSION. In Civil Law. The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, Leç. El. § 1071.

CONDEDIT. In Ecclesiastical Law. The name of a plea entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind. 2 Eccl. 438; 6 *id.* 431.

CONDEMN. To sentence; to adjudge. 3 Blackstone, Comm. 291.

To declare a vessel a prize. To declare a vessel unfit for service. 1 Kent, Comm. 102; 5 Esp. 65.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be reexamined and litigated by the parties interested in disputing it. 5 Esp. 65; Abbott, Shipp. 4.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See CAPTOR.

The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to devest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia*. 1 Rob. Rep. 134; 3 *id.* 97, n.; Carth. 423; 1 Kent, Comm. 101–104; Chitty, Law of Nat. 99, 100; 10 Mod. 79; Abbott, Shipp. 14; Weskett, Ins.; Marshall, Ins. 402. A sentence of condemnation is generally binding everywhere. Marshall, Ins. 402; 3 Kent, Comm. 103; 3 Wheat. 246; 4 Cranch, 434. But see 1 Binn. 299, n.; 7 Bingh. 495.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases. 3 Blackstone, Comm. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDICTIO (Lat. from *condicere*).

In Civil Law. An assignment; a summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing. Inst. 3. 15. pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the *actor*, and from mixed actions (*actiones mixtæ*). *Condictio* is also distinguished from an action *ex stipulatu*, which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Hallifax, Anal. 117.

CONDICTIO EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTIO INDEBITATI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and

which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex æquitate*, or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat, quod non debetat, præsumitur donare.* Bell, Dict.; Calvinus, Lex.; 1 Kaimes, Eq. 307.

CONDICTIO REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTIO SINE CAUSA. An action by which any thing which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDITION. In Civil Law. The situation of every person in some one of the different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

2. *Casual conditions* are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as, "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, if I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutory conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

3. Domat says conditions are of three sorts. The *first* tend to accomplish the covenants to which they are annexed. The *second* dissolve covenants. The *third* neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the *condition* is in suspense until the condition comes to pass and the covenant is void. Domat, lib. i. tit. 1, § 4, art. 6 *et seq.* See Pothier, Obl. pt. i. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. 1 Bouvier, Inst. n. 730.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc. may either be defeated, enlarged, or created upon an uncertain event. Coke, Litt. 201 *a*.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenleaf, Cruise, Dig. tit. xiii. c. i. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

4. A condition annexed to a bond is usually termed a defeazance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE. Conditions annexed to the realty are to be distinguished from *limitations;* a stranger may take advantage of a *limitation,* but only the grantor or his heirs of a condition, 2 Dutch. N. J. 1; 3 *id.* 376; 2 Paine, C. C. 545; a limitation always determines an estate without entry or claim, and so doth not a condition, Sheppard, Touchst. 121; 2 Blackstone, Comm. 155; 4 Kent, Comm. 122, 127; 3 Gray, Mass. 142; 19 N. Y. 100: from *conditional limitations;* in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibility of reverter remains to him and to his heirs and devisees; in case of a conditional limitation, the possibility of reverter is given over to a third person, 3 Gray, Mass. 142: from *remainders;* a condition operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate, Coke, Litt. Butler's note 94: from *covenants;* a covenant may be said to be a contract, a condition, something affixed *nomine pœnæ* for the non-fulfilment of a contract; the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition, 2 Parsons, Contr. 31; Platt, Cov. 71; 10 East, 295; see 2 Stockt. N. J. 489; 6 Barb. N. Y. 386; 4 Harr. Del. 117; a covenant may be made by a grantee, a condition by the grantor only, 2 Coke, 70: from *charges;* if a testator create a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout" or "therefrom" or "from the estate," it is rather to be held a charge. 4 Kent, Comm. 604; 12 Wheat. 498; 4 Metc. Mass. 523; 1 N. Y. 483; 14 Mees. & W. Exch. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge. 10 Gill & J. Md. 480; 10 Leigh, Va. 172. See, also, 38 Me. 18; 1 Powell, Dev. 664.

5. *Affirmative conditions* are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers; but no

such class is now recognized. Sheppard, Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Sheppard, Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Powell, Dev. c. 15.

Covert conditions are implied conditions.

Conditions in deed are express conditions.

Disjunctive conditions are those which require the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. *Condition* (S b) (Y b 2).

Express conditions are those which are created by express words. Coke, Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Sheppard, Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Sheppard, Touchst. 118.

Insensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton, § 380; 2 Blackstone, Comm. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate, the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. 9 Cush. Mass. 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint: as, that a lessee shall not alien. Sheppard, Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used, 7 Gill & J. Md. 227, 240; 2 Dall. Penn, 317; 2 Johns. N. Y. 148; 20 Barb. N. Y. 425; 6 Me. 106; 10 *id.* 318; 1 Va. Cas. 138; 4 Rand. Va. 352; 6 J. J. Marsh. Ky. 161; 6 Litt. Ky. 151; 1 Spenc. N. J. 435; 1 La. Ann. 424; 1 Wisc. 527, nor upon the position of the words in the instrument, 1 Term, 645; 6 *id.* 668; Cas. *temp.* Talb. 166; the question is whether the conditional event is to happen before or after the principal. 4 Rand. Va. 358. The word "if" implies a condition precedent, however, unless controlled by other words. Crabb, Real Prop. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which, *first*, require the performance of some act which is forbidden by law, or which is *malum in se*; or, *second*, require the omission of some act commanded by law; or, *third*, those which encourage such acts or omissions. 1 P. Will. Ch. 189.

Void conditions are those which are of no validity or effect.

6. *Creation of.* Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original. 5 Serg. & R. Penn. 375; 7 Watts & S. Penn. 335; 3 Hill, N. Y. 95; 3 Wend. N. Y. 208; 10 Ohio, 433; 10 N. H. 64; 2 Me. 132; 7 Pick. Mass. 157; 6 Blackf. Ind. 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records. Sheppard, Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage *generally* are held void, 13 Mo. 211; see 10 Penn. St. 350; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage. 10 Eng. L. & Eq. 139; 2 Sim. Ch. N. S. 255; 6 Watts, Penn. 213; 10 *id.* 348. A condition in general restraint of alienation is void, 1 Den. N. Y. 449; 14 Miss. 730; 24 *id.* 203; 6 East, 173; and see 21 Pick. Mass. 42; but a condition restraining alienation for a limited time may be good. Coke, Litt. 223; 2 Serg. & R. Penn. 573; 1 Watts, Penn. 389; 10 *id.* 325.

7. Where land is devised, there need be no limitation over to make the condition good, 1 Mod. 300; 1 Atk. Ch. 361; but where the subject of the devise is personalty without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void. 3 Whart. Penn. 575. But if there be a limitation over, a non-compliance with the condition devests the bequest. 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach. 2 Caines, N. Y. 346; 1 Wend. N. Y. 388; 2 Conn. 196. A gift of personalty may not be on condition subsequent at common law, except as here stated. 1 Rolle, Abr. 412. See 21 Mo. 277.

8. Any words suitable to indicate the intention of the parties may be used in the creation of a condition: "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were, *Sub conditione* (On condition), *Proviso ita quod* (Provided always), *Ita quod* (So that). Littleton, 331; Sheppard, Touchst. 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo, eaintentione, ad effectum* or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required. Coke, Litt. 204 *b*. In a gift, it is said, may be present a modus, a condition, and a consideration: the words of creation are *ut* for the modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition. 7 N. H. 142. The words of condition need be in no particular place in the instrument. 1 Term, 645; 6 *id.* 668.

9. *Construction of.* Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed. Crabb, Real Prop. § 2130; 17 N. Y. 34; 4 Gray, Mass. 140; 35 N. H. 445; 18 Ill. 431; 15 How. 323. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor. Coke, Litt. 42 *a*, 183 *a;* 2 Parsons, Contracts, 22; Sheppard, Touchst. 375, 376; Dy. 14 *b*, 17 *a;* 1 Johns. N. Y. 267. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee. 1 Sumn. C. C. 440.

10. *Performance* should be complete and effectual. 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not non-performance. 6 Dan. Ky. 44; 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it. 10 Serg. & R. Penn. 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage. 1 Mod. 300; 1 Atk. Ch. 361. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance. 3 Ves. Ch. 89; 1 Atk. Ch. 361; 3 *id.* 330; West, 350; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance. Crabb, Real Prop. § 2160; 4 Ind. 628; 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

11. Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life, Plowd. 16; Coke, Litt. 208 *b*, and need not do it when requested. Coke, Litt. 209 *a*. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition. 5 Serg. & R. Penn. 384. In this case, no previous demand is necessary. 5 Serg. & R. Penn. 385. But even then a reasonable time is allowed. 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other. See CONTRACT; PERFORMANCE; 1 Rolle, 444; 11 Vt. 612; 3 Leon. 260.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God, 10 Pick. Mass. 507; or by act of law, if it was lawful at its creation, 4 Monr. 158; 1 Penn. St. 495; or by the act of the party: as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default. 21 Pick. Mass. 389; 1 Paine, C. C. 652; 6 Pet. 745; 1 Cow. N. Y. 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused. 1 Bos. & P. 242; Croke Eliz. 280; 5 Coke, 21; 1 Ld. Raym. 279.

12. *The effect of* conditions may be to *suspend* the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed: or may be to *rescind* the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may *modify* the previous obligation; as, if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

13. The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested. 12 Barb. N. Y. 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law. Coke, Litt. 42; 2 Blackstone, Comm. 157; 4 Kent, Comm. 125; 4 Jones, No. C. 249. Not

so if prevented by the party imposing it. 13 B. Monr. Ky. 163; 2 Vt. 469.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute. 2 Blackstone, Comm. 157; 15 Ga. 103.

In case of a condition broken, if the grantor is in possession, the estate revests at once. 5 Mass. 321; 5 Serg. & R. Penn. 375; 32 Me. 394. But see 2 N. H. 120. But if the grantor is out of possession, he must enter, 8 Blackf. Ind. 138; 12 Ired. No. C. 194; 18 Conn. 535; 8 N. H. 477; 34 Me. 322; 8 Exch. 67, and is then in, of his previous estate. Coke, Litt. Butler's note 94.

14. It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach. Gilbert, Tenn. 26. Statutory have equal rights in this respect with common-law heirs, 2 Conn. 196; 18 *id.* 635; 25 Me. 625; and in some of the United States the common-law rule has been broken in upon, and the devisee may enter, 13 Serg. & R. Penn. 172; 16 Penn. St. 150; 5 Pick. Mass. 528; 10 *id.* 306; *contra*, 2 Caines, N. Y. 345; 20 Barb. N. Y. 455; while in others even an assignment of the grantor's interest is held valid, if made after breach, 4 Harr. Del. 140, and of a particular estate. 19 N. Y. 100. In *equity*, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust. Coke, Litt. 236 *a;* 6 Pick. Mass. 306; 9 Watts, Penn. 60; 2 Conn. 201.

Consult Blackstone; Kent, *Commentaries;* Crabb; Washburn; *Real Prop.;* Parsons, *Contracts.*

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor.

Such a gift, then, was held to be a gift upon condition that it should revert to the donor, if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was therefore called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute and at his own disposal as soon as any issue was born; but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail;* and investing in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion. And hence it is said that tenant in fee tail is by virtue of the statute *De Donis.* 2 Blackstone, Comm. 110.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach, upon entry or claim by the proper person; a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation. *Bigelow*, J., 3 Gray, Mass. 143. The limitation over need not be to a stranger. 2 Blackstone, Comm. 155; 11 Metc. Mass. 102; Watkins, Conv. 204.

Consult CONDITION; LIMITATION; 1 Washburn, Real Prop. 459; 4 Kent, Comm. 122, 127; 1 Preston, Est. §§ 40, 41, 93.

CONDITIONAL STIPULATION. A stipulation on condition.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room: when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail. 1 H. Blackst. 289; 12 East, 6; 6 Ves. Ch. 330; 15 *id.* 521; 2 Munf. Va. 119; 1 Des. Ch. So. C. 573; 2 *id.* 320; 11 Johns. N. Y. 555; 3 Campb. 285. See forms of conditions of sale, in Babington, Auct. 233–243; Sugden, Vend. Appx. no. 4.

CONDONACION. In Spanish Law. The remission of a debt, either expressly or tacitly.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

2. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned. Bishop, Marr. & D. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, *i.e.* signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation. The construction, however, is more strict when the wife than when the husband is the delinquent party. Bishop, Marr. & D. §§ 355–371.

3. Every implied condonation is upon the

implied condition that the party forgiven will abstain from the commission of the like offence thereafter, and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the latter will, at most, only authorize a separation from bed and board. 1 Edw. Ch. N. Y. 439; 4 Paige, Ch. N. Y. 460; 14 Wend. N. Y. 637; Bishop, Marr. & D. §§ 371 *a*–380 *a*.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire. *Conducti actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du-Cange; 2 Kent, Comm. 586.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowel. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Coke, 2d Inst. 203.

CONFECTIO (Lat. from *conficere*). The making and completion of a written instrument. 5 Coke, 1.

CONFEDERACY. In Criminal Law. An agreement between two or more persons to do an unlawful act or an act which, though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Plead. §§ 29, 30; Mitford, Eq. Plead. Jeremy ed. 41; Cooper, Eq. Plead. 9.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which, however, afterwards also agreed to them, were speedily adopted by the United States, and by which they were formed into a federal body, and went into force on the first day of March, 1781, 1 Story, Const. § 225; and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. 5 Wheat. 420.

CONFEDERATION. The name given to that form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFERENCE. In French Law. A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays and other difficulties necessarily attending written communications.

In Legislation. Mutual consultations by two committees appointed, one by each house of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. In Criminal Law. The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.

An admission or acknowledgment by a prisoner, when arraigned for an offence, that he committed the crime with which he is charged.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

2. Voluntary confessions are admissible in evidence, 20 Ga. 60; 12 La. Ann. 805; 28 Ala. N. S. 9; 3 Ind. 552; 30 Miss. 593; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him by a person in authority, 1 Mood. Cr. Cas. 465; Russ. & R. Cr. Cas. 152, 492; 4 Carr. & P. 570; 5 *id.* 539; 6 *id.* 146, 353; 7 *id.* 579; 8 *id.* 140, 187; 4 Harr. Del. 503; 37 N. H. 175, 196; 5 Fla. 285; 10 Ind. 106; 10 Gratt. Va. 734; see 18 N. Y. 9; 29 Penn. St. 429; or where there is reason to presume that such person appeared to the party to sanction such threat or inducement, 1 Mood. Cr. Cas. 410; 5 Carr. & P. 539; 7 *id.* 302; 8 *id.* 140, 733; 2 Crawf. & D. Cas. Ir. 347; 6 Cox, Cr. Cas. 243; 2 Carr. & K. 225; 1 Dev. No. C. 259; but it is admissible if such inducements proceed from a person not in authority over the prisoner, 1 Carr. & P. 97, 129; 4 *id.* 543; 7 *id.* 776; 8 *id.* 734; Russ. & R. 153; 1 Term, Ir. 177; 1 Leach, Cr. Cas. 291; 2 *id.* 559; 19

Pick. Mass. 491; 1 Gray, Mass. 461; 1 Strobh. So. C. 155; 9 Rich. So. C. 428; 14 Gratt. Va. 652; 19 Vt. 116; but see 5 Jones, No. C. 432; 32 Miss. 382; 2 Ohio St. 583; or if the inducement be spiritual merely, 1 Mood. Cr. Cas. 197; Jebb, Cr. Cas. Ir. 15; 16 Mass. 161; 8 Ohio St. 98; and the temporal inducement must have been held out by the person to whom the confession was made, Phillipps, Ev. 430; 4 Carr. & P. 223; Jebb, Cr. Cas. Ir. 15; unless collusion be suspected. 4 Carr. & P. 550.

3. A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person, 1 Mood. Cr. Cas. 27, 452, 465; Jebb, Cr. Cas. Ir. 15; 1 Crawf. & D. Cr. Cas. Ir. 115; 2 *id.* 152; 5 Carr. & P. 312; 7 *id.* 569, 832; 8 *id.* 179, 621; 14 Ark. 556; 19 *id.* 156; 23 Ala. N. S. 28; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice, 1 Mood. Cr. Cas. 28; Phillipps, Ev. 427; 33 Miss. 347; see 8 Carr. & P. 622; and although it appears that the prisoner was not warned that what he said would be used against him. 8 Mod. 89; 1 Carr. & P. 261; 5 *id.* 312, 318; 6 *id.* 179; 7 *id.* 487; 9 *id.* 124.

4. A statement not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath, 2 Mood. Cr. Cas. 45; 1 Carr. & K. 657; 2 Stark. 366; 5 Carr. & P. 530; 9 *id.* 240; 1 Mood. & R. Cr. Cas. 297; 7 Ired. No. C. 96; 5 Rich. So. C. 391; 2 Park. Cr. Cas. N. Y. 663; see 8 Carr. & P. 250; otherwise, if the answers are compulsory. 1 Den. Cr. Cas. 236; 4 Campb. 10; 6 Carr. & P. 161, 177; 15 N. Y. 384; 3 Wisc. 823; 2 Park. Cr. Cas. N. Y. 663. A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself, 5 Carr. & P. 332; 7 *id.* 832; 12 Metc. Mass. 235; 21 Pick. Mass. 515; see 32 Ala. N. S. 560; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate. 1 Mood. Cr. Cas. 347; Mood. & M. 336; 6 Carr. & P. 164.

5. Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence; unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled, 2 Lew. Cr. Cas. 123; 4 Carr. & P. 225; 5 *id.* 318, 535; 6 *id.* 404; 1 Wheel. Cr. Cas. N. Y. 67; 5 Halst. N. J. 163; 3 Jones, No. C. 443; 5 Rich. So. C. 391; 24 Miss. 512; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected. 1 Dev. No. C. 259; 12 Miss. 31; 5 Cush. Mass. 605; 18 Conn. 166; 2 Leigh, Va. 701; 32 Ala. N. S. 560; 1 Sneed, Tenn. 75. And see 6 Carr. & P. 404; 5 Jones, No. C. 315; 12 La. Ann. 895.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true. 1 Leach, Cr. Cas. 263, 386; 9 Carr. & P. 364; 1 Mood. Cr. Cas. 338; Russ. & R. Cr. Cas. 151; 9 Pick. Mass. 496; 32 Miss. 382; 1 Sneed, Tenn. 75; 7 Rich. So. C. 327.

6. A confession made before a magistrate is admissible though made before the evidence of the witnesses against the party was concluded. 4 Carr. & P. 567; 5 *id.* 163.

Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate, Phillipps, Ev. 447; 2 Russell, Crimes, 3d ed. 876–878; 1 Mood. Cr. Cas. 338; 7 Carr. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted. 1 Greenleaf, Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality. 1 Lew. Cr. Cas. 46; 4 Carr. & P. 550, n.; 5 *id.* 162; 6 *id.* 183; 1 Mood. & M. 403; Busb. No. C. 239.

The whole of what the prisoner said must be taken together. 2 Carr. & K. 221; 2 Ball & B. 297; 2 Carr. & P. 629; 3 *id.* 603; 4 *id.* 215, 397; 9 Leigh, Va. 633; 2 Dall. Penn. 86; 5 Miss. 364. See 3 Park. Cr. Cas. N. Y. 256; 26 Ala. N. S. 107.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction. 1 Hayw. Tenn. 455; 5 Halst. N. J. 163, 185; 18 Miss. 229; 17 Ill. 426; 2 Tex. 79. See, *contra*, Russ. & R. Cr. Cas. 481, 509; 1 Leach, Cr. Cas. 311; 3 Park. Cr. Cas. N. Y. 401; 11 Ga. 225. Consult Greenleaf; Phillipps on Evidence; Joy on Confessions; and Heard's note in 1 Bennett & Heard's Lead. Crim. Cases, 112, which note is the basis of this article.

CONFESSION AND AVOIDANCE. **In Pleading.** The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, *in* confession and avoidance. Pleadings in confession and avoidance must give color. See COLOR; 1 East, 212. They must admit the material facts of the opponent's pleading, either expressly in terms, Dy. 171 *b*, or in effect. They must conclude with a verification. 1 Saund. 103, n. For the form of statement, see Stephen, Plead. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

See, generally, 1 Chitty, Plead. 540; 2 *id.* 644; Coke, Litt. 282 *b*; Archbold, Civ. Plead. 215; Dane, Abr. Index; 3 Bouvier, Inst. nn. 2921, 2931.

CONFESSOR. A priest of some Christian sect, who receives an account of the sins of his people and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness in a court of justice.

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any legal transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

2. At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Of this character are all communications made between a husband and his lawful wife in all cases in which the interests of the other party are involved. Buller, Nisi P. 218; 13 Pet. 223; 10 Pick. Mass. 57; 15 Me. 104; 2 Leigh, Va. 142; 6 Binn. Penn. 488; 6 Harr. & J. Md. 153; 7 Exch. 609; 4 Term, 678: 5 Esp. 107; 3 Dougl. 422; 13 Ves. Ch. 144. See 10 Metc. Mass. 287; 3 Day, Conn. 37; 4 Vt. 116; 1 Dougl. Mich. 48; 2 Ashm. Penn. 31; 3 Harr. N. J. 88; 8 Carr. & P. 284. Nor does it make any difference which party is called upon as a witness, Ry. & M. 352; or when the relation commenced, 3 Carr. & P. 558; or whether it has terminated. 13 Pet. 209; 3 Dev. & B. No. C. 110; 1 Barb. N. Y. 392: 6 East, 192; 1 Ry. &. M. 198; 1 Carr. & P. 364. And see 13 Pick. Mass. 445; 7 Vt. 506; 4 Penn. St. 364; 5 Ala. N. s. 224; 1 B. Monr. Ky. 224.

3. The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him, in that capacity, 1 Mylne & K. 101; 4 Barnew. & Ad. 876; 2 Mees. & W. Exch. 100; 4 Term, 753; 6 Carr. & P. 728; 2 Cow. N. Y. 195; 7 Johns. Ch. N. Y. 25; 14 Johns. N. Y. 391; 8 Mass. 370; 12 Pick. Mass. 89; 16 Me. 329; 23 Mo. 474; 11 Wheat. 295; nor will he be permitted to make such communications against the will of his client. 1 Mylne & K. 102; 4 Term, 756, 759; 12 J. B. Moore, 520; 2 Atk. Ch. 524; 3 Barb. Ch. N. Y. 528; 8 Mass. 370. The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings, 9 Beav. Rolls, 16; 11 *id.* 59; 2 Brod. & B. 4; 3 Bingh. N. c. 235; 5 Carr. & P. 592; 6 Madd. Ch. 47; 1 De Gex & S. 12; 3 Watts, Penn. 20; 22 Penn. St. 89; 12 Pick. Mass. 89; 38 Me. 581; 25 Vt. 47; 24 Miss. 134; but see 28 Vt. 701, 750; and to matters discovered by the counsellor, etc. in consequence of this relation. 5 Esp. 52. See 1 Mylne & K. 102; 3 Mylne & C. 515; Story, Eq. Plead. § 601; 13 Ga. 260. See 29 Ala. N. s. 254; 21 Ga. 301.

Interpreters, 4 Term, 756; 3 Wend. N. Y. 337; 4 Munf. Va. 273; 7 Ind. 202; 1 Pet. C. C. 356, and agents, 2 Stark. 239; 2 Beav. Rolls, 173; 1 Phill. Ch. 471, 687, are considered as standing in the same relation as the attorney. So also is a barrister's clerk, 2 Carr. & P. 195; 1 *id.* 545; 5 *id.* 177; 5 Mann. & G. 271; 8 Dowl. & R. 726; 12 Pick. Mass. 93; 3 Wend. N. Y. 337; 16 N. Y. 180; 5 Cal. 450; but not a student at law in an attorney's office. 7 Cush. Mass. 576.

4. The cases in which communications to counsel have been holden not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such, 1 Ventr. 197; 2 Atk. Ch. 524; see 38 Me. 581; after the attorney's employment has ceased, 4 Term, 431; 12 La. Ann. 91; when the attorney was consulted because he was an attorney, yet was not acting as such, 4 Term, 753; 4 Mich. 414; 14 Ill. 89; 7 Rich. So. C. 459; where his character of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication, Cowp. 846; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; 29 N. H. 163; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential communication, 7 East, 357; 2 Brod. & B. 176; 3 Johns. Cas. N. Y. 198; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted, Peake, 77; when the attorney made himself a subscribing witness, 10 Mod. 40; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction, 3 Wisc. 274; Story, Eq. Plead. § 601; when he was directed to plead the facts to which he is called to testify. 7 Mart. La. N. s. 179.

5. The rule of privilege does not extend to confessions made to *clergymen*, 4 Term, 753; 2 Skinn. 404; 15 Mass. 161; though the rule is otherwise by statute in some states, Iowa Code, 1851, art. 23, 93; Michigan Rev. Stat. 1846, c. 102, § 85; Missouri Rev. Stat. 1845, c. 186, § 19; 2 New York Rev. Stat. 406, § 72; 13 Wend. N. Y. 311; Wisconsin Rev. Stat. 1849, c. 98, § 75; nor to *physicians*, 11 Hargrave, State Tr. 243; 20 Howell, State Tr. 643; 1 Carr. & P. 97; 3 *id.* 518; see 14 Wend. N. Y. 637; nor to *confidential friends*, 4 Term, 758; 1 Caines, N. Y. 157; 3 Wisc. 456; 14 Ill. 89; *clerks*, 3 Campb. 337; 1 Carr. & P. 337; *bankers*, 2

Carr. & P. 325; nor *stewards*. 2 Atk. Ch. 524; 11 Price, Exch. 455. Consult Starkie, Ev. Index; 1 Greenleaf, Ev. §§ 237–250, 337–342; 17 Am. Jur. 304.

CONFIRMATIO (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. Sheppard, Touchst. 311; 2 Blackstone, Comm. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral-churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. 1 Blackstone, Comm. 128.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067–2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. Ch. Ir. 353; 2 Schoales & L. 486; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. Ch. 301; 8 Watts, Penn. 280.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law. Coke, Litt. 295. The canon law agrees with this rule; and hence the maxim, *qui confirmat nihil dat.* Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand. *386; 1 Chitty, Pract. 315; 3 Gill & J. Md. 290; 3 Yerg. Tenn. 405; 1 Ill. 236; 9 Coke, 142 *a*; 2 Bouvier, Inst. nn. 2067–69; RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent, 52 *et seq.* *Bona confiscata* and *forisfacta* are said to be the same (1 Blackstone, Comm. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits a state, confiscates goods or other property. Used also as an adjective,—forfeited. 1 Blackstone, Comm. 299.

2. It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary. 1 Gall. C. C. 563; 3 Dall. Penn. 199. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185, 6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends. 1 Kent, Comm. 57.

3. In the United States, the broad principle has been assumed "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself." 8 Cranch, 122. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned. 8 Cranch, 128, 129.

4. The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests very much upon the same principles as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits. 1 Kent, Comm. 64, 65. See 4 Cranch, 415; 6 *id.* 286; T. U. P. Charlt. Ga. 140; 2 Harr. & J. Md.

101, 112, 286, 471; 7 Conn. 428; 1 Day, Conn. 4; Kirb. Conn. 228, 291; 2 Tayl. No. C. 115; Cam. & N. No. C. 77, 492.

See, generally, Chitty, Law of Nations, c. 3; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states in those cases where, from their relations to each other or to the subject-matter in dispute, the rights of the parties are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

An opposition or inconsistency of domestic laws upon the same subject.

2. Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule. 4 Barb. N. Y. 522.

3. Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases. Story, Confl. of Laws, § 18; Vattel, b. 2, c. 7, §§ 84, 85; Wheaton, Int. Law, pt. 1, c. 2, § 5.

4. Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. Huberus, lib. 1, t. 3, § 2. When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect.

5. Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

6. Real Estate. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property. See Lex Rei Sitæ.

Perhaps an exception may exist in the case of mortgages. 23 Miss. 175; 3 McLean, C. C. 397. But the point cannot be considered as settled. 1 Washburn, Real Prop. 524; Story, Confl. Laws, § 363; Westlake, Priv. Int. Law, 75.

7. Personal Property. For the general rules as to the disposition of personal property, see Domicil, **10-14.** *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note, where no other place of payment is specified, is the *locus contractus*, 10 Barnew. & C. 21; 1 Woodb. & M. C. C. 381; 4 Carr. & P. 35; 4 Mich. 450; 6 McLean, C. C. 622; 9 Cush. Mass. 46; 26 Vt. 698; 11 Gratt. Va. 477; 3 Gill, Md. 430; 18 Conn. 138; 6 Ind. 107; see 11 Tex. 54; 17 Miss. 220; where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, 19 N. Y. 436; but see 14 Vt. 33), each indorsement is considered a new contract. 14 B. Monr. Ky. 556; 5 Sandf. N. Y. 330; 2 Ga. 158; 3 McLean, C. C. 397. See Lex Loci, **22.**

The place of payment is, however, to be considered as the place of making. 30 Miss. 59; 7 Ohio St. 134; 4 Mich. 450; 5 McLean, C. C. 448; 13 N. Y. 290; 25 Barb. N. Y. 383; 5 Sandf. N. Y. 326; 3 Gill, Md. 430; 8 B. Monr. Ky. 306; 14 Ark. 189; 17 Miss. 220; 13 Gray, Mass. 597. But see 4 N. J. 319.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned, seems to be the interest of the *lex loci*. 6 Johns. N. Y. 183; 5 Clark & F. Hou. L. 1, 12; 6 Cranch, 221; 3 Wheat. 101; 1 Dall. 191; 12 La. Ann. 815. And see 9 Gratt. Va. 31; 24 Miss. 463; 24 Mo. 65; 1 Parsons, Contr. 238. The damages recoverable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute. 4 Johns. N. Y. 119; 6 Mass. 157; 2 Wash. C. C. 167; 3 Sumn. C. C. 523.

Where a place of payment is specified, the interest of that place must be allowed. 14 Vt. 33; 22 Barb. N. Y. 115; *contra*, 21 Ga. 135.

It seems to be undecided whether a rate of interest which is legal by the *lex loci*, but higher than that allowed at the place of payment, may be reserved where a place of payment is specified. That it may, 1 Parsons, Contr. 96, n.; 20 Mart. La. 1. That it may not, Story, Confl. Laws, § 298.

8. *Chattel mortgages*, valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different. 37 N. H. 86; 7 Ohio St. 134; 12 Barb. N. Y. 631; 8 Humphr. Tenn. 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicil.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, that it will, 30 Vt. 42, overruling 23 Vt. 279; 7 Ohio St. 134; 12 Barb. N. Y. 631; 8 Humphr. Tenn. 542.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property. 5 Cranch, 289; 4 Binn. Penn. 353; 14 Mart. La. 93; 2 Harr. & J. Md. 193, 224; 3 Pick. Mass. 128; 3 Rawle, Penn. 312; 13 Pet. 312; 17 Ga. 491; 4 Rich. So. C. 561, 13 Ark. 543; 3 Barb. N. Y. 89.

The existence of the lien will depend on the *lex loci*. Story, Confl. Laws, § 322 *b*; 5 Cranch, 289.

9. *Marriage* comes under the general rule in regard to contracts, with some exceptions. See Lex Loci, **26–32.**

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus*, 1 Brown, Parl. Cas. 129; 2 Mylne & K. 513; where not repugnant to the *lex rei sitæ*. 31 Eng. L. & Eq. 443; 4 Bosw. N. Y. 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus*. 23 Eng. L. & Eq. 288.

Movables in general. Personal property follows the owner; and hence its disposition and transfer are to be determined by the law of his domicil. 4 Kent, Comm. 428. See Domicil, **12, 13, 14.**

PARTICULAR PERSONAL RELATIONS.

10. *Executors* and *administrators* have no power to sue or be sued by virtue of a foreign appointment as such. Westlake, Priv. Int. Law, 279; 1 Greenleaf, Ev. § 544; 2 Jones, Eq. No. C. 276; 10 Rich. So. C. 393. It seems to be otherwise where a foreign executor has brought assets into the state, 18 B. Monr. Ky. 582; 1 Bradf. Surr. N. Y. 241; and see 16 Ark. 28; and is otherwise by statute in Ohio. 5 McLean, C. C. 4.

In the United States, however, payment to such executor will be a discharge, it seems, 7 Johns. Ch. N. Y. 49; 18 How. 104; *contra*, 3 Sneed, Tenn. 55; otherwise in England. Dy. 305; 3 Kebl. 163; 1 Mann. & G. 159; 3 Q. B. 493. But see Westlake, Priv. Int. Law, 272.

And an executor who has so changed his situation towards the action as to render it his own may sue in a foreign court. Westlake, Priv. Int. Law, 286; 1 Hare, Ch. 84; 4 Beav. Rolls, 506.

Administration must be taken out in the *situs* (place of situation) of the property. 12 Wheat. 109; 20 Johns. N. Y. 229; 1 Mas. C. C. 381; 1 Bradf. Surr. N. Y. 69.

But, in general, administration is granted as of course to the executor or administrator entitled under the *lex domicilii*. In such cases the probate granted in the place of domicil is the principal, that in the *situs* is ancillary. 3 Bradf. Surr. N. Y. 233; 21 Conn. 577. There is no legal privity between them. 35 N. H. 484.

11. All property of the decedent which is in the jurisdiction of the court granting principal or ancillary administration, or which comes into it if not already taken possession of under a grant of administration, comes under its operation. 3 Paige, Ch. N. Y. 459.

Ships and cargoes and the proceeds thereof complete their voyages and return to the home port. Story, Confl. Laws, § 520.

The property in each jurisdiction is held liable for debts due in that jurisdiction, and the surplus is to be remitted to the principal administrator for distribution under the *lex domicilii*. 8 Clark & F. Hou. L. 1; 24 Beav. Rolls, 100; 3 Pick. Mass. 145; 3 Bradf. Surr. N. Y. 233; 21 Conn. 577. See Domicil.

In case of insolvency, it is said the assets would be retained for an equitable distribution among the creditors here of an amount proportioned to the whole amount of assets and claims. 3 Pick. Mass. 147.

Each administrator must give priority to claims according to the law of his jurisdiction. Story, Confl. Laws, § 524; 5 Pet. 518; 20 Johns. N. Y. 265.

But a transmission of effects or their proceeds to another jurisdiction does not devest a creditor's precedence. 7 Law Journ. Ch. 135; Westlake, Priv. Int. Law, 293.

12. *Guardians* have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment. 4 Cow. N. Y. 52; 1 Johns. Ch. N. Y. 153; Story, Confl. Laws, § 504. As to the relations of foreign and domestic guardians, see 14 B. Monr. Ky. 544.

As to the power of a guardian over the domicil of his ward, see Domicil, **6, 9.**

Receivers in equity have no extra-territorial powers by virtue of their appointment, 17 How. 322; and the comity of states and tribunals will, it is said, hardly help a receiver. 3 Wend. N. Y. 538; 3 Fla. 93.

An appointment of a receiver does not vest funds in a foreign jurisdiction. 17 How. 322. See 2 Paige, Ch. N. Y. 615.

Sureties come under the general rules, and their contracts are governed by the *lex loci*; but in case of government bonds the seat of government is held to be the *lex loci*. 6 Pet. 172; 7 *id.* 435; Story, Confl. Laws, § 290.

13. Judgments and Decrees of Foreign Courts relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with re-

gard to movables actually within their jurisdiction. Story, Confl. Laws, § 592; 1 Greenleaf, Ev. § 541.

Thus, *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter. 4 Cranch, 241, 293, 433; 7 *id.* 423; 9 *id.* 126; 4 Johns. N. Y. 34; 3 Sumn. C. C. 600; 1 Stor. C. C. 157; 1 Johns. Cas. N. Y. 341; 1 Harr. & J. Md. 142; 1 Binn. Penn. 299; 3 *id.* 220; 6 Mass. 277; 7 *id.* 275.

But such decree may be avoided for matter apparently erroneous on the face of the record, 7 Term, 523; 8 *id.* 444; 1 Caines, Cas. N. Y. 21; or if there be an ambiguity as to grounds of condemnation. 7 Bingh. 495; 1 Greenleaf, Ev. § 541, n.; 14 Cow. N. Y. 520, n. 3; 2 Kent, Comm. 120.

Proceedings under the garnishee process are held proceedings *in rem;* and a decree may be pleaded in bar of an action against the trustee or garnishee. 1 Greenleaf, Ev. § 542; 4 Cow. N. Y. 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also. 31 Me. 314; 7 B. Monr. Ky. 376; 9 Mass. 498; Story, Confl. Laws, § 592; Greenleaf, Ev. § 542.

14. *Foreign judgments* are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally. 1 Greenleaf, Ev. § 547, and note; 12 Pick. Mass. 572; 7 Bost. Law Rep. 461.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties, 1 Greenleaf, Ev. § 546; Westlake, Priv. Int. Law, 372; Story, Confl. Laws, § 607; 2 Swanst. Ch. 325; Dougl. 6, n.; 3 Sim. Ch. 458; 6 Q. B. 288; 16 *id.* 717; 4 Munf. Va. 241; 15 N. H. 227; that they are *primâ facie* evidence merely. See 2 H. Blackst. 410; Dougl. 1, 6; 3 Maule & S. 20; 9 Mass. 462; 8 *id.* 273.

Any foreign judgment may be impeached for error apparent on its face. 21 Barnew. & Ad. 757; 1 Greenleaf, Ev. § 547, n.

15. Under the United States constitution, "full force and effect" are to be given the decrees of the courts of any state in those of all other states.

This is construed to mean that the judgments so obtained and properly authenticated shall be conclusive evidence of the rights of the parties, 15 N. H. 227; 9 Mass. 467; 11 Vt. 425; 22 *id.* 419; 7 Cranch, 481; 3 Wheat. 234; 15 Johns. N. Y. 121; 11 How. 165; 5 Gill & J. Md. 500; 7 Ohio, 273; 9 Serg. & R. Penn. 252; 4 B. Monr. Ky. 136; 13 Ill. 436; 12 Ark. 756; but not unless actual personal jurisdiction was obtained. 4 Bradf. Surr. N. Y. 174; 9 Mass. 467; 15 Johns. N. Y. 121; 4 Conn. 380; 17 *id.* 500; 6 Pick. Mass. 240; 4 Metc. Mass. 333; 3 Gray, Mass. 508; 11 Vt. 425; 5 Ill. 536; 17 *id.* 572; 4 Harr. Del. 280; 2 Blackf. Ind. 108; 29 Me. 19; 3 Ala. N. s. 552; 13 Ohio, 209. And lack of jurisdiction may undoubtedly be shown even to contradict the record, 13 Gray, Mass. 597; 15 Johns. N. Y. 121; 19 *id.* 162; 3 Binn. Penn. 241; 9 Mass. 467; 4 Cow. N. Y. 292; 4 Cranch, 241; 1 R. I. 73; 2 Ind. 24; 15 Ill. 415; 4 Metc. Mass. 343; but see 17 Vt. 302; 4 Harr. Del. 230; and must be shown affirmatively, if the record show jurisdiction on its face. 4 Bradf. Surr. N. Y. 174.

The constitution and rules of comity apply only to civil judgments, and not to criminal decisions. 17 Mass. 515.

16. Assignments and Transfers.—Voluntary assignments of personal property, valid where made, will transfer property everywhere, 15 N. Y. 320; 4 N. J. 162, 270; 17 Penn. St. 91; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession. 13 Mass. 146; 6 Pick. Mass. 97; 5 Harr. Del. 31. Otherwise, by 12 Md. 54; 4 N. J. 162; 18 Penn. St. 331.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors in the place of situation of the property. 20 Johns. N. Y. 229; 5 N. Y. 320; 4 Zabr. N. J. 162, 270; 6 Pick. Mass. 286, 302; 2 Hayw. No. C. 24; 4 M'Cord, So. C. 519; 5 N. H. 213; 14 Mart. La. 93; 6 Binn. Penn. 353; 5 Cranch, 289; 5 Me. 245; 1 Harr. & McH. Md. 236; 19 N. Y. 207; 32 Miss. 246.

It may be a question whether the same rule would hold if the assignees had obtained possession. Dougl. 161. An assignment by operation of law is good so as to vest property in the assignees by comity of nations. 6 Maule & S. 126; 1 East, 6; 20 Johns. N. Y. 262; 6 Binn. Penn. 363; 3 Mass. 517.

The assignment by marriage is held valid. Story, Confl. Laws, § 423. See Domicil.

17. *Discharges* by the *lex loci contractus* are valid everywhere. 4 Bosw. N. Y. 459; 7 Cush. Mass. 15; 40 Me. 204. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts.

Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effects to discharge the debtor. 5 How. 307; 7 N. Y. 500. See Lex Fori. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity. See Lex Loci Contractus. Until the fact is shown, they will be assumed to be the same as those of the *forum*. 1 Harr. & J. Md. 687. See Lex Fori.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions. 19 N. Y. 207.

18. Foreign Laws must be proved as matters of facts, 4 Mood. Parl. Cas. 21; 1 Dowl. & L. 614; 1 Tex. 434; 9 Humphr. Tenn. 546; 2 Barb. Ch. N. Y. 582; 19 Vt. 182; 9 Mo. 3; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or, in their absence, perhaps, by opinion of experts as secondary evidence, Story, Confl. Laws, § 641; 1 Greenleaf, Ev. § 486; 14 How. 426; 2 Cranch, 237; 8 Ad. & E. 208; 1 Campb. 65; 6 Wend. N. Y. 475; 10 Ala. N. s. 885; 1 Tex. 93; 10 Ark. 516; but the sanction of an oath is said to be required in such case, 4 Conn. 517; 12 *id.* 384; see 12 Vt. 396; Story, Confl. Laws, § 641; 1 Greenleaf, Ev. § 488, note; *unwritten*, by the opinion of experts. 11 Clark & F. Hou. L. 85; 1 Carr. & K. 269; 4 Johns. Ch. N. Y. 520; 14 Eng. L. & Eq. 549; 1 Wall. Jr. C. C. 47; 4 Cow. N. Y. 526. n.

CONFRONTATION. In Practice. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his presence. No man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). **In Civil Law.** A pouring together of liquids; a melting of metals; a blending together of an inseparable compound.

It is distinguished from *commixtis* by the fact that in the latter case a separation may be made, while in a case of *confusio* there cannot be. Bowyer, Comm. 88; 2 Blackstone, Comm. 405.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares. 6 Hill, N. Y. 425. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril, 30 Me. 237, 295; 19 Ohio, 337; 9 Barb. N. Y. 630; 3 Kent, Comm. 365, and must bear the whole loss, 2 Blackf. Ind. 377; 3 Ind. 306; 2 Johns. Ch. N. Y. 62; 11 Metc. Mass. 493; 30 Me. 237; otherwise, it is said, if the confusion is the result of negligence merely, or accident. 20 Vt. 333. The rule extends no further than necessity requires. 2 Campb. 575; 1 Vt. 286; 24 Penn. St. 246.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person. The effect of such a union is, generally, to extinguish the debt. 1 Salk. 306; Croke Car. 551; 1 Ld. Raym. 515. See 5 Term, 381; Comyns, Dig. *Baron et Feme* (D).

CONGE. In French Law. A clearance. A species of passport or permission to navigate.

CONGE D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. Termes de la Ley; Cowel. See Licentia Concordandi; 2 Blackstone, Comm. 350.

CONGE D'EMPARLER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Sharswood, Blackst. Comm. 299.

CONGE D'ESLIRE (Fr.). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whensoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions: as, that at every vacation they should ask of the king *congé d'eslire*. Cowel; Termes de la Ley; 1 Blackstone, Comm. 379, 382.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission: as, entry congeable, and the like. Littleton, § 279.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

In the ecclesiastical law, this term is used to designate certain bureaus at Rome, where ecclesiastical matters are attended to.

In the United States, by congregation is meant the members of a particular church who meet in one place to worship. See 2 Russ. 120.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs.

The name of the legislative body of the United States, composed of the senate and house of representatives. U. S. Const. art. 1, s. 1.

2. Congress is composed of two independent houses,—the senate and the house of representatives.

The senate is composed of two senators from each state, chosen by the legislature thereof for six years; and each senator has one vote. They represent the states, rather than the people, as each state has its equal voice and equal weight in the senate, without any regard to the disparity of population, wealth, or dimensions. The senate have been, from the first formation of the government, divided into three classes. The rotation of the classes was originally determined by lot, and the seats of one class are vacated at the end of the second year, so that one-third of the senate is chosen every second year. U. S. Const. art. 1, s. 3. This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example.

The qualifications which the constitution requires of a senator are that he should be thirty years of age, have been nine years a citizen of the United States, and, when elected, be an inhabitant of that state for which he shall be chosen. U. S. Const. art. 1, s. 3.

3. The house of representatives is composed of members chosen every second year by the people of the several states who are qualified electors of

the most numerous branch of the legislature of the state to which they belong.

No person can be a representative until he has attained the age of twenty-five years, and has been seven years a citizen of the United States, and is at the time of his election an inhabitant of the state in which he is chosen. U. S. Const. art. 1, s. 2.

The constitution requires that the representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. U. S. Const. art. 1, s. 1.

The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative. *Id.*

4. Each house is made the judge of the election, returns, and qualifications of its own members. Art. 1, s. 5. As each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law and strictly adhered to, for the sake of uniformity and certainty. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner and under such penalties as each may provide. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. Each house is bound to keep a journal of its proceedings and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy, and to enter the yeas and nays on the journal, on any question, at the desire of one-fifth of the members present. Art. 1, s. 5.

5. The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same; and—important to the freedom of deliberation—no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Each house of congress claims and exercises the power to punish contempts of its mandates lawfully issued, and also to punish breaches of its privileges. This power rests upon no express law, but is claimed as of necessity, on the ground that all public functionaries are essentially invested with the powers of self-preservation, and that whenever authorities are given the means of carrying them into execution are given by necessary implication. Jefferson, Manual, § 3, art. *Privilege;* Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122–124, 184, and Index; Wolcott's Case, Journal Hou. Reps. 1st Sess. 35th Congress, pp. 371–374, 386–389, 535–539. The cases in which the power has been exercised are numerous. See Barclay, Dig. Rules of Hou. Reps. U. S. tit. *Privilege.* This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

The house of representatives has the exclusive right of originating bills for raising revenue; and this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and even those bills are amendable by the senate in its discretion. U. S. Const. art. 1. s. 7.

One of the houses cannot adjourn, during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting. U. S. Const. art. 1, s. 5.

6. All the legislative powers granted by the constitution of the United States are vested in the congress. These powers are enumerated in art. 1, s. 8, as follows: To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States, to borrow money on the credit of the United States, to regulate commerce with foreign nations and among the several states and with the Indians, 1 McLean, C. C. 257; to establish a uniform rule of naturalization and uniform laws of bankruptcy throughout the United States, to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures, to provide for the punishment of counterfeiting the securities and current coin of the United States, to establish post-offices and post-roads, to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, to constitute tribunals inferior to the supreme court, to define and punish piracies and felonies on the high seas and offences against the laws of nations, to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress, to exercise exclusive legislation over such district as may in due form become the seat of government of the United States, and also over all forts, magazines, arsenals, dock-yards, and other needful buildings ceded and acquired for those purposes, to exercise exclusive legislation over the District of Columbia, and to make all laws necessary and proper to give full efficacy to the powers contained in the constitution.

7. The rules of proceeding in each house are substantially the same: the house of representatives choose their own speaker; the vice-president of the United States is, *ex officio*, president of the senate. For rules of proceeding and forms observed in passing laws, see Barclay's Dig., Washington, 1863.

8. When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Comm. Lect. XI.

CONJECTIO CAUSÆ. In Civil Law.

A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob.* quæst. 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Confl. Laws, § 71; Wolffius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. Rights arising from the relation of husband and wife.

In England, a writ lies for restitution to conjugal rights in case of intentional desertion, including, perhaps, a refusal to consummate marriage, under some circumstances; but this remedy has never been adopted in the United States. Bishop, Marr. & D. § 503 *et seq.*; 3 Blackstone, Comm. 94.

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versâ*.

An obligation is conjunctive when it contains several things united by a conjunction to indicate that they are all equally the object of the matter or contract. For example, if I promise for a lawful consideration to deliver to you my copy of the Life of Washington, my Encyclopædia, and my copy of the History of the United States, I am then bound to deliver all of them, and cannot be discharged by delivering one only. There are, according to Toullier, tom. vi. n. 686, as many separate obligations as there are things to be delivered; and the obligor may discharge himself *pro tanto* by delivering either of them, or, in case of refusal, the tender will be valid. It is presumed, however, that only one action could be maintained for the whole. But if the articles in the agreement had not been enumerated, I could not, according to Toullier, deliver one in discharge of my contract without the consent of the creditor: as if, instead of enumerating the books above mentioned, I had bound myself to deliver all my books, the very books in question. See Bacon, Abr. *Conditions* (P); 1 Bos. & P. 242; 4 Bingh. N. C. 463; 1 Bouvier, Inst. 657.

CONJURATION (Lat. a swearing together).

A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose.

CONNECTICUT. The name of one of the original states of the United States of America.

2. It was not until the year 1665 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II. in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united. In 1687, Sir Edward Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until 1818, when the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. 29.

3. The present constitution was adopted on the 15th of September, 1818.

Every white male citizen of the United States who has attained the age of twenty-one years, who has resided in the state for the term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector at least six months next preceding, the time he may offer himself, who sustains a good moral character, and is able to read any article of the constitution or any section of the statutes of the state, may be admitted to the privileges of an elector. Comp. Stat. Conn. 49; Stat. 1854, p. 131.

The Legislative Power.

4. This is vested in two distinct houses or branches, the one styled the senate, the other the house of representatives, and both together, the General Assembly.

The Senate consists of twenty-one members, elected annually, one from each of the twenty-one senatorial districts into which the state is divided.

The House of Representatives consists of two members from each town which was in existence when the constitution was adopted, unless the right to one of them has been voluntarily relinquished, and of one member from each of the towns which have been organized since the adoption of the constitution. The representatives are elected annually, on the first Monday in April. The whole number in 1859 was two hundred and thirty-six.

The Executive Power.

This is vested in a governor and lieutenant-governor.

5. *The Governor* is chosen annually, on the first Monday in April, by the electors of the state. He is to hold his office for one year from the first Wednesday in May next succeeding his election, and until his successor is duly qualified. He is captain-general of the militia of the state, except when called into the service of the United States, may require information in writing from the executive officers, may adjourn the general assembly, when the two houses disagree as to time of adjournment, not beyond the next session, must take care that the laws be faithfully executed, may grant reprieves after conviction, except in cases of impeachment, till the end of the next session of the general assembly, and no longer, may veto any bill, but must return it with his objections, and it may then be passed over his objections by a majority in both houses.

The Lieutenant-Governor is elected at the same time, in the same way, for the same term, and must possess the same qualifications, as the governor.

He is president of the senate by virtue of his office, and in case of the death, resignation, refusal to serve, or removal from office of the governor, or of his impeachment or absence from the state, the lieutenant-governor exercises all the powers and authority appertaining to the office of governor until another be chosen at the next periodical election for governor and be duly qualified, or until the governor, if impeached, shall be acquitted, or, if absent, shall return. Const. art. 4, § 14.

The Judicial Power.

6. This is vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly may from time to time establish.

The only courts of general jurisdiction at present are the supreme court of errors and the superior court. No person can hold a judicial office after the age of seventy.

The Supreme Court of Errors is held by four

judges. The present judges hold office during good behavior. Judges hereafter elected will hold office for eight years. They are elected by the general assembly. This court has final and conclusive jurisdiction of all actions brought before it, by way of complaint or error, from judgments of superior courts, and may carry into complete execution all judgments and decrees.

The Superior Court is composed of five judges, elected by the general assembly for the term of eight years. One of their number is by themselves selected annually as chief justice. It has jurisdiction of petitions for change of name, and has a supervisory power over the county commissioners in regard to the county funds. It has all the powers formerly exercised by the county court which were not transferred to the county commissioners. This court is to decide all questions of law, excepting those arising on motion for a new trial, writs of error, or motions in error, which, and no others, are to be reserved for the supreme court.

County Commissioners, three in number in each county, are appointed annually by the general assembly. They have power to remove deputy sheriffs, enter upon county lands, levy county taxes, take care of the highways, and administer the poor debtor's oath; are to exercise exclusively all the powers formerly exercised by the county courts which relate to the process of forcible entry and detainer, the courts of review for settlement of estates by the probate court, and the appointment of the county treasurers and surveyors.

Probate Courts are held, in the districts into which the state is divided for this purpose, by judges elected by the people of the district.

Justices of the Peace are elected annually, on the first Monday of April, by the electors of the several towns.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted. 3 Hagg. Eccl. 350.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance. 3 Hagg. Eccl. 130.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer. 4 Term, 657. It may be satisfactorily proved by implication. See Shelford, Marr. & D. 449; Bishop, Marr. & D. Index; 2 Hagg. Eccl. 278, 376; 3 *id.* 58, 82, 107, 119, 312; 3 Pick. Mass. 299; 2 Caines, N. Y. 219.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a description of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, *Répert. Univ.; Ord. de la Marine*, l. 3, t. 2, art. 1.

CONNUBIUM (Lat.). A lawful marriage.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamiento*. For the requisites of this instrument, see the Code of Commerce of Spain, arts. 799–811.

CONQUEST (Lat. *conquiro*, to seek for).

In Feudal Law. Purchase; any means of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissociated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer a very reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical *purchase*,—the prevalent method of *purchase* then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a *conquest*, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of *purchase* from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going too far to say, with Burrill, that the meaning assigned by Blackstone is "demonstrated," or, with Wharton, that the same meaning is a "mere idle ingenuity." Fortunately, the question is not of the slightest importance in any respect.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to the submission of its empire.

It is a general rule that, where conquered countries have laws of their own, those laws remain in force after the conquest until they are abrogated, unless contrary to religion or *mala in se*. In this case, the laws of the conqueror prevail. 1 Story, Const. § 150.

The conquest and occupation of a part of the territory of the United States by a public enemy renders such conquered territory during such occupation a foreign country with respect to the revenue laws of the United States. 4 Wheat. 246; 2 Gall. C. C. 486. The people of a conquered territory change their allegiance, but not their relations to each other. 7 Pet. 86. Conquest does not *per se* give the conqueror *plenum dominium et utile*, but a temporary right of possession and government. 2 Gall. C. C. 486; 3 Wash. C. C. 101; 8 Wheat. 591; 2 Bay, So. C. 229; 2 Dall. 1; 12 Pet. 410.

The right which the English government claimed over the territory now composing the United States was not founded on conquest, but discovery. Story, Const. § 152 *et seq.*

In Scotch Law. Purchase. Bell, Dict.; 1 Kaimes, Eq. 210.

CONQUETS. In French Law. The name given to every acquisition which the

husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one-half for the benefit of the other. Merlin, Rép. *Conquêt;* Merlin, Quest. *Conquêt.* In Louisiana, these gains are called *aquets.* La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs. 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Blackstone, Comm. 231.

CONSANGUINITY (Lat. *consanguis,* blood together).

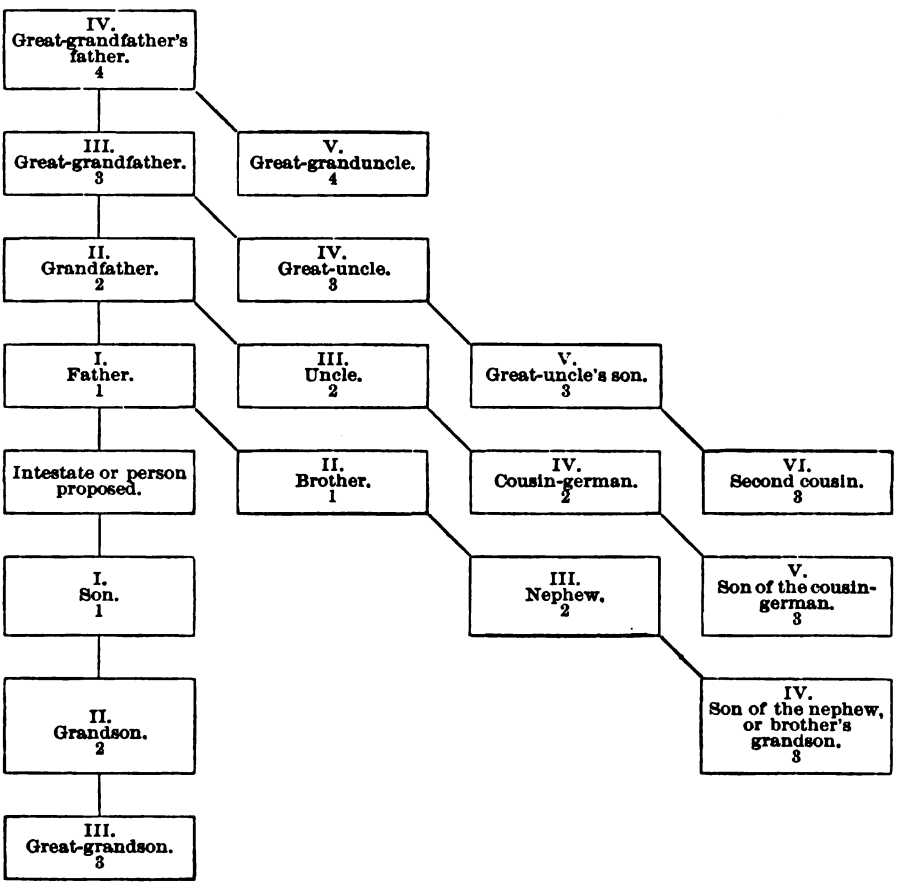
The relation subsisting among all the different persons descending from the same stock or common ancestor.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upwards in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

2. In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two



brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle, three; which points out the relationship.

3. The preceding table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures at the bottom, those by the common law, will fully illustrate the subject.

4. The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same person to be the heir. 2 Blackstone, Comm. 202.

CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted. Pothier, Obl. pt. 1, c. 1, s. 1, art. 2; 1 Bell, Comm. 5th ed. 435.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed. 10 Ves. Ch. 308, 378. See further, as to the matter of consent in vesting or devesting legacies, 2 Ves. & B. Ch. Ir. 234; Ambl. Ch. 264; 2 Freem. Ch. 201; 1 Eq. Ch. 6; 1 Phill. Ch. 200; 3 Ves. Ch. 239; 12 *id.* 19; 3 Brown, Ch. 145; 1 Sim. & S. Ch. 172. As to the matter of implied consent arising from acts, see ESTOPPEL IN PAIS.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of ejectment. This was, until recently, used in England and in those of the United States in which the action of ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz.: *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order. Adams, Ej. 233, 234. See, also, 2 Cow. N. Y. 442; 6 *id.* 587; 4 Johns. N. Y. 311; 1 Caines, Cas. N. Y. 102; 12 Wend. N. Y. 105.

CONSEQUENTIAL DAMAGES. Those damages or those losses which arise not from the immediate act of the party, but in consequence of such act. See DAMAGES; CASE.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowel.

A guardian. So used in Connecticut. 3 Day, Conn. 472; 5 Conn. 280; 3 *id.* 228; 12 *id.* 376.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they hold; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. This latter sort are superseded by the modern justices of the peace. 1 Blackstone, Comm. 349.

The judges and other similar officers of the

various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior." 1 Sharswood, Blackst. Comm. 349.

CONSERVATOR TRUCIS (Lat.). An officer whose duty it was to inquire into all offences against the king's truces and safe-conducts upon the main seas out of the liberties of the Cinque Ports.

Under stat. 2 Hen. V. stat. 1, c. 6, such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the antient maritime law then practised in the admiral's court, as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Blackstone, Comm. 69, 70.

CONSIDERATION (L. Latin, *consideratio*). The material cause which moves a contracting party to enter into a contract. 2 Blackstone, Comm. 443.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

Concurrent considerations are those which arise at the same time or where the promises are simultaneous.

Continuing considerations are those which are executed only in part.

Equitable considerations are moral considerations.

Executed considerations are those done or received before the obligor made the promise.

Executory considerations are those by which it is undertaken to do something at a future time.

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class. 2 Johns. N. Y. 52; 7 *id.* 26; 10 *id.* 293; 2 Bail. So. C. 588; 1 M'Cord, So. C. 504; 2 Leigh, Va. 337; 20 Vt. 595; 19 Penn. St. 248; 1 Carr. & P. 401. The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration. 3 Cranch, 140; 2 Aik. 601; 24 N. H. 302; 2 Madd. Ch. 430; 3 Coke, 81; Ambl. 598; 1 Ed. Ch. 167; Newland, Contr. 386; Atherby, Marriage Sett. p. 191. Generally, however, *good* is opposed to *valuable*.

Gratuitous considerations are those which are not founded on such a deprivation or injury to the promisee as to make the consideration valid at law. 2 Mich. 381.

Illegal considerations are agreements to do things in contravention of the common or of statute law.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are sufficient to support an executed contract.

Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. Chitty, Contr. 7; Doct. & Stud. 179; 1 Selwyn, Nisi P. 39, 40; 2 Pet. 182; 5 Cranch, 142, 150; 1 Litt. Ky. 183; 3 Johns. N. Y. 100; 14 *id.* 466; 8 N. Y. 207; 6 Mass. 58; 2 Bibb, Ky. 30; 2 J. J. Marsh. Ky. 222; 2 N. H. 97; Wright, Ohio, 660; 5 Watts & S. Penn. 427; 13 Serg. & R. Penn. 29; 12 Ga. 52; 24 Miss. 9; 4 Ill. 33; 5 Humphr. Tenn. 19; 4 Blackf. Ind. 388; 3 C. B. 321; 4 East, 55.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract. 2 How. 426; 1 Metc. Mass. 84; 12 Mass. 365; 12 Vt. 259; 23 *id.* 532; 29 Ala. N. s. 188; 20 Penn. St. 803; 22 N. H. 246; 11 Ad. & E. 983; 6 *id.* 438, 456; 16 East, 372; 9 Ves. Ch. 246; 2 Crompt. & M. Exch. 623; Ambl. Ch. 18; 2 Schoales & L. Ch. Ir. 395, n. *a*; 3 Anstr. Exch. 732. These valuable considerations are divided by the civilians into four classes, which are given, with literal translations:—*Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

2. Consideration is the very life and essence of a contract; and a contract or promise for which there is no consideration cannot be enforced at law: such a promise is called a *nudum pactum* (ex nudo pacto non oritur actio), or *nude pact;* because a *gratuitous promise* to do or pay any thing on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities,—*pactum verbis prescriptis vestitum.* 7 Watts & S. Penn. 317; Plowd. 308; Smith, Lead. Cas. 456; Doctor & Stud. 2, c. 24; 3 Call, Va. 439; 7 Conn. 57; 1 Stew. 51; 5 Mass. 301; 4 Johns. N. Y. 235; 6 Yerg. Tenn. 418; Cooke, Tenn. 467; 6 Halst. N. J. 174; 4 Munf. Va. 95; 11 Md. 281; 25 Miss. 66; 30 Me. 412; Year B. 17 Edw. IV. 4, pl. 4; 3 Hen. VI. 36, pl. 33; Brooke, Abr. *Action sur le Case*, 40; Vinnius, Comm. de Inst. lib. 3, *de verborum obligationibus*, tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity had much the force of our seal, which imports consideration, as it is said, meaning that the formality implies *consideration* in its ordinary sense, *i.e.* deliberation, caution, and fulness of assent. 3 Bingh. 111; 7 Term, 477; 3 Burr. 1639; 4 Md. Ch. Dec. 176; 35 Me. 260, 491; 42 *id.* 322; 25 Miss. 86.

3. Therefore, though the existence of a consideration seems as essential to a sealed instrument as to any other, it is generally conclusively presumed from the nature of the contract, 11 Serg. & R. Penn. 107; but it seems that in some of the states by usage, and in others by statute, the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract. 1 Bay, So. C. 275; 2 *id.* 11; 1 Dall. Penn. 17; 5 Binn. Penn. 232; 11 Wend. N. Y. 106; 1

Blackf. Ind. 173; 3 J. J. Marsh. Ky. 473; 1 Bibb, Ky. 500; 13 Ired. No. C. 235; 8 Rich. So. C. 437.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *primâ facie* evidence of consideration. 4 Blackstone, Comm. 445. *Vide* BILLS OF EXCHANGE, etc.

4. The consideration, if not expressed (when it is *primâ facie* evidence of consideration), in all parol contracts (oral or written), must be proved. This may be done by evidence *aliunde*. 2 Ala. 51; 16 *id.* 72; 21 Wend. N. Y. 628; 9 Cow. N. Y. 778; 3 N. Y. 335; 7 Conn. 57, 291; 13 *id.* 170; 16 Me. 394, 458; 4 Munf. Va. 95; Cooke, Tenn. 499; 4 Pick. Mass. 71; 26 Me. 397; 1 La. Ann. 192; 21 Vt. 292; 4 Mo. 33.

A contract upon a *good* consideration is considered merely *voluntary*, but is good both in law and equity as against the grantor himself when they are once executed, Fonblanque Eq. b. 1, ch. 5, § 2; Chitty, Contr. 28; but void against creditors and subsequent *bonâ fide* purchasers for value. Stat. 27 Eliz. c. 4; Cowp. 705; 9 East, 59; 7 Term, 475; 10 Barnew. & C. 606.

5. A moral or equitable consideration is not sufficient to support an express or implied promise.

They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession. 9 Yerg. Tenn. 418. These purely moral obligations are wisely left by the law to the conscience and good faith of the individual. Mr. Baron Parke says, "A mere moral consideration is *nothing*." 9 Mees. & W. Exch. 501; 8 Mo. 698.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must have once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy (*e. g.*). The claim, in this case, remains equally strong on the conscience of the debtor.

The rule amounts only to a permission to waive certain positive rules of law as to *remedy*. 2 Blackstone, Comm. 445; Cowp. 290; 3 Bos. & P. 249, n.; 2 East, 506; 3 Taunt. 312; 5 *id.* 36; Yelv. 41 *b*, n.; 8 Mass. 127; 3 Pick. Mass. 207; 19 *id.* 429; 6 Cush. Mass. 238; 20 Ohio, 332; 5 *id.* 58; 24 Wend. N. Y. 97; 24 Me. 561; 2 Bail. So. C. 420; 13 Johns. N. Y. 259; 19 *id.* 147; 14 *id.* 178–378; 1 Cow. N. Y. 249; 7 Conn. 57; 1 Vt. 420; 5 *id.* 173; 3 Penn. 172; 5 Binn. Penn. 33; 12 Serg. & R. Penn. 177; 17 *id.* 126; 14 Ark. 267; 1 Wisc. 131; 21 N. H. 129; 4 Md. 476. If the *moral duty* were once a *legal* one which could have been made available in defence, it is equally within the rule. 5 Barb. N. Y. 556; 2 Sandf. N. Y. 311; 25 Wend. N. Y. 389; 10 B. Monr. Ky. 382; 8 Tex. 397.

6. A valuable consideration only is good as against subsequent purchasers and attaching creditors; and these are always sufficient if rendered at the request, express or implied, of the promisor. Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 3; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 3 Bingh. N. C. 710; 6 Ad. & E. 718; 3 Carr. & P. 36; 6 Mees. & W. Exch. 485; 2 Stark. 201; 2 Strange, 933; 3 Q. B. 234; Croke Eliz. 442; F. Moore, 643; 5 Johns. No. C. 273; 2 *id.* 442; 1 M'Cord, So. C. 22, and cases *passim*.

Among valuable considerations may be mentioned these:—

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise. 3 Pick. Mass. 452; 4 *id.* 97; 13 *id.* 284; 2 N. H. 97; Wright, Ohio, 660; 20 Wend. N. Y. 184; 14 Johns. N. Y. 466; 9 Cow. N. Y. 266; 4 Ired. Eq. No. C. 207; 4 Harr. Del. 311; 1 Salk. 171; 12 Mod. 455; 4 Barnew. & C. 8; 5 Pet. 114; 2 Perr. & D. 477; 2 Nev. & P. 114; 7 Ad. & E. 108.

7. Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee. 1 Rolle, Abr. 24, pl. 33; Comyns, Dig. *Action on the Case upon Assumpsit* (B 1); 3 Chitty, Com. Law, 66; 1 Bingh. N. C. 444; 8 Md. 55; 4 Me. 387; 4 Johns. N. Y. 237; 1 Cush. Mass. 168; 9 Penn. St. 147; 3 Watts & S. Penn. 420; 20 Wend. N. Y. 201; 13 Ill. 140; Wright, Ohio, 434; 5 Humphr. Tenn. 19; 6 Leigh, Va. 85; 1 Dougl. Mich. 188; 20 Ala. N. S. 309; 6 Ind. 528; 4 Dev. & B. No. C. 209; 21 Eng. L. & Eq. 199; 6 T. B. Monr. Ky. 91; 2 Rand. Va. 442; 5 Watts, Penn. 259; 15 Ga. 321; 5 Gray, Mass. 553; 3 Md. 346; 25 Barb. N. Y. 175; 9 Yerg. Tenn. 436; 35 Caines, N. Y. 329; 15 Me. 138; 5 Barnew. & Ad. 117; 6 Munf. Va. 406; 11 Vt. 483; 4 Hawks, No. C. 178; 6 Conn. 81; 1 Bulstr. 41; 2 Binn. Penn. 506; 4 Wash. C. C. 148; 1 Penn. 385; 5 Rawle, Penn. 69; 23 Vt. 235; 3 Watts, Penn. 213.

An invalid or not enforceable agreement to forbear is not a good consideration; for suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time. Hardr. 5; 4 East, 455; 4 Mees. & W. Exch. 795; 4 Me. 387; 3 Penn. 282; 9 Vt. 233.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law. 1 Chanc. Rep. 158; 1 Atk. Ch. 3; 4 Pick. Mass. 507; 17 *id.* 470; 2 Strobh. Eq. So. C. 258; 2 Mich. 145; 1 Watts, Penn. 216; 6 *id.* 421; 2 Penn. 531; 6 Munf. Va. 406; 1 Bibb, Ky. 168; 2 *id.* 448; 4 Hawks, No. C. 178; 1 Watts & S. Penn. 456; 8 *id.* 31; 9 *id.* 69; 14 Conn. 12; 4 Metc. Mass. 270; 35 N. H. 556; 11 Vt. 483; 28 *id.* 796; 28 Miss. 56; 4 Jones, No. C. 359; 27 Me. 262; 18 Ala. 549; 21 Ala. N. S. 424; 14 Conn. 12; 2 M'Mull. So. C. 356; 4 Ill. 378; 5 Dan. Ky. 45;

21 Eng. L. & Eq. 199; 2 Rand. Va. 442; 5 Watts, Penn. 259; 5 Barnew. & Ald. 117.

8. The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor. 1 Sid. 212; 2 W. Blackst. 820; 4 Barnew. & C. 525; 7 Dowl. & R. 14; 13 Q. B. 548; 23 Vt. 532; 7 Tex. 47; 22 N. H. 185; 10 J. B. Moore, 34; 2 Bingh. 437; 1 Crompt. M. & R. Exch. 430; 5 Tyrwh. 116; 4 Term, 690; 4 Taunt. 326; 22 Me. 484; 7 N. H. 549. Work and service are perhaps the most common considerations.

In the case of deposit or mandate, it seems that the bailee is bound to restore the thing bailed to its owner. Jones, Bailm.; Edwards, Bailm.; Story, Bailm. 75, 76; Yelv. 50; Croke Jac. 667; 2 Ld. Raym. 920; Doct. & Stud. 2, c. 24. Though it was once held that in these contracts there was no consideration, Yelv. 4, 128; Croke Eliz. 883, the reverse is now universally maintained. 10 J. B. Moore, 192; 2 Bingh. 464; 2 Mees. & W. Exch. 143; M'Clell. & Y. Exch. 205; 6 Dowl. & R. 443; 4 Barnew. & C. 345; 13 Ired. No. C. 39; 24 Conn. 484; 1 Perr. & D. 3; 1 Smith, Lead. Cas. (1841 ed.) 96.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

9. Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding. Hob. 188; 1 Sid. 180; 4 Leon. 3; Croke Eliz. 543; 6 Barnew. & C. 255; 9 *id.* 840; 3 Barnew. & Ad. 703; 9 Bingh. 68; Peake, 227; 3 Eng. L. & Eq. 420; 2 Maule & S. 205; 5 Mees. & W. Exch. 241; 12 How. 126; 8 Miss. 508; 17 Me. 372; 19 *id.* 74; 4 Ind. 257; 6 *id.* 252; 3 Iowa, 527; 4 Jones, No. C. 527; 7 Ohio St. 270; 3 Humphr. Tenn. 19; 5 Tex. 572; 2 Hall, N. Y. 405; 12 Barb. N. Y. 502; 1 Caines, N. Y. 45; 1 Murph. So. C. 287; 13 Ill. 140; 8 Mo. 574. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot. 9 Metc. Mass. 519; 7 Watts, Penn. 412; 5 Cow. N. Y. 475; 7 *id.* 22; 1 D. Chipm. Vt. 252; 1 A. K. Marsh. Ky. 76; 2 Bail. So. C. 497; 3 Maule & S. 205; 2 Strange, 937.

Marriage is now settled to be a *valuable* consideration, though it is not convertible into money or pecuniarily valuable. 3 Cow. N. Y. 537; 1 Johns. Ch. N. Y. 261; Add. Penn. 276; 11 Leigh, Va. 136; 7 Pet. 348; 6 Dan. Ky. 89; 22 Me. 374.

10. Subscriptions to take shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must pay for them. Parsons, Contr. 377; 16 Mass. 94; 8 *id.* 138; 21 N. H. 247; 34 Me. 360; 15 Barb. N. Y. 249; 5 Ala. N. s. 787; 22 Me. 84; 9 Vt. 289.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities. 6 Metc. 310.

The subscriptions to a common object are not usually *mutual* or really *concurrent*, and can only be held binding on grounds of public policy. See 4 N. H. 533; 6 *id.* 164; 7 *id.* 435; 5 Pick. Mass. 506; 2 Vt. 48; 9 *id.* 289; 5 Ohio, 58.

The subscription, to be binding, should be a promise to some particular person or committee; and there should be an agreement on the part of such person or committee to do something on their part: as, to provide materials or erect a building. 11 Mass. 114; 2 Pick. Mass. 579; 24 Vt. 189; 9 Barb. N. Y. 202; 10 *id.* 309; 9 Gratt. Va. 633; 42 Am. Jur. 281–283; 4 Me. 382; 2 Den. N. Y. 403; 1 N. Y. 581; 2 Cart. Ind. 555; 12 Pick. Mass. 541.

If advances were fairly authorized, and have been made on the strength of the subscriptions, it will be deemed sufficient to make them obligatory. 12 Mass. 190; 14 *id.* 172; 1 Metc. Mass. 570; 5 Pick. Mass. 228; 19 *id.* 73; 4 Ill. 198; 2 Humphr. Tenn. 335; 2 Vt. 48; 5 Ohio, 58; 9 Barb. N. Y. 202.

11. Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for *future* illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio.* The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature. 3 Burr. 1568; 3 Ves. Ch. 370; 5 *id.* 286; 7 *id.* 470; 11 *id.* 535; 2 Atk. Ch. 333; 1 Vern. Ch. 483; 1 Ball & B. Ch. Ir. 360; 3 Madd. Ch. 110; Chanc. Pract. 114; 1 Taunt. 136; 10 Ad. & E. 815; 10 Bingh. 107; 2 Mees. & W. Exch. 149; 2 Wils. Ch. 347; 2 Eng. L. & Eq. 113; 10 *id.* 424; 6 Dan. Ky. 91; 3 Bibb, Ky. 500; 9 Vt. 23; 11 *id.* 592; 17 *id.* 105; 21 *id.* 184; 11 Wheat. 258; 22 Me. 488; 14 *id.* 404; 4 Pick. Mass. 314; 2 Miss. 18; 2 Ind. 392; 14 Mass. 322; 15 *id.* 39; 17 *id.* 258; 4 Serg. & R. Penn. 159; 1 Watts & S. Penn. 181; 1 Binn. Penn. 118; 5 Penn. St. 452; 4 Halst. N. J. 352; 2 Sandf. N. Y. 186; 4 Humphr. Tenn. 199; 3 McLean, C. C. 214; 14 N. H. 294, 435; 23 *id.* 128; 29 *id.* 264; 5 Rich. So. C. 47; 3 Brev. So. C. 54. If any part of the consideration is void as against the law, it is void *in toto.* 11 Vt. 592.

12. A contract founded upon an impossible consideration is void. *Lex neminem cogit*

ad vana aut impossibilia. 5 Viner, Abr. 110, 111, *Condition* (C) *a*, (D) *a;* 1 Rolle, Abr. 419; Coke, Litt. 206 *a;* 2 Blackstone, Comm. 341; Sheppard, Touchst. 164; 3 Term, 17; 2 Barnew. & C. 474. But this impossibility must be a natural or physical impossibility. Platt, Cov. 569; 3 Chitty, Com. Law, 101; 3 Bos. & P. 296, n.; 6 Term, 718; 7 Ad. & E. 798; 1 Pet. C. C. 91, 221; 5 Taunt. 249; 2 Moore & S. 89; 9 Bingh. 68.

A consideration which appeared to be valuable, but has turned out to be a mere nullity, —that is, has totally failed,—will not support a contract. An agreement to do what one is already obliged to do is of this kind. 2 Burr. 1012; 4 Ad. & E. 605; 7 Carr. & P. 108; 1 Barnew. & Ad. 604; 2 C. B. 548; 1 Campb. 640, n.; 4 East, 455; 3 Johns. N. Y. 458; 11 *id.* 50; 7 N. Y. 369; 2 Den. N. Y. 139; 1 Vt. 166; 7 Mass. 14; 8 *id.* 46; 10 *id.* 34; 13 *id.* 216; 1 Metc. Mass. 21; 23 Ala. N. s. 320; 1 Cons. So. C. 467; 2 Day, Conn. 437; 2 Root, Conn. 258; 4 Conn. 428; 1 Nott & M'C. So. C. 210; 2 *id.* 65; 1 Ov. Tenn. 438; 3 Call, Va. 373; 26 Me. 217; 5 Humphr. Tenn. 337, 496; 3 Pick. Mass. 83; 6 Cranch, 53; 4 Dev. & B. No. C. 212; 15 N. H. 114; 3 Ind. 289; 7 *id.* 529; Dudl. Ga. 161; Pothier, Obl. pt. 1, c. 1, art. 3, § 6.

Sometimes, when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed. 4 Ad. & E. 605; 11 *id.* 10, 27; 7 Carr. & P. 108; 1 Mann. & R. 218; 3 Taunt. 53; 3 Bingh. N. C. 746; 5 *id.* 341; 8 Mees. & W. Exch. 870; 2 Crompt. & M. Exch. 48, 214; 3 Tyrwh. 907; 14 Pick. Mass. 198; 6 Cush. Mass. 508; 28 N. H. 290; 2 Watts & S. Penn. 235.

13. An executed consideration will not generally be sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation. 3 Bingh. N. C. 10; 6 Mann. & G. 153; 8 *id.* 538; 2 Barnew. & C. 833; 6 *id.* 439; 8 Term, 308; 2 Ill. 113; 14 Johns. N. Y. 378; 22 Pick. Mass. 393; 2 Metc. Mass. 180; 3 *id.* 155; 4 Mass. 574; 12 *id.* 328; 9 N. H. 195; 21 *id.* 544; 7 Me. 76, 118; 20 *id.* 275; 24 *id.* 349, 374; 27 *id.* 106; 1 Caines, 584; 7 Johns. N. Y. 87; 7 Cow. N. Y. 358; 2 Conn. 404.

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons. Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory. 3 Md. 67; 17 Me. 303; 24 Wend. N. Y. 285; 17 Pick. Mass. 407; 1 Speers, So. C. 368. See, in general, the text-books which have been cited *supra.*

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *consideratum est per curiam,* that the plaintiff recover his debt, etc. 3 Bouvier, Inst. n. 3298.

CONSIGN. To send goods to a factor or agent.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignation, is derived from the Latin *consignare,* which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. b. 2, t. 11, c. 1, § 5.

Generally, the consignation is made with a public officer: it is very similar to our practice of paying money into court. See Burge, Suret.

CONSIGNATIO. See CONSIGN.

CONSIGNEE. One to whom a consignment is made.

2. When the goods consigned to him are his own, and they have been ordered to be sent, they are at his risk the moment the consignment is made according to his direction; and the persons employed in the transmission of the goods are his agents. 1 Livermore, Ag. 9. When the goods are not his own, if he accept the consignment, he is bound to pursue the instructions of the consignor: as, if the goods be consigned upon condition that the consignee will accept the consignor's bills, he is bound to accept them, *id.* 139; or if he is directed to insure, he must do so. *id.* 325.

3. It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight. Abbott, Shipp. pt. 3, c. 7, § 4; 3 Bingh. 383; 2 Parsons, Contr. 640.

CONSIGNMENT. The goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or disposed of by the latter for and on account of the former.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare,* to advise). **In Civil Law.** A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. DuCange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument. It is commonly used for the day appointed

for the argument of a demurrer, or errors assigned. 1 Tidd, Pract. 438; 2 *id.* 684, 1122; 1 Sellon, Pract 336; 2 *id.* 385; 1 Archbold, Pract. 191, 246.

CONSIMILI CASU (Lat. in like case). **In Practice.** A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy aliened in fee or for life.

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See CASE; ASSUMPSIT; 3 Sharswood, Blackst. Comm. 51; 3 Bouvier, Inst. n. 3482.

CONSISTORY. In Ecclesiastical Law. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is *public* when the pope receives princes or gives audience to ambassadors; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

CONSISTORY COURT. In English Law. The courts of diocesan bishops held in their several cathedrals (before the bishop's chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. From the sentence of these courts an appeal lies to the archbishop of each province respectively. 2 Stephen, Comm. 230, 237; 3 *id.* 430, 431; 3 Blackstone, Comm. 641; 1 Wooddeson, Lect. 145; Hallifax, An. b. 3, c. 10, n. 12.

CONSOLATO DEL MARE. A code of sea-laws, compiled by order of the ancient kings of Arragon. It comprised the ancient ordinances of the Greek and Roman emperors and of the kings of France and Spain, and the laws of the Mediterranean islands and of Venice and Genoa. See ADMIRALTY It was originally written in the dialect of Catalonia, as its title indicates; and it has been translated into every language of Europe. This code has been reprinted in the second volume of the Collection de Lois Maritimes antérieures au XVIII^e^ Siècle, par J. M. Pardessus, Paris, 1831;—a collection of sea-laws which is very complete. See, also, Riddu's History of Mar. Commerce, 171; Marvin's Legal Bibliography.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols.*) A fund for the payment of the public debt.

Formerly, when a loan was made, authorized by government, a particular part of the revenue was appropriated for the payment of the interest and of the principal. This was called the fund; and every loan had its fund. In this manner the Aggregate fund originated in 1715; the South-Sea fund in 1717; the General fund in 1717; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government. All the regular permanent income of the kingdom flows into this fund.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versâ*. In either case the usufruct is extinct. Leç. El. Dr. Rom. 424.

It may take place in two ways: first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowel.

In Practice. The union of two or more actions in the same declaration.

CONSOLIDATION RULE. In Practice. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. 1 Dall. Penn. 147; 1 Yeates, Penn. 5; 4 *id.* 128; 3 Serg. & R. Penn. 264; 2 Archbold, Pract. 180. The matter is regulated by statute in many of the states.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried.

It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance, 2 Marshall, Ins. 701; Park, Ins. xlix.; see 4 Cow. N. Y. 78, 85; 1 Johns. N. Y. 29; 9 *id.* 262; or against several obligors in a bond. 3 Chitty, Pract. 645; 3 Carr. & P. 58. See 1 Nott & M'C. So. C. 417, n.; 2 *id.* 438; 1 Ala. 77; 5 Yerg. Tenn. 297; 7 Mo. 477; 2 Tayl. No. C. 200; 4 Halst. N. J. 335; 3 Serg. & R. Penn. 262; 19 Wend. N. Y. 63.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amisit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person. 3 Blackstone, Comm. 140.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). **In Criminal Law.** A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. 2 Mass. 337, 538; 4 Metc. Mass. 111; 4 Wend. N. Y. 229;

15 N. H. 396; 5 Harr. & J. Md. 317; 3 Serg. & R. Penn. 220; 12 Conn. 101; 11 Clark & F. Hou. L. 155; 4 Mich. 414.

2. The terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment. 12 Conn. 101; 15 N. H. 396; 1 Mich. 216; Dearsl. Cr. Cas. 337; 11 Q. B. 245; 9 Penn. St. 24; 8 Rich. So. C. 72; 1 Dev. No. C. 357.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence. 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny, which is not indictable. *Per Shaw*, C. J., 4 Metc. Mass. 123. So a conspiracy to induce and persuade a young female, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution. 5 Watts & S. Penn. 461; 2 Den. Cr. Cas. 79. And see 5 Rand. Va. 627; 6 Ala. N. S. 765; 2 Yeates, Penn. 114. So a conspiracy by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price. 1 Dearsl. Cr. Cas. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors. 1 Fost. & F. Cr. Cas. 33.

3. The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment. 1 Cush. Mass. 189. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy. 1 Cush. Mass. 189.

4. A combination to go to a theatre to hiss an actor, 2 Campb. 369; 6 Term, 628; to indict for the purpose of extorting money, 4 Barnew. & C. 329; to charge a person with being the father of a bastard child, 1 Salk. 174; to coerce journeymen to demand a higher rate of wages, 6 Term, 6 19; 14 Wend. N. Y. 9; to charge a person with poisoning another, F. Moore, 816; to affect the price of public stocks by false rumors, 3 Maule & S. 67; to prevent competition at an auction, 6 Carr. & P. 239, have each been held indictable.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime. 2 Mass. 337, 538; 6 *id.* 74; 7 Cush. Mass. 514; 3 Serg. & R. Penn. 220; 8 *id.* 420; 23 Penn. St. 355; 4 Wend. N. Y. 259; 1 Halst. N. J. 293; 3 Zabr. N. J. 33; 3 Ala. 360; 5 Harr. & J. Md. 317. But see 10 Vt. 353.

5. By the laws of the United States, st. 1825, c. 76, § 23, 3 Story, Laws U. S. 2006, a wilful and corrupt conspiracy to cast away, burn, or otherwise destroy any ship or vessel, with intent to injure any underwriter thereon, or the goods on board thereof, or any lender of money on such vessel on bottomry or respondentia, is made felony, and the offender punishable by fine not exceeding ten thousand dollars, and by imprisonment and confinement at hard labor not exceeding ten years.

Consult Russell, Crimes, Greaves ed.; Gabbett, Crim. Law; 2 Bishop, Crim. Law, §§ 149–202.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestable* (Lat. *comes-stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of every thing relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, Dict.

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I.); and question has been frequently made whether the office existed in England before that time. 1 Blackstone, Comm. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc. were added to its other functions. See Cowel; Willcock, Const.; 1 Blackstone, Comm. 356.

High constables were first ordained, according to Blackstone, by the statute of Westminster, though they were known as efficient public officers long before that time. 1 Sharswood, Blackst. Comm. 356. They are to be appointed for each franchise or hundred by the leet, or, in default of such appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Stephen, Comm. 47; Jacob, Law Dict. In some cities and towns in the United States there are officers called high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertain-

ing to the keeping the peace within their town, village, or tithing.

In England, however, their duties have been much restricted by the act 5 & 6 Vict. c. 109, which deprives them of their power as conservators of the peace. 3 Stephen, Comm. 47.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharswood, Blackst. Comm. 356, n. They are authorized to arrest without warrant on a reasonable suspicion of felony, for offences against the peace committed in their presence, and in various other cases. 1 Chitty, Crim. Law, 20–24; 4 Sharswood, Blackst. Comm. 292; ARREST.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellain. Stat. Westm. I, c. 7 (3 Edw. I.); Spelman, Gloss.

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowel; Lambard, Const.

CONSTABLE OF ENGLAND (called, also, *Marshal*). His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, Const. 4.

He was to regulate all matters of chivalry, tournaments, and feats of arms which were performed on horseback. 3 Stephen, Comm. 47. He held the court of chivalry, besides sitting in the *aula regis*. 4 Blackstone, Comm. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by Stafford, Duke of Buckingham, under Henry VIII. His title is Lord High Constable of England. 3 Stephen, Comm. 47; 1 Blackstone, Comm. 355.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the states of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 43. Bell, Dict.; Erskine, Inst. 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowel.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, Gloss.

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rép. Univ.*; Cowel.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See 1 Hayw. No. C. 410.

An exemplification under the great seal of the enrolment of letters patent. Coke, Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of any thing; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTITUENT (Lat. *constituo*, to appoint). He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. In Old English Law. To establish; to appoint; to ordain.

Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du-Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. In Civil Law. An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, Lex.

A sum paid according to agreement. Du-Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a free country which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman.

2. *Constitution*, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *jus circa sacra*, contained in the Code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions thus, the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany. In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism.

3. We now mean by the term constitution, in common parlance, the fundamental law of a free country which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called an organic law. Napoleon I. styled himself Emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and not-written constitutions, analogous to *leges scriptæ* and *nonscriptæ*. These terms do not indicate the distinguishing principle: Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*. Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been exposed in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex nata*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

4. Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, and regarding which they differ,—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Story on the Constitution; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, &c., Philadelphia, 1859; Lieber's article Constitution, in the Encyclopædia Americana; Rotteck's article Constitution, in the Staats-Lexicon, 2d ed.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The supreme law of the United States.

2. It was framed by a convention of the representatives of the people, who met at Philadelphia, and finally adopted it on the 17th day of September, 1787. It became the law of the land on the first Wednesday in March, 1789. 5 Wheat. 420.

The preamble declares that the people of the United States, in order to form a more perfect union, establish justice, insure public tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

3. *The first article* is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the times and places of holding elections, and the time of meeting of congress. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests, and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions: 1st. That the migration or importation of certain classes of persons shall not be prohibited prior to the year 1808. 2d. That the writ of *habeas corpus* shall not be suspended, except in particular cases. 3d. That no bill of attainder or *ex post facto* law shall be passed. 4th. The manner of laying taxes. 5th. The manner of drawing money out of the treasury. 6th. That no title of nobility shall be granted. 7th. That no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

4. *The second article* is divided into four sections. The *first* vests the executive power in the president of the United States, and (as amended) provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

5. *The fourth article* is composed of four sections. The *first* relates to the faith which state records, &c. shall have in other states. The *second* secures the rights of citizens in the several states,—the delivery of fugitives from justice or from labor. The *third*, for the admission of new states, and the

government of the territories. The *fourth* guaranties to every state in the union the republican form of government, and protection from invasion or domestic violence.

The *fifth article* provides for amendments to the constitution.

The *sixth article* declares that the debts due under the confederation shall be valid against the United States; that the constitution and treaties made under its powers shall be the supreme law of the land; that public officers shall be required by oath or affirmation to support the constitution of the United States; and that no religious test shall be required as a qualification for office.

The *seventh article* directs what shall be a sufficient ratification of this constitution by the states.

6. In pursuance of the fifth article of the constitution, articles in addition to, and amendment of, the constitution, were proposed by congress, and ratified by the legislatures of the several states. These additional articles are to the following import:—

The *first* relates to religious freedom; the liberty of the press; and the right of the people to assemble and to petition for redress of grievances.

The *second* secures to the people the right to bear arms.

The *third* provides for the quartering of soldiers.

The *fourth* regulates the right of search, and the manner of arrest on criminal charges.

The *fifth* directs the manner of being held to answer for crimes, and provides for the security of the life, liberty, and property of the citizens.

The *sixth* secures to the accused the right to a fair trial by jury.

The *seventh* provides for a trial by jury in civil cases.

The *eighth* directs that excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The *ninth* secures to the people the rights retained by them.

The *tenth* secures the rights to the states, or to the people the rights they have not granted.

The *eleventh* limits the powers of the courts as to suits against one of the United States.

The *twelfth* points out the manner of electing the president and vice-president.

The following are the dates of the ratification of the constitution by each of the original thirteen states: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January, 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

CONSTITUTIONAL. That which is consonant to, and agrees with, the constitution.

When laws are made in violation of the constitution, they are null and void; but the courts will not declare such a law void unless there appears to be a clear and unequivocal breach of the constitution. The question may arise with regard to both state and United States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state constitution. See 1 Kent, Comm. 249 *et seq.*; Story, Const.

CONSTITUTOR. In Civil Law. He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4. 6. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. DuCange.

A day appointed for any purpose. A form of appeal. Calvinus, Lex.

CONSTRAINT. In Scotch Law. Duress.

It is a general rule, that when one is compelled into a contract there is no effectual consent, though, ostensibly, there is the form of it. In such case the contract will be declared void. The constraint requisite thus to annul a contract must be a *vis aut metus qui cadet in constantem virum*, (such as would shake a man of firmness and resolution). Erskine, Inst. 3. 1. 16; 4. 1. 26; 1 Bell, Comm. b. 3, pt. 1, c. 1, s. 1, art. 1, page 295.

CONSTRUCTION (Lat. *construere*, to put together).

In Practice. Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expressions of the term. Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for. C. 1, § 8; c. 3, § 2; c. 4; c. 5. This distinction needs no higher authority for its accuracy; but it is convenient to adopt the common usage, and consider some common rules and examples on these subjects, without attempting to distinguish exactly cases of construction from those of interpretation.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes; and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of (*ultra sed non contra*) the strict letter. In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their natural, plain, obvious, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear, in either case, from the context.

All instruments and agreements are to be so construed as to give effect to the whole or as large a portion as possible of the instrument or agreement.

Statutes, if penal, are to be strictly, and, if remedial, liberally, construed. Dwarris, Stat. 615 *et seq.* The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly.

In construing statutes of the various states or of foreign countries, the supreme court of the United States adopts the construction put upon them by the courts of the state or country by whose legislature the statute was enacted; but this does not necessarily include subsequent variations of construction by such courts. 5 Pet. 280. See CONFLICT OF LAWS.

In contracts, words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the contract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected. 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it. Cowp. 714.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

Numerous other rules for construction exist, for which reference may be had to the following authorities:—

As to the construction of statutes, 1 Kent, Comm. 460; Bacon, Abr. *Statutes*, J; Dwarris, Statutes; 1 Bouvier, Inst. nn. 86–90; Sedgwick, Stat. and Const. Law; Lieber, Legal and Polit. Hermeneutics.

As to the construction of contracts, Comyns, Chitty, Parsons, Powell, Story, on Contracts; 2 Blackstone, Comm. 379; 1 Bell, Comm. 5th ed. 431; 4 Kent, Comm. 419; Vattel, b. 2, c. 17; Story, Const. §§ 397–456; Pothier, Obligations; Long, Story, on Sales; 1 Bouvier, Inst. nn. 658, 699.

As to the construction of wills, Bythewood, Jarman, Wigram, on Wills; 6 Cruise, Dig. 171; 2 Fonblanque, Eq. 309; Roper, Legacies; Washburn, Real Property.

The following words and phrases have received construction in the cases referred to.

A B, agent. 1 Ill. 172.
A B (seal), *agent for C D.* 1 Blackf. Ins. 242.
A and his associates. 2 Nott & M'C. So. C. 400.
A case. 9 Wheat. 738.
A piece of land. F. Moore, 702; s. c. Ow. 18.
A place called the vestry. 3 Lev. 96; 2 Ld. Raym. 1471.
A slave set at liberty. 3 Conn. 467.
A true bill. 1 Meigs, Tenn. 109.
A two-penny bleeder. 3 Whart. 138.
Abbreviations. 4 Carr. & P. 51; s. c. 19 Eng. C. L. 268.
Abide. 6 N. H. 162.
About. 2 Barnew. & Ad. 106; 5 Me. 482. See 4 Me. 286. *About —— dollars.* 5 Serg. & R. Penn. 402. *About* $150. 23 Me. 121.
Absolute disposal. 2 Ed. Ch. 87; 1 Brown, Parl. Cas. 476; 2 Johns. N. Y. 391; 12 *id.* 389.
Absolutely. 2 Penn. St. 133.
Accept. 4 Gill & J. Md. 5, 129.
Acceptance. There is your bill: it is all right. 1 Esp. 17. If you will send it to the counting-house again, I will give directions for its being accepted. 3 Campb. 179. What! not accepted? We have had the money, and they ought to have been paid; but I do not interfere: you should see my partner. 3 Bingh. 625. The bill shall be duly honored and placed to the drawer's credit. 1 Atk. Ch. 611. See Leigh, Nisi P. 420.
Accepted. 2 Hill, N. Y. 582.
According to the bill delivered by the plaintiff to the defendant. 3 Term, 575.
According to their discretion. 5 Coke, 100; 8 How. St. Tr. 55, n.
Account. 5 Cow. N. Y. 587, 593. *Account closed.* 8 Pick. Mass. 191. *Account stated.* 8 Pick. Mass. 193. *Account dealings.* 5 Mann. & G. 392, 398.
Account and risk. 4 East, 211; Holt, Shipp. 376.
Accounts. 2 Conn. 433.
Acquittance. 7 Carr. & P. 549; 2 Mood. Cr. Cas. 215; 1 Exch. 131; 15 Mass. 526.
Across. 10 Me. 391.
Across a country. 3 Mann. & G. 759.
Act of God. 1 Cranch, 345; 22 Eng. C. L. 36; 12 Johns. N. Y. 44; 4 Add. Eccl. 490.
Acts. Platt, Cov. 334.
Actual cash payment. 34 Penn. St. 344.
Actual cost. 2 Mas. C. C. 48, 393; 2 Stor. C. C. 422.
Actual damages. 1 Gall. C. C. 429.
Adhere. 4 Mod. 153.
Adjacent. Cooke, Dist. Ct. 128.
Adjoining. 1 Term, 21.
Administer. 1 Litt. Ky. 93, 100.
Ad tunc et ibidem. 1 Ld. Raym. 576.
Advantage, priority, or preference. 4 Wash. C. C. 447.
Adverse possession. 3 Watts, Penn. 70, 77, 205, 345; 3 Penn. 134; 2 Rawle, Penn. 305; 17 Serg. & R. Penn. 104; 3 Wend. N. Y. 337, 357; 4 *id.* 507; 7 *id.* 62; 8 *id.* 440; 9 *id.* 523; 15 *id.* 597; 4 Paige, Ch. N. Y. 178; 2 Gill & J. Md. 173; 6 Pet. 61, 291; 11 *id.* 41; 4 Vt. 155; 14 Pick. Mass. 461.
Advice. As per advice. Chitty, Bills, 185.
Affecting. 9 Wheat. 855.
Aforesaid. 1 Ld. Raym. 256, 405.
After paying debts. 1 Ves. Ch. 440; 3 *id.* 738; 2 Johns. Ch. N. Y. 614; 1 Brown, Ch. 34; 2 Schoales & L. Ch. Ir. 188.
Afterwards to wit. 1 Chitty, Crim. Laws, 174.
Against all risks. 1 Johns. Cas. N. Y. 337.
Aged, impotent, and poor people. Preamble to stat. 43 Eliz. ch. 4; 17 Ves. Ch. 373, in notes;

Ambl. Ch. 595; 7 Ves. Ch. 98, n., 423; 16 *id.* 206; Schoales & L. Ch. Ir. 111; 1 P. Will. Ch. 674; s. c. Eq. Cas. Abr. 192, pl. 9; 4 Viner, Abr. 485; Duke, Char. Us. Bridgm. ed. 361; Boyle, Char. 31.

Agree. 24 Wend. N. Y. 285; 5 Hill, N. Y. 256; 13 Barb. N. Y. 147.

Agreed. 1 Rolle, Abr. 518.

Agreement. 7 Eng. C. L. 331; 3 Ball & B. Ch. Ir. 14; Fell, Guar. 262. Of a good quality and a moderate price. 1 Mood. & M. 483; s. c. 22 Eng. C. L. 363.

Aider. East, Pl. Cr. 160.

Aiding and abetting. Act of Cong. 1818, c. 86, § 3; 12 Wheat. 460.

Aliments. Dig. 34. 1. 1.

All. 3 P. Will. Ch. 56; 1 Vern. Ch. 3, 341; Dane, Abr. Index. All debts due to me. 1 Mer. Ch. 541, n.; 3 *id.* 434. All I am worth. 1 Brown, Ch. 487; 8 Ves. Ch. 604. All I am possessed of. 5 Ves. Ch. 816. All my clothes and linen whatsoever. 3 Brown, Ch. 311. All my household goods and furniture, except my plate and watch. 2 Munf. Va. 234. All my estate. Cowp. 299; 9 Ves. Ch. 604. All my real property. 18 Ves. Ch. 193. All my freehold lands. 6 Ves. Ch. 642. All and every other my lands, tenements, and hereditaments. 8 Ves. Ch. 256; 2 Mass. 56; 2 Caines, N. Y. 345; 4 Johns. N. Y. 388. All the inhabitants. 2 Conn. 20. All sorts of. 1 Holt, N. P. 69. All business. 8 Wend. N. Y. 498; 23 Eng. C. L. 398; 1 Taunt. 349; 7 Barnew. & C. 278, 283, 284. All claims and demands whatsoever. 1 Edw. Ch. N. Y. 34. All baggage is at the owner's risk. 13 Wend. N. Y. 611; 5 Rawle, Penn. 179; 1 Pick. Mass. 53; 12 Me. 422; 4 Harr. & J. Md. 317. All civil suits. 4 Serg. & R. Penn. 76. All demands. 2 Caines, N. Y. 320, 327; 15 Johns. N. Y. 197; 1 Ld. Raym. 114. All lots I own in the town of F. 4 Bibb, Ky. 288. All the buildings thereon. 4 Mass. 110; 7 Johns. N. Y. 217. All my rents. Croke Jac. 104. All I am worth. 1 Brown, Ch. 437. All my estate and effects. 4 Eng. L. & Eq. 133.

All actions. 5 Binn. Penn. 457.

All and every. 2 Dev. Eq. No. C. 488.

All liability. 18 N. Y. 502.

All other articles perishable in their own nature. 7 Cow. N. Y. 202.

All that I possess, in doors and out of doors. 3 Hawks, Tenn. 74.

All timber trees and other trees, but not the annual fruit thereof. 8 Dowl. & R. 657; s. c. 5 Barnew. & C. 842.

All two lots. 7 Gill & J. Md. 227.

Also. 4 Rawle, Penn. 69; 2 Hayw. No. C. 161; 4 Maule & S. 60; 1 Salk. 239.

Amongst. 9 Ves. Ch. 445; 9 Wheat. 164; 6 Munf. Va. 352.

And, construed *Or.* 3 Ves. Ch. 450; 7 *id.* 454; 1 Belt, Suppl. Ves. Ch. 435; 2 *id.* 9, 43, 114; 1 Yeates, Penn. 41, 319; 1 Serg. & R. Penn. 141. See DISJUNCTION; *Or.*

And also. 1 Hayw. No. C. 161.

And so on, from year to year, until the tenancy hereby created shall be determined as hereinafter mentioned. 1 Perr. & D. 454. And see 2 Campb. 573; 3 *id.* 510; 1 Term, 378.

And the plaintiff doth the like. 1 Ill. 125.

Annual interest. 16 Vt. 44.

Annually, or in any way she may wish. 2 M'Cord, Ch. So. C. 281.

Any court of record. 6 Coke, 19. See COURT OF RECORD.

Any creditor. 5 Barnew. & Ald. 869.

Any goods. 3 Campb. 321.

Any other fund. 1 Colly. Ch. 693.

Any other matter or thing from the beginning of the world. 4 Mas. C. C. 227.

Any person or persons. 3 Wheat. 631; 11 *id.* 392; 10 How. N. Y. Pract. 79.

Apartment. 10 Pick. Mass. 293.

Apparatus. 9 Bost. Law Rep. 207.

Apparel. Goods and wearing-apparel, in a will. 3 Atk. Ch. 61.

Appeals. 1 Ill. 261.

Appear. 2 Bail. So. C. 51.

Appellate. 1 Ill. 261.

Apply. 2 N. Y. 296.

Apply to payment. 3 Duer, N. Y. 426.

Appropriation. 2 Ill. 314.

Approved paper. 4 Serg. & R. Penn. 1; 20 Wend. N. Y. 431; 2 Campb. 532.

Appurtenances. 1 Serg. & R. Penn. 169; 5 *id.* 110; 8 Johns. N. Y. 2d ed. 47; Comyns, Dig. *Grant*, E 9; Holt, Shipp. 404; 9 Pick. Mass. 293; 12 *id.* 436; 7 Mass. 6; 5 Serg. & R. Penn. 110.

Are. 2 Ball & B. Ch. Ir. 223.

Arrears. Ward, Leg. 219; 2 Ves. Ch. 430.

Arrive. 17 Mass. 188; 28 Law Journ. 316.

As appears by the bond or by the books. 1 Wils. 121, 279, 339; 2 Strange, 157, 1209, 1219.

As appears by the master's allocatur. 2 Term, 55.

As executors are bound in law to do. 2 Ohio, 346.

As follows. 1 Chitty, Crim. Law, 233.

As this deponent believes. 2 Maule & S. 563.

Ass. 2 Mood. Cr. Cas. 3.

Assent to. 4 Gill & J. Md. 5, 129.

Asses—Cattle. 1 Ry. & M. Cr. Cas. 3; 2 Russell, Crim. Law, 498.

Assets. 2 Sandf. N. Y. 201.

Assignment, actual or potential. 5 Maule & S. 228.

Assigns. 5 Coke, 77 *b.*

At. 2 Caines, Cas. N.Y. 158; 6 Paige, Ch. N.Y. 554.

At and from. 1 Marshall, Ins. 261, *a*, 358; 1 Caines, N. Y. 75, 79; 1 Bos. & P. N. R. 23; 4 East, 130.

At any port or places. 1 Marshall, Ins. 191.

At his will. 2 Rolle, Abr. 845; Bacon, Abr. *Estate for Life and Occupancy*, A.

At least. 8 Watts & S. Penn. 470.

At par. 22 Penn. St. 479.

At sea. 3 Hill, N. Y. 118; 7 *id.* 321; 14 Mass. 31; 20 Pick. Mass. 275; 6 Whart. Penn. 247; 8 Am. Law Reg. 362.

At such time and manner. 19 Ves. Ch. 387.

At the risk of the master and owners. 8 N. Y. 375.

At the trial of the cause. 9 Eng. C. L. 186, 202.

At the wholesale factory prices. 2 Conn. 69.

At twenty-one. Payable at twenty-one. 6 Ves. Ch. 245; 7 *id.* 421; 9 *id.* 225; 1 Brown, Ch. 91.

Attention, shall meet. 3 Eng. C. L. 407; 13 *id.* 329.

Attest. 9 Mees. & W. Exch. 404.

Authority—Jurisdiction. 2 W. Blackst. 1141.

Available means. 13 N. Y. 215.

Bag. Croke Car. 511.

Baggage. 6 Hill, N. Y. 586. See BAGGAGE.

Baggage of passengers at the risk of the owners. 19 Wend. N. Y. 234, 251; 21 *id.* 153; 26 *id.* 591; 16 Ohio, 145. See COMMON CARRIERS.

Balance. 2 Jac. & W. Ch. 248.

Balance due on general account. 3 Pet. 430.

Baltic. 3 Campb. 16. See Ry. & M. Cr. Cas. 75; 1 Bingh. 445.

Bank bills—Bank notes. 3 Ill. 301; 17 Vt. 151.

Bank money. 5 Humphr. Tenn. 140.

Bank notes. 5 Mas. C. C. 549; 6 Wend. N. Y. 346, 354.

Bankruptcy. 6 Term, 684.

Bargain and sell. 4 T. B. Monr. Ky. 463.

Bar-keeper. 3 Serg. & R. Penn. 351.

Barley. 4 Carr. & P. 548.

Barrels. 7 Cow. N. Y. 681.

Beans. Bacon, Abr. *Merchant*, etc. I; 1 Mood. Cr. Cas. 323.

Bearing interest. 1 Stark. 452; 2 Eng. C. L. 466.

Beast. 1 Russell, Crim. Law, 568; Bacon, Abr. *Sodomy.*

Beef. 6 Watts & S. Penn. 279.

Before the first day of the term after the action has been commenced. 4 Dall. Penn. 433.

Before the next term. 1 Binn. Penn. 76; 4 Yeates, Penn. 511.
Before the sitting of the court. 5 Mass. 197.
Beginning to keep house. 6 Bingh. 363; 19 Ves. Ch. 543.
Begotten—To be begotten. Coke, Litt. 20 *b*, and n. 3; 3 Leon. 5.
Believe. 2 Wend. N. Y. 298.
Belongs—Belonging. 3 Conn. 467; 11 *id.* 240; 1 Coxe, N. J. 225; 2 Bingh. 76; Chitty, Pract. 475, n.
Benefits of my real estate. 4 Yeates, Penn. 23.
Benevolent purposes. 3 Mer. Ch. 17; Ambl. Ch. Blunt ed. 585, n.
Best of his knowledge and belief. 1 Paige, Ch. N. Y. 404; 3 *id.* 107, 212.
Between. 2 Saund. 158 *b*, n. 6; 14 Me. 201; 1 Mass. 91; 5 Metc. Mass. 439.
Between them. 2 Mer. 70.
Beyond sea. 3 Wheat. 541; 3 Cranch, 177; 14 Pet. 141; 1 Harr. & M'H. Md. 89; 1 Harr. & J. Md. 350; 2 M'Cord, So. C. 331; 3 Mass. 271; 1 Pick. Mass. 263; 9 Serg. & R. Penn. 288; 2 Dall. Penn. 217; 1 Yeates, Penn. 329. See BEYOND SEA.
Beyond seas. 3 Wheat. 343; 9 Serg. & R. Penn. 291.
Bien. 2 Ves. Ch. 163.
Big. 2 Dev. No. C. 115.
Bill of exchange. 1 Russ. & R. 149, 195; 2 Mood. Cr. Cas. 295.
Blubber. 1 Stor. C. C. 603.
Board—Boarding. 2 Miles, Penn. 323.
Boiler. Wright, Ch. Ohio, 143.
Bonâ fide. 1 Leigh, Nisi P. 326.
Book. 2 Campb. 25, 28, n.; 11 East, 244.
Book debt—Book entries. 2 Miles, Penn. 101, 102; 3 Ired. 77, 443; 4 Ired. 110.
Boons. Sugden, Pow. 633, 671.
Bound by surety. 5 Serg. & R. Penn. 329.
Bound with surety. 6 Binn. Penn. 53.
Bounded on the margin. 6 Cow. N. Y. 526.
Bounded on the road. 13 Mass. 259.
Breach of good behavior. 2 Mart. N. S. La. 683.
Brick factory. 21 Pick. Mass. 25.
Buck. 3 Brev. No. C. 9.
Building. 13 Johns. N. Y. 346; 16 *id.* 14; 1 Metc. Mass. 268; 9 Bingh. 305; 5 Mann. & G. 9, 33; 7 Carr. & P. 516.
Burn. 1 Carr. & M. 541; 16 Mass. 105; 5 Cush. Mass. 427; 3 Ired. No. C. 570; 16 Johns. N. Y. 203; 18 *id.* 115.
Business. 1 M. & S. 95.
But. 1 Wms. Saund. 58, n. 1.
Butcher. 1 Barnew. & Ald. 617; 6 Watts & S. Penn. 269, 277.
By act and operation of law. 3 Caines, N. Y. 64. *By surety.* 5 Serg. & R. Penn. 329. *By a certain time.* 1 Hill, N. Y. 519; 3 Penn. 48. *By any other means.* 2 Coke, 46. *By virtue of his office.* 3 Eng. C. L. 425.
By a stream. 3 Sumn. C. C. 170.
By next November. 3 Penn. 48.
By the year. 2 Miles, Penn. 302.
Cabinet of curiosities. 1 Cox, Ch. 77; 1 Brown, Ch. 467.
Came by descent, gift, or devise. 2 Pet. 58.
Cargo. 4 Pick. Mass. 433; 2 Gill & J. Md. 134, 162.
Case—Suit. 2 Murph. No. C. 320.
Catchings. 1 Stor. C. C. 603.
Cattle. 2 Russell, Crimes, 498; 1 Russ. & R. Cr. Cas. 77; 2 East, Pl. Cr. 1074; 1 Leach, Cr. Cas. 72; 2 W. Blackst. 721; 2 Mood. Cr. Cas. 3.
Cause. 1 Belt, Suppl. Ves. Ch. 510. *Cause of action.* Wilkinson, Lim. [49.]
Cease. Coop. Ch. 145.
Cede. 1 Harr. N. J. 181.
Certificate of deposit. 6 Watts & S. Penn. 227.
Chamber or room. 3 Leon. 210.
Chambers. 5 Watts, Penn. 243.
Charged in execution. 4 Term, 367.
Charges, costs, and expenses. 2 Wils. 267; 13 Serg. & R. Penn. 79.
Charitable uses. Boyle, Char. 281; 7 Ves. Ch. 79; 1 Mer. Ch. 86, 92, 93; 1 Sim. & S. Ch. 69; 1 Mylne & C. Ch. 286; 4 Wheat. App. p. 6.
Charity. 9 Ves. Ch. 399.
Chest. 2 Hale, Pl. Cr. 183; Bacon, Abr. *Indictment*, G 3.
Chiefest and discreetest. 13 Ves. Ch. 13.
Child, grandchild, issue, son. See LEGATEE. Ambl. Ch. 397, 701; 5 Burr. 2703; Cowp. 314; 3 Anstr. 684; Lofft, 19; 7 Term, 322; 1 East, 120; 1 Ed. Ch. 64; 2 *id.* 194; 1 Ves. Ch. 290, 335; 2 *id.* 673; 3 *id.* 530; 6 *id.* 43, 345; 7 *id.* 522; 10 *id.* 166, 176, 195; 13 *id.* 340; 1 Cox, Ch. 248, 327; 2 *id.* 184; 1 Ves. & B. Ch. Ir. 422, 462, 469; 2 *id.* 213; 3 *id.* 59, 67, 69, 113; 1 Mer. Ch. 654; 2 *id.* 382; Dick. Ch. 344; 1 Brown, Ch. 55, 530; 2 *id.* 33, 68, 230, 658; 3 *id.* 148, 347, 352, 434; 1 Ball & B. Ch. Ir. 486; Comyns, Dig. App. *Devise of Real Property*, x. 5. 6. 7. 8. 9.; *Devise of Personal Property*, viii. 13.
Children. 3 Paige, Ch. N. Y. 10; 5 Conn. 228; 1 Bradf. Surr. N. Y. 252; 5 Ves. Ch. 530; 1 Ves. & B. Ch. 434; 28 Eng. L. & Eq. 267. To such child, or children, if more than one, as A may happen to be enceinte by me. 17 Ves. Ch. 528. To the children which I may have by A living at my decease. 1 Ves. & B. Ch. Ir. 422.
Child's part. 1 Poph. 148; 1 Rolle, 193; 2 *id.* 104; Croke Jac. 417.
Chromate of iron. 5 Watts, Penn. 34.
Chuck-a-luck. 3 J. J. Marsh. Ky. 133.
Civil action. 1 Binn. Penn. 197; 6 *id.* 5.
Civil suit. 4 Serg. & R. Penn. 76.
Claim. 16 Pet. 538, 575, 576, 604, 615.
Clear. Ambl. Ch. 273; 2 Ves. Sen. Ch. 500; Ward, Leg. 222; 2 Atk. Ch. 376.
Clear deed. 3 Watts & S. Penn. 563, 565.
Clear of all charges and assessments whatever. 4 Yeates, Penn. 386.
Clerk sleeps in the store. 27 Penn. St. 325.
Closing an account. 7 Serg. & R. Penn. 128; 8 Pick. Mass. 187.
Clothes. All my clothes and linen whatsoever. 3 Brown, Ch. 311.
Coal mine. Croke Jac. 150; Noy, 121; Gilbert, Ej. 1, 2d ed. 61; Roscoe, Real Act. 486.
Coasting trade. 3 Cow. N. Y. 713.
Coffer. 2 Hale, Pl. Cr. 183; Bacon, Abr. *Indictment*, G 3.
Cohabitation. 1 Add. Penn. 476; 3 *id.* 277; 2 Tyrwh. Exch. 76; 2 Crompt. & J. Exch. 66; Rogers, Eccl. Law, *Marriage.*
Collateral. Sugden, Pow. 76.
Collectable. 8 Watts, Penn. 361.
Come to. 1 Serg. & R. Penn. 224; 2 Pet. 69, 94.
Commenced. 14 East, 539.
Commerce—Navigation. 9 Wheat. 1.
Commission and guaranty. 3 Whart. Penn. 288.
Commit. 3 C. B. 465, 477.
Commit suicide. 3 C. B. 477.
Commodities. 12 Mass. 256.
Common law. 3 Pet. 447; 1 Gall. C. C. 19.
Complete steam engine. 2 Hall, N. Y. 328.
Concealed. 12 Wheat. 486, 493.
Conclusive. 5 Binn. Penn. 387; 6 *id.* 128; 4 Yeates, Penn. 551.
Conditions performed. 1 Call, Va. 567.
Confidence. Boyle, Char. 319; 2 Penn. St. 133; 20 *id.* 268.
Consent—Submission. 9 Carr. & P. 722.
Consentable lines. 10 Serg. & R. Penn. 114.
Construction. 3 T. B. Monr. Ky. 166.
Containing. 1 Murph. No. C. 348.
Contents unknown. 3 Taunt. 303.
Contract. 3 Ohio St. 229.
Contrary to law. 1 Blackf. Ind. 318.
Convenient speed, or as soon as convenient. 1 Ves. Ch. 366; 19 *id.* 336, 390, n.; 25 Barb. N. Y. 175.

Convey. 3 A. K. Marsh. Ky. 618.
Conveyance. 2 Serg. & R. Penn. 498; 3 Mass. 487.
Convicted. 1 Wheat. 461; 15 East, 570; 7 Mann. & G. 481, 508.
Coppered ship. 8 Pet. 557.
Copper-fastened. 24 Eng. C. L. 415.
Correcting—revising. 15 Me. 205.
Corrupt. 1 Bentham, Ev. 351.
Cost. 2 Wash. C. C. 498.
Costs. Wright, Ch. Ohio, 121. Pay his own costs. 1 Hayw. No. C. 485.
Cotton in bales. 2 Carr. & P. 525.
County aforesaid. 2 W. Blackst. 847.
Court of record. 5 Ohio, 546. See 3 Wend. 267.
Cousins. 2 Brown, Ch. 125; Ward, Leg. 121; 29 Eng. L. & Eq. 509.
Covenants. Provided always, and it is agreed, that the lessor shall find great timber. Bacon, Abr. *Covenant*, A. I oblige myself to pay so much money. Hardr. 178. I am content to give A ten pounds at Michaelmas, and ten pounds at Lady-day. 3 Leon. 119. With usual covenants. 15 Ves. Ch. 528; 3 Anstr. Exch. 700.
Covenants performed, absque hoc. 6 Penn. St. 398.
Credible. Com. 91; s. c. 1 Freem. Ch. 510.
Credible witness. 5 Mass. 219; 12 *id.* 358; 17 Pick. Mass. 134; 2 Bail. So. C. 24; 8 Conn. 254.
Credit. Mutual credit. 1 Atk. Ch. 228; 7 Term, 378; Montague, Set-Off, 48; 8 Taunt. 22; 1 Marsh. 190.
Credit the drawer. 28 Penn. St. 233.
Creditors and subsequent purchasers. 5 Cranch, 165.
Criminal proceeding. 2 Q. B. 1.
Cross. 5 Pick. Mass. 163.
Cruise of three months. 2 Gall. C. C. 526.
Cultivation. 2 N. H. 56.
Curby hock. Oliphant, Horses, 40.
Currency. 1 Ohio, 119.
Current bank money. 5 Humphr. Tenn. 140.
Current bank notes. 1 Ohio, 178. See, also, 1 Ohio, 119, 531; 1 Ill. 152; 3 Litt. Ky. 245; 19 Johns. N. Y. 146; 1 Dall. Penn. 126, 176.
Current lawful money. 1 Dall. Penn. 175.
Current money. 1 Dall. Penn. 126, 176.
Current rate of exchange to be added. 2 Miles, Penn. 442, 443.
Curricle. Anth. N. Y. 114.
Cutting. 1 Russ. & R. Cr. Cas. 104.
Damages. 5 Cow. N. Y. 161.
Damages, costs, and expenses. 12 N. Y. 277.
Damna. Bacon, Abr. *Costs*, L.
Dangerous weapon. 1 Baldw. C. C. 78; 2 Curt. C. C. 241; 3 Wash. C. C. 440; 1 Ired. No. C. 76; 8 *id.* 407; 9 *id.* 391.
Dangers of the navigation. 9 Watts, Penn. 87.
Date. Coke, Litt. 46 *b*, note 8; Bulstr. n. 177; Style, 382; Comyns, Dig. *Estates*, G 8, *Bargain and Sale*, B 8, *Temps*, A; Viner, Abr. *Estates*, Z *a*, *Time*, A; 2 Parsons, Contr. 175–178.
Day (fraction of). 1 Cow. N. Y. 594; 6 *id.* 611; 1 Nott & M'C. So. C. 405; 3 Penn. 245.
Day of the date. Coke, Litt. 46 *b*, note 8; Powell, Powers, 498 *et seq.* to 533. See *Date*, above.
Days. Running days. Working days. 1 Bell, Comm. 5th ed. 577.
Daytime. 9 Mass. 154.
Dealings. 1 Mood. & M. 137; 3 Carr. & P. 85.
Death. Swanst. Ch. 161.
Debt, contracted. 2 Barnew. & C. 762; 9 Eng. C. L. 236.
Debts due me at my decease. 9 Sim. Ch. 16.
Debts now due. 3 Leigh, Va. 389. See 4 Rawle, Penn. 367.
Declare. 3 Coke, 82 *b*; Coke, Litt. 76 *a*, 290 *b*; 3 Term, 546.
Deed. A good and sufficient deed. Wright, Ch. Ohio, 644. A good and sufficient warranty deed. 15 Pick. Mass. 546.
Default. Platt, Cov. 335.
Definitive. 1 Watts, Penn. 257.
Delivered. 7 Dowl. & R. 131; 16 Eng. C. L. 277; 7 Term, 381.
Demands in full. 9 Serg. & R. Penn. 123.
Demise. 2 Caines, N. Y. 188; 8 Cow. N. Y. 36; 8 Mass. 201; 4 Taunt. 329.
Depart to. 3 Maule & S. 461.
Depending. 5 Coke, 47, 48; 7 *id.* 30; 9 Barnew. & C. 755; 8 *id.* 635; 4 Bingh. 561.
Deponent believes. 2 Strange, 1209, 1226; 2 Burr. 655; 1 Wils. 231.
Descendants. 3 Brown, Ch. 367; 2 Bradf. Surr. N. Y. 413.
Descent. 2 Pet. 94; 1 Serg. & R. Penn. 224; 11 *id.* 232.
Desire. 1 Caines, N. Y. 84; 1 Brown, Ch. 489.
Deviation. 3 Chitty, Com. Law, 471.
Devise. All messuages, lands. 17 Ves. Ch. 64.
Devolve. 1 Mylne & K. Ch. 647.
Die by his own hands. 5 Mann. & G. 639.
Diligent inquiry. 1 Meigs, Tenn. 70.
Discharge. Her receipt to be a sufficient discharge. 3 Brown, Ch. 362.
Discharge of all demands. Ward, Leg. 222; 2 Vern. Ch. Raithb. ed. 114.
Discount—Discounted. 2 Cow. N. Y. 376; 15 Johns. N. Y. 168; 19 *id.* 332; 8 Wheat. 338; 35 Penn. St. 223; 4 Yeates, Penn. 223.
Discounting. 5 Mann. & G. 590.
Disfiguring. Cheves, So. C. 157.
Disparagement. 1 Ired. Eq. No. C. 232.
Dispose of. 1 Watts, Penn. 386; 14 Pet. 529; 3 Atk. Ch. 287; Roberts, Wills, 3, App. note 3.
Disposing mind and memory. 2 South. N. J. 454.
Distiller. 1 Pet. C. C. 180; 2 Wheat. 248.
Distribute. 11 Serg. & R. Penn. 232.
Divide. Boyle, Char. 291.
Division. 4 Term, 224, 459.
Do the needful. 4 Esp. 65, 66.
Doctor. 2 Campb. 441; 4 E. D. Smith, N. Y. 1.
Domus. 4 Leon. 16.
Doth bargain and sell. 4 T. B. Monr. Ky. 463.
Down the said creek with the several meanders thereof. 2 Ohio, 309.
Due. 3 Leigh, Va. 389; 4 Rawle, Penn. 307.
Due A B. 2 Penn. 67.
Due A B $94 on demand. 5 Day, Conn. 337. And see 2 Cow. N. Y. 536.
Due course of law. 3 Cranch, 300; 5 *id.* 363; 1 Wheat. 447.
Due security. Saxt. Ch. N. J. 259.
Duly honored. 7 Taunt. 164, 167; 2 Eng. C. L. 63.
Dunce. Croke Car. 382; 1 Rolle, Abr. 55; Bacon, Abr. *Slander*, I.
Dying by his own hands. 5 Mann. & G. 639.
Dying without children. 5 Day, Conn. 517.
Dying without issue. 3 East, 303, 491; 12 *id.* 253; 1 Ves. Jr. 562; 10 Ves. Ch. 562; 17 *id.* 482.
Dying without lawful issue. 10 Johns. N. Y. 12; 5 Day, Conn. 20; 2 Brown, Ch. 553.
Each. 1 Barnew. & C. 682; 8 Carr. & K. 184; 4 Watts, Penn. 51; 10 Serg. & R. Penn. 33.
Eadem. Coke, Litt. 20 *b*.
Effects. 13 Ves. Ch. 39; 15 *id.* 326, 507; Cowp. 299; 1 Hill, So. C. 155. Estates and effects. 1 Ves. & B. Ch. Ir. 406; 1 East, 53; 11 *id.* 290; 1 Russ. & R. Cr. Cas. 66.
Emigrant laborers. 2 Mann. & G. 574, 589; 40 Eng. C. L. 520, 528.
Employed by him. 11 N. Y. 593.
Ended. 10 Serg. & R. Penn. 391.
Engagement. 15 Johns. N. Y. 385, 390.
Entreat. 2 Madd. Ch. 458; 2 Ves. & B. Ch. 378.

Equally. Cowp. 657; 3 Ves. Ch. 260; Dougl. 760; 9 East, 276.

Equally to be divided. 1 Roper, Leg. 266; 1 Atk. Ch. 494; 1 Wils. 341; 3 Brown, Ch. 25; 5 Ves. Ch. 510; Add. Penn. 310; 3 Serg. & R. Penn. 135; 1 Des. So. C. 329.

Erect. 3 Madd. Ch. 306; 2 Ves. 181, 247; 8 *id.* 191; Ambl. Ch. 751; 1 Brown, Ch. 444.

Erection. 9 Carr. & P. 233.

Erections and improvements. 2 Mann. & G. 756, 757; 40 Eng. C. L. 612.

Errors excepted. Gower, Partn. 136; 3 Brown, Ch. 266.

Establishing. 3 Madd. Ch. 306; Boyle, Char. 93; 2 Cox, Ch. 387; s. c. 4 Brown, Ch. 326.

Estate. 3 Cranch, 97; 3 Yeates, Penn. 187; 2 Binn. Penn. 20; 6 *id.* 97; 12 Serg. & R. Penn. 54; 6 Johns. N. Y. 185; 1 Wash. Va. 96; 1 Call, Va. 127; 3 *id.* 306; 2 Nott & M'C. So. C. 380; 1 Salk. 236; 1 Term, 659, n.; 6 *id.* 610; 11 East, 246; 2 Ves. & B. Ch. Ir. 222; 2 Atk. Ch. 38; 3 *id.* 486; Ambl. Ch. 155, 216; 12 Mod. 592; 8 Ves. Ch. 604; 9 *id.* 137; 19 *id.* 195; 1 Cox, Ch. 362. Temporal estate. 8 Ves. Ch. 617. All the residue of my estate of every name and kind. 4 Bost. Law Rep. 256.

Every of them. 12 Serg. & R. Penn. 158.

Evidence—Conclusive evidence. 1 Leigh, Nisi P. 307.

Except what shall be mentioned hereafter. 1 T. B. Monr. Ky. 399.

Excepting. Perkins, § 439; Crabb, Real Prop. 157.

Exclusive of costs. 1 Edw. Ch. N. Y. 483.

Execute. 2 Green, N. J. 350.

Expectation. Boyle, Char. 319.

Expenses. 15 Serg. & R. Penn. 55.

Extend. 1 Paine, C. C. 385.

Fac-similes. 7 Mann. & G. 399.

Factory prices. 2 Conn. 69; 2 Mas. C. C. 89, 90.

Factum. 1 Leon. 310.

Fair value. 24 Eng. L. & Eq. 328.

Faithful. 12 Pick. Mass. 303.

Falsely. 2 Maule & S. 379; Noy, 35; Ow. 51.

Family. Coop. Ch. 117; 8 Ves. Ch. 604; 15 Eng. L. & Eq. 202; 11 Paige, Ch. N. Y. 159.

Farcy. Oliphant, Horses, 42.

Farm. 6 Term, 345.

Father, on the part of the. 11 Serg. & R. Penn. 224.

Feeder. 13 Pick. Mass. 50.

Fifty pounds (50*l.*). Sid. 151.

Filled. 1 Ill. 70.

Final. Final and conclusive. 5 Binn. Penn. 387; 6 *id.* 128. Final judgment. 2 Pet. 264, 464. Final decree. 8 Wend. N. Y. 242. Final settlement and decree. 1 Halst. N. J. 195; 14 *id.* 396; 17 Serg. & R. Penn. 59, 340; 1 Penn. 282; 2 Pet. 464.

Final process. 6 Pet. 313.

Fine. 5 Mees. & W. Exch. 535.

Firmly. 4 Serg. & R. Penn. 135; 1 Browne, Penn. 258.

First-born son. 1 Ves. Sen. Ch. 290.

First cousin or cousins german. 4 Mylne & C. Ch. 56.

First had and obtained. 1 Serg. & R. Penn. 89.

First or sterling cost. 1 Stu. Low. C. 215.

Fixed furniture. 6 Carr. & P. 653.

Flats. 8 Watts & S. Penn. 442.

Flock. Inst. 4. 3. 1.

Flock of sheep. Inst. 2. 20. 18.

Fold course. Sheppard, Touchst. 93; Coke, Litt. 6.

For. Dougl. 688; 1 Wms. Saund. 320, n. 4; Willes, 157.

For and in consideration of —— dollars. 6 Vt. 411; 7 *id.* 522.

For such times as we think fit. 1 Chitty, Com. Law, 495.

For value received. 18 Johns. N. Y. 60; 8 Dowl. & R. 163; s. c. 5 Barnew. & C. 501.

For which he has not accounted. 4 Burr. 2126; 1 Term, 716.

For whom it may concern. 1 Pet. 151.

Foreign bills. 19 Johns. N. Y. 146.

Foreign part, place. 2 Gall. C. C. 4; 19 Johns. N. Y. 375; 4 Hall, Law Journ. 101.

Foreign state. 5 Pet. 1.

Foreign vessel. 1 Gall. C. C. 58.

Foreign voyage. 1 Gall. C. C. 55, 142.

Foreigner. 1 Pet. 349.

Forever. 6 Cruise, Dig. 281; 4 Dane, Abr. c. 129, art. 2, § 14.

Forthwith. 1 Mood. & M. 300; s. c. 22 Eng. C. L. 313; 9 Carr. & P. 706; s. c. 38 Eng. C. L. 299, 301; 12 Ad. & E. 672; s. c. 40 Eng. C. L. 158, 160, 161, 162; 7 Mann. & G. 493.

Forwards and backwards. 2 Bos. & P. N. R. 434.

Four mills. 1 Mod. 90.

Fourth part of house in N. Croke Eliz. 286; 1 Strange, 695.

Fowl. 1 Russ. Crim. Law, 568.

Frame house filled with bricks. 7 Wend. N. Y. 270.

Fraudulently. Willes, 584; 1 Chitty, Plead. 376.

Free. 1 Wheat. 335; 2 Salk. 637.

Free of average. 16 East, 214.

Free of particular average. 6 East, 14; 15 *id.* 559; Code de Comm. art. 409.

Free on board a foreign ship. 3 Campb. 270.

Freely to be enjoyed. Cowp. 352; 3 Burr. 1895; 11 East, 220.

Freight. 1 Mas. C. C. 11, 12.

From. 1 Marshall, Ins. 261 *a*; 2 Cow. N. Y. 605, 606, n. 518; 24 Barb. N. Y. 9; 15 Mass. 193; 1 Serg. & R. Penn. 411; 3 *id.* 496; 6 Watts & S. Penn. 328; 5 Term, 283; 2 Wms. Saund. 158 *b*, n. 6; 5 Comyns, Dig. 335; 4 Cruise, Dig. 72; Greenleaf, Cas. 9.

From and after. 9 Cranch, 104; 4 Term, 659.

From and after the passing of the act. 4 Term, 660.

From the date. 15 Serg. & R. Penn. 135; 2 Parsons, Contr. 175, 177.

From the day of the date. Cowp. 717, 725.

From 1000 *to* 3000 *bushels of potatoes.* 4 Me. 497.

From thenceforth. 2 Mer. Ch. 431.

Front and rear. 10 Paige, Ch. N. Y. 386.

Front to the river. 6 Mart. La. 19, 228, 229; 9 *id.* 656; 8 La. N. S. 576.

Full and free. 1 Wheat. 335.

Full cargo. 7 Taunt. 272; 15 Mees. & W. Exch. 737.

Fully. Powell, Mort. 83, 858.

Fur. 7 Cow. N. Y. 202.

Furniture. Ambl. Ch. 605; 3 Ves. Ch. 311; 4 Term, 206; 1 Johns. Ch. N. Y. 329. Furniture at —— ——. 3 Madd. Ch. 276.

Future. 7 Watts & S. Penn. 305; 2 Penn. St. 146.

Future conveyances. 2 Penn. St. 146.

Future increase. 3 Yerg. Tenn. 546. See 2 Bibb, Ky. 76; 4 Hen. & M. Va. 283.

Gamble. 2 Yerg. Tenn. 472.

Gelding—Horse. 3 Humphr. Tenn. 323.

Geldings—Cattle. 1 Leach, Cr. Cas. 73, n.

Gentlemen. 2 Younge & C. Ch. 683; 21 Jur. 152.

Gift. I give this note to A. 4 Ves. Ch. 565. I return to A his bond. 3 Ves. Ch. 231.

Give. 2 Caines, N. Y. 188; 7 Johns. N. Y. 258; 11 *id.* 122; 2 N. Y. 153; 5 Me. 227.

Give and grant. 1 Hayw. No. C. 251.

Given. 1 Harr. N. J. 286.

Giving testimony in a suit. 3 Mart. La. cond. ed. 157.

Giving way. 10 Jur. 1065.

Glass eye. Oliphant, Horses, 44.

Glass with care, this side up. 11 Pick. Mass. 41.

Good. 5 Mees. & W. Exch. 535; 14 Mo. 9.
Good and lawful men. 1 Blackf. Ind. 396.
Good and sufficient deed. Wright, Ch. Ohio, 644. Good and sufficient warranty deed. 15 Pick. Mass. 546; 20 Johns. N. Y. 130; 4 Paige, Ch. N. Y. 628; 9 N. Y. 535.
Good barley. 5 Mees. & W. Exch. 535; 2 Parsons, Contr. 4, n.
Good custom cowhide. Brayt. Vt. 77.
Good merchantable goods. 3 Campb. 462.
Good note. 7 Vt. 67.
Good security. 9 Johns. N. Y. 43.
Good title. 14 Eng. L. & Eq. 350.
Good will. 7 Abb. Pr. N. Y. 202.
Good work. Wright, Ch. Ohio, 471.
Goods. 1 Ves. Jr. 237; 2 *id.* 163; 11 *id.* 666; 1 Atk. 171–177, 180, 182; 3 *id.* 63; 1 P. Will. Ch. 267; 2 *id.* 302; 1 Brown, Ch. 127; 7 Taunt. 191; 2 Barnew. & Ald. 327; 4 *id.* 206; 9 East, 215; 5 Mas. C. C. 544; 1 Marshall, Ins. 319.
Goods and chattels. 1 Yeates, Penn. 101; 2 Watts, Penn. 61; 2 Barnew. & Ald. 259, 327, 335; 8 Coke, 33; 6 Bingh. 363; 4 Moore & P. 36; 1 Ves. Sen. Ch. 363; 1 Atk. Ch. 165; 2 East, Pl. Cr. c. 16, s. 37.
Goods and movables. 1 Yeates, Penn. 101.
Government or other securities. 9 Sim. Ch. 104.
Government security. 3 Younge & C. Ch. 397.
Grange. Coke, Litt. 5; Sheppard, Touchst. 93; Plowd. 197.
Grant and demise. 4 Wend. N. Y. 502; 8 Cow. N. Y. 36; 9 Ves. Ch. 330.
Grant, bargain, sell. 4 Dall. Penn. 441; 2 Binn. Penn. 99; 1 Rawle, Penn. 377; 1 Serg. & R. Penn. 50, 438; 4 Kent, Comm. 460.
Grant, bargain, sell, alien, and confirm. 2 Caines, N. Y. 188; 7 Johns. N. Y. 258; Comyns, Dig. *Guaranty*, A.
Grantee. 1 Cow. N. Y. 509.
Ground. 1 Belt, Suppl. Ves. 510.
Ground-rents. 1 Mer. Ch. 26; 2 Strange, 1020; 1 Brown, Ch. 76.
Growing. 4 Leon. 36.
Gutta serena. Oliphant, Horses, 44.
Habitable repair. 2 Mood. & R. 186.
Half a year. 1 N. Y. Rev. Stat. 606.
Half-mile. 9 Barnew. & C. 774.
Has bargained and sold. 4 Cow. N. Y. 225.
Have. 2 Benl. & D. 34.
Having. 2 Ves. Ch. 427; 11 Ad. & E. 273; 39 Eng. C. L. 80.
Having children. 7 Term, 322; 7 Ves. Ch. 453.
He has removed land-marks. 10 Serg. & R. Penn. 18. See 1 Ala. 138.
He is a corrupt old tory. 1 Ala. 212.
He is forsworn. 1 Caines, N. Y. 347.
He is perjured. 1 Caines, N. Y. 347; 2 *id.* 91.
He keeps false books, and I can prove it. 5 Johns. N. Y. 476; 17 *id.* 217.
He paying thereout. Dick. Ch. 444; 3 East, 590.
He shall be well satisfied. 2 Johns. N. Y. 395.
He swore a false oath, and I can prove it. 2 Binn. Penn. 60; 2 Dall. Penn. 58; 4 Bibb, Ky. 99.
He swore a lie before the church session, and I can prove it. 1 Penn. St. 12.
Head of a family. 2 How. 581, 590.
Heir male. 4 Ves. Ch. 326, 794.
Heirs. 2 Tayl. No. C. 484; 3 Wend. N. Y. 503; 18 N. Y. 412.
Heirs at law. 4 Rand. Va. 95.
Heirs female. Coke, Litt. 24 *b*, n. 3; 5 Brown, Parl. Cas. 93; Fearne, Cont. Rem. App. No. 1.
Heirs of the body. 2 Bligh, 49. See 3 Term, 373; 4 *id.* 88, 300; 3 Ves. Ch. 257; 18 *id.* 340.
Heirs of the wife. 3 Yerg. Tenn. 96.
Heirs of them. 21 Penn. St. 343.
Henceforth. 8 Serg. & R. Penn. 133.
Her. 1 Des. So. C. 353.
Her increase. 1 Ired. No. C. 460.
Her part aforesaid. 4 Dowl. & R. 387.
Hereafter. 15 N. Y. 595.
Hereditament. 1 Salk. 238; 3 Term, 358; 7 *id.* 558; 2 Bos. & P. 247, 251; 6 Nev. & M. 441; 4 Ad. & E. 805.
Hereinafter—Hereinbefore. 1 Sim. Ch. 173.
Hides. 7 Cow. N. Y. 202.
High seas. 1 Russ. & R. Cr. Cas. 243; 2 Leach, Cr. Cas. 109; 3 Mas. C. C. 290.
Him or his. 2 Ves. Ch. 213; 5 Barnew. & Ad. 689.
Hire. 11 N. Y. 593.
Hiring. 6 Term, 452.
Holiday. 4 Clark & F. Hou. L. 234.
Homestead—Homestead farm. 7 N. H. 241; 15 Johns. N. Y. 471.
Hope. Boyle, Char. 319.
Horse. 2 Ill. 304.
Horse—Gelding. 3 Humphr. Tenn. 323.
Horse, Mares, and Colts—Cattle. 2 East, Pl. Cr. 1074; 1 Leach, Cr. Cas. 72.
Hotel-keeper. 1 Carr. & M. 458.
House. 7 Mann. & G. 66, 122.
House I live in and garden to B. 2 Term, 298.
Household furniture. 2 Hall, N. Y. 490; 21 Eng. L. & Eq. 452.
Household goods. 3 Ves. Ch. 310; 1 Johns. Ch. N. Y. 329; 3 P. Will. Ch. 335.
I guaranty the payment of the within note at the insolvency of the drawers. 5 Humphr. Tenn. 476.
I return A his bond. 3 Ves. Ch. 231.
I warrant this note good. 14 Wend. N. Y. 231.
If. Sheppard, Touchst. 123; Coke, Litt. 204, 214 *b*.
Immediate. 2 Lev. 77; 7 Mann. & G. 493; 29 Penn. St. 198.
Immediately. 4 Younge & C. Ch. 511; 8 Mees. & W. Exch. 281.
Immovables. Ward, Leg. 210.
Impedimentum. Bacon, Tr. 211.
Impetitio. Bacon, Tr. 211.
Implements. 9 Bost. Law Rep. 207.
Imprimis. 3 Eng. L. & Eq. 26.
Improvement. 4 Pick. Mass. 204.
Improvidence. 14 N. Y. 449.
In actual military service. 3 Curt. C. C. 522; 7 Eng. Eccl. 496.
In all the month of May. 3 Wash. C. C. 140.
In case of the death. Swanst. Ch. 162.
In current bank notes. 1 Ohio, 178. See, also, 1 Ohio, 119, 531; 1 Ill. 152; 2 Litt. Ky. 245; 1 Dall. Penn. 126, 176; 19 Johns. N. Y. 146.
In default of such issue. 7 East, 521; 3 Term, 484.
In fullest confidence. 1 Turn. & R. 143, 157.
In like manner. Ward, Leg. 246; 5 Ves. Ch. 465.
In money or negroes. 4 Bibb, Ky. 97.
In the occupation of. 2 Bingh. 456; 1 Barnew. & C. 350.
Income. 9 Mass. 372; 1 Metc. Mass. 75; 4 Hill, N. Y. 20; 7 *id.* 4; 3 Du. N. Y. 426.
Inde. Coke, Litt. 82 *b*.
Indebted. 15 Serg. & R. Penn. 142; 17 *id.* 285; 3 Caines, N. Y. 323.
Indefeasible title. 3 Bibb, Ky. 317.
Indirect. 2 Gill & J. Md. 382.
Individually. "Personally," not "severally." 2 Sandf. Ch. 257.
Indorse. 7 Pick. Mass. 117.
Infamous crime. 1 Mood. Cr. Cas. 34, 38.
Inferior tradesmen. 1 Ld. Raym. 149; Comyn, 26; 5 Mod. 307; Bacon, Abr. *Costs*, B.
Inhabitants of a neighborhood. 10 Pick. Mass. 367.
Inn. See INN.
Insolvent circumstances. 1 Chitty, Bills, 120; M'Clel. & Y. Exch. 407.
Instantly. 3 Perr. & D. 52; 8 Dowl. 157.
Instrument. 2 Carr. & P. 235; 2 Den. Cr. Cas. 472.

Instrument in writing. 18 Mo. 445.
Intended to be recorded. 2 Rawle, Penn. 14.
Intent to defraud—Intent to deceive. Roberts, Fraud. Conv. 30. And see 8 Johns. N. Y. 446; 12 *id.* 320; 2 Johns. Ch. N. Y. 35; 4 Wheat. 466.
Intents and purposes. To all intents and purposes. 11 Ves. Ch. 530.
Investment. 15 Johns. N. Y. 384, 392.
Irregularity. 1 Cow. N. Y. 735 *b.*
Irreparable. 3 Mart. N. S. La. 25.
Is indebted to the plaintiff in trover. 1 H. Blackst. 218.
Is indebted to the plaintiff upon promises. 2 Dougl. 467. And see Say, 109.
Issuably. 3 Chitty, Pract. 705.
Issue. 3 Ves. & B. Ch. 67; 3 Ves. Ch. 257, 340; 7 *id.* 522; 13 *id.* 340; 1 Dall. Penn. 47; 1 Yeates, Penn. 332; 1 Edw. Ch. N. Y. 41; 1 Cox. Ch. 38; 9 Eng. L. & Eq. 193. Failure of issue. 1 Ball & B. Ch. Ir. 1. Die without issue. 17 Ves. Ch. 482.
It shall and may be lawful. 1 Edw. Ch. N. Y. 84.
It shall be lawful for the court. 1 Johns. Ch. N. Y. 491.
Ita quod. 2 Ld. Raym. 760.
Jewelry. 14 Pick. Mass. 370. See, beyond, *Trinkets.*
Jewels. Ward, Leg. 221; Mosel. Ch. 112.
Jockey. 3 Scott, N. S. 584.
Joint and equal proportions. Jointly. Ambl. Ch. 656; 1 Brown. Ch. 118; 2 Roper, Leg. 267.
Joint and several. 2 Day, Conn. 442; 1 Caines, Cas. N. Y. 122; 1 Const. So. C. 486; 1 Cox, Ch. 200; 4 Des. So. C. 148; 7 Serg. & R. Penn. 356.
Judicial decision. 1 Sandf. N. Y. 78.
Judicial proceedings. 5 Ohio, 547; 3 Md. 248; 4 *id.* 451; 6 *id.* 668; 7 *id.* 325; 9 *id.* 204, 325; 10 *id.* 1; 2 La. 438; 3 La. Ann. 551; 5 *id.* 519.
Junior. 8 Johns. N. Y. 549; 10 Paige, Ch. N. Y. 170; 8 Conn. 293.
Just debts. 1 Binn. Penn. 209; 9 Mass. 62; 1 Den. N. Y. 508; 9 N. Y. 398.
Justifiable cause. 1 Sumn. C. C. 194.
Kept. 5 Ill. 168.
Kill. (A stream.) 1 N. Y. 96.
Kin. Next of kin. 15 Ves. Ch. 109, 583; 3 Brown, Ch. 355. Next of kin or heir at law. 4 Ves. Ch. 469. Next of kin, in equal degree. 12 Ves. Ch. 433.
King's enemies. 1 Leigh, Nisi P. 509.
Knocked down. 7 Hill, N. Y. 431.
Knowing and being privy to. Platt, Cov. 338.
Laborer. 1 La. 268.
Lamb—Mutton. 1 Mood. Cr. Cas. 242. And see Russ. & R. Cr. Cas. 497.
Lampooner. 3 Lev. 248.
Lands. 10 Paige, Ch. N. Y. 140.
Last past—August last past. 3 Cow. N. Y. 70.
Last sickness. 20 Johns. N. Y. 502.
Last will. 7 Term, 138.
Law charges. 3 Mart. La. 282.
Law of the land. 2 Yerg. Tenn. 554; 6 Penn. St. 87, 91; 4 Dev. No. C. 1.
Lawful. Lawful heir. 2 Term, 720. Lawful deed of conveyance. 2 Serg. & R. Penn. 498; Coxe, N. J. 106. Lawful money. 1 Yeates, Penn. 349; 1 Dall. Penn. 126, 176. Shall be lawful. 2 Dowl. & R. 172; 4 Barnew. & Ald. 271; 1 Barnew. & C. 8, 35. Lawful title. 1 Blackf. Ind. 380; 2 Me. 22; 10 Johns. N. Y. 266. Lawful current money of Pennsylvania. 1 Dall. Penn. 124.
Lawfully demanded. 2 Maule & S. 525.
Leasehold ground rents. Ward, Leg. 222; 1 Brown, Ch. 76.
Leaving children. 6 Term, 307; 7 *id.* 332. And see 7 Ves. Ch. 453; 9 *id.* 204; 27 Eng. L. & Eq. 402. See *Having children.*
Legal heir. 24 Penn. St. 168.
Legal representatives. 3 Ves. Ch. 486; 3 Brown, Ch. 224; 1 Yeates, Penn. 213; 2 *id.* 585; 2 Dall. Penn. 205; 6 Serg. & R. Penn. 83; 3 Bradf. Surr. N. Y. 45; 1 Anstr. Exch. 128; 6 Eng. L. & Eq. 99.
Lend. 1 Hill, Ch. So. C. 37.
Lent. Bacon, Abr. *Assumpsit,* F; 2 Wils. 141.
Let. 5 Whart. Penn. 278.
Level. 5 Ad. & E. 302; 4 Nev. & M. 602.
Life estate. £500 to the sole use of N, or of her children, forever. 1 Cox, Ch. 341. See 12 Ves. Ch. 295; 13 *id.* 445, 486; 2 Ed. Ch. 323; 1 Rose, Bank. 200; Ambl. Ch. 499; 4 Brown, Ch. 542; 1 Bay, So. C. 447.
Limit and appoint. 5 Term, 124.
Linen. 3 Brown, Ch. 311.
Literary composition. Eden, Inj. 324.
Live and dead stock. Ward, Leg. 220; 3 Ves. Ch. 311.
Livelihood. 3 Atk. Ch. 399.
Living together. 1 Add. Eccl. 476; 3 *id.* 277; 2 Tyrwh. 76; 2 Crompt. & J. Exch. 66; Rogers, Eccl. Law, *Marriages.*
Loaded arm. 5 Carr. & P. 159; 7 *id.* 242; 1 Carr. & K. 530; s. c. 47 Eng. C. L. 530.
Loaf sugar. 1 Sumn. C. C. 159.
Locate. 6 How. Pr. N. Y. 37.
Lost or not lost. 1 Marshall, Ins. 332; Park, Ins. 25; 5 Burr. 2803; Weskett, Ins. 345.
Lot No. 54. 1 Vt. 336; 18 Johns. N. Y. 107; 5 N. H. 58.
Lots. 4 Ohio, 5.
Luggage. 28 Law Journ. 385.
Lying at the wharf. 2 M'Cord, So. C. 105.
Made. 1 Cranch, 239.
Made his note to the plaintiff for $760. 1 Ill. 122.
Magistrate. 13 Pick. Mass. 523.
Maintenance. 2 Conn. 155; 4 *id.* 558; 2 Sandf. Ch. N. Y. 91. See *Support.*
Make over and grant. 3 Johns. N. Y. 484; 18 *id.* 60.
Mange. Oliphant, Horses, 46.
Mankind. Fort. 91.
Mare. 1 Leach, Cr. Cas. 72; 2 W. Blackst. 721; 2 East, Pl. Cr. 1074.
Mariner or seaman. 2 Curt. Eccl. 336.
Mark. Trade mark. 19 Pick. Mass. 214.
Married. Dying unmarried; without being married, and having children. 1 Roper, Leg. 412; 3 Ves. Ch. 450, 454; 7 *id.* 454.
Material issue. 6 How. Pr. N. Y. 145; 4 Sandf. N. Y. 668.
Matter in controversy. 2 Yeates, Penn. 276; 1 Serg. & R. Penn. 269; 5 Binn. Penn. 522; 2 Dall. Penn. 260, n.; 3 *id.* 404.
Matter in dispute. 3 Cranch, 159.
Matters in difference. 5 Mass. 334.
May. 1 Wms. Saund. 58, n. 1; 5 Johns. Ch. N. Y. 101; 5 Cow. N. Y. 195; 22 Barb. N. Y. 154; 14 Serg. & R. Penn. 429; 1 Pet. 46; 1 Eng. C. L. 46. May assign. May suggest. Id.; stat. 8 & 9 W. III. ch. 11, § 8.
Meadows. 5 Cow. N. Y. 216; Coke, Litt. 4 *b.*
Means. Platt, Cov. 334, 335.
Medals. Ward, Leg. 221; 3 Atk. Ch. 201.
Men. 2 Parsons, Contr. 10.
Merchandise. 8 Pet. 277.
Merchantable. 3 Campb. 462; 5 Me. 419.
Merchantable quality. 20 Wend. N. Y. 61.
Merits. 3 Watts & S. Penn. 273.
Mess. 2 Russell, Crim. Law, 360.
Mess pork of Scott & Co. 2 Bingh. N. C. 668.
Messuage and house. Croke Eliz. 89; 2 Chanc. Cas. 27; 2 Term, 498; 1 Bos. & P. 53.
Mill. 5 Serg. & R. Penn. 107.
Mill privilege. 16 Me. 63.
Mill saw. 10 Me. 135.
Mill site. 15 Pick. Mass. 57; 6 Cow. N. Y. 677; 11 Johns. N. Y. 191.
Minerals. 5 Watts, Penn. 34.
Misapply. 12 Ad. & E. 140; 40 Eng. C. L. 140.

Misnomer. 16 East, 110; 2 Stark. 29; 3 Campb. 29; 2 Caines, N. Y. 362; 13 Johns. N. Y. 486; Dunlap, Pract. 238.
Mobilier. 3 Mart. La. cond. ed. 430.
Molest. F. Moore, 402; s. c. Croke Eliz. 421.
Money. 15 Ves. Ch. 319; 3 Mer. Ch. 691; 1 Johns. Ch. N. Y. 231. Money only. 7 Term, 539, 549.
Money—Moneys. 1 Johns. Ch. N. Y. 231; 14 Johns. N. Y. 1; 31 Eng. L. & Eq. 452.
Money deposited in court. 2 Gall. C. C. 146.
Money in the funds. 5 Price, Exch. 217.
More or less. 2 Powell, Mortg. 445 *a*, note; Sugden, Vend. 231, 232; 1 Ves. & B. Ch. Ir. 376; 2 Barnew. & Ad. 106; s. c. 22 Eng. C. L. 36; 2 Wms. Saund. 305 *b*, note; 1 Campb. 337; 1 Munf. Va. 336; 2 Hen. & M. Va. 164; 7 N. Y. 210; 1 Yeates, Penn. 309; 6 Binn. Penn. 102; 4 Serg. & R. Penn. 493; 5 *id.* 260; 4 Mas. C. C. 418.
Mountain. 1 Strange, 71; 1 Burr. 629.
Movables. Ward, Leg. 210; W. Jones, 225.
Mr. 3 Carr. & P. 59; s. c. 1 Mood. & M. 118.
Mrs. 3 Carr. & P. 59; s. c. 1 Mood. & M. 118.
Mulatto. 18 Ala. 276, 720; 7 Mass. 88.
Mutual credit. 4 Term, 211; 8 Taunt. 499; 4 Burr. 2222; Cooke, Bankr. Laws, 536; 2 Smith, Lead. Cas. 178, and the cases there cited.
My fishing place. 1 Whart. Penn. 137.
My half part. 11 East, 163.
My house and all that shall be in it at my death. 1 Brown, Ch. 129, n.; 11 Ves. Ch. 662.
My inheritance. Hob. 2; 7 East, 97.
My property. 17 Johns. N. Y. 281.
My right heirs, on the part of my mother. 4 Ves. Ch. 766.
My seven children, naming only *six.* 2 Coxe, N. J. 184.
Name and blood. 15 Ves. Ch. 92.
Navicular disease. Oliphant, Horses, 47.
Navigable river. 6 Cow. N. Y. 528; 6 Barb. N. Y. 265; 21 Pick. 344.
Necessary. 4 Wheat. 413, 418; 7 Cow. N. Y. 606; 2 A. K. Marsh. Ky. 84; 15 N. Y. 9, 168; 1 Johns. Ch. N. Y. 467.
Necessary charges. 3 Me. 191.
Necessary implication. 1 Ves. & B. Ch. Ir. 466.
Necessary tools of a tradesman. 2 Whart. Penn. 26.
Needful. 4 Esp. 66.
Negotiate. 5 Du. N. Y. 373.
Negro. 9 Ired. No. C. 384.
Nerving. Oliphant, Horses, 47; Ry. & M. Cr. Cas. 290.
Neurotomy. Oliphant, Horses, 47; Ry. & M. Cr. Cas. 290.
Never. 2 Atk. Ch. 32; 3 Q. B. 239, 242; Bayley, Bills, 4; Chitty, Bills, 54.
New manufacture. 4 Mann. & G. 580.
Next. Strange, 394; Croke Jac. 646, 677; Bacon, Abr. *Conditions,* P 3; 2 Johns. N. Y. 190; 9 Cow. N. Y. 255; 6 N. H. 374; 13 *id.* 446.
Next of kin. 15 How. Pr. N. Y. 182; 4 Abb. Pr. N. Y. 312; 14 Ves. Ch. 372; 15 *id.* 109, 536; 3 Brown, Ch. 64, 355.
Next of kin, equal in degree. 12 Ves. Ch. 433.
Next of kin, or heir at law. 4 Ves. Ch. 469.
Non-arrival. 2 Barnew. & C. 564.
Non-resident. 4 La. 11.
Northerly. 1 Johns. N. Y. 156. See 3 Caines, N. Y. 293.
Northward. 3 Caines, N. Y. 293; 1 Johns. N. Y. 158.
Not liable for any damage to or from her sheathing. 20 Pick. Mass. 389.
Note or notes. 7 Serg. & R. Penn. 465.
Notes current in the city of New York. 19 Johns. N. Y. 146.
Notice of action. 1 Holt, N. P. 27.
Now. 3 Penn. St. 288, 289; 4 Mann. & G. 99, 100.
Obligation. Coke, Litt. 171 *b*.
Occupant. 25 Barb. N. Y. 54.
Occupation. 7 Watts & S. Penn. 330.
Occupied. 1 Ill. 70.
Of. 2 Term, 431; 2 Bingh. N. C. 668.
Of and concerning. 4 Maule & S. 169; 3 Caines, N. Y. 329; 5 Johns. N. Y. 211; 7 *id.* 264, 359; 1 Binn. Penn. 537; 3 *id.* 517; 5 *id.* 218.
Offence. 9 Carr. & P. 525; s. c. 38 Eng. C. L. 222.
Office of trust. 6 Blackf. Ind. 529.
Office, or public trust. 2 Cow. N. Y. 29, n.; 20 Johns. N. Y. 492; 1 Munf. Va. 468.
On. 2 Term, 431.
On a stream. 3 Sumn. C. C. 170.
On arrival. 2 Campb. 237, 532.
On condition. 4 Watts & S. Penn. 302.
On payment of costs. 6 Cow. N. Y. 582; 5 J. J. Marsh. Ky. 243.
On shore. 1 Bos. & P. 187.
On the trial. 2 Whart. Penn. 159.
Once a week. 4 Pet. 361; 2 Miles, Penn. 150, 151.
One day after date. 2 Penn. St. 496.
One foot high. 2 Zabr. N. J. 165; 2 Parsons, Contr. 51, n.
One pair of boots. 3 Harr. Del. 559.
One thousand dollars to the children of ——. 9 Vt. 41.
One whole year. 12 Mass. 262.
Openly. Coke, 2d Inst. 57; Bacon, Abr. *Merchant,* &c.
Or, construed *And.* 2 Roper, Leg. 290; 1 P. Will. Ch. 483; 2 *id.* 383; 2 Cox, Ch. 213; 2 Atk. Ch. 643; 3 *id.* 83, 85; 6 Ves. Ch. 341; 1 Ves. Sen. 409; 2 *id.* 67; 2 Strange, 1175; Croke Eliz. 525; Poll. 645; 1 Bingh. 500; 3 Term, 470, 1 Belt, Suppl. Ves. 485; 2 *id.* 9, 43, 114; 1 Yeates, Penn. 41, 319; 1 Serg. & R. Penn. 141; 1 Wend. N. Y. 396; 8 Barb. N. Y. 189; 6 Toullier, nn. 703 and 704. See Disjunctive. Or any other person. 15 Wend. N. Y. 747. Or by any other person. 3 A. K. Marsh. Ky. 720. Or elsewhere. 2 Gall. C. C. 477. Or otherwise. 1 Chitty, Bail, 205, 206; Hawkins, Pl. Cr. c. 25, § 4.
Or when realized. 2 Eng. L. & Eq. 286.
Orchard. Croke Eliz. 854.
Ordained minister. 4 Conn. 134.
Order (in chancery pleading). 7 Sim. Ch. 17.
Original. 6 Wheat. 396; 5 Serg. & R. Penn. 549. See Courts of the United States.
Orphan. 3 Mer. Ch. 48; 2 Sim. & S. Ch. 93; 33 Penn. St. 9.
Other. 1 Brock. C. C. 187.
Other offices. 1 Barnew. & C. 237; 5 *id.* 640. See 5 Term, 375, 379; 8 Dowl. & R. 393.
Other writing. 1 Rawle, Penn. 231.
Otherwise. 1 Gall. C. C. 39.
Out and out. 36 Penn. St. 204.
Out of the country. 3 Bibb, Ky. 510.
Out of the state. 1 Johns. Cas. N. Y. 76.
Out of their joint funds, according to the articles of association. 4 Serg. & R. Penn. 356.
Outfitt. 1 Stor. C. C. 603.
Out-house. 5 Day, Conn. 151; 4 Conn. 446.
Over the sea. Kirb. Conn. 299.
Overseers. 7 Mann. & G. 481.
Own use. 4 Rawle, Penn. 68.
Owned by them. 5 Cow. N. Y. 509.
Owner. 6 Nev. & M. 340; 4 N. Y. 66; 8 *id.* 383; 9 *id.* 435.
Ox gang. Sheppard, Touchst. 93; Coke, Litt. 5.
Oyster spat. 12 Ad. & E. 13; s. c. 40 Eng. C. L. 15.
Par value. 2 Hill, N. Y. 158; 8 Paige, Ch. N. Y. 527.
Pardon. 28 Penn. St. 297.
Passage room. 2 Ld. Raym. 1470.
Passing. 1 Baldw. C. C. 366.
Passing through the town. 6 Ohio, 142.
Payable. 3 Ves. Ch. 13; 13 *id.* 113; 14 *id.* 470; 16 *id.* 172; 2 Belt, Suppl. Ves. 296; 2 Brown, Ch. 305.

Payable and negotiable without defalcation at the K Bank. 29 Penn. St. 529.
Paying. Rolle, Abr. 411; Bacon, Abr. *Conditions*, A; Lane, 56, 78.
Paying thereout. Dick. Ch. 444.
Paying yearly and every year. 3 Lomax, Real Prop. 187.
Pearls. Dig. 34. 2. 18.
Peas. Bacon, Abr. *Merchant*, etc. I.
Pencil writing. 1 Eccl. 406, 407; 5 Barnew. & C. 234; 7 Dowl. & R. 653; 1 Stark. 267; 1 Phill. Eccl. 52, 53; 2 *id.* 173.
Per annum. Bacon, Abr. *Covenant*, F.
Percussit. 2 Va. Cas. 111.
Perishable articles. 7 Cow. N. Y. 202.
Permitting and suffering. 6 Barnew. & C. 295; Platt, Cov. 338.
Perpetual. 2 Brod. & B. 27; s. c. 6 J. B. Moore, 159.
Person liable. Eden, Bankr. Law, 146.
Personal estate. 1 Ves. & B. Ch. 415; 4 Ves. Ch. 76; 1 M'Cord, So. C. 349.
Personal ornaments. 1 Beav. Rolls, 189.
Personal property. 24 Penn. St. 20.
Personal representatives. 1 Anstr. Exch. 128.
Persons of color. 3 Ired. No. C. 455.
Pigs—Cattle. 1 Russ. & R. Cr. Cas. 76.
Pilfering. 4 Blackf. Ind. 499.
Piratical. 2 How. 210.
Place—Office. 1 Munf. Va. 468.
Places. 5 Term, 375, 379; 5 Barnew. & C. 640; 8 Dowl. & R. 393. See 1 Ball & B. Ch. Ir. 237.
Placitum. Skinn. 550, 554.
Plant. 1 Mood. & M. 341; s. c. 22 Eng. C. L. 330.
Plantation. 2 Humphr. Tenn. 315; 3 M'Cord, So. C. 363.
Planting. 7 Conn. 186.
Pleasure. At her pleasure. Boyle, Char. 307.
Pleasure carriage. 9 Conn. 371; 11 *id.* 185; 18 Johns. N. Y. 128; 19 *id.* 442.
Plow land. Coke, Litt. 5; Plowd. 167; Sheppard, Touchst. 93.
Plundered. 16 Pick. Mass. 1.
Poll-evil. Oliphant, Horses, 49.
Poor. Poor kindred. Boyle, Char. 31; 17 Ves. Ch. 371; 1 Caines, N. Y. 59.
Poor inhabitants. Ambl. Ch. 422.
Port. 2 Barnew. & Ad. 43; s. c. 22 Eng. C. L. 23.
Port of destination—Port of discharge. 5 Mas. C. C. 404; 8 Am. Law Reg. 362.
Possess. 1 Dev. & B. No. C. 452.
Possession. Coming into possession. 3 Brown, Ch. 180.
Post notes. 22 Penn. St. 479.
Postea. 1 Saund. 287.
Power coupled with an interest. 8 Wheat. 203; 2 Cow. N. Y. 196.
Power of attorney. 8 Pick. Mass. 490.
Predict. Coke, Litt. 20 *b.*
Preference. 1 Paine, C. C. 630.
Premises. All the premises. 17 Ves. Ch. 75; 1 East, 456.
Presentation. 20 Eng. L. & Eq. 277.
Presented. 2 Hill, So. C. 582.
Price. A price clear of all expenses. 2 Ves. & B. Ch. Ir. 341.
Prime cost. 2 Mas. C. C. 53, 55.
Prior in date. 3 Day, Conn. 66.
Prison charges. 4 Me. 82.
Private charity. Turn. & R. Ch. 260.
Private expenses. 1 Johns. Ch. N. Y. 467.
Privileges and appurtenances. 14 Mass. 49; 17 *id.* 443.
Pro A B, C D. 11 Mass. 97.
Proceed to sea. 9 Serg. & R. Penn. 154; 2 Pet. Adm. 97, 98.
Proceeding. 2 East, 213; 2 Comyns, Dig. 48, note; 1 Hall, N. Y. 166; 8 Wend. N. Y. 167.
Proceedings thereupon. 16 Pet. 303, 313.
Proceeds. 4 Mas. C. C. 529.
Procreatis—Procreandis. 1 Maule & S. 124.
Procure. 1 Carr. & M. 458.
Procurement. Platt, Cov. 337.
Produce of a farm. 6 Watts & S. Penn. 269, 280.
Professions. 7 Watts & S. Penn. 330.
Profits. 10 Johns. N. Y. 226.
Promise. I don't consider the land as yours: prove your right to it, and I'll pay you for it. 9 Dowl. & R. 480; s. c. 22 Eng. C. L. 394. I promise *never* to pay. 2 Atk. Ch. 32; Bayley, Bills, 4; Chitty, Bills, 54.
Promise to pay out of the proceeds of the next crop. 2 La. 258.
Promissory note. Due A B three hundred and twenty-five dollars, payable on demand. 10 Wend. N. Y. 675. To pay P D, or plaintiffs, or his or their order. 2 B. & A. 417. "I, B C, promise to pay E F the sum of £51 or his order," signed, "B C or else H B." 4 Barnew. & Ald. 679; 6 Eng. C. L. 563. And see Russ. & R. 455; 6 Cox, Cr. Cas. 533; 9 Mo. 845; 22 Ala. N. s. 43; 6 Johns. N. Y. 320.
Proper county. 2 Yeates, Penn. 152; 7 Watts, Penn. 245.
Property. 6 Serg. & R. Penn. 452; 17 Johns. N. Y. 281; 6 Binn. Penn. 94; 18 Ves. Ch. 193; 14 East, 370; 2 Bos. & P. N. R. 214; 5 Eng. L. & Eq. 199; 17 *id.* 46.
Property on board. 2 Metc. Mass. 1.
Property, personal and real. 1 Speers, Eq. So. C. 51, 56.
Proportion. Charge on estates in equal proportion. 3 Brown, Ch. 286. In just and equal proportions. 7 Serg. & R. Penn. 514.
Proprietor. 6 Nev. & M. 340; Wordsw. El. Cas. 338.
Prosecute with effect. 12 Mod. 380; 2 Selw. Nisi P. 1013, note.
Protect. 21 Penn. St. 455.
Protest. 1 N. Y. 186.
Proviso. Comyns, Dig. *Condition*, A 2; Littleton, s. 329; Coke, Litt. 203 *b*; 2 Coke, 71 *b*; 1 Rolle, Abr. 410.
Public house. 4 Leigh, Va. 680.
Public place. 18 Ala. N. s. 415; 12 *id.* 492; 6 Gratt. Va. 689; 8 *id.* 585; 2 Va. Cas. 515; 1 Bishop, Crim. Law, § 184.
Public policy. 9 Eng. C. L. 452.
Public sale. 4 Watts, Penn. 258.
Public trade. 3 Q. B. 39.
Public trust. 20 Johns. N. Y. 492; 2 Cow. N. Y. 29, n.
Publish. 2 Dev. No. C. 115.
Published. 3 Mees. & W. Exch. 461; 6 *id.* 473; 9 Bingh. 605; 5 Barnew. & Ad. 518; 8 Dow, Parl. Cas. 392.
Purchasing. 6 Ves. Ch. 404. See 2 Hall, N. Y. 477.
Put off. 8 Carr. & P. 582; 1 Russ. & R. Cr. Cas. 86; 1 Bishop, Crim. Law, § 186.
Quamdiu. O. Bridgm. 202.
Quantity and boundary. 2 Caines, N. Y. 146.
Quarter of a year. 1 N. Y. Rev. Stat. 606.
Quatenus sine prejudicio indulgentiam fieri potest. 4 Johns. Ch. N. Y. 460, 477; 3 Wend. N. Y. 539, 550.
Qui s'amuse; qui s'accuse. 19 N. Y. 549, 569.
Quit. 2 N. H. 402.
Quotation. Eden, Inj. 327, 328.
Race-field. 9 Leigh, Va. 648.
Raffle. 2 Const. So. C. 128.
Raise. 1 Atk. Ch. 421; 2 Vern. Ch. 153.
Rascal. 2 Const. So. C. 235.
Real action. 4 Pick. Mass. 169; 10 *id.* 473; 7 Mass. 476; 16 *id.* 448; 8 Me. 106, 138.
Real cost. 2 Mas. C. C. 53, 55.
Real estate. 9 N. Y. 502.
Realm. 1 Taunt. 270; 4 Campb. 289; Rose, Bank. 387.

Reasonable notice. 1 Penn. St. 466. See REASONABLE TIME.
Rebuild. 3 Rawle, Penn. 482.
Receipts. 2 Gill & J. Md. 511; 9 Humphr. Tenn. 55; 10 *id.* 442; 10 Ohio, 75; 8 Carr. & P. 180, 276, 623; 9 *id.* 382; 1 Exch. 131; 1 Den. Cr. Cas. 325.
Received for record. 3 Conn. 544; 1 Root, Conn. 500; 2 *id.* 298; Kirb. Conn. 72.
Received note in payment. 2 Gill & J. Md. 511.
Recollect. 1 Dan. Ky. 56.
Recommendation. 2 Ves. Ch. 333, 359; 3 *id.* 150; 9 *id.* 546; Jac. Ch. 317; 1 Sim. & S. Ch. 387.
Record. 3 Serg. & R. Penn. 207.
Record and docket. 1 Watts, Penn. 395.
Recoupe. 22 Wend. N. Y. 155.
Recovered in a suit. 5 Wend. N. Y. 620; 4 Du. N. Y. 275.
Recovery. 2 Caines, N. Y. 214; 1 Paine, C. C. 230, 238.
Rectifier of spirits. 1 Pet. C. C. 180.
Refine. 1 Pet. C. C. 113.
Refuse—Renounce. 2 Rawle, Penn. 398. Refuse to execute. 10 Eng. C. L. 65; 1 Harrison, Dig. 442.
Relations. See *Legatee.* Cas. *temp.* Talb. 215; 1 P. Will. Ch. 327; 2 Ves. Ch. 527; 3 *id.* 231; 5 *id.* 529; 16 *id.* 206; 19 *id.* 323; Ambl. Ch. 70, 507, 595, 636; Dick. Ch. 50, 380; 1 Brown, Ch. 31; 3 *id.* 64; 2 Vern. Ch. 381; 1 Taunt. 163; 3 Mer. Ch. 689; Coop. Ch. 275; Comyns, Dig. App. *Devise of Personal Property*, viii. 30, 32. Next relations, as sisters, nephews, and nieces. 1 Cox, Ch. 234. Poor relations. Dick. Ch. 380.
Relatives. 3 Bradf. Surr. N. Y. 382.
Release and forever quit claim. 10 Johns. N. Y. 456.
Remaining untried. 5 Binn. Penn. 390.
Rents. 2 Penn. St. 165.
Rents and profits. 2 Ves. & B. Ch. Ir. 67; 6 Johns. Ch. N. Y. 73; 1 Sanders, Us. & T. 318; 1 Ves. Sen. Ch. 171; 2 Atk. Ch. 358.
Repaire. 1 M'Cord, So. C. 517.
Reprieve. 1 Yeates, Penn. 477; 3 Penn. St. 477.
Request. 2 Brown, Ch. 38; 3 Ves. & B. Ch. Ir. 198; 5 Madd. Ch. 118; 18 Ves. Ch. 41; 1 Mood. Cr. Cas. 300.
Residence. 8 Wend. N. Y. 45; 4 Jur. N. S. 4.
Resident. 20 Johns. N. Y. 208, 211; 2 Pet. Adm. 450; 3 Ill. 377; 7 Mann. & G. 9.
Residuary. 11 Ves. Ch. 92.
Residue, surplus, etc. 2 Atk. Ch. 168; 3 Ves. Ch. 25, 26; 11 *id.* 330; 14 *id.* 364; 15 *id.* 406; 18 *id.* 466; Dick. Ch. 477; Chanc. Prec. 264; 2 Vern. Ch. 690; 1 Brown, Ch. 589; 4 *id.* 207; 1 Ves. Ch. 63; 1 Wash. Va. 45, 262; 3 Call, Va. 507; 3 Munf. Va. 76; 2 Des. Ch. So. C. 573; Boyle, Char. 390.
Respective, respectively. 2 Atk. Ch. 121; 3 Brown, Ch. 404; 1 Mer. Ch. 358; 2 East, 41; Cowp. 34; 10 Eng. L. & Eq. 235.
Rest. Al. 28; 3 P. Will. Ch. 63, n.
Rest and residue. 2 Lee, Cons. 270; 11 East, 164.
Retained. 5 Term. 143; 18 Jur. pt. 2, p. 21.
Retire. 25 Eng. L. & Eq. 423.
Reversion. If the reversion should never fall to the testator. 10 Ves. Ch. 453.
Revising—Correcting. 14 Me. 205.
Revoked. 1 Cow. N. Y. 335; 16 Johns. N. Y. 205.
Rice. 5 Bos. & P. 213.
Right. 2 Caines, N. Y. 345.
Right and title in the deed. 2 Ohio, 221.
Right, title, and interest. 4 Pick. Mass. 179.
Ringbone. Oliphant, Horses, 48, 50.
River-feeder. 13 Pick. Mass. 50.
Rolling-mill. 2 Watts & S. Penn. 390.
Roots. 7 Johns. N. Y. 385.
Running days. 1 Bell, Comm. 5th ed. 577.
Said. 1 Chitty, Crim. Law, *174; 2 Car. Law Rep. 75.
Said—saith. 3 Dowling, Pl. Cr. 455; 5 Tyrwh. Exch. 391; 1 Gale, Exch. 47.
Sail, to. 3 Maule & S. 461.
Sail from, to. 3 Barnew. & C. 501.
Sailed on or about. 4 N. Y. 345.
Same. Croke Eliz. 838.
Sand carck. Oliphant, Horses, 53.
Sanguini suo. Bacon, Abr. *Legacies and Devises*, C 1.
Sans recours. Chitty, Bills, 266; 1 Leigh, Nisi P. 405.
Sarsaparilla. 7 Johns. N. Y. 385.
Satisfactory proof. 10 Johns. N. Y. 167.
Satisfied. 1 M'Cord, Ch. So. C. 53; 2 Johns. N. Y. 395.
Saving. 2 Rolle, Abr. 449.
Say not less than. 3 Eng. L. & Eq. 365.
School. 1 Maule & S. 95; Viner, Abr. h. t.
Schools of learning. Wilm. 14; 2 Vern. Ch. 387; 14 Ves. Ch. 7; 1 Sim. Ch. 109; Jac. Ch. 474.
Sea letter. 2 Johns. N. Y. 531.
Sea stores. Baldw. C. C. 504.
Sealed. Harp. So. C. 1.
Secured to be paid. 1 Paine, C. C. 518; 12 Wheat. 487.
Security. 3 Johns. N. Y. 481; 3 Blackf. Ind. 431.
See him paid. Fell, Guar. 36, 37; 1 Ld. Raym. 224; Cowp. 227; 2 Term, 86.
See you out. 12 Wend. N. Y. 446.
Seen. 2 Hill, So. C. 582.
Seised. Bacon, Abr. *Us. and T.*, part 1, D.
Sell. To sell. Boyle, Char. 307; 9 Me. 128.
Sell and convey. 12 Me. 460. See also 2 Me. 22.
Sell for at the pit's mouth. 5 Term, 564; 7 *id.* 676; s. c. 1 Bos. & P. 524.
Seminary. 13 N. Y. 220.
Semini suo. Bacon, Abr. *Legacies and Devises*, C 1.
Separate estate. 24 Penn. St. 429.
Servant. 5 La. 15; 10 Eng. L. & Eq. 92.
Served. 6 Serg. & R. Penn. 281.
Setting fire. 2 East, Pl. Cr. 1020; 5 Gratt. Va. 664.
Settled. 2 Leach, Cr. Cas. 910; 1 Hill, N. Y. 572; 8 Wend. N. Y. 600.
Seventh child. 3 Brown, Ch. 148; s. c. 2 Cox, Ch. 258.
Seventy acres, being and lying in the southwest corner of —— section. 2 Ohio, 327. See 4 T. B. Monr. 63.
Shall. 1 Vt. 153. Shall be lawful. 2 Dowl. & R. 172; 4 Barnew. & Ald. 271; 1 Barnew. & C. 35, 65; 2 Term, 172; 3 Mart. N. S. 532. Shall and may. 1 Eng. C. L. 46; 5 Johns. Ch. N. Y. 101; 5 Cow. N. Y. 193; 1 Crompt. & M. Exch. 355; 3 Tyrwh. Exch. 272.
Shall show by his own oath or other competent proof. 1 N. Y. 330.
Share. 3 Mer. Ch. 348; 13 N. Y. 98, 102; 4 Bradf. Surr. N. Y. 306.
Share and share alike. 3 Des. Eq. So. C. 143.
Shave. 2 Den. N. Y. 293.
Ship damage. Abbott, Shipp. 204; Bacon, Abr. *Merchant*, etc., H.
Shop. 5 Day, Conn. 131; 4 Conn. 446; 1 Carr. & K. 173.
Should be secured. 5 Binn. Penn. 496.
Shovel plough. 3 Brev. So. C. 5.
Signing. I, A B, do make this my will. 18 Ves. Ch. 183.
Silks. 1 Carr. & M. 45.
Silver dollars—Goods, wares, and merchandise. Mas. C. C. 407.
Sitfasts. Oliphant, Horses, 53; 9 Mees. & W. Exch. 670.
Six handkerchiefs. 1 Mood. Cr. Cas. 25.
Sixty pounds in specie, or tobacco at specie price. Mart. No. C. 20.
Skins. 7 Johns. N. Y. 385; 7 Cow. N. Y. 202.
Slip. 11 N. Y. 115.
So long as wood grows or water runs. 1 Vt. 303.

Sold. 3 Wend. N. Y. 112.
Sold and conveyed. 2 Serg. & R. Penn. 473.
Sole. 1 Madd. Ch. 207; 1 Belt, Suppl. Ves. 410; 4 Rawle, Penn. 66; 10 Serg. & R. Penn. 209; 4 Wash. C. C. 241; 3 Penn. St. 64, 201.
Solvent. 10 Ves. Ch. 100; Gower, Partn. 409.
Soon as convenient. 1 Ves. Ch. 366; 19 *id.* 387.
Southwest corner of —— section. 2 Ohio, 327.
Spawn. 12 Ad. & E. 13; s. c. 40 Eng. C. L. 15.
Specially. 1 Dall. Penn. 208; 1 Binn. Penn. 254.
Specie. 5 Hill, N. Y. 523.
Specifically. 16 Ves. Ch. 451.
Splint. Oliphant, Horses, 55; 1 Moore & S. 622.
Stab, stick, and thrust. 2 Va. Cas. 111.
Stable. 1 Lev. 58; 3 Mann. & R. 475.
Stage—Stage-coach. 8 Ad. & E. 386; 35 Eng. C. L. 409; 9 Conn. 371; 11 *id.* 385.
Standing by. 6 Ind. 289.
Steam boiler. Wright, Ch. Ohio, 143.
Steamboat clause. 32 Penn. St. 351.
Sterling. 1 Carr. & P. 286.
Stock in the funds. 5 Price, Exch. 217.
Stock in trade. Bunb. Exch. 28.
Store. 10 Mass. 153; 18 Conn. 432. See 4 Johns. N. Y. 424; 1 Nev. & M. 583; 2 N. H. 9.
Storehouse. 3 Ired. No. C. 570; 19 Ala. N. s. 527.
Straw. 4 Carr. & P. 245; s. c. 19 Eng. C. L. 367; 1 Mood. Cr. Cas. 239.
Stretching along the bay. 2 Johns. N. Y. 357; Hargrave, Law Tracts, 12.
Strict settlement. 4 Bingh. N. C. 1.
String halt. Oliphant, Horses, 56.
Subject to incumbrances. 2 P. Will. Ch. 385; 2 *id.* Cox ed. 659, n.; 1 Atk. Ch. 487.
Subject to the payment of rent. 5 Penn. St. 204.
Submission—Consent. 9 Carr. & P. 722; s. c. 38 Eng. C. L. 306.
Subscriber. 6 Barnew. & C. 341.
Subscription list. 2 Watts, Penn. 112.
Substantial inhabitants. 2 Mann. & R. 98; s. c. 8 Barnew. & C. 62.
Such. 2 Atk. Ch. 292.
Suit at law. 23 Pick. Mass. 10.
Sum in controversy. 9 Serg. & R. Penn. 301.
Summit of a mountain. 3 Watts & S. Penn. 379.
Superfine flour. 9 Watts, Penn. 121.
Supersede. 1 Pick. Mass. 261.
Superstitious use. 1 Watts, Penn. 224.
Support. A decent and comfortable *support* and maintenance out of my estate, in sickness and in health, during my natural life. 2 Sandf. Ch. N. Y. 91.
Surety. 2 Ill. 35; 2 N. Y. 406.
Surplus. 18 Ves. Ch. 466; 3 Bacon, Abr. 67; 2 Penn. St. 129, 268.
Survivor and survivors. 3 Burr. 1881; 8 Barnew. & C. 231.
Survivors. 5 Ves. Ch. 465; 17 *id.* 482.
Swine. 15 Mass. 205.
Take. 2 Pet. 538; 2 N. Y. 153.
Take and fill shares. 10 Me. 478.
Taken out of the state. 1 Hill, So. C. 150.
Taking a franchise. 4 Barb. N. Y. 405.
Tapering. 2 Stark. 249.
Taxes and other public dues. 2 Leigh, Va. 178.
Tea-kettle and appurtenances. Ward, Leg. 222; Mosel. Ch. 47; 1 Eq. Cas. Abr. 201.
Team. 15 Barb. N. Y. 568; 5 How. Pr. N. Y. 288.
Ten acres of pease. 1 Brownl. 149.
Terra. Croke Jac. 573; Palm. 102; 4 Mod. 98; Cowp. 349.
Testamentary estate. 2 H. Blackst. 444. See 3 Brod. & B. 85.
That is to say. 1 Serg. & R. Penn. 141.
The county aforesaid. 2 W. Blackst. 847.
The dangers of the river excepted. 1 Miss. 81; 2 Bail. So. C. 157.
The parties shall abide by the award of arbitrators. 6 N. H. 162.
The said defendant. 2 Marsh. 101; s. c. 6 Taunt. 122, 406.
The said E R. 9 Carr. & P. 215; s. c. 38 Eng. C. L. 87.
The said N. 2 Law Rep. No. C. 75.
The said plaintiff. 2 Marsh. 101; s. c. 6 Taunt. 122, 406.
The said property. 3 Mann. & G. 356.
The same rents and covenants. 1 Brown, Parl. Cas. 522; 3 Atk. Ch. 83; Cowp. 819; 2 Brown, Ch. 639, n.
Their heirs at law, or their legal representatives. 20 Penn. St. 349.
Them. 9 Watts, Penn. 346; O. Bridgm. 214.
Them or any of them. 3 Serg. & R. Penn. 393.
Then. 24 Barb. N. Y. 645.
Then and there. 2 Atk. Ch. 310; 4 Ves. Ch. 698; 2 P. Will. Ch. 594; 1 Brown, Ch. 190; 1 Ld. Raym. 123, 577.
Then next. 9 Cow. N. Y. 255.
Thereabouts. Moll. Ch. Ir. 232.
Thereafter. 13 La. 556.
Thereafter built. 2 Leigh, Va. 721.
Thereafterwards continuing his said assault. 2 Mass. 50.
Therefore the defendant is indebted. 1 Term, 716; 2 Bos. & P. 48.
Thereinbefore mentioned. Ward, Leg. 105, 344; 7 Ves. Ch. 391.
Thereunto belonging. 22 Eng. C. L. 171.
Thing patented. 1 How. 202.
Things. 11 Ves. Ch. 666.
Third parties. 1 Mart. N. s. 384.
This demise. 2 W. Blackst. 973.
This indenture. 2 Wash. Va. 58.
Thousand. 3 Barnew. & Ad. 728.
Through. 7 Pick. Mass. 274.
Thrush. Oliphant, Horses, 59.
Timber. 7 Johns. N. Y. 234; 1 Madd. Ch. 140, n.
Time. Till she arrives. From her beginning to load. On the ship's arrival. And is there moored twenty-four hours in good safety. 3 Chitty, Com. Law, 462. Within four days. 15 Serg. & R. Penn. 43. Time being. Angell & A. Corp. 284.
Title. An indefeasible title in fee simple, such as the state makes. 3 Bibb, Ky. 317; 16 Me. 164.
To a stream. 3 Sumn. C. C. 170.
To be begotten. 1 Maule & S. 124.
To be by her freely possessed and enjoyed. 12 Serg. & R. Penn. 56; Cowp. 352.
To be kept by the secretary. 1 Scott, N. R. 245.
To be paid when in funds. 1 Ala. 173; 7 Me. 126.
To be signed and published by her in the presence of, and to be attested by, two or more credible witnesses. Curt. Eccl. 1.
To do the needful. 4 Esp. 66.
To, from, or by. 14 Me. 198.
To his knowledge and belief. 1 H. Blackst. 245.
To make a will. 20 Penn. St. 205.
To render a fair and perfect account, in writing, of all sums received. 1 Dougl. 382.
To settle. 2 Miles, Penn. 1.
To sue. 3 Barnew. & C. 178, 183.
To the best of his knowledge and belief. 8 T. R. 418; 1 Wils. 232.
To the legatees above named. 17 Serg. & R. Penn. 61.
To the order. 1 Watts & S. Penn. 418.
To them. 9 Watts, Penn. 351, 352.
To wait a while. 1 Penn. St. 385.
Toll. 2 Show. 34.
Ton. 9 Paige, Ch. N. Y. 188.
Took the oath in such case required by the act of congress. 5 Leigh, Va. 743.
Tools. 2 Wheat. 26; 3 Abb. Pr. N. Y. 466.
Touch and stay. 1 Marshall, Ins. 188; 1 Esp. 610; Weskett, Ins. 548.

Transact all business. 22 Eng. C. L. 397; 1 Taunt. 349; 5 Barnew. & Ald. 204, 210, 211; 1 Younge & C. 394.
Transaction. 7 Mann. & G. 538.
Treasonable practices. 1 Stu. Low. C. 4.
Tree. 2 Dev. No. C. 162.
Trees, woods, coppice—wood-grounds, of what kind or growth soever. 4 Taunt. 316.
Trifling. 1 Watts & S. Penn. 328; 14 Serg. & R. Penn. 349.
Trinkets. 1 Carr. & M. 45.
True value. 17 Wheat. 419; 1 Stu. Low. C. 419.
Truly. 5 Mann. & G. 696.
Turnpike road. 2 Johns. N. Y. 742.
Two years after demand. 8 Dowl. & R. 347.
Unavoidable accident. 1 Brock. C. C. 187.
Understood. 2 Cox, Ch. 16.
Underwood. 2 Rolle, 485.
Unexecuted writ. 1 Harr. N. J. 154.
Unless. Boyle, Char. 291; 1 Mer. Ch. 102; 3 *id.* 65, 79; 3 Burr. 1550.
Unmarried. 2 Belt, Suppl. Ves. 43; 2 Barnew. & Ald. 452; 21 Eng. L. & Eq. 504; 31 *id.* 547. Without being married. 7 Ves. Ch. 458.
Until. Cowp. 571; 5 East, 250; Cas. *temp.* Hardw. 116; 17 N. Y. 502. Until she hath moored at anchor twenty-four hours in good safety. Park, Ins. 35; 1 Marshall, Ins. 262; 2 Strange, 1248; 1 Esp. 412. Until discharged and safely landed. 1 Dougl. 510.
Unto and amongst. 9 Ves. Ch. 445.
Up the creek. 10 Ohio, 508.
Use till paid. Kirb. Conn. 145.
Used. 1 Chitty, Pract. 214.
Useful invention. 1 Mas. C. C. 302; 4 Wash. C. C. 9.
Usque. 2 Mod. 280.
Usual clauses. 2 Chitty, Com. Law, 227; 1 Mer. Ch. 459.
Usual covenants. Platt, Cov. 430.
Usual terms. 8 Mod. 308; Barnes, 330; 3 Prec. Chanc. 705.
Usurped power. 2 Marshall, Ins. 700; 2 Wils. 363.
Usury. See 2 Pick. Mass. 2d ed. 152, n. 1; 5 Mass. 53; 7 *id.* 36; 10 *id.* 121; 13 *id.* 443; 4 Day, Conn. 37; 2 Conn. 341; 7 Johns. N. Y. 402; s. c. 8 *id.* 218; 2 Dall. Penn. 92; 4 *id.* 216; 6 Munf. Va. 430, 433; 3 Ohio, 18; 1 Blackf. Ind. 336; 10 Me. 315; 3 Ld. Raym. 36; Rastell, Entr. 689; Hardr. 420; 2 Chitty, Crim. Law, 549; Comyn, Dig. *Usury*, C; 4 Blackstone, Comm. 158.
Utter. 1 Den. Cr. Cas. 59; 2 *id.* 78; 1 Templ. & M. Cr. Cas. 409; 6 Carr. & P. 408; 7 *id.* 549; 1 Carr. & K. 707; 2 *id.* 352; 1 Brev. No. C. 482; 1 Baldw. C. C. 366; 1 Bishop, Crim. Law, § 186.
Vacancies. 2 Wend. N. Y. 273.
Vacancy. 1 Ill. 70.
Valuable things. 1 Cox, Ch. 77; 1 Brown, Ch. 467.
Value received. 3 Maule & S. 351; 5 *id.* 65; 5 Barnew. & C. 360; s. c. 11 Eng. C. L. 252; 3 Kent, Comm. 50; Maxwell, Law Dict.; 1 Hall, N. Y. 201; 1 Blackf. Ind. 41; 2 McLean, 213. True value. 11 Wheat. 419.
Vegetable production. 1 Mood. & M. 341.
Victual. Coke, 3d Inst. 195; Hale, Pl. Cr. 152; Croke Car. 231; Bacon, Abr. *Forestalling*, B; 1 East, 169.
Victualler. 6 Watts & S. Penn. 278.
Videlicet. 3 Ves. Ch. 194.
Village or town. Coke, Litt. 5; Plowd. 168; Sheppard, Touchst. 92.
Voluntary assignment. 3 Sumn. C. C. 345.
Wantonness. 1 Wheel. Cr. Cas. N. Y. 365; 4 Wash. C. C. 534; 1 Hill, So. C. 46, 363.
Warbles. Oliphant, Horses, 53; 9 Mees. & W. Exch. 670.
Warehouse. Croke Car. 554; 2 Mood. & R. 458; Gilbert, Ej. 57; 2 Roscoe, Real Act. 484; 8 Mass. 490; 22 Me. 47.
Waste. 1 Ves. Sen. Ch. 461; 2 *id.* 71.
Watch. Ward, Leg. 221; Mosel. Ch. 112.
Water lots. 14 Pet. 302.
Way. In, through, and along. 1 Term, 560.
Weapon drawn. Skinn. 666; 3 Lev. 255.
Well and truly executes the duties of his office. 1 Pet. 69.
Well and truly to administer. 9 Mass. 114, 119, 370; 13 Johns. N. Y. 441; 1 Bay, So. C. 328.
Well and truly to administer according to law. 1 Litt. Ky. 93, 100.
Whaling voyage. 3 Sandf. N. Y. 26.
Wharf. 6 Mass. 332.
What I may die possessed of. 8 Ves. Ch. 604; 3 Call, Va. 225.
What remains. 11 Ves. Ch. 330.
Wheat. An unthrashed parcel of wheat. 1 Leach, Cr. Cas. 484; 2 East, Pl. Cr. 1018; 2 Term, 255.
Wheezing. Oliphant, Horses, 61.
When. 6 Ves. Ch. 239; 11 *id.* 489; 3 Brown, Ch. 471. When able. 3 Esp. 159; 3 Eng. C. L. 264, note; 4 Esp. 36. When received. 13 Ves. Ch. 325. When the same shall be recovered. 13 Ves. Ch. 325.
When or if. 1 Hare, Ch. 10.
When paid. 15 Serg. & R. Penn. 114.
Wherefore he prays judgment, etc. 2 Johns. Cas. N. Y. 312.
Whereupon. 6 Term, 573.
Whilst. 7 East, 116.
Wholesale factory prices. 2 Conn. 69.
Widows and orphans. 2 Sim. & S. Ch. 93.
Wife. 3 Ves. Ch. 570.
Wilful. 1 Bentham, Ev. 351.
Wilful and corrupt. 1 Bentham, Ev. 351.
Wilfully. 8 Bost. Law Rep. 78.
Will. He will change. 2 Ball & B. Ch. Ir. 223.
With. 2 Vern. 466; 1 Prec. Chanc. 200; 1 Atk. Ch. 469; 2 Schoales & L. 189; 3 Mer. Ch. 437; 2 Barnew. & Ald. 710; 2 Bos. & P. 443.
With all faults. 5 Barnew. & Ald. 240; 3 Eng. C. L. 475; 7 *id.* 82.
With all usual and reasonable covenants. 12 Ves. Ch. 179, 186; 15 *id.* 528; 3 Brown, Ch. 632; 3 Anstr. Exch. 700.
With effect. 2 Watts & S. Penn. 33.
With liberty. 2 Gill & J. Md. 190.
With sureties. 2 Bos. & P. 443.
With surety. 6 Binn. Penn. 53; 12 Serg. & R. Penn. 312.
With the prothonotary. 5 Binn. Penn. 461.
Within four days. 15 Serg. & R. Penn. 43. Within —— days after. 3 Serg. & R. Penn. 395; 2 Parsons, Contr. 175–178.
Without fraud, deceit, or oppression. 6 Wend. N. Y. 454.
Without prejudice. 2 Chitty, Pract. 24, note (x); 3 Mann. & G. 903.
Without recourse. 1 Cow. N. Y. 538; 3 Cranch, 193; 7 *id.* 159; 12 Mass. 172; 14 Serg. & R. Penn. 325; 8 Watts & S. Penn. 353; 2 Penn. St. 200. See SANS RECOURS.
Without reserve. 5 Mass. 34; 8 Am. Law Reg. 241.
Wm. William. 2 Ill. 451.
Wood. Croke Jac. 166.
Wood-land. 1 Serg. & R. Penn. 169.
Woods. 4 Mass. 268.
Working days. 1 Bell, Comm. 5th ed. 577.
Worldly labor. 4 Bingh. 84; s. c. 13 Eng. C. L. 351; 34 Penn. St. 398.
Worth and value. 3 Barnew. & C. 516.
Writing. 14 Johns. N. Y. 484; 8 Ves. Ch. 504; 17 *id.* 459; 2 Maule & S. 286.
Writing in pencil. 1 Spinks, Eccl. 406.
Yard lane. Sheppard, Touchst. 93; Coke, Litt. 5.
Yearly meeting. 6 Conn. 292.

Yearly meeting of Quakers. 6 Conn. 393.
Yielding and rendering. 9 N. Y. 9.
You. 2 Dowl. 145.

CONSTRUCTION OF POLICY. In Insurance. This is liberal, according to the maxim, *ut res magis valeat quam pereat.* A contract embracing so many interests and parties, and liable to be affected by so many events, cannot but present difficulties of construction. 1 Phillipps, Ins. § 6, in Marine Insurance; 1 Binn. Penn. 98; 19 Penn. St. 45; 23 *id.* 262; 32 *id.* 351; 2 Barb. N. Y. 623; 14 *id.* 383; 2 Du. N. Y. 556; 5 *id.* 594; 8 *id.* 351; 13 *id.* 89; 13 B. Monr. Ky. 311; 16 *id.* 242; 3 Ind. 23; 11 *id.* 171; 5 R. I. 38, 426; 27 Ala. N. S. 77; 33 Me. 242; 37 *id.* 137; 38 *id.* 414; 9 Cush. Mass. 479; 10 *id.* 337; 2 Gray, Mass. 297; 6 *id.* 214; 7 *id.* 261; 19 N. H. 580; 29 *id.* 132; 4 Zabr. N. J. 447; 22 Mo. 82; 27 *id.* 152; 18 Ill. 553; 8 Ohio, St. 458; 22 Conn. 235; 2 Curt. C. C. 322; 29 Eng. L. & Eq. 111; 33 *id.* 514.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD, etc.

CONSUETUDINARIUS (Lat.). In Old English Law. A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A.D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally-received authority. The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss.; but this is uncertain. It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm. 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.). A custom; an established usage or practice. Coke, Litt. 58. Tolls; duties; taxes. Coke, Litt. 58 *b*.

This use of *consuetudo* is not correct: *custuma* is the proper word to denote duties, etc. 1 Sharswood, Blackst. Comm. 313, n. An action formerly lay for the recovery of customs due, which was commenced by a writ *de consuetudinibus et servitiis* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him." Blount; Old Nat. Brev. 77; Fitzherbert, Nat. Brev. 151.

There were various customs: as, *consuetudo Anglicana* (custom of England), *consuetudo curiæ* (practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM.

CONSUL. A commercial agent appointed by a government to reside in a sea-port of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him.

A vice-consul is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called *consuls*. 1 Boulay Paty, Dr. Mar. tit. *Prél.* s. 2, p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded. 3 St. John, Mann. and Cus. of Anc. Greece, 283. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

2. As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented. Bee, Adm. 209; 1 Mas. C. C. 14; 3 Wheat. 435; 6 *id.* 152; 10 *id.* 66. Their duties and privileges are now generally limited, defined, and secured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers, 3 Taunt. 102, and have no judicial powers except those which may be conferred by treaty and statutes. See 10 U. S. Stat. 909; 11 *id.* 723; Ware, Dist. Ct. 367.

3. *American consuls* are nominated by the president to the senate, and by the senate confirmed or rejected. U. S. Const. art. 2, sec. 2. Each consul and vice-consul is required, before he enters on the execution of his office, to give bond, with such sureties as shall be approved by the secretary of state, in a sum not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office, and also for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of the act of 14th April, 1792, which bond is to be lodged in the office of the secretary of state. Act of April 14, 1792, sec. 6.

4. They have the power and are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to administer on the estate of American citizens dying within their consulate and leaving no legal representatives, when the laws of the country permit it, see 2 Curt. Eccl. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See Act of 14th April, 1792; Act of 28th February, 1803, c. 62; Act of 20th July, 1840, c. 23. The consuls are also authorized to make certificates of certain facts in certain cases,

which receive faith and credit in the courts of the United States. 3 Sumn. C. C. 27. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function, 2 Cranch, 187; Paine, C. C. 594; 2 Wash. C. C. 478; 1 Litt. Ky. 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute. 2 Sumn. C. C. 355.

5. Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent. They are entitled, by the act of 14th April, 1792, s. 4, to receive certain fees, which are there enumerated. And the consuls in certain places, as London, Paris, and the Barbary States, receive, besides, a salary.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment, and, on conviction by any court of competent jurisdiction, shall be fined not less than one nor more than ten thousand dollars, and be imprisoned not less than one nor more than five years. Act of July 20, 1840, c. 23, cl. 18. The act of February 28, 1803, ss. 7 and 8, imposes heavy penalties for falsely and knowingly certifying that property belonging to foreigners is the property of citizens of the United States, or for granting a passport, or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States.

6. The duties of consuls residing on the Barbary coast are prescribed by a particular statute. Act of May 1, 1810, s. 4.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; and he has a right to interpose claims for the restitution of property belonging to the citizens or subjects of the country he represents, 1 Curt. C. C. 87; 1 Mas. C. C. 14; Bee, Adm. 209; 6 Wheat. 152; 10 *id.* 66; see 2 Wall. Jr. C. C. 59; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his sovereign in negotiations with foreign states. 3 Wheat. 435.

7. Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws, in the same manner with other foreign residents owing a temporary allegiance to the state. Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148.

In the United States, the act of September 24, 1789, s. 13, gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. The act last cited, section 9, gives to the district courts of the United States jurisdiction exclusively of the courts of the several states of all suits against consuls or vice-consuls, except for offences where whipping exceeding thirty stripes, a fine exceeding one hundred dollars, or a term of imprisonment exceeding six months, is inflicted. For offences punishable beyond these penalties the circuit court has jurisdiction in the case of consuls. 5 Serg. & R. Penn. 545. See 1 Binn. Penn. 143; 2 Dall. Penn. 299; 2 Nott & M'C. So. C. 217; 3 Pick. Mass. 80; 1 Green, N. J. 107; 17 Johns. N. Y. 10; 6 Wend. N. Y. 327; 7 N. Y. 576; 2 Du. N. Y. 656; 6 Pet. 41; 7 *id.* 276.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract made in his official capacity on account of his government. 3 Dall. Penn. 384.

See, generally, Kent, Comm. Lect. II.; Abbott, Shipp.; Parsons, Marit. Law; Marten, on Consuls; Worden, on Consuls; Azuni, Mar. Law, pt. 1, c. 4, art. 8, § 7; Story, Const. § 1654; Sergeant, Const. Law, 225; 7 Opinions of Atty. Gen.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consultation and deliberation, they decree it to be returned, whereupon this writ issues. Termes de la Ley; 2 Sharswood, Blackst. Comm. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate. A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washburn, Real Prop. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and consummate upon the death of the wife. 1 Washburn, Real Prop. 140; 13 Conn. 83; 2 Me. 400; 2 Blackstone, Comm. 128.

A contract is said to be consummated when every thing to be done in relation to it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See DELIVERY, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed. See CONFLICT OF LAWS; LEX LOCI.

CONTAGIOUS DISORDERS. Dis-

eases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses, 2 Barb. N. Y. 104; but are indictable for exposing themselves in a public place endangering the public. See 4 Maule & S. 73, 272. Nuisances which produce such diseases may be abated. 15 Wend. N. Y. 397. See 4 M'Cord, So. C. 472; 2 Dougl. Mich. 332; 1 Greene, Iowa, 348; 3 Hill, N. Y. 479; 25 Penn. St. 503.

CONTANGO. In English Law. The commission received for carrying over or putting off the time of execution of a contract to deliver stocks or pay for them at a certain time. Wharton, Dict. 2d Lond. ed.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Crabbe, 529; 5 Barnew. & Ad. 289; 4 Bingh. 20, 22; 9 *id.* 349; 5 Taunt. 529.

Contemplation of a *state* of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. *Story*, J., 5 Bost. Law Rep. 295, 299.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void. 2 Sharswood, Blackst. Comm. 485.

CONTEMPT. A wilful disregard or disobedience of a public authority.

2. By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

3. The power to make rules carries that of enforcing them, and to attach persons who violate them, and punish them for contempts. 1 Kent, Comm. 236; 37 N. H. 450; 3 Wils. 188; 14 East, 1. But see 4 Moore, Priv. Coun. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it, 6 Wheat. 204, 230, 231; and it seems this power cannot be exerted beyond imprisonment. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States. 6 Wheat. 204; 10 Q. B. 359. And see 23 Bost. Law Rep. 7.

4. Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings. Bacon, Abr. *Courts* (E); Rolle, Abr. 219; 8 Coke, 38 *b*; 11 *id.* 43 *b*; 22 Me. 550; 5 Ired. No. C. 199; 37 N. H. 450; 16 Ark. 384; 25 Ala. N. S. 81; 25 Miss. 883; 1 Woodb. & M. C. C. 401. A court may commit for a period reaching beyond the term at which the contempt is committed. 13 Md. 642.

5. In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. Similar provisions, limiting the power of the courts of the United States to punish for contempts, are incorporated in the act of March 2, 1831. 4 Sharsw. cont. of Stor. U. S. Laws, 2256. See Oswald's Case, 4 Lloyd's Debates, 141 *et seq.*

6. It is said that it belongs exclusively to the court offended to judge of contempts and what amounts to them, 37 N. H. 450; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction. 3 Wils. 188; 14 East, 1; 2 Bay, So. C. 182; 1 Ill. 266; 1 J. J. Marsh. Ky. 575; 1 Blackf. Ind. 166; T. U. P. Charlt. Ga. 136; 14 Ark. 538, 544; 1 Ind. 161; 6 Johns. N. Y. 337; 9 *id.* 395; 6 Wheat. 204; 7 *id.* 38. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt, 1 Grant, Cas. Penn. 453; 7 Cal. 181; 13 Gratt. Va. 40; 15 B. Monr. Ky. 607; though not on *habeas corpus*. 14 Tex. 436. It should be by direct order of the court. 5 Wisc. 227. A proceeding for contempt is regarded as a distinct and independent suit. 22 Eng. L. & Eq. 150; 25 Vt. 680; 21 Conn. 185. See, generally, 1 Abb. Adm. 508; 5 Du. N. Y. 629; 1 Dutch. N. J. 209; 16 Ill. 534; 1 Ind. 96; 8 Blackf. Ind. 574; 3 Tex. 360; 1 Greene, Iowa, 394; 18 Miss. 103.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and determined between party and party. It is to be distinguished from *voluntary* jurisdiction, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Sharswood, Blackst. Comm. 66.

CONTENTS UNKNOWN. A phrase contained in a bill of lading, denoting that the goods are shipped in apparently good condition.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufman, Mack. Civ. Law, 205. A cause is said to be *contestata* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Stephen, Plead. 39; Crabbe, Hist. Eng. Law, 216.

CONTEXT (Lat. *contextum*,—*con*, with, *tigere*, to weave,—that which is interwoven).

Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely, as if it stood by itself, but is to be read in the light of the context, *i.e.* in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any *obscurity* in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing, also, a promise *not* to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting: each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. Consult, also, CONSTRUCTION; INTERPRETATION; STATUTES.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearne, Cont. Rem. 373.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried before demurrer to one or more counts in the same declaration has been decided. 1 Strange, 431.

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, Real Prop. § 946.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Roper, Leg. 506.

A legacy which has not vested. Williams, Ex.

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainder-man, so that the particular estate may chance to be determined and the remainder never take effect. 2 Blackstone, Comm. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearne, Cont. Rem. 3; 1 Washburn, Real Prop. 155.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Coke, 121; Comyns, Dig. *Uses* (K 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Sharswood, Blackst. Comm. 234.

A contingent remainder limited by way of uses. Sugden, Uses, 175. See, also, 4 Kent, Comm. 237 *et seq.*

CONTINUANCE (Lat. *continuere*, to continue).

In Practice The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chitty, Plead. 421, n; 3 Blackstone, Comm. 316. The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most, if not all, of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium;* after the declaration, and before issue joined, by *imparlance;* after issue joined, and before verdict, by *vice-comes non misit breve;* and after verdict or demurrer, by *curia advisare vult.* 1 Chitty, Plead. 421, n., Bacon, Abr. *Pleas* (P), *Trial* (H); Comyns, Dig. *Pleader* (V); Stephen, Plead. 31. In its modern use the word has the second of the two meanings given above.

2. Among the causes for granting a continuance are *absence of a material witness*, 2 Dall. Penn. 98; 4 Munf. Va. 547; 10 Leigh, Va. 687; 3 Harr. N. J. 495; 2 Wash. C. C. 159; and see 1 Mass. 6; 1 Const. So. C. 234; 2 Ark. 33; 9 Leigh, Va. 639; 18 B. Monr. Ky. 705; that he must have been subpœnaed, 1 Const. So. C. 198; 10 Tex. 116; 18 Ga. 383; see 2 Dall. Penn. 183; 3 Ill. 454; but in many states the opposite party may oppose and prevent it by admitting that certain facts would be proved by such witness, Harp. So. C. 83; 7 Cow. N. Y. 369; 1 Meigs, Tenn. 195; 5 Dan. Ky. 298; 2 Ill. 399; 15 Miss. 475; 33 *id.* 47; 9 Ind. 563; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request, 10 Yerg. Tenn. 258; 2 Ill. 307; 16 *id.* 507; 7 Ark. 256; 1 Cal. 403; 8 Rich. So. C. 295, and, in some states, as to what he expects to prove by the absent witness, 5 Gratt. Va. 332; 12 Ill. 459; 13 *id.* 76; 10 Tex. 525; 4 McLean, C. C. 538; in others, an examination is made by the court, 2 Leigh, Va. 584; 7 Cow. N. Y. 386; 4 E. D. Smith, N. Y. 68: *inability to obtain the evidence* of a witness out of the state in season for trial, in some cases, 1 Wall. C. C. 5; 3 Wash. C. C. 8; 4 McLean, C. C. 364; 3 Ill. 629; and see 2 Call, Va. 415; 2 Caines, N. Y. 384; 1 Miles, Penn. 282; 23 Ga. 613; 12 La. Ann. 3; 1 Pet. C. C. 217: *filing amendments* to the pleadings which introduce new matter of substance, 1 Ill. 43; 2 *id.* 525; 4 Mass. 506; 4 Mo. 279; 8 *id.* 500; 4 Blackf.

Ind. 387; 6 *id.* 419; 1 Hempst. C. C. 17; see 6 Penn. St. 171; 13 Ga. 190: *filing a bill of discovery* in chancery, in some cases, 3 Harr. & J. Md. 452; 3 Dall. Penn. 512; see 8 Miss. 458: *detention of a party* in the public service, 2 Dall. Penn. 108; 4 *id.* 107; see 1 Wall. Jr. C. C. 189: *illness of counsel*, sometimes. 1 McLean, C. C. 334; 11 Pet. 226; 5 Harr. Del. 107; 4 Cal. 188; 4 Iowa, 146; 19 Ga. 586. See 2 Caines, N. Y. 384; 1 Wall. C. C. 1.

The request must be made in due season. 4 Cranch, 237; 5 Halst. N. J. 245; 1 Browne, Penn. 240; 2 Root, Conn. 25, 45; 5 B. Monr. Ky. 314. It is addressed to the discretion of the court, 12 Gratt. Va. 564; 2 Dall. Penn. 95; 3 *id.* 305; 3 Mo. 123; Harp. So. C. 85, 112; 2 Bail. So. C. 576; 1 Ill. 12; without appeal, 2 Ala. 320; 2 Miss. 100; 14 *id.* 451; 6 Ired. No. C. 98; 9 Ark. 108; 16 Penn. St. 412; 6 How. 1; 13 *id.* 54; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways. See 1 Blackf. Ind. 50, 64; 3 *id.* 504; 4 Hen. & M. Va. 157, 180; 4 Pick. Mass. 302; 1 Ga. 213; 5 *id.* 48; 16 Miss. 401; 9 Mo. 19; 3 Tex. 18; 18 Ill. 439; 7 Cow. N. Y. 369; 2 South. N. J. 518. Reference must be made to the statutes and rules of the courts of the various states for special provisions.

CONTINUANDO (Lat. *continuare*, to continue, *continuando*, continuing).

In Pleading. An averment that a trespass has been continued during a number of days. 3 Sharswood, Blackst. Comm. 212. It was allowed to prevent a multiplicity of actions, 2 Rolle, Abr. 545, only where the injury was such as could, from its nature, be continued. 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See, generally, Gould, Plead. c. 3, § 86; Hammond, Nisi. P. 90, 91; Bacon, Abr. *Trespass*, I 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING DAMAGES. See DAMAGES.

CONTRA (Lat.). Over; against; opposite. *Per contra.* In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores*. 2 Wils. 447; Cowp. 729; 4 Campb. 152; 1 Barnew. & Ald. 683; 16 East, 150.

CONTRA FORMAM STATUTI (against the form of the statute).

In Pleading. The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

2. When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should conclude *contra formam statutorum.* Plowd. 206; 2 East, 333; Espinasse, Pen. Act. 111; 1 Gall. C. C. 268. The same rule applies to informations and indictments. 2 Hale, Pl. Cr. 172; 2 Hawkins, Pl. Cr. c. 25, § 117; Ow. 135. But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti.* Hale, Pl. Cr. 172; 1 Lutw. 212. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti.* Yelv. 116; Croke Jac. 187; Noy, 125; Rep. *temp.* Hard. 409; And. 115; 2 Saund. 377.

3. When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes. 1 Saund. 135 *c;* 2 East, 333; 1 Chitty, Plead. 358; 1 Saund. 249; 7 East, 516; 2 Mass. 216; 7 *id.* 9; 10 *id.* 36; 11 *id.* 280; 1 M'Cord, So. C. 121; 1 Gall. C. C. 30.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative. Coke, 2d Inst. 200; 2 Burr. 803; 3 *id.* 1418; 4 *id.* 2351; 2 Wils. 146; 3 Mass. 515.

When a statute only inflicts a punishment on that which was an offence at common law, the offence prescribed may be inflicted though the statute is not noticed in the indictment. 2 Binn. Penn. 332.

4. If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at common law. 1 Saund. 135, n. 3; 16 Mass. 385; 4 Cush. Mass. 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited. 1 Chitty. Crim. Law, 266, 289. See, further, Comyns, Dig. *Pleader* (C 76); 5 Viner, Abr. 552, 556; 1 Gall. C. C. 26, 257; 5 Pick. 128; 9 *id.* 1; 262 Yerg. Tenn. 390; 1 Hawks, No. C. 192; 3 Conn. 1; 11 Mass. 280; 5 Me. 79.

CONTRA PACEM (Lat. against the peace).

In Pleading. An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term, 503; 1 Chitty, Plead. 375; Archbold, Civ. Plead. 169; TRESPASS.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the

belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent, Comm. 138, 143.

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband. 1 Kent, Comm. 140.

The meaning of the term is generally defined by treaty provisions enumerating the things which shall be deemed contraband.

These include, generally, all articles of direct use in maintaining war, but exclude all things which are of use merely in the ordinary course of life and business: as, provisions which are not in course of conveyance to some port or town actually besieged or blockaded.

See 2 Wildmore, Int. Law, 210 *et seq.*; Wheaton, Int. Law, 509; 6 Mass. 102; 2 Johns. Cas. N. Y. 77, 120; 1 Wheat. 382; 8 Pet. 495; and also the very important declaration respecting maritime law signed by the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey, at Paris, April 16, 1856, Appendix to 3 Phillimore's International Law, 850; also title Contraband and Free Ships in the index to same vol., and part 9, chap. 10, and part 11, chap. 1, of the same.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Græci συνάλλαγμα vocant.* Fr. *contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Parsons, Contr. 5.

2. It has been variously defined, as follows. A compact between two or more parties. 6 Cranch, 87, 136. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Stephen, Comm. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Blackstone, Comm. 446; 2 Kent, Comm. 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol. lib. 1, § 10; Cowel; Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. 2 Hill, N. Y. 551.

3. We have not included consideration in our definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First*, that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Stephen, Comm. 109.

4. The use of the word *agreement* (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grego*) it seems nearly equivalent. We do not think the objection that it is a synonyme (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonymes convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonyme properly qualified. By pointing out distinctions and the mutual relations between synonymes, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

5. As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is always presumed by law,—the form of the instrument being held to import a consideration. 2 Kent, Comm. 450, note.

A contract without consideration is called a *nudum pactum* (nude pact), but it is still a *pactum*; and this implies that consideration is not an essential. The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly obnoxious.

There is an idea of mutuality in *con* and *traho*, to draw together, but we think that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Blackstone, Comm. 442) "a mutual bargain or convention." In our definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

6. In its widest sense, "contract" includes records and specialties; but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement," which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum*. 2 Coke, 15; 7 Mann. & G. 998, argum. & note.

7. This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee

to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitem*. It may properly be denied to be a contract, though Blackstone insists that one is implied. *Per Mansfield*, 3 Burr. 1545; 1 Cow. N. Y. 316; *per Story*, J., 1 Mas. C. C. 288. Mr. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chitty, Contr. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes. 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1. 27 Miss. 417. See IMPAIRING THE OBLIGATION OF CONTRACTS.

8. *Accessory contracts* are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. La. Civ. Code, art 1764; Pothier, Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. La. Civ. Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. La. Civ. Code, art. 1761.

9. *Consensual contracts* are those which are formed by mere consent of the parties, such as all contracts of hiring and mandate.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Entire contracts are those the consideration of which is entire on both sides.

The entire fulfilment of the promise by either is a condition precedent to the fulfilment of any part of the promise by the other. Whenever, therefore, there is a contract to pay a gross sum for a certain and definite consideration, the contract is entire.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time.

A contract *executed* (which differs in nothing from a grant) conveys a chose in possession; a contract *executory* conveys a chose in action. 2 Blackstone, Comm. 443. As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Blackstone, Comm. 443.

10. *Gratuitous contracts* are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. La. Civ. Code, 1766.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. La. Civ. Code, art. 1769.

11. *Implied contracts* are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

Thus, if I employ a person to do any business for me or perform any work, or take up wares with a tradesman, the law implies that I understood or contracted to pay the real value of the services or wares. 2 Blackstone, Comm. 443. These contracts form the web and woof of actual life. 1 Parsons, Contr. 4.

There is one species of implied contract which runs through and is annexed to all other contracts, conditions, and covenants,—viz.: that if I fail in my part of the agreement I shall pay the other party such damages as he has sustained by my neglect or refusal. See QUANTUM MERUIT; QUANTUM VALEBANT; ASSUMPSIT; Comyns, Dig. *Action upon the Case upon Assumpsit*, A 1, *Agreement*.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. La. Civ. Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as, sales, exchange, partnership, and the like.

12. *Onerous contracts* are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These are the highest class of contracts. Statutes merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record. 4 Blackstone, Comm. 465.

13. *Severable* (or *separable*) *contracts* are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—*i. e.* so much per pound or bushel—does not make a contract severable.

14. *Simple contracts* are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. And see **17.** They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written*; for contracts are equally *verbal* whether the words are *written* or spoken,—the meaning of verbal being expressed in words. See 3 Burr. 1670; 7 Term, 350, note; 11 Mass. 27, 30; 5 *id.* 299, 301; 7 Conn. 57; 1 Caines, N. Y. 386.

15. *Specialties* are those which are under seal: as, deeds and bonds.

Specialties are sometimes said to include also contracts of record, 1 Parsons, Contr. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed, sealed,* and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity. Plowd. 305; 7 Term, 477; 4 Barnew. & Ad. 652; 3 Bingh. 111; 1 Fonblanque, Eq. 342, note. Though little of the real solemnity now remains (except witnessing), and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact. See CONSIDERATION.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol. 2 Watts, Penn. 451; 9 Pick. Mass. 298; 13 Wend. N. Y. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758. A loan for use and a loan of money are of this kind. Pothier, Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

16. Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Pothier, Obl. pt. 1. c. 1, s. 1, art. 2, makes the five following classes: *reciprocal* and *unilateral; consensual* and *real; those of mutual interest, of beneficence* and *mixed; principal* and *accessory; those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law: it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu.* Inst. 3. 14. 2; 2 Blackstone, Comm. 443.

17. *Qualities of.* Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms. Peake, 227; 3 Term, 653; 1 Barnew. & Ald. 681; 1 Pick. Mass. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract. Strange, 937. See other instances, 6 East, 307; 3 Taunt. 169; 5 *id.* 788; 3 Barnew. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing. 7 Term, 350, note (*a*); 2 Blackstone, Comm. 444; Fonblanque, Eq. 335, n. (*a*); Chitty, Bills, 68. There is an exception to this rule in the case of bills and notes, which are of themselves *primâ facie* evidence of consideration. And in other contracts (written) when consideration is acknowledged it is *primâ facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be omitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty. Chitty, Com. Law, 215, 217, 222, 228, 250; 1 Binn. Penn. 110, 118; 6 *id.* 321; 4 Dall. Penn. 269, 298; 4 Yeates, Penn. 24, 84. As to contracts which cannot be enforced from noncompliance with the statute of frauds, see FRAUDS, STATUTE OF.

18. *Construction and interpretation* in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties is to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their comprehensive and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat.*

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor —*contra proferentem*—except in the case of the sovereign.

This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither false English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"). 2 Blackstone, Comm. 379; 6 Coke, 59.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of it. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for any thing else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

See, generally, as to contracts, Bouvier, Inst. Index; Parsons, Chitty, Comyns, and Newland, on Contracts; Comyns, Dig. *Abatement* (E 12), (F 8), *Admiralty* (E 10, 11), *Action on Case on Assumpsit, Agreement, Bargain and Sale, Baron et Feme* (2), *Condition, Debt* (A 8, 9), *Enfant* (B 5), *Idiot* (D 1), *Merchant* (E 1), *Pleader* (2 W 11, 43), *Trade* (D 3), *War* (B 2); Bacon, Abr. *Agreement, Assumpsit, Condition, Obligation;* Viner, Abr. *Condition, Contract and Agreements, Covenant, Vendor, Vendee;* 2 Belt. Suppl. Ves. 260, 295, 376, 441; Yelv. 47; 4 Ves. 497, 671; Archbold, Civ. Plead. 22; La. Civ. Code, 3, tit. 3–18; Pothier, Obligations; Sugden, Vendors and Purchasers; Long, Sales (Rand. ed.); Jones, Story, and Edwards on Bailment; Toullier, *Droit Civil Français*, tom. 6, 7; Barbour, Parties; Hammond, Parties to Actions, c. 1; Calvert, Parties; Chitty, Pract. Index.

Each subject included in the law of contracts will be found discussed in the separate articles of this Dictionary. See AGREEMENT; APPORTIONMENT; APPROPRIATION; ASSENT; ASSIGNMENT; ASSUMPSIT; ATTESTATION; BAILMENT; BARGAIN AND SALE; BIDDER; BILATERAL CONTRACT; BILL OF EXCHANGE; BUYER; COMMODATE; CONDITION; CONSENSUAL; CONJUNCTIVE; CONSUMMATION; CONSTRUCTION; COVENANT; DEBT; DEED; DELEGATION; DELIVERY; DISCHARGE OF A CONTRACT; DISJUNCTIVE; EQUITY OF REDEMPTION; EXCHANGE; GUARANTY; IMPAIRING THE OBLIGATION OF CONTRACTS; INSURANCE; INTEREST; INTERESTED CONTRACTS; ITEM; MISREPRESENTATION; MORTGAGE; NEGOCIORUM GESTOR; NOVATION; OBLIGATION; PACTUM CONSTITUTÆ PECUNIÆ; PARTIES; PARTNERS; PARTNERSHIP; PAYMENT; PLEDGE; PROMISE; PURCHASER; QUASI CONTRACTUS; REPRESENTATION; SALE; SELLER; SETTLEMENT; SUBROGATION; TITLE.

CONTRACTION (Lat. *con*, together, *traho*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Those who undertake to do public work, or the work for a company or corporation on a large scale, at a certain fixed price, or to furnish goods to another at a fixed or ascertained price. 2 Pardessus, n. 300. See 5 Whart. Penn. 366.

CONTRADICT. In Practice. To prove a fact contrary to what has been asserted by a witness.

A party cannot *impeach* the character of his witness, but may contradict him as to any particular fact. 1 Greenleaf, Ev. § 443; Buller, Nisi P. 297; 2 Campb. 555; 2 Stark. 334; 3 Barnew. & C. 746; 4 *id.* 25; 8 Bingh. 57; 1 Exch. 91; 11 Jur. 478; 14 *id.* 792; 5 Wend. N. Y. 305; 12 *id.* 105; 21 *id.* 190; 7 Watts, Penn. 39; 12 Serg. & R. Penn. 381; 4 Pick. Mass. 179, 194; 1 Bail. So. C. 32; 1 Ired. No. C. 239; 17 Me. 19.

CONTRAESCRITURA. In Spanish Law. Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACTIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowel; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATOR (Fr. *contrerouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowel.

CONTRAROTULATOR PIPÆ. An officer of the exchequer that writeth out summons twice every year to the sheriffs to levy

the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. In French Law. An act which violates the law, a treaty, or an agreement which the party has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. In French Law. The second officer in command of a ship. The officer next in command to the master and under him.

His business is said to relate to providing fit things for the navigation of the vessel before the voyage,—ropes, sails, anchors, etc.; to attending to its condition through the voyage, reporting each day to the master, and attending to the anchoring and security of the vessel at the end of the voyage. *Ord. de la Marine de* 1681, liv. 2.

He is always to execute, day or night, the commands of the master, and represents the master in his sickness or absence. Guyot, *Rép. Univ.*

CONTRECTATIO. In Civil Law. The removal of a thing from its place, amounting to a theft. The offence is purged by a restoration of the thing taken. Bowyer, Comm. 268.

CONTREFACON. In French Law. The offence of those who print or cause to be printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. At Common Law. The payment by each or any one of several parties who are liable in company with others of his proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability. 1 Bibb, Ky. 562; 4 Johns. Ch. N. Y. 545; 4 Bouvier, Inst. n. 3935.

2. A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them. 4 Jones, No. C. 71; 32 Me. 381; 13 Mo. 561; 4 Ga. 545; 19 Vt. 59; 3 Den. N. Y. 130; 7 Humphr. Tenn. 385. See 1 Ohio St. 327. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part. 3 Munf. Va. 29; 1 Johns. Ch. N. Y. 425; 1 Cush. Mass. 107; 8 B. Monr. Ky. 419. As to contribution under the maritime law, see GENERAL AVERAGE. See, generally, 4 Gray, Mass. 75; 34 Me. 205; 1 Mich. 202; 4 Gill, Md. 166; 11 Penn. St. 325; 8 B. Monr. Ky. 137. There is no contribution among wrongdoers. 9 Ind. 248; 10 Cush. Mass. 287; 2 Ohio St. 203; 18 Ohio, 1; 11 Paige, Ch. N. Y. 18.

3. A debtor liable to contribution is not responsible upon a contract, but is so in equity. But courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion. White, Lead. Cas. 66; 7 Gill, Md. 34, 85; 17 Mo. 150. The remedy in equity is, however, much more effective. 12 Ala. N. s. 225; 2 Rich. Eq. So. C. 15. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt, 1 Chanc. Cas. 246; Finch, 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties. 2 Bos. & P. 268; 6 Barnew. & C. 697; 32 Me. 381.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionably to the amount of their respective credits. La. Civ. Code, art. 2522, n. 10. It is a division *pro rata.* Merlin, *Répert.*

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Coke, 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

It differs from case, which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding. 2 Dall. 419, 431, 432; 1 Tucker, Blackst. Comm. App. 420, 421; Story, Const. § 1668.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. 2, s. 1. The meaning to be attached to the word controversy in the constitution is that above given.

CONTUBERNIUM. In Civil Law. A marriage between persons of whom one or both were slaves. Pothier, *Contr. du Mar.* pt. 1, c. 2, § 4.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Eccl. 1.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 1 Chanc. Pract. 38; 4 Carr. & P. 381, 487, 558, 565; 6 *id.* 684; 2 Beck, Med. Jur. 178.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows: as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Coke, Litt. 157.

CONUSOR. A cognizor.

CONVENE. In Civil Law. To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowel.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). **In Canon Law.** The act of summoning or calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Plead. 402; 4 Bouvier, Inst. n. 4117.

In Contracts. An agreement; a covenant. Cowel.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supersedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max. 308. See MAXIMS.

CONVENTION. In Civil Law. A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, Lois Civ. l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5; 1 Bouvier, Inst. n. 100.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is mostly used to denote an assembly to make or amend the constitution of a state; but it sometimes indicates an assembly of the delegates of the people to nominate officers to be supported at an election.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Blackstone, Comm. 120.

CONVENTUS (Lat. *convenire*). An assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Sharswood, Blackst. Comm. 148.

In Civil Law. A contract made between two or more parties.

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd.

A collection of the people by the magistrate to give judgment. Calvinus, Lex.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes, 162.

Acquainted; familiar.

CONVERSION (Lat. *con*, with, together, *vertere*, to turn; *conversio*, a turning to, with, together).

In Equity. The exchange of one species of property for another, which takes place under some circumstances in the consideration of the law, although no such change has actually taken place.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs. 2 Vern. Ch. 52; 1 W. Blackst. 129.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Will. Ch. 176; 10 Pet. 563; Bouvier, Inst. Index.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. 44 Me. 197; 36 N. H. 311.

A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

2. Every such unauthorized taking of personal property, 2 J. J. Marsh. Ky. 84; 2 Penn. 416; 1 Bail. So. C. 546; 1 Nott & M'C. So. C. 592; 10 Johns. N. Y. 172; 5 Cow. N. Y. 323; 6 Hill, N. Y. 425; 13 N. H. 494, and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given, 1 Metc. Mass. 555; 14 Vt. 367; 1 Ga. 381, with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion, 4 Pick. Mass. 249; 18 *id.* 227; 8 Mees. & W. Exch. 540; 1 N. W. Chipm. Vt. 241, is a conversion, including a *taking* by those claiming without right to be assignees in bankruptcy, 3 Brod. & B. 2; *using* a thing without license of the owner, 8 Vt. 281; 6 Hill, N. Y. 425; 5 Ill. 495; 44 Me. 497; 11 Rich. So. C. 267; 5 Sneed, Tenn. 261; 24 Mo. 86; or in excess of the license, 16 Vt. 138; 5 Mass. 104; 4 E. D. Smith, N. Y. 397; 5 Du. N. Y. 40; 5 Jones, No. C. 122; *misuse* or *detention* by a finder or other bailee, 2 Penn. 416; 5 Mass. 104; 3 Pick. Mass. 492; 2 B. Monr. Ky. 339; 10 N. H. 199; 18 Me. 382; 8 Leigh, Va. 565; 3 Ark. 127; 1 Humphr. Tenn. 199; 4 E. D. Smith, N. Y. 397; 31 Ala. N. S. 26; see 12 Gratt. Va. 153; *delivery* by a bailee in violation of orders, 16 Ala. 466; *non-delivery* by a wharfinger, carrier, or other bailee, 4 Ala. 46; 2 Johns. Cas. N. Y. 411; 1 Rice, So. C. 204; 17 Pick. Mass. 1; see 28 Barb. N. Y. 515; *a wrongful sale* by a bailee, under some circumstances, 4 Taunt. 799; 8 *id.* 237; 10 Mees. & W. Exch. 576; 11 *id.* 363; 6 Wend. N. Y. 603; 16 Johns. N. Y. 74; 11 Ala. N. S. 233; 14 Vt. 367; 1

Dev. No. C. 306; 30 N. H. 164; *a failure to sell* when ordered, 1 Harr. & J. Md. 579; 13 Ala. N. S. 460; *improper* or *informal* seizure of goods by an officer, 2 Vt. 383; 18 *id.* 590; 5 Cow. N. Y. 323; 3 Mo. 207; 5 Yerg. Tenn. 313; 1 Ired. No. C. 453; 17 Conn. 154; 2 Blatchf. C. C. 552; 37 N. H. 86; see 24 Me. 326; *informal sale* by such officer, 2 Ala. 576; 14 Pick. Mass. 356; 3 B. Monr. 457, or appropriation to himself, 2 Penn. 416; 3 N. H. 144, as against such officer in the last three cases; the *adulteration* of liquors as to the whole quantity affected, 1 Strange, 586; 3 Ad. & E. 306; 14 Mass. 500; 8 Pick. Mass. 551; but *not including* a *mere trespass* with no further intent, 8 Mees. & W. 540; 18 Pick. Mass. 227, nor an *accidental loss* by mere omission of a carrier, 2 Greenleaf, Ev. § 643; 5 Burr. 2825; 1 Ventr. 223; 2 Salk. 655; 1 Pick. Mass. 50; 6 Hill, N. Y. 586; see 17 Pick. Mass. 1; nor mere *non-feasance*. 2 Bos. & P. 438; 6 Johns. N. Y. 9; 12 *id.* 300; 19 Vt. 551; 30 *id.* 436. A manual taking is not necessary.

3. The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion. 3 Ired. No. C. 29; 4 Den. N. Y. 180; 30 Vt. 307; 11 Cush. Mass. 11; 17 Ill. 413; 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases, 2 Bulstr. 280; 6 Esp. 81; or, it is said, to do a work of charity, 2 Greenleaf, Ev. § 643, or a *kindness* to the owner, 4 Esp. 195; 11 Mo. 219; 8 Metc. Mass. 578; without intent, in the last two cases, to injure or convert it. 8 Metc. Mass. 578. For what constitutes a conversion as between joint owners, see 2 Dev. & B. No. C. 252; 3 *id.* 175; 1 Hayw. No. C. 255; 6 Hill, N. Y. 461; 21 Wend. N. Y. 72; 2 Murph. So. C. 65; 4 Vt. 164; 16 *id.* 382; 1 Dutch. N. J. 173; and as to a joint conversion by two or more, see 2 N. H. 546; 15 Conn. 384; 2 Rich. So. C. 507; 3 E. D. Smith, N. Y. 555; 40 Me. 574.

An original unlawful taking is in general conclusive evidence of a conversion, 1 M'Cord, So. C. 213; 15 Johns. N. Y. 431; 8 Pick. Mass. 543; 10 Metc. Mass. 442; 13 N. H. 494; 17 Conn. 154; 29 Penn. St. 154; as is the existence of a state of things which constitutes an actual conversion, 3 Wend. N. Y. 406; 6 *id.* 603; 7 Halst. N. J. 244; 1 Leigh, Va. 86; 12 Me. 243; 3 Mo. 382; 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown, 1 Chitty, Pl. 179; 3 Bouvier, Inst. n. 3522; Metc. Yelv. 174, n.; 2 East, 405; 6 *id.* 540; 5 Barnew. & C. 146; 2 J. J. Marsh. Ky. 84; 16 Conn. 71; 19 Mo. 467; 2 Cal. 571; but this evidence is open to explanation and rebuttal, 2 Wms. Saund. 47 *e*; 5 Barnew. & Ald. 847; 16 Conn. 71; 6 Serg. & R. Penn. 300; 8 Metc. Mass. 548; 1 Cow. N. Y. 322; 28 Barb. N. Y. 75; 8 Md. 148; even though absolute. 2 Crompt. M. & R. Exch. 495.

4. The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse, 4 Esp. 156; 7 Carr. & P. 285; 3 Ad. & E. 106; 5 N. H. 225; 8 Vt. 433; 9 Ala. 383; 16 Conn. 76; 1 Rich. So. C. 65; 24 Barb. N. Y. 528; or accompanied by a condition which the party has no right to impose, 6 Q. B. 443; 2 Dev. No. C. 130; if made by an agent, must be within the scope of his authority, to bind the principal, 2 Salk. 441; 6 Jur. 507; 5 Hill, N. Y. 455; 1 E. D. Smith, N. Y. 522; but is not evidence of conversion where accompanied by a condition which the party has a right to impose. 2 Bingh. No. C. 448; 6 Q. B. 443; 5 Barnew. & Ald. 247; 4 Taunt. 198; 7 Johns. N. Y. 302; 2 Dev. No. C. 130; 2 Mas. C. C. 77. It may be made at any time prior to bringing suit, 2 Greenleaf, Ev. § 644; 2 H. Blackst. 135; 11 Mees. & W. Exch. 366; 6 Johns. N. Y. 44; if before he has parted with his possession. 11 Vt. 351. It may be inferred from non-compliance with a proper demand. 7 Carr. & P. 339; 2 Johns. Cas. N. Y. 411. The demand must be a proper one, 2 N. H. 546; 1 Johns. Cas. N. Y. 406; 2 Const. So. C. 239; 9 Ala. 744; made by the proper person, see 2 Brod. & B. 447; 2 Mas. C. C. 77; 12 Me. 328; and of the proper person or persons. See 13 East, 197; 3 Q. B. 699; 2 N. H. 546; 1 E. D. Smith, N. Y. 522.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another.

The instrument for effecting such transfer.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser, 2 Ves. Ch. 155, note; who must prepare and tender the conveyance. But see, *contra*, 2 Rand. Va. 20. The expense of the execution of the conveyance is, on the contrary, always borne by the vendor. Sugden, Vend. 296. *Contra*, 2 Rand. Va. 20; 2 McLean, C. C. 495. See 3 Mass. 487; 5 *id.* 472; Eunomus, Dial. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. For a fuller account of this subject, see Sugden, Vendors; Geldart; Preston; Thornton on Conveyancing; Washburn on Real Property; Bouvier, Institutes, Index.

CONVEYANCE OF VESSELS. The transfer of the title to vessels.

The act of congress approved the 29th July, 1850, entitled an act to provide for recording the conveyances of vessels, and for other purposes, enacts that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Provided, that the lien by bottomry on any vessel created, during her voyage, by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of the act.

The *second* section enacts that the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also all certificates for discharging and cancelling any such conveyances, in a book or books to be kept for that purpose, in the order of their reception,—noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance or certificate of discharge, fifty cents.

The *third* section enacts that the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee; and shall permit said index and books of records to be inspected during office-hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrolment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel recorded since the issuing of the last register or enrolment,—viz., the date, amount of such incumbrance, and from and to whom or in whose favor made. The collector shall receive for each such certificate one dollar.

The *fourth* section provides that the collectors of the customs shall furnish certified copies of such records, on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

The *fifth* section provides that the owner or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrolment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register of enrolment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others. 1 Bouvier, Inst. n. 2422. They frequently act as brokers for the sale of estates and obtaining loans on mortgage.

CONVEYANCING. A term including both the science and act of transferring titles to real estate from one man to another.

It includes the examination of the title of the alienor, and also the preparation of the instruments of transfer. It is, in England and Scotland, and, to a greatly inferior extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr. Preston's. Geldart and Thornton's works are important works; and an interesting and useful summation of the American law is given in Washburn on Real Property.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*. Vicat; Bacon, Abr. *Slander*.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

To condemn. To find guilty of a crime or misdemeanor. 4 Blackstone, Comm. 362.

CONVICTION (Lat. *convictio*; from *con*, with, *vincere*, to bind). **In Practice.** That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded.

Finding a person guilty by verdict of a jury. 1 Bishop, Crim. Law, § 223.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been *convicted* and sentenced. Holthouse, Dict.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwarris, Stat. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

2. Conviction must precede judgment or sentence, 1 Caines, N. Y. 72; 34 Me. 594; 16 Ark. 601; but is not necessarily or always followed by it. 1 Den. Cr. Cas. 568; 14 Pick. Mass. 88; 17 *id.* 296; 8 Wend. N. Y. 204; 3 Park. Crim. N. Y. 567; Dudl. Ga. 188; 4 Ill. 76. Generally, when several are charged in the same indictment, a part may be convicted and the others acquitted. 2 Den. Cr. Cas. 86; 4 Hawks, No. C. 356; 8 Blackf. Ind. 205; see 2 Va. Cas. 227; 3 Yerg. Tenn. 428; 3 Humphr. Tenn. 289; but not where a joint offence is charged. 14 Ohio, 386; 6 Ired. No. C. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute. 7 Mass. 250; 2 Pick. Mass. 506; 19 *id.* 479; 7 Mo. 177; 1 Murph. No. C. 134; 13 Ark. 712. See 16 Ala. 495; 5 Ill. 197; 3 Hill, So. C. 92; 9 Ired. No. C. 454; 14 Ga. 55. A conviction prevents a second prosecution for the same offence. 1 McLean, C. C. 429; 7 Conn. 414; 14 Ohio, 295; 2 Yerg. Tenn. 24; 28 Penn. St. 13. See 2 Gratt. Va. 558. As to the rule where the indictment under which the indictment is procured is defective and liable to be set aside, see 1 Bishop, Crim. Law, §§ 663, 664; 4 Coke, 44 *a*; APPEAL.

3. Conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness. 18 Miss. 192. And see 11 Metc. Mass. 302.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute, 1 Burr. 613; and the record must show fully that all proper steps have been taken, R. M. Charlt. Ga. 235; 1 Coxe, N. J. 392; 1 Ashm. Penn. 410; 2 Bay, So. C. 105; 19 Johns. N. Y. 39, 41; 14 Mass. 224; 10 Metc. Mass. 222; 3 Me. 51; 4 Zabr. N. J. 142; and especially that the court had jurisdiction. 2 Tyl. Vt. 167; 4 Johns. N. Y. 292; 14 *id.* 371; 7 Barb. N. Y. 462; 3 Yeates, Penn. 475.

Consult Arnold; Paley on *Convictions;* Russell; Bishop on *Criminal Law;* Greenleaf; Phillipps on *Evidence.*

CONVOCATION (Lat. *con,* together, *voco,* to call).

In Ecclesiastical Law. The general assembly of the clergy to consult upon ecclesiastical matters.

The clergy were always summoned at the commencement of each parliament. They themselves constituted a parliament, with a higher and lower house of convocation: the higher including the bishops and archbishops; the lower, the rest of the clergy. It is still summoned before each parliament *pro formâ,* preserving the ancient custom, but adjourns without transacting any business. 2 Stephen, Comm. 542; 2 Burns, Eccl. Law, 18 *et seq.*

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marshall, Ins. b. 1, c. 9, s. 5; Park, Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing-instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

COÖBLIGOR. Contracts. One who is bound together with one or more others to fulfil an obligation. As to suing coöbligors, see PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. In Criminal Law. Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given. 1 Russell, Crimes, 525; Wharton, Law of Hom. 179; 3 Gratt. Va. 594.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washburn, Real Prop. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists. 3 Ind. 360; 4 Gratt. Va. 16; 17 Mo. 13; 3 Md. 190. See Watkins, Conv. Coventry ed. 145.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Blackstone, Comm. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females. 4 Kent, Comm. 462; 2 Bouvier, Inst. n. 1781.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPULATIVE TERM. One which is placed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilbert, Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers intrusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately. 2 Taunt. 470; 1 Stark. 183; 4 Campb. 372; 1 Carr. & P. 578. An examined copy of the books of an unincorporated bank is not *per se* evidence. 12 Serg. & R. Penn. 256; 13 *id.* 135, 334; 2 Nott & M'C. So. C. 299; 1 Greenleaf, Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the originals from which they are taken are lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original. 1 Greenleaf, Ev. § 508; 3 Bouvier, Inst. n. 3055.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the manor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the roll of the courts baron. Coke, Litt. 58 *a;* 2 Sharswood, Blackst. Comm. 95. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Williams, Real Prop. 257, 258, Rawle's note; 1 Washburn, Real Prop. 26.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Blackstone, Comm. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, publishing, and vending copies of writings or drawings.

The intellectual productions to which the law extends protection are of three classes. *First,* writings or drawings capable of being multiplied by the arts of printing or engraving. *Second,* designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies. *Third,* inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface, and configurations of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author

or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right*. But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of all civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle; because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as applied to books, existed at common law, and whether the first statute (8 Anne, c. 19) which undertook to regulate this species of incorporeal property had taken away the perpetuity which must have existed at common law if that law recognized any right whatever.

The better opinion seems to be that the common law of England, before the statute of Anne, was supposed to admit the exclusive right of an author to multiply copies of his work by printing, and also his capacity to assign that right; for injunctions were granted in equity to protect it. See, on this subject, 4 Burr. 2303, 2408; 2 Brown, Parl. Cas. 145; 1 W. Blackst. 301; 3 Swanst. Ch. 673; 2 Ed. Ch. 327; 4 Hou. L. 815; 4 Exch. 145. But it has long been settled that, whatever the common-law right may have been before the statute, it was taken away by the statute, and that copyright exists only by force of some statutory provision. *Id.*; 8 Pet. 591; 17 How. 454.

In America, before the establishment of the constitution of the United States, it is doubtful whether there was any copyright at common law in any of the states. 8 Pet. 591. But some of the states had passed laws to secure the rights of authors, and the power to do so was one of their original branches of sovereignty, afterwards ceded to congress. By art. 1, sect. 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this authority, an act of May 31, 1790, secured a copyright in maps, charts, and books; and an act of April 29, 1802, gave a similar protection to engravings.

These statutes were revised and amended by the act of February 3, 1831, which embraces the present copyright law as to "books, maps, charts, musical compositions, prints, cuts, and engravings;" and it also extends protection to manuscripts.

2. *The persons entitled to secure a copyright.* Any person or persons being a citizen or citizens of the United States, or resident therein, and being the author or authors of any book, map, chart, or musical composition, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of any such person or persons, may secure a copyright therein by complying with the requisitions of the statute. The term "citizen" comprehends both native-born and naturalized citizens. A foreigner may take a copyright, if resident; but whether such residence must be permanent, or may be temporary, has not been judicially determined.

The term for which a copyright may be obtained is the period of twenty-eight years from the time of recording the title; and at the expiration of that period the author, engraver, or designer, if living, and his widow and children, if he be dead, may re-enter for fourteen years additional or renewed term.

3. *The formalities* requisite to the securing of the original term are—1. The deposit of a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the United States district court for the district where the author or proprietor resides. 2. The recording of that title by the clerk. 3. The deposit of a copy of the book, etc. with the same clerk within three months of the time of publication. 4. The printing of a notice that a copyright has been secured on the title-page of every copy, or the page immediately following, if it be a book, or on the face, if it be a map, chart, musical composition, print, cut, or engraving, or on the title or frontispiece, if it be a volume of maps, charts, music, or engravings, in the following words:—

"Entered according to act of congress, in the year , by A B, in the clerk's office of the District Court of " (as the case may be). In England the name of the author need not appear on the title-page. 7 Term, 620.

To obtain the renewed or additional term, these requisites must be repeated within six months before the expiration of the first term; and a notice must also be printed within two months of the date of the entry for renewal, for the space of four weeks, in one or more newspapers printed in the United States, which notice must consist of a copy of the record of the renewal. As to the necessity for the observance of these conditions, see 8 Pet. 591; 4 Wash. C. C. 486; 1 Blatchf. C. C. 618; 2 *id.* 82.

Prior to the act of congress "providing for keeping and distributing all public documents," approved February 5, 1859, the law provided that one copy of each book or other

production should be sent to the librarians of the Smithsonian Institute, and one to the librarian of the Congress Library. This provision is now repealed; and while in existence it was questionable whether a compliance with its conditions was essential to a valid copyright. 1 Blatchf. C. C. 618.

4. *The remedy for an infringement of copyright is threefold.* By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass. 2 Blatchf. C. C. 39. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court, 6 Ves. Ch. 705; 8 *id.* 323; 9 *id.* 341; 1 Russ. & M. Ch. 73, 159; 1 Younge & C. Ch. 197; 2 Hare, Ch. 560; though it cannot embrace penalties. 2 Curt. C. C. 200; 2 Blatchf. C. C. 39. The complainant in a bill in equity must show a *prima facie* legal title; although a strictly legal title is not indispensable to relief. It is sufficient if there be clear color of title founded on long possession. 6 Ves. Ch. 689; 8 *id.* 215; 17 *id.* 422; Jac. 314, 471; 2 Russ. 385; 2 Phill. Ch. 154. As to the objections that may be taken by general demurrer, see 2 Blatchf. C. C. 39. The injunction may go against an entire work or a part, 2 Russ. 393; 3 Stor. C. C. 768; 17 Ves. Ch. 422; 3 Mylne & C. Ch. 737; 11 Sim. Ch. 31; 2 Beav. Rolls, 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling. 17 Law Term, 141; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247. Original jurisdiction in respect to all these remedies is vested by another statute (Feb. 15, 1819) in the circuit courts of the United States. The act of 1831 limits the action for the penalties and forfeitures to the period of two years after the cause of action arose. The remedy for an unauthorized printing or publishing of any manuscript is by a special action on the case, or by a bill in equity for an injunction. Original jurisdiction in these cases is likewise vested in the circuit courts by force of the two acts of 1819 and 1831.

5. *Infringement.* The statute provides that any person who shall print, publish, or import, or cause to be printed, published, or imported, any *copy* of a book which is under the protection of a copyright, without the consent of the person legally entitled to the copyright first obtained in writing, signed in presence of two or more credible witnesses, or who shall, knowing the same to be so printed or imported, publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any *copy* of such book, without such consent in writing, shall forfeit every copy of such book to the person legally at the time entitled to the copyright, and shall also forfeit and pay fifty cents for every sheet which may be found in his possession, either printed, or printing, published, imported, or exposed to sale, contrary to the intent of the act, one moiety to the owner of the copyright, and one moiety to the use of the United States. The act is confined to the sheets in the possession of the party who prints or exposes them to sale. 7 How. 798. It has been held to be necessary to the recovery of these statutory penalties and forfeitures that the whole of the book should be reprinted. 23 Bost. Law Rep. 397.

6. But in order to sustain an action at common law for damages, or a bill in equity for an infringement of copyright, an exact reprint is not necessary. There may be a piracy. 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy. 3 Mylne & C. Ch. 737. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable. 17 Ves. Ch. 422; 17 Law Jour. 142; 1 Campb. 94; Ambl. Ch. 694; 2 Swanst. Ch. 428; 2 Stor. C C. 100; 2 Russ. 383; 1 Am. Jur. 212; 2 Beav. Rolls, 6; 11 Sim. Ch. 31. 2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it. The principal authorities applicable to this class of piracies are, 5 Ves. Ch. 24; 8 *id.* 215; 12 *id.* 270; 16 *id.* 269, 422; 5 Swanst. Ch. 672; 2 Brown, Ch. 80; 2 Russ. 385; 2 Sim. & S. Ch. 6; 3 Ves. & B. Ch. Ir. 77; 1 Campb. 94; 1 East, 361; 4 Esp. 169; 1 Stor. C. C. 11; 3 *id.* 768; 2 Woodb. & M. C. C. 497; 2 Paine, C. C. 393, which was the case of a chart. A fair and *bonâ fide* abridgment has in some cases been held to be no infringement of the copyright. 2 Atk. Ch. 141; Ambl. 403; Lofft, 775; 1 Brown, Ch. 451; 5 Ves. Ch. 709; 2 Am. Jur. 491; 3 *id.* 215; 4 *id.* 456, 479; 39 Leg. Obs. 346; 1 Younge & C. Ch. 298; 4 McLean, C. C. 506; 1 Stor. C. C. 19; 2 Story, Eq. § 939; 2 Kent, Comm. 382. A translation has been held not to be a violation of the copyright of the original. 2 Wall. Jr. C. C. 547.

In the case of piracy of prints, maps, charts, and musical compositions, the statute gives penalties and forfeitures for copying of the whole, and for copying, by varying, adding to, or diminishing the main design, with intent to evade the law. The acts of infringement thus defined are, printing or importing for sale, or causing to be printed or imported for sale, without the consent of the proprietor of the copyright first obtained in writing, and signed in the presence of two credible witnesses, or, knowing the same to be printed or imported without such consent, exposing to sale, or disposing of in any manner, without such consent. The forfeitures extend to the plate or plates used, and to every sheet printed, and the penalties are one dollar for every sheet found in the possession of the infringer, printed or published or exposed to sale contrary to the intent of the act, to be re-

covered as in the case of the penalties for unlawfully printing, publishing, or selling a book.

7. *The title to a copyright* is made assignable by that provision of the statute which authorizes it to be taken out by the "legal assigns" of the author. An assignment may therefore be made before the entry for copyright; but as the statute makes a written instrument, signed by the author, etc., and attested by two credible witnesses, necessary to a lawful authority in another to print, publish, and sell, a valid assignment or license, whether before or after the copyright is obtained by entry, must be so made. Whether a general assignment of the first term by the author will carry the interest in the additional or renewed term, see 2 Brown, Ch. 80; Jac. 315; 2 Woodb. & M. C. C. 23.

The sole right of acting, performing, and representing dramatic compositions, which have been entered for copyright under the act of 1831, by a supplemental act, passed August 18, 1856, is now added to the sole right of printing and publishing, and is vested in the author or proprietor, his heirs or assigns, during the whole period of the copyright. This new right, being made an incident to the copyright, follows the latter whenever the formalities for obtaining it have been complied with. For an unlawful representation, the statute gives an action of damages, to be assessed at a sum not less than one hundred dollars for the first and at fifty dollars for every subsequent performance, as to the court shall seem just. The author's remedy in equity is also saved. The statute does not apply to cases where the right of representation has been acquired before the composition has been made the subject of copyright. For a discussion of these acts, and of the nature and incidents of dramatic literary property, see 9 Am. Law Reg. 33, and 23 Bost. Law Rep. 397. On the general subject, see Curtis on Copyright; Renouard, *Droits d'Auteurs;* 2 Am. Jur. 248; 1 Phil. Leg. Int. 66.

CORAAGIUM. Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carvage*. Blount.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Blackstone, Comm. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archbold, Pract. 234. See CORAM VOBIS.

CORAM NON JUDICE. Acts done by a court which has no jurisdiction either over the person, the cause, or the process, are said to be *coram non judice*. 1 Conn. 40. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis*. 5 Harr. & J. Md. 42; 8 Cranch, 9; Paine, C. C. 55; 1 Preston, Conv. 266.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. 3 Md. 325; 3 Stephen, Comm. 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram* nobis (before us), or *quæ coram nobis residant;* so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram* vobis (before you), or *quæ coram vobis residant.* 3 Chitty, Blackst. Comm. 406, n.

CORD. A measure of wood. A cord of wood must, when the wood is piled close, measure eight feet by four, and the wood must be four feet long. There are various local regulations in our principal cities as to the manner in which wood shall be measured and sold.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans: this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice. Park, Ins. 112; 1 Marshall, Ins. 223, n.; Stevens, Av. pt. 4, art. 2; Benecke, Av. c. 10; Weskett, Ins. 145. See Comyns, Dig. *Biens* (G 1).

CORN LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Mr. Burke, and repealed in 1846 under Sir Robert Peel.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. Bacon, Abr. *Tenure* (N).

CORNET. A commissioned officer in a regiment of cavalry.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Blackstone, Comm. 282; 1 Chitty, Pract. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. Fitzherbert, Nat. Brev. 230.

An assize lay for a corody. Cowel. Corodies are now obsolete. Coke, 2d Inst. 630; 2 Sharswood, Blackst. Comm. 40.

CORONATOR (Lat.). A coroner. Spelman, Gloss.

CORONER. An officer whose principal duty it is to hold an inquisition, with the as-

sistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

2. It is his duty also, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve. 20 Ga. 336; 11 Tex. 284; 14 Ala. N. S. 326; 10 Humphr. Tenn. 346; 1 Sharswood, Blackst. Comm. 349.

The chief justice of the King's Bench is the sovereign or chief coroner of all England; though it is not to be understood that he performs the active duties of that office in any one county. 4 Coke, 57 *b*; Bacon, Abr. *Coroner;* 3 Comyns, Dig. 242; 5 *id.* 212.

3. It is also his duty to inquire concerning shipwreck, and to find who has possession of the goods; concerning treasure-trove, who are the finders, and where the property is. 1 Sharswood, Blackst. Comm. 349.

The office has lost much of the honor which formerly appertained to it; but the duties are of great consequence to society, both for bringing murderers to punishment and protecting innocent persons from accusation. It may often happen that the imperfections of the early examination enable one who is undoubtedly a criminal to escape. It is proper in most cases of homicide to procure the examination to be made by a physician, and in many cases it is his duty. 4 Carr. & P. 571.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowel. It is now held to mean solemn oath. 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 3 Term, 464; 5 East, 184.

CORPORATION (Lat. *corpus*, a body). A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

It is this last characteristic of a corporation, sometimes called its immortality, prolonging its existence beyond the term of natural life, and thereby enabling a long-continued effort and concentration of means to the end which it was designed to answer, that constitutes its principal utility. A corporation is modelled upon a state or nation, and is to this day called a body *politic* as well as corporate,—thereby indicating its origin and derivation. Its earliest form was, probably, the municipality or city, which necessity exacted for the control or local police of the marts and crowded places of the state or empire. The combination of the commonalty in this form for local government became the earliest bulwark against despotic power: and a late philosophical historian traces to the remains and remembrance of the Roman *municipia* the formation of those elective governments of towns and cities in modern Europe, which, after the fall of the Roman empire, contributed so largely to the preservation of order and to the protection of the rights of life and property as to become the foundation of modern liberty. McIntosh, Hist. of Eng. pp. 31, 32.

Aggregate corporations are those which are composed of two or more members at the same time.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are those which are created for the purposes of charities, such as schools, hospitals, and the like.

Lay corporations are those which exist for secular purposes.

Private corporations are those which are created wholly or in part for purposes of private emolument. 4 Wheat. 668; 9 *id.* 907.

Public corporations are those which are exclusively instruments of the public interest.

Sole corporations are those which by law consist of but one member at any one time.

2. By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United states, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank, when such a body is an appropriate instrument for the exercise of its constitutional powers. 4 Wheat. 424.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or general statute or constitutional law, may impose, every corporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its govern-

ment, so that they be consistent with its charter and with law. Indeed, at this day, it may be laid down as a general rule that a corporation may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

3. A corporation may be dissolved, if of limited duration, by the expiration of the term of its existence, fixed by charter or general law; by the loss of all its members, or of an integral part of the corporation, by death or otherwise, if the charter or act of incorporation provide no mode by which such loss may be supplied; by the surrender of its corporate franchise to, and the acceptance of the surrender by, the sovereign authority; and, lastly, by the forfeiture of its charter by the neglect of the duties imposed or abuse of the privileges conferred by it; the forfeiture being enforced by proper legal process.

4. In England, a private as well as a public corporation may be dissolved by act of parliament; but in the United States, although the charter of a public corporation may be altered or repealed at pleasure, the charter of a private corporation, whether granted by the king of Great Britain previous to the revolution, or by the legislature of any of the states since, is, unless in the latter case express power be for that purpose reserved, within the protection of that clause of the constitution of the United States which, among other things, forbids a state from passing any "law impairing the obligation of contracts." Const. U. S. art. 1, sect. 10; 4 Wheat. 518. Under this clause of the constitution it has been settled that the charter of a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporation, and that the legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation, judicially ascertained and declared. *Id.*

A corporate franchise, however, as to build and maintain a toll-bridge, may, by virtue of the power of eminent domain, be condemned by a state to public uses, upon just compensation, like any other private property. 6 How. 507.

CORPORATOR. A member of a corporation.

CORPOREAL HEREDITAMENTS. Substantial, permanent objects which may be inherited. The term land will include all such. 2 Sharswood, Blackst. Comm. 17.

CORPOREAL PROPERTY. In Civil Law. That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The *dead body* (*q. v.*) of a human being. 1 Russ. & R. Cr. Cas. 366, n.; 2 Term, 733; 1 Leach, Cr. Cas. 497; 8 Pick. Mass. 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is not larceny at common law. Coke, 3d Inst. 203.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. 5 Mas. C. C. 290.

CORPUS CUM CAUSA. See HABEAS CORPUS.

CORPUS DELICTI. The body of the offence; the essence of the crime.

2. It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body. Best, Pres. § 201; 1 Starkie, Ev. 575. See 6 Carr. & P. 176; 2 Hale, Pl. Cr. 290. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence. 3 Bentham, Jud. Ev. 234; Wills, Circum. Ev. 105; Best, Pres. § 204.

3. The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dearsl. Cr. Cas. 284; 1 Taylor, Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out

of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

CORPUS JURIS CANONICI (Lat. the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels, of Justinian. See those several titles, and also CIVIL LAW, for fuller information. The name is said to have been first applied to this collection early in the seventeenth century.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him to legal subjection.

2. It is chiefly exercised in a parental manner by parents, or those who are placed in *loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner. Comyns, Dig. *Pleader*, 3 M. 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; 2 Humphr. Tenn. 283; 2 Dev. & B. No. C. 365.

The master of an apprentice, for disobedience, may correct him moderately, 1 Barnew. & C. 469; Croke Car. 179; 2 Show. 289; 10 Mart. La. 38; but he cannot delegate the authority to another. 9 Coke, 96.

A master has no right to correct his servants who are not apprentices. 10 Conn. 455; 2 Greenleaf, Ev. § 97.

3. Soldiers are liable to moderate correction from their superiors. For the sake of maintaining discipline on board of the navy, the captain of a vessel, either belonging to the United States or to private individuals, may inflict moderate correction on a sailor for disobedience or disorderly conduct. Abbott, Shipp. 160; 1 Chanc. Pract. 73; 14 Johns N. Y. 119; 15 Mass. 365; 1 Bay, So. C. 3; Bee, Adm. 161; 1 Pet. Adm. 168; Moll. 209; 1 Ware, Dist. Ct. 83. Such has been the general rule. But by a proviso to an act of congress, approved the 28th of September, 1850, flogging in the navy and on board vessels of commerce was abolished.

4. The husband, by the old law, might give his wife moderate correction. 1 Hawkins, Pl. Cr. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. 1 Blackstone, Comm. 444; Strange, 478, 875, 1207; 2 Lev. 128.

5. Any excess of correction by the parent, master, officer, or captain may render the party guilty of an assault and battery and liable to all its consequences. 4 Gray, Mass. 36. In some prisons, the keepers have the right to correct the prisoners.

CORREGIDOR. In Spanish Law. A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. In Civil Law. Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Erskine, Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dict.

CORRESPONDENCE. The letters written by one person to another, and the answers thereto. See LETTER; COPYRIGHT.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, *Rép.*

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject.

2. When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." See 4 Sharswood, Blackst. Comm. 388; 1 Cruise, Dig. 52; 3 *id.* 240, 378–381, 473; 1 Chitty, Crim. Law, 740.

CORSE-PRESENT. In Old English Law. A gift of the second best beast belonging to a man at his death, taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowel; 2 Blackstone, Comm. 425.

CORSNED. In Old English Law. A piece of barley bread, which, after the pronunciation of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated, with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Sharswood, Blackst. Comm. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. In French Law. Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, etc.

Corvée seigneuriale are *services* due the lord of the manor. Guyot, *Rép. Univ.;* 3 Low. C. 1.

COSBERING. In Feudal Law. A prerogative or seignorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowel.

COSENING. In Old English Law. An offence whereby any thing is done deceitfully, whether in or out of contracts, which cannot be fitly termed by any especial name. Called in the civil law *Stellionatus.* West, Symb. pt. 2, *Indictment,* § 68; Blount; 4 Blackstone, Comm. 158.

COSINAGE (spelled, also, *Cousinage, Cosenage*). A writ which lay where the father of the great-grandfather of the demandant had been disseised and the heir brought his writ to recover possession. Fitzherbert, Nat. Brev. 221.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Blackstone, Comm. 186; Coke, Litt. 160 *a.*

COSTS. In Practice. The expenses incurred by the parties in the prosecution or defence of a suit at law.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. 11 Serg. & R. Penn. 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

2. A party can in no case recover costs from his adversary unless he can show some statute which gives him the right.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly. Salk. 206; 2 Strange, 1006, 1069; 3 Burr. 1287; 4 Binn. Penn. 194; 4 Serg. & R. Penn. 129; 5 *id.* 344; 1 Rich. So. C. 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party, they neither pay nor receive costs, unless it be so expressly provided by statute. 1 Serg. & R. Penn. 505; 8 *id.* 151; 3 Cranch, 73; 2 Wheat. 395; 12 *id.* 546; 5 How. 29. This exemption is founded on the sovereign character of the state, which is subject to no process. 3 Sharswood, Blackst. Comm. 400; Cowp. 366; 3 Penn. St. 153.

3. In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence, he will be entitled to recover them. 2 Strange, 1911; 1 Wils. 19; 3 *id.* 48; 3 Dougl. 448; 9 Moore, Priv. Coun. 625; 2 Chitt. Bail. 394; 8 East, 28, 347; 2 Price, Exch. 19; 1 Taunt. 60; 4 Bingh. 169; 1 Dall. Penn. 308, 457; 2 *id.* 74; 3 Serg. & R. Penn. 388; 13 *id.* 287; 16 *id.* 253; 4 Penn. St. 330.

4. When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant, unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief. 2 Woodb. & M. C. C. 417; 1 Wall. Jr. C. C. 187; 2 Wheat. 363; 9 *id.* 650; 3 Sumn. C. C. 473; 15 Mass. 221; 16 Penn. St. 200; 4 Dall. Penn. 388; 3 Litt. Ky. 332; 2 Yerg. Tenn. 579; Wright, Ch. Ohio, 417; 1 Vt. 488; 2 Halst. N. J. 168.

In equity, the giving of costs is entirely discretionary, as well with respect to the period at which the court decides upon them as with respect to the parties to whom they are given.

5. In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *victus victui in expensis condemnatus est;* and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *primâ facie* claim to costs given by success to the party who prevails. 3 Daniell, Chanc. Pract. 1515–1521.

6. An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate. 11 Serg. & R. Penn. 47; 15 *id.* 239; 23 Penn. St. 471. But the rule is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit. 5 Binn. Penn. 138; 7 Penn. St. 136, 137; 3 Penn. L. J. 116.

See DOUBLE COSTS; TREBLE COSTS. Consult Brightly, Hulloch, Merrifield, Sayer, Tidd, *Costs;* the books of practice adapted to the laws of each state; Bouvier, *Institutes,* Index, this title.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Adams, Eq. 343.

COSTS DE INCREMENTO (increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. 13 How. 372.

The cost of the suit, etc. recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento*. Buller, N. P. 328 *a*. Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs. 2 Strange, 1048; TAXED COSTS. Costs were enrolled in England in the time of Blackstone as *increase* of damages. 3 Blackstone, Comm. 299.

COTERELLI. Anciently, a kind of peasantry who were outlaws. Robbers. Blount.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowel.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowel; Blount.

COTSETUS. A cottager or cottage-holder who held by servile tenure and was bound to do the work of the lord. Cowel.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Termes de la Ley. Twenty years' possession of cottage gives good title as against the lord. Buller, Nisi P. 103 *a*, 104. By a grant of a cottage the curtilage will pass. 4 Viner, Abr. 582.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Blackstone, Comm. 9.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See 14 Mass. 470; 3 Pick. Mass. 517; 4 *id.* 25.

A governor's council is still retained in some of the states of the United States. It is analogous in many respects to the privy council of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

See PRIVY COUNCIL.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more; though it is perhaps more common, when speaking of one of several counsellors concerned in the management of a case in court, to say that he is "of counsel."

Knowledge. A grand jury is sworn to keep secret "the commonwealth's *counsel*, their fellows', and their own."

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is employed by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law.

In the supreme court of the United States, the two degrees of attorney and counsel are kept separate, and no person is permitted to practise in both capacities. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case. 1 Kent, Comm. 307.

Generally, in the other courts of the United States, as well as in the courts of Pennsylvania, the same person performs the duty of counsellor and attorney at law.

2. In giving their advice to their clients, counsel and others, professional men, have duties to perform to their clients, to the public, and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas*. 1 Hagg. 222. See ATTORNEY AT LAW; PRIVILEGE; CONFIDENTIAL COMMUNICATIONS.

COUNT (Fr. *comte*; from the Latin *comes*). An earl.

It gave way as a distinct title to the Saxon earl, but was retained in countess, viscount, and as the basis of county. Termes de la Ley; 1 Blackstone, Comm. 398. See COMES.

In Pleading (Fr. *conte*, a narrative). The plaintiff's statement of his cause of action.

This word, derived from the French *conte*, a narrative, is in our old law-books used synonymously with declaration; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action; so that, if one or more of

several counts be not adapted to the evidence, some other of them may be so. Gould, Plead. c. 4, ss. 2, 3, 4; Stephen, Plead. 279; *Doctrina Plac.* 178; 3 Comyns, Dig. 291; Dane, Abr. Index; Bouvier, Inst. Index. In real actions, the declaration is usually called a count. Stephen, Plead. 36.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowel; Whishaw; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to indemnify. 2 Leon. 90.

COUNTER-LETTER. An agreement to recovery where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. 11 Pet. 351.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damnified, the one who gives the counter-security will indemnify him.

COUNTERFEIT. In Criminal Law. To make something false in the semblance of that which is true. It always implies a fraudulent intent. Vide Viner, Abr. *Counterfeit;* FORGERY.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order.

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles, 296. See 3 Coke, 26 *b;* 2 Ventr. 298; 10 Mod. 432; Viner, Abr. *Countermand* (A 1), *Bailment* (D); 9 East, 49; Bacon, Abr. *Bailment* (D); Comyns, Dig. *Attorney* (B 9), (C 8); Dane, Abr. *Countermand.*

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals. 2 Blackstone, Comm. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies: although both are original, one of them is sometimes called the counterpart. See 12 Viner, Abr. 104; Dane, Abr. Index; 7 Comyns, Dig. 443; Merlin, *Rép. Double Ecrit.*

COUNTERPLEA. In Pleading. A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. 2 Wms. Saund. 45 *h.* Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should not be granted. *Counterplea of aid prayer* is the demandant's allegation why the vouchee of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouchee in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. Termes de la Ley; *Doctrina Plac.* 300; Comyns, Dig. *Voucher* (B 1, 2); Dane, Abr.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Blackstone, Comm. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Blackstone, Comm. 116.

2. The United States are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England States, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. vol. 1, p. 234; vol. 2, p. 258.

3. In some states, a county is considered a corporation, 1 Ill. 115; in others, it is held a quasi corporation. 7 Mass. 461; 16 *id.* 87; 3 Me. 131; 9 *id.* 88; 8 Johns. N. Y. 385; 3 Munf. Va. 102. In regard to the division of counties, see 11 Mass. 399; 16 *id.* 86; 6 J. J. Marsh. Ky. 147; 4 Halst. N. J. 357; 5 Watts, Penn. 87; 9 Cow. N. Y. 640.

4. In the English law, this word signifies the same as *shire,*—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shire-reeve (*sheriff*) was the governor of the province, under the *comes,* earl, or count.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers.

COUNTY CORPORATE. A city or town, with more or less territory annexed, constituting a county by itself. 1 Blackstone, Comm. 120. Something similar to this exists in this country in regard to Philadelphia, New York, and Boston. They differ in no material points from other counties.

COUNTY COURT. In English Law. Tribunals of limited jurisdiction, originally established under the statute 9 & 10 Vict. c. 95.

They had at their institution jurisdiction of actions for the recovery of debts, damages, and demands, legacies, and balances of partnership accounts, where the sum sued for did not exceed twenty pounds. It has since been much extended, especially in cases where the parties give assent in writing. They are chiefly regulated by stat. 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74. See 3 Sharswood, Blackst. Comm. 76.

Tribunals of limited jurisdiction in the county of Middlesex, established under the statute 22 Geo. II. c. 33.

These courts are held once a month at least in every hundred in the county of Middlesex, by the county clerk and a jury of twelve suitors, or freeholders, summoned for that purpose. They examine the parties under oath, and make such order in the case as they shall judge agreeable to conscience. 3 Stephen, Comm. 452; 3 Blackstone, Comm. 83.

The county court was a court of great antiquity, and originally of much splendor and importance. It was a court of limited jurisdiction incident to the jurisdiction of the sheriff, in which, however, the suitors were really the judges, while the sheriff was a ministerial officer. It had jurisdiction of personal actions for the recovery of small debts, and of many real actions prior to their abolition. By virtue of a *justicies*, it might entertain jurisdiction of personal actions to any amount. At this court all proclamations of laws, outlawries, etc. were made, and the elections of such officers as sheriffs, coroners, and others took place. In the time of Edward I. it was held by the earl and bishop, and was of great dignity. It was superseded by the courts of Requests to a great degree; and these, in turn, gave way to the new county courts, as they are sometimes called distinctively.

In American Law. Courts in many of the states of the United States, and in Canada, of widely varying powers. See the accounts of the various states and the article CANADA.

COUNTY PALATINE. A county possessing certain peculiar privileges.

The owners of such counties have kingly powers within their jurisdictions, as the pardoning crimes, issuing writs, etc. These counties have either passed into the hands of the crown, or have lost their peculiar privileges to a great degree. 1 Blackstone, Comm. 117; 4 *id.* 431. The name is derived from *palatium* (palace), and was applied because the earls anciently had palaces and maintained regal state. Cowel; Spelman, Gloss.; 1 Blackstone, Comm. 117.

COUPONS. Those parts of a commercial instrument which are to be *cut*, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor.

COUR DE CASSATION. In French Law. The supreme judicial tribunal and court of final resort. It is composed of forty-nine counsellors and judges, including a first president and three presidents of chamber, an attorney-general and six advocates-general, one head registrar and four deputy registrars appointed by the head registrar, and a certain number of ushers. Jones, French Bar, 22; Guyot, *Rép. Univ.*

The jurisdiction of the court is only on error shown in the proceedings of the lower courts in matters of law, taking the facts as found by the lower courts.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land must be bounded by the courses and distances mentioned in the patent or deed. 4 Wheat. 444; 3 Pet. 96; 3 Murph. No. C. 82; 2 Harr. & J. Md. 267; 5 *id.* 254. When the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds. 2 Overt. Tenn. 304; 7 Wheat. 7. See 3 Call, Va. 239; 7 T. B. Monr. Ky. 333. See BOUNDARY.

COURSE OF TRADE. What is usually done in the management of trade or business.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship takes in going from one port to another, and the shortest way. Marshall, Ins. 185.

COURT (Fr. *cour*, Dutch, *koert*, a yard). **In Practice.** A body in the government to which the public administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions.

The place where justice is judicially administered. Coke, Litt. 58 *a*.

The judge or judges themselves, when duly convened.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which originally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Latin term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *General Court*.

In England, however, and in those states of the United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges,—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers. Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc.; while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, and who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc. For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:—

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL; APPELLATE JURISDICTION; DIVISION OF OPINION.

Central. See CENTRAL CRIMINAL COURT.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts; also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony. See LOCAL COURTS.

Martial. See COURT-MARTIAL.

Not of record, those which are not courts of record.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior, which are those of immediate jurisdiction between the inferior and supreme courts; also, those of controlling as distinguished from those of subordinate jurisdiction.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

COURT OF ADMIRALTY. See ADMIRALTY; COURTS OF THE UNITED STATES, **71–89.**

COURT OF ANCIENT DEMESNE. In English Law. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 2 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Sharswood, Blackst. Comm. 99; 1 Report Eng. Real Prop. Comm. 28, 29; 3 Stephen, Comm. 211, 212.

COURT OF APPEALS. In American Law An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. See the articles on those states.

COURT OF ARCHES (L. Lat. *curia de arcubus*). **In English Ecclesiastical Law.** A court of appeal, and of original jurisdiction.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary *le Bow* (*Sancta Maria de arcubus*,—literally, "St. Mary *of arches*"), so named from the style of its steeple, which is raised upon pillars built *archwise*, like so many bent bows. Termes de la Ley. It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctors' Commons.

2. Its proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but, the office of dean of the arches having been for a long time united with that of the archbishop's principal official, the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Blackstone, Comm. 64; 3 Stephen, Comm. 431; Wharton's Law Dict. 2d Lond. ed. *Arches Court.* Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law by the denomination of *letters of request.* 3 Stephen, Comm. 431; 2 Chitty, Genl. Pract. 496; 2 Add. Eccl. 406.

3. From the court of arches an appeal formerly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (that is, to a court of delegates appointed under the king's great seal), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the judicial committee of the privy

council. 3 Blackstone, Comm. 65; 3 Stephen, Comm. 431.

4. A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge pronounces decree upon hearing the arguments of advocates, which is then carried into effect.

Consult Burn, Eccl. Law; Reeve, Hist. Eng. Law; 3 Blackstone, Comm. 65; 3 Stephen, Comm. 431.

COURTS OF ASSIZE AND NISI PRIUS. In English Law. Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by the queen's special commission on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, before the chief or other judge of the superior court, at what are called the London and Westminster sittings.

2. These judges of assize came into use in the room of the ancient justices in eyre (*justiciarii in itinere*), who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176 (22 Hen. II.), with a delegated power from the king's great court, or *aula regis*, being looked upon as members thereof; though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c. 4 (explained by 12 Edw. II. c. 3), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county; by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or, otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sergeant sworn; and, finally, by 2 & 3 Vict. c. 22, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Stephen, Comm. 421–423; 3 Blackstone, Comm. 57, 58.

3. There are eight circuits (formerly seven), viz.: the Home, Midland, Norfolk, Oxford, Northern, Western, North Wales, and South Wales. A general commission is issued twice a year to the judges mentioned (of the superior courts of common law at Westminster), two of whom are assigned to every circuit. The judges have four several commissions, viz.: of *the peace;* of *oyer and terminer;* of *gaol delivery;* and of *nisi prius.* There were formerly five, including the commission of assize; but the recent abolition of assizes and other real actions has thrown that commission out of force. The commission of *nisi prius* is directed to the judges, the clerks of assize, and others; and by it civil causes in which issue has been joined in any one of the superior courts are tried in circuit by a jury of twelve men of the county in which the venire is laid, and on return of the verdict to the court above—usually on the first day of the term following—the court gives judgment on the fifth day after, allowing the four intermediate days to either party, if dissatisfied with the verdict, to move for a new trial. 3 Stephen, Comm. 424, 425; 3 Blackstone, Comm. 58, 59. Where courts of this kind exist in the United States, they are instituted by statutory provision. 4 Watts & S. Penn. 404. See OYER AND TERMINER; GAOL DELIVERY; COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; NISI PRIUS; COMMISSION OF THE PEACE.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests.

The highest court is called Justice in Eyre's Seat; the middle, the Sweinmote; and the lowest, the Attachment. Sharswood, For. Laws, 90, 99; Wharton, Law Dict. *Attachment of the Forests.*

The Court of Attachments is to be held before the verderors of the forest once in every forty days, to inquire of all offenders against vert and venison, by receiving from the foresters or keepers their attachments or presentments *de viridi et venatione*, enrolling them, and certifying them under their seals to the court of justice-seat, or sweinmote; for this court can only inquire of offenders; it cannot convict them. 3 Blackstone, Comm. 439; Carta de Foresta, 9 Hen. III. c. 8; Termes de la Ley. But see FOREST COURTS.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under two hundred pounds a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office, in the keeping of the master of

the rolls, stat. 1 & 2 Vict. c. 94, and may be searched on payment of a fee. Eng. Cyclopædia; Termes de la Ley; Cowel.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, and which is declared a court of law and equity for that purpose. The nature of its constitution may be learned from the early sections of the Bankrupt Law Consolidation Act, 1849. The judgments of this court may be examined, on appeal, by a vice-chancellor, and successively by the lord-chancellor and the house of lords, if he deem the question of sufficient difficulty or importance. 3 Sharswood, Blackst. Comm. 428. There is a court of bankruptcy in London, established by 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, s. 21; and courts of bankruptcy for different districts are established by 5 & 6 Vict. c. 122, which are branches of the London court. 2 Stephen, Comm. 199, 200; 3 *id.* 426.

COURT BARON. A domestic court, incident to every manor, to be held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record.

Customary court baron is one appertaining entirely to copyholders. See CUSTOMARY COURT BARON.

Freeholders' court baron is one held before the freeholders who owe suit and service to the manor. It is the court-baron proper.

These courts have now fallen into great disuse in England; and provision is made by statute 9 & 10 Vict. c. 95, § 14, enabling the lord of any manor which has a court in which debts or demands are recoverable to surrender to the crown the right of holding such court, and upon such surrender the court is discontinued and the right of holding it ceases. In the state of New York such courts were held while the state was a province. See charters in Bolton's Hist. of New Chester. The court has derived its name from the fact that it was the court of the baron or lord of the manor, 3 Sharswood, Blackst. Comm. 33, n.; see Fleta, lib. 2, c. 53; though it is explained by some as being the court of the freeholders, who were in some instances called barons. Coke, Litt. 58 *a*.

2. Before the abolition of the writ of right, by statute 3 & 4 Will. IV. c. 27, § 36, the most important business of this court was to determine all controversies relating to the right to lands within the manor. It also secured the performance of the services and duties stipulated for by lords of manors, and adjudicated upon actions of a personal nature where the amount of the debt or damage was under forty shillings. This jurisdiction over personal action it still retains. 3 Blackstone, Comm. 33; 1 Crabb, Real Prop. §§ 631–634.

3. These courts may also make by-laws regulating the use of commons and the like, which are binding upon such tenants as assent to them, unless already regulated by prescription or under an immemorial custom; but such laws cannot bind strangers. The penalty for a breach of such laws is in the nature of a fine, and not of an amercement.

The freeholders of the manor alone can be suitors, and they also constitute the judges of the court. Unless, then, there are two or more freeholders, there can be no such court, and the party must appeal to the lord paramount. The steward of the manor acts rather as registrar than as judge; but his presence is necessary to a proper constitution of the court.

It may be held at any place within the manor, upon giving fifteen days' notice (including three Sundays), or even upon shorter notice of the time of holding. In later times it assembles usually but once a year; though formerly it was held every three weeks, or, as some think, as often as the lord chose.

COURT OF CHANCERY, or **CHANCERY.** A court existing in England and several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the *cancelli* (bars) which in this court anciently separated the press of people from the officers. See 3 Sharswood, Blackst. Comm. 46, n.; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

2. Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. See the articles on the various states. The federal courts exercise an equity jurisdiction whether the state courts in the district are courts of equity or not. 2 McLean, C. C. 568; 15 Pet. 9; 11 How. 669; 13 *id.* 268, 519.

In English Law. The highest court of judicature next to parliament.

The superior court of chancery, called distinctively "The High Court of Chancery," consists of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, which title see; the three separate courts of the vice-chancellors.

The jurisdiction of this court is fourfold.

3. *The common-law or ordinary jurisdiction.* By virtue of this the lord-chancellor is a privy councillor and prolocutor of the house of lords. The writs for a new parliament issue from this department. The Petty Bag Office is in this jurisdiction. It is a common-law court of record, in which pleas of *scire facias* to repeal letters-patent are exhibited, and many other matters are determined, and

whence all original writs issue. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction includes the power which the lord-chancellor exercises under the *habeas corpus* act, and inquires into charitable uses, but does not include the equitable jurisdiction.

The specially delegated jurisdiction includes the exclusive authority which the lord-chancellor and lords justices of appeal have over the persons and property of idiots and lunatics.

4. *The equity or extraordinary jurisdiction* is either *assistant* or auxiliary to the common law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving from the consequences of common-law judgments; *concurrent* with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or *exclusive*, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in action, partition, the appointment of receivers, charities, or public trusts. Wharton, Law Dict. 2d Lond. ed.

5. The inferior courts of chancery are the equity courts of the Palatine Counties, the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. Consult Story, Equity Jurisprudence; Daniell, Chancery Practice; Spence, Eq. Jur.; COURTS OF EQUITY.

COURT OF CHIVALRY. In English Law. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war.

As a court of civil jurisdiction, it was held by the lord high constable of England while that office was filled, and the earl-marshal, jointly, and subsequently to the attainder of Stafford, duke of Buckingham, in the time of Henry VIII., by the earl-marshal alone. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it could be held only by the lord high constable and earl-marshal jointly. It had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it."

It was not a court of record, could neither fine nor imprison, 7 Mod. 127, and has fallen entirely into disuse. 3 Sharswood, Blackst. Comm. 68; 4 *id.* 268.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. In English Law. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports.

A writ of error lay to the lord-warden in his court at Shepway, and from this court to the queen's bench. By the 18 & 19 Vict. c. 48, and 20 & 21 Vict. c. 1, the jurisdiction and authority of the lord-warden of the Cinque Ports and constable of Dover Castle, in or in relation to the administration of justice in actions, suits, or other civil proceedings, at law or in equity, are abolished. 3 Sharswood, Blackst. Comm. 79; 3 Stephen, Comm. 447, 448. See CINQUE PORTS.

COURT OF CLAIMS. See COURTS OF THE UNITED STATES, **97, 98.**

COURT OF THE CLERK OF THE MARKET. In English Law. A tribunal incident to every fair and market in the kingdom, to punish misdemeanors therein.

This is the most inferior court of criminal jurisdiction in the kingdom. The object of its jurisdiction is principally the recognizance of weights and measures, to try whether they are according to the true standard thereof, which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though usually a layman, is called the *clerk* of the market.

The jurisdiction over weights and measures formerly exercised by the clerk of the market has been taken from him by stat. 5 & 6 Will. IV. c. 63.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name still exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania. 3 Serg. & R. Penn. 246. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names; and for peculiarities in their constitution reference is made to the articles on the states in regard to which the question may arise.

In English Law. One of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, is a branch of the *aula regis* and was at its institution ambulatory, following the household of the king. In the eleventh clause of Magna Charta, A.D. 1214, it is provided that it shall be held at some fixed place, which is Westminster. The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and

civilians. It derived its name from the fact that the causes of *common people* were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it now has a concurrent jurisdiction in many matters. Formerly none but serjeants at law were admitted to practice before this court *in banc*, 6 Bingh. N. C. 235; but, by statutes 6 & 7 Vict. c. 18, § 61, 9 & 10 Vict. c. 54, all barristers at law have the right of "practice, pleading, and audience."

It consists of one chief and four puisne or associate justices.

It has a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74; the examination of married women concerning their conveyances, 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court, 6 & 7 Vict. c. 18. Wharton, Law Dict. 2d Lond. ed.

Appeals formerly lay from this court to the king's bench; but, by statutes 11 Geo. IV., and 1 Will. IV. c. 70, appeals for errors in law are now taken to the judges of the king's bench and barons of exchequer in the exchequer chambers, from whose judgment an appeal lies only to the house of lords. 3 Sharswood, Blackst. Comm. 40.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT OF CONVOCATION. In English Ecclesiastical Law. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation. In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro formâ* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purpose of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the queen in council, by stat. 2 & 3 Will. IV. c. 92.

Cowel; Termes de la Ley; Bacon, Abr. *Ecclesiastical Courts*, A 1; 1 Sharswood, Blackst. Comm. 279.

COURT OF THE CORONER. In English Law. A court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. 4 Stephen, Comm. 341; 4 Sharswood, Blackst. Comm. 274. See CORONER.

COURT FOR THE CORRECTION OF ERRORS. See SOUTH CAROLINA.

COURTS OF THE COUNTIES PALATINE. In English Law. A species of private court which formerly appertained to the counties palatine of Lancaster and Durham.

They were local courts, which had exclusive jurisdiction in law and equity of all cases arising within the limits of the respective counties. The judges who held these courts sat by special commission from the owners of the several franchises and under their seal, and all process was taken in the name of the owner of the franchise, though subsequently to the 27 Hen. VIII. c. 24 it ran in the king's name. See COUNTY PALATINE.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English Law. A court which has the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consists of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who is entitled judge ordinary.

The judge ordinary exercises all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision is made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries may be summoned to try matters of fact, and such trials are conducted in the same manner as jury trials at common law. See stat. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61.

COURT OF THE DUCHY OF LANCASTER. In English Law. A court of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster.

It is held by the chancellor or his deputy, is a court of equity jurisdiction and not of

record. It is to be distinguished from the court of the county palatine of Lancaster. 3 Blackstone, Comm. 78.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURTS OF CHANCERY, and the articles upon the various states.

2. Such courts are not, in general, courts of record. Their decrees touch the person only, 3 Caines, N. Y. 36, but are conclusive between the parties. 8 Conn. 268; 1 Stockt. Ch. N. J. 302; 6 Wheat. 109. See 2 Bibb, Ky. 149. And as to the personalty, their decrees are equal to a judgment, 2 Madd. Ch. 355; 2 Salk. 507; 1 Vern. Ch. 214; 3 Caines, N. Y. 35, and have preference according to priority. 3 P. Will. Ch. 401, n.; Cas. *temp.* Talb. 217; 4 Brown, Parl. Cas. 287; 4 Johns. Ch. N. Y. 638. They are admissible in evidence between the parties, 2 Leigh, Va. 474; 13 Miss. 783; 1 Fla. 409; 10 Humphr. Tenn. 610; and see 3 Litt. Ky. 248; 8 B. Monr. Ky. 493; 5 Ala. 254; 2 Gill, Md. 21; 12 Mo. 112; 2 Ohio St. 551; 9 Rich. So. C. 454, when properly authenticated, 2 A. K. Marsh. Ky. 290, and come within the provisions for authentication of judicial records of the various states for use as evidence in other states. Pet. C. C. 352.

3. An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum, 1 Campb. 253; Hempst. C. C. 197, but not for an unascertained sum, 3 Caines, N. Y. 37, n.; but *nil debet* or *nul tiel record* is not to be pleaded to such an action. 9 Serg. & R. Penn. 258.

COURT OF EXCHEQUER. In English Law. A superior court of record, administering justice in questions of law and revenue.

It is the lowest in rank of the three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding or non-payment. The privilege of suing and being sued in this court in personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king, to all personal actions. It had formerly an equity jurisdiction, and there was then an equity court; but, by statute 5 Vict. c. 5, this jurisdiction was transferred to the court of chancery.

It consists of one chief and four puisne judges or barons.

As a court of revenue, its proceedings are regulated by 22 & 23 Vict. c. 1, § 9.

As a court of common law, it administers redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court is to the judges of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords. 3 Stephen, Comm. 400–402; 3 Sharswood, Blackst. Comm. 44–46.

In Scotch Law. A court which formerly had jurisdiction of matters of revenue, and a limited jurisdiction over cases between the crown and its vassals where no questions of title were involved.

This court was established by the statute 6 Anne, c. 26, and its processes resembled those in the English court of exchequer. It is now merged in the court of sessions; but the name is still applied to this branch of the latter court, which is held by two of the judges acting in rotation. Paterson, Comp. 1055, n. The proceedings are regulated by stat. 19 & 20 Vict. c. 56.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the lord chancellor, lord treasurer, and the justices of the king's bench and common pleas. A second court of exchequer chamber was instituted by statute 27 Eliz. c. 8, consisting of the justices of the common pleas and the exchequer, which had jurisdiction in error of cases commenced in the king's bench. By statutes 11 Geo. IV. and 1 Will. IV. c. 70, these courts were abolished and the present court of exchequer chamber substituted in their place.

As a court of debate, it is composed of the judges of the three superior courts of law, to whom is sometimes added the lord chancellor. To this court questions of unusual difficulty or moment are referred before judgment from either of the three courts.

As a court of appeals, it consists of the judges of two of the three superior courts of law (common bench, king's bench, and exchequer) sitting to decide questions appealed from the others. 3 Sharswood, Blackst. Comm. 55.

From the decisions of this court a writ of error lies to the house of lords.

COURT OF FACULTIES. In Ecclesiastical Law. A tribunal, in England, belonging to the archbishop.

It does not hold pleas in any suits, but creates rights to pews, monuments and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc. of different descriptions: as, a license to marry, a faculty to erect an organ in a parish church, to level a church-yard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad facultates*. Coke, 4th Inst. 337; 2 Chitty, Genl. Pract. 507.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction. See NEW JERSEY.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year.

It is held before two or more justices of the

peace, one of whom must be a justice of the *quorum*.

The stated times of holding sessions are fixed by stat. 11 Geo. IV. and 1 Will. IV. c. 70, § 35. When held at other times than quarterly, the sessions are called "general sessions of the peace."

As to the jurisdiction of the various sessions, see 5 & 6 Vict. c. 38; 7 & 8 Vict. c. 71; 9 & 10 Vict. c. 25; 4 Sharswood, Blackst. Comm. 271.

COURT OF HUSTINGS. In English Law. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Blackstone, Comm. 80, n.; 3 Stephen, Comm. 449, n.; Madox, Hist. Exch. c. 20; Coke, 2d Inst. 327; Calth. 131.

In American Law. A local court in some parts of the state of Virginia. 6 Gratt. Va. 696.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person properly impeached. In England, the house of lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. See IMPEACHMENT, and also the articles on the various states.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. In English Law. A local court which has its sittings in London only, which receives the petitions of insolvent debtors and decides upon the question of granting a discharge.

It is held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, are not reversible by any other tribunal. See 3 Stephen, Comm. 426; 4 *id.* 287, 288.

COURT OF INQUIRY. In English Law. A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Stephen, Comm. 600, note (z); 1 Coleridge, Blackst. Comm. 418, n.; 2 Brod. & B. 130.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier. The said court shall consist of one or more officers, not exceeding three, and a judge-advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the performance of their duty. Gordon, Dig. U. S. Laws, art. 3558–3560.

COURT OF JUSTICE SEAT. In English Law. The principal of the forest courts.

It was held before the chief justice in eyre, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, privileges, and all pleas and causes whatsoever, therein arising. It might also try presentments in the inferior courts of the forests, and give judgment upon conviction of the sweinmote. After presentment made or indictment found, the chief justice might issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting.

2. It was a court of record, and might fine and imprison for offences within the forest. A writ of error lay from it to the court of queen's bench to rectify and redress any maladministration of justice; or the chief justice in eyre might adjourn any matter of law into that court.

These justices in eyre were instituted by King Henry II., in 1184.

These courts were formerly very regularly held; but the last court of justice seat of any note was held in the reign of Charles I., before the earl of Holland. After the restoration another was held, *pro formâ* only, before the earl of Oxford. But since the era of the revolution of 1688 the forest-laws have fallen into total disuse. 3 Stephen, Comm. 439–441; 3 Blackstone, Comm. 71–73; Coke, 4th Inst. 291.

COURT OF JUSTICIARY. In Scotch Law. A court of general criminal and limited civil jurisdiction.

It consists of the lord justice general, the lord justice clerk, and five other members of the court of sessions. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the lord justice general alone, or, in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a quorum, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pract. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling. See Paterson, Comp. § 940, n. *et seq.*; Bell, Dict.; Alison, Pract. 25; 20 Geo. II. c. 43; 23 Geo. III. c. 45; 30 Geo. III. c. 17; 1 Will. IV. c. 69, § 19; 11 & 12 Vict. c. 79, § 8.

COURT OF KING'S BENCH. In English Law. The supreme court of common law in the kingdom.

It is one of the successors of the *aula regis*, and received its name, it is said, because the king for-

merly sat in it in person, the style of the court being *coram rege ipso* (before the king himself). During the reign of a queen it is called the Queen's Bench, and during Cromwell's protectorate it was called the Upper Bench. Its jurisdiction was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force (*vi et armis*), and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law, the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions of the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It is, from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable "*ubicunque fuerimus in Anglia*" (wherever in England we the sovereign may be), but has *for some centuries* been held at Westminster.

2. It consists of a lord chief justice and four puisne or associate justices, who are, by virtue of their office, conservators of the peace and supreme coroners of the land.

3. The *civil* jurisdiction of the court is either *formal* or *plenary*, including personal actions and the mixed action of ejectment; *summary*, applying to annuities and mortgages, 15 & 16 Vict. cc. 55, 76, 219, 220, arbitrations and awards, cases under the Habeas Corpus Act, 31 Car. II. c. 2; 56 Geo. III. c. 100, cases under the Interpleader Act, 1 & 2 Will. IV. c. 58, officers of the court, warrants of attorney, cognovits, and judges' orders for judgment; *auxiliary*, including answering a special case, enforcing judgments of inferior courts of record, prerogative, mandamus to compel inferior courts or officers to act, 17 & 18 Vict. c. 125, §§ 75–77, prohibition, quo warranto, trying an issue in fact from a court of equity or a feigned issue; or *appellate*, including appeals from decisions of justices of the peace giving possession of deserted premises to landlords, 11 Geo. II. c. 19, §§ 16, 17, writs of false judgment from inferior courts not of record, but proceeding according to the course of the common law, appeals by way of a case from the summary jurisdiction of justices of the peace on questions of law, 20 & 21 Vict. c. 43; Order of Court of Novr. 25, 1857. See Wharton, Law Dict. 2d Lond. ed.

4. Its *criminal* jurisdiction extends to all crimes and misdemeanors whatever of a public nature, it being considered the *custos morum* of the realm. Its jurisdiction is so universal that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges does not exclude the jurisdiction of this court, without negative words. It may also proceed on indictments removed into that court out of the inferior courts by certiorari.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

These courts were established as substitutes for the sheriff's tourn in those districts which were not readily accessible to the sheriff on the tourn. The privilege of holding them is a franchise subsisting in the lord of the manor by prescription or charter, and may be lost by disuse. The court leet took cognizance of a wide variety of crimes, ranging from the very smallest misdemeanors to, but excluding, treason. For some of these offences of a lower order, punishment by fines, amercements, or other means might be inflicted. For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took *view of frankpledge*. Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected, certain municipal officers in the borough to which the leet was appended.

This court has fallen considerably into disuse, but still exists in some parts of England. In some boroughs it still elects, and in others assists in the election of, the chief municipal officers of the borough. Its duties are mainly, however, those of the trial of the smaller offences or misdemeanors, and presentment of the graver offences. These presentments may be removed by certiorari to the king's bench and an issue there joined. 4 Sharswood, Blackst. Comm. 273; Greenwood, County Courts, 308 *et seq.*; Kitchin, Courts Leet; Powell, Courts Leet; 1 Reeve, Hist. Eng. Law, 7.

COURT OF THE LORD HIGH STEWARD. In English Law. A court instituted for the trial of peers indicted for treason, felony, or misprision of either.

This court can be held only during a recess of parliament, since the trial of a peer for either of the above offences can take place, during a session of that body, only before the High Court of Parliament. It consists of a lord high steward (appointed in modern times *pro hac vice* merely) and as many of the temporal lords as may desire to take the proper oath and act. And all the peers qualified to sit and vote in parliament are to be summoned at least twenty days before the trial. Stat. 7 Will. III. c. 3.

The lord high steward, in this court, decides upon matters of law, and the lords triers decide upon the questions of fact.

The course of proceedings is to obtain jurisdiction of the cause by a writ of certiorari removing the indictment from the queen's bench or court of oyer and terminer where it was found, and then to go forward with the trial before the court composed as above stated. The guilt or innocence of the peer is determined by a vote of the court, and a majority suffices to convict; but the number voting for conviction must not be less than twelve. The manner of proceeding is much the same as in trials by jury; but no special verdict can be rendered.

A peer indicted for either of the above offences may plead a pardon in the queen's bench, but can make no other plea there. If indicted for any less offence, he must be tried by a jury before the ordinary courts of jus-

tice. 4 Blackstone, Comm. 261–265. See HIGH COURT OF PARLIAMENT.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. In English Law. A court constituted for the trial of scholars or privileged persons connected with the university at Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university bedels, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day.

COURT OF THE STEWARD OF THE KING'S HOUSEHOLD. In English Law. A court which had jurisdiction of all cases of treason, misprision of treason, murder, manslaughter, bloodshed, and other malicious strikings whereby blood is shed, occurring in or within the limits of any of the palaces or houses of the king, or any other house where the royal person is abiding.

It was created by statute 33 Hen. VIII. c. 12, but long since fell into disuse. 4 Sharswood, Blackst. Comm. 276, 277, and notes.

COURT OF MAGISTRATES AND FREEHOLDERS. In American Law. The name of a court in South Carolina for the trial of slaves and free persons of color for criminal offences.

COURT OF THE MARSHALSEA. In English Law. A court which had jurisdiction of causes to which the domestic servants were parties.

It was held by the steward of the king's household, as judge, and the marshal was the ministerial officer, and held pleas of trespasses committed within twelve miles of the sovereign's residence (called the verge of the court), where one of the parties was a servant of the king's household, and of all debts, contracts, and covenants where both parties were servants as above. Where one of the parties only was of the king's household, a jury of the country was summoned; in the other case, the inquest was composed of men of the household only. This court was merged, in the time of Charles I., in the Palace Court, and abolished by 12 & 13 Vict. c. 101, § 13. See PALACE COURT.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the law of the service, military or naval, in which the offender is engaged.

The original tribunal, for which courts-martial are a partial substitute, was the Court of Chivalry, which title see. These courts exist and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same; and for consideration of the exact distinctions between them reference must be had to the works of writers upon these subjects. Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, composed, however, of militia officers.

2. As to their constitution and jurisdiction, these courts may belong to one of the following classes:—

General, which have jurisdiction over every species of offence of which courts-martial have jurisdiction. They are to be composed in the United States of not less than five nor more than thirteen commissioned officers of suitable rank, according to the exigencies of the service, and in England of not less than thirteen commissioned officers, except in special cases, and usually do consist of more than that number.

Regimental, which have jurisdiction of some minor offences occurring in a regiment or corps. They consist in the United States of not less than three commissioned officers; in England, of not less than five commissioned officers, when that number can be assembled without detriment to the service, and of not less than three in any event. The jurisdiction of this class of courts-martial extends only to offences less than capital committed by those below the rank of commissioned officers, and their decision is subject to revision by the commanding officer of the division, regiment, or detachment, by the officer who appointed them, or by certain superior officers.

Garrison, which have jurisdiction of some minor offences occurring in a garrison, fort, or barracks. They are of the same constitution as to number and qualifications of members as regimental courts-martial. Their limits of jurisdiction in degree are the same, and their decisions are in a similar manner subject to revision.

3. The appointment or assemblage of a general court-martial in the *United States* can take place, *for the army*, only by command of the president, a general officer commanding an army, or an officer commanding a separate department; for the navy, by command of the president, the secretary of the navy, the commander-in-chief of the fleet, or the commander of a squadron acting out of the United States; in *England*, by command of the sovereign, the commander-in-chief to whom the power has been delegated by the sovereign, or in consequence of a warrant from the commander-in-chief to some officer directing him to convene such court. See DeHart, Courts-Mart. 8; V. Kennedy, Courts-Mart. 16. The decision of the commanding officer as to the number that can be convened without injury to the service is conclusive. 12 Wheat. 19.

4. The jurisdiction of such courts is limited

to offences against the military law (which title see) committed by individuals in the service, 12 Johns. N. Y. 257; see DeHart, Courts-Mart. 28; 3 Wheat. 212; 3 Am. Jur. 281; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field. 60th Art. of War; DeHart, Courts-Mart. 24, 25. See V. Kennedy, Courts-Mart. 3. But while a district is under martial law by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace. V. Kennedy, Courts-Mart. 14. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence. Benèt, Mil. Law, 15.

In regard to the jurisdiction of naval courts-martial over civil crimes committed at sea, see 1 Term, 548; 3 Wheat. 212; 10 *id.* 159; 1 N. Y. Leg. Obs. 371; 7 Hill, N. Y. 95; 1 Kent, Comm. 341, n.

5. The court must appear from its record to have acted within its jurisdiction. 3 Serg. & R. Penn. 590; 1 Rawle, Penn. 143; 11 Pick. Mass. 442; 19 Johns. N. Y. 7; 25 Me. 168; 1 M'Mull. So. C. 69; 13 How. 134. A want of jurisdiction either of the person, 1 Brock. C. C. 324, or of the offence, will render the members of the court and officers executing its sentence trespassers. 3 Cranch, 331. See MILITARY LAW; MARTIAL LAW. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law, 2 Kent, Comm. 10; V. Kennedy, Courts-Mart. 13; or award excessive or illegal punishment. V. Kennedy, Courts-Mart. 13.

The decisions of general courts-martial are subject to revision by the commanding officer, the officer ordering the court, or by the president or sovereign, as the case may be. 11 Johns. N. Y. 150. Consult Benèt; DeHart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Macomb; Simmons; Tytler on Courts-Martial.

COURT OF NISI PRIUS. In American Law. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state.

It has jurisdiction where the matter in controversy is of the value of five hundred dollars or more. Stroud & Brightly's Purd. Dig. 772, tit. *Supreme Court.* See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF ORDINARY. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such courts exist in Georgia, New Jersey, South Carolina, and Texas. See 2 Kent, Comm. 409; ORDINARY.

COURT OF ORPHANS. In English Law. The court of the lord mayor and aldermen of London, which has the care of those orphans whose parent died in London and was free of the city.

By the custom of London this court is entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased parent is obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. 2 Stephen, Comm. 343.

COURT OF OYER AND TERMINER. In American Law. The name of courts of criminal jurisdiction in several of the states of the American Union, as in Georgia, New Jersey, and New York.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. In English Law. Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the queen, among whom are usually two justices of the superior courts at Westminster, twice in every year in all the counties of England except the four northern, where they are held once only, and Middlesex and parts of other counties, over which the central criminal court has jurisdiction.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissions are joined with those of *assize* and *nisi prius* and the commission *of the peace.* See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in the state of Pennsylvania.

They are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. See Purdon, Dig. Penn. Laws, Stroud & B. ed. pp. 694, 1377.

COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY, AND COURT OF QUARTER SESSIONS OF THE PEACE, IN AND FOR THE CITY AND COUNTY OF PHILADELPHIA. In American Law. A court of record of general criminal jurisdiction in and for the city and county of Philadelphia, in the state of Pennsylvania.

COURT OF PECULIARS. In English Law. A branch of the court of arches, to which it is annexed.

It has jurisdiction of all ecclesiastical causes arising in the peculiars of Canterbury or other dioceses which are exempt from the ordinary's jurisdiction and subject to that of the metropolitan only. The court of arches has an appellate jurisdiction of causes tried in this court. 3 Blackstone, Comm. 65; 3 Stephen, Comm. 431, 432. See PECULIARS.

COURT OF PIEPOUDRE (Fr. *pied*, foot, and *poudre*, dust, or *puldreaux*, old

French, pedlar). **In English Law.** A court of special jurisdiction incident to every fair or market.

The word *piepoudre*, spelled also *piedpoudre* and *pypowder*, has been considered as signifying dusty feet, pointing to the general condition of the feet of the suitors therein, Cowel; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot, Coke, 4th Inst. 472; or pedlar's feet, as being the court of such chapmen or petty traders as resorted to fairs. It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or vills for the collection of debts and the like. Croke Jac. 313; Croke Car. 46; 2 Salk. 604. It was held before the steward of him who was entitled to the tolls from the market. It has fallen into disuse.

The *civil* jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place.

The *criminal* jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Blackstone, Comm. 32; Skene, *de verb. sig. Pede pulverosus;* Bracton, 334.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an appeal lay by way of a bill to the court of chancery. The court has been long disused. 3 Blackstone, Comm. 74; 3 Stephen, Comm. 443, 444; Crabb, Hist. Eng. Law, 503.

COURT OF PROBATE. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of persons deceased intestate. See stat. 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95.

COURT OF QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction in the state of Pennsylvania.

There is one such court in each county of the state. Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general jail delivery*. See Purdon, Dig. Penn. Laws, Stroud & B. ed. 692.

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Blackstone, Comm. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. 37 Me. 29.

All courts are either *of record* or *not of record*. The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record, Coke, Litt. 117 *b*, 260 *a*; 1 Salk. 144; 12 Mod. 388; 2 Wms. Saund. 101 *a*; Viner, Abr. *Courts*; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record, 1 Salk. 200; 12 Mod. 388; 1 Wooddeson, Lect. 98; 3 Blackstone, Comm. 24, 25; but every court of record does not possess this power. 1 Sid. 145; 3 Sharswood, Blackst. Comm. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See 11 Mass. 510; 22 Pick. Mass. 430; 1 Cow. N. Y. 212; 3 Wend. N. Y. 268; 10 Penn. St. 158; 5 Ohio, 545; 7 Ala. 351; 25 *id.* 540. The definition first given above is taken from the opinion of *Shaw*, C. J., in 8 Metc. Mass. 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law.

2. Courts may be at the same time of record for some purposes and not of record for others. 23 Wend. N. Y. 376; 6 Hill, N. Y. 590; 8 Metc. Mass. 168; 12 *id.* 11.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land. 1 Pet. 604; 3 Serg. & R. Penn. 253; 8 *id.* 336; 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only. 3 Yeates, Penn. 479; 9 Serg. & R. Penn. 298; 2 Burr. 1042; 1 W. Blackst. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See 22 Pick. Mass. 430; 6 Gray, Mass. 515; 6

Hill, N. Y. 590; 1 Cow. N. Y. 212; 25 Ala. N. s. 540; 37 Me. 29.

3. Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see 8 Pick. Mass. 168; 23 Wend. N. Y. 375.

A writ of error lies to correct erroneous proceedings in a court of record, 3 Blackstone, Comm. 407; 18 Pick. Mass. 417; but will not lie unless the court be one, technically, of record. 11 Mass. 510. See WRIT OF ERROR.

COURT OF REGARD. In English Law. One of the forest courts, in England, held every third year, for the lawing or expeditation of dogs, to prevent them from running after deer. 3 Stephen, Comm. 440; 3 Blackstone, Comm. 71, 72.

COURTS OF REQUESTS (called otherwise *courts of conscience*). **In English Law.** Courts of special jurisdiction, constituted by act of parliament in the city of London and other towns, for the recovery of small debts.

They were courts *not of record*, and proceeded in a summary way to examine upon oath the parties and other witnesses, without the aid of a jury, and made such order as is consonant to equity and good conscience.

They had jurisdiction of causes of debt generally to the amount of forty shillings, but in many instances to the amount of five pounds sterling.

The courts of requests in London consisted of two aldermen and four common councilmen, and was formerly a court of considerable importance, but was abolished, as well as all other courts of requests, by the Small Debts Act, 9 & 10 Vict. c. 95, and the order in council of May 9, 1847, and their jurisdiction transferred to the county courts.

The court of requests before the king in person was virtually abolished by 16 Car. I. c. 10. See 3 Stephen, Comm. 449, and note (j); Bacon, Abr. *Courts in London;* COUNTY COURTS.

COURT OF SESSION. In Scotch Law. The supreme court of civil jurisdiction in Scotland.

The full title of the court is *council and session.* It was first established in 1425. In 1469 its jurisdiction was transferred to the king's council, which in 1503 was ordered to sit in Edinburgh. In 1532 the jurisdiction of both courts and the joint title were transferred to the present court. The regular number of judges was fifteen; but an additional number of justices might be appointed by the crown to an unlimited extent. This privilege was renounced by 10 Geo. I. c. 19.

It consists of fifteen judges, and is divided into an inner and an outer house.

The inner house is composed of two branches or chambers, of co-ordinate jurisdiction, each consisting of four judges, and called respectively the first division and the second division. The first division is presided over by the lord president or lord justice general, the second by the lord justice clerk. The outer house is composed of five separate courts, each presided over by a single judge, called a lord ordinary.

All causes commence before a lord ordinary, in general; and the party may select the one before whom he will bring his action, subject to a removal by the lord president in case of too great an accumulation before any one or more lords ordinary. See Bell, Dict.; Paterson, Comp. § 1055, n. *et seq.*

COURT OF SESSIONS. In American Law. A court of criminal jurisdiction existing in some of the states of the United States. Courts of this name exist in California, New York, and, perhaps, other states.

COURT OF STAR-CHAMBER. In English Law. A court which was formerly held by divers lords, spiritual and temporal, who were members of the privy council, together with two judges of the courts of common law.

It was of very ancient origin, was new-modelled by the 3 Hen. VII. c. 1 and 21 Hen. VIII. c. 20, and was finally abolished, after having become very odious to the people, by the 16 Car. I. c. 10. The name *star-chamber* is of uncertain origin. It has been thought to be from the Saxon *steoran*, to govern,—alluding to the jurisdiction of the court over the crime of cosenage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148; or because the roof was originally studded with gilded stars, Coke, 4th Inst. 66; or, according to Blackstone, because the Jewish covenants (called starrs or stars, and which, by a statute of Richard I., were to be enrolled in three places, one of which was near the exchequer) were originally kept there. 4 Blackstone, Comm. 266, n. The derivation of Blackstone receives confirmation from the fact that this location (near the exchequer) is assigned to the *star-chamber* the first time it is mentioned. The word *star* acquired at some time the recognized signification of inventory or schedule. Stat. Acad. Cont. 32; 4 Sharswood, Blackst. Comm. 266, n.

The legal jurisdiction of this court extended originally to riots, perjuries, misbehavior of sheriffs, and other notorious misdemeanors. It acted without the assistance of a jury. See Hudson, *Court of Star Chamber* (printed at the beginning of the second volume of the *Collectanea Juridica*); 4 Sharswood, Blackst. Comm. 266, and notes.

COURT OF THE STEWARD AND MARSHAL. See COURT OF MARSHALSEA.

COURT OF SWEINMOTE (spelled, also, *Swainmote, Swain-gemote;* Saxon *swang*, an attendant, a freeholder, and *mote* or *gemote*, a meeting).

In English Law. One of the forest courts, held before the verderors, as judges, by the steward, thrice in every year,—the sweins or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn,

under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowel; 3 Blackstone, Comm. 71, 72; 3 Stephen, Comm. 439.

COURTS OF THE UNITED STATES.

Except in the case of the senate as a court to try impeachments, and the mode prescribed for the appointment of the judges, the judicial system of the United States has been constructed under the authority derived primarily from the following provisions of the federal constitution and the amendments thereto, viz.:

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and a citizen of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed. Const. art. 3, sects. 1, 2.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. Amendments, art. 11.

2. As the government of the United States possesses many of the attributes of sovereignty, while the state governments possess others, it results that the citizens are obliged to accommodate themselves to different judiciary systems. These two sets of courts frequently occupy the same house at the same time, and their judgments or decrees operate upon the same community and upon the same mass of property. It is evident, therefore, that without great care, both in legislation and the administration of the law, there would be danger of clashing between these two classes of independent tribunals.

3. As respects criminal proceedings, each court generally confines itself to the administration of the laws of the government which created it. In civil cases, however, as the constitution of the United States has conferred jurisdiction upon the federal courts in cases, for example, where a citizen of one state sues a citizen of another state, it is manifest that the court which tries such a case must administer the laws of the state in which the action is brought, subject to the constitution of the United States in cases which conflict with its provisions.

4. In the organization of the federal system of courts, there were two objects to be accomplished. The first was to prevent a clashing between the state and United States courts, by imposing restrictions upon the United States courts. The second was to carry out the mandates of the constitution, by clothing the latter with all the powers necessary to execute its provisions. This organization was commenced by the act of 1789, familiarly known as the Judiciary Act. 1 Stat. at Large, 921.

5. To accomplish the first object, it was accordingly enacted by the fourteenth section that writs of *habeas corpus* should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or it was necessary that they should be brought into court to testify.

This important restriction was intended to leave to the state authorities the absolute and exclusive administration of the state laws in all cases of imprisonment; and no instance has ever occurred in which this act has been disregarded. On the contrary, its observance has been emphatically enjoined and enforced. 21 How. 523, 524.

6. By the thirty-fourth section of the same act, it was enacted that the laws of the several states, except where the constitution, treaties, or statutes of the United States should otherwise require or provide, were to be regarded as rules of decision in trials of common law, in the courts of the United States in cases where they applied. This provision has received examination and interpretation in the following, among the more recent cases:—7 How. 40; 8 *id.* 169; 14 *id.* 504; 17 *id.* 476; 18 *id.* 502, 507; 20 *id.* 393, 584.

7. And while the United States courts follow the interpretation given to the laws of the state by their highest tribunals, yet in case of conflicting decisions, or in the absence of decisions at the time of consideration by the United States courts, the rule is, of course, modified. 5 How. 139; 18 *id.* 599.

The decisions of state courts upon questions of general commercial law are held not to be binding upon the United States courts. 18 How. 520. Nor are they binding upon questions of the general principles of equity jurisprudence. 13 How. 271.

8. In clothing the United States courts with sufficient authority to carry out the mandates of the constitution, their powers are made in certain cases to transcend those of the state courts.

The twelfth section of the Judiciary Act of 1789 declares that "If a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, etc., and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, etc., it shall then be the duty of the state court to accept the surety and proceed no further in the cause," etc.

This jurisdiction is held to be exclusive when it has once attached, from the moment of attaching. 15 How. 209, 211. It is based upon the supposition that possibly the state tribunal may not be impartial between its own citizens and foreigners.

9. In like manner, by the act of 1833, where suit or prosecution is commenced in a court of any state against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under any such law of the United States, it is lawful for the defendant at any time before trial, upon a petition to the circuit court of the United States, etc., to remove it to the circuit court, and the cause is thereupon to be entered on the docket of said court, and a *certiorari* to be issued to the state court, etc. 4 Stat. at Large, 632.

10. By the twenty-fifth section of the act of 1789 it is enacted "That a final judgment or decree in any suit, in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where is drawn in question the construction of any clause of the constitution or of a treaty or statute of or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceedings upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."

It is no objection to the appellate jurisdiction under this section that one party is a state and the other a citizen of that state. 6 Wheat. 264.

11. The practical importance of this clause is evidenced by the fact that in the eighteenth, nineteenth, twentieth, and twenty-first volumes of Howard's Reports there are thirty-three cases in which its provisions are involved.

The rules adopted from time to time as necessary to give to the supreme court jurisdiction under this section are summed up by Mr. Justice Daniel, in delivering the opinion of the court in Smith *v.* Hunter. They are as follows:—

That, to give jurisdiction, it must appear on the *record itself* that the case is one embraced by the section: first, either by express averment or by necessary intendment in the pleadings in the case; secondly, by directions given by the court and stated in the exceptions; or, thirdly, when the proceedings are according to the laws of Louisiana, by the statements of the facts and of the decision as is usually made in such cases by the court; fourthly, it must be entered on the record of the proceedings of the appellate court, in cases where the record shows that such a point may have arisen and may have been decided, that it was in fact raised and decided, and this entry must appear to have been made by order of the court or the presiding judge and certified by the clerk as part of the record in the state court; or, fifthly, in proceedings in equity it may be stated in the body of the final decree of the state court; or, sixthly, it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree without deciding it. 7 How. 744.

12. But, independently of their relation to the jurisdiction of the several states, the courts of the United States are necessarily clothed with powers as the organized branch of the government of the United States established for the purpose of executing the constitution and laws of the general government as a distinct sovereignty. See Const. art. 3, and Act of 1789, ch. 20, sect. 3, cited § **19**, for the manner in which this has been done. For matters of detail, see Law, Jurisdiction, and Powers of the United States Courts, § 13. The several courts embraced in the judicial system of the United States will be separately considered, and in the following order:—

13. The Senate of the United States as a court to try impeachments.
The Supreme Court.
The Circuit Court.
The District Court.
The Territorial Courts.
The Supreme Court of the District of Columbia.
The Court of Claims.

The Senate of the United States as a Court to try Impeachments.

14. The constitution provides that the senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law. Const. art. 1, sect. 3. The president, vice-president, and all civil officers

of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Const. art. 1, sect. 4.

15. The organization of this extraordinary court, therefore, differs according as it has or has not the president of the United States to try. For the trial of an impeachment of the president the presence of the chief justice and a sufficient number of senators to form a quorum is required. For the trial of all other impeachments it is sufficient if a quorum is present.

16. The jurisdiction of the senate as a court for the trial of impeachments extends to the officers above named, to wit, the president, vice-president, and all civil officers of the United States, when they have been guilty of treason, bribery, and other high crimes and misdemeanors. Art. 2, sect. 4.

The constitution defines treason, art. 3, sect. 3; but recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are. Story, Const. sect. 795.

17. This is an extraordinary court, and its sittings are of rare occurrence. It is mentioned in the constitution under the head of the legislative, and not the judicial, power, and is not usually intended when speaking of the judicial tribunals of the country, which comprehend rather the ordinary courts of law, equity, etc.; and it would be out of place to treat at large of this tribunal here. For instances in which it has been convened, see the impeachments of Judge Chase, in 1804, Judge Peck, in 1831, and Judge Humphreys, in 1862.

The Supreme Court.

18. The constitution of the United States directs that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish.

Organization. The judges of the supreme court are appointed by the president, by and with the consent of the senate. Const. art. 2, sect. 2. They hold their office during good behavior, and receive for their services a compensation which is not to be diminished during their continuance in office. Const. art. 3, sect. 1. They consist of a chief justice and nine associate justices. Act of March 3, 1837, sect. 1, and act of March 3, 1863, sect. 1. The salary of the chief justice is now six thousand five hundred dollars, and that of the associate justices six thousand dollars each. Act of 1855, 10 Stat. at Large, 655. The associate for the tenth circuit is allowed one thousand dollars additional. Act of March 3, 1863, sect. 2.

Six judges are required to make a quorum, act of March 3, 1863, sect. 1; but by the act of the 21st of January, 1829, the judges attending on the day appointed for holding a session of the court, although fewer than a quorum,—at that time four,—have authority to adjourn the court from day to day for twenty days after the time appointed for the commencement of said session, unless a quorum shall sooner attend; and the business shall not be continued over till the next session of the court, until the expiration of the said twenty days. By the same act, if, after the judges shall have assembled, on any day less than a quorum shall assemble, the judge or judges so assembling shall have authority to adjourn the said court from day to day until a quorum shall attend, and, when expedient and proper, may adjourn the same without day.

The supreme court is holden at the city of Washington. Act of April 29, 1802. The session commences on the second Monday of January in each and every year. Act of May 4, 1826. The first Monday of August in each year is appointed as a return day. Act of April 29, 1802. In case of a contagious sickness, the chief justice or his senior associate may direct in what other place the court shall be held, and the court shall accordingly be adjourned to such place. Act of February 25, 1799, sect. 7. The officers of the court are a clerk, who is appointed by the court, a marshal, appointed by the president by and with the advice and consent of the senate, a crier, and other inferior officers.

19. *The Jurisdiction* of the supreme court is either original or appellate, civil or criminal. The constitution establishes the supreme court and defines its jurisdiction. It enumerates the cases in which its jurisdiction is original and exclusive, and defines that which is appellate. See 11 Wheat. 467. The provisions of the constitution that relate to the original jurisdiction of the supreme court are contained in the articles of the constitution already cited, sect. 1.

By the act of September 24, 1789, sect. 13, the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction; and shall have, exclusively, all such jurisdiction of suits or proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact, in the supreme court, in all actions at law, against citizens of the United States, shall be by jury.

20. Many cases have occurred of controversies between states, amongst which may be mentioned that of Rhode Island *v.* Massachusetts, 4 How. 491, in which the attorney-general of the United States is authorized by act of congress, 11 Stat. at Large, 382, to in-

tervene; Missouri *v.* Iowa, 7 How. 660, and 10 How. 1; and Alabama *v.* Georgia. 23 How. There are now (1860) pending two other cases, viz.: Florida *v.* Georgia, and Missouri *v.* Kentucky. The state of Pennsylvania filed a bill against the Wheeling & Belmont Bridge Company, for the history of which see 18 How. 421, and the previous proceedings therein noted.

21. The proceeding by bill and cross-bill is said to be the most appropriate where the question in dispute is one of boundary between states; and the court, in such cases, proceeds to execute its own decree by the appointment of commissioners to run the line decided upon. 7 How. 660.

In consequence of the decision in the case of Chisholm *v.* Georgia, where it was held that assumpsit might be maintained against a state by a citizen of another state, the eleventh article of the amendments of the constitution, cited **1**, was adopted.

This article is retrospective, and not only prevents the bringing of new suits, but deprives the court of jurisdiction of all suits depending at the time, wherever a state was sued by the citizens of another state, or by citizens or subjects of a foreign state. 3 Dall. 375.

22. The supreme court has also the power to issue writs of *habeas corpus*, *scire facias*, and all other writs not especially provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law; and the justices have, individually, the power to grant writs of *habeas corpus*, of *ne exeat*, and of injunction. Act of 1789, c. 20, sects. 14, 15, 18, 33; Act of 1833, c. 57, sect. 7; Act of 1842, c. 527. It has also the ordinary powers exercised by courts.

In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. With the exception of cases in which original jurisdiction is given to this court, there are none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution.

23. Congress cannot vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; and affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases, as otherwise the clause would be inoperative and useless. 1 Cranch, 137. See 5 Pet. 1, 284; 12 *id.* 657; 6 Wheat. 264; 9 *id.* 738.

24. The supreme court exercises appellate jurisdiction in the following different modes: By writ of error from the final judgment of the circuit courts, of the district courts exercising the powers of circuit courts, and of the superior courts of the territories exercising the powers of circuit courts in certain cases. In the case of the United States *v.* Goodwin, 7 Cranch, 108, it was held that a writ of error did not lie to the supreme court to reverse the judgment of a circuit court, in a civil action by writ of error carried from the district court to the circuit court. But now, by the act of July 4, 1840, c. 20, sect. 3, it is enacted that writs of error shall lie to the supreme court from all judgments of a circuit court, in cases brought there by writs of error from the district court, in like manner and under the same regulations as are provided by law for writs of error for judgments rendered upon suits originally brought in the circuit court.

25. It has jurisdiction by appeal from the final decrees of the circuit courts, of the district courts exercising the powers of circuit courts in certain cases. See 8 Cranch, 251; 6 Wheat. 448. Its appellate jurisdiction from the courts of the United States is specified in the first and second sections of the third article of the constitution, both of which have been cited at length, and by the act of 1789, c. 20, sects. 13, 22. To give jurisdiction over a case which is removed from the circuit courts, the judgments or decrees in civil actions and suits in equity must be final; the matter in dispute must exceed the sum or value of two thousand dollars, exclusive of costs; and the right of appeal on a writ of error extends to cases whether they have been brought in the circuit court by original process, or were removed there from a state court, or removed there by appeal from a district court. Appeals are allowed from the circuit court of the District of Columbia where the matter in dispute exceeds one thousand dollars.

The right of appeal from the territorial courts varies in the several territories, and will be noticed under the head of each.

26. Under the revenue acts of March 3, 1839, 5 Stat. at Large, 349; of 1845, 5 Stat. at Large, 727; and of 1846, 9 Stat. at Large, 84, relating to the payment of duties under protest, and the return of the money under certain circumstances, in an action against a collector for such return a writ of error to the supreme court will not lie where the recovery is for a less sum than two thousand dollars, 21 How. 390; although by the act of 1844, 5 Stat. at Large, 658, such a writ will lie, without regard to the sum or value in controversy, at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws or for the collection of duties due or alleged to be due.

27. The supreme court has also jurisdiction by writ of error from the final judgments and decrees of the highest courts of law or equity in a state, in the cases provided for by the twenty-fifth section of the act of September 24, 1789, the provisions of which have been given at large in a preceding part of this article. See 5 How. 20, 55. The appellate jurisdiction of the supreme court extends to all cases of the specified character pending in the state courts; and this section of the Judiciary Act, which authorizes the exercise of this

jurisdiction, in such cases, by writ of error, is supported by the letter and spirit of the constitution. 1 Wheat. 304.

When the construction or validity of a treaty of the United States is drawn in question in the state courts, and the decision is against its validity, or the title specially set up by either party under the treaty, the supreme court has jurisdiction to ascertain that title and to determine its legal meaning. 1 Wheat. 358; 9 *id.* 738; 5 Cranch, 344; 1 Pet. 94; 6 *id.* 515; 9 *id.* 224; 10 *id.* 368.

28. It has jurisdiction although one of the parties is a state and the other a citizen of that state. 6 Wheat. 264.

Under the twenty-fifth section of the Judiciary Act, when any clause of the constitution or any statute of the United States is drawn in question, the decision must be against the title or right set up by the party under such clause or statute; otherwise the supreme court has no appellate jurisdiction of the case. 3 Cranch, 268; 4 Wheat. 311; 6 *id.* 598; 7 *id.* 164; 12 *id.* 117, 129; 1 Pet. 655; 2 *id.* 241, 449; 5 *id.* 248; 6 *id.* 41; 11 *id.* 167.

When the judgment of the highest court of law of a state decides in favor of the validity of a statute of a state drawn in question on the ground of its being repugnant to the constitution of the United States, it is not a final judgment within the twenty-fifth section of the Judiciary Act, if the suit has been remanded to the inferior court, where it originated, for further proceedings, not inconsistent with the judgment of the highest court. 12 Wheat. 135.

The words "matters in dispute," in the act of congress which is to regulate the jurisdiction of the supreme court, seem appropriated to civil causes. 3 Cranch, 159. As to the manner of ascertaining the matter in dispute, see 4 Cranch, 216, 316; 5 *id.* 13; 3 Dall. 365; 4 *id.* 22; 2 Pet. 243; 3 *id.* 33; 7 *id.* 634.

29. The supreme court has jurisdiction by certificate from the circuit court that the opinions of the judges are opposed on points stated, as provided for by the sixth section of the act of April 29, 1802. The provisions of the act extend to criminal as well as to civil cases. See 2 Cranch, 33; 7 *id.* 279; 2 Dall. 385; 4 Hall, Law Journ. 462; 5 *id.* 434; 6 *id.* 542; 12 *id.* 212. It has also jurisdiction by mandamus, prohibition, certiorari, and procedendo.

30. The *criminal* jurisdiction of the supreme court is derived from the constitution and the act of September 24, 1789, sect. 13, which gives the supreme court exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers or their domestics, as a court of law can have or exercise consistently with the law of nations. But it must be remembered that the act of April 30, 1790, sections 25 and 26, declares void any writ or process whereby the person of any ambassador, or other public minister, their domestics or domestic servants, may be arrested or imprisoned.

The Circuit Courts.

31. *Organization.* The circuit courts are the principal inferior courts established by congress. There are ten circuits, in each of which a circuit court is held. The United States are first divided into districts (see "District Courts"), and the ten circuits are composed respectively of the following districts, to wit:—

The first circuit, of the districts of Maine, New Hampshire, Massachusetts, and Rhode Island. See acts April 29, 1802, March 26, 1812, and March 30, 1820.

The second circuit, Vermont, Connecticut, and New York. Act of March 3, 1837.

The third circuit, New Jersey, and Eastern and Western Pennsylvania. Act of March 3, 1837.

The fourth circuit, Maryland, Delaware, Virginia, and North Carolina. Act of July 15, 1862, sect. 1.

The fifth circuit, South Carolina, Georgia, Alabama, Mississippi, and Florida. Act of July 15, 1862, sect. 1.

The sixth circuit, Louisiana, Texas, Arkansas, Kentucky, and Tennessee. Act of July 15, 1862, sect. 1.

The seventh circuit, Ohio and Michigan. Act of January 28, 1863.

The eighth circuit, Indiana and Illinois. Acts of January 28, 1863, and February 9, 1863.

The ninth circuit, Missouri, Iowa, Kansas, Wisconsin, and Minnesota. Acts of July 15, 1862, sect. 1, and February 9, 1863.

The tenth circuit, California and Oregon. Act of March 3, 1863, sect. 1.

32. In the early history of the government it was intended that one or more of these courts should be held annually in every state, at which should be present one of the justices of the supreme court. But the increase of the number of states and the remoteness of some of them from any of the justices sometimes rendered this impossible, and there were in 1860 seven states in which no justice of the supreme court held court,—viz.: Florida, Texas, Iowa, Wisconsin, California, Minnesota, and Oregon. But this evil has been remedied by the acts of July 15, 1862, and March 3, 1863.

The act of September 24, 1789, sect. 10, gives the district court of the Kentucky district, besides the usual jurisdiction of a district court, the jurisdiction of all causes, except of appeals and writs of error, thereinafter made cognizable in a circuit court, and writs of error and appeals were to lie from decisions therein to the supreme court, and under the same regulations. By the 12th section, authority was given to remove cases from a state court to such court, in the same manner as to a circuit court.

33. One of the justices of the supreme court of the United States, and the district judge of the district where the circuit is holden, compose the circuit court. The district judge may alone hold a circuit court,

if no judge of the supreme court have been allotted to that circuit.

The act of April 29, 1802, sect. 5, provides that on every appointment which shall be hereafter made of a chief justice or associate justice, the chief justice and associate justices shall allot among themselves the aforesaid circuits as they shall think fit, and shall enter such allotment on record.

The act of March 3, 1837, sect. 4, directs that the allotment of the chief justice and the associate justices of the said supreme court to the several circuits shall be made as heretofore.

By the act of August 16, 1842, the justices of the supreme court of the United States, or a majority of them, are required to allot the several districts among the justices of the said court. And in case no such allotment shall be made by them at their sessions next succeeding such appointment, and also after the appointment of any judge as aforesaid and before any other allotment shall have been made, it shall and may be lawful for the president of the United States to make such allotment as he shall deem proper,—which allotment, in either case, shall be binding until another allotment shall be made. And the circuit courts constituted by this act shall have all the power, authority, and jurisdiction, within the several districts of their respective circuits, that before the 13th February, 1801, belonged to the circuit courts of the United States.

34. Formerly there were two terms of the circuit court held in each state, at which the supreme judge and district judge presided; but the system has been essentially changed by the increased number of states in the Union and the division of several of the large states into two or more judicial districts. Thus the judges of the district courts are increased as follows: there are two districts and two judges in New York, Pennsylvania, Virginia, Florida, Louisiana, Texas, Missouri, Ohio, Illinois, Michigan, and California.

There are two districts and but one judge in Alabama, Mississippi, Arkansas, and Georgia, and in Tennessee three districts and one judge. And by the act of March 3, 1837, 5 Stat. at Large, 177, the district courts of certain districts which had exercised the powers and jurisdiction of circuit courts were deprived of these, and circuit courts were directed to be held. The act provided "that so much of any act or acts of congress as vests in the district courts of the United States for the districts of Indiana, Illinois, Missouri, Arkansas, the eastern district of Louisiana, the district of Mississippi, the northern district of New York, the western district of Virginia, and the western district of Pennsylvania, and the district of Alabama, or either of them, the powers and jurisdiction of circuit courts, be, and the same is hereby, repealed; and there shall hereafter be circuit courts held for said districts by the chief or associate justices of the supreme court, assigned or allotted to the circuit to which such districts may respectively belong, and the district judges of such districts, severally and respectively, either of whom shall constitute a quorum; which circuit courts, and the judges thereof, shall have like powers and exercise like jurisdiction as other circuit courts and the judges thereof; and the said district courts, and the judges thereof, shall have like powers and exercise like jurisdiction as the district courts and the judges thereof in the other circuits. And a like enactment was passed July 15, 1862, taking away the circuit-court powers of the district courts of Texas, Florida, Wisconsin, Iowa, Minnesota, and Kansas; and March 3, 1863, from the district courts of California. From all judgments and decrees rendered in the district courts of the United States for the western district of Louisiana, writs of error and appeals shall lie to the circuit court in the other district in said state, in the same manner as from decrees and judgments rendered in the districts within which a circuit court is provided by this act."

Whilst the increased business of the circuit courts occasioned the multiplication of these courts, the act of 1844, 5 Stat. at Large, 676, relieved the justice of the supreme court from attending more than one term of the court within any district of such circuit in any one year.

35. The circuit court for California is held six times a year, three times in the northern and three times in the southern district. Circuit courts may be held in both districts at the same time. In the absence of the circuit judge, the district judge may hold the circuit court. Act of February 19, 1864.

36. In all cases where the day of meeting of the circuit court is fixed for a particular day of the month, if that day happen on Sunday, then, by the act of 29th April, 1802, and other acts, the court shall be held the next day.

The act of September 24, 1789, sect. 6, provides that a circuit court may be adjourned from day to day by one of its judges, or, if none are present, by the marshal of the district, until a quorum be convened. By the act of May 19, 1794, a circuit court in any district, when it shall happen that no judge of the supreme court attends within four days after the time appointed by law for the commencement of the sessions, may be adjourned to the next stated term by the judge of the district, or, in case of his absence also, by the marshal of the district. But by the 4th section of the act of April 29, 1802, where only one of the judges thereby directed to hold the circuit courts shall attend, such circuit court may be held by the judge so attending.

37. By the act of March 2, 1809, certain duties are imposed on the justices of the supreme court in case of the disability of a district judge within their respective circuits to hold a district court. Sect. 1 enacts that in case of the disability of the district judge of either of the district courts of the United States to hold a district court, and to perform the duties of his office, and satisfactory evi-

dence thereof being shown to the justice of the supreme court allotted to that circuit in which such district court ought by law to be holden, and on application of the district attorney or marshal of such district, in writing, the said justice of the supreme court shall, thereupon, issue his order in the nature of a certiorari, directed to the clerk of such district court, requiring him forthwith to certify unto the next circuit court to be holden in said district all actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, that may be depending in such district court, and undetermined, with all the proceedings thereon, and all files and papers relating thereto, which said order shall be immediately published in one or more newspapers printed in said district, and at least thirty days before the session of such circuit court, and shall be deemed a sufficient notification to all concerned. And the said circuit court shall, thereupon, have the same cognizance of all such actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, and in the like manner, as the district court of said district by law might have, or the circuit court, had the same been originally commenced therein, and shall proceed to hear and determine the same accordingly; and the said justice of the supreme court, during the continuance of such disability, shall, moreover, be invested with and exercise all and singular the powers and authority vested by law in the judge of the district court in said district. And all bonds and recognizances taken for, or returnable to, such district court, shall be construed and taken to be to the circuit court to be holden thereafter, in pursuance of this act, and shall have the same force and effect in such court as they would have had in the district court to which they were taken. Provided, that nothing in this act contained shall be so construed as to require of the judge of the supreme court, within whose circuit such district may lie, to hold any special court, or court of admiralty, at any other time than the legal time for holding the circuit court of the United States in and for such district.

Sect. 2 provides that the clerk of such district shall, during the continuance of the disability of the district judge, continue to certify, as aforesaid, all suits or actions, of what nature or kind soever, which may thereafter be brought to such district court, and the same transmit to the circuit court next thereafter to be holden in the same district. And the said circuit court shall have cognizance of the same, in like manner as is hereinbefore provided in this act, and shall proceed to hear and determine the same. Provided, nevertheless, that when the disability of the district judge shall cease or be removed, all suits or actions then pending and undetermined in the circuit court in which, by law, the district courts have an exclusive original cognizance, shall be remanded, and the clerk of the said circuit court shall transmit the same, pursuant to the order of the said court, with all matters and things relating thereto, to the district court next thereafter to be holden in said district, and the same proceedings shall be had therein as would have been had the same originated, or been continued, in the said district court.

Sect. 3 enacts that, in case of the district judge in any district being unable to discharge his duties as aforesaid, the district clerk of such district shall be authorized and empowered, by leave or order of the circuit judge of the circuit in which such district is included, to take, during such disability of the district judge, all examinations and depositions of witnesses, and to make all necessary rules and orders preparatory to the final hearing of all causes of admiralty and maritime jurisdiction. See 1 Gall. 337; 1 Cranch, 309; note to Hayburn's case, 3 Dall. 410.

If the disability of the district judge terminate in his death, the circuit court must remand the certified causes to the district court. Ex parte United States, 1 Gall. 337.

38. So also in case of the disability of any district judge to hold a district or circuit court, the circuit judge may appoint the district judge of any other judicial district within the same circuit to hold the district or circuit court; and in case the circuit judge cannot perform the duty, the chief justice of the United States is to appoint in manner aforesaid. 9 Stat. at Large, 442. And this may be done whenever the public interests require it: so that each of the district judges may be holding court at the same time. 10 Stat. at Large, 5.

By the first section of the act of March 3, 1821, in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district, and, if there be no circuit court in such district, to the next circuit court in the state, and, if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof, in like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases to be removed as were cognizable in the district court from which the same was removed.

And the act of February 28, 1839, sect. 8, enacts "That in all suits and actions, in any circuit court of the United States, in which it shall appear that both the judges thereof, or

the judge thereof, who is solely competent by law to try the same, shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is or are so related to or connected with either party as to render it improper for him or them, in his or their opinion, to sit in the trial of such suit or action, it shall be the duty of such judge, or judges, on application of either party, to cause the fact to be entered on the records of the court, and also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be certified to the most convenient circuit court in the next adjacent state, or in the next adjacent circuit, which circuit court shall, upon such record and order being filed with the clerk thereof, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly; and the proper process for the due execution of the judgment or decree rendered therein shall run into, and may be executed in, the district where such judgment or decree was rendered, and also into the district from which such suit or action was removed."

By sect. 1 of the act of March 3, 1863, it is provided that whenever the judge of the supreme court for any circuit, from disability, absence, the accumulation of business in the circuit court in any district within his circuit, or from his having been of counsel or being interested in any case pending, etc., or from any other cause, he may request in writing the judge of any other circuit to hold the circuit court in such district; and thereupon it shall be lawful for the judge so requested to hold the circuit court in such district.

39. The judges of the supreme court are not appointed as circuit-court judges, or, in other words, have no distinct commission for that purpose; but practice and acquiescence under it for many years were held to afford an irresistible argument against this objection to their authority to act, when made in the year 1803, and to have fixed the construction of the judicial system. The court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest, and not to be disturbed then. Stuart *v.* Laird, 1 Cranch, 308. If a vacancy exist by the death of the justice of the supreme court to whom the district was allotted, the district judge may, under the act of congress, discharge the official duties (Pollard *v.* Dwight, 4 Cranch, 428. See the fifth section of the act of April 29, 1802), except that he cannot sit upon a writ of error from a decision in the district court. United States *v.* Lancaster, 5 Wheat. 434.

40. It is enacted by the act of February 28, 1839, sect. 2, that all the circuit courts of the United States shall have the appointment of their own clerks; and, in case of disagreement between the judges, the appointment shall be made by the presiding judge of the court.

The marshal of the district is an officer of the court, and the clerk of the district court is also clerk of the circuit court in such district. Act of September 24, 1789, sect. 7.

Of the Jurisdiction of the Circuit Courts.

41. The jurisdiction of the circuit courts is either civil or criminal.

Civil Jurisdiction.

The civil jurisdiction is either at law or in equity. Their civil jurisdiction at law is—1st, Original; 2d, By removal of actions from the state courts; 3d, By writ of mandamus; 4th, By appeal.

Original Jurisdiction.

The act of 1789, c. 20, sect. 11, defines their jurisdiction as follows:—

"And be it further enacted, that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that in which he is an inhabitant or in which he shall be found at the time of serving the writ; nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange."

42. *The matter in dispute.* In actions to recover damages for torts, the sum laid in the declaration is the criterion as to the matter in dispute. 3 Dall. 358. In an action of covenant on an instrument under seal, containing a penalty less than five hundred dollars, the court has jurisdiction if the declaration demand more than five hundred dollars. 1 Wash. C. C. 1. In ejectment, the value of the land should appear in the declaration, 4 Wash. C. C. 624; 8 Cranch, 220; 1 Pet. 73; but though the jury do not find the value of the land in dispute, yet if evidence be given on the trial that the value exceeds five hundred dollars, it is sufficient to fix the jurisdiction; or the court may ascertain its value by affidavits. 1 Pet. C. C. 73.

If the matter in dispute arise out of a

local injury, for which a local action must be brought, in order to give the circuit court jurisdiction it must be brought in the district where the lands lie. 4 Hall, Law Journ. 78.

43. By various acts of congress, jurisdiction is given to the circuit courts in cases where actions are brought to recover damages for the violation of patent and copyrights, without fixing any amount as the limit. See acts of April 17, 1800, sect. 4; Feb. 15, 1819; 7 Johns. N. Y. 144; 9 *id.* 507.

44. The circuit courts have jurisdiction in cases arising under the patent laws. By the act of July 4, 1836, sect. 17, it is enacted "that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable. Provided, however, that from all judgments and decrees from any such court rendered in the premises a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the courts shall deem it reasonable to allow the same."

45. In general, the circuit court has no original jurisdiction of suits for penalties and forfeitures arising under the laws of the United States, nor in admiralty cases. 2 Dall. 365; 4 *id.* 342; Bee, Adm. 19.

46. It is apparent from the acts heretofore cited that the principal duty of the circuit courts is to enforce those obligations which are incumbent upon the people of the United States from their national character, or which result from the laws of congress or treaties. They are excluded from jurisdiction of all controversies between citizens of the same state, except those arising under an act of congress, the constructions of which it has been supposed to be the peculiar right and duty of the federal tribunals to give. Therefore the jurisdiction of the circuit courts includes cases which arise under the laws relating to patents and copyrights; bankruptcy, when a bankrupt law is in force; the revenue; the Indians; the slave-trade, or piracy; the post-office; cases where the United States or its officers sue; of steamboat regulations; of laws for the enforcement of our neutral duties; offences against the United States, and cases arising under the grant by the constitution of admiralty and maritime jurisdiction. See the notes to Little & Brown's edition of the Statutes and Law, U. S. Courts.

47. *The confirmation of imperfect land titles* in the country which was acquired by treaties from France, Spain, and Mexico, is also a branch of the jurisdiction of these courts. In the Louisiana and Florida treaties, clauses were inserted which were intended to apply to claims to land whose validity depended on the performance of conditions in consideration of which the concession had been made, and which must have been performed before those governments were bound to perfect the titles. The United States were bound, after the cession of the territories, to the same extent that those governments had been bound before the ratification of the treaties, to perfect them by legislation and adjudication. Previous to the passage of the act of May 26, 1824, 4 Stat. at Large, 52, the political power dealt with these claims by legislation, through the medium of boards of commissioners and acts of congress. By that act jurisdiction was conferred on the courts to adjudge incipient titles as far as Missouri and Arkansas were concerned. And this power was extended to Florida by act of May 22, 1828. 4 Stat. at Large, 285. Afterwards the act of June 17, 1844, 5 Stat. at Large, 676, renewed the jurisdiction as to Missouri, and extended it to Louisiana and Arkansas, and to so much of the states of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude and between the Mississippi and Perdido rivers, as to land-claims originating with either the Spanish, French, or British authorities.

After the acquisition of California, congress established a board of commissioners, and submitted the claims of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government, to their determination, and that of the courts of the United States, on appeal. 9 Stat. at Large, 632; 10 *id.* 99; 21 How. 447. The principles adopted by the supreme court in deciding the cases which were brought before it under all these acts are too numerous to be stated here.

The Character of the Parties.

48. *The United States* may sue on all contracts in the circuit courts where the sum in controversy exceeds, besides costs, the sum of five hundred dollars; but in cases of penalties the action must be commenced in the district court, unless the law gives express jurisdiction to the circuit courts. 4 Dall. 342. Under the act of March 3, 1815, sect. 4, the circuit court has jurisdiction concurrently with the district court of all suits at common law where any officer of the United States sues under the authority of an act of congress: as, where the postmaster-general sues under an act of congress for debts or balances due to the general post-office. 12 Wheat. 136. See 1 Pet. 318; 2 *id.* 447.

The circuit court has jurisdiction on a bill

in equity filed by the United States against the debtor of their debtor, they claiming priority under the statute of March 2, 1798, c. 28, sect. 65, though the law of the state where the suit is brought permits a creditor to proceed against the debtor of his debtor by a peculiar process at law. 4 Wheat. 108.

49. *In suits between citizens of different states*, one of the parties must be a citizen of the state where the suit is brought under the act of Sept. 24, 1789, sect. 11. 1 Mas. C. C. 520; 2 *id.* 472; 1 Pet. C. C. 431; 3 *id.* 185; 4 Wash. C. C. 84, 482, n., 595; 1 Pet. 238; 5 Cranch, 51, 57, 288; 6 Wheat. 450; 8 *id.* 699.

Under this section the division of a state into two or more districts does not affect the jurisdiction of the circuit court on account of citizenship. The residence of a party in a different district of a state from that in which the suit is brought does not exempt him from the jurisdiction of the court: if he is found in the district where he is sued, he is not within the prohibition of this section. 11 Pet. 25. A territory is not a state for the purpose of giving jurisdiction; and therefore a citizen of a territory cannot sue a citizen of a state in the circuit court. 1 Wheat. 91.

50. *Aliens* may bring suit under the act of Sept. 24, 1780, sect. 11, which gives the circuit court cognizance of all suits of a civil nature where an alien is a party; but these general words must be restricted by the provision in the constitution which gives jurisdiction in controversies between a state, or the citizens of a state, and foreign states, citizens, or subjects; and the statute cannot extend the jurisdiction beyond the limits of the constitution. 4 Dall. 11; 5 Cranch, 303. When both parties are aliens, the circuit court has no jurisdiction. 4 Cranch, 46; 4 Dall. 11. An alien who holds lands under a special law of the state in which he is resident may maintain an action in relation to those lands in the circuit court. 1 Baldw. C. C. 216.

51. *When an assignee is the plaintiff*, the court has no jurisdiction unless a suit might have been prosecuted in such court to recover on the contract assigned, if no assignment had been made, except in cases of bills of exchange. Act of September 24, 1789, sect. 11. 2 Pet. 319; 11 *id.* 83; 12 *id.* 164; 6 Wheat. 146; 9 *id.* 137; 4 Wash. C. C. 349; 1 Mas. C. C. 243; 2 *id.* 252; 4 *id.* 435. It is said that this section of the act of congress has no application to the conveyance of lands from a citizen of one state to a citizen of another. The grantee in such case may maintain his action in the circuit court, when otherwise properly qualified, to try the title to such lands. 2 Sumn. C. C. 252.

52. The defendant must be an inhabitant of, or found in, the circuit at the time of serving the writ; else the circuit court has no jurisdiction. 3 Wash. C. C. 456. A citizen of one state may be sued in another, if the process be served upon him in the latter; but in such cases the plaintiff must be a citizen of the latter state, or an alien. 1 Pet. C. C. 431.

Removal of Actions from the State Courts.

53. The act of Sept. 24, 1789, gives, in certain cases, the right of removing a suit instituted in a state court to the circuit court of the district. It is enacted by that law that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court, on the first day of its session, copies of the said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the state court to accept the surety and proceed no further in the cause. And any bail that may have been originally taken shall be discharged. And the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered by the circuit court in which the suit commenced. See act of September 24, 1789, sect. 12; 4 Dall. 11; 5 Cranch, 303; 4 Johns. N. Y. 493; 1 Pet. 220; 2 Yeates, Penn. 275; 4 Wash. C. C. 286, 344.

And sect. 5 of the act of March 3, 1863, enacts that any suit or prosecution, civil or criminal, commenced in any state court against any officer, civil or military, or any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the president of the United States, or any act of congress, the defendant may, by petition filed in conformity to the provisions of the act, have such suit or prosecution removed for trial at the next circuit court of the United States to be held in the district where the suit is pending.

54. By the constitution, art. 3, sect. 2, 1, the judicial power shall extend to controversies between citizens of the same state claiming lands under grants of different states.

By a clause of the 12th section of the act of September 24, 1789, it is enacted that if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter

in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court, and make affidavit, if it require it, that he claims and shall rely upon a right or title to the land under grant from a state other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of records shall put it out of his power, and shall move that the adverse party inform the court whether he claims a right of title to the land under a grant from the state in which the suit is pending, the said adverse party shall give such information, otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under any such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district. But if he is the defendant, he shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such court by an alien. And neither party removing the cause shall be allowed to plead, or give evidence of, any other title than that by him stated as aforesaid as the ground of his claim. See 9 Cranch, 292; 2 Wheat. 378.

Application for removal must be made during the term at which the defendant enters his appearance. 1 J. J. Marsh. Ky. 232. If a state court agree to consider a petition to remove the cause as filed of the preceding term, yet if the circuit court see by the record that it was not filed till a subsequent term, they will not permit the cause to be docketed. 1 Pet. C. C. 44; Paine, 410. But see 2 Penn. N. J. 625.

55. In chancery, when the defendant wishes to remove the suit, he must file his petition when he enters his appearance, 4 Johns. Ch. N. Y. 94; and in an action in a court of law, at the time of putting in special bail. 12 Johns. 153. And if an alien file his petition when he files special bail, he is in time, though the bail be excepted to. 1 Caines, N. Y. 248; Coleman, 58. A defendant in ejectment may file his petition when he is let in to defend. 4 Johns. 493. See Pet. C. C. 220; 2 Wash. C. C. 463; 4 *id.* 84, 286; 2 Yeates, Penn. 275, 352; 3 Dall. 467; 2 Root, 444; 5 Johns. Ch. N. Y. 300; 3 Ohio, 48.

Remedy by Mandamus.

56. The power of the circuit court to issue a mandamus is confined exclusively to cases in which it may be necessary for the exercise of a jurisdiction already existing: as, for instance, if the court below refuse to proceed to judgment, then a mandamus in the nature of a procedendo may issue. 7 Cranch, 504; 6 Wheat. 598. After the state court had refused to permit the removal of a cause on petition, the circuit court issued a mandamus to transfer the cause.

Appellate Jurisdiction.

57. The appellate jurisdiction is exercised by means of—1. Writs of error; 2. Appeals from the district courts in admiralty and maritime jurisdiction; 3. Certiorari; 4. Procedendo.

58. This court has jurisdiction to issue writs of error to the district court, on judgments of that court in civil cases at common law.

The 11th section of the act of September 24, 1789, provides that the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions thereinafter provided.

By the 22d section, final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court or a justice of the supreme court, the adverse party having at least twenty days' notice. But there shall be no reversal on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or, in case the person entitled to such writ of error be an infant, *non compos mentis*, or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation or any writ of error as aforesaid shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

59. The district judge cannot sit in the circuit court on a writ of error to the district court. 5 Wheat. 434.

It is observed above that writs of error may be issued to the district court in civil cases at common law; but a writ of error does not lie from a circuit to a district court in an admiralty or maritime cause. 1 Gall. C. C. 5.

60. Appeals from the district to the circuit court take place generally in civil causes of admiralty or maritime jurisdiction.

By the act of March 3, 1803, sect. 2, it is enacted that from all final judgments or decrees in any of the district courts of the United States, an appeal where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the district court next to be holden in the district where such final judgment or judgments, decree or decrees, shall be rendered; and the circuit courts are thereby authorized and required to hear and determine such appeals.

61. Although no act of congress authorizes the circuit court to issue a certiorari to the district court for the removal of a cause, yet if the cause be so removed, and, instead of taking advantage of the irregularity in proper time and in a proper manner, the defendant makes the defence and pleads to issue, he thereby waives the objection, and the suit will be considered as an original one in the circuit court, made so by consent of the parties. 2 Wheat. 221.

The circuit court may issue a writ of procedendo to the district court.

Equity Jurisdiction of the Circuit Courts.

62. *Circuit courts* are vested with equity jurisdiction in certain cases. The act of September 24, 1789, sect. 11, gives original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state.

63. The act of April 15, 1819, sect. 1, provides "That the circuit court of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries, and, upon any bill in equity filed by any party aggrieved in such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: provided, however, that from all judgments and decrees of any circuit courts rendered in the premises a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit court."

64. By the act of August 23, 1842, sect. 5, it is enacted "That the district courts, as courts of admiralty, and the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct and award all such process, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are not grantable of course according to the rules and practice of the court."

Criminal Jurisdiction of the Circuit Courts.

65. The often-cited eleventh section of the act of the 24th of September, 1789, gives the circuit courts exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act otherwise provides or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. The jurisdiction of the circuit courts in criminal cases is confined to offences committed within the district for which those courts respectively sit, when they are committed on land. Serg. Const. Law, 129; 1 Gall. C. C. 488.

66. *The Circuit Court of the District of Columbia.* (Abolished by sect. 16 of act of March 3, 1863. See sect. 96, *post.*)

The District Courts.

The act of 1789, c. 20, sect. 9, establishes the district courts, as follows:—

"The district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas,—saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States; and shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States; and shall also have cognizance, concurrent, as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars; and shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offences above the description aforesaid; and the trial of issues in fact in the district courts, in all causes except

civil causes of admiralty and maritime jurisdiction, shall be by jury." This act allows appeals to the circuit court in certain cases.

67. *Organization.* The United States are divided into districts, in each of which is a court called a district court, which is to consist of one judge, who is to reside in the district for which he is appointed, and to hold annually four sessions. Act of September 24, 1789. By subsequent acts of congress, the number of annual sessions in particular districts is sometimes more and sometimes less; and they are to be held at various places in the district.

68. As the number of states increased into which no supreme judge went, and the old states became so large that one district judge could not transact the business, it was found necessary to increase the number of judges, to clothe these district courts with circuit-court powers, and to allow appeals and writs of error from them to the supreme court.

Thus, from time to time acts were passed, with this view, relative to the district courts of Western Tennessee, Northern and Middle Alabama, Northern and Southern Florida, Northern Georgia, Texas, Iowa, Wisconsin, Western Arkansas, and California; and by the act of March 3, 1837, cited **34**, many of the district courts were made circuit courts, whereby the same rights of appeal and writ of error were conferred. There are in the United States (in 1860) thirty-three district judges who hold courts; in ten of the states, an additional judge who holds courts; in three states, two districts in which the same judge holds courts; and in Tennessee, three districts in which the same judge holds courts. The system has become, therefore, somewhat complicated. For the powers and duties of all these district courts, the books which have already been mentioned may be referred to.

69. *Jurisdiction.* Their jurisdiction is either civil or criminal. Their civil jurisdiction includes admiralty and maritime causes, and is either ordinary or extraordinary. The ordinary jurisdiction is granted by the act of September 24, 1789, sect. 9. It is there enacted that the district court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. This jurisdiction is exclusive. Bee, Adm. 19; 3 Dall. 16; Paine, C. C. 111; 4 Mas. C. C. 139.

This ordinary jurisdiction is exercised in—

70. *Prize suits.* The act of September 24, 1789, sect. 9, vests in the district courts as full jurisdiction of all prize causes as is possessed by the admiralty of England; and this jurisdiction is an ordinary inherent branch of the powers of the court of admiralty, whether considered as *prize* courts or *instance* courts. 3 Dall. 16; Paine, C. C. 111.

71. The act of congress marks out not only the general jurisdiction of the district courts, but also that of the several courts in relation to each other, in cases of seizure on the waters of the United States, navigable, etc. When the seizure is made within the waters of one district, the court of that district has exclusive jurisdiction though the offence may have been committed out of the district. When the seizure is made on the high seas, the jurisdiction is in the court of the district where the property may be brought. 9 Wheat. 402; 6 Cranch, 281; 1 Mas. C. C. 360; Paine, C. C. 40.

72. When the seizure has been made within the waters of a foreign nation, the district court has jurisdiction when the property has been brought into the district and a prosecution has been instituted there. 9 Wheat. 402; 9 Cranch, 102.

The district court has jurisdiction of seizures, and of the question who is entitled to their proceeds, as informers or otherwise, and the principal jurisdiction is exclusive. The question as to who is the informer is also exclusive. 4 Mas. C. C. 139.

73. *Cases of salvage.* Under the constitution and laws of the United States, this court has exclusive original cognizance in cases of salvage; and, as a consequence, it has the power to determine to whom the residue of the property belongs after deducting the salvage. 3 Dall. 183.

74. *Actions arising out of torts and injuries.* The district court has jurisdiction over all torts and injuries committed on the high seas, and in ports or harbors within the ebb and flow of the tide. See 1 Wheat. 304; 2 Gall. C. C. 389; 1 Mas. C. C. 96; 3 *id.* 242; 4 *id.* 380; 18 Johns. N. Y. 257.

75. In the very leading case of Waring *v.* Clarke, 5 How. 441, two grounds were taken to sustain the position that the court had not jurisdiction, as the collision took place within the ebb and flow of the tide, and so *infra corpus comitatus:* First, "That the grant in the constitution of all cases of admiralty and maritime jurisdiction was limited to what were cases of admiralty and maritime jurisdiction in England when our revolutionary war began, or when the constitution was adopted; and that a collision between ships within the ebb and flow of the tide, *infra corpus comitatus*, was not one of them. Second, That the distinguishing limitation of admiralty jurisdiction, and decisive test against it, in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury."

And as auxiliary to this ground it was urged that the clause in the ninth section of the Judiciary Act of 1789, 1 Stat. at Large, 77, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, took away such cases from the admiralty jurisdiction of the courts of the United States. The court held, confining their opinion to cases of collision, that the objections were not valid. Mr. Justice Wayne asserts that the grant of admiralty and maritime jurisdiction to the federal judiciary by the constitution of the United States was not limited to the restricted jurisdiction which had prevailed in England since

the restraining statutes of 13 & 15 Rich. II. and 2 Hen. IV.

76. The admiralty jurisdiction has been held to include a collision which took place on the Yazoo river where it falls into the Mississippi, more than two hundred miles from its mouth. 22 How. 48.

A court of admiralty has jurisdiction to redress personal wrongs committed on a passenger, on the high seas, by the master of a vessel, whether those wrongs be by direct force or consequential injuries. 3 Mas. C. C. 242.

The admiralty may decree damages for an unlawful capture of an American vessel by a French privateer, and may proceed by attachment *in rem*. Bee, Adm. 60.

It has jurisdiction in cases of maritime torts, *in personam* as well as *in rem*. 10 Wheat. 473.

77. This court has also jurisdiction of petitory suits to reinstate owners of vessels who have been displaced from their possession. 5 Mas. C. C. 465.

A father, whose minor son has been tortiously abducted and seduced on a voyage on the high seas, may sue, in the admiralty, in the nature of an action *per quod*, etc., also for wages earned by such son in maritime service. 4 Mas. C. C. 380.

78. *Suits on contracts.* As a court of admiralty, the district court has a jurisdiction, concurrent with the courts of common law, over all maritime contracts, wheresoever the same may be made or executed, or whatsoever be the form of the contract. 2 Gall. C. C. 398. It may enforce the performance of charter-parties for foreign voyages, and, by proceeding *in rem*, a lien for freight under them. 1 Sumn. C. C. 551; 2 *id.* 589. It has jurisdiction over contracts for the hire of seamen, when the service is substantially performed on the sea, or on waters within the flow and reflow of the tide. 10 Wheat. 428; 7 Pet. 324; Bee, Adm. 199; Gilp. Dist. Ct. 529. But unless the services are essentially maritime, the jurisdiction does not attach. 10 Wheat. 428; Gilp. Dist. Ct. 529.

79. In 1845, congress passed an act, 5 Stat. at Large, 726, to extend the jurisdiction of the district courts to certain cases upon the lakes and the navigable waters connecting the same. It enacted "that the district court of the United States shall have like powers and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States," etc. etc. In the case of the propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, it was held that this act was not passed under the power conferred by the constitution upon congress to regulate commerce, but upon the grant of admiralty and maritime jurisdiction conferred upon the federal judiciary by the constitution, and that the jurisdiction of the federal courts upon the lakes and the navigable waters connecting them was not conferred, therefore, by this act, but that it existed independently of it. It will be perceived from the above quotation that jurisdiction is conferred upon the district courts in cases where vessels are employed in business of commerce and navigation between ports and places in different states and territories. It was therefore held that it did not extend to a case where there was a shipment of goods from a port in a state to another port in the same state. 21 How. 244.

80. The master of a vessel may sue in the admiralty for his wages; and the mate, who on his death succeeds him, has the same right. 1 Sumn. C. C. 157; 3 Mas. C. C. 161; 4 *id.* 196. But when the services for which he sues have not been performed by him as master, they cannot be sued for in admiralty. 3 Mas. C. C. 161.

The jurisdiction of the admiralty attaches when the services are performed on a ship in port where the tide ebbs and flows. 7 Pet. 324; Gilp. Dist. Ct. 529.

81. Seamen employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction. But those in ferry-boats are not so. Gilp. Dist. Ct. 203, 532.

Wages may be recovered in the admiralty by the pilot, deck-hands, engineer, and firemen on board of a steamboat. Gilp. Dist. Ct. 505.

But unless the service of those employed contribute in navigating the vessel, or to its preservation, they cannot sue for their wages in the admiralty. Musicians on board of a vessel, who are hired and employed as such, cannot, therefore, enforce a payment of their wages by a suit *in rem* in the admiralty. Gilp. Dist. Ct. 516.

82. *The extraordinary jurisdiction* of the district court, as a court of admiralty, or that which is vested by various acts of congress, consists of—

Seizures under the laws of imposts, navigation, or trade of the United States. It is enacted, by the act of September 24, 1789, sect. 9, that the district court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, when the common law is competent to give it.

83. Causes of this kind are to be tried by

the district court, and not by a jury. 1 Wheat. 9, 20; 4 Cranch, 438; 5 *id.* 281; 7 *id.* 112; 3 Dall. 297.

It is the place of seizure, and not the committing of the offence, that, under the act of September 24, 1789, gives jurisdiction to the court, 4 Cranch, 443; 5 *id.* 304; for until there has been a seizure the forum cannot be ascertained. 9 Cranch, 289.

When the seizure has been voluntarily abandoned, it loses its validity; and no jurisdiction attaches to any court unless there be a new seizure. 10 Wheat. 325; 1 Mas. C. C. 361.

84. *Captures* made within the jurisdictional limits of the United States are within the admiralty jurisdiction. By the act of April 20, 1818, sect. 7, the district court shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts and shores thereof.

85. The civil jurisdiction of the district court extends to cases of seizure on land, under the laws of the United States, and in suits for penalties and forfeitures incurred under the laws of the United States.

The act of September 24, 1789, sect. 9, gives to the district court exclusive original cognizance of all seizures made on land, and other waters than as aforesaid (that is, those which are navigable by vessels of ten or more tons burthen, within their respective districts, or on the high seas), and of all suits for penalties and forfeitures incurred under the laws of the United States.

In all cases of seizure on land the district court sits as a court of common law, and its jurisdiction is entirely distinct from that exercised in case of seizure on waters navigable by vessels of ten tons burthen and upwards. 8 Wheat. 395.

Seizures of this kind are triable by jury: they are not cases of admiralty and maritime jurisdiction. 4 Cranch, 443.

86. *Aliens' suits for torts in violation of the laws of nations or a treaty of the United States* are within its jurisdiction. The act of September 24, 1789, sect. 9, directs that the district court shall have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only, in violation of the law of nations, or of a treaty of the United States.

87. *Suits instituted by the United States* are within its jurisdiction. By the ninth section of the act of September 24, 1789, the district court shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And by the act of March 3, 1815, sect. 4, it has cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of congress, sue, although the debt, claim, or other matter in dispute shall not amount to one hundred dollars.

These last words do not confine the jurisdiction given by this act to one hundred dollars, but prevent it from stopping at that sum; and, consequently, suits for sums over one hundred dollars are cognizable in the district, circuit, and state courts, and before magistrates, in the cases here mentioned. By virtue of this act, these tribunals have jurisdiction over suits brought by the postmaster-general for debts and balances due the general post-office. 12 Wheat. 147; 1 Pet. 318; 2 *id.* 447.

88. *Actions by or against consuls or vice-consuls* are within its jurisdiction, exclusively of the courts of the several states, except for offences where other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is inflicted.

For offences above this description formerly the circuit court only had jurisdiction in cases of consuls. 5 Serg. & R. Penn. 545; 2 Dall. 299. But by the act of August 23, 1842, the district courts shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States the punishment of which is not capital. And by the act of February 28, 1839, sect. 5, the punishment of whipping is abolished. See also the act of 28th Sept. 1850, making appropriations for the naval service.

89. *Their Bankrupt jurisdiction* is given under BANKRUPT, which see.

90. *Equitable jurisdiction* is given in certain cases. By the first section of the act of February 13, 1807, the judges of the district courts of the United States shall have as full power to grant writs of injunction, to operate within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations, and restrictions as are prescribed by the several acts of congress establishing the judiciary of the United States, any law to the contrary notwithstanding. Provided, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit then next ensuing; nor shall an injunction be issued by a district judge in any case where the party has had a reasonable time to apply to the circuit court for the writ.

An injunction may be issued by the district judge under the act of March 3, 1820, sects. 4, 5, where proceedings have taken place by warrant and distress against a debtor to the United States or his sureties, subject by sect. 6 to appeal to the circuit court from the decision of such district judge in refusing or dissolving the injunction, if such appeal be allowed by a justice of the supreme court; on which, with an exception as to the necessity of an answer on the part of the United States, the proceedings are to be as in other cases.

91. The act of September 24, 1789, sect. 14,

vests in the judges of the district courts power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment.

Other acts give them power to issue writs, make rules, take depositions, etc. The acts of congress already treated of relating to the privilege of not being sued out of the district of which the defendant is an inhabitant, or in which he is found, restricting suits by assignees, and various others, apply to the district court as well as to the circuit court.

92. By the ninth section of the act of September 24, 1789, the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury. Serg. Const. Law. 226, 227.

93. *The criminal jurisdiction of the district court.* By the act of August 23, 1842, sect. 3, it is enacted that the district courts of the United States shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States the punishment of which is not capital.

94. There is a peculiar class of district courts possessing the powers of circuit courts to a great extent. See **32–34.**

The Territorial Courts.

95. There are at present (1864) nine territorial governments, viz.: New Mexico, Utah, Washington, Nebraska, Colorado, Dakota, Arizona, Idaho, and Montana, in each of which is a territorial court, consisting of a chief justice and two associate justices, who hold their offices for a term of four years. This circumstance is sufficient to show that these are not constitutional courts, that is, courts upon which judicial power is conferred by the constitution of the United States; but their powers and duties are conferred upon them by the acts of congress which created them. It is not necessary to specify these. The chief judge and associate justices hold one term annually of the supreme court, and each territory is divided into three districts, in which each one of the judges holds a district court. By a law passed in 1858, 4 Stat. at Large, 366, the judges of the supreme court of each territory are authorized to hold courts within their respective districts in the counties wherein, by the laws of said territories, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party. The expenses thereof are to be paid by the territory or by the counties in which the courts are held. In all the territorial courts there is an appeal to the supreme court of the United States where the value in dispute exceeds one thousand dollars. In Washington this limit is extended to two thousand dollars, and an appeal or writ of error is allowed in all cases where the constitution of the United States, or acts of congress, or a treaty of the United States is brought in question. In the territory of Nebraska an appeal or writ of error lies to the supreme court of the United States, without regard to the value in dispute, in all cases involving title to slaves, and also in decisions upon any writ of *habeas corpus* involving the question of personal freedom. Provided, that nothing shall affect the acts of 1793 and 1850 respecting fugitives, etc. Examples of acts constituting these courts may be found under the titles of the respective territories.

Supreme Court of the District of Columbia.

96. The supreme court of the district of Columbia was established by act of congress, approved March 3, 1863. The same act abolished the former circuit court, district court, and criminal court of the district. The supreme court consists of four justices (one of whom is designated the chief justice), appointed by the president of the United States, and who hold their offices during good behavior. It has general jurisdiction in law and equity, and the judges possess and exercise the same powers and jurisdiction formerly possessed and exercised by the judges of the circuit court of the district. Any one of the judges may hold a district court, with the same powers, etc. as other district courts of the United States; and any one of the judges may hold a criminal court for the trial of crimes and offences committed within the district, with the same powers, etc. as the old criminal court. Any final judgment, order, or decree of the court may be re-examined and reversed or affirmed in the supreme court of the United States, on writ of error or appeal. The supreme court of the district has appellate jurisdiction of all judgments of justices of the peace, and has power to remove said justices of the peace for cause. Three general terms of the court are held annually at Washington.

Court of Claims.

97. This court as originally created by statute of February 24, 1855, 10 Stat. at Large, 12, consisted of three judges, appointed by the president with the advice and consent of the senate, to hold their offices during good behavior, and have jurisdiction to hear and determine all claims founded upon any law of congress, or regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and of all claims which might be referred to it by either house of congress. The United States were represented before it by a solicitor and assistant solicitor, appointed for the government by the same authority that appointed the judges, the solicitor being authorized to appoint a deputy,—the compensation of each of whom, as well as that of the judges, being fixed by the statute. The court had no power to render a judgment which it could execute, but reported to congress the cases upon which it had finally acted, the material facts it found established by the evidence, with its opinion in the case, and reasons

therefor, or what was equivalent to an opinion in the nature of a judgment as to the rights of the parties upon the facts proved or admitted in the case. Bright. Dig. 198–200.

But by an amendatory act of March 3, 1863, it is enacted that two additional judges shall be appointed by the president with the consent of the senate; and from the whole number of judges (five) a chief justice shall be appointed. In addition to the jurisdiction previously conferred upon the court, it is now authorized to take jurisdiction of all set-offs, counter-claims, claims for damages, liquidated or unliquidated, or other demands whatsoever on the part of the government against any person making claim against the government in said court. If the judgment of the court shall be in favor of the government, it shall be filed in the office of the clerk of the proper district or circuit court of the United States, and shall *ipso facto* become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments are. If the judgment shall be in favor of the claimant, the sum thereby found due to the claimant shall be paid out of any general appropriation made by law for the payment of private claims, on presentation to the secretary of the treasury of a duly certified copy of said judgment. In cases where the amount in controversy exceeds three thousand dollars, an appeal may be taken to the supreme court of the United States at any time within ninety days after judgment. Where the judgment or decree may affect a constitutional question, or furnish a precedent affecting a class of cases, the United States may take an appeal without regard to the amount in controversy. Claims must be filed within six years after the claim accrues, except in cases of disability. The court is required to hold one session annually, commencing on the first Monday in October. Members of congress are prohibited from practising in the court. At the instance of the solicitor of the United States, any claimant may be required to testify on oath. The solicitor, assistant solicitor, and deputy solicitor are appointed by the president of the United States with the consent of the senate. The jurisdiction of the court is not to extend to any claim growing out of any treaty with foreign nations or Indian tribes, unless such claim was pending in said court on the first day of December, 1862. And by sect. 1 of the act of July 4, 1864, it is enacted that the jurisdiction of the court shall not extend to any claim against the United States for the destruction, appropriation, or damage of any property by the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof.

Proceedings in the court of claims originate by petition filed; and testimony used in the hearing and determination of claims is taken by commissioners who are appointed by the court for the purpose.

COURTS OF THE TWO UNIVERSITIES. In English Law. See CHANCELLOR'S COURTS OF THE TWO UNIVERSITIES.

COURT OF WARDS AND LIVERIES. In English Law. A court of record in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat. 32 Hen. VIII. c. 46, to take the place of the ancient *inquisitio post mortem*, and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c. 22, when it became the Court of Wards and liveries. It was abolished by statute 12 Car. II. c. 24.

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license. 4 Reeve, Hist. Eng. Law, 259; Crabb, Hist. Eng. Law, 468; 1 Stephen, Comm. 183, 192; 4 *id.* 40; 2 Sharswood, Blackst. Comm. 68, 77; 3 *id.* 258.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother.

The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S. Ch. 301; 3 Russ. Ch. 140; 9 Sim. Ch. 386, 457.

COUSTUM (Fr.). Custom; duty; toll. 1 Sharswood, Blackst. Comm. 314.

COUSTUMIER (Fr.). A collection of customs and usages in the old Norman law. See the Grand Coutumier de Normandie.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount.

COVENANT (Lat. *convenire*, to come together; *conventio*, a coming together. It is equivalent to the *factum conventum* of the civil law).

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist. It differs from an express assumpsit in that it must be by deed.

2. *Affirmative covenants* are those in which the covenantor declares that something has been already done, or shall be done in the future. Such covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants. Dy. 19 *b*; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operation is in *aid* or *support* of the principal covenant. If the principal covenant is void, the auxiliary is discharged. Anstr. 256; Prec. Chanc. 475.

3. *Collateral covenants* are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted: as, to pay a sum of money in gross, that the lessor shall distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like. Platt, Cov. 69; Sheppard, Touchst. 161; 4 Burr. 2439; 3 Term, 393; 2 J. B. Moore, 164; 5 Barnew. & Ald. 7; 2 Wils. 27; 1 Ves. Ch. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. Platt, Cov. 71; 2 Selwyn, Nisi P. 443; Dougl. 698; 18 Eng. L. & Eq. 81; 4 Wash. C. C. 714; 16 Mo. 450.

4. *Declaratory covenants* are those which serve to limit or direct uses. 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement. Platt, Cov. 71; 2 Selwyn, Nisi P. 443; Stephen, Nisi P. 1071; 1 C. B. N. S. 646; 6 Cow. N. Y. 296; 2 Johns. N. Y. 209; 2 Watts & S. Penn. 227; 8 Serg. & R. Penn. 268; 4 Conn. 3; 24 *id.* 624; 11 Vt. 549; 17 Me. 232; 3 Ark. 581; 1 Blackf. Ind. 175; 6 Ala. 60; 3 Ala. N. S. 330. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant. 1 Wms. Saund. 320, n.; 7 Term, 130; 8 *id.* 366; Willes, 157; 5 Bos. & P. 223; 36 Eng. L. & Eq. 358; 4 Wash. C. C. 714; 4 Rawle, Penn. 26; 2 Watts & S. Penn. 227; 4 *id.* 527; 2 Johns. N. Y. 145; 5 Wend. N. Y. 496; 5 N. Y. 247; 1 Root, Conn. 170; 4 Rand. Va. 352.

5. *Disjunctive covenants.* Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Platt, Cov. 21; 1 Du. N. Y. 209.

Executed covenants are those which relate to acts already performed. Sheppard, Touchst. 161.

Executory covenants are those whose performance is to be future. Sheppard, Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention. Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant. 2 Mod. 268; 3 Kebl. 848; 1 Leon. 324; 1 Bingh. 433; 8 J. B. Moore, 546; 12 East, 182, n.; 16 *id.* 352; 1 Bibb, Ky. 379; 2 *id.* 614; 3 Johns. N. Y. 44; 5 Cow. N. Y. 170; 4 Conn. 508; 1 Harr. Del. 233. The words "I oblige," "agree," 1 Ves. Ch. 516; 2 Mod. 266, "I bind myself," Hardr. 178; 3 Leon. 119, have been held to be words of covenant, as are the words of a bond. 1 Chanc. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant. 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant. 6 J. B. Moore, 202, n. (*a*).

6. *Covenants for further assurance.* See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use are five in number in England,—of *seisin*, of *rights to convey*, for *quiet enjoyment*, against *incumbrances*, and for *further assurance*,—and are held to run with the land. Platt, Cov. 305; 1 Maule & S. 355. In the United States there is, in addition, a covenant of *warranty*, which is more commonly used than any of the others. The covenants of seisin, right to convey, and against incumbrances, are generally held to be *in presenti*, and not assignable. Rawle, Cov. 110, 337, 342, 346; 4 Kent, Comm. 471; 6 Cush. Mass. 128. See 36 Me. 170; and see the various titles beyond for a fuller statement of the law relative to the different covenants for title.

7. *Implied covenants* are those which arise by intendment and construction of law from the use of certain words in some kinds of contracts. Bacon, Abr. *Covenant*, B; Rawle, Cov. 364; 1 C. B. 402. Thus, in a conveyance of lands in fee, the words "grant," bargain, and sell, imply certain covenants, see 4 Kent, Comm. 473; beyond, **12**; and the word "give" implies a covenant of warranty during the life of the feoffor, 10 Cush. Mass. 134; 4 Gray, Mass. 468; 2 Caines, N. Y. 193; 9 N. H. 222; 7 Ohio, pt. 2, 63; and in a lease the use of the words "grant and demise," Coke, Litt. 384; 4 Wend. N. Y. 502; 8 Cow. N. Y. 36; "grant," Freem. Ch. 367; Croke Eliz. 214; 4 Taunt. 609; 1 Perr. & D. 360; "demise," 4 Coke, 80; 10 Mod. 162; Hob. 12; 9 N. H. 222; 15 N. Y. 327; "demisement," 1 Show. 79; 1 Salk. 137, raises an implied covenant on the part of the lessor, as do "yielding and paying," 9 Vt. 151, on the

part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see 23 Barb. N. Y. 153.

8. *Covenants in deed.* Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes, 5 Harr. & J. Md. 193; 5 N. H. 96; 6 *id.* 225; 1 Binn. Penn. 118; 6 *id.* 321; 4 Serg. & R. Penn. 159; 4 Halst. N. J. 252, or if they are of an immoral nature, 3 Burr. 1568; 1 Esp. 13; 1 Bos. & P. 340; 3 T. B. Monr. Ky. 35, against public policy, 4 Mass. 370; 5 *id.* 385; 7 Me. 113; 5 Halst. N. J. 87; 3 Day, Conn. 145; 7 Watts, Penn. 152; 5 Watts & S. Penn. 315; 6 Miss. 769; 2 McLean, C. C. 464; 4 Wash. C. C. 297; 11 Wheat. 258, in general restraint of trade, 21 Wend. N. Y. 166; 7 Cow. N. Y. 307; 6 Pick. Mass. 206; 19 *id.* 51, or fraudulent between the parties, 4 Serg. & R. Penn. 483; 7 Watts & S. Penn. 111; 5 Mass. 16, or third persons. 3 Day, Conn. 450; 14 Serg. & R. Penn. 214; 3 Caines, N. Y. 213; 2 Johns. N. Y. 286; 12 *id.* 306; 15 Pick. Mass. 49.

9. *Independent covenants* are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent, Platt, Cov. 71; 2 Johns. N. Y. 145; 10 *id.* 204; 21 Pick. Mass. 438; 1 Ld. Raym. 666; 3 Bingh. N. S. 355; unless the undertaking on one side is *in terms* a condition to the stipulation of the other, and then only consistently with the intention of the parties, 3 Maule & S. 308; 10 East, 295, 530; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance, Willes, 496; or unless the non-performance on one side goes to the entire substance of the contract, and to the whole consideration. 1 Seld. N. Y. 247. If once independent, they remain so. 19 Barb. N. Y. 416.

Inherent covenants are those which relate directly to the land itself, or matter granted. Sheppard, Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land. Platt, Cov. 66.

10. *Intransitive covenants* are those the duty of performing which is limited to the covenantee himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. 26 Barb. N. Y. 63; 16 How. 580; 1 Gray, Mass. 376; 10 B. Monr. Ky. 291. It may be in the negative. 35 Me. 260.

Negative covenants are those in which the party obliges himself *not* to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible. 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674; 1 Sid. 87.

Obligatory covenants are those which are binding on the party himself. 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Covenants of right to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants of warranty. See COVENANT OF WARRANTY.

Personal covenants. See PERSONAL COVENANT.

11. *Principal covenants.* Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. Those by which a single covenantor undertakes the performance of the covenant. It frequently happens that each one of several covenantors binds himself to perform singly the whole undertaking. The words commonly used for this purpose are "severally," "each of us." Still more commonly the undertaking is both joint and several.

It is the nature of the interest, and not the form of the covenant, which determines its character in this respect. 16 How. 580; 1 Gray, Mass. 376.

Covenants to stand seised, etc. See COVENANT TO STAND SEISED TO USES.

Transitive covenants are those personal covenants the duty of performing which passes over to the representatives of the covenantor.

12. Covenants are subject to the same rules as other contracts in regard to the qualifications of *parties*, the *assent* required, and the nature of the *purpose* for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise a covenant, either express or implied, 12 Ired. No. C. 145; but certain words have been decided to have this effect. See, before, **5**, **7**. And by statute in Alabama, Delaware, Illinois, Indiana, Mississippi, Missouri, and Pennsylvania, the words *grant*, *bargain*, and *sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seised in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts, 14 Kent, Comm. 473; 2 Binn. Penn. 95; 23 Mo. 151, 174; 17 Ala. N. S. 198; 1 Smedes & M. Ch. Miss. 611; 19 Ill. 235; but do not imply any warranty of title in Alabama and North Carolina. 4 Kent, Comm. 474; 1 Murph. No. C. 343, 348; 2 Ala. N. S. 535.

13. Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description, 7 Gray, Mass. 563, and that the purchaser shall have the use thereof, 5 Md. 314; 23 N. H. 261; which binds subsequent purchasers from the grantor. 7 Gray, Mass. 83.

In New York, no covenants can be implied in any conveyance of real estate, 4 Kent, Comm. 469; but this provision does not extend to leases for years. 1 Paige, Ch. N. Y. 566. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass, the *benefit* is said to run; if liabilities, the *burden*. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee, 2 Sugden, Vend. 468, 484; 3 Wils. 29; 2 Mylne & K. 535; 19 Pick. Mass. 449, 464; 24 Barb. N. Y. 366; 45 Me. 474; and die with the estate to which they are annexed, 3 Jones, No. C. 12; 13 Ired. No. C. 193; but an estoppel to deny passage of title is said to be sufficient, 3 Metc. Mass. 124; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run. 23 Mo. 151, 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the "covenantee and his assigns," will run with the land though no estate passed between the covenantor and covenantee, Rawle, Cov. 335; Year B. 42 Edw. III. 13; 3 Den. N. Y. 301; 8 Gratt. Va. 403; but the weight of authority is otherwise. 2 Sugden, Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land, 3 N. J. 260, except those that are broken before the land passed. 4 Kent, Comm. 473; 30 Vt. 692; COVENANTS OF SEISIN, etc.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been re-enacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on express covenants after an assignment by him, but not on implied ones, 4 Term, 98; but he is liable to the assignee of the lessor on implied covenants, at common law. Platt, Cov. 532; 2 Sugden, Vend. 466; Burton, Real Prop. § 855.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining. 2 Sugden, Vend. 508; Rawle, Cov. 359; 36 Me. 170; 27 Penn. St. 288; 3 Metc. Mass. 87; 8 Gratt. Va. 407; 9 B. Monr. Ky. 58. But covenants are not, in general, apportionable. 27 Penn. St. 288.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal. Fitzherbert, Nat. Brev. 340; Chitty, Plead. 112, 113; Stephen, Nisi P. 1058.

14. The action lies, generally, where the covenantor does some act contrary to his agreement, fails to do or perform that which he has undertaken, 4 Dane, Abr. 115, or does that which disables him from performance. Croke Eliz. 449; 15 Q. B. 88; 11 Mass. 302; 23 Pick. Mass. 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and assumpsit brought. 27 Penn. St. 429; 24 Vt. 347.

The venue is local when the action is founded on privity of estate, 2 Stephen, Nisi P. 1148; 1 Wms. Saund. 241 *b*, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by the statute 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory. 1 Chitty, Plead. 274, 275.

15. *The declaration* must, at common law, aver a contract under seal, 2 Ld. Raym. 1536, and either make protest thereof or excuse the omission, 3 Term, 151, at least of such part as is broken, 4 Dall. C. C. 436; 4 Rich. So. C. 196; and a breach or breaches, 15 Ala. 201; 5 Ark. 263; 4 Dan. Ky. 381; 6 Miss. 229, which may be by negativing the words of the covenant in actions upon covenants of seisin and right to convey, Rawle, Cov. 53, or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances, Rawle, Cov. 125; and must allege an eviction in case of covenants of warranty. Rawle, Cov. 308. No consideration need be averred or shown, as it is implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred. 1 Chitty, Plead. 116; 2 Greenleaf, Ev. § 235; 26 Ala. N. S. 748. The damages laid must be large enough to cover the real amount sought to be recovered. 3 Serg. & R. Penn. 364, 567; 9 *id.* 45.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed, 1 Seld. N. Y. 422; 1 Mich. 438: as, personal incapacity, 2 Campb. 272; 3 *id.* 126; that the deed was fraudulent, Lofft, 457; was not delivered, 4 Esp. 255; or was not executed by all the parties. 6 Maule & S. 341.

Non infregit conventionem and *nil debet* have both been held insufficient. Comyns, Dig. *Pleader*, 2 V, 4. As to the effect of covenant performed, see COVENANT PERFORMED.

In respect to the damages to be recovered, see DAMAGES.

The judgment is that the plaintiff recover a named sum for the damages which he has sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use in several of the United States. 14 Penn. St. 308; 19 Barb. N. Y. 639; 4 Md. 498; 11 Ill. 194; 19 Ohio, 347. Substantially the same effect is secured as by a conveyance and a mortgage back for the purchase-money, with this important difference, however, that the title of course remains in the covenantor till he actually executes the conveyance.

The remedy for breach may be by action on the covenant, 29 Penn. St. 264; but the better remedy is said to be in equity for specific performance. 1 Grant, Cas. Penn. 230.

It is satisfied only by a perfect conveyance of the kind bargained for, 19 Barb. N. Y. 639; otherwise where an imperfect conveyance has been accepted. 4 Md. 498.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. Platt, Cov. 341.

The covenant is of frequent occurrence in English conveyances; but its use in the United States seems to be limited to some of the middle states. 2 Washburn, Real Prop. 648; 10 Me. 91; 4 Mass. 627; 10 Cush. Mass. 134.

The covenantor, in execution of his covenant, is not required to do unnecessary acts. Yelv. 44; 9 Price, 43. He must in equity grant a subsequently acquired title, 2 Chanc. Cas. 212; 1 Eq. Cas. Abr. 26; 2 Vern. Ch. 111; 2 P. Will. 630; must levy a fine, Yelv. 44; 16 Ves. Ch. 366; 5 Taunt. 427; 4 Maule & S. 188; must remove a judgment or other incumbrance, 5 Taunt. 427; but a mortgagor with such covenant need not release his equity. 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach. 2 Coke, 3 *a;* 6 Jenk. Cas. 24; Platt, Cov. 353; Rawle, Cov. 185; 2 Washburn, Real Prop. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. For what constitutes an incumbrance, see INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant, 2 Washburn, Real Prop. 658; 20 Ala. 137, 156, without regard to the knowledge of the grantee. 2 Greenleaf, Ev. § 242; 27 Vt. 739; 8 Ind. 171; 10 *id.* 424.

Such covenants, being *in presenti*, do not run with the land, in the United States, 2 Washburn, Real Prop. 659; 20 N. H. 369; 5 Wisc. 17; though it is held otherwise in 10 Ohio, 317; 13 Johns. N. Y. 105.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty: as in case of a mortgage. 4 Mass. 349; 17 *id.* 586; 8 Pick. Mass. 547; 22 *id.* 494.

The measure of damages is the amount of injury actually sustained. 7 Johns. N. Y. 358; 16 *id.* 254; 5 Me. 94; 34 *id.* 422; 12 Mass. 304; 3 Cush. Mass. 201; 20 N. H. 369; 25 *id.* 229.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement. 4 Ind. 533; 19 Mo. 480; 25 N. H. 229. See COVENANT; REAL COVENANT.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such. Croke Eliz. 623; 1 Term, 446; 8 *id.* 486; 2 Salk. 375; 3 *id.* 298; 12 Mod. 415; 7 Mass. 153; 16 *id.* 24; 17 *id.* 623; 3 Ind. 473. And see 11 Serg. & R. Penn. 149.

A covenant of this kind with one of several jointly and severally bound will not protect the others so bound. 12 Mod. 551; 8 Term, 168; 6 Munf. Va. 6; 1 Conn. 139; 4 Me. 421; 2 Dan. Ky. 107; 17 Mass. 623.

A covenant by one of several partners not to sue cannot be set up as a release in an action by all. 3 Perr. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action. Carth. 63; 1 Show. 46; 2 Salk. 573; 6 Wend. N. Y. 471; 5 Cal. 501. See 29 Ala. N. S. 322, as to requisite consideration.

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon. Platt, Cov. 312. By it, when general in its terms, the covenantor stipulates at all events, 11 East, 642; 1 Mod. 101, to indemnify the covenantee against all acts committed by virtue of a paramount title, Platt, Cov. 313; 1 Lev. 83; 8 *id.* 305; Hob. 34; 4 Coke, 80 *b;* Cro. Car. 5; 3 Term, 584; 6 *id.* 66; 3 Duer, N. Y. 464; 2 Jones,

No. C. 203; Busb. No. C. 384; 3 N. J. 260; not including the acts of a mob, 19 Miss. 87; 2 Strobh. So. C. 366, nor a mere trespass by the lessor. 10 N. Y. 151.

But this rule may be varied by the terms of the covenant: as where it is against acts of a particular person, Croke Eliz. 212; 5 Maule & S. 374; 1 Barnew. & C. 29; 2 Ventr. 61, or those "claiming or pretending to claim," 10 Mod. 383; 1 Ventr. 175, or molestation by any person. See 21 Miss. 87.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances. 2 Washburn, Real Prop. 661.

It occurs most frequently in leases, 1 Washburn, Real Prop. 325, is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc., 1 Perr. & D. 360; 9 N. H. 222; 15 N. Y. 327; 6 Bingh. 656; 4 Kent, Comm. 474, n., and exists impliedly in a parol lease, 20 Eng. L. & Eq. 374; 3 N. J. 260; see 1 Du. N. Y. 176, and is frequently replaced in conveyances in the United States by the covenant of warranty. 2 Washburn, Real Prop. 661.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin. 2 Washburn, Real Prop. 648, 651. It is said to be the same as a covenant of seisin, 10 Me. 91; 4 Mass. 627; 10 Cush. Mass. 134, but is not necessarily so as it includes the capacity of the grantor. T. Jones, 195; 2 Bulstr. 12; Croke Jac. 358.

The breach takes place on execution of the deed, if at all, Freem. Ch. 41, and the covenantee need not wait for a disturbance to bring suit, 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach. Platt. Cov. 310; 1 Maule & S. 365; 4 *id.* 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Platt, Cov. 306. It has given place in English conveyancing to the covenant of right to convey, but is in use in several states of the United States. 2 Washburn, Real Prop. 648.

In England, 1 Maule & S. 355; 4 *id.* 53; Walker, Am. Law, 382, and in several states of the United States by decisions, 5 Blackf. Ind. 232; 3 Ohio, 211; 17 *id.* 52, or by statute, 2 Washburn, Real Prop. 650, this covenant runs with the land, and may be sued on for breach by an assignee; in others it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed. Rawle, Cov. 110; 2 Washburn, Real Prop. 655, 657; 4 Mass. 408, 439, 627; 10 Cush. Mass. 134; 2 Barb. N. Y. 303; 2 Me. 269; 10 *id.* 95; 2 Dev. No. C. 30; 8 Gratt. Va. 396; 5 Sneed, Tenn. 119; 7 Ind. 673.

A covenant for *indefeasible seisin* is everywhere held to run with the land, 2 Vt. 328; 2 Dev. No. C. 30; 4 Dall. 439; 5 Sneed, Tenn. 123; 14 Johns. N. Y. 248; 14 Pick. Mass. 128; 10 Mo. 467; and to apply to all titles adverse to the grantor's. 2 Washburn, Real Prop. 656.

A covenant of *seisin* or *lawful seisin*, in England and several of the states, is satisfied only by an indefeasible seisin, Rawle, Cov. 20; 22 Vt. 106; 15 N. H. 176; 6 Conn. 374; while in other states possession under a claim of right is sufficient. 3 Vt. 403–407; 2 Mass. 433; 10 Cush. Mass. 134; 26 Mo. 92; 3 Ohio, 220, 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee. 2 Johns. N. Y. 1; 2 Vt. 327; 5 Conn. 497; 14 Pick. Mass. 170; 1 Metc. Mass. 450; 17 Ohio, 60; 8 Gratt. Va. 397; 4 Cranch, 430; 36 Me. 170; 24 Ala. N. S. 189; 4 Kent, Comm. 471; 2 Washburn, Real Prop. 656.

The existence of an outstanding life-estate, Rawle, Cov. 52; a material deficiency in the amount of land, 1 Bay, So. C. 256; see 24 Miss. 597; non-existence of the land described, 16 Pick. Mass. 68; 4 Cush. Mass. 210; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them, 1 N. Y. 564; 7 Penn. St. 122; concurrent seisin of another as tenant in common, 12 Me. 389; adverse possession of a part by a stranger, 7 Johns. N. Y. 376, constitute a breach of this covenant.

But a covenantee cannot recover against his grantor when the covenantee purchased knowing that he had a good title. Rawle, Cov. 111–114; 8 Pick. Mass. 547; 22 *id.* 490; 6 Cush. Mass. 127.

In the execution of a power, a covenant that the power is subsisting and not revoked is substituted. Platt, Cov. 309.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected. Burton, Real Prop. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage. 2 Washburn, Real Prop. 129, 130. See 2 Seld. N. Y. 342.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance. 2 Washburn, Real Prop. 155, 156; 2 Sanders, Uses, 79, 83; 4 Mass. 136; 18 Pick. Mass. 397; 22 *id.* 376; 5 Me. 232; 11 Johns. N. Y. 351; 20 *id.* 85; 5 Yerg. Tenn. 249.

COVENANT OF WARRANTY. An

assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title. 2 Jones, No. C. 203;. 3 Duer, N. Y. 464.

It is not in use in English conveyances, but is in general use in the United States, 2 Washburn, Real Prop. 659, and in several states is the *only* covenant in general use. Rawle, Cov. 203, n.; 4 Ga. 593; 8 Gratt. Va. 353; 6 Ala. 60.

2. The form in common use is as follows:—"And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant* and *defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]," [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted. 2 Washburn, Real Prop. 665.

This limitation may arise from the nature of the subject-matter of the grant. 8 Pick. Mass. 547; 19 *id.* 341; 5 Ohio, 190; 9 Cow. N. Y. 271.

3. Such covenants give the covenantee and grantee the benefit of subsequently acquired titles, 11 Johns. N. Y. 91; 13 *id.* 316; 14 *id.* 193; 9 Cow. N. Y. 271; 6 Watts, Penn. 60; 9 Cranch, 43; 13 N. H. 389; 1 Ohio, 190; 3 *id.* 107; 3 Pick. Mass. 52; 13 *id.* 116; 24 *id.* 324; 3 Metc. Mass. 121; 13 Me. 281; 20 *id.* 260, to the extent of their terms, 12 Vt. 39; 3 Metc. Mass. 121; 9 Cow. N. Y. 271; 34 Me. 483; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate, 3 McLean, C. C. 56; 9 Cow. N. Y. 271; 12 Pick. Mass. 47; 5 Gratt. Va. 157; in case of terms for years, as well as conveyances of greater estates, Burton, Real Prop. § 850; Williams, Real Prop. 229; 2 Washburn, Real Prop. 478; 4 Kent, Comm. 261, n.; Croke Car. 109; 1 Ld. Raym. 729; 4 Wend. N. Y. 502; 1 Johns. Cas. N. Y. 90; as against the grantor and those claiming under him, 2 Washburn, Real Prop. 479, 480; including purchases for value, 14 Pick. Mass. 224; 24 *id.* 324; 5 N. H. 533; 13 *id.* 389; 5 Me. 231; 12 Johns. N. Y. 201; 13 *id.* 316; 9 Cranch, 53; but see 4 Wend. N. Y. 619; 18 Ga. 192. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title. 1 Gray, Mass. 195; 25 Vt. 635; 12 Me. 499. See 33 Me. 346.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion of a subsequently acquired title. 26 N. H. 401; 4 Wend. N. Y. 300; 6 Cush. Mass. 34; 5 Gray, Mass. 328; 11 Ohio, 475; 14 Me. 351; 29 *id.* 183; 43 *id.* 432; 14 Cal. 472.

4. It is a real covenant, and runs with the estate in respect to which it is made into the hands of whoever becomes the owner, 2 Washburn, Real Prop. 659; 4 Sneed, Tenn. 52, against the covenantor and his personal representatives, 27 Penn. St. 288; 3 Zabr. N. J. 260, to the extent of assets received, and cannot be severed therefrom. 13 Ired. No. C. 193.

The action for breach should be brought by the owner of the land, and, as such, assignee of the covenant at the time it is broken, 4 Johns. N. Y. 89; 19 Wend. N. Y. 334; 2 Mass. 455; 7 *id.* 444; 3 Cush. Mass. 219; 10 Me. 81; 5 T. B. Monr. Ky. 357; 12 N. H. 413; but may be by the original covenantee, if he has satisfied the owner. 5 Cow. N. Y. 137; 10 Wend. N. Y. 184; 2 Metc. Mass. 618; 3 Cush. Mass. 222; 5 T. B. Monr. Ky. 357; 1 Conn. 244; 1 Dev. & B. No. C. 94; 10 Ga. 311; 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title, Rawle, Cov. 221; 6 Barb. N. Y. 165; 5 Harr. Del. 162; 11 Rich. So. C. 80; 13 La. Ann. 390, 499; 5 Cal. 262; 4 Ind. 174; 6 Ohio St. 525; 26 Mo. 92; 17 Ill. 185; 36 Me. 455; 14 Ark. 309; which may be constructive, 12 Me. 499; 17 Ill. 185; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession. 5 Hill, N. Y. 599; 4 Mass. 349; 8 Ill. 162; 5 Ired. 393. See 4 Halst. N. J. 139.

5. Exercise of the right of eminent domain does not render the covenantee liable. 31 Penn. St. 37.

The measure of damages in England, Arkansas, Georgia, Indiana, Iowa, Kentucky, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin, and in the United States courts, is the value of the lands at the time of conveyance, and the interest. Rawle, Cov. 314; 8 Taunt. 715; 19 Mo. 435; 17 How. 609; 25 N. H. 229; 3 Chandl. Wisc. 295. In Connecticut, Maine, Massachusetts, and Vermont it is the value at the time of the eviction. 2 Washburn, Real Prop. 676.

COVENANTS PERFORMED. In Pleading. A plea to an action of covenant, allowed in the state of Pennsylvania, whereby the defendant, upon informal notice to the plaintiff, may give any thing in evidence which he might have pleaded. 4 Dall. Penn. 439; 2 Yeates, Penn. 107; 15 Serg. & R. Penn. 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for. 2 Wash. C. C. 456.

COVENANTEE. One in whose favor a covenant is made.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by laying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed in England by the 9 Geo. IV. c. 31.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband. See ABATEMENT; PARTIES.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another of his rights. Coke, Litt. 357 *b*; Comyns, Dig. *Covin*, A; 1 Viner, Abr. 473. See COLLUSION; FRAUD.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf. 2 East, Pl. Cr. 616; 1 Leach, Cr. Cas. 105.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial. 1 Story, U. S. Laws, 761; Act of Congr. April 10, 1806, art. 52.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf: so called because the instrument used for the purpose is called a crane. 8 Coke, 46.

CRASTINUM, CRASTINO (Lat. tomorrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law, 56, 57.

CRAVE. To ask; to demand.

This word is frequently used in pleading: as, to crave oyer of a bond on which the suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. 1 Chitty, Pract. 520. See OYER.

CRAVEN. A word denoting defeat, and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle. Victory was obtained by the death of one of the combatants, or if either champion proved *recreant*,—that is, yielded, and pronounced the horrible word "*craven*." Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Sharswood, Blackst. Comm. 340.

CREANCE. In French Law. A claim; a debt. 1 Bouvier, Inst. n. 1040, note.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court. Best, Ev. §§ 76–86; 1 Greenleaf, Ev. §§ 49, 425; 11 Mees. & W. Exch. 216.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief. 5 Mass. 219; 17 Pick. Mass. 154; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

In some of the states, as Delaware, Illinois, Maine, Maryland, Rhode Island, and Vermont, wills must be attested by credible witnesses.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor.

That which is due to a merchant, as distinguished from debit, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

See, generally, 5 Taunt. 338; 3 N. Y. 344.

CREDITOR. He who has a right to require the fulfilment of an obligation or contract.

Preferred creditors are those who, in consequence of some provision of law, are entitled to some special prerogative, either in the manner of recovery or in the order in which their claims are to be paid. See Bouvier, Inst. Index.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, by and in behalf of him or themselves and all other creditors who shall come in under the decree, for an account of the assets and a due settlement of the estate of a decedent.

The usual decree against the executor or administrator is *quod computet;* that is to say, it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public

notice, to come before him to prove their debts at a certain place and within a limited time; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration. 1 Story, Eq. Jur. 442.

CREEK. In Maritime Law. Such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow passages and have shore on either side of them. Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet they are either members of or dependent upon other ports.

In England the name arose thus. The king could not conveniently have a customer and comptroller in every port or haven. But such custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed. 1 Chitty, Com. Law, 726; Hale, *de Portibus Maris*, pt. 2, c. 1, vol. 1, p. 46; Comyns, Dig. *Navigation* (C); Callis, Sew. 34.

A small stream, less than a river. 12 Pick. Mass. 184; Cowp. 86.

A creek passing through a deep level marsh and navigable by small craft may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce. 2 Pet. 245; 1 Pick. Mass. 180; 21 *id.* 344; 3 Metc. Mass. 202; 2 Stockt. N. J. 211. See 4 Barnew. & Ald. 589.

CREMENTUM COMITATUS. The increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account. Wharton, Dict. 2d Lond. ed.

CREPUSCULUM. Daylight; twilight. The light which immediately precedes or follows the rising or setting of the sun. 4 Blackstone, Comm. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary. Coke, 3d Inst. 63; 1 Russell, Crimes, 820; 3 Greenleaf, Ev. § 75.

CRETIO. Time for deliberation allowed an heir to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CRIER (Norman, to proclaim.) An officer whose duty it is to make the various proclamations in court, under the direction of the judges. The office of crier in chancery is now abolished, in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery; unlawful sexual intercourse with a married woman. Buller, Nisi P. 27; Bacon, Abr. *Marriage* (E) 2; 4 Blackf. Ind. 157.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant, that he had connived at her intimacy with other men, or that the plaintiff had been false to his wife, only goes in mitigation of damages. 4 N. H. 501.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff.

The action is of more frequent occurrence in England than in the United States.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bishop, Crim. Law, § 43. See 4 Den. N. Y. 260; 6 Ark. 187, 461.

The word crime generally denotes an offence of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor. 4 Blackstone, Comm. 4.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes: yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable criminally by courts of justice. 2 Rev. Swift, Dig. 284; 2 East, 5, 21; 7 Conn. 386; 5 Cow. N. Y. 258; 3 Pick. Mass. 26.

2. A crime *malum in se* is an act which shocks the moral sense of the community as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as heinous *mala in se;* while in others, owing to the perversion of the moral sentiment by prejudice, education, and custom, they are not even *mala prohibita.*

3. An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

It is not only just, but it has been found necessary, to have the severity of punishment proportioned to the enormity of crimes. Different opinions are entertained as to what

should be the highest in degree. In the United States this is generally death by hanging.

4. Capital punishment has been abolished in Rhode Island, Wisconsin, and, except for treason, in Michigan. R. I. Rev. Stat. Supp. 866; Wisc. Act of 1853, n. 100; Mich. Rev. Stat. 1846.

There are three degrees of murder according to the statute laws of Minnesota and Wisconsin, and two degrees in Alabama, Arkansas, California, Connecticut, Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia; and the death-penalty is inflicted for the first degree in all of them except Michigan and Wisconsin. In some of the other states murder remains as at common law, and in some it is somewhat modified by statute.

5. Crimes are sometimes classified according to the degree of punishment incurred by the commission of them. Ohio Rev. Stat., Swan ed. 266.

They are more generally arranged according to the nature of the offence.

The following is, perhaps, as complete a classification as the subject admits:—

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter. 3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jail-breach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3. Rout. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharswood, Blackstone, Comm. 42, etc.; 2 Comp. Stat. 305, etc.

Offences against the public, individuals, or their property. 1. Conspiracy.

CRIME AGAINST NATURE. Sodomy.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or false oath,—perjury; by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like. See Dig. 48. 10. 22; 34. 8. 2; Code, 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.;* 1 Bro. Civ. Law, 426; 1 Phillipps, Ev. 26; 2 Starkie, Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. 1 Greenleaf, Ev. § 373.

The meaning of this term at common law is not well defined. It has been held to include forgery, 5 Mod. 74; perjury, subornation of perjury, Coke, Litt. 6 *b;* Comyns, Dig. *Testmoigne* (A 5); suppression of testimony by bribery or conspiracy to procure the absence of a witness, Ry. & M. 434; conspiracy to accuse of crime, 2 Hale, Pl. Cr. 277; 2 Leach, Cr. Cas. 496; 3 Stark. 21; 2 Dods. Adm. 191; barratry. 2 Salk. 690. The effect of a conviction for a crime of this class is infamy, and incompetency to testify. Statutes sometimes provide what shall be such crimes.

CRIMEN LÆSÆ-MAJESTATIS (Lat.). Injuring or violating the majesty of the king's person; any crime affecting the king's person. 4 Blackstone, Comm. 75.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL INFORMATION. A criminal suit brought, without the interposition of a grand jury, by the proper officer of the king or state. Cole, Crim. Inf.; 4 Blackstone, Comm. 398.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

2. From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up a part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

3. The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person

of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. *Per Tindal,* C. J., in 10 Clark & F. 210. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country. 1 Ell. & B. 1; Dearsl. 51; 7 Carr. & P. 456; Russ. & R. Cr. Cas. 4. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals: so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such. Broom, Comm. 865; Hawkins, Pl. Cr. bk. 2, c. 25, § 4; 8 Q. B. 883. See 15 Mees. & W. Exch. 404.

4. In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid, prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is commonly designated the common law of England; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted. 5 Cush. Mass. 303, 304; 4 Metc. Mass. 358; 13 *id.* 69, 70. "The common law of crimes," says a very recent writer, "is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I.; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

5. Some of the leading principles of the English and American system of criminal law are—*First.* Every man is presumed to be innocent till the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. *Second.* In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. *Third.* The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final. *Fourth.* The question of his guilt is to be determined without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the probabilities arising from the prisoner's previous history and habits of life. *Fifth.* The prisoner cannot be required to criminate himself, nor permitted to exculpate himself, by giving his own testimony on his trial. The justice and expediency of this latter restriction are now much questioned. *Sixth.* He cannot be twice put in jeopardy for the same offence. *Seventh.* He cannot be punished for an act which was not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

CRIMINAL LETTERS. **In Scotch Law.** A summons issued by the lord advocate or his deputies as the means of commencing a criminal process. It differs from an indictment, and is like a criminal information at common law.

CRIMINALITER. Criminally; on criminal process.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

2. It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. 3 Bouvier, Inst. nn. 3209–3212; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; 16 *id.* 1149; 24 *id.* 720; 2 Dougl. 593; 2 Ld. Raym. 1088; 16 Ves. Ch. 242; 2 Swanst. Ch. 216; 1 Carr. & P. 11; 5 *id.* 213, 521; 1 Den. Cr. Cas. 236; 1 Cranch, 144; 2 Yerg. Tenn. 110; 5 Day, Conn. 260; 2 Nott & M'C. So. C. 13; 6 Cow. N. Y. 254; 8 Wend. N. Y. 598; 1 Johns. N. Y. 498; 12 Serg. & R. Penn. 284. See 4 N. H. 562; 18 Me. 272; 13 Ark. 307.

3. An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, 10 Pick. Mass. 477; 2 Starkie, Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner. 9 Cow. N. Y. 721, note (a); 2 Carr. & P. 411.

CRITICISM. The art of judging skilfully of the merits or beauties, defects or faults, of a literary or scientific performance, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure what is hostile to morality. 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. And the critic does a good service to the public who writes down any vapid or useless publication, such as ought never to have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled. 1 Campb. 358, n. See 1 Esp. 28; 2 Stark. 73; 4 Bingh. N. S. 92; 3 Scott, 340; 1 Mood. & M. 44, 187; Cooke, Def. 52.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dict. A small space fenced off in which to keep farm-cattle. Spelman, Gloss. The word is now entirely obsolete.

CROP. See EMBLEMENTS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. 2 Rawle, Penn. 12.

CROSS. A mark made by persons who are unable to write, instead of their names.

When properly attested, and proved to have been made by the party whose name is written with the mark, it is generally admitted as evidence of the party's signature.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him: therefore a cross-action becomes necessary.

CROSS-BILL. In Equity Practice. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Plead. § 389; Mitford, Chanc. Plead. Jerem. ed. 80.

2. It is considered as a defence to the original bill, and is treated as a dependency upon the original suit. 1 Eden, Inj. 190; 3 Atk. Ch. 312; 19 Eng. L. & Eq. 325; 14 Ark. 346; 14 Ga. 674; 14 Vt. 208; 24 *id.* 181; 15 Ala. 501. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired, 3 Swanst. Ch. 474; 3 Younge & C. Ch. 594; 2 Cox, Ch. 109; or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, as to prevent subsequent suits, 1 Ves. Ch. 284; 7 *id.* 222; 2 Schoales & L. Ch. Ir. 9, 11, n., 144, n. (z); 2 Stockt. Ch. N. J. 107; 14 Ill. 229; 20 Ga. 472; Story, Eq. Plead. § 390, n.; or where the defendants have conflicting interests, 9 Cow. N. Y. 747; 1 Sandf. Ch. N. Y. 108; 2 Wisc. 299, but may not introduce new parties. 17 How. 130. It is also used for the same purpose as a plea *puis darrein continuance* at law. Cooper, Eq. Plead. 86; 2 Ball & B. Ch. Ir. 140; 2 Atk. Ch. 177, 553; 1 Stor. C. C. 218.

3. It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, or the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill, Mitford, Chanc. Plead. Jerem. id. 81; and it should not introduce new and distinct matters. 8 Cow. N. Y. 361.

It should be brought before publication, 1 Johns. Ch. N. Y. 62; 13 Ga. 478, and not after, —to avoid perjury. 7 Johns. Ch. N. Y. 250; Nelson, Ch. 103.

In England it need not be brought before the same court. Mitford, Chanc. Plead. Jerem. ed. 81 *et seq.* For the rule in the United States, see 11 Wheat. 446; Story, Eq. Plead. § 401.

CROSS-EXAMINATION. In Practice. The examination of a witness by the party opposed to the party who called him, and who examined or was entitled to examine him in chief.

2. In England and some of the states of the United States, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him though he be not examined in chief, 2 Stark. 314, 472; 1 Esp. 357; 4 *id.* 67; 1 Armstr. M. & O. Ir. 204; 17 Pick. Mass. 490; 1 Cush. Mass. 189; 7 Cow. N. Y. 238; 2 Wend. N. Y. 166, 483; 23 Ga. 154; 32 Miss. 405; see 3 Carr. & P. 16; 7 *id.* 64; 1 Crompt. M. & R. Exch. 94; 2 Mood. & R. 273; 23 Ga. 154; but it is held in other states and in the federal courts that the cross-examination is confined to facts and circumstances connected with matters stated in the direct examination. 3 Wash. C. C. 580; 14 Pet. 448; 16 Serg. & R. Penn. 77; 6 Watts & S. Penn. 75; 2 Dutch. N. J. 463; 5 Cal.

450; 4 Iowa, 477; 4 Mich. 67. But see 12 La. Ann. 826; 2 Pat. & H. Va. 616.

3. Inquiry may be made in regard to collateral facts in the discretion of the judge, 7 Carr. & P. 389; 5 Wend. N. Y. 305; but not merely for the purpose of contradicting the witness by other evidence. 1 Starkie, Ev. 164; 7 East, 108; 2 Lew. Cr. Cas. 154, 156; 7 Carr. & P. 789; 2 Campb. 637; 16 Pick. Mass. 157; 8 Me. 42; 2 Gall. C. C. 51. And see 3 Carr. & P. 75; 1 Exch. 91; 7 Clark & F. Hou. L. 122; 16 Pick. Mass. 157; 4 Den. N. Y. 502; 7 Wend. N. Y. 57; 2 Ired. No. C. 346; 14 Pet. 461.

As to whether the witness may be called subsequently to his examination in chief and cross-examined, see 1 Greenleaf, Ev. § 447; 1 Starkie, Ev. 164; 16 Serg. & R. Penn. 77; 17 Pick. Mass. 498.

A written paper identified by the witness as having been written by him may be introduced in the course of a cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination. 16 Jur. 103; 8 Carr. & P. 369; 2 Brod. & B. 289.

4. A cross-examination as to matters not admissible in evidence entitles the party producing the witness to re-examine him as to those matters. 3 Ad. & E. 554; 17 Tex. 417.

Leading questions may be put in cross-examination. 1 Starkie, Ev. 96; 1 Phillipps, Ev. 210; 6 Watts & S. Penn. 75. For some suggestions as to the propriety of cross-examination in various cases and the most expedient manner of conducting it, see 2 Pothier, Obl. Evans ed. 233; 1 Starkie, Ev. 160, 161; Archbold, Crim. Plead. 111.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, and upon the termination of the interest of either of them his share is to remain over to the rest, and the reversioner or remainder man is not to take till the termination of all the estates, the parties take as tenants in common with cross-remainders between them. 4 Cruise, Dig. 249; 1 Hilliard, Real Prop. 650. It is not an essential quality of cross-remainders that the original estates should be held in common. 1 Prest. Est. 94; 2 Wash. Real Prop. Index.

CROWN LAW. Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Blackstone, Comm. 308.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Blackstone, Comm. 265.

CRUELTY. *As between husband and wife.* Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, will not amount to legal cruelty, 17 Conn. 189; *a fortiori*, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty. The negative descriptions of cruelty are perhaps the best, under the infinite variety of cases that may occur, by showing what is not cruelty. 1 Hagg. Eccl. 35; 4 Eccl. 238, 311, 312; 1 Hagg. Cons. 37, 458; 2 *id.* 154; 1 Phill. Eccl. 111, 132; 1 M'Cord, Ch. So. C. 205; 2 J. J. Marsh. Ky. 324; 2 Chitty, Pract. 461, 489; Poynton, Marr. & D. c. 15, p. 208; Shelford, Marr. & D. 425; 8 N. H. 307; 3 Mass. 321; 4 *id.* 487.

2. *Cruelty towards weak and helpless persons* takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. Exposing a person of tender years, under a party's care, to the inclemency of the weather, 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food, 1 Leach, Cr. Cas. 137; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them, Russ. & R. 46, 47, 48, are examples of this species of cruelty.

By the civil code of Louisiana, art. 192, it is enacted that, when the master shall be convicted of cruel treatment of his slave, the judge may pronounce, besides the penalty established for such cases, that the slave shall be sold at public auction, in order to place him out of the reach of the power which his master has abused.

3. *Cruelty to animals* is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk while affording the calf all he needed. 6 Rog. N. Y. 62. A man may be indicted for cruelly beating his horse. 3 Rog. N. Y. 191. See 1 Bishop, Crim. Law, § 439.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Weskett, Ins.; Lex Merc. Rediv.

271, 284; Dougl. 509; Park, Ins. 58; Marshall, Ins. 196, 199, 520; 2 Gall. C. C. 268.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women.

Called also a trebucket, tumbrill, and castigatory. Bakers and brewers were formerly also liable to the same punishment. Being fastened in the machine, they were immersed over head and ears in some pool. Blount; Coke, 3d Inst. 219; 4 Blackstone, Comm. 168.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). **In Practice.** A writ which anciently lay in favor of a woman who had been divorced from her husband to recover lands and tenements which she had in fee simple, fee tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it. Fitzherbert, Nat. Brev. 240; 3 Sharswood, Blackst. Comm. 183, n.; Stearns, Real Act. 143; Booth, Real Act. 188.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua, ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). **In Practice.** A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands. Fitzherbert, Nat. Brev. 193. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is now of no use in England, by force of the provisions of the statute 32 Hen. VIII. c. 28, § 6. See 6 Coke, 8, 9; Booth, Real Act. 186. As to its use in Pennsylvania, see 3 Binn. Penn. App.; Rep. Comm. on Penn. Civ. Code, 1835, 90, 91.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It seems not to be settled whether a *cul de sac* is to be considered a highway. See 1 Campb. 260; 11 East, 376, note; 5 Taunt. 137; 5 Barnew. & Ald. 456; Hawkins, Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47. 10. 15. § 7.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely negligence. There are three degrees of *culpa: lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18. See NEGLECT.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllabic abbreviations,—*cul. prit.* 4 Blackstone, Comm. 339; 1 Chitty, Crim. Law, 416. See Christian's note to Blackst. Comm. cited. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes place when a lord seizes his tenant's estate. Blount; DuCange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum onere*. Coke, Litt. 231 *a*; 7 East, 164; Paley, Ag. 175.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence.

CUMULATIVE LEGACY. See LEGACY.

CUNEATOR. A coiner. DuCange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuneata*, coined. DuCange; Spelman, Gloss.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Eccl. Law; 1 Blackstone, Comm. 393.

CURATIO (Lat.). **In Civil Law.** The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. One who has been legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all his contracts; curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. La. Civ. Code, art. 357 to 366. There are also curators of insane persons, *id.* art. 31; and of vacant successions and absent heirs. *Id.* art. 1105, 1125.

CURATOR BONIS (Lat.). **In Civil Law.** A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship (*q. v.*) in this, that the latter is instituted for the protection of property in the first place, and, secondly, of the person; while the former is intended to protect,

first, the person, and, secondly, the property. 1 Leçons Elem. du Droit Civ. Rom. 241.

CURATRIX. A woman who has been appointed to the office of curator.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls;* but more frequently it is understood to signify a clerk not instituted to the *cure of souls,* but exercising the spiritual office in a parish under the rector or vicar. 2 Burns, Eccl. Law, 54; 1 H. Blackst. 424.

CURFEW (French, *couvre,* to cover, and *feu,* fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman; for we find an order of king Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

2. That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of the court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odious tyranny.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakspeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England and of this country, as a very convenient mode of apprizing people of the time of night.

CURIA. In Roman Law. One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curiæ:* the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 82; Liv. l. 1, cap. 13; Plut. *in Romulo,* p. 30; Festus Brisson, *in verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brisson, *in verb.;* Ortolan, Histoire, no. 25, 408; Ort. Inst. no. 125.

The senate-house at Rome; the senate-house of a provincial city. Cod. 10. 31. 2; Spelman, Gloss.

In English Law. The king's court; the palace; the royal household. The residence of a noble; a manor or chief manse; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1; Feud. lib. 2, tit. 1, 2, 22; Spelman; Cowel; 3 Blackstone, Comm. c. iv. See COURT.

A court-yard or enclosed piece of ground; a close. Stat. Edw. Conf. 1, 6; Bracton, 76, 222 *b,* 335 *b,* 356 *b,* 358; Spelm. See CURIA CLAUDENDA.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider the matter.

In Practice. The entry formerly made upon the record to vindicate the continuance of a cause until a final judgment should be rendered.

It is commonly abbreviated thus: *cur. adv. vult.* Thus, from amongst many examples, in Clement *v.* Chivis, 2 Barnew. & C. 172, after the report of the argument we find "*cur. adv. vult.,*" then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA (Lat.). **In Practice.** A writ which anciently lay to compel a party to enclose his land. Fitzherbert, Nat. Brev. 297.

CURIA REGIS (Lat.). The king's court. A term applied to the *aula regis,* the *bancus* or *communis bancus,* and the *iter* or *eyre,* as being courts of the king, but especially to the *aula regis,* which title see.

CURIALTY. In Scotch Law. Curtesy.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course.

Such writs were called writs *de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him. Coke, 2d Inst. 670; 1 Spence, Eq. Jur. 238.

CURSITOR BARON. An officer of the court of exchequer, who is appointed by patent under the great seal to be one of the barons of the exchequer. The office is abolished by stat. 19 & 20 Vict. c. 86. Wharton, Dict. 2d Lond. ed.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate.

It is a freehold estate for the term of his natural life. 1 Washburn, Real Prop. 127. In the common law the word is used in the phrases *tenant by curtesy,* or *estate by curtesy,* but seldom alone; while in Scotland of itself it denotes the estate. See ESTATE BY CURTESY.

Some considerable question has been made as to the derivation both of the custom and its name. It seems pretty clear, however, that the term is derived from *curtis,* a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy and still exists in Scotland. 1 Washburn, Real Prop. 128,

n.; Wright, Ten. 192; Coke, Litt. 30 *a*; 2 Blackstone, Comm. 126; Erskine, Inst. 380; Grand Cout. de Normandie, c. 119.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowel.

It has recently been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure." 10 Cush. Mass. 480.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Blackstone, Comm. 224; 1 Hale, Pl. Cr. 558; 2 Russell, Crimes, 13; 1 *id.* 790; Russ. & R. 289; 1 Carr. & K. 84; 10 Cush. Mass. 480.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. 2 Mich. 250.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Washburn, Real Prop. 120; Spelman, Gloss.; 3 Blackstone, Comm. 320.

The similarity of the derivative meaning of this word and of *aula* is quite noticeable, both coming to denote the court itself from denoting the place where the court was held.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Blackstone, Comm. 349.

Custodes libertatis Angliæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dict.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chitty, Pract. 355.

The care and possession of a thing.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place; of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like. 2 Blackstone, Comm. 263.

General customs are such as constitute a part of the common law and extend to the whole country.

Particular customs are those which are confined to a particular district.

2. In general, when a contract is made in relation to another, about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. 1 Hall, N. Y. 602; 2 Pet. 138; 5 Binn. Penn. 285; 9 Wend. N. Y. 349; 1 Mees. & W. Exch. 476. But if the meaning of the contract is certain and beyond doubt, no evidence of usage will be admitted to vary or contradict it. 13 Pick. Mass. 176; 1 Crompt. & M. Exch. 808. As to the effect of usage with respect to agricultural leases, see Taylor, Landl. & T. § 541.

3. In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended. 1 Blackstone, Comm. 76; 2 *id.* 31; 14 Mass. 488; 3 Q. B. 581; 6 *id.* 383.

4. It must also have been peaceably acquiesced in and not subject to dispute; for, as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, shows that such consent was wanting. 2 Wend. N. Y. 501; 3 Watts, Penn. 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good. 2 Blackstone, Comm. 78.

5. Evidence of usage is never admissible to oppose or alter a general principle or rule of land, so as, upon a given state of facts, to make the legal rights and liabilities of the parties other than they are by law. 2 Term, 327; 19 Wend. N. Y. 252; 6 Metc. Mass. 393; 6 Pick. Mass. 131; 6 Binn. Penn. 416. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law. 3 Wash. C. C. 150; 7 Pet. 1; 5 Binn. Penn. 287; 8 Pick. Mass. 360; 4 Barnew. & Ald. 210. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed. 1 Caines, N. Y. 43; 4 Stark. 452.

See further, on this subject, Bacon, Abr.; 1 Lilly, Reg. 516; Comyns, Dig.; Nelson, Abr.; Ayliffe, Pand. 15, 16; Ayliffe, Parerg. 194;

Doctrina Plac. 201; 2 Pet. 148; 6 *id.* 715; 3 Wash. C. C. 150; 1 Gilp. Dist. Ct. 486; 1 Pet. C. C. 220; 1 Edw. Ch. N. Y. 146; 1 Gall. C. C. 443; 1 Hill, N. Y. 270; 1 Caines, N. Y. 45; 15 Mass. 433; Wright, Ohio, 573; 5 Ohio, 436; 1 Nott & M'C. So. C. 176; 5 Binn. Penn. 287; 3 Conn. 9; 15 Ala. 123; 2 N. H. 93; 1 Harr. & G. Md. 239; 1 Mart. La. N. S. 192; 4 La. 160; 7 *id.* 215, 529.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land. See LAW MERCHANT; 1 Chitty, Blackst. Comm. 76, n. 9.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOMARY COURT BARON. A court baron at which copyholders might transfer their estates, and where other matters relating to their tenures were transacted. 3 Blackstone, Comm. 33.

This court was held on the manor, the lord or his steward sitting as judge. 1 Crabb, Real Prop. § 633. It might be held anywhere in the manor, at the pleasure of the judge, unless there was a custom to the contrary. It might exist at the same time with a court baron proper, or even where there were no freeholders in the manor.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom of the manor in which they are held. 2 Blackstone, Comm. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villein socage. Holders of such an estate have a freehold interest though it is not held by a freehold tenure. 2 Blackstone, Comm. 149.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons resident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Blackstone, Comm. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Blackstone, Comm. 149.

CUSTOMS. This term is usually applied to those taxes which are payable upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling.*

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial. Expressed in law Latin by *custuma*, as distinguished from *consuetudines*, which are usages merely. 1 Sharswood, Blackst. Comm. 314.

CUSTOMS OF LONDON. Particular regulations in force within the city of London, in regard to trade, apprentices, widows and orphans, etc., which are recognized as forming part of the English common law. 1 Blackstone, Comm. 75.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *posteas*. Blount. An officer in the king's bench having similar duties. Cowel; Termes de la Ley. The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiralius.*

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowel to be the same as the *Custos Rotulorum.*

CUSTOS ROTULORUM (Lat.). Keeper of the Rolls. The principal justice of the peace of a county, who is the keeper of the records of the county. 1 Blackstone, Comm. 349. He is always a justice of the peace and *quorum*, is the chief civil officer of the king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Blount; Cowel; Lambard, Eiren. lib. 4, cap. 3, p. 373; 4 Blackstone, Comm. 272; 3 Stephen, Comm. 37.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin, or wool-pelts and leather exported were so called, and were payable by every merchant stranger as well as native, with the exception that merchant strangers paid one-half as much again as natives. 1 Sharswood, Blackst. Comm. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, Hist. Exch. 526, 532; 1 Sharswood, Blackst. Comm. 314.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a particular and a general intention and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. 3 Hare, Ch. 12; 2 Term, 254; 2 Bligh, 49; Sugden, Powers, 60; 1 Spence, Eq. Jur. 532.

2. The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedg-

wick, Const. Law, 265; Story, Eq. Jur. §§ 1169 *et seq.*

3. It is also applied to sustain devises and bequests for charity (*q. v.*). Where there is a definite charitable purpose which cannot take place, the courts will not substitute another, as they once did; but if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, provided only it be charitable. Boyle, Char. 147, 155; Shelford, Mortm. 601; 3 Brown, Ch. 379; 4 Ves. Ch. 14; 7 *id.* 69, 82. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses, 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinherison of heirs and next of kin. See CHARITIES; CHARITABLE USES; 1 Am. Law Reg. 538; 2 How. 127; 17 *id.* 369; 24 *id.* 465; 4 Wheat. 1; 8 N.Y. 548; 14 *id.* 380; 22 *id.* 70.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void. Cruise, Dig. t. 38, c. 9, § 34. See, generally, 1 Vern. Ch. 250; 2 Ves. Ch. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 13; Comyns, Dig. *Condition* (L 1); 1 Roper, Leg. 514; Swinburne, Wills, pl. 4, § 7, a. 4, ed. 1590, p. 31; Dane, Abr. Index; Toullier, Dr. Civ. Fr. liv. 3, t. 3, n. 586, 595, 611; Domat, Lois Civ. liv. 6, t. 2, § 1; Shelford, Mortm.; Highmare, Mortm.

CYROGRAPHARIUS. **In Old English Law.** A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A cirograph, which see.

CZAR. A title of honor which is assumed by the emperor of all the Russias. See AUTOCRACY.

CZARINA. The title of the empress of Russia.

CZAROWITZ. The title of the eldest son of the czar and czarina of Russia.

D.

DACION. **In Spanish Law.** The real and effective delivery of an object in the execution of a contract.

DAKOTA. One of the territories of the United States.

Congress, by an act approved March 2, 1861, erected so much of the territory of the United States as is included within the following boundaries—viz.: commencing at a point in the main channel of Red River of the North where the forty-ninth parallel of north latitude crosses the same; thence up the main channel of the same and along the boundary of the state of Minnesota to Big Stone lake; thence along the boundary-line of the said state of Minnesota to the Iowa line; thence along the boundary-line of the state of Iowa to the point of intersection between the Big Sioux and Missouri rivers; thence up the Missouri river and along the boundary of the territory of Nebraska to the mouth of the Niobrara or Running-Water river; thence following up the same in the main channel thereof to the mouth of the Keha Paha or Turtle Hill river; thence up said river to the forty-third parallel of north latitude; thence due west to the present boundary of the territory of Washington; thence along the boundary-line of Washington territory to the forty-ninth parallel of north latitude; thence east along said forty-ninth parallel of north latitude to the place of beginning—into a separate territory, by the name of The Territory of Dakota, with a temporary territorial government, excepting from the operation of the act any territory to which there are Indian rights not extinguished by treaty, with a proviso that the territory may be divided, or part thereof attached to another territory. United States Statutes at Large, 1861, c. 86, Little & Brown's ed. 239.

The provisions of the organic act are substantially the same as those of the act erecting the territory of New Mexico. See NEW MEXICO.

Since the date of the organic act, the boundaries of the territory of Dakota have been twice changed: first, by the act erecting the territory of Idaho, March 8, 1863, sect. 1, which cut off from the territory all that part lying west of the twenty-seventh degree of longitude west from Washington; and second, by the act erecting the territory of Montana, May 26, 1864, sect. 18, which attached temporarily to the territory of Dakota the lands lying within the following limits:—commencing at a point formed by the intersection of the thirty-third degree of longitude west from Washington with the forty-first degree of north latitude; thence along said thirty-third degree of longitude to the crest of the Rocky Mountains; thence northward along the said crest of the Rocky Mountains to its intersection with the forty-fourth degree and thirty minutes of north latitude; thence eastward along said forty-fourth degree thirty minutes of north latitude to the thirty-fourth degree of longitude west from Washington; thence north along said thirty-fourth degree of longitude to its intersection with the forty-fifth degree of north latitude; thence east along said forty-fifth degree of north latitude to its intersection with the twenty-seventh degree of longitude west from Washington; thence south along said twenty-seventh degree of longitude west from Washington to the forty-first degree of north latitude; thence west along said forty-first degree of latitude to the place of beginning.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole.

2. The owner of a stream not navigable may erect a dam across it, provided he do

not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow. 4 Mas. C. C. 401; 13 Johns. N. Y. 212; 17 *id.* 306; 20 *id.* 90; 3 Caines, N. Y. 307; 9 Pick. Mass. 528; 13 Conn. 309; 15 *id.* 366; 4 Dall. Penn. 211; 6 Penn. St. 32; 2 Binn. Penn. 475; 14 Serg. & R. Penn. 71; 3 N. H. 321; 3 Kent, Comm. 354. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury. 12 Penn. St. 248; 17 Barb. N. Y. 654; 28 Vt. 459; 25 Conn. 321; 2 Gray, Mass. 394; 38 Me. 243. But he must not unreasonably detain the water, 6 Ind. 324; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others. 10 Cush. Mass. 367. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors. 1 Barnew. & Ald. 258; 6 East, 208; 1 Sim. & S. Ch. 203; 12 Ill. 281; 24 N. H. 364; 8 Cush. Mass. 595; 19 Penn. St. 134; 20 *id.* 85; 25 *id.* 519; 38 Me. 237. And see BACK-WATER. These rights may, of course, be modified by contract or prescription. See WATERCOURSE.

3. When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *filum aquæ*, thread of the river, without committing a trespass. Croke Eliz. 269; Holt, 499; 12 Mass. 211; 4 Mas. C. C. 397; Angell, Waterc. 14, 104, 141. See Lois des Bât. p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 236; Hillier, Abr. Index; 7 Cow. N. Y. 266; 2 Watts, Penn. 327; 3 Rawle, Penn. 90; 5 Pick. Mass. 175; 4 Mass. 401; 17 *id.* 289.

4. The degree of care which a party who constructs a dam across a stream of water is bound to use is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own. 5 Vt. 371; 3 Hill, N. Y. 531; 3 Den. N. Y. 433; Angell, Waterc. 336.

5. If a mill-dam be so built that it causes a watercourse to overflow the surrounding country, where it becomes stagnant and unwholesome, so that the health of the neighborhood is sensibly impaired, such dam is a public nuisance, for which its author is liable to indictment. 4 Wisc. 387. So it is an indictable nuisance to erect a dam so as to overflow a highway, 4 Ind. 515; 6 Metc. Mass. 433; or so as to obstruct the navigation of a public river. 1 Stockt. N. J. 754; 3 Blackf. Ind. 136; 2 Ind. 591; 5 *id.* 433; 6 *id.* 165; 18 Barb. N. Y. 277; 4 Watts, Penn. 437; 3 Hill, N. Y. 621; 9 Watts, Penn. 119.

DAMAGE. The loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.

He who has caused the damage is bound to repair it; and if he has done it maliciously he may be compelled to pay beyond the actual loss. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured: as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake, or other natural cause, the loss must be borne by the owner. See Comyns, Dig.; Sayer, Dam.; Sedgwick, Dam.

DAMAGE CLEER. The tenth part in the common pleas, and the twentieth part in the king's bench and exchequer courts, of all damages beyond a certain sum, which was to be paid the prothonotary or chief officer of the court in which they were recovered before execution could be taken out. At first it was a gratuity, and of uncertain proportions. Abolished by stat. 17 Car. II. c. 6. Cowel; Termes de la Ley.

DAMAGE FEASANT (French, *faisant dommage*, doing damage). A term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, and treading down his grass, corn, or other production of the earth. 3 Blackstone, Comm. 6; Coke, Litt. 142, 161; Comyns, Dig. *Pleader* (3 M 26). By the common law, a distress of animals or things damage feasant is allowed. Gilbert, Distress, 21. It was also allowed by the ancient customs of France. 11 Toullier, 402, 203; Merlin, Répert. *Fourriere;* 1 Fournel, *Abandon.*

DAMAGED GOODS. Goods, subject to duties, which have received some injury either in the voyage home, or while bonded in warehouse.

DAMAGES. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

The sum claimed as such indemnity by a plaintiff in his declaration.

The injury or loss for which compensation is sought.

Compensatory damages. Those allowed as a recompense for the injury actually received.

Consequential damages. Those which though directly are not immediately consequential upon the act or default complained of.

Double or treble damages. See those titles.

Exemplary damages. Those allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression.

General damages. Those which necessarily and by implication of law result from the act or default complained of.

Liquidated damages. See that title.

Nominal damages. See that title.

Punitive damages. See EXEMPLARY DAMAGES.

Special damages. Such as arise directly, but not necessarily or by implication of law, from the act or default complained of.

These are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing.

Unliquidated damages. See LIQUIDATED DAMAGES.

Vindictive damages. See EXEMPLARY DAMAGES.

In modern law, the term is not used in a legal sense to include the costs of the suit; though it was formerly so used. Coke, Litt. 267 *a;* Dougl. 751.

The various classes of damages here given are those commonly found in the text-books and in the decisions of courts of common law. Other terms are of occasional use (as *resulting,* to denote consequential damages), but are easily recognizable as belonging to some one of the above divisions. The question whether damages are to be limited to an allowance compensatory merely in its nature and extent, or whether they may be assessed as a punishment upon a wrong-doer in certain cases for the injury inflicted by him upon the plaintiff, has been very fully and vigorously discussed by the late Professor Greenleaf and Mr. Sedgwick, and has received much attention from the courts. The current of authorities sets strongly (in numbers, at least) in favor of allowing punitive damages. That view of the matter is certainly open to the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just amount of which the jury may well be held to be proper judges. It would also seem to savor somewhat of judicial legislation in a criminal department to extend such damages beyond those cases where an injury is committed to the feelings of the innocent plaintiff. But see 2 Greenleaf, Ev. § 253, n.; Sedgwick, Dam. c. xviii.; *id.* 2d ed. App.; 1 Kent, Comm. 10th ed. 630; 3 Am. Jur. 387; 9 Bost. Law Rep. 529; 10 *id.* 49; EXEMPLARY DAMAGES.

It is, perhaps, hardly necessary to add that *direct* is here used in opposition to *remote,* and *immediate* to *consequential.*

2. In Pleading. In personal and mixed actions (but not in penal actions, for obvious reasons), the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of damages. Comyns, Dig. *Pleader* (C 84); 10 Coke, 116 *b.*

In personal actions there is a distinction between actions that sound in damages and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only of such debt or chattel, and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration. Comyns, Dig. *Pleader* (C 84); 10 Coke, 117 *a, b;* Viner, Abr. *Damages* (R); 1 Bulstr. 49; 2 W. Blackst. 1300; 17 Johns. N. Y. 111; 4 Den. N. Y. 311; 8 Humphr. Tenn. 530; 1 Iowa, 336; 2 Dutch. N. J. 60.

In real actions no damages are to be laid, because in these the demand is specially for the land withheld, and damages are in no degree the object of the suit. Stephen, Plead. 426; 1 Chitty, Plead. 397–400.

3. General damages need not be averred in the declaration; nor need any specific proof of damages be given to enable the plaintiff to recover. The legal presumption of injury in cases where it arises is sufficient to maintain the action. Whether special damage be the gist of the action, or only collateral to it, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. See Sedgwick, Dam. 575; 1 Chitty, Plead. 428; 4 Q. B. 493; 10 *id.* 756; 11 Price, Exch. 19; 7 Carr. & P. 804; 2 Penn. St. 318; 22 *id.* 471; 1 Cal. 51; 32 Me. 379; 23 N. H. 83; 21 Wend. N. Y. 144; 2 Du. N. Y. 153; 16 Johns. N. Y. 122; 11 Barb. N. Y. 387; 4 Cush. Mass. 104, 408.

4. In Practice. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with a wrong; the loss must be the natural and proximate consequence of the wrong.

There is no right to damages, properly so called, where there is no *loss.* A sum in which a wrong-doer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a "fine," or a "penalty," rather than damages. Damages are based on the idea of a loss to be compensated, a damage to be made good. 11 Johns. N. Y. 136; 2 Tex. 460; 11 Pick. Mass. 527; 15 Ohio, 726; 3 Sumn. C. C. 192; 4 Mas. C. C. 115. This loss, however, need not always be distinct and definite, capable of exact description or of measurement in dollars and cents. A sufficient loss to sustain an action may appear from the mere nature of the case itself. The law in many cases presumes a loss where a wilful wrong is proved; and thus also damages are awarded for injured feelings, bodily pain, grief of mind, injury to reputation, and for other sufferings which it would be impossible to make subjects of exact proof and computation in respect to the amount of loss sustained. 2 Day, Conn. 259; 5 *id.* 140; 3 Harr. & M'H. Md. 510; 5 Ired. No. C. 545; 2 Humphr. Tenn. 140; 15 Conn. 267; 19 *id.* 154; 8 B. Monr. Ky. 432. The rule is not that a loss

must be proved by evidence, but that one must appear, either by evidence or by presumption, founded on the nature of the case.

5. There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called,—a wilful wrong, an act involving moral guilt. The wrong may be either a wilful, malicious injury, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on land, etc.; or it may consist in a mere neglect to discharge a duty with suitable skill or fidelity, as where a surgeon is held liable for malpractice, a sheriff for the escape of his prisoner, or a carrier for neglect to deliver goods; or a simple breach of contract, as in case of refusal to deliver goods sold, or to perform services under an agreement; or it may be a wrong of another person for whose act or default a legal liability exists, as where a master is held liable for an injury done by his slave or apprentice, or a railroad-company for an accident resulting from the negligence of their engineer. But there must be something which the law recognizes as a wrong, some breach of a legal duty, some violation of a legal right, some default or neglect, some failure in responsibility, sustained by the party claiming damages. For the sufferer by accident or by the innocent or rightful acts of another cannot claim indemnity for his misfortune. It is called *damnum absque injuria*,—a loss without a wrong; for which the law gives no remedy. 15 Ohio, 659; 11 Pick. Mass. 527; 11 Mees. & W. Exch. 755; 10 Metc. Mass. 371; 13 Wend. N. Y. 261.

6. The obligation violated must also be one *owed to the plaintiff*. The neglect of a duty which the plaintiff had no legal right to enforce gives no claim to damages. Thus, where the postmaster of Rochester, New York, was required by law to publish lists of letters uncalled for in the newspaper having the largest circulation, and the proprietors of the "Rochester Daily Democrat" claimed to have the largest circulation and to be entitled to the advertising, but the postmaster refused to give it to them, it was held that no action would lie against him for loss of the profits of the advertising. The duty to publish in the paper having the largest circulation was not a duty owed to the publisher of that paper. It was imposed upon the postmaster not for the benefit of publishers of newspapers, but for the advantage of persons to whom letters were addressed; and they alone had a legal interest to enforce it. 11 Barb. N. Y. 135. See, also, 17 Wend. N. Y. 554; 11 Pick. Mass. 526.

Whether when the law gives judgment on a contract to pay money—*e. g.* on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which jurisconsults have differed. Regarded in the latter point of view, the default of payment is the wrong on which the award of damages is predicated.

7. The loss must be the *natural and proximate consequence* of the wrong. 2 Greenleaf, Ev. § 256; Sedgwick, Dam. c. 3. Or, as others have expressed the idea, it must be the "direct and necessary," or "legal and natural," consequence. It must not be "remote" or "consequential." The loss must be the *natural* consequence. Every man is expected—and may justly be—to foresee the usual and natural consequences of his acts, and for these he may justly be held accountable; but not for consequences that could not have been foreseen. 17 Pick. Mass. 78; 3 Tex. 324; 13 Ala. N. S. 490; 28 Me. 361; 2 Wisc. 427; 1 Sneed, Tenn. 515; 4 Blackf. Ind. 277; 6 Q. B. 928. It must also be the *proximate* consequence. Vague and indefinite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes. 4 Jones, No. C. 163; 1 Smith, Lead. Cas. 302–304.

8. The foregoing are the general principles on which the right to recover damages is based. Many qualifying rules have been established, of which the following are among the more important instances. In an action for damages for an injury caused by negligence, the plaintiff must himself appear to have been free from fault; for if his own negligence in any degree contributed directly to produce the injury, he can recover nothing. The law will not attempt to apportion the loss according to the different degrees of negligence of the two parties. 1 Carr. & P. 181; 11 East, 60; 7 Me. 51; 1 Iowa, 407; 17 Pick. Mass. 284; 2 Metc. Mass. 615; 3 Barb. N. Y. 49; 14 Ohio, 364; 3 La. Ann. 441; Sedgwick, Dam. 468. There is no right of action by an individual for damages sustained from a public nuisance, so far as he only shares the common injury inflicted on the community. 5 Coke, 72. For any special loss incurred by himself alone, he may recover, 4 Maule & S. 101; 2 Bingh. 263; 1 Bingh. N. C. 222; 2 *id.* 281; 3 Hill, N. Y. 612; 22 Vt. 114; 7 Metc. Mass. 276; 1 Penn. St. 309; 17 Conn. 372; but in so far as the whole neighborhood suffer together, resort must be had to the public remedy. 7 Q. B. 339; 7 Metc. Mass. 276; 1 Bibb, Ky. 293. Judicial officers are not liable in damages for erroneous decisions.

9. Where the wrong committed by the defendant amounted to a felony, the English rule was that the private remedy by action was stayed till conviction for the felony was had. This was in order to stimulate the exertions of private persons injured by the commission of crimes to bring offenders to justice. This rule has, however, been changed in some of the United States. Thus, in New York it is enacted that when the violation of a right admits of both a civil and criminal remedy, one is not merged in the other. N. Y. Code of

Proc. § 7. And see 15 Mass. 336; 2 Stor. C. C. 59; Ware, Adm. 78. When a servant is injured through the negligence of a fellow-servant employed in the same enterprise or avocation, the common employer is not liable for damages. The servant, in engaging, takes the risk of injury from the negligence of his fellow-servants. 4 Metc. Mass. 49; 6 La. Ann. 495; 23 Penn. St. 384; 5 N. Y. 493; 15 Ga. 349; 15 Ill. 550; 20 Ohio, 415; 3 Ohio St. 201; 5 Exch. 343. But this rule does not exonerate the master from liability for negligence of a servant in a different employment. By the common law, no action was maintainable to recover damages for the death of a human being. 1 Campb. 493; 1 Cush. Mass. 475. But in England, by the 9 & 10 Vict. c. 93, known as Lord Campbell's Act, it has been provided that whenever the death of a person shall be caused by a wrongful act which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable notwithstanding the death. Similar statutes have been passed in several of the United States. Laws of New York, 1847, c. 450, 1849, c. 256; Laws of Mass. 1842, c. 81. And see 3 N. Y. 489; 15 *id.* 432; 18 Mo. 162; 18 Q. B. 93.

10. *Excessive or inadequate damages.* Even in that large class of cases in which there is no fixed measure of damages, but they are left to the discretion of the jury, the court has a certain power to review the verdict, and to set it aside if the damages awarded are grossly excessive or unreasonably inadequate. The rule is, however, that a verdict will not be set aside for excessive damages unless the amount is so large as to satisfy the court that the jury have been misled by passion, prejudice, ignorance, or partiality. 19 Barb. N. Y. 461; 9 Cush. Mass. 228; 16 B. Monr. Ky. 577; 22 Conn. 74; 27 Miss. 68; 10 Ga. 37; 20 *id.* 428; 6 Rich. So. C. 419; 1 Cal. 33, 363; 5 *id.* 410; 11 Gratt. Va. 697. But this power is very sparingly used; and cases are numerous in which the courts have expressed themselves dissatisfied with the verdict, but have refused to interfere, on the ground that the case did not come within this rule. See 3 Abb. Pr. N. Y. 104; 5 *id.* 272; 22 Barb. N. Y. 87; 20 Mo. 272; 15 Ark. 345; 6 Tex. 352; 9 *id.* 20; 16 Ill. 405; Cowp. 230; 2 Stor. C. C. 661; 3 *id.* 1; 1 Zabr. N. J. 183; 5 Mas. C. C. 197.

As a general rule, in actions of tort the court will not grant a new trial on the ground of the smallness of damages. 12 Mod. 150; 2 Strange, 940; 24 Eng. L. & Eq. 406; 23 Conn. 74. But they have the power to do so in a proper case; and in a few instances in which the jury have given no redress at all, when some was clearly due, the verdict has been set aside. 1 Cal. 450; 2 E. D. Smith, N. Y. 349; 4 Q. B. 917. The circumstances must show that the jury have acted under an improper motive.

11. In the cases in which there is a fixed legal rule regulating the measure of damages, it must be stated to the jury by the presiding judge upon the trial. His failure to state it correctly is ground of exception; and if the jury disregard the instructions of the court on the subject, their verdict may be set aside. In so far, however, as the verdict is an honest determination of questions of fact properly within their province, it will not, in general, be disturbed. Sedgwick, Dam. 604. See NOMINAL DAMAGES; LIQUIDATED DAMAGES; EXEMPLARY DAMAGES; MEASURE OF DAMAGES. Consult Greenleaf, Evidence; Sedgwick, Damages, 2d ed.

DAMNA (Lat. *damnum*). Damages, both inclusive and exclusive of costs.

DAMNI INJURIÆ ACTIO (Lat.). **In Civil Law.** An action for the damage done by one who intentionally injured the beast of another. Calvinus, Lex.

DAMNOSA HÆREDITAS. A name given by Lord Kenyon to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors: for example, a term of years where the rent would exceed the revenue.

The assignees are not bound to take such property; but they must make their election, and having once entered into possession they cannot afterwards abandon the property. 7 East, 342; 3 Campb. 340.

DAMNUM ABSQUE INJURIA (Lat. injury without wrong). A wrong done to a man for which the law provides no remedy. Broom, Max. 1.

Injuria is here to be taken in the sense of *legal injury;* and where no malice exists, there are many cases of wrong or suffering inflicted upon a man for which the law gives no remedy. 2 Ld. Raym. 595; 11 Mees. & W. Exch. 755; 11 Pick. Mass. 527; 10 Metc. Mass. 371. Thus, if the owner of property, in the prudent exercise of his own right of dominion, does acts which cause loss to another, it is *damnum absque injuria.* 2 Barb. N. Y. 168; 5 *id.* 79; 10 Metc. Mass. 371; 10 Mees. & W. Exch. 109.

So, too, acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria.* Sedgwick, Dam. 29, 111; 8 Watts & S. Penn. 85; 1 Pick. Mass. 418; 12 *id.* 467; 23 *id.* 360; 2 Barnew. & Ald. 646; 3 Scott, 356; 4 Dowl. & R. 195; 1 Gale & D. 589; 4 Rawle, Penn. 9; 8 Cow. N. Y. 146; 2 Hill, N. Y. 466; 7 *id.* 357; 3 Barb. N. Y. 459; 14 Penn. St. 214; 9 Conn. 436; 14 *id.* 146; 4 N. Y. 195; 25 Vt. 49. See 2 Zabr. N. J. 243.

DAMNUM FATALE. In Civil Law. Damages caused by a fortuitous event, or inevitable accident; damages arising from the act of God.

Among these were included losses by shipwreck, lightning, or other casualty; also losses by pirates, or by vis major, by fire, robbery, and burglary; but theft was not numbered among these casualties. In general, bailees are not liable for such damages. Story, Bailm. 471.

DANEGELT. A tax or tribute imposed upon the English when the Danes got a footing in their island.

DANELAGE. The laws of the Danes

which obtained in the eastern counties and part of the midland counties of England in the eleventh century. 1 Blackstone, Comm. 65.

DANGERS OF THE SEA. See PERILS OF THE SEA.

DARREIN (Fr. *dernier*). Last. *Darrein continuance*, last continuance.

DARREIN SEISIN (L. Fr. last seisin). A plea which lay in some cases for the tenant in a writ of right. 3 Metc. Mass. 184; Jackson, Real Act. 285. See 1 Roscoe, Real Act. 206; 2 Preston, Abstr. 345.

DATE. The designation or indication in an instrument of writing of the time and place when and where it was made.

When the place is mentioned in the date of a deed, the law intends, unless the contrary appears, that it was executed at the place of the date. Plowd. 7 *b*. The word is derived from the Latin *datum* (given); because when instruments were in Latin the form ran *datum*, etc. (given the day of, etc.).

A date is necessary to the validity of policies of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract. Marshall, Ins. 336; 2 Parsons, Marit. Law, 27. Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved. 2 Greenleaf, Ev. §§ 12, 13, 489, n.; 8 Mass. 159; 4 Cush. Mass. 403; 1 Johns. Cas. N. Y. 91; 3 Wend. N. Y. 233; 31 Me. 243; 17 Eng. L. & Eq. 548; 2 Greenleaf, Cruise, Dig. 618, n. And if the written date is an impossible one, the time of delivery must be shown. Sheppard, Touchst. 72; Cruise, Dig. c. 2, s. 61.

In general, it is sufficient to insert the day, month, and year; but in recording deeds and, in Pennsylvania, in noting the receipt of a *fi. fa.*, the hour and minute of reception must be given.

In public documents, it is usual to give not only the day, the month, and the year of our Lord, but also the year of the United States, when issued by authority of the general government, or of the commonwealth, when issued under its authority. See, generally, Bacon, Abr. *Obligations;* Comyns, Dig. *Fait* (B 3); Cruise, Dig. tit. 32, c. 21, ss. 1–6; 1 Burr. 60; Dane, Abr. Index.

DATION. In Civil Law. The act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality: as, the giving of an office.

DATION EN PAIEMENT. In Civil Law. A giving by the debtor and receipt by the creditor of something in payment of a debt instead of a sum of money.

It is somewhat like the accord and satisfaction of the common law. 16 Toullier, n. 45; Pothier, *Vente*, n. 601. Dation en paiement resembles in some respects the contract of sale; *dare in solutum est quasi vendere*. There is, however, a very marked difference between a sale and a dation en paiement. *First.* The contract of sale is complete by the mere agreement of the parties; the dation en paiement requires a delivery of the thing given. *Second.* When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess; not so when property other than money has been given in payment. *Third.* He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and, while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary, the dation en paiement is good only when the debtor transfers to the creditor the property in the thing which he has agreed to take in payment; and if the thing thus delivered be the property of another, it will not operate as a payment. Pothier, *Vente*, nn. 602, 603, 604. See 1 Low. C. 53.

DAUGHTER. An immediate female descendant.

DAUGHTER-IN-LAW. The wife of one's son.

DAY. The space of time which elapses while the earth makes a complete revolution on its axis.

A portion of such space of time which, by usage or law, has come to be considered as the whole for some particular purpose.

The space of time which elapses between two successive midnights. 2 Blackstone, Comm. 141.

That portion of such space of time during which the sun is shining.

Generally, in legal signification, the term includes the time elapsing from one midnight to the succeeding one, 2 Blackstone, Comm. 141; but it is also used to denote those hours during which business is ordinarily transacted (frequently called a *business* day), 5 Hill, N. Y. 437, as well as that portion of time during which the sun is above the horizon (called, sometimes, a *solar* day), and, in addition, that part of the morning or evening during which sufficient of his light is above for the features of a man to be reasonably discerned. Coke, 3d Inst. 63.

By custom, the word *day* may be understood to include working-days only, 3 Esp. 121, and, in a similar manner only, a certain number of hours less than the number during which the work actually continued each day. 5 Hill, N. Y. 437.

A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized. 15 Ves. Ch. 257; 2 Barnew. & Ald. 586. And see 9 East, 154; 4 Campb. 397; 11 Conn. 17.

It is said that there is no general rule in regard to including or excluding days in the computation of time from the day of a fact or act done, but that it depends upon the reason of the thing and the circumstances of the case. 5 East, 244; 9 Q. B. 141; 6 Mees. & W. Exch. 55; 15 Mass. 193; 19 Conn. 376. And see, also, 5 Coke, 1 *a;* Dougl. 463; 3 Term, 623; 4 Nev. & M. 378; 5 Metc. Mass. 439; 9 Wend. N. Y. 346; 9 N. H. 304; 5 Ill. 420; 24 Penn. St. 272. See,

generally, 2 Sharswood, Blackst. Comm. 141, n.; 1 Roper, Leg. 518; 15 Viner, Abr. 554.

DAY BOOK. In Mercantile Law. An account-book in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and, as such, may be given in evidence to prove the sale and delivery of merchandise or of work done

DAY RULE. A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term-time, to go out of the prison and its rule or bounds. Tidd, Pract. 961.

DAYS IN BANK. In English Practice. Days of appearance in the court of common pleas, usually called *bancum*. They are at the distance of about a week from each other, and are regulated by some festival of the church.

By the common law, the defendant is allowed three full days in which to make his appearance in court, exclusive of the day of appearance or return-day named in the writ. 3 Blackstone, Comm. 278. Upon his appearance, time is usually granted him for pleading; and this is called giving him day, or, as it is more familiarly expressed, a continuance. 3 Blackstone, Comm. 316. When the suit is ended by discontinuance or by judgment for the defendant, he is discharged from further attendance, and is said to go thereof *sine die*, without day. See CONTINUANCE.

DAYS OF GRACE. Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself.

2. They are so called because formerly they were allowed as a matter of favor; but, the custom of merchants to allow such days of grace having grown into law and been sanctioned by the courts, all bills of exchange are by the law merchant entitled to days of grace as of right. The act of Anne making promissory notes negotiable confers the same right on those instruments. This act has been generally adopted throughout the United States; and the days of grace allowed are three. 6 Watts & S. Penn. 179; Chitty, Bills; Byles, Bills.

3. Where there is an established usage of the place where the bill is payable to demand payment on the fourth or other day instead of the third, the parties to it will be bound by such usage. 5 How. 317; 9 Wheat. 582; 1 Smith, Lead. Cas. 417. When the last day of grace happens on Sunday or a general holiday, as the Fourth of July, Christmas-day, etc., the bill is due on the day previous, and must be presented on that day in order to hold the drawer and indorsers. 2 Caines, Cas. N. Y. 195; 2 Caines, N. Y. 343; 7 Wend. N. Y. 460; 8 Cow. N. Y. 203; 1 Johns. Cas. N. Y. 328; 4 Dall. Penn. 127; 5 Binn. Penn. 541; 4 Yerg. Tenn. 210; 10 Ohio, 507; 1 Ala. 295; 3 N. H. 14. Days of grace are, for all practical purposes, a part of the time the bill has to run, and interest is charged on them. 2 Cow. N. Y. 712.

4. Our courts always assume that the same number of days are allowed in other countries; and a person claiming the benefit of a foreign law or usage must prove it. 8 Johns. N. Y. 189; 13 N. Y. 290; 4 Metc. Mass. 203; 2 Vt. 129; 7 Gill & J. Md. 78; 9 Pet. 33; 4 Metc. Mass. 203. When properly proved, the law of the place where the bill or note is payable prescribes the number of days of grace and the manner of calculating them. 1 Den. N. Y. 367; Story, Prom. Notes, §§ 216, 247. The tendency to adopt as laws local usages or customs has been materially checked. 8 N. Y. 190. By tacit consent, the banks in New York city have not claimed days of grace on bills drawn on them; but the courts refused to sanction the custom as law or usage. 25 Wend. N. Y. 673.

5. According to law and usage, days of grace are allowed on bills payable at the following places according to this table:—

Altona and *Hamburg*, twelve days.

United States of America, three days, except Vermont, where no grace is allowed, and Louisiana, where, although on bills and notes made and payable in the state the three days are allowed, the bill is considered to be due without the grace for purposes of set-off. In New York, bills on bank corporations are not entitled to grace, by statute.

Great Britain and *Ireland*, *Berlin*, *Trieste*, *Vienna*, three days.

Amsterdam, *Antwerp*, *Genoa*, *France*, *Leghorn*, *Palermo*, none.

Brazil, *Rio Janeiro*, *Bahia*, fifteen days.

Frankfort-on-the-Main (Sundays and holidays not included), four days.

Spain, vary in different parts,—generally fourteen on foreign and eight on inland bills; at Cadiz, six. When bills are drawn at a certain date fixed, no grace. Bills at sight are not entitled to grace; nor are any bills, unless accepted.

Lisbon and Oporto, fifteen days on local bills and six on foreign; but if not previously accepted, no grace.

6. Days of grace are computed in America by adding three days to the term of the bill or note, irrespective of the fact that the day on which the bill would be due without the days of grace is a Sunday or holiday. Bankers' checks are payable on demand, without days of grace.

DAYS OF THE WEEK. Sunday, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday.

The court will take judicial notice of the days of the week: for example, when a writ of inquiry was stated in the pleadings to have been executed on the fifteenth of June, and upon an examination it was found to be Sunday, the proceeding was held to be defective. Fortesc. 373; Strange, 387.

DAYSMAN. An arbitrator, umpire, or elected judge. Cowel.

DAYWERE. As much arable land as could be ploughed in one day's work. Cowel.

DE ADMENSURATIONE. Of admeasurement.

Used of the writ of admeasurement of dower, which lies where the widow has had more dower assigned to her than she is entitled to. It is said by some to lie where either an infant heir or his guardian made such assignment, at suit of the infant heir whose rights are thus prejudiced. 2 Blackstone, Comm. 136; Fitzherbert, Nat. Brev. 348. It seems, however, that an assignment by a guardian binds the infant heir, and that after such assignment the heir cannot have his writ of admeasurement. 2 Ind. 388; 1 Pick. Mass. 314; 37 Me. 509; 1 Washburn, Real Prop. 226.

Used also of the writ of admeasurement of pasture, which lies where the quantity of common due each one of several having rights thereto has not been ascertained. 3 Blackstone, Comm. 38. See ADMEASUREMENT OF DOWER.

DE ÆTATE PROBANDA (Lat. for proving age). A writ which lay to summon a jury for the purpose of determining the age of the heir of a tenant *in capite* who claimed his estate as being of full age. Fitzherbert, Nat. Brev. 257.

DE ALLOCATIONE FACIENDA (Lat. for making allowance). A writ to allow the collectors of customs, and other such officers having charge of the king's money, for sums disbursed by them.

It was directed to the treasurer and barons of the exchequer.

DE ANNUA PENSIONE (Lat. of annual pension). A writ by which the king, having due unto him an annual pension from any abbot or prior for any of his chaplains which he will name who is not provided with a competent living, demands it of the said abbot or prior for the one that is named in the writ. Fitzherbert, Nat. Brev. 231; Termes de la Ley, *Annua Pensione.*

DE ANNUO REDITU (Lat. for a yearly rent). A writ to recover an annuity, no matter how payable. 2 Reeve, Hist. Eng. Law, 258.

DE APOSTATA CAPIENDO (Lat. for taking an apostate). A writ directed to the sheriff for the taking the body of one who, having entered into and professed some order of religion, leaves his order and departs from his house and wanders in the country. Fitzherbert, Nat. Brev. 233; Termes de la Ley, *Apostata Capiendo.*

DE ARBITRATIONE FACTA (Lat. of arbitration had). A writ formerly used when an action was brought for a cause which had been settled by arbitration. Watson, Arb. 256.

DE ASSISA PROROGANDA (Lat. for proroguing assize). A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.

DE ATTORNATO RECIPIENDO (Lat. for receiving an attorney). A writ to compel the judges to receive an attorney and admit him for the party. Fitzherbert, Nat. Brev. 156 *b.*

DE AVERIIS CAPTIS IN WITHERNAM (Lat. for cattle taken in withernam). A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin. Termes de la Ley; 3 Sharswood, Blackst. Comm. 149.

DE AVERIIS REPLEGIANDIS (Lat.). A writ to replevy beasts. 3 Blackstone, Comm. 149.

DE AVERIIS RETORNANDIS (Lat. for returning cattle). Used of the pledges in the old action of replevin. 2 Reeve, Hist. Eng. Law, 177.

DE BENE ESSE (Lat. formally; conditionally; provisionally). A technical phrase applied to certain acts deemed for the time to be well done, or until an exception or other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse*, or provisionally.

2. The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death by reason of age or dangerous illness, or where he is the only witness to an important fact. 1 Bland, Ch. Mich. 238; 3 Bibb, Ky. 204; 16 Wend. N. Y. 601. In such case, if the witness be alive at the time of trial, his examination is not to be used. 2 Daniell, Ch. Pract. 1111.

To declare *de bene esse* is to declare in a bailable action subject to the contingency of bail being put in; and in such case the declaration does not become absolute till this is done. Graham, Pract. 191.

When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse;* which verdict, if the court shall afterwards be of opinion that it ought to have been found, shall stand. Bacon, Abr. *Verdict* (A). See, also, 11 Serg. & R. Penn. 84.

DE BIEN ET DE MAL. See DE BONO ET MALO.

DE BONIS ASPORTATIS (Lat. for goods carried away). The name of the action for trespass to personal property is trespass *de bonis asportatis.* Buller, Nisi P. 836; 1 Tidd, Pract. 5.

DE BONIS NON. See ADMINISTRATOR DE BONIS NON.

DE BONIS PROPRIIS (Lat. of his own goods). A judgment against an executor or administrator which is to be satisfied from his own property.

When an executor or administrator has been guilty of a *devastavit,* he is responsible for the loss which the estate has sustained *de bonis propriis.* He may also subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity: as, if he plead *plene administravit* and it be found against

him, or a release to himself when false. In this latter case the judgment is *de bonis testatoris si, et si non de bonis propriis*. 1 Wms. Saund. 336 *b*, n. 10; Bacon, Abr. *Executor* (B 3).

DE BONIS TESTATORIS (Lat. of the goods of the testator). A judgment rendered against an executor which is to be satisfied out of the goods or property of the testator: distinguished from a judgment *de bonis propriis*.

DE BONIS TESTATORIS AC SI (Lat. from the goods of the testator, *if he has any*, and, if *not, from those of the executor*). A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. 1 Wms. Saund. 366 *b*; Bacon, Abr. *Executor* (B 3); 2 Archbold, Pract. 148.

DE BONO ET MALO (Lat. for good or ill). A person accused of crime was said to put himself upon his country *de bono et malo*. The French phrase *de bien et de mal* has the same meaning.

A special writ of gaol delivery, one being issued for each prisoner: now superseded by the general commission of gaol delivery. 4 Blackstone, Comm. 270.

DE CALCETO REPARENDO (Lat.). A writ for repairing a highway, directed to the sheriff, commanding him to distrain the inhabitants of a place to repair the highway. Reg. Orig. 154; Blount.

DE CARTIS REDDENDIS (Lat. for restoring charters). A writ to secure the delivery of charters; a writ of detinue. Reg. Orig. 159 *b*.

DE CATALLIS REDDENDIS (Lat. for restoring chattels). A writ to secure the return specifically of chattels detained from the owner. Cowel.

DE CAUTIONE ADMITTENDA (Lat. for admitting bail). A writ directed to a bishop who refused to allow a prisoner to go at large on giving sufficient bail, requiring him to admit him to bail. Fitzherbert, Nat. Brev. 63 *c*.

DE COMMUNI DIVIDENDO. In Civil Law. A writ of partition of common property. See COMMUNI DIVIDENDO.

DE CONTUMACE CAPIENDO. A writ issuing from the English court of chancery for the arrest of a defendant who is in contempt of the ecclesiastical court. 1 Nev. & P. 685–689; 5 Dowl. 213, 646; 5 Q. B. 335.

DE CURIA CLAUDENDA (Lat. of enclosing a court). An obsolete writ, to require a defendant to fence in his court or land about his house, where it was left open to the injury of his neighbor's freehold. 1 Crabb, Real Prop. 314; 6 Mass. 90.

DE DOMO REPARANDA (Lat.). The name of an ancient common-law writ, by which one tenant in common might compel his cotenant to concur in the expense of repairing the property held in common. 8 Barnew. & C. 269; 1 Thomas, Coke, Litt. 216, note 17, and p. 787.

DE DONIS, THE STATUTE (more fully, *De Donis Conditionalibus;* concerning conditional gifts). The statute Edw. I. c. 1.

The object of the statute was to prevent the alienation of estates by those who held only a part of the estate in such a manner as to defeat the estate of those who were to take subsequently. By introducing perpetuities, it built up great estates and strengthened the power of the barons. See Bacon, Abr. *Estates Tail;* 1 Cruise, Dig. 70; 1 Washburn, Real Prop. 271.

DE DOTE ASSIGNANDA (Lat. for assigning dower). A writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Fitzherbert, Nat. Brev. 263 *c*.

DE DOTE UNDE NIHIL HABET (Lat. of dower in that whereof she has none). A writ of dower which lay for a widow where no part of her dower had been assigned to a widow. It is now much disused; but a form closely resembling it is still much used in the United States. 4 Kent, Comm. 63; Stearns, Real Act. 302; 1 Washburn, Real Prop. 230.

DE EJECTIONE FIRMÆ. A writ which lay at the suit of the tenant for years against the lessor, reversioner, remainderman, or stranger who had himself deprived the tenant of the occupation of the land during his term. 3 Blackstone, Comm. 199. Originally lying to recover damages only, it came to be used to recover the rest of the term, and then generally the possession of lands. Involving, in the question of who should have possession, the further question of who had the title, it gave rise to the modern action of ejectment. Brooke, Abr.; Adams, Ejectment; 3 Sharswood, Blackst. Comm. 199 *et seq.*

DE ESTOVERIIS HABENDIS (Lat. to obtain estovers). A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers. 1 Blackstone, Comm. 441.

DE EXCOMMUNICATO CAPIENDO (Lat. for taking one who is excommunicated). A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church. 3 Blackstone, Comm. 102.

DE EXCOMMUNICATO DELIBERANDO (Lat. for freeing one excommunicated). A writ to deliver an excommunicated person, who has made satisfaction to the church, from prison. 3 Blackstone, Comm. 102.

DE EXONERATIONE SECTÆ. A writ to free the king's ward from suit in any court lower than the court of common pleas during the time of such wardship.

DE FACTO. Actually; in fact; in deed. A term used to denote a thing actually done.

An officer *de facto* is one who performs the

duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. 37 Me. 423.

An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it,—such a one being an officer *de jure* only. An officer holding without strict legal authority. 2 Kent, Comm. 295. An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts. 10 Serg. & R. Penn. 250; 11 *id.* 411; 1 Coxe, N. J. 318; 10 Mass. 290; 15 *id.* 180; 5 Pick. Mass. 487; 25 Conn. 278; 5 Wisc. 308; 24 Barb. N. Y. 587; 37 Me. 423; 19 N. H. 115; 2 Jones, No. C. 124; 2 Swan, Tenn. 87

An officer *de facto* is *primâ facie* one *de jure*. 21 Ga. 217.

A wife *de facto* only is one whose marriage is voidable by decree. 4 Kent, Comm. 36.

Blockade *de facto* is one actually maintained. 1 Kent, Comm. 44 *et seq.*

DE HÆRETICO COMBURENDO (Lat. for burning a heretic). A writ which lay where a heretic had been convicted of heresy, had abjured, and had relapsed into heresy. Said to be very ancient. 4 Blackstone, Comm. 46.

DE HOMINE CAPTO IN WITHERNAM (Lat. for taking a man in withernam). A writ to take a man who had carried away a bondman or bondwoman into another country beyond the reach of a writ of replevin. 3 Blackstone, Comm. 129.

DE HOMINE REPLEGIANDO (Lat. for replevying a man). A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzherbert, Nat. Brev. 66; 3 Blackstone, Comm. 129. The statute—which had gone nearly out of use, having been superseded by the writ of *habeas corpus*—has been revived within a few years in some of the United States in an amended and more effectual form. 1 Kent, Comm. 404, n.; Mass. Gen. Stat. c. 144, § 42 *et seq.*

DE INCREMENTO (Lat. of increase). Costs *de incremento*, costs of increase,—that is, which the court assesses in addition to the damages established by the jury. See COSTS DE INCREMENTO.

DE INJURIA (Lat. The full form is, *de injuria sua propria absque tali causa*, of his own wrong without such cause; or, where part of the plea is admitted, *absque residuo causæ*, without the rest of the cause).

In Pleading. The replication by which in an action of tort the plaintiff denies the effect of excuse or justification offered by the defendant.

2. It can only be used where the defendant pleads matter merely in excuse and not in justification of his act. It is confined to those instances in which the plea neither denies the original existence of the right which the defendant is charged with having violated, nor alleges that it has been released or extinguished, but sets up some new matter as a sufficient excuse or cause for that which would otherwise and in its own nature be wrongful. It cannot, therefore, be properly used when the defendant's plea alleges any matter in the nature of title, interest, authority, or *matter of record*. 8 Coke, 66; 1 Bos. & P. 76; 4 Johns. N. Y. 159, note; 5 *id.* 112; 12 *id.* 491; 1 Wend. N. Y. 126; 8 *id.* 129; 25 Vt. 328; Stephen, Plead. 276.

3. The English and American cases are at variance as to what constitutes such legal authority as cannot be replied to by *de injuria*. Most of the American cases hold that this replication is bad whenever the defendant insists upon a right, no matter from what source it may be derived; and this seems to be the more consistent doctrine.

If the plea in any sense *justifies* the act, instead of merely excusing it, *de injuria* cannot be used. 4 Wend. N. Y. 577; 1 Hill, N. Y. 78; 13 Ill. 80. The English cases, on the other hand, hold that an authority derived from a court *not of record* may be traversed by the replication *de injuria*. 3 Barnew. & Ad. 2.

The plaintiff may confess that portion of a plea which alleges an authority in law or an interest, title, or matter of record, and aver that the defendant did the act in question *de injuria sua propria absque residuo causæ*, of his own wrong without the residue of the cause alleged. 1 Hill, N. Y. 78; 2 Am. Law Reg. 246; Stephen, Plead. 276.

4. The replication *de injuria* puts in issue the whole of the defence contained in the plea; and evidence is, therefore, admissible to disprove any material averment in the whole plea. 8 Coke, 66; 11 East, 451; 10 Bingh. 157; 8 Wend. N. Y. 129. In England, however, by a uniform course of decisions in their courts, evidence is not admissible under the replication *de injuria* to a plea, for instance, of *moderate castigavit* or *molliter manus imposuit*, to prove that an excess of force was used by the defendant; but it is necessary that such excess should be specially pleaded. There must be a new assignment. 2 Crompt. M. & R. Exch. 338; 1 Bingh. 317; 1 Bingh. N. C. 380; 3 Mees. & W. Exch. 150.

5. In this country, on the other hand, though some of the earlier cases followed the English doctrine, later cases decide that the plaintiff need not plead specially in such a case. It is held that there is no new cause to assign when the act complained of is the same which is attempted to be justified by the plea. Therefore the fact of the act being moderate is a part of the plea, and is one of the points brought in issue by *de injuria;* and evidence is admissible to prove an excess. 15 Mass. 351; 25 Wend. N. Y. 371; 2 Vt. 474; 24 *id.* 218; 15 Mass. 365; 1 Zabr. N. J. 183.

Though a direct traverse of several points going to make up a single defence in a plea

will be bad for duplicity, yet the general replication *de injuria* cannot be objected to on this ground, although putting the same number of points in issue. 3 Barnew. & Ad. 1; 25 Vt. 330; 2 Bingh. N. C. 579; 3 Tyrwh. 491. Hence this mode of replying has a great advantage when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest his cause on an issue joined on one fact alone.

6. In England it is held that *de injuria* may be replied in assumpsit. 2 Bingh. N. C. 579.

In this country it has been held that the use of *de injuria* is limited to actions of tort. 2 Pick. Mass. 357. Whether *de injuria* can be used in actions of replevin seems, even in England, to be a disputed question. The following cases decide that it may be so used:—9 Bingh. 756; 3 Barnew. & Ad. 2; *contra*, 1 Chitty, Plead. 5th ed. 622.

The improper use of *de injuria* is now held to be only a ground of general demurrer. 6 Dowl. 502. Where it is improperly employed, the defect will be cured by a verdict. 5 Johns. N. Y. 112; Hob. 76; 1 T. Raym. 50.

DE JUDAISMO, STATUTUM. The name of a statute passed in the reign of Edward I., which enacted severe and absurd penalties against the Jews. Barrington, Stat. 197.

The Jews were exceedingly oppressed during the middle ages throughout Christendom, and are so still in some countries. In France, a Jew was a serf, and his person and goods belonged to the baron on whose demesnes he lived. He could not change his domicil without permission of the baron, who could pursue him as a fugitive even on the domains of the king. Like an article of commerce, he might be lent or hired for a time, or mortgaged. If he became a Christian, his conversion was considered a larceny of the lord, and his property and goods were confiscated. They were allowed to utter their prayers only in a low voice and without chanting. They were not allowed to appear in public without some badge or mark of distinction. Christians were forbidden to employ Jews of either sex as domestics, physicians, or surgeons. Admission to the bar was forbidden to Jews. They were obliged to appear in court in person when they demanded justice for a wrong done them; and it was deemed disgraceful to an advocate to undertake the cause of a Jew. If a Jew appeared in court against a Christian, he was obliged to swear by the ten names of God and invoke a thousand imprecations against himself if he spoke not the truth. Sexual intercourse between a Christian man and a Jewess was deemed a crime against nature, and was punishable with death by burning. *Quia est rem habere cum cane, rem habere a Christiano cum Judæa quæ* CANIS *reputatur: sic comburi debet.* 1 Fournel, *Hist. des Avocats*, 108, 110. See Merlin, Répert. *Juifs*.

In the fifth book of the Decretals it is provided that if a Jew have a servant that desireth to be a Christian, the Jew shall be compelled to sell him to a Christian for twelve-pence; that it shall not be lawful for them to take any Christian to be their servant; that they may repair their old synagogues, but not build new; that it shall not be lawful for them to open their doors or windows on Good Friday; that their wives shall neither have Christian nurses, nor themselves be nurses to Christian women; that they wear different apparel from the Christians, whereby they may be known, etc. See Ridley's View of the Civ. and Eccl. Law, part 1, chap. 5, sect. 7, and Madox, Hist. of Exch., as to their condition in England.

DE JURE. Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (which see). 4 Blackstone, Comm. 77.

Of right: distinguished from *de gratia* (by favor). By law: distinguished from *de æquitate* (by equity).

DE LA PLUS BELLE (Fr. of the fairest). A kind of dower: so called because assigned from the best part of the husband's estate. It was connected with the military tenures, and was abolished, with them, by stat. 12 Car. II. cap. 24. Littleton, § 48; 2 Blackstone, Comm. 132, 135; 1 Washburn, Real Prop. 149, n.

DE LIBERTATIBUS ALLOCANDIS (Lat. for allowing liberties). A writ, of various forms, to enable a citizen to recover the liberties to which he was entitled. Fitzherbert, Nat. Brev. 229; Reg. Orig. 262.

DE LUNATICO INQUIRENDO (Lat.). The name of a writ directed to the sheriff, directing him to inquire by good and lawful men whether the party charged is a lunatic or not. See 4 Rawle, Penn. 234; 1 Whart. Penn. 52; 5 Halst. N. J. 217; 6 Wend. N. Y. 497.

DE MANUCAPTIARE (Lat. of mainprize). A writ directed to the sheriff, commanding him to take sureties for the prisoner's appearance,—usually called mainpernors. —and to set him at large. Fitzherbert, Nat. Brev. 250; 1 Hale, Pl. Cr. 141; Coke, *Bail & Mainp.* c. 10; Reg. Orig. 268 *b*.

DE MEDIETATE LINGUÆ. See MEDIETATE LINGUÆ.

DE MEDIO (Lat. of the *mesne*). A writ in the nature of a writ of right, which lies where upon a subinfeudation the *mesne* (or middle) lord suffers his under-tenant or tenant *paravail* to be distrained upon by the lord paramount for the rent due him from the *mesne* lord. Booth, Real Act. 136; Fitzherbert, Nat. Brev. 135; 3 Sharswood, Blackst. Comm. 234; Coke, Litt. 100 *a*.

DE MELIORIBUS DAMNIS (Lat.). Of the better damages. When a plaintiff has sued several defendants, and the damages have been assessed severally against each, he has the choice of selecting the best, as he cannot recover the whole. This is done by making an election *de melioribus damnis*.

DE MERCATORIBUS, THE STATUTE. The statute of Acton Burnell. See ACTON BURNELL.

DE MODO DECIMANDI (Lat. of a manner of taking tithes).

A prescriptive manner of taking tithes, different from the general law of taking tithes in kind. It is usually by a compensation either in work or labor, and is generally called a *modus*. 1 Kebl. 162; 1 Rolle, Abr. 649; 1 Lev. 179; Croke Eliz. 446; Salk.

657; 2 P. Will. Ch. 462; 2 Russ. & M. 102; 4 Younge & C. Exch. 269, 283; 12 East, 35; 2 Sharswood, Blackst. Comm. 29 *et seq.*: 3 Stephen, Comm. 130.

DE NON DECIMANDO (Lat. of not taking tithes). An exemption by custom from paying tithes is said to be a prescription *de non decimando*. A claim to be entirely discharged of the payment of tithes, and to pay no compensation in lieu of them. Croke Eliz. 511; 3 Sharswood, Blackst. Comm. 31.

DE NOVI OPERIS NUNCIATIONE (Lat.). **In Civil Law.** A form of injunction or interdict which lies in some cases for the party aggrieved, where a thing is intended to be done against his right. Thus, where one buildeth an house contrary to the usual and received form of building, to the injury of his neighbor, there lieth such an injunction, which being served, the offender is either to desist from his work or to put in sureties that he shall pull it down if he do not in a short time avow, *i.e.* show, the lawfulness thereof. Ridley, Civ. and Eccl. Law, pt. 1, c. 1, sect. 8.

DE NOVO (Lat.). Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a *venire de novo* is awarded, in order that the case may again be submitted to a jury.

DE ODIO ET ATIA (Lat. of hatred and ill will). A writ directed to the sheriff, commanding him to inquire whether a person charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam* (through hatred and ill will); and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Sharswood, Blackst. Comm. 128. This was one of the many safeguards by which the English law early endeavored to protect the innocent against the oppression of the powerful through a misuse of its forms. The writ was to issue of course to any one, without denial, and *gratis*. Bracton, l. 3, tr. 2, ch. 8; Magna Charta, c. 26; Stat. Westm. 2 (13 Edw. I.), c. 29. It was restrained by stat. Gloucester (6 Edw. I.), c. 9, and abolished by 28 Edw. III. c. 9, but revived, however, on the repeal of this statute, by the 42 Edw. III. c. 1. Coke, 2d Inst. 43, 55, 315. It has now passed out of use. 3 Sharswood, Blackst. Comm. 129. See ASSIZE.

DE PARCO FRACTO (Lat. of pound-breach). A writ which lay where cattle taken in distress were rescued by their owner after being actually impounded. Fitzherbert, Nat. Brev. 100; 3 Blackstone, Comm. 146; Reg. Orig. 116 *b*; Coke, Litt. 47 *b*.

DE PARTITIONE FACIENDA (Lat. for making partition). The ancient writ for the partition of lands held by tenants in common.

DE PERAMBULATIONE FACIENDA (Lat. for making a perambulation). A writ which lay where there was a dispute as to the boundaries of two adjacent lordships or towns, directed to the sheriff, commanding him to take with him twelve discreet and lawful knights of his county and make the perambulation and set the bounds and limits in certainty. Fitzherbert, Nat. Brev. A similar provision exists in regard to town-lines in Connecticut, Maine, Massachusetts, and New Hampshire, by statute. Conn. Rev. Stat. tit. 3, c. 7; Me. Rev. Stat. c. 15; Mass. Gen. Stat. c. 18, § 3; N. H. Laws (1842), c. 7. And see 1 Greenleaf, Ev. § 146.

DE PLEGIIS ACQUIETANDIS (Lat. for clearing pledges). A writ which lay where one had become surety for another to pay a sum of money at a specified day, and the principal failed to pay it. If the surety was obliged to pay, he was entitled to this writ against his principal. Fitzherbert, Nat. Brev. 37 C; 3 Reeve, Hist. Eng. Law. 65.

DE PROPRIETATE PROBANDA (Lat. for proving property). A writ which issues in a case of replevin, when the defendant claims property in the chattels replevied and the sheriff makes a return accordingly. The writ directs the sheriff to summon an inquest to determine on the validity of the claim; and, if they find for the defendant, the sheriff merely returns their finding. The plaintiff is not concluded by such finding: he may come into the court above and traverse it. Hammond, Nisi P. 456.

DE QUOTA LITIS (Lat.). **In Civil Law.** A contract by which one who has a claim difficult to recover agrees with another to give a part, for the purpose of obtaining his services to recover the rest. 1 Duval, n. 201. See CHAMPERTY.

DE RATIONABILI PARTE BONORUM (Lat. of a reasonable part of the goods). A writ to enable the widow and children of a decedent to recover their proper shares of the inheritance. 2 Blackstone, Comm. 492. The writ is said to be founded on the customs of the counties, and not on the common-law allowance. Fitzherbert, Nat. Brev. 122, L.

DE RATIONALIBUS DIVISIS (Lat. for reasonable boundaries). A writ which lies to determine the boundaries between the lands of two proprietors which lie in different towns. The writ is to be brought by one against the other. Fitzherbert, Nat. Brev. 128, M; 3 Reeve, Hist. Eng. Law, 48.

DE RECTO DE ADVOCATIONE (Lat. of right of advowson; called, also, *de droit de advocatione*). A writ which lay to restore the right of presentation to a benefice, for him who had an advowson, to himself and heirs in fee simple, if he was disturbed in the presentation. Year B. 39 Hen. VI. 20 *a*; Fitzherbert, Nat. Brev. 30 B.

DE REPARATIONE FACIENDA.

(Lat.). The name of a writ which lies by one tenant in common against the other, to cause him to aid in repairing the common property. 8 Barnew. & C. 269.

DE RETORNO HABENDO (Lat.). The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied. See 3 Bouvier, Inst. n. 3376.

DE SALVA GUARDIA (Lat. of safeguard). A writ to protect the persons of strangers seeking their rights in English courts. Reg. Orig. 26.

DE SCUTAGIO HABENDO (Lat. of having scutage). A writ which lay in case a man held lands of the king by knight's service, to which homage, fealty, and escuage were appendant, to recover the services or fee due in case the knight failed to accompany the king to the war. It lay also for the tenant *in capite*, who had paid his fee, against his tenants. Fitzherbert, Nat. Brev. 83, C.

DE SECTA AD MOLENDINUM (Lat. of suit to a mill). A writ which lieth to compel one to continue his custom (of grinding) at a mill. 3 Blackstone, Comm. 235; Fitzherbert, Nat. Brev. 122, M; 3 Reeve, Hist. Eng. Law, 55.

DE SON TORT (Fr.). Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. See EXECUTOR.

DE SON TORT DEMESNE (Fr.). Of his own wrong. See DE INJURIA.

DE SUPERONERATIONE PASTURÆ (Lat. of surcharge of pasture). A writ lying where one who had been previously impleaded in the county court was again impleaded in the same court for surcharging common of pasture, and the cause was removed to Westminster Hall. Reg. Jur. 36 *b*.

DE TALLAGIO NON CONCEDENDO (Lat. of not allowing talliage). The name given to the statute 34 Edw. I., restricting the power of the king to grant talliage. Coke, 2d Inst. 532; 2 Reeve, Hist. Eng. Law, 104.

DE UNA PARTE (Lat.). A deed *de una parte* is one where only one party grants, gives, or binds himself to do a thing to another. It differs from a deed *inter partes* (*q. v.*). 2 Bouvier, Inst. n. 2001.

DE UXORE RAPTA ET ABDUCTA (Lat. of a wife ravished and carried away). A kind of writ of trespass. Fitzherbert, Nat. Brev. 89, O; 3 Sharswood, Blackst. Comm. 139.

DE VENTRE INSPICIENDO (Lat. of inspecting the belly). A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. 1 Blackstone, Comm. 456; 2 Stephen, Comm. 308; Croke Eliz. 556; Croke Jac. 685; 2 P. Will. 593; 21 Viner, Abr. 547.

It lay also where a woman sentenced to death pleaded pregnancy. 4 Blackstone, Comm. 495. This writ has been recognized in America. 2 Chandler, Am. Crim. Trials, 381.

DE VICINETO (Lat. from the neighborhood). The sheriff was anciently directed in some cases to summon a jury *de vicineto*. 3 Blackstone, Comm. 360.

DE WARRANTIA CHARTÆ (Lat. of warranty of charter). This writ lieth properly where a man doth enfeoff another by deed and bindeth himself and heirs to warranty. Now, if the defendant be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions he cannot vouch, then he shall have the writ against the feoffor or his heirs who made such warranty. Fitzherbert, Nat. Brev. 134, D; Cowel; Termes de la Ley; Blount; 3 Reeve, Hist. Eng. Law, 55.

DE WARRANTIA DIEI. A writ which lay for a party in the service of the king who was required to appear in person on a certain day, commanding the justices not to record his default, the king certifying to the fact of such service. Fitzherbert, Nat. Brev. 36.

DEACON. *In Ecclesiastical Law.* A minister or servant in the church, whose office in some churches is to assist the priest in divine service and in the distribution of the sacrament.

DEAD BODY. A corpse.

2. To take up a dead body without lawful authority, even for the purpose of dissection, is a misdemeanor, for which the offender may be indicted at common law. 1 Russell, Crimes, 414; 1 Dowl. & R. 13; Russ. & R. 366, n. b; 2 Chitty, Crim. Law, 35. This offence is punished by statute in New Hampshire, N. H. Laws, 339, 340; in Vermont, Vt. Laws, 368, c. 361; in Massachusetts, Gen. Stat. c. 165, § 37; 8 Pick. Mass. 370; 11 *id.* 350; 19 *id.* 304; in New York, 2 Rev. Stat. 688. See 1 Russ. 414, n. A. There can be no larceny of a dead body, 2 East, Pl. Cr. 652; 12 Coke, 106, but may be of the clothes or shroud upon it. 13 Pick. Mass. 402; 12 Coke, 113; Coke, 3d Inst. 110.

3. In a very recent English case, the defendant had removed, without leave, the bodies of deceased relatives from the burial-ground of a congregation of Protestant dissenters; and it was held that he was guilty of a misdemeanor at common law, and that it was no defence to such a charge that his motives were pious and laudable. 1 Dearsl. & B. Cr. Cas. 160. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the statute to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, "or unless the surviving husband or wife, or any known relative,

of the deceased person, should require the body to be interred without such examination," in order to prevent the relatives of the deceased paupers from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through, and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection, he was held not to be indictable at common law. 1 Dearsl. & B. Cr. Cas. 590.

4. The preventing a dead body from being buried is also an indictable offence. 2 Term, 734; 4 East, 460; 1 Russell, Crimes, 415, 416, note A. To inter a dead body found in a river, it seems, would render the offender liable to an indictment for a misdemeanor, unless he first sent for the coroner. 1 Keny. 250. The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325.

DEAD-BORN. A dead-born child is to be considered as if it had never been conceived or born; in other words, it is presumed it never had life, it being a maxim of the common law that *mortuus exitus non est exitus.* Coke, Litt. 29 *b.* See 2 Paige, Ch. N. Y. 35; Domat, liv. prél. t. 2, s. 1, nn. 4, 6; 4 Ves. Ch. 334.

This is also the doctrine of the civil law. Dig. 50. 16. 129. *Non nasci, et natum mori, pari sunt* (not to be born, and to be born dead, are equivalent). *Mortuus exitus non est exitus* (a dead birth is no birth). La. Civ. Code, art. 28.

DEAD FREIGHT. The amount paid by a charterer for that part of the vessel's capacity which he does not occupy although he has contracted for it.

When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is considered *dead freight.* The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chitty, Com. Law, 399; 2 Stark. 450.

DEAD LETTERS. Letters transmitted through the mails according to direction, and remaining for a specified time uncalled for by the persons addressed, are called dead letters.

By the act to amend the laws relating to the post-office department, March 3, 1863, chap. 71, the post-master-general is authorized to regulate the times at which undelivered letters shall be sent to the dead-letter office, and for their return to the writers; and to have published a list of undelivered letters —by writing, posting, or advertising—in his discretion. If advertised, it must be in the newspaper of largest circulation regularly published within the delivery. If no daily paper is published within the delivery, then the list may be advertised in the daily paper of adjoining delivery. One cent to be paid the publisher for each letter advertised. Letters addressed in a foreign language may be advertised in the journal of that language most used. Such journal must be in the same or adjoining delivery.

Dead letters containing valuables shall be registered in the department; and if they cannot be delivered to person addressed or to writer, the contents, so far as available, shall be included in receipts of department, subject to reclamation within four years; and such letters, containing valuables not available, shall be disposed of as the postmaster-general shall direct.

Foreign dead letters remain subject to treaty stipulations.

The postage on a returned dead letter is three cents, the single rate, unless it is registered as valuable, when double rates are charged.

By the act of July 1, 1864, c. 197, sect. 13, the contents of dead letters which have been registered in the department, so far as available, shall be used to promote the efficiency of the dead-letter office.

DEAD MAN'S PART. That portion of the personal estate of a person deceased which by the custom of London became the administrator's.

If the decedent left wife and children, this was one-third of the residue after deducting the widow's chamber; if only a widow, or only children, it was one-half, 1 P. Will. Ch. 341; Salk. 246; if neither widow nor children, it was the whole. 2 Show. 175. This provision was repealed by the statute 1 Jac. II. c. 17, and the same made subject to the statute of distributions. 2 Sharswood, Blackst. Comm. 5, 8.

DEAD'S PART. In Scotch Law. The part remaining over beyond the shares secured to the widow and children by law. Of this the testator had the unqualified disposal. Stair, Inst. lib. iii. tit. 4, § 24; Bell, Dict.; Paterson, Comp. §§ 674, 848, 902.

DEAD-PLEDGE. A mortgage.

DEAF AND DUMB. No definition is requisite, as the words are sufficiently known. A person deaf and dumb is *doli capax;* but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial.

2. A case occurred of a woman deaf and dumb who was charged with a crime. She was brought to the bar, and the indictment was then read to her; and the question, in the usual form, was put, Guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *simpliciter.* When the party indicted is deaf and dumb, he may, if he understands the use of signs, be arraigned, and the meaning of the clerk who addresses him conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of punishment. 14 Mass. 207; 1 Leach, Cr. Cas. (4th ed.) 102; 1 Chitty, Crim. Law, 417.

3. A person deaf and dumb may be examined as a witness, provided he can be sworn; that is, if he is capable of understanding the terms of the oath, and assents to it, and if, after he is sworn, he can convey his ideas, with or without an interpreter, to the court and jury. Phillipps, Ev. 14. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method; but, if his knowledge of that method is imperfect, he will be permitted to testify by means of signs. 1 Greenleaf, Ev. § 366.

DEAF, DUMB, AND BLIND. A man born deaf, dumb, and blind is considered an idiot (*q. v.*). 1 Blackstone, Comm. 304; Fitzherbert, Nat. Brev. 233; 2 Bouvier, Inst. n. 2111.

DEAFFOREST. In Old English Law. To discharge from being forest. To free from forest laws.

DEAN. In Ecclesiastical Law. An ecclesiastical officer, who derives his name from the fact that he presides over ten canons, or prebendaries, at least.

There are several kinds of deans, namely: deans of chapters; deans of peculiars; rural deans; deans in the colleges; honorary deans; deans of provinces.

DEAN AND CHAPTER. In Ecclesiastical Law. The council of a bishop, to assist him with their advice in the religious and also in the temporal affairs of the see. 3 Coke, 75; 1 Blackstone, Comm. 382; Coke, Litt. 103, 300; Termes de la Ley; 2 Burns, Eccl. Law, 120.

DEAN OF THE ARCHES. The presiding judge of the court of arches. He is also an assistant judge in the court of admiralty. 1 Kent, Comm. 371; 3 Stephen, Comm. 727.

DEATH. The cessation of life. The ceasing to exist.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights and as to them, is considered as dead.

A person convicted and attainted of felony and sentenced to the state prison for life is, in the state of New York, in consequence of the act of 29th of March, 1799, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead. 6 Johns. Ch. N. Y. 118; 4 *id.* 228, 260; Laws of N. Y. Sess. 24, c. 49, ss. 29, 30, 31. And a similar doctrine anciently prevailed in other cases at common law in England. See Coke, Litt. 133; 1 Sharswood, Blackst. Comm. 132, n.

Natural death is the cessation of life.

It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a *violent* death, or one caused or accelerated by the interference of human agency.

In Medical Jurisprudence. The cause, phenomena, and evidence of violent death are of importance.

2. An ingenious theory as to the cause of death has been brought forward by Philip, in his work on Sleep and Death, in which he claims that to the highest form of life three orders of functions are necessary,—viz.: the muscular, nervous, and sensorial; that of these the two former are independent of the latter, and continue in action for a while after its cessation; that they might thus continue always, but for the fact that they are dependent on the process of respiration; that this process is a voluntary act, depending upon the will, and that this latter is embraced in the sensorial function. In this view, death is the suspension or removal of the sensorial function, and that leads to the suspension of the others through the cessation of respiration. Philip, Sleep & D.; Dean, Med. Jur. 413 *et seq.*

3. *Its phenomena, or signs and indications.* Real is distinguishable from apparent death by several signs, some more conclusive than others: 1, cessation of the circulation; 2, cessation of the respiration; 3, the *facies Hippocratii*,—wrinkled brow, hollow eyes, pointed nose, hollow wrinkled temples, elevated ears, relaxed lips, sunken cheek-bones, and wrinkled and pointed chin; 4, collapsed and softened state of the eye; 5, pallor and loss of elasticity in the skin; 6, insensibility and immobility; 7, extinction of muscular irritability; 8, extinction of animal heat; 9, muscular rigidity; and, 10, the supervening of putrefaction, which depends something upon age, sex, condition of the body, and cause of death,—also upon period, place, and mode of interment. The process is increased by a high temperature, moisture, and access to air. Dean, Med. Jur. 418 *et seq*

4. *Its evidence when produced by violence.* This involves the inquiry as to the cause of death in all cases of the finding of bodies divested of life through unknown agencies. It seeks to gather all the evidence that can be furnished by the body and surrounding circumstances bearing upon this difficult and at best doubtful subject. It more immediately concerns the duties of the coroner, but is liable to come up subsequently for a more thorough and searching investigation. As this is a subject of great, general, and growing interest, no apology is deemed necessary for presenting briefly some of the points to which inquiry should be directed, together with a reference to authorities where the doctrines are more thoroughly discussed.

The first point for determination is whether the death was the act of God or the result of violence. Sudden death is generally produced by a powerful invasion of the living forces that develop themselves in the *heart*, *brain*, or *lungs*,—the first being called *syncope*, the second *apoplexy*, and the third *asphyxia*. Dean, Med. Jur. 426 *et seq.*

The two last are the most important to be understood in connection with the subject of persons found dead.

5. In *death from apoplexy*, the sudden invasion of the brain destroys innervation, by which the circulation is arrested, each side of the heart containing its due proportion of blood, and the cavities are all distended from loss of power in the heart to propel its contents. Death from apoplexy is disclosed by a certain apoplectic make or form of body, consisting of a large head, short neck, and

plethoric frame, from the posture in which the body is found, and the appearances revealed by dissection, particularly in the head.

6. *Death by asphyxia* is still more important to be understood. It is limited to cases where the heart's action is made to cease through the interruption of the respiration. It is accomplished by all the possible modes of excluding atmospheric air from the lungs. The appearances in the body indicating death from asphyxia are, violet discolorations, eyes prominent, firm, and brilliant, cadaveric rigidity early and well marked, venous system of the brain full of blood, lungs distended with thick dark-colored blood, liver, spleen, and kidneys gorged, right cavities of the heart distended, left almost empty.

Many indications as to whether the death is the act of God or the result of violence may be gathered from the position and circumstances in which the body is found. As thorough an examination as possible should be first made of the body before changing its position or that of any of the limbs or varying in any respect its relations with surrounding bodies. This is more necessary if the death has been apparently caused by wounds. Then the wounds require a special examination before any change is made in position, in order from their nature, character, form, and appearance to determine the instrument by which they were inflicted, and also their agency in causing the death. Their relations with external objects may indicate the direction from which they were dealt, and, if incised, their extent, depth, vessels severed, and hæmorrhage produced may be conclusive as to the cause of death.

7. A thorough examination should be made of the clothes worn by the deceased, and any parts torn or presenting any unusual appearance should be carefully noted. A list should be made of all articles found on the body, and of their state and condition. The body itself should undergo a very careful examination. This should have reference to the color of the skin, the temperature of the body, the existence and extent of the cadaveric rigidity of the muscular system, the state of the eyes and of the sphincter muscles, noting at the same time whatever swellings, ecchymosis, or livid, black, or yellow spots, wounds, ulcers, contusions, fractures, or luxation, may be present. The fluids that have exuded from the nose, mouth, ears, sexual organs, etc. should be carefully examined; and when the deceased is a female it will be proper to examine the sexual organs with care, with a view of ascertaining whether before death the crime of rape had or had not been committed.

8. Another point to which the attention should be directed is the state of the body in reference to the extent and amount of decomposition that may have taken place in it, with the view of determining when the death took place. This is sometimes important to identify the murderer. The period after death at which putrefaction supervenes became a subject of judicial examination in Desha's case, reported in Dean's Med. Jur. 423 *et seq.*, and more fully in 2 Beck's Med. Jur. 44 *et seq.* Another interesting inquiry, where persons are found drowned, is presented in the inquiry as to the existence of *adipocere*, a compound of wax and fat of a yellowish-white color, which is formed in bodies immersed in water in from four to eight weeks from the cessation of life. Taylor Med. Jur., Hartshorn ed. 542.

9. Another point towards which it is proper to direct examination regards the situation and condition of the place where the body is found, with the view of determining two facts:—*first*, whether it be a case of homicide, suicide, or visitation of God; and, *second*, whether, if one of homicide, the murder occurred there or at some other place, the body having been brought there and left. The points to be noted here are whether the ground appears to have been disturbed from its natural condition; whether there are any, and what, indications of a struggle; whether there are any marks of footsteps, and, if any, their size, number, the direction to which they lead, and whence they came; whether any traces of blood or hair can be found; and whether any, or what, instruments or weapons, which could have caused death, are found in the vicinity; and all such instruments should be carefully preserved, so that they may be identified. Dean, Med. Jur. 257; 2 Beck, Med. Jur. 107, n., 136, 250.

As the decision of the question relating to the cause of death is often important and difficult to determine, it may be proper to notice some of its signs and indications in a few of the most prominent cases where it is induced by violence.

10. *Death by drowning* is caused by asphyxia from suffocation, by nervous or syncopal asphyxia, or by asphyxia from cerebral congestion.

In the first, besides other indications of asphyxia, the face is pale or violet, a frothy foam at the mouth, froth in the larynx, trachea, and bronchi, water in the trachea and sometimes, in the ramifications of the bronchia, and also in the stomach. In the second, the face and skin are pale, the trachea empty, lungs and brain natural, no water in the stomach. In the third, the usual indications of death by apoplexy are found on examination of the brain.

11. *Death by hanging* is produced by asphyxia suspending respiration by compressing the larynx, by apoplexy pressing upon the veins and preventing the return of blood from the head, by fracture of the cervical vertebræ, laceration of trachea or larynx, or rupture of the ligaments of the neck, or by compressing the nerves of the neck. The signs and indications depend upon the cause of death. Among these are, face livid and swollen, lips distorted, eyelids swollen, eyes red and projecting, tongue enlarged, livid, compressed, froth about the lips and nostrils, a deep ecchymosed mark of the cord about

the neck, sometimes ecchymosed patches on different parts of the body, fingers contracted or clenched, and the body retaining its animal heat longer than in other modes of death.

12. *Death by strangulation* presents much the same appearances, the mark of the cord being lower down on the neck, more horizontal, and plainer and more distinctly ecchymosed.

Death by cold leaves few traces in the system. Pale surface, general congestion of internal organs, sometimes effused serum in the ventricles of the brain.

Death by burning presents a narrow white line surrounding the burnt spot; external to that, one of a deep-red tint, running by degrees into a diffused redness. This is succeeded in a few minutes by blisters filled with serum.

13. *Death by lightning* usually exhibits a contused or lacerated wound where the electric fluid entered and passed out. Sometimes an extensive ecchymosis appears,—more commonly on the back, along the course of the spinal marrow.

Death by starvation produces general emaciation; eyes and cheeks sunken; bones projecting; face pale and ghastly; eyes red and open; skin, mouth, and fauces dry; stomach and intestines empty; gall-bladder large and distended; body exhaling a fetid odor; heart, lungs, and large vessels collapsed; early commencement of the putrefactive process. These and all other questions relating to persons found dead will be found fully discussed in works on medical jurisprudence.

14. The Legal Consequences of.

Persons who have been once shown to have been in life are presumed thus to continue until the contrary is shown: so that it lies on the party asserting the death to make proof of it. 2 East, 312; 2 Rolle, 461.

But proof of a long-continued absence unheard from and unexplained will lay a foundation for presumption of death. Various periods of time are found in the adjudged cases. Thus, such presumption arises after twenty-seven years. 3 Brown, C. C. 510. So, also, twenty years, sixteen years, 5 Ves. Ch. 458; fourteen years, 3 Serg. & R. Penn. 390; twelve years. 18 Johns. N. Y. 141. The general rule, as now understood, is that the presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living. 1 Phillipps, Ev. Cowen & H. ed. 197; 2 Cowen & H. Notes, 489; 1 Greenleaf, Ev. § 41; 5 Johns. Ch. N. Y. 263; 5 Barnew. & Ald. 86. It seems that such continued absence for seven years from the particular state of his residence, without showing an absence from the United States, is sufficient. 10 Pick. Mass. 515; 1 Rawle, Penn. 373; 1 A. K. Marsh. Ky. 278; 1 Penn. N. J. 167; 2 Bay, So. C. 476.

15. Questions of great doubt and difficulty have arisen where several persons, respectively entitled to inherit from one another, happen to perish all together by the same event, such as a shipwreck, a battle, or a conflagration, without any possibility of ascertaining who died first. In such cases the French civil code and the civil code of Louisiana lay down rules (the latter copying from the former) which are deduced from the probabilities resulting from the strength, age, and difference of sex of the parties.

If those thus perishing together were under fifteen, the eldest shall be presumed the survivor. If they were all above sixty, the youngest shall be presumed the survivor. If some were under fifteen and others above sixty, the former shall be presumed the survivors. If those who have perished together had completed the age of fifteen and were under sixty, the male shall be presumed the survivor where the ages are equal or the difference does not exceed one year. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature; and thus the younger must be presumed to have survived the elder. French Civil Code, art. 720, 721, 722; La. Civ. Code, art. 930, 931, 932, 933.

16. The English common law has never adopted these provisions, or gone into the refinement of reasoning upon which they are based. It requires the survivorship of two or more to be proved by facts, and not by any settled legal rule or prescribed presumption. In some of the cases that have arisen involving this bare question of survivorship, the court have advised a compromise, denying that there was any legal principle upon which it could be decided. In others the decision has been that they all died together, and that none could transmit rights to others. 1 W. Blackst. 640; Fearne, Posth. Works, 38, 39; 2 Phill. 261, 266; Croke Eliz. 503; 1 Metc. Mass. 308; 3 Hagg. Eccl. 748; 5 Barnew. & Ad. 91; 1 Younge & C. Ch. 121; 1 Curt. C. C. 405, 429.

17. *As to contracts.* These are, in general, not affected by the death of either party. The executors or administrators of the decedent are required to fulfil all his engagements, and may enforce all those in his favor. But to this rule there are the following exceptions, in which the contracts are terminated by the death of one of the parties:—

The contract of marriage. See MARRIAGE.

The contract of partnership. See PARTNERSHIP.

18. Those contracts which are altogether personal: as, where the deceased had agreed to accompany the other party to the contract on a journey, or to serve another, Pothier, Obl. c. 7, art. 3, §§ 2, 3, or to instruct an apprentice. Bacon, Abr. *Executor*, P; 1 Burn, Eccl. Law, 82; Hammond, Partn. 157; 1 Rawle, Penn. 61; also an instance of this species of contract in 2 Barnew. & Ad. 303. In all those cases where one is acting for another and by his authority, such as agencies and powers of attorney, where the agency or power is not coupled with an interest, the death of the party works an immediate revocation. Wherever any express or implied authority is being exercised by another, the death of

the party giving it is a revocation. 30 Vt. 11.

As to torts. In general, when the tort feasor or the party injured dies, the cause of action dies with him; but when the deceased might have waived the tort and maintained assumpsit against the defendant, his personal representative may do the same thing. See ACTIO PERSONALIS MORITUR CUM PERSONA, where this subject is more fully examined. When a person accused and guilty of crime dies before trial, no proceedings can be had against his representatives or his estate.

19. *As to inheritance.* By the death of a person seised of real estate or possessed of personal property, his property real and personal, after satisfying his debts, vests, when he has made a will, as he has directed by that instrument; but if he dies intestate, his real estate goes to his heirs at law under the statute of descents, and his personal to his administrators, to be distributed to the next of kin, under the statute of distributions.

In suits. The death of a defendant discharges the special bail, Tidd, Pract. 243; but when he dies after the return of the *ca. sa.* and before it is filed, the bail are fixed. 6 Term, 284; 5 Binn. Penn. 332, 338; 2 Mass. 485; 12 Wheat. 604; 4 Johns. N. Y. 407; 4 N. H. 29.

DEATH-BED DEED. A deed made by one who was at the time sick of a disease from which he afterwards died. Bell, Dict.

DEATH'S PART. See DEAD'S PART; DEAD MAN'S PART.

DEBENTURE. A certificate given, in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties arising on the importation of the said merchandise shall have been discharged prior to the time aforesaid. See Act of Congr. March 2, 1799, s. 80; Encyclopédie; Dane, Abr. Index.

DEBET ET DETINET (Lat. he owes and withholds). **In Pleading.** An action of *debt* is said to be in the *debet et detinet* when it is alleged that the defendant owes and unjustly withholds or detains the debt or thing in question.

The action is so brought between the contracting parties. See DETINET.

DEBET ET SOLET (Lat. he owes and is used to). Where a man sues in a writ of right or to recover any right of which he is for the first time disseised, as of a suit at a mill or in case of a writ of *quod permittat*, he brings his writ in the *debet et solet*. Reg. Orig. 144 *a;* Termes de la Ley; Fitzherbert, Nat. Brev. 122, M.

DEBIT. A term used in book-keeping, to express the left-hand page of the ledger, to which are carried all the articles supplied or paid on the subject of an account, or that are charged to that account. It also signifies the balance of an account.

DEBITA FUNDI (Lat.). **In Scotch Law.** Debts secured on land. Bell, Dict.

DEBITA LAICORUM (Lat.). Debts of the laity. Those which may be recovered in civil courts.

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO (Lat.). An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period.

On such a debt an action may be brought. 13 Pet. 494; 11 Mass. 270.

DEBT (Lat. *debere*, to owe; *debitum*, something owed). **In Contracts.** A sum of money due by certain and express agreement. 3 Blackstone, Comm. 154.

All that is due a man under any form of obligation or promise. 3 Metc. Mass. 522.

Any claim for money. Penn. Stat. March 21, 1806, § 5.

Active debt. One due to a person. Used in the civil law.

Doubtful debt. One of which the payment is uncertain. *Clef des Lois Romaines.*

Hypothecary debt. One which is a lien upon an estate.

Judgment debt. One which is evidenced by matter of record.

Liquid debt. One which is immediately and unconditionally due.

Passive debt. One which a person owes.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

The privilege may result from the *character* of the *creditor*, as where a debt is due to the United States; or the *nature* of the *debt*, as funeral expenses, etc. See PREFERENCE; PRIVILEGE; LIEN; PRIORITY; DISTRIBUTION.

2. A debt may be evidenced by matter of record, by a contract under seal, or by a simple contract. The distinguishing and necessary feature is that a fixed and specific quantity is owing and no future valuation is required to settle it. 3 Blackstone, Comm. 154; 2 Hill, N. Y. 220.

Debts are discharged in various ways, but principally by payment. See ACCORD AND SATISFACTION; BANKRUPTCY; COMPENSATION; CONFUSION; DEFEASANCE; DELEGATION; DISCHARGE OF A CONTRACT; EXTINCTION; EXTINGUISHMENT; FORMER RECOVERY; LAPSE OF TIME; NOVATION; PAYMENT; RELEASE; RESCISSION; SET-OFF.

In Practice. A form of action which lies to recover a sum certain. 2 Greenleaf, Ev. § 279.

It lies wherever the sum due is certain or ascertained in such a manner as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or is evidenced. 3 Sneed, Tenn. 145; 1 Dutch. N. J. 506; 26 Miss. 521; 3 McLean, C. C. 150; 2 A. K. Marsh. Ky. 264; 1 Mas. C. C. 243.

It is thus distinguished from *assumpsit*, which lies as well where the sum due is uncertain as where it is certain, and from *covenant*, which lies only upon contracts evidenced in a certain manner.

It is said to lie in the *debet* and *detinet* (when it is stated that the defendant owes and detains) or in the *detinet* (when it is stated merely that he detains).

Debt in the *detinet* for goods differs from detinue, because it is not essential in this action, as in detinue, that the specific property in the goods should have been vested in the plaintiff at the time the action is brought. Dy. 24 *b*.

It is used for the recovery of a debt *eo nomine* and *in numero*; though damages, which are in most instances merely nominal, are usually awarded for the detention. 1 H. Blackst. 550; Cowp. 588.

3. The action lies in the debet and detinet to recover money due, on a record or a judgment of a court of record, Salk. 109; 17 Serg. & R. Penn. 1; 27 Vt. 20; 10 Tex. 24; 21 Vt. 569; 1 Dev. No. C. 378; 1 Conn. 402, although a foreign court, 18 Ohio, 430; 3 Brev. So. C. 395; 15 Me. 167; 2 Ala. 85; 1 Blackf. Ind. 16; 3 J. J. Marsh. Ky. 600; 12 Me. 94; see 6 How. 44, or *statutes* at the suit of the party aggrieved, 15 Ill. 39; 22 N. H. 234; 11 Ala. N. s. 346; 15 *id.* 452; 11 Ohio, 130; 14 *id.* 486; 10 Watts, 382; 1 Scamm. Ill. 290; 2 McLean, C. C. 195; 8 Pick. Mass. 514, or a common informer, 2 Cal. 243; 16 Ala. N. s. 214; 8 Leigh, Va. 479, including awards by a statutory commission, 11 Cush. Mass. 429: on *specialties*, 1 Term, 40; 9 Mo. 218; 7 Ala. 772; 14 *id.* 395; 3 Ill. 14; 3 T. B. Monr. Ky. 204; 5 Gill, Md. 103; 3 Gratt. Va. 350; 12 *id.* 520; 32 N. H. 446; 16 Ill. 79; 10 Humphr. Tenn. 367, including a recognizance, 1 Hempst. C. C. 290; 21 Conn. 81; 8 Blackf. Ind. 527; 26 Me. 209; see 15 Ill. 221; 6 Cush. Mass. 138; 30 Ala. N. s. 68: on *simple contracts*, whether express, 26 Miss. 521; 17 Ala. N. s. 634; 1 Humphr. Tenn. 480, although the contract might have been discharged on or before the day of payment in articles of merchandise, 4 Yerg. Tenn. 171, or implied, Buller, Nisi P. 167; 18 Pick. Mass. 229; 10 Yerg. Tenn. 452; 28 Me. 215; 31 *id.* 314; 1 Hempst. C. C. 181; 14 N. H. 414, to recover a specific reward offered. 1 N. J. 310.

4. It lies in the detinet for goods, Dy. 24 *b*; 1 Hempst. C. C. 290; 3 Mo. 21; Hard. Ky. 508; and by an executor for money due the testator, 1 Wms. Saund. 1; 4 Maule & S. 120; see 10 B. Monr. Ky. 247; 7 Leigh, Va. 604; or against him on the testator's contracts. 8 Wheat. 642. The *declaration*, when the action is founded on a *record*, need not aver consideration. When it is founded on a *specialty*, it must contain the specialty, 11 Serg. & R. Penn. 238, but need not aver consideration, 16 Ill. 79; but when the action is for rent, the deed need not be declared on. 14 N. H. 414. When it is founded on a simple contract, the consideration must be averred; and a liability or agreement, though not necessarily an express promise to pay, must be stated. 2 Term, 28, 30.

5. The *plea* of *nil debet* is the general issue when the action is on a simple contract, on statutes, or where a specialty is matter of inducement merely. 2 Mass. 521; 5 *id.* 266; 11 Johns. N. Y. 474; 13 Ill. 619; 6 Ark. 250; 18 Vt. 241; 3 McLean, C. C. 163; 15 Ohio, 372; 8 N. H. 22; 33 Me. 268; 1 Ind. 146; 23 Miss. 233. *Non est factum* is the common plea when on specialty, denying the execution of the instrument, 2 Ld. Raym. 1500; 2 Iowa, 320; 4 Strobh. So. C. 38; 5 Barb. N. Y. 449; 8 Penn. St. 467; 7 Blackf. Ind. 514; 3 Mo. 79; and *nul tiel record* when on a record, denying the existence of the record. 16 Johns. N. Y. 55; 23 Wend. N. Y. 293. As to the rule when the judgment is one of another state, see 33 Me. 268; 3 J. J. Marsh. Ky. 600; 7 Cranch, 481; 4 Vt. 58; 1 Penn. 499; 2 South. So. C. 778; 2 Ill. 2; 2 Leigh, Va. 172; as well as the titles FOREIGN JUDGMENT, CONFLICT OF LAWS. Other matters must, in general, be pleaded specially. 1 Ind. 174.

The *judgment* is, generally, that the plaintiff receive his debt and costs when for the plaintiff, and that the defendant receive his costs when for the defendant. 20 Ill. 120; 1 Iowa, 99; 4 How. Miss. 40; 3 Penn. St. 437. See 8 Serg. & R. Penn. 263; 9 *id.* 156. See JUDGMENT.

DEBTEE. One to whom a debt is due; a creditor: as, debtee executor. 3 Blackstone, Comm. 18.

DEBTOR. One who owes a debt; he who may be constrained to pay what he owes.

DECANATUS, DECANIA, DECANA (Lat.). A town or tithing, consisting originally of ten families of freeholders. Ten tithings compose a hundred. 1 Blackstone, Comm. 114.

Decanatus, a deanery, a company of ten. Spelman, Gloss.; Calvinus, Lex.

Decania, Decana, the territory under the charge of a dean.

DECANUS (Lat.). A dean; an officer having charge of ten persons. In Constantinople, an officer who has charge of the burial of the dead. Nov. Jus. 43. 59; DuCange. The term is of extensive use, being found with closely related meanings in the old Roman, the civil, ecclesiastical, and old European law. It is used of civil and ecclesiastical as well as military affairs. There were a variety of *decani*.

Decanus monasticus, the dean of a monastery.

Decanus in majori ecclesia, dean of a cathedral church.

Decanus militaris, a military captain of ten soldiers.

Decanus episcopi, a dean presiding over ten parishes.

Decanus friborgi, dean of a fribourg, tithing, or association of ten inhabitants. A Saxon officer, whose duties were those of an inferior judicial officer. DuCange; Spelman, Gloss.; Calvinus, Lex.

DECAPITATION (Lat. *de*, from, *caput*, a head). The punishment of putting a person to death by taking off his head.

DECEDENT. A deceased person.

The signification of the word has become more extended than its strict etymological meaning. Strictly taken, it denotes a dying person, but is always used in the more extended sense given, denoting any deceased person, testate or intestate.

DECEIT. A fraudulent misrepresentation or contrivance, by which one man de-

ceives another, who has no means of detecting the fraud, to the injury and damage of the latter.

2. Fraud, or the intention to deceive, is the very essence of this injury; for if the party misrepresenting was himself mistaken, no blame can attach to him. The representation must be made *malo animo;* but whether or not the party is himself to gain by it is wholly immaterial.

It may be by the deliberate assertion of a falsehood to the injury of another, by failure to disclose a latent defect, or by concealing an apparent defect. See CAVEAT EMPTOR.

The party deceived must have been in a situation such as to have no means of detecting the deceit.

3. The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and, this being a perversion of law to an evil purpose and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. See Brooke, Abr. *Disceit;* Viner, Abr. *Disceit.*

When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy. See, generally, 2 Bouvier, Inst. nn. 2321–2329; Skin. 119; Sid. 375; 3 Term, 52–65; 1 Lev. 247; 1 Strange, 583; 1 Rolle, Abr. 106; Comyns, Dig. *Action upon the Case for a Deceit, Chancery* (3 F 1, 2), (3 M 1), (3 N 1), (4 D 3), (4 H 4), (4 L 1), (4 O 2), *Covin, Justices of the Peace* (B 30), *Pleader* (2 H); 1 Viner, Abr. 560; 8 *id.* 490; *Doctrina Plac.* 51; Dane, Abr. Index; 1 Chitty, Pract. 832; Hammond, Nisi P. c. 2, s. 4; Ayliffe, Pand. 99; 2 Day, Conn. 205, 531; 12 Mass. 20; 3 Johns. N. Y. 269; 6 *id.* 181; 18 *id.* 395; 4 Yeates, Penn. 522; 11 Serg. & R. Penn. 309; 7 Penn. St. 296; 4 Bibb, Ky. 91; 1 Nott & M'C. So. C. 97.

DECEM TALES (Lat. ten such). **In Practice.** A writ requiring the sheriff to appoint ten like men (*apponere decem tales*), to make up a full jury when a sufficient number do not appear.

DECEMVIRI LITIBUS JUDICANDIS. Ten judges (five being senators and five knights), appointed by Augustus to act as judges in certain cases. Calvinus, Lex.; Anthon, Rom. Ant.

DECENNARIUS (Lat.). One who held one-half a virgate of land. DuCange. One of the ten freeholders in a *decennary.* DuCange; Calvinus, Lex.

Decennier. One of the *decennarii*, or ten freeholders making up a tithing. Spelman, Gloss.; DuCange, *Decenna;* 1 Blackstone, Comm. 114. See DECANUS.

DECENNARY (Lat. *decem*, ten). A district originally containing ten men with their families.

King Alfred, for the better preservation of the peace, divided England into counties, the counties into hundreds, and the hundreds into tithings or decennaries: the inhabitants whereof, living together, were sureties or pledges for each other's good behaviour. One of the principal men of the latter number presided over the rest, and was called the chief pledge, borsholder, borrow's elder, or tything-man.

DECIES TANTUM (Lat.). An obsolete writ, which formerly lay against a juror who had taken money for giving his verdict. Called so, because it was sued out to recover from him ten times as much as he took.

DECIMÆ (Lat.). The tenth part of the annual profit of each living, payable formerly to the pope. There were several valuations made of these livings at different times. The *decimæ* (tenths) were appropriated to the crown, and a new valuation established, by 26 Hen. VIII. c. 3. 1 Sharswood, Blackst. Comm. 284.

DECIME. A French coin, of the value of the tenth part of a franc, or nearly two cents.

DECISION. **In Practice.** A judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. See Inst. 1. 2. 8; Dig. 1. 2. 2.

DECLARANT One who makes a declaration.

DECLARATION. **In Pleading.** A specification, in a methodical and logical form, of the circumstances which constitute the plaintiff's cause of action. 1 Chitty, Plead. 248; Coke, Litt. 17 *a*, 303 *a;* Bacon, Abr. *Pleas* (B); Comyns, Dig. *Pleader*, C 7; Lawes, Plead. 35; Stephen, Plead. 36; 6 Serg. & R. Penn. 28.

In real actions, it is most properly called the *count;* in a personal one, the declaration. Stephen, Plead. 36; *Doctrina Plac.* 83; Lawes, Plead. 33. See Fitzherbert, Nat. Brev. 16 *a*, 60 *d.* The latter, however, is now the general term,—being that commonly used when referring to real and personal actions without distinction. 3 Bouvier, Inst. n. 2815.

In an action at law, the declaration answers to the bill in chancery, the libel (*narratio*) of the civilians, and the allegation of the ecclesiastical courts.

2. It may be *general* or *special:* for example, in debt on a bond, a declaration counting on the penal part only is *general;* one which sets out both the bond and the condition and assigns the breach is *special.* Gould, Plead. c. 4, § 50.

3. The *parts* of a declaration are the *title* of the court and term; the venue, see VENUE; the *commencement*, which contains a statement of the names of the parties and the character in which they appear, whether in their own right, the right of another, in a political capacity, etc., the mode in which the defendant has been brought into court, and a brief recital of the form of action to be proceeded in, 1 Saund. 318, n. 3, 111; 6 Term, 130; the *statement* of the cause of action, which varies with the facts of the case and the nature of the action to be brought, and which may be made by means of one or of several counts, 3 Wils. 185; 2 Bay, So. C.

206, see COUNT; the *conclusion*, which in personal and mixed actions should be to the damage (*ad damnum*, which title see) of the plaintiff, Comyns, Dig. *Pleader* (C 84); 10 Coke, 116 *b*, 117 *a*; 1 Maule & S. 236, unless in *scire facias* and in penal actions at the suit of a common informer, but which need not repeat the capacity of the plaintiff, 5 Binn. Penn. 16, 21; the *profert* of letters testamentary in case of a suit by an executor or administrator, Bacon, Abr. *Executor* (C); Dougl. 5, n.; 1 Day, Conn. 305; and the *pledges of prosecution*, which are generally disused, and, when found, are only the fictitious persons John Doe and Richard Roe.

4. The *requisites* or *qualities* of a declaration are that it must correspond with the process; and a variance in this respect was formerly the subject of a plea in abatement, see ABATEMENT; it must contain a statement of all the facts necessary in point of law to sustain the action, and no more. Coke, Litt. 303 *a*; Plowd. 84, 122. See 2 Mass. 363; Cowp. 682; 6 East, 422; 5 Term, 623; Viner, Abr. *Declaration*.

5. The circumstances must be stated with certainty and truth as to *parties*, 3 Caines, N. Y. 170; 1 Penn. St. 75; 10 Serg. & R. Penn. 267; 6 Rich. So. C. 390; 8 Tex. 109; 4 Munf. Va. 430; 6 *id.* 219; 1 Wash. C. C. 372; *time* of occurrence, and in personal actions it must, in general, state a time when every material or traversable fact happened, 36 N. H. 252; 3 Ind. 484; 3 Zabr. N. J. 309; 3 McLean, C. C. 96; see 15 Barb. N. Y. 550; and when a venue is necessary, time must also be mentioned, 5 Term, 620; Comyns, Dig. *Pleader* (C 19); Plowd. 24; 14 East, 390; 5 Barb. N. Y. 375; 4 Den. N. Y. 80, though the precise time is not material, 2 Dall. Penn. 346; 3 Johns. N. Y. 43; 13 *id.* 253; 25 Ala. N. S. 469, unless it constitute a material part of the contract declared upon, or where the date, etc. of a written contract or record is averred, 4 Term, 590; 10 Mod. 313; 2 Campb. 307, 308, n.; 36 N. H. 252; 3 Zabr. N. J. 309; or in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued, 2 East, 257; 1 Johns. Cas. N. Y. 283; the place, see VENUE; and, generally, as to particulars of the demand, sufficient to enable the defendant to ascertain precisely the plaintiff's claim. 13 East, 102; 7 Taunt. 642; F. Moore, 467; 2 Bos. & P. 265; 2 Saund. 74 *b*; 12 Ala. N. S. 567; 2 Barb. N. Y. 643; 35 N. H. 530; 32 Miss. 17; 1 Rich. So. C. 493.

In Evidence. A statement made by a party to a transaction, or by one having an interest in the existence of some fact in relation to the same.

6. Such declarations are regarded as original evidence and admissible as such—*first*, when the fact that the declaration was made is the point in question, 4 Mass. 702; 5 *id.* 444; 9 Johns. N. Y. 45; 11 Wend. N. Y. 110; 1 Conn. 387; 2 Campb. 511; 2 Barnew. & Ad. 845 1 Mood. & R. 2, 8; 9 Bingh. 359; see 1 Phillipps, Ev. 188; 4 Bingh. N. C. 489; 1 Brod. & B. 269; *second*, including expressions of bodily feeling, where the existence or nature of such feelings is the object of inquiry, as expressions of affection in actions for crim. con., 2 Stark. 191; 1 Barnew. & Ald. 90; 8 Watts, Penn. 355; see 4 Esp. 39; 2 Carr. & P. 22; 7 *id.* 198, representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring, 6 East, 188; 4 M'Cord, So. C. 38; 8 Watts, Penn. 355; see 9 Carr. & P. 275; 7 Cush. Mass. 581; 30 Ala. N. S. 562; 23 Ga. 17; 27 Mo. 279; 30 Vt. 377, in prosecutions for rape, the declarations of the woman forced, 1 Russell, Crimes, 565; 2 Stark. 241; 18 Ohio, 99; *third*, in cases of pedigree, including the declarations of deceased persons nearly related to the parties in question, Cowp. 591; 13 Ves. Ch. 140, 514; 2 Bingh. 86; 3 Russ. & M. 147; 2 Carr. & K. 701; 1 Crompt. M. & R. Exch. 919; 1 De Gex & S. 40; 1 How. 231; 4 Rand. Va. 607; 3 Dev. & B. No. C. 91; 18 Johns. N. Y. 37; 2 Conn. 347; 4 N. H. 371, family records, 4 Campb. 401; 8 Barnew. & C. 813; 5 Clark & F. Hou. L. 24; 11 *id.* 85; 7 Scott, N. R. 141; 2 Dall. Penn. 116; 1 Penn St. 381; 8 Johns. N. Y. 128; and see 11 East, 503; 13 Ves. Ch. 514; 1 Pet. 328; 5 Serg. & R. Penn. 251; 4 Mas. C. C. 268; *fourth*, cases where the declaration may be considered as a part of the *res gestæ*, 36 N. H. 167, 353; 16 Tex. 74; 6 Fla. 13; 41 Me. 149, 432; 20 Ga. 452, including those made by persons in the possession of land, 4 Taunt. 6, 7; 5 Barnew. & Ad. 223; 9 Bingh. 41; 1 Campb. 361; 1 Bingh. N. C. 430; 8 Q. B. 243; 16 Mees. & W. Exch. 497; 2 Pick. Mass. 536; 5 Metc. Mass. 223; 7 Conn. 319; 17 *id.* 539; 1 Watts, Penn. 152; 4 Serg. & R. Penn. 174; 2 M'Cord, So. C. 241; 2 Me. 242; 16 *id.* 27; 2 N. H. 287; 14 *id.* 19; 15 *id.* 546; 1 Ired. No. C. 482; 10 Ala. N. S. 355; 6 Hill, N. Y. 405; 30 Vt. 29; 19 Ill. 31; 30 Miss. 589; see 33 Penn. St. 411; 27 Mo. 220; 28 Ala. N. S. 236; 4 Iowa, 524; 9 Ind. 323, and entries made by those whose duty it was to make such entries. See 1 Greenleaf, Ev. §§ 115–123; 1 Smith, Lead. Cas. Hare & W. ed. 142.

7. Declarations regarded as secondary evidence or hearsay are yet admitted in some cases: *first*, in matters of general and public interest, common reputation being admissible as to matters of public interest, 14 East, 329, n.; 1 Maule & S. 686; 4 Campb. 416; 6 Mees. & W. Exch. 234; 19 Conn. 250, but reputation amongst those only connected with the place or business in question, in regard to matters of general interest merely, 1 Crompt. M. & R. Exch. 929; 2 Barnew. & Ad. 245; and the matter must be of a *quasi* public nature, 1 East, 357; 14 *id.* 329, n.; 5 Term, 121; 10 Barnew. & C. 657; 3 Campb. 288; 1 Maule & S. 77; 2 *id.* 494; 1 Taunt. 261; 1 Mood. & M. 416; 10 Pet. 412; 16 La. 296; see REPUTATION; *second*, in cases of ancient possession where ancient documents are admitted, if found in a place in which and under the care of persons with whom such papers

might reasonably be expected to be found, 2 Bingh. N. C. 183; 4 Dow, Parl. Cas. 297; 12 Mees. & W. Exch. 205; 8 Q. B. 158; 11 *id.* 884; 1 Price, Exch. 225; 2 *id.* 303; 5 *id.* 312; 4 Wheat. 213; 5 Pet. 319; 9 *id.* 663; 5 Cow. N. Y. 221; 7 Wend. N. Y. 371; 2 Nott. & M'C. So. C. 55, 400; 4 Pick. Mass. 160, if they purport to be a part of the transaction to which they relate, 1 Greenleaf, Ev. § 144; *third*, in case of declarations and entries made against the interest of the party making them, whether made concurrently with the act or subsequently, 1 Taunt. 141; 3 *id.* 303; 4 *id.* 16; 1 Campb. 367; 3 *id.* 457; 2 Term, 53; 3 Brod. & B. 132; 3 Barnew. & Ad. 893; and see 1 Phillipps, Ev. 293; Gresley, Eq. Ev. 221; but such declarations and entries, to be so admitted, must appear or be shown to be against the pecuniary interest of the party making them, 1 Carr. & P. 276; 11 Clark & F. Hou. L. 85; 10 East, 109; 2 Jac. & W. Ch. 789; 3 Bingh. N. C. 308, 320; *fourth*, dying declarations.

8. Dying declarations, made in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations, are admissible, 2 Barnew. & C. 605; 1 Leach, Cr. Cas. 267, 378; 2 Mood. & R. 53; 2 Johns. N. Y. 31, 35; 15 *id.* 286; 1 Meigs, Tenn. 265; 4 Miss. 655; see 4 Carr. & P. 233, if made under a sense of impending death. 2 Leach, Cr. Cas. 563; 6 Carr. & P. 386, 631; 7 *id.* 187; 1 Mood. Cr. Cas. 97; 2 *id.* 135; 5 Cox, Cr. Cas. 318; 11 Ohio, 424; 2 Ark. 229; 3 Cush. Mass. 181; 9 Humphr. Tenn. 9, 24. And see 3 Carr. & P. 269; 6 *id.* 386; 2 Va. Cas. 78, 111; 3 Leigh, Va. 786; 1 Hawks, Tenn. 442. The declaration may have been made by signs, 1 Greenleaf, Ev. § 161 *b*, and in answer to questions. 7 Carr. & P. 238; 2 Leach, Cr. Cas. 563; 3 Leigh, Va. 758. The substance only need be given by the witness, 11 Ohio, 424; 8 Blackf. Ind. 101; but the declaration must have been complete, 3 Leigh, Va. 786, and the circumstances under which it was made must be shown to the court. 1 Stark. 521; 3 Carr. & P. 629; 6 *id.* 386; 7 *id.* 187; 1 Hawks, No. C. 444; 2 Ashm. Penn. 41, 69; 2 Gratt. Va. 594; 16 Miss. 401; 2 Hill, So. C. 619.

9. Declarations, to be admissible as original evidence, must have been made at the time of doing the act to which they relate. 3 Conn. 250; 19 *id.* 250; 16 Miss. 722; 9 Paige, Ch. N. Y. 611; 3 Ga. 513; 23 *id.* 193; 8 Metc. Mass. 436; 13 *id.* 237, 544; 6 Me. 266; 34 *id.* 310; 8 N. H. 40; 36 *id.* 353; 14 Serg. & R. Penn. 275; 8 Watts, Penn. 479; 5 Term, 512; 2 Bingh. 99; 9 *id.* 349; 1 Barnew. & Ad. 135. And see 1 Metc. Mass. 242; 3 *id.* 199; 4 Fla. 104; 3 Humphr. Tenn. 315; 24 Vt. 363; 21 Conn. 101. For cases of entries in books, see 1 Binn. Penn. 234; 8 Watts, Penn. 544; 4 Serg. & R. Penn. 3, 5; 9 *id.* 285; 13 Mass. 427.

In order to their admission as secondary evidence, the declarant must be dead, 11 Price, Exch. 162; 1 Carr. & K. 58; 12 Vt. 178; and the declaration must have been made before any controversy arose. 13 Ves. Ch. 514; 3 Campb. 444; 4 *id.* 401; 10 Barnew. & C. 657; 4 Maule & S. 486; 1 Pet. 328. It must also appear that the declarant was in a condition or situation to know the facts, or that it was his duty to know them. 2 Jac. & W. Ch. 464; 10 East, 109; 15 *id.* 32; 9 Barnew & C. 935; 10 *id.* 317; 4 Q. B. 137; 2 Smith, Lead. Cas. Hare & W. ed. 193, n.

10. The declarations of an agent respecting a subject-matter, with regard to which he represents the principal, bind the principal, Story, Ag. §§ 134–137; 1 Phillipps, Ev. 381; 2 Q. B. 212; 3 Harr. N. J. 299; 20 N. H. 165; 31 Ala. N. S. 33; 6 Gray, Mass. 450, if made during the continuance of the agency with regard to a transaction then pending, 8 Bingh. 451; 10 Ves. Ch. 123; 4 Taunt. 519; 5 Wheat. 336; 6 Watts, Penn. 487; 8 *id.* 39; 14 N. H. 101; 4 Cush. Mass. 93; 30 Vt. 29; 11 Rich. So. C. 367; 24 Ga. 211; 31 Ala. N. S. 33; 7 Gray, Mass. 92, 345; 4 E. D. Smith, N. Y. 165; see 3 Rob. La. 201; 8 Metc. Mass. 44; 19 Ill. 456; and similar rules extend to partners' declarations. 1 Greenleaf, Ev. § 112; 31 Ala. N. S. 26; 36 N. H. 167. See PARTNER.

11. When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made *while acting in the common design*, are evidence against the whole, 3 Barnew. & Ald. 566; 1 Stark. 81; 2 Pet. 358; 10 Pick. Mass. 497; 30 Vt. 100; 32 Miss. 405; 9 Cal. 593; but the declarations of one of the rioters or conspirators, made *after the accomplishment of their object* and when they no longer acted together, are evidence only against the party making them. 2 Starkie, Ev. 235; 2 Russell, Crimes, 572; Roscoe, Crim. Ev. 324; 1 Ill. 269; 1 Mood. & M. 501. And see 2 Carr. & P. 232; 7 Gray, Mass. 1, 46. See HEARSAY; BOUNDARY; REPUTATION; CONFESSION.

In Scotch Law. The prisoner's statement before a magistrate.

12. When used on trial, it must be proved that the prisoner was in his senses at the time of making it, and made it of his own free will. 2 Hume, Sess. Sc. 328; Alison, Pract. 557. It must be signed by the witnesses present when it was made, Alison, Pract. 557, and by the prisoner himself. Arkl. Just. Sc. 70. See Paterson, Comp. §§ 952, 970.

DECLARATION OF INDEPENDENCE. A state paper issued by the congress of the United States of America, in the name and by the authority of the people, on the fourth day of July, 1776, wherein are set forth:—

Certain natural and unalienable rights of man; the uses and purposes of governments; the right of the people to institute or to abolish them; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain;

The various acts of tyranny of the British king;

The petitions for redress of those injuries, and the refusal to redress them; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity;

An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives;

A declaration that the United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is and ought to be dissolved;

A pledge by the representatives to each other of their lives, their fortunes, and their sacred honor.

The effect of this declaration was the establishment of the government of the United States as free and independent; and thenceforth the people of Great Britain have been held, as the rest of mankind, enemies in war, in peace friends.

DECLARATION OF INTENTION. The act of an alien who goes before a court of record and in a formal manner declares that it is *bonâ fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject. Act of Cong. April 14, 1802, s. 1.

This declaration must, in ordinary cases, be made at least three years before his admission. *Id.* But there are numerous exceptions to this rule. See NATURALIZATION.

DECLARATION OF TRUST. The act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same.

The instrument in which such an acknowledgment is made.

Such a declaration is not always in writing; though it is highly proper it should be so. Hill, Trust, 49, note y; Sugden, Pow. 200; 1 Washburn, Real Prop.; Geldart, Conv.

DECLARATION OF WAR. The public proclamation of the government of a state, by which it declares itself to be at war with a foreign power which is named, and which forbids all and every one to aid or assist the common enemy.

2. The power of declaring war is vested in congress by the constitution, art. 1, s. 8. There is no form or ceremony necessary except the passage of the act. A manifesto stating the causes of the war is usually published; but war exists as soon as the act takes effect. It was formerly usual to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. Potter, Grec. Ant. b. 3, c. 7; Dig. 49. 15. 24. But that is not the practice of modern times.

In some countries, as England, the power of declaring war is vested in the king; but he has no power to raise men or money to carry it on,—which renders the right almost nugatory.

DECLARATORY. Something which explains or ascertains what before was uncertain or doubtful: as, a declaratory statute, which is one passed to put an end to a doubt as to what the law is, and which declares what it is and what it has been. 1 Blackstone, Comm. 86.

DECLINATION. In Scotch Law. A preliminary plea objecting to the jurisdiction on the ground that the judge is interested in the suit.

DECOCTION. The operation of boiling certain ingredients in a fluid for the purpose of extracting the parts soluble at that temperature. The product of this operation.

In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called savin, it appeared that the prisoner had administered an *infusion*, and not a decoction. The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed; but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 8 Campb. 74, 75.

DECOCTOR. In Roman Law. A bankrupt; a person who squandered the money of the state. Calvinus, Lex.; DuCange.

DECOLLATIO. Decollation; beheading.

DECONFES. In French Law. A name formerly given to those persons who died without confession, whether they refused to confess or whether they were criminals to whom the sacrament was refused. Droit de Canon, par M. l'Abbé André; Dupin, Gloss. to Loisel's Institutes.

DECOY. A pond used for the breeding and maintenance of water-fowl. 11 Mod. 74, 130; 3 Salk. 9; Holt, 14; 11 East, 571.

DECREE. In Practice. The judgment or sentence of a court of equity.

It is either interlocutory or final. The former is given on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute; and a final decree has the same effect as a judgment at law. 2 Madd. Ch. 462; 1 Chanc. Cas. 27; 2 Vern. Ch. 89; 4 Brown, Parl. Cas. 287. See 7 Viner, Abr. 394; 7 Comyns, Dig. 445; 1 Belt, Suppl. Ves. 223; Bouvier, Inst. Index.

In Legislation. In some countries, as in France, some acts of the legislature or of the sovereign, which have the force of law, are called *decrees:* as, the Berlin and Milan decrees.

In Scotch Law. A final judgment or sentence of court by which the question at issue between the parties is decided.

DECREE IN ABSENCE. In Scotch Law. Judgment by default or *pro confesso.*

DECREE OF CONSTITUTION. In

Scotch Law. Any decree by which the extent of a debt or obligation is ascertained.

The term is, however, usually applied especially to those decrees which are required to found a title in the person of the creditor in the event of the death of either the debtor or the original creditor. Bell, Dict.

DECREE DATIVE. In Scotch Law. The order of a court of probate appointing an administrator.

DECREE OF FORTHCOMING. In Scotch Law. The decree made after an arrestment, ordering the debt to be paid or the effects to be delivered up to the arresting creditor. Bell, Dict.

DECREE OF LOCALITY. In Scotch Law. The decree of a teind court allocating stipend upon different heritors. It is equivalent to the apportionment of a tithe rent-charge.

DECREE OF MODIFICATION. In Scotch Law. A decree of the teind court modifying or fixing a stipend.

DECREE OF REGISTRATION. In Scotch Law. A proceeding by which the creditor has immediate execution. It is somewhat like a warrant of attorney to confess judgment. 1 Bell, Comm. 1. 1. 4.

DECREET. In Scotch Law. The final judgment or sentence of court by which the question at issue between the parties is decided.

Decreet absolutor. One where the decision is in favor of the defendant.

Decreet condemnator. One where the decision is in favor of the plaintiff. Erskine, Inst. 4. 3. 5.

DECREET ARBITRAL. In Scotch Law. The award of an arbitration. The form of promulgating such award. Bell, Dict. *Arbitration;* 2 Bell, Hou. L. Sc. 49.

DECRETALES BONIFACII OCTAVI. A supplemental collection of the canon law, published by Boniface VIII. in 1298, called, also, *Liber Sextus Decretalium* (Sixth Book of the Decretals). 1 Kaufmann, Mackeld. Civ. Law, 83, n. See DECRETALS.

DECRETALES GREGORII NONI. The decretals of Gregory the Ninth. A collection of the laws of the church, published by order of Gregory IX. in 1227. It is composed of five books, subdivided into titles, and each title is divided into chapters. They are cited by using an X (or *extra*): thus, *Cap.* & X *de Regulis Juris*, etc. 1 Kaufm. Mackeld. Civ. Law, 83, n.; Butler, Hor. Jur. 115.

DECRETALS. In Ecclesiastical Law. Canonical epistles, written by the pope alone, or by the pope and cardinals, at the instance or suit of one or more persons, for the ordering and determining some matter in controversy, and which have the authority of a law in themselves.

The decretals were published in three volumes. The first volume was collected by Raymundus Barcinius, chaplain to Gregory IX., about the year 1227, and published by him to be read in schools and used in the ecclesiastical courts. The second volume is the work of Boniface VIII., compiled about the year 1298, with additions to and alterations of the ordinances of his predecessors. The third volume is called the Clementines, because made by Clement V., and was published by him in the council of Vienna, about the year 1308. To these may be added the Extravagantes of John XXII. and other bishops of Rome, which, relatively to the others, are called *Novellæ Constitutiones.* Ridley's View, etc. 99, 100; 1 Fournel, *Hist. des Avocats*, 194, 195.

The false decretals were forged in the names of the early bishops of Rome, and first appeared about A.D. 845–850. The author of them is not known. They are mentioned in a letter written in the name of the council of Quierzy, by Charles the Bald, to the bishops and lords of France. See Van Espen Fleury, *Droit de Canon*, by André.

The decretals constitute the second division of the *Corpus Juris Canonici.*

DECRETAL ORDER. In Chancery Practice. An order made by the court of chancery, upon a motion or petition, in the nature of a decree. 2 Daniell, Chanc. Pract. 637.

DECRETUM GRATIANI. A collection of ecclesiastical law made by Gratian, a Bolognese monk, in the year 1151. It is the oldest of the collections constituting the *Corpus Juris Canonici.* 1 Kaufmann, Mackeld. Civ. Law, 81; 1 Blackstone, Comm. 82; Butler, Hor. Jur. 113.

DECRY. To cry down; to destroy the credit of. It is said that the king may at any time decry the coin of the realm. 1 Blackstone, Comm. 278.

DECURIO. In Roman Law. One of the chief men or senators in the provincial towns. The *decuriones*, taken together, had the entire management of the internal affairs of their towns or cities, with powers resembling in some degree those of our modern city councils. 1 Spence, Eq. Jur. 54; Calvinus, Lex.

DEDI (Lat. I have given). A word used in deeds and other instruments of conveyance when such instruments were made in Latin.

The use of this word formerly carried with it a warranty in law, when in a deed: for example, if in a deed it was said, "*dedi* (I have given), etc. to A B," there was a warranty to him and his heirs. Brooke, Abr. *Guaranty*, pl. 85. The warranty thus wrought was a special warranty, extending to the heirs of the feoffee during the life of the donor only. Coke, Litt. 384 *b;* 4 Coke, 81; 5 *id.* 17. *Dedi* is said to be the aptest word to denote a feoffment. 2 Sharswood, Blackst. Comm. 310. The future, *dabo*, is found in some of the Saxon grants. 1 Spence, Eq. Jur. 44.

DEDI ET CONCESSI (Lat. I have given and granted). The aptest words to work a feoffment. They are the words ordinarily used, when instruments of conveyance were in Latin, in charters of feoffment, gift, or grant. These words were held the aptest; though others would answer. Coke, Litt. 384 *b;* 1 Stephen, Comm. 114; 2 Blackstone, Comm. 53, 316.

DEDICATION. An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public.

Express dedication is that made by deed, vote, or declaration.

Implied dedication is that presumed from an acquiescence in the public use.

2. To be valid, it must be made by the owner of the fee, 5 Barnew. & Ald. 454; 3 Sandf. N. Y. 502; 4 Campb. 16, or, if the fee be subject to a naked trust, by the equitable owner, 6 Pet. 431; 1 Ohio St. 478, and to the public at large. 22 Wend. N. Y. 425; 2 Vt. 480; 10 Pet. 662; 11 Ala. N. s. 63. In making the appropriation, no particular formality is required, but any act or declaration, whether written or oral, which clearly expresses an intent to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use. 5 Taunt. 125; 11 Mees. & W. Exch. 827; 5 Carr. & P. 460; 6 Pet. 431; 22 Wend. N. Y. 450; 25 Conn. 235; 19 Pick. Mass. 405; 2 Vt. 480; 9 B. Monr. Ky. 201; 12 Ga. 239. And, without any express appropriation by the owner, a dedication may be presumed from twenty years' use of his land by the public, with his knowledge, 22 Ala. N. s. 190; 19 Conn. 250; 11 Metc. Mass. 421; 3 Zabr. N. J. 150; 4 Ind. 518; 17 Ill. 249; 26 Penn. St. 187; 3 Kent, Comm. 451, or from any shorter period, if the use be accompanied by circumstances which favor the presumption, the fact of dedication being a conclusion to be drawn, in each particular case, by the jury, who as against the owner have simply to determine whether by permitting the public use he has intended a dedication. 1 Strange, 1004; 5 Taunt. 125; 6 Wend. N. Y. 651; 11 *id.* 486; 9 How. 10; 10 Ind. 219; 4 Cal. 114; 17 Ill. 416; 30 Eng. L. & Eq. 207; 11 East, 375. But this presumption being merely an inference from the public use, coupled with circumstances indicative of the owner's intent to dedicate, is open to rebuttal by the proof of circumstances indicative of the absence of such an intent. 2 Pick. Mass. 51; 4 Cush. Mass. 332; 25 Me. 297; 9 How. 10; 1 Campb. 262; 4 Barnew. & Ad. 447; 7 Carr. & P. 570; 8 Ad. & E. 99.

3. Without acceptance, a dedication is incomplete. In the case of a highway, the question has been raised whether the public itself, or the body charged with the repair, is the proper party to make the acceptance. In England, it has been decided that an acceptance by the public, evidenced by mere uses, is sufficient to bind the parish to repair, without any adoption on its part. 5 Barnew. & Ad. 469; 2 Nev. & M. 583. In this country there are cases in which the English rule seems to be recognized, 1 R. I. 93; 23 Wend. N. Y. 103; though the weight of decision is to the effect that the towns are not liable, either for repair or for injuries occasioned by the want of repair, until they have themselves adopted the way thus created, either by a formal acceptance or by indirectly recognizing it, as by repairing it or setting up guide-posts therein. 13 Vt. 424; 14 *id.* 282; 6 N. Y. 257; 16 Barb. N. Y. 251; 8 Gratt. Va. 632; 2 Ind. 147; 19 Pick. Mass. 405; 3 Cush. Mass. 290; Angell, Highw. 111. See THOROUGHFARE; BRIDGE; HIGHWAY.

4. The authorities above cited relate chiefly to the dedication of land for a highway. But a dedication may be made equally well to any other purpose which is for the benefit of the public at large, as for a square, a common, a landing, a cemetery, a school, or a monument; and the principles which govern in all these cases are the same, though they may be somewhat diversified in the application, according as they are invoked for the support of one or another of these objects. 6 Hill, N. Y. 407; 11 Penn. St. 444; 7 Ohio, 135; 18 *id.* 18; 2 Ohio St. 107; 12 Ga. 239; 4 N. H. 537; 1 Wheat. 469; 2 Watts, Penn. 23; 1 Spenc. N. J. 86; 8 B. Monr. Ky. 234; 3 Sandf. N. Y. 502; 7 Ind. 641; 2 Wisc. 153. As to what shall amount to a dedication of an invention to public use, see 1 Gall. C. C. 482; 1 Paine, C. C. 345; 2 Pet. 1; 7 *id.* 292; 4 Mas. C. C. 108.

DEDIMUS ET CONCESSIMUS (Lat. we have given and granted). Words used by the king where there were more grantors than one, instead of *dedi et concessi.*

DEDIMUS POTESTATEM (Lat. we have given power). The name of a writ to commission private persons to do some act in the place of a judge: as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. Cowel; Comyns, Dig. *Chancery* (K 3), (P 2), *Fine* (E 7); Dane, Abr. Index; 2 Sharswood, Blackst. Comm. 351.

DEDIMUS POTESTATEM DE ATTORNO FACIENDO (Lat.). The name of a writ which was formerly issued by authority of the crown in England to authorize an attorney to appear for a defendant.

By statute of Westminster 2, 13 Edw. I. c. 10, all persons impleaded may make an attorney to sue for them, in all pleas moved by or against them, in the superior courts there enumerated. 3 Mann. & G. 184, n.

DEDITITII (Lat.). **In Roman Law.** Criminals who have been marked in the face or on the body with fire or an iron so that the mark cannot be erased, and subsequently manumitted. Calvinus, Lex.

DEDUCTION FOR NEW. In Maritime Law. The allowance (usually one-third) on the cost of repairing a damage to the ship by the extraordinary operation of the perils of navigation, the renovated part being presumed to be better than before the damage. In some ports, by custom or by express provision in the policy, the allowance is not made on a new vessel during the first year, or on new sheathing, or on an anchor or chain-cables. 1 Phillipps, Ins. § 50; 2 *id.* §§ 1369, 1431, 1433; Benecke & S. Av. Phill. ed. 167, n. 238; 2 Serg. & R. Penn. 229; 1 Caines, N. Y. 573; 18 La. 77; 2 Cranch, C. C. 218; 21 Pick. Mass. 456; 5 Cow. N. Y. 63.

DEED. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee. Coke, Litt. 171; 2 Blackstone, Comm. 295; Sheppard, Touchst. 50.

A writing containing a contract sealed and delivered by the party thereto. 2 Washburn, Real Prop. 553.

A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. 2 Sharswood, Blackst. Comm. 294.

Any instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter,—as, for instance, a bond, single bill, agreement, or contract of any kind,—is as much a deed as is a conveyance of real estate, and, after delivery and acceptance, is obligatory. 2 Serg. & R. Penn. 504; 5 Dan. Ky. 365; 2 Miss. 154. The term is, however, often used in the latter sense above given, and perhaps oftener than in its more general signification.

2. *Deeds of feoffment.* See FEOFFMENT.

Deeds of grant. See GRANT.

Deeds indented are those to which there are two or more parties who enter into reciprocal and corresponding obligations to each other. See INDENTURE.

Deeds of release. See RELEASE; QUIT-CLAIM.

Deeds poll are those which are the act of a single party and which do not require a counterpart. See DEED POLL.

Deeds under the statute of uses. See BARGAIN AND SALE; COVENANT TO STAND SEISED; LEASE AND RELEASE.

According to Sir William Blackstone, 2 Comm. 313, deeds may be considered as *conveyances at common law*,—of which the original are feoffment; gift; grant; lease; exchange; partition; the derivative are release; confirmation; surrender; assignment; defeasance,—or *conveyances which derive their force by virtue of the statute of uses:* namely, covenant to stand seised to uses; bargain and sale of lands; lease and release; deed to lead and declare uses; deed of revocation of uses.

For a description of the various forms in use in the United States, see 2 Washburn, Real Prop. 607.

3. *Requisites of.* Deeds must be upon *paper* or parchment, 5 Johns. N. Y. 246; must be completely written before delivery, 1 Hill, So. C. 267; 6 Mees. & W. Exch. 216, Am. ed. note; 2 Washburn, Real Prop. 554; must be between competent *parties*, see PARTIES; and certain classes are excluded from holding lands, and, consequently, from being grantees in a deed, see 1 Washburn, Real Prop. 48, 49; 2 *id.* 564; must have been made without restraint, 13 Mass. 371; 2 Blackstone, Comm. 291; must contain the *names* of the grantor and grantee, 2 Brock. C. C. 156; 19 Vt. 613; 12 Mass. 447; 14 Mo. 420; 13 Ohio, 120; 14 Pet. 322; 1 McLean, C. C. 321; 2 N. H. 525; must relate to suitable property, Browne, Stat. Frauds, § 6; 2 Washburn, Real Prop. 597 *et seq.*; must contain the *requisite parts*, see § 5; must be *sealed*, 6 Pet. 124; Thornton, Conv. 205; see 12 Cal. 166; and should, for safety, be *signed*, even where statutes do not require it. 2 Washburn, Real Prop. 569.

In Virginia, all that is required on this point is that the instrument of conveyance should be in writing. Va. Rev. Stat. (1849) 508. The statute of Missouri requires that the instrument should be sealed; yet the courts of that state have held that a scroll purporting to be a seal is sufficient. 2 Mo. 220; 8 *id.* 301. In Arkansas, Connecticut, and Ohio, a scroll purporting to be a seal is sufficient. Conn. Comp. Stat. (1854) p. 633; Swan, Ohio Rev. Stat. (1854) 864.

In Kentucky, no seal or scroll is necessary except in the case of a corporation. Ky. Rev. Stat. (1852) 196.

4. They must be *delivered*, see DELIVERY, and *accepted*. 8 Ill. 177; 1 N. H. 353; 5 *id.* 71; 20 Johns. N. Y. 187. Deeds conveying real estate must in most states of the United States be acknowledged, see ACKNOWLEDGMENT, and recorded.

The requisite number of witnesses is also prescribed by statute in most if not all of the states; and many particulars relating to the execution of deeds of conveyance are to be found detailed in the more valuable works treating of this subject, among which Browne on the Statute of Frauds, Washburn on Real Property, and Thornton on Conveyancing are recommended for consultation.

Two witnesses are required in Arkansas, Connecticut, Florida, Georgia, Michigan, Ohio, Vermont, and Wisconsin. In Alabama, two are required where the grantor cannot read, and one where he can. One is sufficient in New York and Massachusetts. An acknowledgment before proper authority dispenses with witnesses in Alabama, Arkansas, and Tennessee. 1 Dig. of Ark. Laws, 265, n. d; 5 Ark. 693; Conn. Comp. Stat. (1854) 631; Thompson, Dig. Fla. Laws, 180; Sess. Laws of Ga. (1853–4) 26; 2 Mich. Comp. Stat. (1857) 838; Swan, Ohio Rev. Stat. (1854) 309; 3 N. Y. Rev. Stat. 5th ed. 45; Vt. Comp. Stat. (1850) 384; Wisc. Rev. Stat. (1858) 537.

5. *Formal parts.* The *premises* embrace the statement of the parties, the consideration, recitals inserted for explanation, description of the property granted, with the intended exceptions. The *habendum* begins at the words "to have and to hold," and limits and defines the estate which the grantee is to have. The *reddendum*, which is used to reserve something to the grantor, see EXCEPTION; the *conditions*, see CONDITION; the *covenants*, see COVENANT; WARRANTY; and the *conclusion*, which mentions the execution, date, etc., properly follow in the order observed here. 2 Washburn, Real Prop. 611–640.

6. The *construction* of deeds is favorable to their validity; the principal includes the incident; punctuation is not regarded; a false description does not harm; the construction is least favorable to the party making the conveyance or reservation; the *habendum* is rejected if repugnant to the rest of the deed. Sheppard, Touchst. 89 *et seq.*; 3 Kent, Comm. 422; BOUNDARIES.

The *lex rei sitæ* governs in the conveyance of lands, both as to the requisites and forms of conveyance. See LEX REI SITÆ.

Much of the English law in reference to the possession and discovery of title-deeds has been rendered useless in the United States by the system of registration, which prevails so universally.

Consult Preston, Wood, Thornton, on Conveyancing; Greenleaf's Cruise, Dig.; Washburn, Hilliard, on Real Property.

DEED TO DECLARE USES. A deed made after a fine or common recovery, to show the object thereof.

DEED TO LEAD USES. A deed made before a fine or common recovery, to show the object thereof.

DEED POLL. A deed which is made by one party only.

A deed in which only the party making it executes it or binds himself by it as a deed. 2 Washburn, Real Prop. 588.

The distinction between deed poll and indenture has come to be of but little importance. The ordinary purpose of a deed poll is merely to transfer the rights of the grantor to the grantee. It was formerly called *charta de una parte*, and usually began with these words,—Sciant præsentes et futuri quod ego, A, etc.; and now begins, "Know all men by these presents that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc. Cruise, Dig. tit. 32, c. 1, s. 23. See INDENTURE.

DEEMSTERS. Judges in the Isle of Man, who decide all controversies without process, writings, or any charges. These judges are chosen by the people, and are said by Spelman to be two in number. Spelman, Gloss.; Camden, Brit.; Cowel; Blount.

DEFALCATION. The act of a defaulter.

The bankrupt act of August 19, 1841, declared that a person who owed debts which had been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, should not have the benefit of that law.

The reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.

The law operates this reduction in certain cases; for, if the parties die or are insolvent, the balance between them is the only claim; but if they are solvent, and alive, the defendant may or may not defalcate at his choice. See SET-OFF. For the etymology of this word, see Brackenridge, Law Misc. 186; 1 Rawle, Penn. 291; 3 Binn. Penn. 135.

DEFAMATION. The speaking or writing words of a person so as to hurt his good fame, *de bona famâ aliquid detrahere.* Written defamation is termed libel, and oral defamation slander.

2. The provisions of the law in respect of defamation, written or oral, are those of a civil nature, which give a remedy in damages to an injured individual, or of a criminal nature, which are devised for the security of the public. Heard, Lib. & Sland. § 1.

3. In England, besides the remedy by action, proceedings may be instituted in the ecclesiastical court for redress of the injury. The punishment for defamation, in this court, is payment of costs and penance enjoined at the discretion of the judge. When the slander has been privately uttered, the penance may be ordered to be performed in a private place; when publicly uttered, the sentence must be public, as in the church of the parish of the defamed party, in time of divine service; and the defamer may be required publicly to pronounce that by such words—naming them—as set forth in the sentence he had defamed the plaintiff, and, therefore, that he begs pardon, first of God, and then of the party defamed, for uttering such words. Clerk's Assist. 225; 3 Burn, Eccl. Law, *Defamation*, pl. 14; 2 Chitty, Pract. 471; Cooke, Def. See LIBEL; SLANDER.

DEFAULT. The non-performance of a duty, whether arising under a contract or otherwise. 2 Barnew. & Ald. 516.

By the fourth section of the English statute of frauds, 29 Car. II. c. 3, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, *default*, or miscarriage of another person, unless the agreement," etc. "shall be in writing," etc.

In Practice. The non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defence.

When the plaintiff makes default, he may be nonsuited; and when the defendant makes default, judgment by default is rendered against him. Comyns, Dig. *Pleader*, E 42, B 11. See article JUDGMENT BY DEFAULT; 7 Viner, Abr. 429; *Doctrina Plac.* 208; Graham, Pract. 631. See, as to what will excuse or save a default, Coke, Litt. 259 *b*.

DEFEASANCE. An instrument which defeats the force or operation of some other deed or estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyns, Dig. *Defeasance.*

The defeasance may be subsequent to the deed in case of things executory, Coke, Litt. 237 *a;* 2 Saund. 43, but must be a part of the same transaction in case of an executed contract. Coke, Litt. 236 *b;* 1 N. H. 39; 3 Mich. 482; 7 Watts, Penn. 401; 21 Ala. N. S. 9. Yet, where an instrument of defeasance is executed subsequently in pursuance of an agreement made at the time of making the original deed, it is sufficient, 2 Washburn, Real Prop. 489, as well as where a deed and the defeasance bear different dates but are delivered at the same time. 12 Mass. 463; 13 Pick. Mass. 411; 18 *id.* 540; 31 Penn. St. 131; 7 Me. 435; 13 Ala. 246. The instrument of defeasance must *at law* be of as high a nature as the principal deed. 13 Mass. 443; 22 Pick. Mass. 526; 7 Watts, Penn. 261, 401; 8 Me. 246; 43 *id.* 206. Defeasances of deeds conveying real estate are generally subject to the same rules as deeds, as to record and notice to purchasers, 3 Wend. N. Y. 208; 14 *id.* 63; 17 Serg. & R. Penn. 70; 12 Mass. 456; 38 Me. 447; 40 *id.* 381; but in some states actual notice is not sufficient without recording. Mich. Rev. Stat. 261; Minn. Laws, 1858, c. 52, § 3.

DEFECT. The want of something required by law.

In pleading, matter sufficient in law must be deduced and expressed according to the forms of law. Defects in matters of substance cannot be cured, because it does not appear that the plaintiff is entitled to recover; but when the defects are in matter of form, they are cured by a verdict in favor of the party who committed them. 3 Bouvier, Inst. n. 3292; 2 Wash. C. C. 1; 1 Hen. & M. Va. 153; 16 Pick. Mass. 128, 541; 1 Day, Conn. 315; 4 Conn. 190; 5 *id.* 416; 6 *id.* 176; 12 *id.* 455; 1 Pet. C. C. 76; 2 Green, N. J. 133; 4 Blackf. Ind. 107; 2 McLean, C. C. 35; Bacon, Abr. *Verdict*, X.

DEFENCE. Torts. A forcible resistance of an attack by force.

2. A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and that an excess becomes itself an injury, 3 Mees. & W. Exch. 150; but it must be in defence, and not in revenge. 1 Carr. & M. 214; 11 Mod. 43.

A man may also repel force by force in defence of his personal property, and even justify homicide against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery.

3. With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault. 1 Hale, Pl. Cr. 440, 444; 1 East, Pl. Cr. 259, 277. And where an illegal forcible attack is made upon a dwelling-house with the intention merely of committing a trespass, and not with any felonious intent, it is generally lawful for the rightful occupant to oppose it by force. 7 Bingh. 305; 20 Eng. Com. Law, 139. See, generally, 1 Chitty, Pract. 589; Grotius, lib. 2, c. 1; Rutherforth, Inst. b. 1, c. 16. And see ASSAULT.

4. In Pleading and Practice. The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea. 3 Sharswood, Blackst. Comm. 296; Coke, Litt. 127.

In this sense it is similar to the *contestatio litis* of the civilians, and does not include justification. In a more general sense it denotes the means by which the defendant prevents the success of the plaintiff's action, or, in criminal practice, the indictment. The word is commonly used in this sense in modern practice.

5. *Half defence* was that which was made by the form "defends the force and injury, and says" (*defendit vim et injuriam, et dicit*).

Full defence was that which was made by the form "defends the force and injury when and where it shall behoove him, and the damages and whatever else he ought to defend" (*defendit vim et injuriam quando et ubi curia consideravit, et damna et quicquid quod ipse defendere debet, et dicit*), commonly shortened into "defends the force and injury when," etc. Gilbert, C. P. 188; 8 Term, 632; 3 Bos. & P. 9, n.; Coke, Litt. 127 *b*; Willes, 41. It follows immediately upon the statement of appearance, "comes" (*venit*), thus: "comes and defends." By a general defence the propriety of the writ, the competency of the plaintiff, and the jurisdiction of the court were allowed; by defending the force and injury, misnomer was waived; by defending the damages, all exceptions to the person of the plaintiff; and by defending either when, etc., the jurisdiction of the court was admitted. 3 Sharswood, Blackst. Comm. 298.

6. The distinction between the forms of half and full defence was first lost sight of, 8 Term, 633; Willes, 41; 3 Bos. & P. 9; 2 Saund. 209 *c*; and no necessity for a technical defence exists, under the modern forms of practice.

Formerly, in criminal trials for capital crimes the prisoner was not allowed counsel to assist in his defence. 1 Ry. & M. Cr. Cas. 166; 3 Campb. 98; 4 Sharswood, Blackst. Comm. 356, n. This privilege was finally extended to all persons accused of felonies in England, by 6 and 7 Will. IV. c. 114. It is secured in the United States courts by act of congress April 30, 1789, 1 Story, U. S. Laws, 89, and by statute in the various states.

7. The act of congress enacts that every person accused or indicted of the crime of treason, or other capital offence, shall "be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

DEFENDANT. A party sued in a personal action. The term does not in strictness apply to the person opposing or denying the allegations of the demandant in a real action, who is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits.

DEFENDANT IN ERROR. The distinctive term appropriate to the party against whom a writ of error is sued out.

DEFENDER. In Scotch and Canon Law. A defendant.

DEFENDER (Fr.). To deny; to defend; to conduct a suit for a defendant; to forbid; to prevent; to protect.

DEFENSA. A park or place fenced in for deer, and defended as a property and peculiar for that use and service. Cowel.

DEFENSE AU FOND EN DROIT (called, also, *defence en droit*). A demurrer. 2 Low. C. 278. See, also, 1 Low. C. 216.

DEFENSE AU FOND EN FAIT. The general issue. 3 Low. C. 421.

DEFENSIVE ALLEGATION. In Ecclesiastical Practice. The answer of the party defending to the allegations of the party moving the cause.

DEFENSIVE WAR. A war in defence of national right,—not necessarily defensive in its operations. 1 Kent, Comm. 50.

DEFENSOR. In Civil Law. A defender; one who takes upon himself the defence of another's cause, assuming his liabilities.

An advocate in court. In this sense the word is very general in its signification, including *advocatus, patronus, procurator*, etc. A tutor or guardian. Calvinus, Lex.

In Old English Law. A guardian or protector. Spelman, Gloss. The defendant; a warrantor. Bracton.

In Canon Law. The advocate of a church. The patron. See ADVOCATUS. An officer having charge of the temporal affairs of the church. Spelman, Gloss.

DEFENSOR CIVITATUS (Lat. defender of the state).

In Roman Law. An officer whose business it was to transact certain business of the state.

Those officers were so called who, like the tribunes of the people at first, were chosen by the people in the large cities and towns, and whose duty it was to watch over the order of the city, protect the people and the *decuriones* from all harm, protect sailors and naval people, attend to the complaints of those who had suffered injuries, and discharge various other duties. As will be seen, they had considerable judicial power. DuCange; Schmidt, Civ. Law, Introd. 16.

DEFICIT (Lat. is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received.

DEFINITION (Lat. *de*, and *finis*, a boundary; a limit). An enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature; that which denotes and points out the substance of a thing. Ayliffe, Pand. 59.

2. A definition ought to contain every idea which belongs to the thing defined, and to exclude all others; it should show the general class to which the thing defined belongs, and the particulars which distinguish it from other members of the same class; it should be *universal*, that is, such that it will apply equally to all individuals of the same kind; *proper*, that is, such that it will not apply to any individual of any other kind; *clear*, that is, without any equivocal, vague, or unknown word; *short*, that is, without any useless word, and without any foreign to the idea intended to be defined.

3. Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so: *omnis definitio in jure civili periculosa est, parum est enim, ut non subverti possit.*

All ideas are not susceptible of definition, and many words cannot be defined. This inability is frequently supplied, in a considerable degree, by descriptions.

DEFINITIVE. That which terminates a suit; final. A definitive sentence or judgment is put in opposition to an interlocutory judgment.

DEFLORATION. The act by which a woman is deprived of her virginity.

When this is done unlawfully and against her will, it bears the name of rape (which see); when she consents, it is fornication (which see); or if the man be married, it is adultery on his part. 2 Greenleaf, Ev. § 48; 21 Pick. Mass. 509; 36 Me. 261; 11 Ga. 53; 2 Dall. Penn. 124.

DEFORCEMENT. The holding any lands or tenements to which another has a right.

In its most extensive sense the term includes any withholding of any lands or tenements to which another person has a right, Coke, Litt. 277: so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned. 3 Blackstone, Comm. 173; Archbold, Civ. Plead. 13; Dane, Abr. Index.

In Scotch Law. The opposition given, or resistance made, to messengers or other officers while they are employed in executing the law.

This crime is punished by confiscation of movables, the one half to the king and the other to the creditor at whose suit the diligence is used. Erskine, Pract. 4. 4. 32.

DEFORCIANT. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Blackstone, Comm. 350.

DEFORCIARE. To withholds lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word. Coke, Litt. 331 *b*; 3 Thomas, Coke, Litt. 3; Bract. lib. 4, 238; Fleta, lib. 5, c. 11.

DEFRAUDACION. In Spanish Law. The crime committed by a person who fraudulently avoids the payment of some public tax.

DEFUNCT. A deceased person.

DEGRADATION. In Ecclesiastical Law. A censure by which a clergyman is deprived of the holy orders which he had as a priest or deacon.

DEGRADING. Sinking or lowering a person in the estimation of the public.

As to compelling a witness to answer questions tending to degrade him, see PRIVILEGE; WITNESS; 13 Howell, St. Tr. 17, 334; 16 *id.* 161; 1 Phillipps, Ev. 269. To write or print of a man what will degrade him in society is a libel. 1 Dowl. 674; 2 Mann. & R. 77.

DEGREE (Fr. *degré*, from Lat. *gradus*, a step in a stairway; a round of a ladder).

A remove or step in the line of descent or consanguinity.

As used in law, it designates the distance between those who are allied by blood; it means the relations descending from a common ancestor, from generation to generation, as by so many steps. Hence, according to some lexicographers, we obtain the word pedigree (*q. v.*), *par degrez* (by degrees), the descent being reckoned *par degrez*. Minshew. Each generation lengthens the line of descent one degree; for the degrees are only the generations marked in a line by small circles or squares, in which the names of the persons forming it are written. See CONSANGUINITY; LINE; Ayliffe, Parerg. 209; Toullier, Droit Civ. Franç. liv. 3, t. 1, c. 3, n. 158; Aso & M. Inst. b. 2, t. 4, c. 3, § 1.

The state or civil condition of a person.

The ancient English statute of additions, for example, requires that in process, for the better description of a defendant, his *state, degree*, or *mystery* shall be mentioned.

An honorable state or condition to which a student is advanced in testimony of proficiency in arts and sciences.

They are of pontifical origin. See 1 Schmidt, Thesaurus, 144; Vicat, *Doctores;* Minshew, Dict. *Bacheler;* Merlin, Répert. *Université;* Van Espen, pt. 1, tit. 10; Giannone, Istoria di Napoli, lib. xi. c. 2, for a full account of this matter.

DEHORS (Fr. out of; without). Something out of the record, agreement, will, or other thing spoken of; something foreign to the matter in question.

DEI JUDICIUM (Lat. the judgment of God). A name given to the trial by ordeal.

DEJACION. In Spanish Law. A general term applicable to the surrender of his property to his creditors by an insolvent. The renunciation of an inheritance. The release of a mortgage upon payment, and the abandonment of the property insured to the insurer.

DEL CREDERE COMMISSION. One under which the agent, in consideration of an additional premium, engages to insure to his principal not only the solvency of the debtor, but the punctual discharge of the debt; and he is liable, in the first instance, without any demand from the debtor. 1 Term, 112; Paley, Ag. 39. See Parsons, Contracts; Story, Ag.

DELATE. In Scotch Law. To accuse. Bell, Dict.

DELATIO. In Civil Law. An accusation or information. DuCange; Calvinus, Lex.

DELATOR. An accuser or informer. DuCange.

DELATURA. In Old English Law. The reward of an informer. Whishaw.

DELAWARE. The name of one of the original states of the United States of America.

In 1623, Cornelius May, with some Dutch emigrants, established a trading-house, but the settlers soon removed to North river. Ten years afterwards DeVries arrived at Cape Henlopen, but the natives shortly destroyed the settlement. In the spring of 1638 the Swedes under Minuit established a settlement at the mouth of the Minquas river, which was called by them the Christiana, in honor of their queen. They purchased all the lands from Cape Henlopen to the falls near Trenton. They named the country New Sweden. Stuyvesant, the Dutch governor of New York, ended the Swedish authority in 1654. The Dutch held the country until 1664, when it fell into the hands of the English, and was granted by Charles II. to his brother James, Duke of York. In 1682, William Penn obtained a patent from the Duke of York, releasing all his title claimed through his patent from the crown to a portion of the territory. By this grant Penn became possessed of New Castle and the land lying within a circle of twelve miles around it, and subsequently of a tract of land beginning twelve miles south of New Castle and extending to Cape Henlopen. In consequence of a dispute between Penn and Lord Baltimore, the south and west lines, dividing his possessions from Maryland, were traced in 1761, under a decree of lord-chancellor Hardwicke, by the surveyors Mason and Dixon; and this line, extended westward between Maryland and Pennsylvania, has become historical, as *Mason and Dixon's line.*

2. Delaware was divided into three counties, called New Castle, Kent, and Sussex, and by enactment of Penn was annexed to Pennsylvania under the name of The Three Lower Counties upon Delaware. These counties remained for twenty years a part of Pennsylvania, each county sending six delegates to the general assembly. They seceded in 1703, with the consent of the proprietary, and were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter. In 1776 a constitution was framed, a second in 1792, and a third in 1831, which still forms the fundamental law of the state. Delaware was the first state to ratify the federal constitution, on December 7, 1787.

3. The present constitution was adopted December 2, 1831.

The Legislative Power.

This is vested in a general assembly, which meets biennially, and consists of a senate and house of representatives.

The senate is composed of senators from each county, chosen for four years by the citizens residing in the several counties. They must be twenty-seven years of age, and possessed of two hundred acres of freehold land. The number may be increased by the general assembly, two-thirds of each branch concurring; but the number of the senators may never be greater than two-thirds, nor less than one-half, of the number of representatives.

The house of representatives is composed of seven members from each county, chosen for two years by the citizens residing in the several counties. The general assembly, two-thirds of each branch concurring, may increase the number. They must be twenty-four years of age.

The Executive Power.

4. *The governor* is chosen by the citizens of the state for the term of four years. He must be thirty years old, and have been for twelve years next before his election a citizen and resident of the United States, the last six of which he must have lived in the state, unless absent on business of the state or the United States.

He is commander-in-chief of the army and navy of the state and of the militia; may appoint all officers whose appointment is not otherwise provided for; may remit fines and forfeitures and grant reprieves and pardons, except in cases of impeachment, but must set forth the grounds of his action in writing, which is to be laid before the general assembly at their next session; may require information in writing from other executive officers; shall give information and recommend measures to the legislature; may convene the general assembly at unusual times and places, in cases of necessity; may adjourn the houses, for not more than three months, when they disagree as to the time of adjournment; and must take care that the laws are faithfully executed.

In case of a vacancy happening in the office of governor, the speaker of the senate is to act till a new governor is chosen or the vacancy ceases. In case a vacancy occurs while he is acting, the speaker of the house of representatives is to act.

The state treasurer and *the auditor* are elected by the general assembly for two years.

The secretary of state is appointed by the governor for four years.

The attorney-general is appointed by the governor for five years.

5. *The Judicial Power.*

The court of errors and appeals consists of the chancellor, who is president, the chief justice of the superior court, who presides in the absence of the chancellor, and the three assistant justices of the superior court. The three assistant justices are selected one from each county in the state.

The superior court is held by the chief justice and two assistant justices. It may hold pleas of assize, *scire facias*, replevin, informations, and actions arising under penal statutes, and hear and determine all and all manner of pleas, actions, suits, and causes, civil, real, personal, and mixed, according to the laws and constitution of the state, as fully and amply to all intents and purposes as the justices of the king's bench, common pleas, and exchequer in England, or any of them, may or can do.

The court of oyer and terminer is held by the chief justice and the three assistant justices of the superior court, and has jurisdiction of all capital crimes, and of manslaughter, and of being an accessory to such crime.

The court of general sessions is composed of the chief justice and two assistant justices of the superior court. It has jurisdiction of all crimes, except those mentioned above as within the jurisdiction of the court of oyer and terminer, and also except those committed by slaves, and which are cognizable before a justice of the peace. It acts also as a court of general jail delivery, and may indict prisoners for crimes for which they are to be tried before the court of oyer and terminer. The full title of this court is, The Court of General Sessions of the Peace and Jail Delivery.

The court of chancery is held by the chancellor. It is to hear and decree all matters in equity, including injunctions to stay suits at law and prevent waste, according to the course of chancery practice in England. But these powers are to be exercised only when no adequate remedy exists at law. In cases where matters of fact are in dispute, the cause is to be remitted to the superior court, to be tried by a jury.

The orphans' court in each county consists of the chancellor and the assistant justice from that county. It appoints and removes guardians, and has the superintendence of the settlement of estates of decedents.

All the judges are appointed by the governor, and hold office during good behavior.

Justices of the peace have a jurisdiction of actions arising from contracts, of trespass where the amount involved does not exceed one hundred dollars, of cases under the process of forcible entry and detainer, and a civil jurisdiction, generally, where the amount involved is not over one hundred dollars. They may issue search-warrants, and may punish breaches of the peace, in cases which are not aggravated, by a fine not exceeding ten dollars. If the case be aggravated, the justice must bind over the offender for trial by the higher court.

DELECTUS PERSONÆ (Lat. the choice of the person). The right of a partner to decide what new partners, if any, shall be admitted to the firm. Story, Partn. §§ 5, 195.

This doctrine excludes even executors and representatives of partners from succeeding to the state and condition of partners. 7 Pick. Mass. 237; 3 Kent, Comm. 55; Collyer, Partn. §§ 8, 10, 113, n.

In Scotch Law. The personal preference which is supposed to have been exercised by a landlord in selecting his tenant, by the members of a firm in making choice of partners, in the appointment of persons to office, and other cases. Nearly equivalent to personal trust, as a doctrine in law. Bell, Dict.

DELEGATE (Lat. *delegere*, to choose from). One authorized by another to act in his name; an attorney.

A person elected, by the people of an organized territory of the United States, to congress, who has a seat in congress and a right of debating, but not of voting. Ord. July 13, 1787, 3 Story, U. S. Laws, 2076.

A person elected to any deliberative assembly. It is, however, in this sense generally limited to occasional assemblies, such as conventions and the like, and does not usually apply to permanent bodies, as houses of assembly, etc.

DELEGATION. In Civil Law. A kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. See NOVATION.

Perfect delegation exists when the debtor who makes the delegation is discharged by the creditor.

Imperfect delegation exists when the creditor retains his rights against the original debtor. 2 Duvergnoy, n. 169.

2. It results from the definition that a delegation is made by the concurrence of at least three parties, viz.: the party delegating,—that is, the ancient debtor who procures another debtor in his stead; the party delegated, who enters into the obligation in the place of the ancient debtor, either to the creditor or to some other person appointed by him; and the creditor, who, in consequence of the obligation contracted by the party delegated, discharges

the party delegating. Sometimes there intervenes a fourth party: namely, the person indicated by the creditor in whose favor the person delegated becomes obliged, upon the indication of the creditor and by the order of the person delegating. Pothier, Obl. pt. 3, c. 2, art. 6. See La. Civ. Code, 2188, 2189; 1 Wend. N. Y. 164; 3 *id.* 66; 14 *id.* 116; 20 Johns. N. Y. 76; 5 N. H. 410; 11 Serg. & R. Penn. 179; 1 Bouvier, Inst. 311, 312.

3. The party delegated is commonly a debtor of the person delegating, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. Pothier, Obl. pt. 3, c. 2, art. 6, § 2.

In general, where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the substitute's insolvency. There is an exception to this rule when it is agreed that the debtor shall at *his own risk* delegate another person; but even in that case the creditor must not have omitted using proper diligence to obtain payment whilst the substitute continued solvent. Pothier, Obl. pt. 3, c. 2.

4. Delegation differs from transfer and simple indication. The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer, to the other, who receives it, and only takes place between these two persons, without the consent of the debtor necessarily intervening. Again, when the debtor indicates to the creditor a person from whom he may receive payment of the debt, and to whom the debtor gives the creditor an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. So, where the creditor indicates a person to whom his debtor may pay the money, the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication. Pothier, Obl. pt. 3, c. 2. See NOVATION.

At Common Law. The transfer of authority from one or more persons to one or more others.

5. All persons, *sui juris*, may delegate to another authority to act for them in a matter which is lawful and otherwise capable of being delegated. Comyns, Dig. *Attorney*, c. 1; 9 Coke, 75 *b*; Story, Ag. § 6.

When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person, for the obvious reason that the principal has relied upon the intelligence, skill, and ability of his agent, and cannot have the same confidence in a stranger. Story, Ag. § 13; 1 Livermore, Ag. 54–66; 2 Kent, Comm. 633; 5 Pet. 390; 3 Stor. C. C. 411, 425; 1 McMull. So. C. 453; 15 Pick. Mass. 303, 307; 26 Wend. N. Y. 485; 11 Gill & J. Md. 58; 5 Ill. 127, 133. A power to delegate his authority may, however, be given to the agent by express terms of substitution. 1 Livermore, Ag. 54–56; 1 Hill, N. Y. 505. And sometimes such power is implied, as in the following cases: *First*, when, by the law, such power is indispensable in order to accomplish the end proposed: as, for example, when goods are directed to be sold at auction, and the law forbids such sales except by licensed auctioneers. 6 Serg. & R. Penn. 386. *Second*, when the employment of such substitute is in the ordinary course of trade: as, where it is the custom of trade to employ a ship-broker or other agent for the purpose of procuring freight and the like. 2 Maule & S. 301; 2 Bos. & P. 438; 3 Johns. Ch. N. Y. 167, 178; 6 Serg. & R. Penn. 386. *Third*, when it is understood by the parties to be the mode in which the particular thing would or might be done. 3 Chitty, Com. Law, 206; 9 Ves. Ch. 234, 251, 252; 1 Maule & S. 484; 2 *id.* 301, 303, note. *Fourth*, when the powers thus delegated are merely mechanical in their nature. 1 Hill, N. Y. 501; Bunb. 166; Sugden, Pow. 176.

6. As to the form of the delegation, for most purposes it may be either in writing, not under seal, or verbally without writing; or the authority may be implied. When, however, the act is required to be done under seal, the delegation must also be under seal, unless the principal is present and verbally or impliedly authorizes the act. Story, Ag. § 51; 5 Cush. Mass. 483.

In Legislation. The whole number of the persons who represent a district, a state, and the like in a deliberative assembly: as, the delegation from Ohio, the delegation from the city of Philadelphia.

DELIBERATE. To examine, to consult, in order to form an opinion. Thus, a jury deliberate as to their verdict.

DELIBERATION. The act of the understanding by which a party examines whether a thing proposed ought to be done or not to be done, or whether it ought to be done in one manner or another.

The deliberation relates to the end proposed, to the means of accomplishing that end, or to both. It is a presumption of law that all acts committed are done with due deliberation,—that the party intended to do what he has done. But he may show the contrary. In contracts, for example, he may show that he has been taken by surprise (*q. v.*); and when a criminal act is charged, he may prove that it was an accident, and not with deliberation,—that, in fact, there was no intention or will. See INTENTION; WILL.

In Legislation. The council which is held touching some business in an assembly having the power to act in relation to it.

DELICT. In Civil Law. The act by which one person, by fraud or malignity, causes some damage or tort to some other.

In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally, without evil intention. But more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment.

Private delicts are those which are directly injurious to a private individual.

Public delicts are those which affect the whole community in their hurtful consequences.

Quasi delicts are the acts of a person who, without malignity, but by an inexcusable imprudence, causes an injury to another. Pothier, Obl. n. 116; Erskine, Pract. 4. 4. 1.

DELICTUM (Lat.). A crime or offence; a tort or wrong, as in actions *ex delicto*. 1 Chitty, Plead. A challenge of a juror *propter delictum* is for some crime or misdemeanor that affects his credit and renders him infamous. 3 Blackstone, Comm. 363; 2 Kent, Comm. 241. Some offence committed or wrong done. 1 Kent, Comm. 552; Cowp. 199, 200. A state of culpability. Occurring often, in the phrase "*in pari delicto melior est conditio defendentis.*" So, where both parties to a broken contract have been guilty of unlawful acts, the law will not interfere, but will leave them *in pari delicto*. 2 Greenleaf, Ev. § 111.

DELINQUENT. In Civil Law. He who has been guilty of some crime, offence, or failure of duty.

DELIRIUM FEBRILE. In Medical Jurisprudence. A form of mental aberration incident to febrile diseases, and sometimes to the last stages of chronic diseases.

2. The aberration is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. "Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past, which pass before it in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody." Ray, Med. Jur. 346. It comes on gradually, being first manifested by talking while asleep, and by a momentary forgetfulness of persons and things on waking. Fully aroused, however, the mind becomes clear and tranquil, and so continues until the return of sleep, when the same incidents recur. Gradually the mental disorder becomes more intense, and the intervals between its returns of shorter duration, until they disappear altogether. Occasionally the past is revived with wonderful vividness, and acquirements are displayed which the patient, before his illness, had entirely forgotten. Instances are related of persons speaking in a language which, though acquired in youth, had long since passed from their memory.

3. The only acts which can possibly be affected by delirium are wills, which are often made in the last illness during the periods when the mind is apparently clear. Under such circumstances it may be questioned whether the apparent clearness was or was not real; and it is a question not always easily answered. In the early stages of delirium the mind may be quite clear, no doubt, in the intervals, while it is no less certain that there comes a period at last when no really lucid interval occurs and the mind is reliable at no time. The person may be still, and even answer questions with some degree of pertinence, while a close examination would show the mind to be in a dreamy condition and unable to appreciate any nice relations. In all these cases the question to be met is, whether the delirium which confessedly existed before the act left upon the mind no trace of its influence; whether the testator, calm, quiet, clear, and coherent as he seemed, was not quite unconscious of the nature of the act he was performing. The state of things implied in these questions is not fanciful. In every case it may possibly exist, and the questions must be met.

4. After obtaining all the light which can be thrown on the mental condition of the testator by nurses, servants, and physicians, then the character of the act itself and the circumstances which accompany it require a careful investigation. If it should appear that the mind was apparently clear, and that the act was a rational act rationally done, consistent one part with another, and in accordance with wishes or instructions previously expressed, and without any appearance of foreign influence, then it would be established. A different state of things would to that extent raise suspicion and throw discredit on the act. Yet at the very best it will occasionally happen, so dubious sometimes are the indications, that the decision will be largely conjectural. 1 Hagg. Eccl. 146, 256, 502, 577; 2 *id.* 142; 3 *id.* 790; 1 Lee, Eccl. 130; 2 *id.* 229. See INSANITY.

DELIRIUM TREMENS (called, also, *mania-à-potu*).

In Medical Jurisprudence. A form of mental disorder incident to habits of intemperate drinking, which generally appears as a sequel to a few days' abstinence from stimulating drink.

2. The nature of the connection between this disease and abstinence is not yet clearly understood. Where the former succeeds a broken limb, or any other severe accident that confines the patient to his bed and obliges him to abstain, it would seem as if its development were favored by the constitutional disturbance then existing. In other cases, where the abstinence is apparently voluntary, there is some reason to suppose that it is really the incubation of the disease, and not its cause.

3. Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals. After a while the delirium becomes constant, as well as the utter absence of sleep. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this time, the disease proves fatal

4. The mental aberration of delirium tremens is marked by some peculiar characters. Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob and murder him, and insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from

going to his own home. One of the most common hallucinations in this disease is that of constantly seeing devils, snakes, or vermin around him and on him. Under the influence of the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies.

5. Delirium tremens must not be confounded with other forms of mental derangement which occur in connection with intemperate habits. Hard drinking may produce a paroxysm of maniacal excitement, or a host of hallucinations and delusions, which disappear after a few days' abstinence from drink and are succeeded by the ordinary mental condition. In U. S. *v.* McGlue, 1 Curt. C. C. 1, for instance, the prisoner was defended on the plea that the homicide for which he was indicted was committed in a fit of delirium tremens. There was no doubt that he was laboring under some form of insanity; but the fact, which appeared in evidence, that his reason returned before the recurrence of sound sleep, rendered it very doubtful whether the trouble was delirium tremens, although in every other respect it looked like that disease.

6. By repeated decisions the law has been settled in this country that delirium tremens annuls responsibility for any act that may be committed under its influence: provided, of course, that the mental condition can stand the tests applied in other forms of insanity. The law does not look to the remote causes of the mental affection; and the rule on this point is that if the act is not committed under the immediate influence of intoxicating drinks the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time. Such drinking may be morally wrong; but the same may be said of other vicious indulgences which give rise to much of the insanity which exists in the world. 1 Curt. C. C. 1; 5 Mas. C. C. 28; State *v.* Wilson, Ray, Med. Jur. 520. In the case of Birdsall, 1 Beck, Med. Jur. 808, it was held that delirium tremens was not a valid defence, because the prisoner knew, by repeated experience, that indulgence in drinking would probably bring on an attack of the disease.

It is not quite certain what the rule of law is in England. Two cases are cited where the plea of delirium tremens was admitted in excuse for crime. Reg. *v.* Watson, and Reg. *v.* Simpson, Taylor, Med. Jur. 656.

DELIVERANCE. In Practice. A term used by the clerk in court to every prisoner who is arraigned and pleads *not guilty*, to whom he wishes a good *deliverance*. In modern practice this is seldom used.

DELIVERY. In Conveyancing. The transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option.

An *absolute* delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor.

A *conditional* delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event.

A deed delivered in this manner is an *escrow*, and such a delivery must be always made to a third person, Sheppard, Touchst. 59; Croke Eliz. 520; 8 Mass. 230; though where the transfer to the possession of the grantee was merely to enable him to convey it to a third person to hold as an escrow, it was held not an absolute delivery to the grantee. 2 Dev. & B. No. C. 530; 4 Watts, Penn. 180; 22 Me. 569; 23 Wend. N. Y. 43; 2 Barnew. & C. 82.

2. No particular form of procedure is required to effect a delivery. It may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist. Comyns, Dig. *Fait* (A); 1 Wood, Conv. 193; 6 Sim. Ch. 31; 11 Vt. 621; 18 Me. 391; 2 Penn. St. 191; 12 Johns. N. Y. 536; 1 Johns. Ch. N. Y. 456; 20 Pick. Mass. 28; 4 J. J. Marsh. Ky. 572. The deed of a corporation is generally delivered by affixing the corporate seal. Coke, Litt. 22, n., 36, n.; Croke Eliz. 167; 2 Rolle, Abr. *Fait* (I).

It may be made by an agent as well as by the grantor himself, 9 Mass. 307; 3 Metc. Mass. 412; 4 Day, Conn. 66; 5 Barnew. & C. 671; 2 Washburn, Real Prop. 579; or to an agent previously appointed, 6 Metc. Mass. 356, or subsequently recognized, 22 Me. 121; 14 Ohio, 307; but a subsequent assent on the part of the grantee will not be presumed. 9 Ill. 177; 1 N. H. 353; 5 *id.* 71; 15 Wend. N. Y. 656; 25 Johns. N. Y. 187. See, also, 9 Mass. 307 · 4 Day Conn. 66; 2 Ired. Eq. No. C. 557.

3. To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession, 1 Harr. & J. Md. 319; 4 Pick. Mass. 518; 2 Ala. 136; 11 *id.* 412; 1 N. H. 353; 4 Fla. 359; 6 Mo. 326; 1 Zabr. N. J. 379; from the relationship of a person holding the deed to the grantee, 7 Ill. 557; 1 Johns. Ch. N. Y. 240, 456; and from other circumstances. 18 Conn. 257; 5 Watts, Penn. 243.

There can ordinarily be but one valid delivery, 12 Johns. N. Y. 536; 20 Pick. Mass. 28; which can take place only after complete execution. 2 Dev. No. C. 379. But there must be one, 2 Harr. Del. 197; 16 Vt. 563; 2 Washburn, Real Prop. 581; and from that one the deed takes effect. 12 Mass. 455; 4 Yeates, Penn. 278; 18 Me. 190. See 1 Den. N. Y. 323.

Consult 2 Bouvier, Inst. n. 2018 *et seq.*; 2 Washburn, Real Prop. 577 *et seq.*; 4 Kent, Comm. 466.

In Contracts. The transfer of the possession of a thing from one person to another.

4. Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferree or his avowed agent, or in their respective warehouses, vessels, carts, and the like; but in modern times it is frequently symbolical, as by delivery of the key to a room containing goods, 2 Aik. Vt. 79; 5 Johns. N. Y. 335; 1 Yeates, Penn. 529; 2 Ves. Sen. Ch. 445; 1 East, 192; see, also, 7 East, 558; 3 Barnew. & Ald. 1; 3 Bos. & P. 233; 3 Barnew. & C. 45; by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them, 2 Vt. 374; or otherwise constructive, as by the delivery of a part for the whole. 23 Vt. 265; 9 Barb. N. Y.

511; 19 *id.* 416; 11 Cush. Mass. 282; 39 Me. 496; 2 H. Blackst. 504; 3 Bos. & P. 69. See 6 East, 614; 2 Gray, Mass. 195. And see, as to what constitutes a delivery, 4 Mass. 661; 8 *id.* 287; 10 *id.* 308; 14 Johns. N. Y. 167; 15 *id.* 349.

5. Delivery is not necessary at common law to complete a sale of personal property as between the vendor and vendee, Story, Sales; but as against third parties possession retained by the vendor raises a presumption of fraud conclusive according to some authorities, 1 Cranch, 309; 2 Munf. Va. 341; 4 M'Cord, So. C. 294; 1 Ov. Tenn. 91; 14 B. Monr. Ky. 533; 18 Penn. St. 113; 4 Harr. Del. 458; 2 Ill. 296; 1 Halst. N. J. 155; 5 Conn. 196; 12 Vt. 653; 23 *id.* 82; 4 Fla. 219; 9 Johns. N. Y. 337; 1 Campb. 332; 2 Term, 587; holding it merely strong evidence of fraud to be left to the jury, Cowp. 432; 2 Bos. & P. 59; 3 Barnew. & C. 368; 4 *id.* 652; 5 Rand. Va. 211; 1 Bail. So. C. 568; 3 Yerg. Tenn. 475; 7 *id.* 440; 3 J. J. Marsh. Ky. 643; 4 N. Y. 303, 580; 2 Metc. Mass. 99; 18 Me. 127; 5 La. Ann. 1; 1 Tex. 415; but *is*, in general, where the property in goods is to be transferred in pursuance of a previous contract, 1 Taunt. 318; 16 Me. 49; 1 Parsons, Contr. 447; and also in case of a *donatio causa mortis*, 3 Binn. Penn. 370; 2 Ves. Ch. 120; 9 *id.* 1. The rules requiring actual full delivery are subject to modification in the case of bulky articles. 5 Serg. & R. Penn. 19; 12 Mass. 400; 16 Me. 49. See, also, 3 Johns. N. Y. 399; 13 *id.* 294; 19 *id.* 218; 1 Dall. Penn. 171; 2 N. H. 75; 2 Kent, Comm. 508.

6. A condition requiring delivery may be annexed as a part of any contract of transfer. 19 Me. 147.

In the absence of contract, the amount of transportation to be performed by the seller to constitute delivery is determined by general usage.

See Browne, Stat. of Frauds; Story, Sales; 1 Parsons, Contr. 201, 442, 482, 577, 650.

In Medical Jurisprudence. The act of a woman giving birth to her offspring.

7. *Pretended delivery* may present itself in three points of view. *First*, when the female who feigns has never been pregnant. When thoroughly investigated, this may always be detected. There are signs which must be present and cannot be feigned. An enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent are conclusive against the fact. 2 Annales d'Hygiène, 227. *Second*, when the pretended pregnancy and delivery have been preceded by one or more deliveries. In this case attention should be given to the following circumstances: the mystery, if any, which has been affected with regard to the situation of the female; her age; that of her husband; and, particularly, whether aged or decrepit. *Third*, when the woman has been actually delivered, and substitutes a living for a dead child. But little evidence can be obtained on this subject from a physical examination.

8. *Concealed delivery* generally takes place when the woman either has destroyed her offspring or it was born dead. In suspected cases the following circumstances should be attended to. *First*, the proofs of pregnancy which arise in consequence of the examination of the mother. When she has been pregnant, and has been delivered, the usual signs of delivery, mentioned below, will be present. A careful investigation as to the woman's appearance before and since the delivery will have some weight; though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive. *Second*, the proofs of recent delivery. *Third*, the connection between the supposed state of parturition and the state of the child that is found; for if the age of the child do not correspond to that time it will be a strong circumstance in favor of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel indicate a recent birth. Whether the child was living at its birth, belongs to the subject of infanticide.

9. *The usual signs of delivery* are very well collected in Beck's excellent treatise on Medical Jurisprudence, and are here extracted:—

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed: greater or less weakness, a slight paleness of the face, the eye a little sunken and surrounded by a purplish or dark-brown colored ring, and a whiteness of the skin like that of a person convalescing from disease. The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groin and pubes to the navel. These lines have sometimes been termed *lineæ albicantes*, and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distension. The breasts become tumid and hard, and, on pressure, emit a fluid, which at first is serous and afterwards gradually becomes whiter; and the presence of this secretion is generally accompanied with a full pulse and soft skin, covered with a moisture of a peculiar and somewhat acid odor. The areolæ round the nipples are dark-colored. The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the fœtus. The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, and rising nearly as high as the umbilicus. Its orifice is soft and tumid, and dilated so as to admit two or more fingers. The fourchette, or anterior margin of the perinæum, is sometimes torn, or it is lax, and appears to have suffered considerable distension. A discharge (termed the lochial) commences from the uterus, which is distinguished from the menses by its pale color, its peculiar and well-known smell, and its duration. The lochia are at first of a red color, and gradually become lighter until they cease.

10. These signs may generally be relied upon as indicating the state of pregnancy: yet it requires much experience in order not to be deceived by appearances.

The lochial discharge might be mistaken for menstruation, or fluor albus, were it not for its peculiar smell; and this it has been found impossible, by any artifice, to destroy.

Relaxation of the soft parts arises as frequently from menstruation as from delivery; but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling. The parts are found pale and flabby when all signs of contusion disappear, after delivery; and this circumstance does not follow menstruation.

11. The presence of milk, though a usual sign of delivery, is not always to be relied upon; for this secretion may take place independent of pregnancy.

The wrinkles and relaxations of the abdomen

which follow delivery may be the consequence of dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state.

See, generally, 1 Beck, Med. Jur. c. 7, p. 206; 1 Chitty, Med. Jur. 411; Ryan, Med. Jur. c. 10, p. 133; 1 Briand, Méd. Lég. 1ère partie, c. 5.

DELUSION. In Medical Jurisprudence. A diseased state of the mind, in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary.

The individual is, of course, insane. For example, should a parent unjustly persist without the least ground in attributing to his daughter a course of vice, and use her with uniform unkindness, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion would arise in the minds of a jury; because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggests that he must labor under some morbid mental delusion. Connolly, Insan. 384; Ray, Med. Jur. Prel. Views, §§ 20, 22; 1 Powell, Dev. Jarman ed. 130, n.; Shelford, Lun. 296; 3 Add. Eccl. 70, 90, 180; 1 Hagg. Eccl. 27; 2 Bouvier, Inst. nn. 2104–2110.

DEMAIN. See DEMESNE.

DEMAND. A claim; a legal obligation.

Demand is a word of art of an extent greater in its signification than any other word except claim. Coke, Litt. 291; 2 Hill, N. Y. 220; 9 Serg. & R. Penn. 124; 6 Watts & S. Penn. 226.

A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like, 3 Penn. 120; 2 Hill, N. Y. 228; but does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only due, but the consideration —the future enjoyment of the lands—for which the rent was to be given was not executed. 1 Sid. 141; 1 Lev. 99; 3 *id.* 274; Bacon, Abr. *Release*, I. See 10 Coke, 128; 23 Pick. Mass. 295; 7 Md. 375.

In Practice. A requisition or request to do a particular thing specified under a claim of right on the part of the person requesting.

2. *In causes of action arising ex contractu*, it is frequently necessary, to secure to the party all his rights and to enable him to bring an action, that he should make a demand upon the party bound to perform the contract or discharge the obligation. Thus, where property is sold to be paid for on delivery, a demand must be made and proved on trial before bringing an action for non-delivery, 5 Term, 409; 3 Mees. & W. Exch. 254; 3 Price. Exch. 58; 1 Tayl. No. C. 149; but not if the seller has incapacitated himself from delivering them, 10 East, 359; 5 Barnew. & Ald. 712; 2 Bibb, Ky. 280; 1 Vt. 25; 4 Mass. 474; 6 *id.* 61; 16 *id.* 453; 3 Wend. N. Y. 556; 9 Johns. N. Y. 361; 2 Me. 308; 5 Munf. Va. 1; and this rule and exception apply to contracts for marriage. 2 Dowl. & R. 55; 1 Chitty, Pract. 57, note (n), 438, note (e). A demand of rent is necessary before re-entry for non-payment. See RE-ENTRY. No demand is necessary on a promissory note before bringing an action in general; but after a tender demand must be made of the sum tendered. 1 Campb. 181, 474; 1 Stark. 323. See PAYMENT; Parsons, Notes & B.

3. *In cases arising ex delicto*, a demand is frequently necessary. Thus, when the wife, apprentice, or servant of one person has been harbored by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer, unless the plaintiff can prove an original illegal enticing away. 2 Lev. 63; Willes, 582; 1 Peake, Cas. 55; 5 East, 39; 6 Term, 652; 4 J. B. Moore, 12.

So, too, in cases where the taking of goods is lawful but their subsequent detention becomes illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. See TROVER; CONVERSION. And when a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice, and request him to remove it, either before an entry is made for the purpose of abating it or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuance of a nuisance originally created by another person. 2 Barnew. & C. 302; Croke Jac. 555; 1 East, 111; 5 Coke, 100, 101; 2 Phillipps, Ev. 8, 18, n., 119; 5 Viner, Abr. 506: 1 Ayliffe, Pand. 497; Bacon, Abr. *Rent*, I.

4. *In cases of contempts*, as where an order to pay money or to do any other thing has been made a rule of court, a demand for the payment of the money or performance of the thing must be made before an attachment will be issued for a contempt. 2 Dowl. Parl. Cas. 338, 448; 4 *id.* 86, 114; 1 Crompt. M. & R. Exch. 88, 459; 4 Tyrwh. 369; 2 Scott, 193; 1 Harr. & W. 216.

The demand should be made by the party having the right, or his authorized agent, 2 Bos. & P. 464 *a*; 1 Bail. So. C. 193; 2 Mas. C. C. 77, of the person in default, in cases of torts, 1 Esp. 22; 8 Barnew. & C. 528; 7 Johns. N. Y. 302, in case of rent, 2 Washburn, Prop. 321, 322, and at a proper time and place in case of rents, 3 Wend. N. Y. 230; 17 Johns. N. Y. 66; 4 N. H. 251; 15 *id.* 68; 4 Harr. & M'H. Md. 135; 21 Pick. Mass. 389, in cases of notes and bills of exchange. Parsons, Notes & B.

As to the allegation of a demand in a declaration, see 1 Chitty, Plead. 322; 2 *id.* 84; 1 Wms. Saund. 33, note 2; Comyns, Dig. *Pleader*.

DEMAND IN RECONVENTION. A demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Used in Louisiana. La. Pract. Code, art. 374.

DEMANDANT. The plaintiff or party who brings a real action. Coke, Litt. 127; Comyns, Dig.

DEMEMBRATION. In Scotch Law. Maliciously cutting off or otherwise separating one limb from another. 1 Hume, 323; Bell, Dict.

DEMENS (Lat.). One who has lost his mind through sickness or some other cause. One whose faculties are enfeebled. Dean, Med. Jur. 481. See DEMENTIA.

DEMENTIA. In Medical Jurisprudence. That form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly.

The mind dwells only in the past, and the thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are transitory, and leave no permanent impression; and for every thing recent the memory is exceedingly weak. In mania, the action of the mind is marked by force, hurry, and intensity; in dementia, by slowness and weakness. It is mostly the sequel of mania, of which, in fact, it is the natural termination. Occasionally it occurs in an acute form in young subjects; and here only it is curable. In old men, in whom it often occurs, it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay. It is this form of dementia only which gives rise to litigation; for in the others the incompetency is too patent to admit of question. It cannot be described by any positive characters, because it differs in the different stages of its progress, varying from simple lapse of memory to complete inability to recognize persons or things. And it must be borne in mind that often the mental infirmity is not so serious as might be supposed at first sight. Many an old man who seems to be scarcely conscious of what is passing around him, and is guilty of frequent breaches of decorum, needs only to have his attention aroused to a matter in which he is deeply interested, to show no lack of vigor or acuteness. In other words, the mind may be damaged superficially(to use a figure), while it may be sound at the core. And therefore it is that one may be quite oblivious of names and dates, while comprehending perfectly well his relations to others and the interests in which he was concerned. It follows that the impressions made upon casual or ignorant observers in regard to the mental condition are of far less value than those made upon persons who have been well acquainted with his habits and have had occasion to test the vigor of his faculties.

The wills of old men are often contested on the ground of senile dementia, and the conflicting testimony of observers, the proofs of foreign influence, and the indications of mental capacity all combine to render it no easy task to arrive at a satisfactory conclusion. The only general rule of much practical value is that competency must be always measured, not by any fancied standard of intellect, but solely by the requirements of the act in question. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon his bounty. Such is the principle; and the ends of justice cannot be better served than by its correct and faithful application. Of course, there will always be more or less difficulty; but generally, by discarding all legal and metaphysical subleties and following the leading of common sense, it will be satisfactorily surmounted.

The legal principles by which the courts are governed are not essentially different whether the mental incapacity proceed from dementia or mania. If the will coincides with the previously expressed wishes of the testator, if it recognizes the claims of those who stood in near relation to him, if it shows no indications of undue influence,—if, in short, it is a rational act rationally done,—it will be established, and very properly so, though there may have been considerable impairment of mind. 2 Phill. Eccl. 449; 3 Wash. C. C. 580; 4 *id.* 262. See INSANITY.

DEMESNE. Lands of which the lord had the absolute property or ownership, as distinguished from feudal lands, which he held of a superior. 2 Sharswood, Blackst. Comm. 104; Cowel. Lands which the lord retained under his immediate control, for the purpose of supplying his table and the immediate needs of his household: distinguished from that farmed out to tenants, called among the Saxons *bordlands*. Blount; Coke, Litt. 17 *a*.

Own; original. *Son assault demesne*, his (the plaintiff's) original assault, or assault in the first place. 2 Greenleaf, Ev. § 633; 3 Blackstone, Comm. 120, 306.

DEMESNE AS OF FEE. A man is said to be seised *in his demesne as of fee* of a corporeal inheritance, because he has a property *dominicum* or *demesne* in the *thing* itself. 2 Blackstone, Comm. 106. But when he has no dominion in the thing itself, as in the case of an incorporeal hereditament, he is said to be *seised* as of fee, and not in his *demesne* as of fee. Littleton, § 10; 17 Serg. & R. Penn. 196; Jones, Land Tit. 166.

Formerly it was the practice in an action on the case—*e. g.* for a nuisance to real estate—to aver in the declaration the seisin of the plaintiff in demesne as of fee; and this is still necessary, in order to estop the record with the land, so that it may run with or attend the title. Archbold, Civ. Plead. 104; Coke, Entr. 9, pl. 8; Lilly, Entr. 62; 1 Saund. 346; Willes, 508. But such an action may be maintained on the possession as well as on the seisin; although the effect of the record in this case upon the title would not be the same. Stephen, Plead. 322; 1 Lutw. 120; 2 Mod. 71; 4 Term, 718; 2 Wms. Saund. 113 *b;* Croke Car. 500, 575.

DEMESNE LANDS. A phrase meaning the same as *demesne*.

DEMESNE LANDS OF THE CROWN. That share of lands reserved to the crown at the original distribution of landed property, or which came to it afterwards by forfeiture or otherwise. 1 Sharswood, Blackst. Comm. 286; 2 Stephen, Comm. 550.

DEMI-MARK. A sum of money (6*s.* 8*d.*, 3 Blackstone, Comm. App. v.) tendered and paid into court in certain cases in the trial of a writ of right by the grand assize. Coke, Litt, 294 *b;* Booth, Real Act. 98.

It was paid by the tenant to obtain an inquiry by the grand assize into the time of the demandant's seisin. 1 Reeve, Hist. Eng. Law, 429; Stearns, Real Act. 378, and note. It compelled the demandant to begin. 3 Chitty, Plead. 1373. It is unknown in American practice. 13 Wend. N. Y. 546; Stearns, Real Act. 378.

DEMI-VILL. Half a tithing.

DEMIDIETAS. A word used in ancient records for a moiety, or one-half.

DEMIES. In some universities and colleges this term is synonymous with *scholars.* Boyle, Char. 129.

DEMISE. A conveyance, either in fee for life or for years.

A lease or conveyance for a term of years. According to Chief Justice Gibson, the term strictly denotes a posthumous grant, and no more. 5 Whart. Penn. 278. See 4 Bingh. N. C. 678; 2 Bouvier, Inst. n. 1774 *et seq.*

A term nearly synonymous with death, appropriated in England especially to denote the decease of the king or queen.

DEMISE OF THE KING. The natural dissolution of the king.

The term is said to denote in law merely a transfer of the property of the crown. 1 Blackstone, Comm. 249. By demise of the crown we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. Plowd. 117, 234.

A similar result, viz.: the perpetual existence of the president of the United States, has been secured by the constitution and subsequent statutes. 1 Sharswood, Blackst. Comm. 249.

DEMISE AND RE-DEMISE. A conveyance by mutual leases made from one to another on each side of the same land, or of something issuing from it. A lease for a given sum—usually a mere nominal amount—and a release for a larger rent. Toullier; Whishaw; Jacob.

DEMOCRACY. That government in which the people rule.

But the multitude cannot actually rule: an unorganic democracy, therefore, one that is not founded upon a number of institutions each endowed with a degree of self-government, naturally becomes a one-man government. The basis of the democracy is equality, as that of the aristocracy is privilege; but equality of itself is no guarantee for liberty, nor does equality constitute liberty. Absolute democracies existed in antiquity and the middle ages: they have never endured for any length of time. On their character, Aristotle's Politics may be read to the greatest advantage. Lieber, in his Civil Liberty, dwells at length on the fact that mere equality, without institutions of various kinds, is adverse to self-government; and history shows that absolute democracy is any thing rather than a convertible term for liberty. See ABSOLUTISM; GOVERNMENT.

DEMONSTRATIO (Lat.). Description; addition; denomination. Occurring often, in the phrase *falsa demonstratio non nocet* (a false description does not harm). 2 Blackstone, Comm. 382, n.; 2 P. Will. Ch. 140; 1 Greenleaf, Ev. § 291; Wigram, Wills, 128.

DEMONSTRATION (Lat. *demonstrare,* to point out). Whatever is said or written to designate a thing or person.

Several descriptions may be employed to denote the same person or object; and the rule of law in such cases is that if one of the descriptions be erroneous it may be rejected, if, after it is expunged, enough will remain to identify the person or thing intended. For *falsa demonstratio non nocet.* The meaning of this rule is, that if there be an adequate description with convenient certainty of what was contemplated, a subsequent erroneous addition will not vitiate it. The complement of this maxim is, *non accipi debent verba in demonstrationem falsam quæ competent in limitationem veram;* which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some object wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to ascertain that person or thing wherein all the circumstances are true. 4 Exch. 604, per *Alderson, B.;* 8 Bingh. 244; Broom, Leg. Max. 490; Plowd. 191; 7 Cush. Mass. 460.

The rule that *falsa demonstratio* does not vitiate an otherwise good description applies to every kind of statement of fact. Some of the particulars in an averment in a declaration may be rejected if the declaration is sensible without them and by their presence is made insensible or defective. Yelv. 182.

In Evidence. That proof which excludes all possibility of error.

DEMONSTRATIVE LEGACY. A pecuniary legacy coupled with a direction that it be paid out of a specific fund.

It is so far of the nature of a specific legacy that (while the fund exists out of which it is specially payable) it will not abate with general legacies upon a deficiency of assets; and yet, like a general legacy, it is not liable to ademption by the alienation or non-existence of the property specially pointed out as a means of satisfying it. 2 Williams, Exec. 839; 2 White & T. Lead. Cas. 237, 253; Sheppard, Touchst. 433; Swinburne, Wills, 485; 1 Mer. Ch. 178; 2 Younge & C. Exch. 90.

DEMPSTER. In Scotch Law. A doomsman. One who pronounced the sentence of court. 1 Howell, St. Tr. 937.

DEMURRAGE. The delay of a vessel by the freighter beyond the time allowed for loading, unloading, or sailing.

Payment for such delay.

Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage, or in waiting for convoy. 3 Kent, Comm. 159; 2 Marshall, Ins. 721; Abbott, Shipp. 192; 5 Comyns, Dig. 94, n., 505; 4 Taunt. 54, 55; 3 Chitty, Com. Law, 426; Parsons, Mar. Law.

DEMURRER (Lat. *demorari*, old Fr. *demorrer*, to stay; to abide). **In Pleading.** An allegation that, admitting the facts of the preceding pleading to be true as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. A declaration that the party demurring will *go no further*, because the other has shown nothing against him. 5 Mod. 232; Coke, Litt. 71 *b*. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do. Coke, Litt. 71 *b*; Stephen, Plead. 61.

2. In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof. Mitford, Eq. Plead. Jerem. ed. 107.

A demurrer may be either to the relief asked by the bill, or to both the relief and the discovery, 5 Johns. Ch. N. Y. 184; 10 Paige, Ch. N. Y. 210; but not to the discovery alone where it is merely incidental to the relief. 2 Brown, Ch. 123; 1 Younge & C. Ch. 197; 1 Sim. & S. Ch. 83. As to exceptions to avoid self-crimination, see 3 Johns. Ch. N. Y. 407; Walk. Ch. Mich. 327; 1 Hayw. No. C. 167; 2 Harr. & G. Md. 382; 6 Day, Conn. 361. If it goes to the whole of the relief, it generally defeats the discovery if successful, 2 Brown, Ch. 319; 9 Ves. Ch. 71; 3 Edw. Ch. N. Y. 117; Saxt. Ch. N. J. 358; Walk. Ch. Mich. 35; 5 Metc. Mass. 525; otherwise, if to part only. Adams, Eq. 334; Story, Eq. Plead. § 545; 10 Paige, Ch. N. Y. 210.

3. They may be brought either to original or supplemental bills; and there are peculiar causes of demurrer in the different classes of supplemental bills. 2 Madd. Ch. 387; 4 Sim. Ch. 76; 17 Ves. Ch. 144; 1 Mylne & C. Ch. 42; 3 Hare, Ch. 476; 3 P. Will. Ch. 284; 4 Paige, Ch. N. Y. 259; 7 Johns. Ch. N. Y. 250; 13 Pet. 6, 14; Story, Eq. Plead. § 611.

Demurrers are *general*, where no particular cause is assigned except the usual formulary that there is no equity in the bill, or *special*, where the particular defects are pointed out. Story, Eq. Plead. § 455. General demurrers are used to point out defects of substance; special, to point out defects in form.

4. The defendant may demur to part of the bill, 2 Barb. Ch. N. Y. 106, and plead or answer to the residue, or both plead and answer to separate parts thereof, 3 P. Will. Ch. 80; 2 Atk. Ch. 282; 6 Johns. Ch. N. Y. 214; 4 Wisc. 54; taking care so to apply them to different and distinct parts of the bill that each may be consistent with the others, 3 Mylne & C. Ch. 653; 1 Keen, Ch. 389; 23 Miss. 304; Cooper, Eq. Plead. 112, 113; Story, Eq. Plead. § 442; but if it be to the whole bill, and a part be good, the demurrer must be overruled. 27 Miss. 419; 5 Ired. Eq. No. C. 86; 29 Me. 273; 12 Metc. Mass. 323.

Demurrers lie only for matter apparent on the face of the bill, and not upon any new matter alleged by the defendant. Beames, Ord. in Ch. 26; 19 Ves. Ch. 180, 327; 6 Sim. Ch. 51; 2 Schoales & L. Ch. Ir. 637; 5 Fla. 110; 3 Halst. Ch. N. J. 440. Demurrers are not applicable to pleas or answers. If a plea or answer is bad in substance, it may be shown on hearing; and if the answer is insufficient in form, exceptions should be filed. Story, Eq. Plead. §§ 456, 864.

5. *Demurrers to relief* are usually brought for causes relating to the *jurisdiction*, as that *the subject* is not cognizable *by any court*, as in some cases under political treaties, 1 Ves. Ch. 371; 2 *id.* 56; 2 Pet. 253; 4 *id.* 411; 7 *id.* 51; but see 3 Story, Const. §§ 1631–1637; 5 Pet. 1; 6 *id.* 515; 8 *id.* 436; 1 Wheat. 304; 2 *id.* 259; 7 *id.* 535; 8 *id.* 464; 9 *id.* 489; 10 *id.* 181; 1 Wash. C. C. 322, certain cases of confiscation, 3 Ves. Ch. 424; 10 *id.* 354; see 3 Dall. Penn. 199, and questions of boundaries, Story, Eq. Plead. 347; 1 Ves. Ch. 446; as to law in the United States, see 6 Cranch, 158; 4 Dall. Penn. 3; 5 Pet. 284; 13 *id.* 23; 14 *id.* 210; or *that it is not cognizable* by a court of equity, 2 Madd. Chanc. Pract. 229; 1 Sim. & S. Ch. 227; 6 Beav. Rolls, 165; Story, Eq. Plead. § 472; 9 Metc. Mass. 469; 30 N. H. 446; 19 Me. 124; 7 Cranch, 68; 16 Ga. 541; 16 Mo. 543; 8 Ired. Eq. No. C. 123; 21 Miss. 93; *or that some other* court of equity has jurisdiction properly, 4 Wheat. 1; 6 Cranch, 158; 7 Ga. 243; 2 Paige, Ch. N. Y. 402; 9 Mod. 95; 1 Ves. Ch. 203; *or that some other court has jurisdiction properly*, 3 Dall. Penn. 382; 8 Pet. 148; 30 N. H. 444; 2 How. 497: *to the person*, as that the plaintiff is not entitled to sue, by reason of personal disability, as infancy, idiocy, etc., Jac. 377, bankruptcy and assignment, 9 Ves. Ch. 77; 8 Sim. Ch. 28, 76; 1 Younge & C. Ch. 172, or has no title to sue in the character in which he sues, 2 P. Will. Ch. 369; 6 Ves. Ch. 773; 4 Johns. Ch. N. Y. 575: *to the substance of the bill*, as that the matter is *too trivial*, 4 Johns. Ch. N. Y. 183; 3 Ohio St. 457; 2 Atk. Ch. 253; 1 Vern. Ch. 359; Cooper, Eq. Plead. 166; that the *plaintiff* has *no interest* in the matter, Mitford, Eq. Plead. Jerem. ed. 154; 2 Brown, Ch. 322; 8 Ves. Ch. 241; 2 Sim. & S. Ch. 592; 4 Russ. Ch. 225, 244; 1 Johns. Ch. N. Y. 305; 30 Me. 419; or that the *defendant* has no such *interest*, Story, Eq. Plead. § 519; 2 Brown, Ch. 332; 1 Ves. & B. Ch. Ir. 545; 5 Madd. Ch. 19; 3 Barb. Ch. N. Y. 485; 10 Wheat. 384; or that

the bill is *to enforce a penalty*, 1 Younge, Ch. 308; 1 Mer. Ch. 391; 4 Brown, Ch. 434: *to the fame and form of the bill*, as that there is a defect or want of form, Mitford, Eq. Plead. 206; 5 Russ. Ch. 42; 5 Madd. Ch. 378; 3 Ves. Ch. 253; 14 *id.* 156; 11 Mo. 42, or that the bill is multifarious, Story, Eq. Plead. § 530, n.; 1 Mylne & C. Ch. 618; 2 Sim. & S. Ch. 79; 4 Harr. Ch. 9; 2 Gray, Mass. 471; 3 How. 412; 5 *id.* 127; 4 Edw. Ch. N. Y. 592; that there is a want or misjoinder of plaintiffs. 16 Ves. Ch. 325; 1 P. Will. Ch. 428; 4 Russ. Ch. 272; 2 Paige, Ch. N. Y. 281; 3 *id.* 222; 4 *id.* 510; 3 Cranch, 220; 7 *id.* 69; 8 Wheat. 451; 5 Fla. 110; 5 Du. N. Y. 168; 2 Gray, Mass. 467; 1 Jones, No. C. Eq. 40; 4 Fla. 11.

6. *Demurrers to discovery* may be brought for most of the above causes, 1 Story, Eq. Plead. § 549; 9 Sim. Ch. 180; 16 Ves. Ch. 239; 12 Beav. Rolls, 423; 2 Stor. C. C. 59; 1 Johns. Ch. N. Y. 547; 2 Paige, Ch. N. Y. 601; and, generally, that the plaintiff has no right to demand the discovery asked for, either in whole or in part, 8 Ves. Ch. 398; 2 Russ. Ch. 564, or to ask it of the defendant. Story, Eq. Plead. §§ 570, 571. See DISCOVERY.

The effect of a demurrer when allowed is to put an end to the suit, unless it is confined to a part of the bill or the court gives the plaintiff leave to amend. 13 Ill. 31. If overruled, the defendant must make a fresh defence by answer, 12 Mo. 132; unless he obtain permission to put in a plea. Adams, Eq. 336. It admits the facts which are well pleaded, 20 How. 108; and the jurisdiction. 28 Vt. 470; 4 R. I. 285; 1 Stockt. Ch. N. J. 434; 4 Md. 72.

7. AT LAW. A *general* demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance. Stephen, Plead. 159; 1 Chitty, Plead. 639; Lawes, Civ. Pl. 167; Bacon, Abr. *Pleas* (N 5); Coke, Litt. 72 *a*; 1 Dutch. N. J. 506; 11 Ark. 12; 2 Iowa, 532; 2 Barb. N. Y. 160.

A *special demurrer* is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception. Coke, Litt. 72 *a*; Bacon, Abr. *Pleas* (N 5).

It is necessary where the objection is to the form, by the statutes 27 Eliz. c. 5 and 4 Anne, c. 16. 18 Ark. 347; 6 Md. 210; 20 Ohio, 100. Under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance.

8. It is not enough that a special demurrer object, in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect it is uncertain, defective, and informal. 1 Wms. Saund. 161, n. 1, 337 *b*, n. 3; Stephen, Plead. 159, 161; 1 Chitty, Plead. 642.

A demurrer may be for insufficiency either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner. Hob. 164. It lies to any of the pleadings, except that there may not be a demurrer to a demurrer. Salk. 219; Bacon, Abr. *Pleas* (N 2). Demurrer may be to the whole or a part of the pleading; but if to the whole, and a part be good, the demurrer will be overruled. 13 East, 76; 3 Caines, N. Y. 89, 265; 5 Johns. N. Y. 476; 13 *id.* 264, 402; 4 Den. N. Y. 65; 20 Barb. N. Y. 339; 11 Cush. Mass. 348; 23 Miss. 548; 28 *id.* 56; 2 Curt. C. C. 97; 2 Paine, C. C. 545; 14 Ill. 77; 2 Md. 284; 1 Wisc. 21. But see 6 Fla. 262; 4 Cal. 327; 9 Ind. 241; 6 Gratt. Va. 130; 8 B. Monr. Ky. 400. The objection must appear on the face of the pleadings, 2 Saund. 364; 29 Vt. 354, or upon oyer of some instrument defectively set forth therein. 2 Saund. 60, n.

For the various and numerous causes of demurrer, reference must be had to the laws of each state.

9. *As to the effect* of a demurrer. It admits all such matters of fact as are sufficiently pleaded. Bacon, Abr. *Pleas* (N 3); Comyns, Dig. *Pleader* (A 5); 4 Iowa, 63; 14 Ga. 8; 9 Barb. N. Y. 297; 7 Ark. 282. On demurrer the court consider the whole record, and give judgment according to the legal right for the party who on the whole seems the best entitled to it. Hob. 56; 4 East, 502; 2 Ventr. Ch. 198; 8 Ark. 224; 2 Mich. 276; 7 How. 706; 28 Ala. N. S. 637; 31 N. H. 22; 39 Me. 426; 16 Ill. 269. For example, on a demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the defendant, but for the plaintiff, 2 Wils. 150; 7 How. 706, provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. 5 Coke, 29 *a*. The court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground. 5 Barnew. & Ald. 507. If, however, the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration. Lutw. 1592, 1667; 1 Salk. 212; Carth. 172; 4 R. I. 110; 13 Ark. 335; 14 Ill. 49.

10. In Practice.

Demurrer to evidence is a declaration that the party making it will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue. 28 Ala. N. S. 637. Upon joinder by the opposite party, the jury is generally discharged from giving any verdict, 1 Archbold, Pract. 186; and the demurrer being entered on record is afterwards argued and decided by the court in banc; and the judgment there given upon it may ultimately be brought before a court

of error. See 2 H. Blackst. 187; 4 Chitty, Pract. 15; Gould, Plead. c. 9, part 2, § 47. It admits the truth of the evidence given and the legal deductions therefrom. 14 Penn. St. 275. As to the right so to demur, and the practice, see 4 Iowa, 63.

Demurrer to interrogatories is the reason which a witness tenders for not answering a particular question in interrogatories. 2 Swanst. Ch. 194. It is not, strictly speaking, a demurrer, except in the popular sense of the word. Gresley, Eq. Ev. 61. The court are judicially to determine its validity. The witness must state his objection very carefully; for these demurrers are held to strict rules, and are readily overruled if they cover too much. 2 Atk. 524; 1 Younge & J. Exch. 132.

See, generally, as to demurrer, Bouvier, Inst. Index.

DEMURRER BOOK. In English Practice. A transcript of all the pleadings that have been filed or delivered between the parties made upon the formation of an issue at law. Stephen, Plead. 95.

DEMY SANKE, DEMY SANGUE. Half-blood. A corruption of *demi-sang*.

DEN AND STROND. Liberty for ships and vessels to run aground or come ashore (strand themselves). Cowel.

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense: *payer de ses propres deniers*.

DENARIUS DEI. A certain sum of money which is given by one of the contracting parties to the other as a sign of the completion of the contract.

It differs from *arrhæ* in this, that the latter is a part of the consideration, while the *denarius Dei* is no part of it. 1 Duvergnoy, n. 132; 3 *id.* n. 49; Répert. de Jur. *Denier à Dieu*.

It does not bind the parties, as he who received it may return it in a limited time, or the other may abandon it and avoid the engagement.

DENIAL. In Pleading. A traverse of the statement of the opposite party; a defence.

DENIER A DIEU. In French Law. A sum of money which the hirer of a thing gives to the other party as evidence, or for the consideration of the contract, which either party may annul within twenty-four hours, the one who gave the *denier à Dieu* by demanding, and the other by returning it. See DENARIUS DEI

DENIZATION. The act by which a foreigner becomes a subject, but without the rights either of a natural-born subject or of one who has become naturalized. Bacon, Abr. *Aliens*, B.

DENIZEN. In English Law. An alien born who has obtained, *ex donatione legis*, letters patent to make him an English subject.

He is intermediate between a natural-born subject and an alien. He may take lands by purchase or devise,—which an alien cannot; but he is incapable of taking by inheritance. 1 Blackstone, Comm. 374.

In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute.

The right of making denizens is not exclusively vested in the king, for it is possessed by parliament, but is scarcely ever exercised but by royal power. It may be effected by conquest. 7 Coke, 6 *a*; 2 Ventr. 6; Comyns, Dig. *Alien* (D 1); Chitty, Com. Law, 120.

DENUNCIATION. In Civil Law. The act by which an individual informs a public officer, whose duty it is to prosecute offenders, that a crime has been committed, See 1 Brown, Civ. Law, 447; 2 *id.* 389; Ayliffe, Parerg. 210; Pothier, Proc. Cr. sect. 2, § 2.

DENUNTIATIO. In Old English Law. A public notice or summons. Bracton, 202 *b*.

DEODAND. Any personal chattel whatever which is the immediate cause of the death of a human creature,—which is forfeited to the king, to be distributed in alms by his high almoner.

A Latin phrase which is attributed to Bracton has, by mistranslation, given rise to some erroneous statements in some of the authors as to what are deodands. *Omnia quæ ad mortem movent*, evidently enough meaning all things which *tend* to produce death, has been rendered *move to death*,—thus giving rise to the theory that things in motion only are to be forfeited. A difference, however, is made by Blackstone to exist as to how much is to be sacrificed. Thus, if a man should fall from a cart-wheel, the cart being stationary, and be killed, the wheel only would be deodand; while, if he was run over by the same wheel in motion, not only the wheel but the cart and the load became deodand.

No deodand accrues in the case of a felonious killing. 1 Q. B. 818; 1 Gale & D. 211; 9 Dow. 1048. See, also, 2 Mann. & R. 397; 11 Ad. & E. 128; 3 Perr. & D. 57; 10 Mees. & W. Exch. 58; 1 Q. B. 826; 1 Gale & D. 481; and, generally, 1 Sharswood, Blackst. Comm. 301; 1 Hale, Pl. Cr. 422; Coke, 3d Inst. 57; Spelman, Gloss.

DEPARTMENT. A portion of a country.

In France, the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments, including certain portions of the country. 1 Pet. 293. These departments are, for the purposes for which they are created, under the immediate government of some officer, who is, in turn, responsible to his superior.

A portion of the agents employed by the executive branch of the United States government, to whom a specified class of duties is assigned.

The *department of the interior* has general supervisory and appellate powers over the office of the commissioner of patents; in relation to the land office; over accounts of marshals, clerks, and other officers of the United States courts; over the commissioner of Indian affairs; over the commissioner of pensions; over the census; over the mines of the United States; over the commissioner of public

buildings; over the penitentiary of the District of Columbia.

The chief officer is a secretary, appointed by the president, and a chief and other clerks, appointed by the secretary, including a chief and other clerks in each of the bureaus among whom the duties of the department are divided.

The *department of the navy* is intrusted with the execution of such orders as may be received from the president relative to the procurement of naval stores and materials and the construction, armament, and equipment of vessels of war, as well as all other matters connected with the naval establishment of the United States. Brightly, Dig. U. S. Laws, 680, 681.

The chief officers are a secretary and assistant secretary, appointed by the president: the secretary is to appoint such clerks as may be necessary of the classes specified by the act of March 3, 1853 (10 U. S. Stat. at Large, 209).

There are in the navy department five bureaus, each with a chief and a number of clerks, viz.: a bureau of navy-yards and docks; a bureau of construction, equipment, and repairs; a bureau of provisions and clothing; a bureau of ordnance and hydrography; a bureau of medicine and surgery.

The *post-office department* has the general charge of matters relating to the postal service, the establishment of post-offices, appointment of postmasters, and the like.

The chief officer is a postmaster-general. There are also three assistant postmasters-general, a chief clerk, three principal clerks, and thirty-three clerks of inferior grade, besides an auditor, and a chief clerk, four principal and thirty-eight subordinate clerks. The assistant postmasters-general are appointed by the president, with the consent of the senate.

The *department of state* is intrusted with such matters relating to correspondences, commissions, and instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such matters respecting foreign affairs, as the president of the United States shall assign to said department. 1 U. S. Stat. at Large, 28.

The principal officer is a secretary, appointed by the president. An assistant secretary, a chief and twenty-one subordinate clerks, appointed by the secretary, are employed in the duties of the department.

The *department of treasury* has charge of the services relating to the finances. It is the duty of the secretary to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant, under limitations established by law, all warrants for moneys to be issued from the treasury in pursuance of appropriations by law; to execute such services relative to the sale of lands belonging to the United States as may by law be required of him; to make report and give information to either branch of the legislature, in person or in writing, respecting all matters referred to him by the senate or house of representatives, or which shall appertain to his office; and, generally, to perform all such services relative to the finances as he shall be directed to perform. The officers consist of a secretary, who is the head of the department, two comptrollers, six auditors, a treasurer, a register, a commissioner of customs, a solicitor, an assistant secretary, and numerous subordinate clerks. There are also assistant treasurers, appointed by the president, to reside in several of the more important cities of the United States. There is also a light-house board attached to this department.

The *department of war* is intrusted with duties relating to military commissions, the land forces, and warlike stores of the United States.

The chief officers are a secretary and assistant secretary, appointed by the president. There are also a chief clerk and numerous subordinate clerks.

DEPARTURE. In Maritime Law. A deviation from the course prescribed in the policy of insurance. It may be justifiable. See DEVIATION.

In Pleading. The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defence, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it. 2 Wms. Saund. 84 *a*, n. 1; 2 Wils. 98; Coke, Litt. 304 *a*. It is not allowable, as it prevents reaching an issue. 2 Wms. Saund. *a*, n. 1; Stephen, Plead. 410; 16 East, 39; 1 Maule & S. 395. It is to be taken advantage of by demurrer, general, 5 Dowl. & R. 295; 14 Johns. N. Y. 132; 20 *id.* 160; 2 Caines, N. Y. 320; 16 Mass. 1; or special. 2 Saund. 84; Comyns, Dig. *Pleader* (F 10).

A departure is cured by a verdict in favor of him who makes it, if the matter pleaded by way of departure is a sufficient answer in substance to what has been before pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance. 2 Saund. 84; 1 Lilly, Abr. 444.

DEPARTURE IN DESPITE OF COURT. This took place where the tenant, having once made his appearance in court upon demand, failed to reappear when demanded. Coke, Litt. 139 *a*. As the whole term is, in contemplation of law, but a single day, an appearance on any day, and a subsequent failure to reappear at any subsequent part of the term, is such a departure. 8 Coke, 62 *a;* 1 Rolle, Abr. 583; Metc. Yelv. 211; Roscoe, Real Act. 283.

DEPENDENCY. A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.

It differs from a *colony*, because it is not settled by the citizens of the sovereign or mother state; and from *possession*, because it is held by other title than that of mere conquest. For example, Malta was considered a dependency of Great Britain in the year 1813. 3 Wash. C. C. 286. See Act of Cong. Mch. 1, 1809, commonly called the non-importation law.

DEPENDENT CONTRACT. One which it is not the duty of the contractor to perform until some obligation contained in the same agreement has been performed by the other party. Hammond, Partn. 17, 29, 30, 109.

DEPONENT. One who gives information, on oath or affirmation, respecting some facts known to him, before a magistrate; he who makes a deposition.

DEPORTATION. **In Roman Law.** A perpetual banishment, depriving the banished of his rights as a citizen: it differed from relegation (*q. v.*) and exile (*q. v.*). 1 Brown, Civ. Law, 125, note; Inst. 1. 12. 1 and 2; Dig. 48. 22. 14. 1.

DEPOSE. To deprive an individual of a public employment or office against his will. Wolffius, Inst. § 1063. The term is usually applied to the deprivation of all authority of a sovereign.

DEPOSIT. A naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall require it. Jones, Bailm. 36, 117; 9 Mass. 470.

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. Story, Bailm. § 41.

A contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously and obliges himself to return it when he shall be requested.

An *irregular deposit* arises where one deposits money with another for safe keeping in cases where the latter is to return, not the specific money deposited, but an equal sum.

A *quasi deposit* arises where one comes lawfully into possession of the goods of another by finding.

A depositary is bound to take only ordinary care of the deposit, which will of course vary with the character of the goods to be kept, and other circumstances. See 14 Serg. & R. Penn. 275; 17 Mass. 479; 3 Mas. C. C. 132; 2 Ad. & E. 256; 1 Barnew. & Ald. 59. He has, in general, no right to use the thing deposited, Bacon, Abr. *Bailment*, D, unless in cases where permission has been given or may from the nature of the case be implied. Story, Bailm. § 90; Jones, Bailm. 80, 81; 1 Bouvier, Inst. n. 1008. He is bound to return the deposit *in individuo*, and in the same state in which he received it: if it is lost, or injured, or spoiled, by his fraud or gross negligence, he is responsible to the extent of the loss or injury. Jones, Bailm. 36, 46, 120; 17 Mass. 479; 2 Hawks, No. C. 145; 1 Dane, Abr. c. 17, art. 1 and 2. He is also bound to restore, not only the thing deposited, but any increase or profits which may have accrued from it: if an animal deposited bear young, the latter are to be delivered to the owner. Story, Bailm. § 99.

In the case of irregular deposits, as those with a banker, the relation of the banker to his customer is that of debtor and creditor, and does not partake at all of a fiduciary character. It ceases altogether to be the money of the depositor, and becomes the money of the banker. It is his to do what he pleases with it, and there is no trust created. 17 Wend. 94; 1 Meriv. 568. The legal remedy is a suit at law for debt: the balance cannot be reached by a bill in equity, as there is no trust raised. 2 Hou. L. Cas. 39; 1 Younge & C. Ch. 464. The banker is not liable for interest unless expressly contracted for; and the deposit is subject to the statute of limitations. 1 Phill. 401, 405; 2 Hou. L. Cas. 39, 40. See Sewell, Banking; 4 Blackf. Ind. 495.

Deposits in the civil law are divisible into two kinds,—necessary and voluntary. A necessary deposit is such as arises from pressing necessity; as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*. La. Civ. Code, 2935. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. Dig. 16. 3. 2.

This distinction was material in the civil law in respect to the remedy, for in voluntary deposits the action was only *in simplum*, in the other *in duplum*, or twofold, whenever the depositary was guilty of any default. The common law has made no such distinction. Jones, Bailm. 48.

Deposits are again divided by the civil law into simple deposits and sequestrations: the former is when there is but one party depositor (of whatever number composed), having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest. These distinctions do not seem to have become incorporated into the common law. See Story, Bailm. §§ 41–46.

DEPOSITION. The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice.

2. Depositions were not formerly admitted in common-law courts, and were afterwards admitted from necessity, where the oral testimony of a witness could not be obtained. But in courts of chancery this is generally the only testimony which is taken. Adams, Equity, 363. In some of the United States, however, as, for instance, in Connecticut, both oral testimony and depositions are used, the same as in courts of common law. 2 Rev. Swift, Dig. 277.

3. In criminal cases, in the United States, depositions cannot be used without the consent of the defendant. 3 Greenleaf, Ev. § 11; 15 Miss. 475; 4 Ga. 335.

The constitution of the United States provides that in all criminal prosecutions "the accused shall enjoy the right to be confronted with the witnesses against him." Amend. of Const. art. 6. This principle is recognized in the constitutions or statutes of most of the states of the Union. 3 Greenleaf, Ev. § 11; Const. of Ohio, art. 1, § 10; Const. of Conn. art. 1, § 9, etc.

In some of the states, provision is made for the taking of depositions by the accused. Conn. Comp. Stat. art. 6, § 162; 3 Greenleaf, Ev. § 11.

4. Provision has been made for taking depositions to be used in civil cases, by an act of congress and by statute in most of the states.

The act of September 24, 1789, s. 30, 1 Story, U. S. Laws, 64, directs that when the testimony of any person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance

from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause: provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. And in causes of admiralty and maritime jurisdiction, or other causes of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses, there testifying, before the circuit court, should an appeal be had, and shall move that their testimony shall be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel or appear at court; but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,—which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken. Brightly, Dig. 264.

In any cause before a court of the United States, it shall be lawful for such court, in its discretion, to admit in evidence any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof. Act of Feb. 20, 1812; Brightly, Dig. U. S. Laws, 264.

The act of January 24, 1827, 3 Story, U. S. Laws, 2040, authorizes the clerk of any court of the United States within which a witness resides, or where he is found, to issue a subpœna to compel the attendance of such witness; and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpœna, as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a subpœna *duces tecum*, and enforce obedience by punishment as for a contempt. Brightly, Dig. U. S. Laws, 264.

5. Some of the statutes of the several states provide that courts may issue commissions to take depositions; others, that the parties may take them by giving notice of the time and place of taking the deposition to the opposite party. The privilege of taking them is generally limited to cases where the witness lives out of the state or at a distance from the court, or where he is sick, aged, about to leave the state, or where, from some other cause, it would be impossible or very inconvenient for him to attend in person. If the deposition is not taken according to the requirements of the statute authorizing it, it will, on objection being made by the opposite party, be rejected.

In Ecclesiastical Law. The act of depriving a clergyman, by a competent tribunal, of his clerical orders, to punish him for some offence and to prevent his acting in future in his clerical character. Ayliffe, Parerg. 206.

DEPOSITO. In Spanish Law. A real contract by which one person confides to the custody of another an object on the condition that it shall be returned to him whenever he shall require it.

DEPOSITOR. He who makes a deposit.

DEPREDATION. In French Law. The pillage which is made of the goods of a decedent.

DEPRIVATION. In Ecclesiastical Law. A censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. See Ayliffe, Parerg. 206; 1 Blackstone, Comm. 393.

DEPUTY. One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

2. In general, ministerial officers can appoint deputies, Comyns, Dig. *Officer* (D 1), unless the office is to be exercised by the ministerial officer in person; and where the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be

made for the performance of a judicial act: a sheriff cannot, therefore, make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ.

3. In general, a deputy has power to do every act which his principal might do; but a deputy cannot make a deputy.

A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy, 3 Dane, Abr. c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts. Dane, Abr. Index; Comyns, Dig. *Officer* (D), *Viscount* (B). See 7 Viner, Abr. 556; Archbold, Civ. Plead. 68; 16 Johns. N. Y. 108.

DEPUTY DISTRICT ATTORNEY. An officer appointed by the district attorney of the United States to act for him in certain cases. See 2 Story, U. S. Laws, 1530; Brightly, Dig. U. S. Laws. 227.

DERELICT. Abandoned; deserted; cast away.

Land left uncovered by the receding of water from its former bed. 2 Rolle, Abr. 170; 2 Blackstone, Comm. 262; 1 Crabb, Real Prop. 109.

When so left by degrees, the derelict land belongs to the owner of the soil adjoining; but when the sea retires suddenly, it belongs to the government. 2 Blackstone, Comm. 262; 1 Brown, Civ. Law, 239; 1 Sumn. C. C. 328, 490; 1 Gall. C. C. 133; Bee, Adm. 62, 178, 260; Ware, Dist. Ct. 332.

Personal property abandoned or thrown away by the owner in such manner as to indicate that he intends to make no further claim thereto. 2 Blackstone, Comm. 9; 2 Reeve, Hist. Eng. Law, 9; 1 C. B. 112; Broom, Max. 261.

It applies as well to property abandoned at sea as on land. 1 Mas. C. C. 373; 1 Sumn. C. C. 207, 336; 2 Kent, Comm. 357. A vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions, is derelict. 2 Parsons, Marit. Law, 615 *et seq.*; 20 Eng. L. & Eq. 607; 2 Cranch, 240; Olc. Adm. 77; Lee, Shipping & Ins. 261.

DERIVATIVE. Coming from another; taken from something preceding; secondary: as, derivative title, which is that acquired from another person.

There is considerable difference between an original and a derivative title. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and, since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derivative acquisition it may be otherwise; for the person from whom the thing is acquired may not have an unlimited right to it, or he may convey or transfer it with certain reservations of right. Derivative title must always be by contract.

Derivative conveyances are those which pre-suppose some precedent conveyance, and serve only to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 3 Blackstone, Comm. 324.

DEROGATION. The partial abrogation of a law. To derogate from a law is to enact something which impairs its utility and force; to abrogate a law is to abolish it entirely.

DESAFUERO. In Spanish Law. An irregular action committed with violence against law, custom, or reason.

DESCENDANTS. Those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl. 327; 2 Brown, Ch. 30, 230; 3 *id.* 367; 1 Roper, Leg. 115; 2 Bouvier, Inst. n. 1956.

The descendants from what is called the direct descending line. The term is opposed to that of ascendants.

There is a difference between the number of ascendants and descendants which a man may have: every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue: the line of descendants is, therefore, diversified in each family.

DESCENT. Hereditary succession.

Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. 2 Blackstone, Comm. 201; Comyns, Dig. *Descent* (A).

It was one of the principles of the feudal system that on the death of the tenant in fee the land should *descend*, and not *ascend*. Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend.

The English doctrine of primogeniture, by which by the common law the eldest son and his issue take the whole real estate, has been universally abolished in this country. So, with few exceptions, has been the distinction between male and female heirs.

2. The rules of descent are applicable only to real estates of inheritance. Estates for the life of the deceased, of course, terminate on his death; estates for the life of another are governed by peculiar rules.

Terms of years, and other estates less than freehold, are regarded as personal estate, and, on the death of the owner, vest in his executor or administrator.

3. The rules of descent are prescribed by the statute laws of the several states; and, although they correspond in some respects, it is doubtful whether in any two they are precisely alike. An abstract of these laws is here given, taken, by permission, from the excellent work of Professor Washburn on the American Law of Real Property (Little, Brown & Co., Boston, 1864).

The rules of descent, prescribed by the statutes of the several United States, are as follows:—

In *Alabama*, the real estate of an intestate descends—1. To the children and their descendants

equally. 2. To the brothers and sisters, or their descendants. 3. If none of these, to the father, if living; if not, to the mother. 4. If there be neither of these, then to the next of kin in equal degree. 5. If there be none of the above-mentioned kindred, then to the husband or wife; and in default of these it escheats to the state. 6. There is no representation among collaterals except with the descendants of brothers and sisters of the intestate. 7. There is no distinction between the whole and half blood, except that, in case the inheritance was ancestral, those not of the blood of the ancestor are excluded as against those of the same degree. Ala. Code, 1852, §§ 1572–1576.

In *Arkansas*, real estate of inheritance descends —1. To the children or their descendants in equal parts. 2. To the father, then to the mother. 3. To the brothers and sisters, or their descendants. 4. To the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestor and his descendants. 5. If there be no such kindred, then to the husband or wife; and in default of these it escheats to the state. 6. The descendants of the intestate, in all cases, take by right of representation, where they are in different degrees. 7. If the estate come from the father, and the intestate die without descendants, it goes to the father and his heirs; and if the estate be maternal, then to the mother and her heirs. But if the estate be an acquired one, it goes to the father for life, remainder to the collateral kindred; and in default of father, then to the mother for life, and remainder to collateral heirs. 8. In default of father and mother, then first to the brothers and sisters, and their descendants of the father; then to those of the mother. This applies only where there is no near kindred, lineal or collateral. 9. The half-blood inherits equally with the whole blood in the same degree; but if the estate be ancestral, it goes to those of the blood of the ancestor from whom it was derived. 10. In all cases not provided for by the statute, the inheritance descends according to the course of the common law. Dig. Ark. Stat. 1858, c. 56.

In *California*—1. If there be a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child. If there be more than one child, or one and the issue of one or more, then one-third to the surviving husband or wife, and the remainder to the children or issue of such by right of representation. If there be no child living, then to lineal descendants equally, if they are in the same degree, otherwise by right of representation. 2. If there be no issue, then in equal shares to the surviving husband or wife and to the intestate's father. If there be no father, then one-half in equal shares to the brothers and sisters of the intestate, and the issue of such by right of representation: provided if there be a mother she shall take an equal share with the brothers and sisters. If there be no surviving issue, husband, or wife, the estate goes to the father. 3. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to children of such by right of representation: provided, if there be a mother also, she takes equally with the brothers and sisters. 4. If there be none of these except the mother, she takes the estate to the exclusion of the issue of deceased brothers and sisters. 5. If there be a surviving husband or wife, and no issue, father, mother, brother, or sister, the whole goes to the surviving husband or wife. 6. If none of these, to the next of kin in equal degree, those claiming through the nearest ancestor to be preferred to those claiming through one more remote. 7. If there be several children, or one child and the issue of one or more, and any such surviving child die under age and unmarried, the estate of such child which came from such deceased parent passes to the other children of the same parent and the issue of such by right of representation. 8. If all the other children be dead, in such case, and any of them have left issue, then the estate descends to such issue equally if in the same degree, otherwise by right of representation. 9. If the intestate leave no husband or wife, nor kindred, the estate escheats to the state for the use of the common schools. 10. The degrees of kindred are computed according to the rules of the civil law; and kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the estate come from an ancestor, in which case those not of the blood of such ancestor are excluded. Wood, Dig. Cal. Laws, 1858, p. 423; Stats. 1862, c. 447.

In *Connecticut*—1. To the children of the intestate and their legal representatives. 2. To brothers and sisters of the intestate, of the whole blood, and their representatives. 3. To the parent or parents of the intestate. 4. To the brothers and sisters of the half-blood, and their representatives. 5. To the next of kin in equal degree, kindred of the whole blood to take in preference to kindred of the half-blood, in equal degree, and no representatives to be admitted among collaterals after the representatives of brothers and sisters. 6. Estates which came to the intestate from his parent ancestor, or other kindred, go—(1) to the brothers and sisters of the intestate of the blood of the person or ancestor from whom such estate came or descended; (2) to the children of such person or ancestor and their representatives; (3) to the brothers and sisters of such person or ancestor and their representatives; (4) if there be none such, then it is divided as other real estate. Conn. Comp. Stat. 1854, pp. 500, 501.

In *Delaware*, when any person, having title or right, legal or equitable, to any lands, tenements, or hereditaments, in fee-simple, dies intestate, such estate descends—1. To the children of the intestate, and their issue by right of representation. 2. If there be no issue, then to his brothers and sisters of the whole blood, and their issue by right of representation. 3. Estates to which the intestate has title, by descent or devise, from his parent or ancestor, go, in default of issue, to his brothers and sisters of the blood of such parent or ancestor, if there be any such. 4. If there be none of these, then to the father. 5. If there be no father, then to the mother. 6. If there be no kindred above mentioned, then to the next of kin in equal degree, and their issue by representation: provided that collateral kindred claiming through a nearer common ancestor shall be preferred to those claiming through one more remote. Del. Rev. Code, 1853, c. 85, p. 276.

In *Florida*, the rules of descent are the same as in Virginia. Thomp. Dig. Fla. Laws, pp. 188, 189.

In *Georgia*, real estate descends—1. To the widow and children in equal shares; and to the representatives of the children *per stirpes*. 2. If there be a widow and no issue, then half to the widow and the other half to the next of kin. But if there be issue and no widow, the whole goes to the issue. 3. If there be neither widow nor issue, then to the next of kin in equal degree, and their representatives. But no representation is admitted among collaterals further than the children of nephews and nieces. 4. If the father and mother be alive, and a child dies intestate and without issue, such father, or mother in case the father be dead, comes in on the same footing as a brother or sister would do: provided that if the mother has married again, she shall take no part of the estate of such child, unless it shall be the last or only child. 5. If there be no issue, but brothers and sisters of

the whole and half blood, then those in the paternal line only inherit equally; but if there be none of these nor their issue, then those of the half-blood and their issue in the maternal line inherit. 6. The next of kin are to be investigated by the following rules of consanguinity, namely: children to be nearest; parents, brothers, and sisters to be equal in respect to distribution, and cousins to be next to them. 1 Cobb, New Dig. Ga. Laws, 1851, p. 297; Laws, 1859, p. 38, no. 31.

In *Illinois*, real estate descends—1. To children and their descendants by right of representation. 2. If no children or their descendants nor widow, then to the parents, brothers, and sisters of the deceased, in equal parts,—allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion; and if there be no parent, then the whole to the brothers and sisters and their descendants. 3. Where there is a widow and no children or their descendants, then one-half of the real estate goes to the widow as her exclusive estate forever. 4. If there be none of the above-mentioned persons, then the estate descends in equal parts to the next of kin in equal degree, computing by the rules of the civil law; and there is no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and there is no distinction between the kindred of the whole and the half blood. 5. When a *feme covert* dies intestate, leaving no children or their descendants, then the one-half of the real estate of the decedent goes to the husband forever. 2 Ill. Comp. Stat. 1858, p. 1199.

In *Indiana*, real property descends—1. To the children and their descendants equally, if in the same degree; if not, *per stirpes*. 2. If no descendants, then half to the father and mother, as joint tenants, or to the survivor; and the other half to the brothers and sisters and their issue. 3. If there be no father and mother, the brothers and sisters of the intestate take the whole. If there be no brothers nor sisters descendants of them, it goes to the father and mother as joint tenants; and if either be dead, to the other. 4. If there be none of these, if the inheritance came from the paternal line, then it goes—(1) to the paternal grandfather and grandmother, as joint tenants, or the survivor of them; (2) to the uncles and aunts and their issue; (3) to the next of kin in equal degree among the paternal kindred; (4) if none of these, then to the maternal kindred in the same order. 5. Maternal inheritances go to the maternal kindred in the same manner. 6. Estates not ancestral descend in two equal parts to the paternal and to the maternal kindred, and on failure of either line the other takes the whole. 7. Kindred of the half-blood inherit equally with those of the whole blood, except that ancestral estates go only to those of the blood of the ancestor: provided that on failure of such kindred, other kindred of the half-blood inherit as if they were of the whole blood. 8. When the estate came to the intestate by gift or by conveyance, in consideration of love and affection, and he dies without issue, it reverts to the donor, if he be still living, saving to the widow or widower her or his rights therein: provided that the husband or wife of the intestate shall have a lien thereon for the value of their lasting improvements. 9. In default of heirs, it escheats to the state for the use of the common schools. 10. Tenancies by the curtesy and in dower are abolished, and the widow takes one-third of the estate in fee-simple, free from all demands of creditors: provided that when the estate exceeds in value ten thousand dollars she takes one-fourth only, and when it exceeds twenty thousand dollars, one-fifth only. 11. When the widow marries again, she cannot alienate the estate; and if during such marriage she die, the estate goes to her children by the former marriage, if any there be. 12. When the estate, real and personal, does not exceed three hundred dollars, the whole goes to the widow. 13. A surviving husband inherits one-third of the real estate of the wife. 14. If a husband die, leaving a widow and only one child, the real estate descends one-half to each. 15. When a husband or wife dies, leaving no child, but a father or mother, or either of them, then three-fourths of the estate goes to the widow or widower, and one-fourth to the father and mother jointly, or the survivor of them; but if it does not exceed one thousand dollars, the whole to the widow or widower. 16. If there be no child or parent, the whole goes to the surviving husband or wife. 1 Ind. Rev. Stat. 1852, c. 27.

In *Iowa*—1. To children and their issue by right of representation. 2. If no issue, one half to the parents of the intestate, and the other half to his wife; if he leave no wife, the portion which would have gone to her goes to his parents. Laws of 1858, c. 63, p. 96. 3. If one of the parents be dead, the surviving parent takes the share of both, including that which would have belonged to the intestate's wife if she had been living. *Id.* 4. If both parents be dead, their portion goes, in the same manner as if they or either of them had outlived the intestate, to their heirs. *Id.* 5. If the mother be the surviving parent, she takes only a life-estate, remainder to the children of her body by her deceased husband, he being father of the intestate. If there be no such children nor issue of such, then the property is to be divided between the nearest heirs of the father and mother equally. *Id.* 6. If there be no heirs, the estate escheats to the state. Iowa Code, 1851, §§ 1408–1415; Iowa Laws, 1858, c. 63, p. 96; Revision, 1860, §§ 2436–2498.

In *Kansas*—1. To children in equal shares, and to the issue of such by right of representation. 2. To the wife, and if no wife, to the father. 3. If the father be dead, the portion which would have fallen to him is disposed of in the same manner as though he had outlived the intestate, and died in the possession of the portion thus falling to his share, and so on through each ascending ancestor and issue, unless heirs are sooner found. 4. If heirs are not found in the male line, the portion thus inherited goes to the mother of the intestate and to her heirs, following the same rules as above prescribed. 5. If heirs are not thus found, the portion uninherited goes to the wife of the intestate or to her heirs, if dead, according to like rules; and if he has had more than one wife, who either died or survived in lawful wedlock, it is equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation. 6. If still there be property uninherited, it escheats to the state. 7. Children of the half-blood inherit equally with children of the whole blood. Genl. Laws, 1862, c. 80, §§ 16, 22, 30.

In *Kentucky*, the statute of descents is the same as in Virginia. 1 Ky. Rev. Stat. Stant. ed. 1860, c. 30, p. 419.

In *Louisiana*—1. To the children and their issue: if in equal degree, then *per capita*; otherwise, *per stirpes*. 2. To the parents of the intestate, one moiety; and the other moiety to his brothers and sisters and their issue. If one parent be dead, his or her share goes to the brothers and sisters of the deceased, who then have three-fourths. If both parents be dead, the whole goes to the brothers and sisters and their issue. 3. If the brothers and sisters are all of the same marriage, they share equally. If they are of different marriages, the portion is divided equally between the paternal and maternal lines of the intestate, the german brothers and sisters taking a part in each line. If the brothers and sisters are on one side only, they take the whole, to the exclusion of all relations of the

other line. 4. If there be no issue, nor parent, nor brothers, nor sisters, nor their issue, then the inheritance goes to the *ascendants* in the paternal and maternal lines, one moiety to each,—those in each line taking *per capita*. If there is in the nearest degree but one ascendant in the two lines, he excludes all others of a remoter degree, and takes the whole. 5. If there be none of the heirs above mentioned, then the inheritance goes to the collateral relations of the intestate,—those in the nearest degree excluding all others. If there are several persons in the same degree, they take *per capita*. 6. Representation takes place *ad infinitum* in the direct descending line, but does not take place in favor of ascendants,—the nearest in degree always excluding those of a degree superior or more remote. 7. In the collateral line, representation is admitted in favor of the issue of the brothers and sisters of the intestate, whether they succeed in concurrence with the uncles and aunts, or whether the brothers and sisters, being dead, their issue succeed in equal or unequal degrees. 8. When representation is admitted, the partition is made *per stirpes;* and if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between themselves *per capita*. La. Civ. Code, art. 882–910.

In *Maine*. The law of descents in Maine was originally derived from that of Massachusetts, and is now the same, except that in Maine there is no provision that in default of kindred the estate shall descend to the widow or to the husband. The statute of Maine regulates the descent of the *real estate* of the intestate without further specification. Me. Rev. Stat. 1847, c. 75, §§ 1, 2.

In *Maryland*, when any person dies seised of an estate in any lands, tenements, or hereditaments, in fee-simple or in fee-simple conditional, or of an estate in fee-tail, such estate descends—1. To children and their descendants. 2. If no issue, and the estate descended on the part of the father, then to the father. 3. If no father, to the brothers and sisters of the intestate of the blood of the father and their descendants. 4. If none of these, then to the grandfather on the part of the father, if living, otherwise to his descendants in equal degree; and if there be none such, then to the father of such grandfather and his descendants, and so on to the next lineal male paternal ancestor and his descendants, without end. And if there be no paternal ancestor, nor descendants of any, then to the mother and the kindred on her side in the same manner as above directed. 5. If there be no issue, and the estate descended on the part of the mother, then to the mother; and if no mother living, then to the brothers and sisters of her blood and their descendants; and if there be none of these, to her kindred in the same order as above; and in default of maternal kindred, then to the paternal kindred in the same manner as above directed. 6. If the estate was acquired by purchase, and there be no issue, then it descends—(1) to the brothers and sisters of the whole blood, and their descendants in equal degree; (2) then to the brothers and sisters of the half-blood; (3) if none of these, to the father; (4) if no father, to the mother; (5) if neither of the above kindred, then to the paternal grandfather and his descendants in equal degree; then to the maternal grandfather and his descendants in equal degree; then to the paternal great-grandfather and his descendants in the same manner, and so on, alternating and giving preference to the paternal ancestor. 7. If there be no kindred, then the estate goes to the surviving wife or husband, and their kindred, as an estate by purchase; and if the intestate has had more husbands or wives than one, all of whom are dead, then to their kindred in equal degree, equally. 8. No distinction is made between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father, nor where all are descendants of the same mother, the estate descending on her part. 9. Children take by representation; but no representation is admitted among collaterals after brothers' and sisters' children. 1 Dorsey, Md. Laws, 745; Code, 1860, pp. 330–333.

In *Massachusetts*, when a person dies seised of lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, they descend, subject to his debts—1. In equal shares to his children and the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants,—equally, if they are all of the same degree of kindred, otherwise according to the right of representation. 2. If he leaves no issue, then to his father. 3. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters, and to the children of any deceased brother or sister by right of representation. 4. If he leaves no issue, and no father, mother, brother, nor sister, then to his next of kin in equal degree, —those claiming through the nearest ancestor to be preferred to those claiming through one more remote. 5. If a person dies leaving several children, or leaving one child and the issue of one or more others, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent descends in equal shares to the other children of the same parent, and to the issue of any such other children who have died, by right of representation. 6. If at the death of such child all the other children of such deceased parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from such parent descends to all the issue of the other children of the same parent,—equally, if they are in the same degree of kindred to the child, otherwise according to the right of representation. 7. If the intestate leaves a widow and no kindred, his estate descends to his widow; and if the intestate is a married woman, and leaves no kindred, her estate descends to her husband. 8. In default of kindred, the estate escheats to the commonwealth. It is provided that the degrees of kindred shall be computed according to the rules of the civil law, and that the kindred of the half-blood shall inherit equally with those of the whole blood in the same degree. Mass. Genl. Stat. c. 91, §§ 1–5.

In *Michigan*, the statute of descent is the same as in Wisconsin. 2 Mich. Comp. Laws, 1857, c. 91, p. 858.

In *Minnesota*, the same is true as in Michigan. Minn. Stat. 1853, c. 37, p. 411.

In *Mississippi*, when any person dies seised of any estate of inheritance in lands, tenements, and hereditaments, it descends—1. To his children and their descendants in equal parts by right of representation. 2. To brothers and sisters and their descendants in the same manner. 3. If there be none of these, then to the father, if living; if not, to the mother; if both be living, then to each in equal portions. 4. To the next of kin in equal degree, computing by the rules of the civil law. 5. There is no representation among collaterals except with the descendants of the brothers and sisters of the intestate. 6. There is no distinction between the half and the whole blood, except that the whole blood is preferred to the half-blood, in the same degree. 7. A surviving wife inherits the whole estate in preference to collateral relatives more remote than the fourth degree, by the rules of the civil law. Miss. Rev. Code, 1857, p. 452.

In *Missouri*, real estate of inheritance descends—1. To children or their descendants in equal parts. 2. If none of these, to the father, mother, brothers, and sisters, and their descendants, in equal parts. 3. If none of these, then to the husband or wife. 4. If no husband or wife, then to the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts. 5. If none of these, then to the great-grandfathers, great-grandmothers, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts. 6. If there be no kindred above named, nor any husband or wife, capable of inheriting, then the estate goes to the kindred of the wife or husband of the intestate, in the like course as if such wife or husband had survived the intestate and then died entitled to the estate. 7. When some of the collaterals are of the half-blood and some of the whole blood, those of the half-blood inherit only half as much as those of the whole blood; but if all such collaterals be of the half-blood, they have whole portions, only giving to the ascendants double portions. 8. When all are of equal degree of consanguinity to the intestate, they take *per capita*; if of different degrees, *per stirpes*. 1 Mo. Rev. Stat. 1855, c. 54, p. 659.

In *New Hampshire*, the real estate of every intestate descends in equal shares—1. To the children of the deceased and the legal representatives of such of them as are dead. 2. If there be no issue, to the father, if he is living. 3. If there be no issue nor father, in equal shares to the mother, and to the brothers and sisters, or their representatives. 4. To the next of kin in equal shares. 5. If the intestate be a minor and unmarried, his estate, derived by descent or devise from his father or mother, goes to his brothers or sisters, or their representatives, to the exclusion of the other parent. 6. No representation is admitted among collaterals beyond the degree of brothers' and sisters' children. 7. In default of heirs, it escheats to the state. N. H. Comp. Laws, 1853, c. 176, §§ 1–3, 7.

In *New Jersey*, when a person dies seised of any lands, tenements, or hereditaments, in his or her own right in fee-simple, they descend—1. To the children of the intestate and their issue, by right of representation to the remotest degree. 2. To brothers and sisters of the whole blood, and their issue, in the same manner. 3. To the father, unless the inheritance came from the part of the mother, in which case it descends as if the father had previously died. 4. To the mother for life, and after her death to go as if the mother had previously died. 5. If there be no such kindred, then to brothers and sisters of the half-blood and their issue by right of representation; but if the estate came from an ancestor, then only to those of the blood of such ancestor, if any be living. 6. If there be none of these, then to the next of kin in equal degree,—subject to the restriction aforementioned as to ancestral estates. Nixon, Dig. N. J. Laws, 1855, pp. 194–196.

In *New York*, the real estate of an intestate descends—1. To his lineal descendants. 2. To his father. 3. To his mother. 4. To his collateral relatives. Subject, however, to these rules: (1) Lineal descendants, being in equal degree, take in equal parts; (2) If any of the children of the intestate are living and others are dead, leaving issue, such issue take by representation; (3) The preceding rule applies to all descendants of unequal degrees: so that those who are in the nearest degree of consanguinity take the share which would have descended to them had all the descendants in the same degree been living, and the children in each degree take the share of their parents; (4) If there be no descendants, but the father be living, he takes the whole, unless the inheritance came to the intestate on the part of his mother, and the mother be living; but if she be dead, then the inheritance descending on her part goes to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants; but if there be none living, then to the father in fee. 5. If there be no descendants and no father, or a father not entitled to take as above, then the inheritance descends to the mother for life, and the reversion to the brothers and sisters of the intestate and their descendants, by representation; but if there be none such, then to the mother in fee. 6. If there be no father or mother capable of inheriting the estate, it descends, in the cases hereafter specified, to the collateral relatives,—in equal parts if they are of equal degree, however remote from the intestate. 7. If all the brothers and sisters of the intestate be living, the inheritance descends to them; but if some be dead, leaving issue, the issue take by right of representation; and the same rule applies to all the direct lineal descendants of brothers and sisters, to the remotest degree. 8. If there be no heirs entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend—(1) to the brothers and sisters of the father of the intestate in equal shares, if all be living; (2) if some be living and others dead, leaving issue, then according to the right of representation; (3) if all the brothers and sisters are dead, then to their descendants. In all cases the inheritance is to descend in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate. 9. If there be no brothers and sisters, nor descendants of such, of the father's side, then the inheritance goes to the brothers and sisters of the mother and their descendants, in the same manner. 10. Where the inheritance has come to the intestate on the part of his mother, the same descends to the brothers and sisters of the mother and to their descendants; and if there be no such, to those of the father, as before prescribed. 11. If the inheritance has not come to the intestate on the part of either father or mother, it descends to collaterals on both sides, in equal shares. 12. Relatives of the half-blood inherit equally with the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors,—in which case none inherit who are not of the blood of that ancestor. 13. In all cases not otherwise provided for, the inheritance descends according to the course of the common law. 14. Real estate held in trust for any other person, if not devised by the person for whose use it is held, descends to his heirs, according to the preceding rules. 2 N. Y. Rev. Stat. 4th ed. pp. 157–161.

In *North Carolina*, when any person dies seised of any inheritance, or of any right thereto, or entitled to any interest therein, it descends according to the following rules:—1. Inheritances lineally descend to the issue of the person who died last seised, but do not lineally ascend, except as hereinafter stated. 2. Females inherit equally with males, and younger with older children. 3. Lineal descendants represent their ancestor. 4. On failure of lineal descendants, where the inheritance has been transmitted by descent or otherwise from an ancestor to whom the intestate was an heir, it goes to the next collateral relations of the blood of that ancestor, subject to the two preceding rules. 5. When the inheritance is not so derived, or the blood of such ancestor is extinct, then it goes to the next collateral relation of the person last seised, whether of the paternal or maternal line, subject to the same rules. 6. Collateral relations of the half-blood inherit equally with those of the whole blood, and the degrees of relationship are computed according to the rules which prevail in descents at common law: provided that if there be no issue, nor brother, nor sister, nor issue of such, the in-

heritance vests in the father, if living, and if not, then in the mother, if living. 7. If there be no heirs, the widow is deemed such, and inherits. 8. An estate for the life of another is deemed an inheritance; and a person is deemed to have been seised, if he had any right, title, or interest in the inheritance. No. C. Rev. Code, 1854, c. 38, p. 248.

In *Ohio*, when any person dies intestate, having title or right to any real estate of inheritance which came to him by devise or deed of gift from any ancestor, such estate descends—1. To the children, or their representatives. 2. To the husband or wife, relict of the intestate, during his or her natural life. 3. To the brothers and sisters of the intestate of the blood of the ancestor, whether of the whole or half blood, or their representatives. 4. To the ancestor from whom the estate came by deed or gift, if living. 5. To the brothers and sisters of such ancestor, or their representatives; and if there be no such, then to the brothers and sisters of the intestate of the half-blood and their representatives, though not of the blood of the ancestor from whom the estate came. 6. To the next of kin to the intestate, of the blood of the ancestor from whom the estate came. 7. If the estate came not by descent, devise, or deed of gift, it descends as follows:—(1) To the children of the intestate and their representatives; (2) To the husband or wife of the intestate; (3) To the brothers and sisters of the whole blood and their representatives; (4) To brothers and sisters of the half-blood and their legal representatives; (5) To the father, or, if the father be dead, to the mother; (6) To the next of kin to and of the blood of the intestate. 8. If there be no kindred, then to the surviving husband or wife as an estate of inheritance; and if there be no such relict, it escheats to the state. Rev. Stat. 1860, c. 36, §§ 1–3.

In *Oregon*, the rules of descent are the same as in Massachusetts, except that in Oregon it is provided that if the intestate leave no issue, nor father, and no brother nor sister, living at his death, the estate shall descend to his mother to the exclusion of the issue of his deceased brothers or sisters; and there is no provision, as there is in Massachusetts, that in default of kindred the estate shall descend to the surviving husband or wife, if any. Oreg. Stat. c. 11, p. 379.

In *Pennsylvania*, real estate descends—1. To children and their descendants; equally, if they are all in the same degree; if not, then by representation, the issue in every case taking only such share as would have descended to the parent, if living. 2. In default of issue, then to the father and mother during their joint lives and the life of the survivor of them; and after them to the brothers and sisters of the intestate of the whole blood, and their children by representation. 3. If there be none of these, then to the next of kin, being the descendants of brothers and sisters of the whole blood. 4. If none of these, to the father and mother, if living, or the survivor of them, in fee. 5. In default of these, to the brothers and sisters of the half-blood and their children by representation. 6. In default of all persons above described, then to the next of kin of the intestate. 7. Before the act of 27th April, 1855, no representation among collaterals was allowed after brothers' and sisters' children; but by that act it was permitted to the grandchildren of brothers and sisters, and the children of uncles and aunts. 8. No person can inherit an estate unless he is of the blood of the ancestor from whom it descended, or by whom it was given or devised to the intestate. 9. In default of known heirs or kindred, the estate is vested in the surviving husband or wife. 10. In default of these it escheats to the state. Purdon, Dig. Penn. Laws, ed. 1857, pp. 452, 1129; 9th ed. 1861, p. 562.

In *Rhode Island*, where any person having title to any real estate of inheritance dies intestate, such estate descends in equal portions—1. To his children or their descendants. 2. To the father. 3. To the mother, brothers, and sisters, and their descendants. 4. If there be none of these, the inheritance goes in equal moieties to the paternal and maternal kindred, each in the following course:—(1) to the grandfather, if there be any; (2) to the grandmother, uncles, and aunts, on the same side, and their descendants; (3) to the great-grandfathers, or great-grandfather; (4) to the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers and their descendants, and so on without end,—passing first to the nearest lineal male ancestors, and for want of them to the lineal female ancestors in the same degree, and the descendants of such male and female lineal ancestors. 5. No right in the inheritance accrues to any persons whatsoever, other than to the children of the intestate, unless such persons be in being, and capable, in law, to take as heirs, at the time of the intestate's death. 6. When the inheritance is directed to go by moieties, as above, to the paternal and maternal kindred, if there be no such kindred on the one part, the whole goes to the other part; and if there be none of either part, the whole goes to the husband or wife of the intestate; and if the wife or husband be dead, it goes to his or her kindred in the like course as if such husband or wife had survived the intestate and then died entitled to the estate. 7. The descendants of any person deceased inherit the estate which such person would have inherited had such person survived the intestate. 8. If the estate came by descent, gift, or devise, from the parent or other kindred of the intestate, and such intestate die without children, it goes to the next of kin to the intestate, of the blood of the person from whom such estate came or descended, if any there be. R. I. Rev. Stat. 1857, c. 159, §§ 1–6. In default of heirs, the estate is taken possession of by the town where it may be. R. I. Rev. Stat. 1857, c. 160.

In *South Carolina*, when any person possessed of, interested in, or entitled to any real estate in his own right, in fee-simple, dies intestate, it descends—1. One-third to the widow in fee, the remainder to the children. 2. Lineal descendants represent their parents. 3. If there be no issue or other lineal descendant, then one half goes to the widow, and the other half to the father, or, if he be dead, to the mother. 4. If there be neither issue nor parent, then one half goes to the widow, and the other half to the brothers and sisters and their issue by representation. 5. If there be no issue, nor parent, nor brother, nor sister of the whole blood, but a widow, and a brother or sister of the half-blood, and a child or children of a brother or sister of the whole blood, then the widow takes one moiety, and the other is divided equally between the brothers and sisters of the half-blood, and the children of the brothers and sisters of the whole blood,—the children of every deceased brother or sister of the whole blood taking among them a share equal to the share of a brother or sister of the half-blood. But if there be no brother or sister of the half-blood, then a moiety of the estate descends to the child or children of the deceased brother or sister; and if there be no child of the whole blood, then to the brothers and sisters of the half-blood. 6. If there be no issue, nor parent, nor brother, nor sister of the whole blood, nor their children, nor any brother nor sister of the half-blood, then one half goes to the widow and the other half to the lineal ancestors; but if there be none of these, then the widow takes two-thirds and the residue goes to the next of kin. 7. If there be no widow, her share in each of the preceding cases goes to the residue. 8. On the de-

cease of the wife, the husband takes the same share in his wife's estate that she would have taken in his had she survived him, and the remainder goes in the same manner as above described in case of the intestacy of a man. 9. If there be no widow nor issue, but a surviving parent and brothers and sisters, then it goes in equal shares to the father, or, if he be dead, to the mother, and to the brothers and sisters and their issue by representation. 10. If there be no issue, parent, nor brother nor sister of the whole blood, nor their children, nor brother nor sister of the half-blood, nor lineal ancestor, nor next of kin, the whole goes to the surviving husband or wife. 5 So. C. Stat. at Large, 162, 163, 305; 6 *id.* 284, 285.

In *Tennessee*, the land of an intestate descends—1. Without reference to the source of his title—(1) to all the sons and daughters equally, and to their descendants by right of representation; (2) if there be none of these, and either parent be living, then to such parent. 2. If the estate was acquired by the intestate, and he died without issue—(1) to his brothers and sisters of the whole and half blood, born before or after his death, and to their issue by representation; (2) in default of these, to the father and mother as tenants in common; (3) if both be dead, then in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, of relationship to the intestate; but if these are not in equal degree, then to the heirs nearest in blood, or representing those nearest in blood, to the intestate, in preference to others more remote. 3. When the land came by gift, devise, or descent from a parent or the ancestor of a parent, and he died without issue—(1) if there be brothers and sisters of the paternal line of the half-blood, and such also of the maternal line, then it descends to the brothers and sisters on the part of the parent from whom the estate came, in the same manner as to brothers and sisters of the whole blood, until the line of such parent is exhausted of the half-blood, to the exclusion of the other line; (2) if no brothers or sisters, then to the parent, if living, from whom or whose ancestors it came, in preference to the other parent; (3) if both be dead, then to the heirs of the parent from whom or whose ancestor it came. 4. The same rules of descent are observed in lineal descendants and collaterals respectively, when the lineal descendants are further removed from their ancestor than grandchildren, and when the collaterals are further removed than children of brothers and sisters. 5. If there be no heirs, then to the husband or wife in fee-simple. 6. A child of color cannot inherit the estate of its mother's husband, unless the mother or husband was a person of color. Tenn. Code, 1858, p. 476, §§ 2420–2425.

In *Texas*, real estate of inheritance descends—1. To children and their descendants. 2. To father and mother in equal portions; but if one be dead, then one half to the survivor and the other to brothers and sisters and their descendants; but if there be none of these, then the whole goes to the surviving father or mother. 3. If there be neither father nor mother, then the whole to the brothers and sisters of the intestate and their descendants. 4. If there be no kindred aforesaid, then the estate descends in two moieties, one to the paternal and the other to the maternal kindred in the following course—(1) to the grandfather and grandmother equally; (2) if only one of these be living, then one half to each survivor and the other to the descendants of the other; (3) if there be no such descendants, then the whole to the surviving grandparent; (4) if there be no such, then to the descendants of the grandfather or grandmother, passing to the nearest lineal ancestors. 5. There is no distinction between ancestral and acquired estates. 6. If there be a surviving husband or wife, and a child or children and their issue, such survivor takes one-third of the estate for life, with remainder to children or their descendants. 7. If no issue or descendants, then the surviving husband or wife takes half the land, without remainder over; and the other half passes according to the preceding rules. 8. Among collaterals, those of the half-blood inherit only half as much as those of the whole blood; but if all be of the half-blood, they have whole portions. 9. If all relations are in the same degree, they take *per capita;* otherwise, *per stirpes.* Oldham & White, Dig. Tex. Laws, 1859, p. 99.

In *Vermont*, when any person dies seised of any lands, tenements, or hereditaments within the state, or any right thereto, or is entitled to any interest therein, the estate descends—1. In equal shares to his children, or their representatives. 2. If he leave no issue, his widow is entitled to the whole forever, if the estate does not exceed the sum of one thousand dollars. If it exceeds this sum, then the widow is entitled to such sum and one-half of the remainder of the estate; and the remainder descends as the whole would if no widow had survived; and if there be no kindred, the widow is entitled to the whole. 3. If there be no issue nor widow, the father takes the whole. 4. If there be neither of these, it goes to the brothers and sisters equally, and their representatives; and if his mother be living, she takes the same share as a brother or sister. 5. If none of the relatives above named survive, then it descends in equal shares to the next of kin, in equal degree; but no person is entitled by right of representation. 6. The degrees of kindred are computed according to the rules of the civil law, and the half-blood inherits equally with the whole blood. 7. If there be no kindred, it escheats to the town for the use of the schools. Vt. Comp. Stat. 1850, c. 55, and Genl. Stats. 1863, c. 56, §§ 1–3.

In *Virginia*, when a person having title to any real estate of inheritance dies intestate as to such estate, it descends—1. To his children and their descendants. 2. If there be none such, to the father. 3. If no father, to the mother and brothers and sisters and their descendants. 4. If there be none of those, then one-half goes to the paternal, the other to the maternal, kindred, as follows:—(1) to the grandfather; (2) to the grandmother, uncles and aunts on the same side, and their descendants; (3) to the great-grandfathers or great-grandfather; (4) to the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; and so on, passing to the nearest lineal male ancestors, and for want of these, to the nearest lineal female ancestors in the same degree, and their descendants. 5. If there be no paternal kindred, the whole estate goes to the maternal kindred; and *vice versâ*. 6. If there be neither paternal nor maternal kindred, the whole goes to the husband or wife of the intestate; and if the husband or wife be dead, their kindred take the estate, in the same manner as though they had survived the intestate, and died. 7. Collaterals of the half-blood inherit only half as much as those of the whole blood. But if all the collaterals be of the half-blood, the ascending kindred (if any) have double portions. 8. When the estate goes to children, or to the mother, brothers and sisters, or to the grandmothers, uncles and aunts, or to any of his female lineal ancestors, with the children of his deceased lineal ancestors, male and female, in the same degree, they take *per capita;* but if the degrees are unequal, they take *per stirpes.* Va. Code, 1849, c. 123, p. 522.

In *Wisconsin*, when any person dies seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, not having law-

fully devised the same, they descend—1. In equal shares to children, and the issue of any deceased child by right of representation; and if there be no child, then to his other lineal descendants, equally, if they are all in the same degree of kindred to the intestate; otherwise, according to the right of representation. 2. If there be no issue, then to the widow for her life, and after her decease to his father; and if there be no issue or widow, then to his father. 3. If there be no issue nor father, then to the widow for life, and after her decease in equal shares to his brothers and sisters, and the children of such by right of representation: provided that if he leave a mother she takes an equal share with his brothers and sisters. 4. If there be no issue, nor widow, nor father, then in equal shares to brothers and sisters, and to the children of such by right of representation: provided if he leave a mother also, she takes an equal share with his brothers and sisters. 5. If there be no issue, nor widow, nor father, and no brother nor sister, then to his mother, to the exclusion of the issue, if any, of deceased brothers and sisters. 6. If there be none of these, then to the next of kin in equal degree, but those claiming through the nearest ancestor to be preferred to those claiming through an ancestor more remote: provided, however, that if any person die, leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent descends in equal shares to the other children of the same parent, and to their issue by right of representation. 7. If, at the death of such child under age, all the other children of such deceased parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from such parent descends to all the issue of other children of the same parent equally, if they are in the same degree of kindred to said child, otherwise according to the right of representation. 8. If the intestate leave a widow, and no kindred, his estate descends to such widow. 9. If there be no widow nor kindred, the estate escheats to the people of the state for the use of the primary school fund. 10. The degrees of kindred are computed according to the rules of the civil law; and kindred of the half-blood inherit equally with those of the whole blood, in the same degree, unless the inheritance be ancestral, in which case those who are not of the blood of such ancestor are excluded. Wisc. Rev. Stat. 1858, c. 92, p. 554.

DESCRIPTIO PERSONÆ. Description of the person. In wills, it frequently happens that the word heir is used as a *descriptio personæ:* it is then a sufficient designation of the person. In criminal cases, a mere *descriptio personæ* or addition, if false, can be taken advantage of only by plea in abatement. 1 Metc. Mass. 151.

DESCRIPTION. An account of the accidents and qualities of a thing. Ayliffe, Pand. 60.

A written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory, but is more particular in ascertaining the exact condition of the property, and is without any appraisement of it.

In Pleading. One of the rules which regulate the law of variance is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. With respect to criminal law, it is clearly established that the name or nature of the property stolen or damaged is matter of essential description. Thus, for example, if the charge is one of firing a stack of hay, and it turns out to have been a stack of wheat, or if a man is accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal. 1 Taylor, Ev. § 233.

DESERTION. In Criminal Law. An offence which consists in the abandonment of the public service, in the army or navy, without leave.

The act of March 16, 1802, s. 19, enacts that if any non-commissioned officer, musician, or private, shall desert the service of the United States, he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall and may be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried.

By the articles of war it is enacted that "any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished, according to the nature of his offence, at the discretion of a court-martial." Art. 21.

By the articles for the government of the navy, art. 16, it is enacted that "if any person in the navy shall desert to an enemy, or rebel, he shall suffer death;" and by art. 17, "if any person in the navy shall desert, or shall entice others to desert, he shall suffer death, or such other punishment as a court-martial shall adjudge."

In Torts. The act by which a man abandons his wife and children, or either of them.

On proof of desertion, the courts possess the power to grant the wife, or such children as have been deserted, alimony. And a continued desertion by either husband or wife, after a certain lapse of time, entitles the party deserted to a divorce, in most states.

DESERTION OF A SEAMAN. The abandonment, by a sailor, of a ship or vessel, in which he had engaged to perform a voyage, before the expiration of his time, and without leave.

2. Desertion without just cause renders the sailor liable on his shipping articles for damages, and will, besides, work a forfeiture of his wages previously earned. 3 Kent, Comm. 155. It has been decided in England that leaving the ship before the completion of the voyage is not desertion, in the case,—*first*, of the seaman's entering the public service, either voluntarily or by impressment; and, *second*, when he is compelled to leave it by the inhuman treatment of the captain. 2 Esp. 269; 1 Bell, Comm. 514, 5th ed.; 2 C.

Rob. Adm. 232. And see 1 Sumn. C. C. 373; 2 Pet. Adm. 393; 3 Stor. C. C. 138.

3. To justify the forfeiture of a seaman's wages for absence for more than forty-eight hours, under the provisions of the act of congress of July 20, 1790, an entry in the log-book of the fact of his absence, made by the officer in charge of it on the day on which he absented himself, and giving the name of the absent seaman as absent without permission, is indispensable. 1 Wash. C. C. 48; Gilp. Dist. Ct. 212, 296.

Receiving a marine again on board, and his return to duty with the assent of the master, is a waiver or pardon of the forfeiture of wages previously incurred. 1 Pet. Adm. 160.

DESIGNATIO PERSONÆ. The description contained in a contract of the persons who are parties thereto.

In all contracts under seal there must be some *designatio personæ*. In general, the names of the parties appear in the body of the deed, "between A B, of, &c., of the one part, and C D, of, &c., of the other part," being the common formula. But there is a sufficient designation and description of the party to be charged if his name is written at the foot of the instrument. 1 Ld. Raym. 2; 1 Salk. 214; 2 Bos. & P. 339.

When a person is described in the body of the instrument by the name of James, and he signs the name of John, on being sued by the latter name he cannot deny it. 3 Taunt. 505; Croke Eliz. 897, n. (*a*). See 11 Ad. & E. 594; 3 Perr. & D. 271.

DESIGNATION. The expression used by a testator to denote a person or thing, instead of the name itself.

A bequest of the farm which the testator bought of a person named, or of a picture which he owns, painted by a certain artist, would be a designation of the thing. A legacy "to the eldest son" of A would be a designation of the person. See 1 Roper, Leg. c. 2.

DESLINDE. In Spanish Law. The act of determining and indicating the boundaries of an estate, county, or province.

DESMEMORIADOS. In Spanish Law. Persons without memory. White, New Recop. lib. 1, tit. 2, c. 1, § 4.

DESPACHEURS. The name given, in some countries, to persons appointed to settle cases of average. Ord. Hamb. t. 21, art. 10.

DESPATCHES. Official communications of official persons on the affairs of government.

In general, the bearer of despatches is entitled to all the facilities that can be given him, in his own country, or in a neutral state; but a neutral cannot, in general, be the bearer of despatches of one of the belligerent parties. 6 C. Rob. Adm. 465. See 2 Dods. Adm. 54; 1 Edw. 274.

DESPERATE. Of which there is no hope.

This term is used frequently in making an inventory of a decedent's effects, when a debt is considered so bad that there is no hope of recovering it. It is then called a desperate debt, and, if it be so returned, it will be *primâ facie* considered as desperate. See Toller, Ex. 248; 2 Williams, Ex. 644; 1 Chitty, Pract. 580.

DESPITUS. A contemptible person. Fleta, l. 4, c. 5, § 4.

DESPOT. This word, in its original and most simple acceptation, signifies *master and supreme lord;* it is synonymous with monarch; but taken in bad part, as it is usually employed, it signifies a tyrant. In some states, despot is the title given to the sovereign, as king is given in others. Encyc. Lond.

DESPOTISM. That abuse of government where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not, properly, a form of government. Toullier, Dr. Civ. Fr. tit. prél. n. 32; Rutherforth, Inst. b. 1, c. 20, § 1.

DESRENABLE. Unreasonable. Britton, c. 121.

DESTINATION. The intended application of a thing.

For example, when a testator gives to a hospital a sum of money to be applied in erecting buildings, he is said to give a destination to the legacy. Mill-stones taken out of a mill to be picked, and to be returned, have a destination, and are considered real estate, although detached from the freehold. Heirlooms, although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land is treated as real property. Newland, Contr. c. 3; 3 Wheat. 577; 2 Bell, Comm. 2; Erskine, Inst. 2. 2. 14; Fonblanque, Eq. b. 1, c. 6, § 9. See EASEMENT; FIXTURES.

In Common Law. The port at which a ship is to end her voyage is called her port of destination. Pardessus, n. 600.

DESUETUDE. Disuse.

DETAINER. Detention. The act of keeping a person against his will, or of withholding the possession of goods or other personal or real property from the owner.

Detainer and detention are pretty much synonymous. If there be any distinction, it is perhaps that detention applies rather to the act considered as a fact, detainer to the act considered as something done by some person. Detainer is more frequently used with reference to real estate than in application to personal property.

2. All illegal detainers of the person amount to false imprisonment, and may be remedied by *habeas corpus*.

A detainer or detention of goods is either lawful or unlawful; when lawful, the party having possession of them cannot be deprived of it. The detention may be unlawful although the original taking was lawful: as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed, and interest was afterwards paid. In these and the like cases the owner should make a demand,

and, if the possessor refuses to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff.

3. There may also be a detainer of land; and this is either lawful and peaceable, or unlawful and forcible. The detainer is lawful where the entry has been lawful and the estate is held by virtue of some right. It is unlawful and forcible where the entry has been unlawful and with force, and it is retained by force against right; or even where the entry has been peaceable and lawful, if the detainer be by force and against right: as, if a tenant at will should detain with force after the will has determined, he will be guilty of a forcible detainer. Hawkins, Pl. Cr. c. 64, s. 22; 2 Chitty, Pract. 238; Comyns, Dig. *Detainer*, B 2; 8 Cow. N. Y. 216; 1 Hall, N. Y. 240; 4 Johns. N. Y. 198; 4 Bibb, Ky. 501. A forcible detainer is a distinct offence from a forcible entry. 8 Cow. N. Y. 216. See FORCIBLE ENTRY AND DETAINER.

In Practice. A writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. A detainer may be lodged against one within the walls of a prison, on what account soever he is there. Comyns, Dig. *Process*, E (3 B).

DETENTION. The act of retaining and preventing the removal of a person or property.

2. The detention may be occasioned by accidents, as the detention of a ship by calms, or by ice; or it may be hostile, as the detention of persons or ships in a foreign country by order of the government. In general, the detention of a ship does not change the nature of the contract; and therefore sailors will be entitled to their wages during the time of the detention. 1 Bell, Comm. 5th ed. 517, 519; Mackeldy, Civ. Law, § 210.

3. A detention is legal when the party has a right to the property, and has come lawfully into possession. It is illegal when the taking was unlawful, as in the case of forcible entry and detainer, although the party may have a right of possession; but in some cases the detention may be lawful although the taking may have been unlawful. 3 Penn. St. 20. When the taking was legal, the detention may be illegal: as, if one borrow a horse, to ride from A to B, and afterwards detain him from the owner, after demand, such detention is unlawful, and the owner may either retake his property, or have an action of replevin or detinue. 1 Chitty, Pract. 135. In some cases the detention becomes criminal although the taking was lawful, as in embezzlement.

DETERMINABLE. Liable to come to an end by the happening of a contingency: as, a determinable fee. See 2 Bouvier, Inst. n. 1695.

DETERMINABLE FEE (also called a *qualified* or *base fee*). One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate. Littleton, § 254; Coke, Litt. 27 *a*, 220; 1 Preston, Est. 449; 2 Blackstone, Comm. 109; Cruise, Dig. tit. 1, § 82; 2 Bouvier, Inst. n. 1695.

DETERMINATE. That which is ascertained; what is particularly designated: as, if I sell you my horse Napoleon, the article sold is here determined. This is very different from a contract by which I would have sold you a horse, without a particular designation of any horse. 1 Bouvier, Inst. nn. 947, 950.

DETERMINATION. The decision of a court of justice.

The end, the conclusion, of a right or authority: as, the determination of a lease. Comyns, Dig. *Estates by Grant* (G 10, 11, 12).

The determination of an authority is the end of the authority given; the end of the return-day of a writ determines the authority of the sheriff; the death of the principal determines the authority of a mere attorney.

DETERMINE. To come to an end. To bring to an end. 2 Blackstone, Comm. 121; 1 Washburn, Real Prop. 380.

DETINET (Lat. *detinere*, to detain; *detinet*, he detains). **In Pleading.** An action of *debt* is said to be in the *detinet* when it it alleged merely that the defendant withholds or unjustly detains from the plaintiff the thing or amount demanded.

The action is so brought by an executor, 1 Wms. Saund. 1; and so between the contracting parties when for the recovery of such things as a ship, horse, etc. 3 Sharswood, Blackst. Comm. 156.

An action of *replevin* is said to be in the detinet when the defendant retains possession of the property until after judgment in the action. Buller, Nisi P. 52; Chitty, Plead. 145.

It is said that anciently there was a form of writ adapted to bringing the action in this form; but it is not to be found in any of the books. 1 Chitty, Plead. 145.

In some of the states of the United States, however, the defendant is allowed to retain possession upon giving a bond similar to that required of the plaintiff in the common-law form: the action is then in the detinet. 3 Sharswood, Blackst. Comm. 146, n.; 5 Watts & S. Penn. 556; 8 Ark. 510; 2 Sandf. N. Y. 68; 13 Ill. 315; 1 Dutch. N. J. 390.

The jury are to find the value of the chattels in such case, as well as the damage sustained. See DEBET ET DETINET; DETINUIT.

DETINUE (Lat. *detinere*,—*de*, and *tenere*,—to hold from; to withhold).

In Practice. A form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention. 3 Blackstone, Comm. 151.

It is generally laid down as necessary to the maintenance of this action that the original taking should have been lawful, thus distinguishing it from replevin, which lies in case the original taking is unlawful. Brooke, Abr. *Detinue*, 21, 36, 63. It is said, however, by Chitty, that it lies in cases of tortious taking, except as a distress, and that it is thus distinguished from replevin, which lay originally only where a distress was made, as was claimed, wrongfully. 1 Chitty, Plead. 112, 113. See 3 Sharswood, Blackst. Comm. 152, and notes. In England this action has yielded to the more practical and less technical action trover, but is much used in the slaveholding states of the United States for the recovery of slaves. 4 Munf. Va. 72; 4 Ala. 221; 3 Bibb, Ky. 510; 16 Ov. Tenn. 187; 10 Ired. No. C. 124.

2. The action lies only to recover such goods as are capable of being identified and distinguished from all others. Comyns, Dig. *Detinue*, B, C; Coke, Litt. 286 *b*; 1 J. J. Marsh. Ky. 500; 5 *id.* 1; 15 B. Monr. Ky. 479; 2 Greene, Iowa, 266; 5 Sneed, Tenn. 562, in cases where the defendant had originally lawful possession, which he retains without right, 12 Ala. 279; 2 Mo. 45; 4 B. Monr. Ky. 365; 15 *id.* 479; 11 Ala. N. S. 322; as where goods were delivered for application to a specific purpose, 4 Bos. & P. 140; but a tort in taking may be waived, it is said, and detinue brought, 2 A. K. Marsh. Ky. 268; 14 Mo. 491; 15 Ark. 235; that it lies whether the taking was tortious or not. 18 Ala. 151; 9 Ala. N. S. 780; 1 Mo. 749. The property must be in existence at the time, 2 Dan. Ky. 332; 10 Ala. 123; 1 Ala. N. S. 203; 1 Ired. No. C. 523; see 10 Ala. 123; 23 Ala. N. S. 377; 13 Mo. 612; 12 Ark. 368; but need not be in the possession of the defendant. 1 Dan. Ky. 110; 3 *id.* 36; 5 Yerg. Tenn. 301; 1 Brev. So. C. 301; 3 Miss. 304; 19 Ala. N. S. 491; 1 Hempst. C. C. 111; 23 Mo. 389; 18 B. Monr. Ky. 86. See 4 Dev. & B. No. C. 458; 10 Ired. No. C. 124.

3. The plaintiff must have had actual possession, or a right to immediate possession, 2 Mo. 45; 1 Wash. Va. 308; 3 Munf. Va. 122; 4 *id.* 72; 4 Bibb, Ky. 518; 7 Ala. N. S. 189; 6 Ired. No. C. 88; 2 Jones, No. C. 168; 2 Md. Ch. Dec. 178; but a special property, as that of a bailee, with actual possession at the time of delivery to the defendant, is sufficient. 2 Wms. Saund. 47 *b*, *c*, *d*; 9 Leigh, Va. 158; Cam. & N. No. C. 416; 1 Miss. 315; 5 *id.* 742; 4 B. Monr. Ky. 365; 2 Mo. 45; 22 Ala. 534. A demand is not requisite, except to entitle the plaintiff to damages for detention between the time of the demand and that of the commencement of the action. 1 Bibb, Ky. 186; 4 *id.* 340; 1 Mo. 9; 14 *id.* 491; 3 Litt. Ky. 46; 3 Munf. Va. 122; 8 Ala. 279; 12 Ala. N. S. 135; 1 Hempst. C. C. 179.

The *declaration* may state a bailment or trover; though a simple allegation that the goods came to the defendant's hands is sufficient. Brooke, Abr. *Detinue*, 10. The bailment or trover alleged is not traversable. Brooke, Abr. *Detinue*, 1, 2, 50. It must describe the property with accuracy. 2 Ill. 206; 13 Ired. No. C. 172; 2 Greene, Iowa, 266.

The *plea* of *non-detinet* is the general issue, and special matter may be given in evidence under it, Coke, Litt. 283; 16 Eng. L. & Eq. 514; 2 Munf. Va. 329; 4 *id.* 301; 6 Humphr. Tenn. 108; 31 Ala. N. S. 136; including title in a third person, 3 Dan. Ky. 422; 17 Ala. 303; 12 Ala. N. S. 823, eviction, or accidental loss by a bailee. 3 Dan. Ky. 36.

4. The defendant in this action frequently prayed garnishment of a third person, whom he alleged owned or had an interest in the thing demanded; but this he could not do without confessing the possession of the thing demanded, and making privity of bailment. Brooke, Abr. *Garnishment*, 1, *Interpleader*, 3. If the prayer of garnishment was allowed, a *sci. fa.* issued against the person named as garnishee. If he made default, the plaintiff recovered against the defendant the chattel demanded, but no damages. If the garnishee appeared, and the plaintiff made default, the garnishee recovered. If both appeared, and the plaintiff recovered, he had judgment against the defendant for the chattel demanded, and a distringas in execution; and against the garnishee a judgment for damages, and a *fi. fa.* in execution.

5. The judgment is in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the property itself, 9 Ala. 123; 7 Ala. N. S. 189; 5 Munf. Va. 166; 1 Bibb, Ky. 484; 7 B. Monr. Ky. 421; 4 Yerg. Tenn. 470; 8 Humphr. Tenn. 406; 5 Mo. 489; 4 Ired. Eq. No. C. 118; 7 Gratt. Va. 343; 4 Tex. 184; 12 *id.* 54; with damages for the detention, 4 Ala. 221; 1 Ired. No. C. 523; 13 Mo. 612; 8 Gratt. Va. 578; 16 Ala. N. S. 271, and full costs.

The verdict and judgment must be such that a special remedy may be had for a recovery of the goods detained, or a satisfaction in value for each parcel in case they or either of them cannot be returned. 7 Ala. N. S. 189, 807; 4 Yerg. Tenn. 570; 2 Humphr. Tenn. 59; 5 Miss. 489; 3 T. B. Monr. Ky. 59; 6 *id.* 52; 4 Dan. Ky. 58; 3 B. Monr. Ky. 313.

DETINUIT (Lat. he detained).

In Pleading. An action of replevin is said to be in the *detinuit* when the plaintiff acquires possession of the property claimed by means of the writ. The right to retain is, of course, subject in such case to the judgment of the court upon his title to the property claimed. Buller, Nisi P. 521.

The declaration in such case need not state the value of the goods. 6 Blackf. Ind. 469; 7 Ala. N. S. 189.

The judgment in such case is for the damage sustained by the unjust taking or detention, or both, if both were illegal, and for costs. 4 Bouvier, Inst. n. 3562.

DEVASTATION. Wasteful use of the property of a deceased person: as, for extravagant funeral or other unnecessary expenses. 2 Blackstone, Comm. 508.

DEVASTAVIT. A mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs.

2. *Devastavit by direct abuse* takes place when the executor, administrator, or trustee sells, embezzles, or converts to his own use the goods intrusted to him, Comyns, Dig. *Administration* (I 1); releases a claim due to the estate, 3 Bacon, Abr. 700; Hob. 266; Croke Eliz. 43; 7 Johns. N. Y. 404; 9 Mass. 352; or surrenders a lease below its value. 2 Johns. Cas. N. Y. 376; 3 P. Will. 330. These instances sufficiently show that any wilful waste of the property will be considered a direct *devastavit*.

3. *Devastavit by mal-administration* most frequently occurs by the payment of claims which were not due nor owing, or by paying others out of the order in which they ought to be paid, or by the payment of legacies before all the debts are satisfied. 4 Serg. & R. Penn. 394; 5 Rawle, Penn. 266.

4. *Devastavit by neglect.* Negligence on the part of an executor, administrator, or trustee may equally tend to the waste of the estate as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit*; and a neglect to collect a doubtful debt which by proper exertion might have been collected will be so considered. Bacon, Abr. *Executors*, L.

5. The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them: when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. See Comyns, Dig. *Administration*, I; 11 Viner, Abr. 306; 1 Belt, Suppl. to Ves. 209; 1 Vern. Ch. 328; 7 East, 257; 1 Binn. Penn. 194; 1 Serg. & R. Penn. 241; 1 Johns. N. Y. 396; 1 Caines, Cas. N. Y. 96; Bacon, Abr. *Executors*, L; 11 Toullier, 58, 59, n. 48.

DEVENERUNT (Lat. *devenire*, to come to). A writ directed to the king's escheators when any of the king's tenants *in capite* dies, and when his son and heir dies within age and in the king's custody, commanding the escheat, or that by the oaths of twelve good and lawful men they shall inquire what lands or tenements by the death of the tenant have come to the king. Dy. 360; Termes de la Ley; Keilw. 199 *a;* Blount; Cowel.

DEVIATION. In Insurance. Varying from the risks insured against, as described in the policy, without necessity or just cause, after the risk has begun. 1 Phillips, Ins. § 977 *et seq.*

2. The mere intention to deviate is not a deviation. Usage, in like cases, has a great weight in determining the manner in which the risk is to be run,—the contract being understood to have implied reference thereto in the absence of specific stipulations to the contrary. 1 Phillips, Ins. c. xii. sects. i.–viii.; 38 Me. 414; 30 Penn. St. 334; 18 Mo. 193; 19 N. Y. 372. A variation from risks described in the policy from a necessity which is not inexcusably incurred does not forfeit the insurance, 1 Phillips, Ins. § 1018: as, to seek an intermediate port for repairs necessary for the prosecution of the voyage, 1 Phillips, Ins. § 1019; changing the course to avoid disaster, 1 Phillips, Ins. § 1023; delay in order to succor the distressed at sea, 1 Phillips, Ins. § 1027; 6 East, 54; 2 Cranch, 240, 258; 2 Wash. C. C. 80; 1 Sumn. C. C. 328; damage merely in defence against hostile attacks. 1 Phillips, Ins. § 1030.

3. Change of risk in insurance against fire, so as to render the insured subject, or its surroundings, or the use made of it, different from those specified in the application, will discharge the underwriters. 1 Phillips, Ins. § 1036; 17 Barb. N. Y. 11; 2 N. Y. 210; 7 Cush. Mass. 175; 8 *id.* 583; 6 Gray, Mass. 185; 19 Penn. St. 45; 13 B. Monr. Ky. 282; 23 Mo. 453; 4 Zabr. N. J. 447; 1 Dutch. N. J. 54; 4 Wisc. 20.

Change of risk under a life-policy in contravention of its express provisions will defeat it, in like manner, 1 Phillips, Ins. § 1039, though such a policy does not appear to have any implied conditions other than those relative to fraud common to all contracts.

The effect of a deviation in all kinds of insurance is to discharge the underwriters, whether the risk is thereby enhanced or not; and the doctrine applies to lake and river navigation as well as that of the ocean. 1 Phillips, Ins. § 987.

4. In Contracts. A change made in the progress of a work from the original plan agreed upon.

When the contract is to build a house according to the original plan, and a deviation takes place, the contract must be traced as far as possible, and the additions, if any have been made, must be paid for according to the usual rate of charging. 3 Barnew. & Ald. 47. And see 1 Ves. Ch. 60; 10 *id.* 306; 13 *id.* 73, 81; 14 *id.* 413; 6 Johns. Ch. N. Y. 38; 3 Cranch, 270; 5 *id.* 262; 9 Pick. Mass. 298; Chitty, Contr. 168.

The Civil Code of Louisiana, art. 2734, provides that when an architect or other workman has undertaken the building of a house by the job, according to a plot agreed on between him and the owner of the ground, he cannot claim an increase of the price agreed on, on the plea of the original plot having been changed and extended, unless he can prove that such changes have been made in compliance with the wishes of the proprietor.

DEVISAVIT VEL NON. In Practice. The name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will. 7 Brown, Parl. Cas. 437; 2 Atk. Ch. 424; 5 Penn. St. 21.

DEVISE. A gift of real property by a person's last will and testament.

The term devise, properly and technically, applies only to real estate; the object of the devise must, therefore, be that kind of property. 1 Hill, Abr. c. 36, nn. 62–74. But it is also sometimes improperly applied to a bequest or legacy. See 2 Bouvier, Inst. n. 2095 *et seq.*; 4 Kent, Comm. 489; 8 Viner, Abr. 41; Comyns, Dig. *Estates by Devise.*

2. In regard to a lapsed devise, where the devisee dies during the life of the testator, the estate so devised will go to the heir, notwithstanding a residuary devise. But if the devise be void, as where the devisee is dead at the date of the will, or is made upon a condition precedent which never happens, the estate will go to the residuary devisee, if the words are sufficiently comprehensive. 2 Vern. Ch. 394; 15 Ves. Ch. 589; 3 Whart. Penn. 477; 4 Kent, Comm. 541, 542, and cases cited in notes. But some of the cases hold in that case, even, that the estate goes to the heir. 6 Conn. 292; 4 Ired. Eq. No. C. 320. By the English law a residuary bequest operates upon all the personal estate which the testator is possessed of at the time of his death, and will include such as would have gone to pay specific legacies which lapse or are void. 4 Ves. Ch. 708, 732; 4 Paige, Ch. N. Y. 115; 6 *id.* 600; 4 Hawks, No. C. 215; 1 Dan. Ky. 206; 1 Dev. & B. Eq. No. C. 115, 116; 1 Jarman, Wills, 585–599.

3. A general devise of lands will pass a reversion in fee, even though the testator had other lands which will satisfy the words of the devise, and although it be highly improbable that he had in mind such reversion. 3 P. Will. Ch. 56; 3 Atk. Ch. 492; Cowp. 808; 3 Brown, Parl. Cas. 408; 4 Brown, Ch. 338; 1 Metc. Mass. 281; 8 Ves. Ch. 256; 15 *id.* 396.

A general devise will pass leases for years, if the testator have no other real estate upon which the will may operate; but if he have both lands in fee and lands for years, a devise of all his lands and tenements will commonly pass only the lands in fee-simple. Croke Car. 293; 2 Atk. Ch. 450; 1 Ed. Ch. 151; 6 Sim. Ch. 99. But if a contrary intention appear from the will, it will prevail. 5 Ves. Ch. 540; 9 East, 448; 6 Term, 345.

4. A devise in a will can never be regarded as the execution of a power, unless that intention is manifest: as, where the will would otherwise have nothing upon which it could operate. But the devise to have that operation need not necessarily refer to the power in express terms. But where there is an *interest* upon which it can operate, it shall be referred to that, unless some other intention is obvious. 6 Coke, 176; 1 Atk. Ch. 559; 6 Madd. Ch. 190; 4 Kent, Comm. 334, 335; 1 Jarman, Wills, 628 *et seq.*

5. The devise of all one's lands will not generally carry the interest of a mortgagee in premises, unless that intent is apparent. 2 Vern. Ch. 621; 3 P. Will, 61; 1 Jarman, Wills, 633–637. The fact that the mortgagee is in possession is sometimes of importance in determining the purpose of the devise. But many cases hold that the interest of a mortgagee or trustee will pass by a general devise of all one's lands, unless a contrary intent be shown. 13 Johns. N. Y. 537; 8 Ves. Ch. 407; 1 Jac. & W. Ch. 494. But see 9 Barnew. & C. 267. This is indeed the result of the modern decisions. 4 Kent, Comm. 539, 540; 1 Jarman, Wills, 638 *et seq.* It seems clear that a devise of one's mortgages will pass the beneficial title of the mortgagee. 4 Kent, Comm. 539.

6. Devises are contingent or vested,—that is, after the death of the testator. Contingent when the vesting of any estate in the devisee is made to depend upon some future event, in which case, if the event never occur, or until it does occur, no estate vests under the devise. But when the future event is referred to merely to determine the time at which the devisee shall come into the use of the estate, this does not hinder the vesting of the estate at the death of the testator. 1 Jarman, Wills, c. xxvi., and numerous cases cited. The law favors the construction of the will that shall vest the estate. 21 Pick. Mass. 311; 1 Watts & S. Penn. 205. But this construction must not be carried to such an extent as to defeat the manifest intent of the testator. 21 Pick. Mass. 311; 7 Metc. Mass. 171. Where the estate is given absolutely, but only the time of possession is deferred, the devisee or legatee acquires a transmissible interest although he never arrive at the age to take possession. 1 Ves. Sen. Ch. 44, 59, 118; 4 Pick. Mass. 198; 7 Metc. Mass. 173. Consult Redfield, Wills.

DEVISEE. A person to whom a devise has been made.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses. Story, Eq. Jur. §§ 1146, 1160; 2 Washburn, Real Prop. 688; 2 How. 127; 4 Wheat. 33, 49. See CHARITABLE USES. In general, he who can acquire property by his labor and industry may receive a devise. Cam. & N. No. C. 353. *Femes covert*, infants, aliens, and persons of non-sane memory may be devisees. 4 Kent, Comm. 506; 1 Harr. Del. 524. Corporations in England and in some of the United States can be devisees only to a limited extent. 2 Washburn, Real Prop. 687.

DEVISOR. A testator. One who devises real estate.

Any person who can sell an estate may, in general, devise it; and there are some disabilities to a sale which are not such to a devise. *Infancy*, as a disability, is partially removed in California, Illinois, Maryland, and Mississippi. *Coverture*, as a disability, is likewise removed entirely, or to some extent, in Alabama, Arkansas, California, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Hampshire, Pennsylvania, Rhode Island, Tennessee, and Vermont. 2 Washburn, Real

Prop. 685, 686. As to how far *idiocy* or *lunacy* is a disability, see 21 Vt. 170; 9 Conn. 102; 26 Wend. N. Y. 255; 7 Pick. Mass. 94; 18 *id.* 115; 1 Phill. Eccl. 90; 1 Jarman, Wills, 1st Am. ed. 29, notes.

DEVOIR. Duty. It is used in the statute of 2 Ric. II. c. 3, in the sense of duties or customs.

DEVOLUTION. In Ecclesiastical Law. The transfer, by forfeiture, of a right and power which a person has to another, on account of some act or negligence of the person who is vested with such right or power: for example, when a person has the right of presentation and he does not present within the time prescribed, the right devolves on his next immediate superior. Ayliffe, Parerg. 331.

DI COLONNA. In Maritime Law. The contract which takes place between the owner of a ship, the captain, and the mariners, who agree that the voyage shall be for the benefit of all. The term is used in the Italian law. Targa, cc. 36, 37; Emerigon, Mar. Loans, s. 5.

The New England whalers are owned and navigated in this manner and under this species of contract. The captain and his mariners are all interested in the profits of the voyage in certain proportion, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreements were very common in former times, all the mariners and the masters being interested in the voyage. It is necessary to know this in order to understand many of the provisions of the laws of Oleron, Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. Hall, Mar. Loans, 42.

DICTATOR. In Roman Law. A magistrate at Rome invested with absolute power. His authority over the lives and fortunes of the citizens was without bounds. His office continued but for six months. Hist. de la Jur. Dig. 1. 2. 18, 1. 1. 1.

DICTUM (also, *Obiter Dictum*). An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication.

It frequently happens that, in assigning its opinion upon a question before it, the court discusses collateral questions and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection or without previous argument at the bar; and as, moreover, they do not enter into the adjudication of the point before it, they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. It may be observed that in recent times, particularly in those jurisdictions where appeals are largely favored, the ancient practice of courts in this respect is much modified. Formerly, judges aimed to confine their opinion to the precise point involved, and were glad to make that point as narrow as it might justly be. Where appeals are frequent, however, a strong tendency may be seen to fortify the judgment given with every principle that can be invoked in its behalf,—those that are merely collateral, as well as those that are necessarily involved. In some courts of last resort, also, when there are many judges, it is not unfrequently the case that, while the court come to one and the same conclusion, the different judges may be led to that conclusion by different views of the law, so that it becomes difficult to determine what is to be regarded as the principle upon which the case was decided and what shall be deemed mere dicta. According to the more rigid rule, an expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point. 1 Abbott, N. Y. Dig. pref. iv. Consult 17 Serg. & R. Penn. 292; 1 Phill. Eccl. 406; 1 Eng. Eccl. 129; Ram, Judgm. c. 5, p. 36; Willes, 666; 1 H. Blackst. 53-63; 2 Bos. & P. 375; 7 Penn. 287; 3 Barnew. & Ald. 341; 2 Bingh. 90. The doctrine of the courts of France on this subject is stated in 11 Toullier, 177, n. 133.

In French Law. The report of a judgment made by one of the judges who has given it. Pothier, Proc. Civ. pl. 1, c. 5, art. 2.

DIEM CLAUSIT EXTREMUM (Lat. he closed his last day,—died). A writ which lay on the death of a tenant *in capite*, to ascertain the lands of which he died seised, and reclaim them into the king's hands. It was directed to the king's escheators. Fitzherbert, Nat. Brev. 251, K; 2 Reeve, Hist. Eng. Law, 327.

2. A writ of the same name, issuing out of the exchequer after the death of a debtor of the king, to levy the debt of the lands or goods of his heir, executor, or administrator. Termes de la Ley. This writ is still in force in England. 4 Stephen, Comm. 47.

DIES (Lat.). A day; days. Days for appearance in court. Provisions or maintenance for a day. The king's rents were anciently reserved by so many days' provisions. Spelman, Gloss.; Cowel; Blount.

DIES AMORIS (Lat.). A day of favor. If obtained after a default by the defendant, it amounted to a waiver of the default. Coke, Litt. 135 *a;* 2 Reeve, Hist. Eng. Law, 60.

DIES COMMUNES IN BANCO (Lat.). Regular days for appearance in court; called, also, common return-days. 2 Reeve, Hist. Eng. Law, 57.

DIES DATUS (Lat. a day given). A day or time given to a defendant in a suit, which is in fact a continuance of the cause. It is so called when given before a declaration. When it is allowed afterwards, it assumes the name of imparlance, which see.

Dies datus in banco, a day in bank. Coke, Litt. 135. *Dies datus partibus*, a continuance; *dies datus prece partium*, a day given on prayer of the parties.

DIES FASTI (Lat.). **In Roman Law.** Days on which courts might be held and judicial and other business legally transacted.

Calvinus, Lex.; Anthon, Rom. Ant.; 3 Blackstone, Comm. 424.

DIES GRATIÆ (Lat.). **In Old English Law.** Days of grace. Coke, Litt. 134 *b*.

DIES NEFASTI (Lat.). **In Roman Law.** Days on which it was unlawful to transact judicial affairs, and on which the courts were closed. Anthon, Rom. Ant.; Calvinus, Lex.; 1 Kaufmann, Mackeld. 24.

DIES NON (Lat.). An abbreviation of the phrase *dies non-juridicus*, universally used to denote non-judicial days. Days during which courts do not transact any business: as, Sunday, or the legal holidays. 3 Chitty, Genl. Pract. 104; W. Jones, 156.

DIES NON-JURIDICUS (Lat.). Non-judicial days. See DIES NON.

DIES PACIS (Lat. day of peace). The year was formerly divided into the days of the peace of the church and the days of the peace of the king,—including in the two divisions all the days of the year. Crabb, Hist. Eng. Law, 35.

DIES A QUO (Lat.). **In Civil Law.** The day from which a transaction begins. Calvinus, Lex.; 1 Kaufmann, Mackeld. Civ. Law, 168.

DIES UTILES (Lat.). Useful or available days. Days in which an heir might apply to the judge for an inheritance. Cooper, Inst.; Calvinus, Lex.; DuCange.

DIETA (Lat.). A day's journey; a day's work; a day's expenses. A reasonable day's journey is said to be twenty miles, by an old computation. Cowel; Spelman, Gloss.; Bracton, 235 *b*; 3 Blackstone, Comm. 218.

DIGEST. A compilation arranged in an orderly manner.

The name is given to a great variety of topical compilations, abridgments, and analytical indices of reports, statutes, etc. When reference is made to *the Digest*, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. As to this Digest, and the mode of citing it, see PANDECTS. Other digests are referred to by their distinctive names. For some account of digests of the civil and canon law, and those of Indian law, see CIVIL LAWS, CODE, and CANON LAW.

The digests of English and American law are for the most part deemed not authorities, but simply manuals of reference, by which the reader may find his way to the original cases which are authorities. 1 Burr. 364; 2 Wils. 1, 2. Some of them, however, which have been the careful work of scholarly lawyers, possess an independent value as original repositories of the law. Bacon's Abridgment, which has long been deservedly popular in this country, and Comyns' Digest, also often cited, are examples of these. The earlier English digests are those of Statham (Hen. VI.), Fitzherbert, 1516, Brooke, 1573, Rolle, Danvers, Nelson, Viner, and Petersdorf. Of these Rolle and Viner are still not unfrequently cited, and some others rarely. The several digests by Coventry & Hughes, by Harrison, and by Chitty, together afford a convenient index for the American reader to the English reports. In most of the United States one or more digests of the state reports have been published, and in some of them digests or topical arrangements of the statutes. There are also digests of the federal reports, the federal statutes, and one known as the United States Digest, which represents the reports of the federal and the state courts together. Dane's Abridgment of American Law has been commended by high authority (Story's article in N. Am. Rev. July, 1826), but it has not maintained a position as a work of general use. There are also numerous digests of cases on particular titles of the law.

DIGNITARY. In Ecclesiastica Law. An ecclesiastic who holds a dignity or benefice which gives him some pre-eminence over mere priests and canons, such as a bishop, archbishop, prebendary, etc. Swift; Burn, Law Dict.

DIGNITIES. In English Law. Titles of honor.

They are considered as incorporeal hereditaments. The genius of our government forbids their admission into the republic.

DILACION. In Spanish Law. The time granted by law or by the judge to parties litigant for the purpose of answering a demand or proving some disputed fact.

DILAPIDATION. A species of ecclesiastical waste which occurs whenever the incumbent suffers any edifices of his ecclesiastical living to go to ruin or decay. It is either voluntary, by pulling down, or permissive, by suffering the church, parsonage-houses, and other buildings, thereunto belonging to decay. And the remedy for either lies either in the spiritual court, where the canon law prevails, or in the courts of common law. It is also held to be good cause of deprivation if the bishop, parson, or other ecclesiastical person dilapidates buildings or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the common-law courts. 3 Blackstone, Comm. 91.

DILATORY DEFENCE. In Chancery Practice. One the object of which is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on shall be removed. See DEFENCE.

DILATORY PLEA. One which goes to defeat the particular action brought, merely, and which does not answer as to the general right of the plaintiff

DILIGENCE. In Scotch Law. Process. Execution.

Diligence against the heritage. A writ of execution by which the creditor proceeds against the real estate of the debtor.

Diligence incident. A writ or process for citing witnesses and examining havers. It is equivalent to the English subpœna for witnesses and rule or order for examination of parties and for interrogatories.

Diligence to examine havers. A process to obtain testimony: equivalent to a bill of discovery in chancery, or a rule to compel oral examination and a *subpœna duces tecum* at common law.

Diligence against the person. A writ of execution by which the creditor proceeds against

the person of the debtor: equivalent to the English *ca. sa.*

Second diligence. Second letters issued where the first have been disregarded. A similar result is produced in English practice by the attachment for contempt.

Summary diligence. Diligence issued in a summary manner, like an execution of a warrant of attorney, *cognovit actionem*, and the like, in English practice.

Diligence against witnesses. Process to compel the attendance of witnesses: equivalent to the English subpœna. See Paterson, Comp.

DIME (Lat. *decem*, ten). A silver coin of the United States, of the value of ten cents, or one-tenth of the dollar.

The act of 1792 provided for the coinage of "dismes, each to be of the value of one-tenth of a dollar, or unit, and to contain thirty-seven grains and two sixteenth-parts of a grain of pure, or forty-one grains and three fifth-parts of a grain of standard, silver" (viz.: 892.4 thousandths fine). See Act of April 2, 1792, sect. 9, 1 U. S. Stat. at Large, 248. Dimes were first regularly issued from the mint in 1796. The standard fineness remained unchanged until 1837, when it was altered to nine-tenths,—nine parts to be of pure silver, and one of copper, the dime to weigh forty-one and one-fourth grains. Act of Jan. 18, 1837, §§ 8, 9, 5 U. S. Stat. at Large, 137. The act of 1853 provided "That from and after the first day of June, eighteen hundred and fifty-two [three], the weight of the half-dollar, or piece of fifty cents, shall be one hundred and ninety-two grains, and the quarter-dollar, dime, and half-dime shall be, respectively, one-half, one-fifth, and one-tenth of the weight of said half-dollar." Act of Feb. 21, 1853, §§ 1, 2, 10 U. S. Stat. at Large, 160. The weight of the dime coined since the passage of the last-cited act, consequently, is 38.4 grains; and by the same act it is made a legal tender in payment of debts for all sums not exceeding five dollars.

DIMINUTION OF THE RECORD. In Practice. Incompleteness of the record of a case sent up from an inferior to a superior court.

When this exists, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the justices of the court below to certify the whole record. Tidd, Pract. 1109; 1 Serg. & R. Penn. 472; Coke, Entr. 232; 8 Viner, Abr. 552; 1 Lilly, Abr. 245; 1 Nelson, Abr. 658; Croke Jac. 597; Croke Car. 91; 1 Ala. 20; 4 Dev. No. C. 575; 1 Dev. & B. No. C. 382; 1 Munf. Va. 119. See CERTIORARI.

DIOCESE. The territorial extent of a bishop's jurisdiction. The circuit of every bishop's jurisdiction. Coke, Litt. 94; 1 Blackstone, Comm. 111; 2 Burns, Eccl. Law, 158.

DIPLOMA. An instrument of writing, executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned.

It is usually granted by learned institutions to their members, or to persons who have studied in them.

Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names. 25 Wend. N. Y. 469.

This word, which is also written duploma, in the civil law signifies letters issued by a prince. They are so called, it is supposed, *a duplicatis tabellis*, to which Ovid is thought to allude, 1 Amor. 12, 2, 27, when he says, *Tunc ego vos duplices rebus pro nomine sensi. Sueton. in Augustum*, c. 26. Seals also were called Diplomata. Vicat, *Diploma.*

DIPLOMACY. The science which treats of the relations and interests of nations with nations.

DIPLOMATIC AGENTS. Public officers who have been commissioned according to law to superintend and transact the affairs of the government which has employed them, in a foreign country. Vattel, liv. 4, c. 5.

These agents are of divers orders and are known by different denominations. Those of the first order are almost the perfect representatives of the government by which they are commissioned: they are legates, nuncios, internuncios, ambassadors, ministers, plenipotentiaries. Those of the second order do not so fully represent their government: they are envoys, residents, ministers, chargés d'affaires, and consuls. See these several words.

DIPLOMATICS. The art of judging of ancient charters, public documents, or diplomas, and discriminating the true from the false. Encyc. Lond.

DIPSOMANIA. In Medical Jurisprudence. A disease produced by drunkenness, and, indeed, other causes, which overmasters the will of its victim and irresistibly impels him to drink to intoxication. 1 Bishop, Crim. Law, § 304. How far the law will hold a party responsible for acts committed while the mind is overwhelmed by the effects of liquor so taken is an open question.

DIRECT. Straightforward; not collateral. The direct line of descent is formed by a series of relationships between persons who descend successively one from the other.

Evidence is termed *direct* which applies immediately to the fact to be proved, without any intervening process, as distinguished from *circumstantial*, which applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

The examination in chief of a witness is called the direct examination.

DIRECTION. The order and government of an institution; the persons who compose the board of directors are jointly called the direction. Direction, in another sense, is nearly synonymous with instruction (*q. v.*).

In Practice. That part of a bill in chancery which contains the address of the bill to the court: this must, of course, contain the appropriate and technical description of the court. See BILL.

DIRECTOR OF THE MINT. An

officer appointed by the president of the United States, by and with the advice and consent of the senate, who has the control and management of the mint, the superintendence of the officers and persons employed therein, and the general regulation and superintendence of the business of the several branch mints and of the assay office. Act of Congress, Jan. 18, 1837, sects. 1, 2, 5 U. S. Stat. at Large, 136.

2. The general direction of the branches of the mint of the United States shall be under the control and regulation of the director of the mint at Philadelphia, subject to the approbation of the secretary of the treasury; and for that purpose it shall be the duty of the said director to prescribe such regulations, and require such returns, periodically, and occasionally, as shall appear to him to be necessary to carry into effect the purposes of the law establishing the branches; also, for the purpose of discriminating the coins which shall be stamped at each branch, and at the mint itself; also, for the purpose of preserving uniformity of weight, form, and fineness in the coins stamped at each place, and for that purpose to require the transmission and delivery to him, at the mint, from time to time, of such parcels of the coinage of each branch as he shall think proper, to be subjected to such assays and tests as he shall direct. Act of March 3, 1835, § 4, 4 U. S. Stat. at Large, 775.

3. The director of the mint has power to appoint, with the approbation of the president of the United States, assistants to the assayer, melter and refiner, chief coiner, and engraver, and clerks for the director [and treasurer], whenever, on representation made by the director to the president, it shall be the opinion of the president that such assistants or clerks are necessary; and it is made the duty of the assistants to aid their principals in the execution of their respective offices, and of the clerks to perform such duties as shall be prescribed for them by the director. Act of Jan. 18, 1837, § 3, 5 U. S. Stat. at Large, 137. Altered as to the words in brackets by resolution of March 3, 1851, 9 Stat. at Large, 647.

4. Whenever any officer of the mint shall be temporarily absent on account of sickness or any other sufficient cause, it shall be lawful for the director, with the consent of the said officer, to appoint some person attached to the mint to act in the place of such officer during his absence, and to employ such workmen and servants in the mint as he shall, from time to time, find necessary. Act of Jan. 18, 1837, § 4, 5 U. S. Stat. at Large, 137.

5. It is the duty of the director to cause assays to be made, from time to time, of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof. This annual report embraces the operations of the mint and its branches, and the assay office, for each fiscal year, which terminates on the 30th of June, and appears in the report of the secretary of the treasury on the finances. See Act of Feb. 21, 1857, §§ 3, 4, 13 U. S. Stat. at Large, 163. The salary of the director of the mint, as fixed by the act of Jan. 18, 1837, § 7, 5 U. S. Stat. at Large, 137, is three thousand five hundred dollars.

DIRECTORS. Persons appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company. The whole of the directors collectively form the board of directors.

2. They are generally invested with certain powers by the acts of the legislature to which they owe their existence.

In modern corporations created by statutes, it is generally contemplated by the charter that the business of the corporation shall be transacted exclusively by the directors. 2 Caines, N. Y. 381. And the acts of such a board, evidenced by a legal vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. 8 Wheat. 357, 358.

3. To make a legal board of directors, they must meet at a time when, and a place where, every other director has the opportunity of attending to consult and be consulted with; and there must be a sufficient number present to constitute a quorum. 3 La. 574; 6 *id.* 759; 13 *id.* 527. See 11 Mass. 288; 5 Litt. Ky. 45; 12 Serg. & R. Penn. 256; 1 Pet. 46.

4. Directors of a corporation are trustees, and as such are required to use due diligence and attention to its concerns, and are bound to a faithful discharge of the duty which the situation imposes. They are liable to the stockholders whenever there has been gross negligence or fraud, but not for unintentional errors. 1 Edw. Ch. N. Y. 513; 8 Mart. La. N. S. 80; 3 La. 575. See 4 Mann. & G. 552.

5. Provision is usually made, in the act under which a company is incorporated, for the election of directors. Such election usually takes place once a year, and is generally by a vote of the stockholders. In the banking laws of many of the states, directors of banks are made personally liable for the debts of the bank when they have exceeded their powers.

DIRIMANT IMPEDIMENTS. Those bars which annul a consummated marriage.

DISABILITY. The want of legal capacity. See ABATEMENT; DEVISE; DEED; LIMITATION; PARTIES.

DISABLING STATUTES (also called the *Restraining Statutes*). The acts of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. cc. 11, 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, by which the power of ecclesiastical or eleemosynary corporations to lease their lands was restricted. 2 Blackstone, Comm. 319, 321; Coke, Litt. 44 *a*; 3 Stephen, Comm. 140.

DISAFFIRMANCE. The act by which a person who has entered into a voidable contract, as, for example, an infant, disagrees to such contract and declares he will not abide by it.

Disaffirmance is express or implied:—the former, when the declaration is made in terms that the party will not abide by the contract; the latter, when he does an act which plainly manifests his determination not to abide by it: as, where an infant made a deed for his land, and on coming of age he made a deed for the same land to another. 2 Dev. & B. No. C. 320; 10 Pet. 58; 13 Mass. 371, 375.

DISAFFOREST. To restore to their former condition lands which have been

turned into forest. To remove from the operation of the forest laws. 2 Sharswood, Blackst. Comm. 416.

DISAVOW. To deny the authority by which an agent pretends to have acted, as when he has exceeded the bounds of his authority.

It is the duty of the principal to fulfil the contracts which have been entered into by his authorized agent; and when an agent has exceeded his authority he ought promptly to disavow such act, so that the other party may have his remedy against the agent. See AGENT; PRINCIPAL.

DISBAR. In English Law. To expel a barrister from the bar. Wharton.

DISCEPTIO CAUSÆ (Lat.). **In Roman Law.** The argument of a cause by the counsel on both sides. Calvinus, Lex.

DISCHARGE. In Practice. The act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.

The discharge of a defendant, in prison under a *ca. sa.*, when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy. 4 Term, 526.

But when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied. In the first case the plaintiff has a remedy against the property of the defendant acquired after his discharge, and in the last case against the executors or administrators of the debtor. Bacon, Abr. *Execution*, D; Bingham, *Execution*, 266.

DISCHARGE OF A JURY. The removal of a case from the consideration of a jury.

2. In criminal cases this can only take place by consent of the prisoner, Foster, Cr. Law, 16; 6 Carr. & P. 151; 1 Carr. & K. 201; 5 Cox, Cr. Cas. 501; 1 Humphr. Tenn. 103; 6 Ala. N. S. 616, or by some necessity, 5 Ind. 290; 10 Yerg. Tenn. 536; 26 Ala. N. S. 135; 3 Ohio St. 239; 1 Dev. No. C. 491; 2 Gratt. Va. 570; 3 Ga. 60; 4 Wash. C. C. 411, so as to compel the prisoner to be tried again for the same offence. 4 Blackstone, Comm. 360. But where such necessity exists as would make such a course highly conducive to purposes of justice, 2 Gall. C. C. 364; 6 Serg. & R. Penn. 586; 2 Dev. & B. No. C. 166; 18 Johns. N. Y. 205; 9 Leigh, Va. 620; 13 Q. B. 734; 3 Cox, Cr. Cas. 495, it may take place. The question of necessity seems to be in the decision of the court which tries the case. 2 Pick. Mass. 503; 4 Harr. Del. 581; 6 Ohio, 399; 13 Wend. N. Y. 55; 9 Wheat. 579. But see 1 Cox, Cr. Cas. 210; 13 Q. B. 734; Bail. So. C. 654; 2 Dev. & B. No. C. 166; Ohio St. 239; 5 Ind. 292. A distinction has been taken in some cases between felonies and misdemeanors in this regard, 3 Dev. & B. No. C. 115; 13 Ired. No. C. 283; 7 Gratt. Va. 662; 2 Sumn. C. C. 19; 6 Mo. 644, but is of doubtful validity. 18 Johns. N. Y. 187; 9 Mass. 494; 5 Litt. Ky. 137; 26 Ala. N. S. 135; 11 Ga. 353; 1 Bennett & H. Lead. Crim. Cas. 369.

3. Among cases of necessity which have been held sufficient to warrant the discharge of a jury without releasing the prisoner are *sickness of the judge*, 8 Ala. 72; *sickness*, 2 Leach, Cr. Cas. 271; 2 Mood. & R. 249; 3 Crawf. & D. Ir. 212; Jebb, Cr. Cas. 103, 106; 3 Campb. 207; 1 Thach. Cr. Cas. Mass. 1; 2 Mo. 135; 10 Yerg. Tenn 532; 5 Humphr. Tenn. 601; 6 *id.* 249; 9 Leigh, Va. 618, or other incapacity of a juror, 1 Curt. C. C. 23; 13 Wend. N. Y. 351; 3 Ill. 326; 3 Ohio St. 239; 12 Gratt. Va. 689; but see 8 Barnew. & C. 417; Yelv. 24; Carr. & M. 647; 8 Ad. & E. 831; 2 Cranch, C. C. 412; 1 Bay, So. C. 150; 4 Ala. 454; 1 Humphr. Tenn. 253; 2 Blackf. Ind. 114; 1 Leigh, Va. 599; 4 Halst. N. J. 256; *sickness of the prisoner*, 2 Leach, Cr. Cas. 546; 2 Carr. & P. 413; 9 Leigh, Va. 623, n.; *expiration of a term of court*, 1 Dev. No. C. 491; 3 Humphr. Tenn. 70; 1 Miss. 134; 5 Litt. Ky. 138; 4 Ala. N. S. 173; 7 *id.* 259; 2 Hill, So. C. 680; 2 Wheel. Cr. Cas. N. Y. 472; and see 5 Ind. 290; 3 Cox, Cr. Cas. 489; *inability of the jury to agree*, 2 Johns. Cas. N. Y. 201, 275; 18 Johns. N. Y. 187; 9 Mass. 494; 2 Pick. Mass. 521; 12 *id.* 503; 4 Harr. Del. 581; 6 Ohio, 399; 9 Wheat. 579: *contra*, 6 Serg. & R. Penn. 577; 3 Rawle, Penn. 498; 16 Ala. 213; 26 Ala. N. S. 135; 10 Yerg. Tenn. 532; 2 Gratt. Va. 167; 3 Crawf. & D. Ir. 212; 1 Cox, Cr. Cas. 210. But see 7 Gratt. Va. 662; 3 Dev. & B. No. C. 115; 13 Ired. No. C. 283.

4. Insufficiency of the evidence to convict, 2 Strange, 984; 18 Johns. N. Y. 206; 8 Blackf. Ind. 540; 2 Park. Cr. Cas. N. Y. 676; 2 McLean, C. C. 114, and sickness or other incapacity of a witness, 1 Crawf. & D. Ir. 151; 1 Mood. Cr. Cas. 186; Jebb, Cr. Cas. 270, are not sufficient necessities to warrant the discharge of a jury. See, in connection, 17 Pick. Mass. 399; 2 Gall. C. C. 364. Consult 2 Bennett & H. Lead. Crim. Cas. 337, for an admirable note on this subject.

DISCLAIMER. A disavowal; a renunciation: as, for example, the act by which a patentee renounces part of his title of invention.

Of Estates. The act by which a party refuses to accept an estate which has been conveyed to him. Thus, a trustee is said to disclaim who releases to his fellow-trustees his estate, and relieves himself of the trust. 1 Hill, Real Prop. 354.

Of Tenancy is the act of a person in possession, who denies holding the estate of the person who claims to be the owner. 2 Nev. & M. 672. An affirmation, by pleading or otherwise, in a court of record, that the reversion is in a stranger. It works a forfeiture of the lease at common law, Coke, Litt. 251; 1 Cruise, Dig. 109, but not, it is said, in the United States. 1 Washburn, Real Prop. 93. Equity, it is said, will not aid a tenant in denying his landlord's title. 1 Pet. 486.

In Patent Law. See PATENT.

In Pleading. A renunciation by the defendant of all claim to the subject of the demand made by the plaintiff's bill. Cooper, Eq. Plead. 309; Mitford, Eq. Plead. Jerem. ed. 318.

In Equity. It must, in general, be accompanied by an answer, 10 Paige, Ch. N.Y. 105; 2 Russ. 458; 2 Younge & C. Ch. 546; 9 Sim. Ch. 102; 2 Bland, Ch. Md. 678; and always, when the defendant has so connected himself with the matter that justice cannot be done otherwise. 9 Sim. Ch. 102; Hinde, Ch. Pr. 208; 1 Anstr. 37. It must renounce all claim in any capacity and to any extent. 6 Gill & J. Md. 152. It may be to part of a bill only, but it must be clearly a separate and distinct part of the bill. Story, Eq. Plead. § 839. A disclaimer may, in general, be abandoned, and a claim put in upon subsequent discovery of a right. Cooper, Eq. Plead. 310.

At Law. *In real actions*, a disclaimer of tenancy or estate is frequently added to the plea of non-tenure. Littleton, § 391; 10 Mass. 64. The plea may be either in abatement or in bar, 13 Mass. 439; 7 Pick. Mass. 31, as to the whole or any part of the demanded premises. Stearns, Real Act. 193.

At common law it is not pleaded as a bar to the action, nor is it strictly a plea in abatement, as it does not give the plaintiff a better writ. It contains no prayer for judgment, and is not concluded with a verification. It is in effect an offer by the plaintiff to yield to the claim of the demandant and admit his title to the land. Stearns, Real Act. 193. It cannot, in general, be made by a person incapable of conveying the land. It is equivalent to a judgment in favor of the demandant, except when costs are demanded, 13 Mass. 439, in which case there must be a replication by the demandant, 6 Pick. Mass. 5; but no formal replication is requisite in Pennsylvania. 5 Watts, Penn. 70; 3 Penn. St. 367. And see 1 Washburn, Real Prop. 93.

DISCONTINUANCE OF ESTATES. An alienation made or suffered by the tenant in tail, or other tenant seised in *autre droit*, by which the issue in tail, or heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

The term discontinuance is used to distinguish those cases where the party whose freehold is ousted can restore it only by action, from those in which he may restore it by entry. Coke, Litt. 325 *a;* 3 Blackstone, Comm. 171; Adams, Ej. 35–41; Comyns, Dig.; Bacon, Abr.; Viner, Abr.; Cruise, Dig. Index; 2 Saund. Index.

In Pleading. The chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission. See Comyns, Dig. *Pleader*, W; Bacon, Abr. *Pleas*, P. It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance. 1 Wms. Saund. 28, n. It constitutes error, but may be cured after verdict, by stat. 32 Hen. VIII. c. 80, and after judgment by *nil dicit*, confession, or *non sum informatus*, under stat. 4 Anne, c. 16. See, generally, 1 Saund. 28; 4 Rep. 62 *a*.

In Practice. The chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought. 3 Blackst. Comm. 296. The entry upon record of a discontinuance has the same effect. The plaintiff cannot discontinue after demurrer joined and entered, or after verdict or writ of inquiry, without leave of court, Croke Jac. 35; 1 Lilly, Abr. 473; 6 Watts & S. Penn. 147; and is generally liable for costs when he discontinues, though not in all cases. See 1 Johns. N.Y. 143; 3 *id.* 249; 6 *id.* 333; 18 *id.* 252; 1 Caines, N.Y. 116; 2 *id.* 380; Comyns, Dig. *Pleader* (W 5); Bacon, Abr. *Plea* (5 P).

DISCONTINUOUS SERVITUDE. An easement made up of repeated acts instead of one continuous act, such as right of way, drawing water, etc.

DISCOUNT. In Contracts. Interest reserved from the amount lent at the time of making a loan. An allowance sometimes made for prompt payment. As a verb, it is used to denote the act of giving money for a bill of exchange or promissory note, deducting the interest.

The taking legal interest in advance is not usurious; but it is only allowed for the benefit of trade and where the bill or note discounted is meant for circulation and is for a short term. 2 Cow. N.Y. 678, 712; 3 Wend. N.Y. 408.

There is a difference between *buying* a bill and *discounting* it. The former word is used when the seller does not indorse the bill and is not accountable for its payment. See Pothier, *De l' Usure*, n. 128; 3 Pet. 40; Blydenburgh, Usury; Sewell, Banking.

In Practice. A set-off or defalcation in an action. Viner, Abr. *Discount*.

DISCOVERT. Not covert; unmarried. The term is applied to a woman unmarried, or widow,—one not within the bonds of matrimony.

DISCOVERY (Fr. *découvrir*, to uncover, to discover). The act of finding an unknown country.

The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects or by whose authority it was made, as against all European governments. This title was to be consummated by possession. 8 Wheat. 543; 16 Pet. 367; 2 Washburn, Real Prop. 518.

An invention or improvement. Act of Cong. July 4, 1836, § 6.

In Practice. The disclosure of facts resting in the knowledge of the defendant, or the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court.

It was originally an equitable form of procedure, and a bill of discovery, strictly so called, was brought to assist parties to suits in other courts.

Every bill in equity is in some sense a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case as propounded in his bill, Story, Eq. Jur. § 1483; but the term is technically applied as defined above. See 4 R. I. 450; 2 Stockt. Ch. N. J. 273. Many important questions have arisen out of the exercise of this power by equity; but these are of comparatively little practical importance in England and many of the states of the United States, where parties may be made witnesses and compelled to produce books and papers in courts of law.

2. Such bills are greatly favored in equity, and are sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction. Story, Eq. Jur. § 1488; 8 Conn. 528; 2 Harr. & G. Md. 382. See 17 Mass. 117; 22 Me. 207; 4 Hen. & M. Va. 478; 3 Md. Ch. Dec. 418. Some of the more important of the objections are, —*first*, that the subject is not cognizable in any municipal court of justice, Story, Eq. Jur. § 1489; *second*, that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted, as where the court can itself compel a discovery, 1 Atk. Ch. 258; 2 Ves. Ch. 451; 1 Johns. Ch. N. Y. 547; 2 Edw. Ch. 605; 37 N. H. 55; see 9 Paige, Ch. N. Y. 580; 6 Ves. Ch. 821; *third*, that the plaintiff is not entitled by reason of personal disability; *fourth*, that the plaintiff has no title to the character in which he sues, 4 Paige, Ch. N. Y. 639; *fifth*, that the value of the suit is beneath the dignity of the court; *sixth*, that the plaintiff has no interest in the subject-matter or title to the discovery required, 2 Brown, Ch. 321; 1 Ves. Sen. Ch. 248; 2 *id.* 243; 4 Madd. Ch. 193; 4 Ves. Ch. 71; 6 *id.* 288; Cooper, Eq. Plead. c. 1, § 4; 2 Metc. Mass. 127; 17 Me. 404, or that an action for which it is wanted will not lie, 3 Brown, Ch. 155; 3 Ves. Ch. 494; 13 *id.* 240; 1 Bligh, N. S. 120; 3 Younge & C. Ch. 255; see 1 Phill. Ch. 209; *seventh*, that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; *eighth*, that the policy of the law exempts the defendant from the discovery, as on account of the peculiar relations of the parties, 5 Ves. Ch. 322; 8 *id.* 405; 15 *id.* 159; 3 Ves. & B. Ch. 165; 3 Esp. 38, 113; 2 Younge & C. Ch. 107; 8 Eng. L. & Eq. 89; 35 *id.* 283; 3 Paige, Ch. N. Y. 36; in case of arbitrators, 2 Vern. Ch. 380; 3 Atk. Ch. 529; *ninth*, that the defendant is not bound to discover his own title, 1 Vern. Ch. 105; 6 Whart. Penn. 141, or that he is a *bonâ fide* purchaser without notice of the plaintiff's claim, 2 Edw. Ch. 81; 1 Term, 763; 10 Ves. Ch. 246; 3 Mylne & K. Ch. 581; 2 Younge & C. Ch. 457; 8 Sim. Ch. 153; 5 Mas. C. C. 269; 1 Sumn. C. C. 506; 2 *id.* 487; 7 Pet. 252; 10 *id.* 177; 7 Cranch, 2; 6 Paige, Ch. N. Y. 323; and see 33 Vt. 252; 1 Stockt. N. J. 82; *tenth*, that the discovery is not material in the suit, 2 Ves. Ch. 491; 1 Johns. Ch. N. Y. 548; *eleventh*, that the defendant is a mere witness, 7 Ves. Ch. 287; 2 Brown, Ch. 332; 3 Edw. Ch. N. Y. 129; but see 2 Ves. Ch. 451; 14 *id.* 252; 1 Schoales & L. Ch. Ir. 227; 11 Sim. Ch. 305; 1 Paige, Ch. N. Y. 37; 9 *id.* 188; *twelfth*, that the discovery called for would criminate the defendant. The suit must be of a purely civil nature, and may not be a criminal prosecution, Lofft, 1; 19 How. St. Tr. 1154; 7 Md. 416; a penal action, 1 Keen, 329; 2 Blatchf. C. C. 39; a suit partaking of this character, 1 Pet. 100; 6 Conn. 36; 8 *id.* 528; 14 Ga. 255; or a case involving moral turpitude. See 2 Ves. Ch. 398; 14 *id.* 64; 1 Bligh, N. S. 96; 2 Eng. L. & Eq. 117; 5 Madd. Ch. 229; 2 Younge & C. Ch. 132; 11 Beav. Rolls, 380; 1 Sim. Ch. 404; 24 Miss. 17.

3. Courts of equity which have once obtained jurisdiction for purposes of discovery will dispose of a cause finally, if proper for the consideration of equity, though the remedy at law is fully adequate. 1 Story, Eq. Jur. 64*k*–70; 1 Munf. Va. 98; 1 A. K. Marsh. 463, 468; 15 Me. 82; 2 Johns. Ch. N. Y. 424; 1 Des. So. C. 208; 2 Ov. Tenn. 71; 1 Harr. Ch. Mich. 12. See 4 Harr. & J. Md. 46; 6 Ala. N. S. 299. Consult Adams; Story, Eq. Jur.; Greenleaf; Phillipps, Ev.; Wigram, Disc.; Joy, Conf.

DISCREDIT. To deprive one of credit or confidence.

In general, a party may discredit a witness called by the opposite party, who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which shows he is not entitled to belief. It is clearly settled, also, that the party voluntarily calling a witness cannot afterwards impeach his character for truth and veracity. 1 Mood. & R. 414; 3 Barnew. & C. 746. But if a party calls a witness who turns out unfavorable, he may call another to prove the same point. 2 Campb. 556; 2 Stark. 334; 1 Nev. & M. 34; 4 Barnew. & A. 193; 1 Phillipps, Ev. 229; Roscoe, Civ. Ev. 96.

DISCREPANCY. A difference between one thing and another, between one writing and another; a variance.

A material discrepancy exists when there is such a difference between a thing alleged and a thing offered in evidence as to show they are not substantially the same: as, when the plaintiff in his declaration for a malicious arrest averred that "the plaintiff, in that action, did not prosecute his said suit, but therein made default," and the record was that he obtained a rule to discontinue.

An immaterial discrepancy is one which does not materially affect the cause: as, where a declaration stated that a deed bore date in a certain year of our Lord, and the deed was simply dated "March 30, 1701." 2 Salk. 658; 19 Johns. N. Y. 49; 5 Taunt. 707; 2 Barnew. & Ald. 301; 8 Miss. 428; 2 McLean, C. C. 69; 1 Metc. Mass. 59; 21 Pick. Mass. 486.

DISCRETION. In Practice. The equitable decision of what is just and proper under the circumstances.

The discretion of a judge is said to be the law of tyrants: it is always unknown; it is different in

different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quæ minimum relinquit arbitrio judicis: optimus judex qui minimum sibi.* Bacon, Aph.; 1 Cas. 80, n.; 1 Powell, Mortg. 247 *a*; 2 Belt, Suppl. to Ves. 391; Toullier, liv. 3, n. 338; 1 Lilly, Abr. 447.

2. There is a species of discretion which is authorized by express law and without which justice cannot be administered: for example, if an old offender, a man of much intelligence and cunning, whose talents render him dangerous to the community, induces a young man of weak intellect to commit a larceny in company with himself, they are both liable to be punished for the offence. The law, foreseeing such a case, has provided that the punishment should be proportioned so as to do justice, and it has left such apportionment to the discretion of the judge. It is evident that without such discretion justice could not be administered; for one of these parties assuredly deserves a much more severe punishment than the other.

3. And many matters relating to the trial, such as the order of giving evidence, granting of new trials, etc., are properly left mainly or entirely to the discretion of the judge.

In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful.

4. The age at which children are said to have discretion is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence which is raised by an age so tender. 1 Hale, Pl. Cr. 27, 28; 4 Blackstone, Comm. 23. Between the ages of seven and fourteen the infant is, *primâ facie*, destitute of criminal design; but this presumption diminishes as the age increases, and even during this interval of youth may be repelled by positive evidence of vicious intention; for tenderness of years will not excuse a maturity in crime, the maxim in these cases being *malitia supplet ætatem*. At fourteen, children are said to have acquired legal discretion. 1 Hale, Pl. Cr. 25.

DISCRETIONARY TRUSTS. Those which cannot be duly administered without the application of a certain degree of prudence and judgment: as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

DISCUSSION. In Civil Law. A proceeding, on the part of a surety, by which the property of the principal debtor is made liable before resort can be had to the sureties: this is called the *benefit of discussion*. This is the law in Louisiana. La. Civ. Code, art. 3014–3020. See Domat, 3, 4, 1–4; Burge, Suret. 329, 343, 348; 5 Toullier, 544; 7 *id.* 93; 2 Bouvier, Inst. n. 1414.

DISFRANCHISEMENT. The act of depriving a member of a corporation of his right as such, by expulsion. 1 Bouvier, Inst. n. 192.

It differs from amotion (*q.v.*), which is applicable to the removal of an officer from office, leaving him his rights as a member. Willcock, Corp. n. 708; Angell & A. Corp. 237. And see EXPULSION.

DISGRACE. Ignominy; shame; dishonor. No witness is required to disgrace himself. 13 How. St. Tr. 17, 334; 16 *id.* 161. See CRIMINATION; DEGRADE.

DISHERISON. Disinheritance; depriving one of an inheritance. Obsolete. See DISINHERISON.

DISHERITOR. One who disinherits, or puts another out of his freehold. Obsolete.

DISHONOR. A term applied to the non-fulfilment of commercial engagements. To dishonor a bill of exchange, or a promissory note, is to refuse or neglect to pay it at maturity.

The holder is bound to give notice to the parties to such instrument of its dishonor; and his laches will discharge the indorsers. Chitty, Bills, 256–278, 394, 395.

DISINHERISON. In Civil Law. The act of depriving a forced heir of the inheritance which the law gives him.

In Louisiana, forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, for just cause. The disinherison must be made in proper form, by name and expressly, and for a just cause; otherwise it is null. See La. Civ. Code, art. 1609–1616.

DISINHERITANCE. The act by which a person deprives his heir of an inheritance, who, without such act, would inherit.

By the common law, any one may give his estate to a stranger, and thereby disinherit his heir apparent. Cooper, Justin. 495; 7 East, 106.

DISINTERESTED WITNESS. One who has no interest in the cause or matter in issue, and who is lawfully competent to testify.

In North Carolina and Tennessee, wills to pass lands must be attested by disinterested witnesses.

DISJUNCTIVE ALLEGATIONS. In Pleading. Allegations which charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him.

An indictment, information, or complaint which charges the defendant with one or other of two offences, in the disjunctive, as, that he murdered *or* caused to be murdered, forged *or* caused to be forged, wrote and published *or* caused to be written and published, is bad for uncertainty. 8 Mod. 330; 1 Salk. 342, 371; 2 Strange, 900; Cas. *temp.* Hardw. 370; 5 Barnew. & C. 251; 1 Carr. & K. 243; 1 Younge & J. Exch. 22. An indictment which averred that S made a forcible entry into two closes of meadow *or* pasture was held to be bad. 2 Rolle, Abr. 81. A complaint which alleges an unlawful sale of "spirituous *or* intoxicating liquor" is bad for uncertainty. 2 Gray, Mass. 501. So is an information which alleges that N sold beer *or* ale without an excise license. 6 Dowl. & R. 143. And the same rule applies if the defendant is charged in two different characters in the disjunctive: as, *quod A existens servus* sive *deputatus*, took, etc. 2 Rolle, Abr. 263.

DISJUNCTIVE TERM. One which is

placed between two contraries, by the affirming of one of which the other is taken away: it is usually expressed by the word *or*. See 3 Ves. Ch. 450; 7 *id.* 454; 2 Roper, Leg. 290; 1 P. Will. 433; 2 *id.* 283; 2 Cox, Ch. 213; 2 Atk. Ch. 643; 3 *id.* 83, 85; 2 Ves. Sen. Ch. 67; 2 Strange, 1175; Croke Eliz. 525; Poll. 645; 1 Bingh. 500; 3 Term, 470; Ayliffe, Pand. 56; 2 Miles, Penn. 49.

In the civil law, when a legacy is given to Caius *or* Titius, the word *or* is considered *and*, and both Caius and Titius are entitled to the legacy in equal parts. 6 Toullier, n. 704. See COPULATIVE TERM; CONSTRUCTION, subdivision *And, Or;* also, Bacon, Abr. *Conditions* (P 5).

DISME. Dime, which see.

DISMISS. To remove. To send out of court. Formerly used in chancery of the removal of a cause out of court without any farther hearing. The term is now used in courts of law also.

DISORDERLY HOUSE. In Criminal Law. A house the inmates of which behave so badly as to become a nuisance to the neighborhood.

The keeper of such house may be indicted for keeping a public nuisance. Hardr. 344; Hawkins, Pl. Cr. b. 1, c. 78, ss. 1, 2; Bacon, Abr. *Inns*, A; 1 Russell, Crimes, 298; 1 Wheel. Cr. Cas. N. Y. 290; 1 Serg. & R. Penn. 342; 2 *id.* 298; Bacon, Abr. *Nuisances*, A; 4 Sharswood, Blackst. Comm. 167, 168, note. The husband must be joined with the wife in an indictment to suppress a disorderly house. Justice's Case, Law, 16; 1 Show. 146.

DISORDERLY PERSONS. A class of offenders described in the statutes which punish them. See 4 Blackstone, Comm. 169.

DISPARAGEMENT. In Old English Law. An injury by union or comparison with some person or thing of inferior rank or excellence.

Marriage without *disparagement* was marriage to one of suitable rank and character. 2 Sharswood, Blackst. Comm. 70; Coke, Litt. 82 *b*. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without *disparagement* or inequality, if the infant refused, he was obliged to pay a *valor maritagii* to the guardian.

Disparagare, to connect in an unequal marriage. Spelman, Gloss. *Disparagatio*, disparagement. Used in Magna Charta (9 Hen. III.), c. 6. *Disparagation*, disparagement. Kelham. *Disparage*, to marry unequally. Used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward.

DISPAUPER. In English Law. To deprive a person of the privilege of suing *in forma pauperis*.

When a person has been admitted to sue *in forma pauperis*, and before the suit is ended it appears that the party has become the owner of a sufficient estate real or personal, or has been guilty of some wrong, he may be *dispaupered*.

DISPENSATION. A relaxation of law for the benefit or advantage of an individual. In the United States, no power exists, except in the legislature, to dispense with law; and then it is not so much a dispensation as a change of the law.

DISPONE. In Scotch Law. A technical word essential to the conveyance of heritable property, and for which no equivalent is accepted however clear may be the meaning of the party. Paterson, Comp.

DISPOSSESSION. Ouster; a wrong that carries with it the amotion of possession. An act whereby the wrong-doer gets the actual occupation of the land or hereditament. It includes abatement, intrusion, disseisin, discontinuance, deforcement. 3 Sharswood, Blackst. Comm. 167.

DISPUTATIO FORI (Lat.). Argument in court. DuCange.

DISSEISEE. One who is wrongfully put out of possession of his lands; one who is disseised.

DISSEISIN. A privation of seisin. A usurpation of the right of seisin and possession, and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightfully belong. 2 Washburn, Real Prop. 283.

It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the commencement of a new estate in the wrong-doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin properly so called. Every dispossession is not a disseisin. A disseisin, properly so called, requires an ouster of the freehold. A disseisin at election is not a disseisin in fact, 2 Preston, Abstr. tit. 279 *et seq.*, but by admission only of the injured party, for the purpose of trying his right in a real action. Coke, Litt. 277; 2 Me. 242; 3 *id.* 316; 11 *id.* 309; 4 N. H. 371; 5 Cow. N. Y. 371; 6 Johns. N. Y. 197; 5 Pet. 402; 6 Pick. Mass. 172; 6 Metc. Mass. 439; 4 Kent, Comm. 485.

Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold: as if a man enters, by force or fraud, into the house of another, and turns, or, at least, keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession nor dispossession. 3 Blackstone, Comm. 169, 170. See 15 Mass. 495; 6 Pick. Mass. 172; 14 *id.* 374; 6 Johns. N. Y. 197; 2 Watts, Penn. 23; 1 Vt. 155; 10 Pet. 414; 11 *id.* 41; 1 Dan. Ky. 279; 11 Me. 408; 8 Viner, Abr. 79; 1 Swift, Dig. 504; 1 Cruise, Dig. *65; Archbold, Civ. Plead. 12; Bacon, Abr.; 2 Suppl. to Ves. 343; Dane, Abr. Index; 1 Chitty, Pract. 374, note (r).

DISSEISOR. One who puts another out of the possession of his lands wrongfully.

DISSENT. A disagreement to something which has been done. It is express or implied.

2. The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit. To rebut the presumption, his dissent must be expressed. See 4 Mas. C. C. 206; 11 Wheat, 78; 1 Binn. Penn. 502; 2 *id.* 174; 6 *id.* 338; 12 Mass. 456; 17 *id.* 552; 3 Johns. Ch. N. Y. 261; 4 *id.* 136, 529; ASSENT, and the authorities there cited.

DISSOLUTION In Contracts. The dissolution of a contract is the anulling its effects between the contracting parties.

The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partners and others: so that they are entitled to all their rights, and are liable on their obligations, as if the partnership had not been dissolved. See PARTNERSHIP; 3 Kent, Comm. 27; Dane, Abr.; Gow, Partn.; Watson, Partn.; Bouvier, Inst. Index.

In Practice. The act of rendering a legal proceeding null, or changing its character: as, a foreign attachment in Pennsylvania is dissolved by entering bail to the action; injunctions are dissolved by the court.

DISSUADE. In Criminal Law. To induce a person not to do an act.

To dissuade a witness from giving evidence against a person indicted is an indictable offence at common law. Hawkins, Pl. Cr. b. 1, c. 21, s. 15. The mere attempt to stifle evidence is also criminal although the persuasion should not succeed, on the general principle that an incitement to commit a crime is in itself criminal. 1 Russell, Crimes, 44; 2 East, 5, 21; 6 *id.* 464; 2 Strange, 904; 2 Leach, Cr. Cas. 925.

DISTRACTED PERSON. A term used in the statutes of Illinois, Ill. Rev. Laws, 1833, p. 332, and New Hampshire, Dig. N. H. Laws, 1830, p. 339, to express a state of insanity.

DISTRACTIO. In Civil Law. The sale of a pledge by a debtor. The appropriation of the property of a ward by a guardian. Calvinus, Lex.

DISTRAHERE To withdraw; to sell. *Distrahere controversias*, to diminish and settle quarrels; *distrahere matrimoniam*, to dissolve marriage; to divorce. Calvinus, Lex.

DISTRAIN. To take as a pledge property of another, and keep the same until he performs his obligation or until the property is replevied by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. 3 Blackstone, Comm. 231; Fitzherbert, Nat. Brev. 32 (B) (C), 223. See DISTRESS.

DISTRESS (Fr. *distraindre*, to draw away from). The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure satisfaction for the wrong done. 3 Blackstone, Comm. 6. It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle.

2. This remedy is of great antiquity, and is said by Spelman to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. The English statutes since the days of Magna Charta have, from time to time, extended and modified its features to meet the exigencies of the times. Our state legislatures have generally, and with some alterations, adopted the English provisions, recognising the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. As a means of collecting rent, however, it is becoming unpopular in the United States, as giving an undue advantage to landlords over other creditors in the collection of debts. Taylor, Landl. & T. § 556; 2 Dall. Penn. 68; 2 Halst. N. J. 29; 1 Harr. & J. Md. 3; 1 M'Cord, So. C. 299; 1 Blackf. Ind. 409; 1 Bibb, Ky. 607; 2 Leigh, Va. 370; 3 Dan. Ky. 209.

3. In the New England states the law of attachment on *mesne process* has superseded the law of distress. 3 Pick. Mass. 105, 360; 4 Dane, Abr. 126. The state of New York has expressly abolished it by statute. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common process of distress does not exist in that state. 2 M'Cord, So. C. 39; Cam. & N. No. C. 22. In Georgia it is limited to the cities of Savannah and Augusta; while in Ohio, Alabama, and Tennessee there are no statutory provisions on the subject, except in the former state to secure to the landlord a share of the crops in preference to an execution creditor. Griffith, Law Reg. 404; Aiken, Dig. 357. Mississippi has abolished it by statute; but property cannot be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord. And in Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant. La. Civ. Code, 2675.

4. To authorize a distress for rent there must be an actual demise, and not a mere agreement for one, at a certain fixed rent, payable either in money, in produce, or by services. But a parol demise will be sufficient, and the terms, although not immediately obvious, may be capable of being reduced to a certainty. Coke, Litt. 96 *a;* 9 Wend. N. Y. 322; 3 Penn. St. 31; 1 Bay, So. C. 315. Thus, an agreement that the lessee shall pay no rent, provided he make repairs, and the value of the repairs is uncertain, would not authorize the landlord to distrain. Add. Penn. 347. But where the rent is a *certain* quantity of grain, the landlord may distrain for so many bushels in arrear, and name the value, in order that if the goods should not be replevied, or the arrears tendered, the officer may know what amount of money is to be raised by the sale; and in such case the tenant may tender the arrears in grain. 13 Serg. & R. Penn. 52. See 3 Watts & S. Penn. 531.

5. A distress can only be taken for rent in arrear, and not, therefore, until the day after it is due; unless by the terms of the lease

it is made payable in advance. 4 Cow. N. Y. 516; 3 Munf. Va. 277. But no previous demand of rent is necessary, except where the conditions of the lease require it. Nor will the right be extinguished either by an unsatisfied judgment for the rent or by taking a promissory note therefor, unless such note has been accepted in absolute payment of the rent. 5 Hill, N. Y. 651; 3 Penn. St. 490.

6. It may be taken for any kind of rent the detention of which beyond the day of payment is injurious to him who is entitled to receive it. At common law, the distrainer must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion. 2 Cow. N. Y. 652; 16 Johns. N. Y. 159; 1 Term, 441; Coke, Litt. 143 *b*. But the English statute of 4 Geo. II. c. 28 substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case. This statute has been enacted in most of the United States. Taylor, Landl. & T. § 560.

7. As to the different classes of persons who may distrain, it is held that each one of several joint tenants may distrain for the whole rent and account to the others for their respective shares thereof, or they may all join together for the purpose. 4 Bingh. 562; 2 Ball & B. Ch. Ir. 465. But tenants in common have several estates, and each one may distrain for his separate share, 1 McClel. & Y. Exch. 107; Croke Jac. 611; Coke, Litt. 317; unless the rent be of an entire thing, as of a house, in which case they must all join, as the subject-matter is incapable of division. Coke, Litt. 197 *a;* 5 Term, 246.

8. A husband as tenant by the curtesy distrains for rent due to his wife, although it may be due to her as an executrix or administratrix. 2 Saund. 195; 1 Ld. Raym. 369. A widow after her dower has been admeasured may distrain for her third of the rent. Coke, Litt. 32 *a*. So may an heir at law, or advisee, for that which becomes due to them respectively, after the death of the ancestor, in respect to their reversionary estate. 5 Cow. N. Y. 501; 1 Saund. 287. So of guardians, trustees, or agents who make leases in their own names, as well as the assignee of the reversion which is subject to a lease. 2 Hill, N. Y. 475; 5 Carr. & P. 379.

9. With respect to what things may be distrained, they are generally whatever goods may be found upon the premises, whether they belong to the tenant, an under-tenant, or to a stranger. 13 Wend. N. Y. 256; 1 Rawle, Penn. 435; 13 Serg. & R. Penn. 57; 7 Harr. & J. Md. 120; 4 Rand. Va. 334; 1 Bail. So. C. 497; Comyns, Dig. *Distress* (B 1). Thus, it has been held that a gentleman's chariot which stood in a coach-house belonging to a common livery-stable keeper was distrainable by the landlord for the rent due him by the livery-stable keeper for the coach-house. 3 Burr. 1498. Or if cattle are put on the tenant's land by consent of the owners of the beasts, they are distrainable by the landlord immediately after for rent in arrear. 3 Blackstone, Comm. 8. And the necessity of this rule is justified by the consideration that the rights of the landlord would be liable to be defeated by a great variety of frauds and collusions, if his remedy should be restricted to such goods only as he could prove to be the property of the tenant.

10. There are, however, a great variety of things which, for obvious reasons, are privileged from distress, either by statute or at common law. Thus, the goods of a person who has some interest in the land jointly with the distrainor, as those of a joint tenant, although found upon the land, cannot be distrained. The goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, cannot in Pennsylvania be distrained for more than one year's rent. Nor can the goods of a former tenant, rightfully on the land, be distrained for another's rent. For example, a tenant at will, if quitting upon notice from his landlord, is entitled to the emblements, or growing crops; and therefore, even after they are reaped, if they remain on the land for the purpose of husbandry, they cannot be distrained for rent due by the second tenant. Willes, 131. And they are equally protected in the hands of a vendee; for they cannot be distrained although the purchaser allow them to remain uncut after they have come to maturity. 2 Ball & B. Ch. Ir. 362; 5 J. B. Moore, 97.

11. As every thing which is distrained is presumed to be the property of the tenant, it will follow that things wherein he can have no absolute and valuable property, as cats, dogs, rabbits, and all animals *feræ naturæ*, cannot be distrained. Yet if deer, which are of a wild nature, are kept in a private enclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent. 3 Blackstone, Comm. 7. Nor can such things as cannot be restored to the owner in the same plight as when they were taken, as milk, fruit, and the like, be distrained. 3 Blackstone, Comm. 9. So things affixed or annexed to the freehold, as furnaces, windows, doors, and the like, cannot be distrained, because they are not personal chattels, but belong to the realty. Coke, Litt. 47 *b*. And this rule extends to such things as are essentially a part of the freehold although for a time removed therefrom, as a millstone removed to be picked; for this is matter of necessity, and still remains, in contemplation of law, part of the freehold. For the same reason, an anvil fixed in a

smith's shop cannot be distrained. Brooke, Abr. *Distress*, pl. 23; 4 Term, 567; Willes, 512; 6 Price, Exch. 3; 2 Chitt. Bail. 167.

12. Goods are also privileged in cases where the proprietor is either compelled from *necessity* to place his goods upon the land, or where he does so for *commercial* purposes. 17 Serg. & R. Penn. 139; 7 Watts & S. Penn. 302; 8 *id.* 302; 4 Halst. N. J. 110; 1 Bay, So. C. 102, 170; 2 M'Cord, So. C. 39; 3 Ball & B. 75; 6 J. B. Moore, 243; 8 *id.* 254; 1 Bingh. 283; 2 Carr. & P. 353; 1 Crompt. & M. Exch. 380. In the first case, the goods are exempt because the owner has no option: hence the goods of a traveller in an inn are exempt from distress. 7 Hen. VII. M 1, p. 1; Hammond, Nisi P. 380 *a;* 2 Keny. 439; Barnes, 472; 1 W. Blackst. 483; 3 Burr. 1408. In the other, the interests of the community require that commerce should be encouraged; and adventurers will not engage in speculations if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage, cannot be distrained. 17 Serg. & R. Penn. 138; 5 Whart. Penn. 9, 14; 21 Me. 47; 23 Wend. N. Y. 462. Valuable things in the way of trade are not liable to distress: as, a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground; for these are privileged and protected for the benefit of trade. 3 Blackstone, Comm. 8. On the same principle, it has been decided that the goods of a boarder are not liable to be distrained for rent due by the keeper of a boarding-house, 5 Whart. Penn. 9, unless used by the tenant with the boarder's consent and without that of the landlord. 1 Hill, N. Y. 565.

13. Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter, 2 Yeates, Penn. 274; 5 Binn. Penn. 505; but he is not entitled to the day of sale. 5 Binn. Penn. 505. See 18 Johns. N. Y. 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent,—which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action unless there has been a demand of rent before the removal. 1 Strange, 97, 214; 3 Taunt. 400; 2 Wils. 140; Comyns, Dig. *Rent* (D 8); 11 Johns. N. Y. 185. This notice can be given by the immediate landlord only. A ground-landlord is not entitled to his rent out of the goods of the under-tenant taken in execution. 2 Strange, 787. And where there are two executions, the landlord is not entitled to a year's rent on each. See 2 Strange, 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent. 2 Dall. Penn. 68.

14. By special acts of some of the legislatures, it is provided that tools of a man's trade, some designated household furniture, school-books, and the like, shall be exempted from distress, execution, or sale. And by a recent act of assembly of Pennsylvania, April 9, 1849, property to the value of three hundred dollars, exclusive of all wearing-apparel of the defendant and his family, and all Bibles and school-books in use in the family, are exempted from levy and sale on execution or by distress for rent.

15. Besides the above-mentioned goods and chattels which are absolutely privileged from distress, there are others which are conditionally so, but which may be distrained under certain circumstances. These are—beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues, Coke, Litt. 47 *a;* Bacon, Abr. *Distress*, B; implements of trade, as a loom in actual use, where there is a sufficient distress besides, 4 Term, 565; other things in actual use,—as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like. Coke, Litt. 47 *a.*

16. At common law a distress could not be made after the expiration of the lease. To remedy this evil, the legislature of Pennsylvania passed an act making it "lawful for any person having any rent in arrear or due upon any lease for life or years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended: provided that such distress be made during the continuance of such lessor's title or interest." Act of March 21, 1772, s. 14, 1 Smith, Penn. Laws, 375. Similar legislative enactments exist in most of the other states. In the city and county of Philadelphia, the landlord may, under certain circumstances, apportion his rent, and distrain before it becomes due. See act of March 25, 1825, s. 1, Pamph. Laws, 114.

17. A distress may be made either upon or off the land. It generally follows the rent, and is, consequently, confined to the land out of which it issues. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them; for this would be to make the rent of one issue out of the other. Rep. *temp.* Hardw. 245; 2 Strange, 1040. But where lands lying in different counties are let together by one demise at one entire rent, and it does not appear that the lands are separate from each other, one distress may be made for the whole rent. 1 Ld. Raym. 55; 12 Mod. 76. And where rent is charged upon land which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole rent is deemed to issue out of every

part of the land. Rolle, Abr. 671. If there be a house on the land, the distress may be made in the house; if the outer door or window be open, a distress may be taken out of it. Rolle, Abr. 671. If an outer door be open, an inner door may be broken for the purpose of taking a distress, but not otherwise. Comb. 47; Cas. *temp.* Hard. 168. Barges on a river, attached to the leased premises (a wharf) by ropes, cannot be distrained. 6 Bingh. 150.

18. By the 5th and 6th sections of the Pennsylvania act of assembly of March 21, 1772, copied from the 11 Geo. II. c. 19, it is enacted that if any tenant for life, years, at will, or otherwise, shall fraudulently or clandestinely convey his goods off the premises to prevent the landlord from distraining the same, such person, or any person by him lawfully authorized, may, within thirty days after such conveyance, seize the same, wherever they shall be found, and dispose of them in such manner as if they had been distrained on the premises. Provided that the landlord shall not distrain any goods which shall have been previously sold, *bonâ fide* and for a valuable consideration, to one not privy to the fraud. To bring a case within the act, the removal must take place *after* the rent becomes due, and must be *secret*, not made in open day; for such removal cannot be said to be clandestine within the meaning of the act. 3 Esp. Nisi P. 15; 12 Serg. & R. Penn. 217; 7 Bingh. 423; 1 Mood. & M. 535. This English statute has been re-enacted in most of the states. It has, however, been made a question whether goods are protected that were fraudulently removed on the night before the rent had become due. 4 Campb. 135. The goods of a stranger cannot be pursued: they can be distrained only while they are on the premises. 1 Dall. Penn. 440.

19. A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable, or bailiff, or other officer properly authorized by him. If made by a constable, it is necessary that he should be properly authorized to make it; for which purpose the landlord should give him a written authority, or, as it is usually called, a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made is sufficient. Hammond, Nisi P. 382.

Being thus provided with the requisite authority to make a distress, he seizes the tenant's goods, or some of them in the name of the whole, and declares that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show. 1 Leon. 50. When making the distress, it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the whole, or the party mistake the value of the thing distrained, he may make a second distress. Bradb. 129, 130; 2 Troubat & H. Pract. 155. It must be taken in the daytime after sunrise and before sunset; except for damage feasant, which may be in the night. Coke, Litt. 142 *a*.

20. As soon as a distress is made, an inventory of the goods should be made, and a copy of it delivered to the tenant, together with a notice of taking such distress, with the cause of taking it, and an opportunity thus afforded the owner to replevy or redeem the goods. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises, or to the owner of the goods distrained. 12 Mod. 76. And although notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due, Dougl. 279, or even whether the true cause of taking the goods be expressed therein. 7 Term, 654. If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the act, at the mansion-house, or other most notorious place on the premises charged with the rent distrained for.

21. The distrainor may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time. 2 Dall. Penn. 69. As in many cases it is desirable, for the sake of the tenant, that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainor, or of a person by him appointed for that purpose. While in his possession, the distrainor cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like. 5 Dane, Abr. 34.

22. Before the goods are sold, they must be appraised by two reputable freeholders, who shall take an oath or affirmation, to be administered by the sheriff, under-sheriff, or coroner, in the words mentioned in the act. The next requisite is to give six days' public notice of the time and place of sale of the things distrained; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement, and sale. The overplus, if any, is to be paid to the tenant. A distrainor has always been held strictly accountable for any irregularity he might commit, although accidental, as well as for the taking of any thing more than was reasonably required to satisfy the demand. Bradby, Dist.; Gilbert, Rent; Taylor, Landl. & T.

DISTRESS INFINITE. In English Practice. A process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because, whatever its value may

be, it cannot be sold, but is to be immediately restored on satisfaction being made. 3 Blackstone, Comm. 231. It was the means anciently resorted to to compel an appearance. See ATTACHMENT; ARREST.

DISTRIBUTION. In Practice. The division by order of the court having authority, among those entitled thereto, of the residue of the personal estate of an intestate, after payment of the debts and charges.

The term sometimes denotes the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will.

2. The title to real estate vests in the heirs by the death of the owner; the legal title to personal estate, by such death, vests in the executor or administrator, and is transferred to the persons beneficially interested, by the distribution. 4 Conn. 347.

The law of the domicil of the decedent governs in the distribution of his personal estate, unless otherwise provided by statute. See DOMICIL; CONFLICT OF LAWS. In *Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas,* and *Vermont,* the rules for the distribution of personal property are, by statute, the same as those of the descent of real estate, where no distinction is made between real estate ancestral and non-ancestral, and, where such distinction is made, of real estate non-ancestral. Ala. Code, § 1572; Ark. Dig. Stat. (1848) 441; Wood, Cal. Dig. 2359; Conn. Comp. Stat. (1854) 499, § 46; Thompson, Fla. Dig. 191; Cobb, New Dig. Ga. Laws, 241; Ill. Rev. Stat. (1858) 1199; 1 Ind. Rev. Stat. 248; Iowa Stat. (1858) 96; Mich. Comp. Laws, 876; Miss. Rev. Stat. 452; Minn. Stat. (1859) c. 42, § 8; 1 Mo. Rev. Stat. 659; Swan, Ohio Rev. Stat. (1854) 322; Purdon, Dig. Penn. Laws (1856), 452; 5 Cooper, So. C. Stat. 162; Tex. Stat. (1859) 99; Vt. Comp. Stat. (1850) 364.

3. The rule is substantially the same, also, in Kentucky, Maine, and Wisconsin. Me. Rev. Stat. (1856) c. 5, § 8; 1 Ky. Rev. Stat. (1860) 423; Wisc. Rev. Stat. (1858) 587. See DESCENT.

In *Delaware,* by statute, the residue of the estate of a deceased person, after the payment of all legal demands and charges, must be distributed to and among the children of the intestate and the lawful issue of such children who may have died before the intestate. If there be none such, then to and among the brothers and sisters of the intestate of the whole blood, and the lawful issue of such of them as may have died before the intestate. If there be none such, then to the father of the intestate, or, if he be dead, to the mother. If they be both dead, then to and among the next of kin to the intestate, in equal degrees, and to lawful issue of such kin as shall have died before the intestate. Provided that if the intestate be a married woman at the time of her death, her husband shall be entitled to the whole residue, or, if the intestate leave a widow, she shall be entitled absolutely, if there be issue of the intestate, to one-third part of such residue; or if there be no such issue, but brothers, sisters, or other kin, to one-half part such residue; or, if there be no kin to the intestate, to the whole of such residue.

4. Distribution among children, brothers, or other kin in equal degree, must be in equal portions; but the issue of such of them as shall have died before the intestate shall take according to stocks, by right of representation; and this rule holds although the distribution be entirely among such issue. Del. Laws (1852), 304.

In *Maryland,* it is provided that when all the debts of an intestate, exhibited and proved, or notified and not barred, shall have been discharged, or settled and allowed to be retained, as herein directed, the administrator shall proceed to make distribution of the surplus as follows. If the intestate leave a widow, and no child, parent, grandchild, brother, or sister, or the child of a brother or sister, of the said intestate, the said widow shall be entitled to the whole. If there be a widow and a child or children, or a descendant or descendants from a child, the widow shall have one-third only. If there be a widow and no child, or descendants, of the intestate, but the said intestate shall leave a father, or mother, or brother, or sister, or child of a brother or sister, the widow shall have one-half. The surplus, exclusive of the widow's share, or the whole surplus, if there be no widow, shall go as follows.

5. If there be children and no other descendant, the surplus shall be divided equally amongst them. If there be a child or children, and a child or children of a deceased child, the child or children of such deceased child shall take such share as his, her, or their deceased parent would, if alive, be entitled to; and every other descendant or other descendants in existence at the death of the intestate shall stand in the place of his, her, or their deceased ancestor: provided that if any child or descendant shall have been advanced by the intestate by settlement or portion, the same shall be reckoned in the surplus, and if it be equal or superior to a share, such child or descendant shall be excluded; but the widow shall have no advantage by bringing such advancement into reckoning; and maintenance, or education, or money given without a view to a portion or settlement in life, shall not be deemed advancement; and in all cases those in equal degree, claiming in the place of an ancestor, shall take equal shares. If there be a father and no child or descendant, the father shall have the whole. If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father of the intestate, the said brother, sister, or child, or descendant of a brother or sister, shall have the whole. Every brother and sister of the intestate shall be entitled to an equal share; and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister. If the intestate leave a mother and no child, descendant, father, brother, sister, or child or descendant of a brother or sister, the mother shall be entitled to the whole; and in case there be no father, a mother shall have an equal share with the brothers and sisters of the deceased, and their children and descendants.

6. After children, descendants, father, mother, brothers, and sisters of the deceased and their descendants, all collateral relations in equal degree shall take; and no representation amongst such collaterals shall be allowed; and there shall be no distinction between the whole and half blood. If there be no collaterals, a grandfather may take; and if there be two grandfathers, they shall take alike; and a grandmother, in case of the death of her husband the grandfather, shall take as he might have done. If any person entitled to distribution shall die before the same be made, his or her share shall go to his or her representatives. Posthumous children of intestates shall take in the same manner as if they had been born before the decease of the intestate; but no other posthumous relation shall be considered as entitled to distribution in his or her own right. If there be no relations of the intestate within the fifth degree,—which degree shall be reckoned by counting down from the common ancestor to the more remote,—the whole surplus shall belong to the state, to be applied as the legislature shall hereafter direct, saving to the dif-

ferent schools in this state the rights which, by existing laws, they now respectively possess. Dorsey, Md. Laws (1798), 401.

7. In *Massachusetts*, it is provided that when a person dies possessed of personal estate, or any right or interest therein, not lawfully disposed of by will, it shall be applied and distributed as follows:—*First*, the widow and minor children shall be entitled to such parts thereof as may be allowed to them under the provisions of the statute (c. 96). *Second*, the personal estate remaining after such allowance shall be applied to the payment of the debts of the deceased, with the charges of his funeral and settling his estate. *The residue shall be distributed* among the same persons who would be entitled to the real estate under the statutes (c. 91), and in the same proportion as therein described, with the following exceptions. If the intestate was a married woman, her husband is entitled to the whole of the residue. If the intestate leaves a widow and issue, the widow is entitled to one-third part of the residue. If he leaves a widow and no issue, the widow is entitled to the whole of the residue to the amount of five thousand dollars, and to one-half of the excess of such residue above ten thousand dollars. If there be no husband, widow, or kindred, the whole escheats to the commonwealth. Mass. Genl. Stat. (1860) 485.

8. In *New Jersey*, it is provided that the whole surplusage of the goods, chattels, and personal estate of every person dying intestate shall be distributed in manner following:—that is to say, one-third part of the said surplusage to the widow of the intestate, and all the residue, by equal portions, to and among the children of such intestate and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate, in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate, in his lifetime, by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate shall be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate shall be allotted to the widow of the said intestate, and the residue of the said estate shall be distributed equally to every of the next of kindred to the intestate who are in equal degree and those who represent them: provided that no representation shall be admitted among collaterals after brothers' and sisters' children. And in case there be no widow, then all the said estate to be distributed equally to and among the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever. 1 Nixon, N. J. Dig. (1855) 257.

9. In *New York*, it is provided that where the deceased shall have died intestate, the surplus of his personal estate remaining after payment of debts, and, where the deceased left a will, the surplus remaining after the payment of debts and legacies, if not bequeathed, shall be distributed to the widow, children, or next of kin to the deceased, in manner following. One-third part thereof to the widow, and all the residue by equal portions among the children, and such persons as legally represent such children, if any of them shall have died before the deceased; if there be no children, nor any legal representatives of them, then one moiety of the whole surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased, entitled under the provisions of this section; if the deceased leave a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to a moiety of the surplus as above provided, and to the whole of the residue where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive, in addition to her moiety, two thousand dollars, and the remainder shall be distributed to the brothers and sisters and their representatives. In case there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin in equal degree to the deceased, and the legal representatives. If there be no widow, then the whole surplus shall be distributed equally to and among the children and such as legally represent them. If the deceased shall leave no children and no representative of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother and to the brothers and sisters, or the representatives of such brothers and sisters.

10. If the deceased leave a father and no child or descendant, the father shall take a moiety if there be a widow, and the whole if there be no widow. If the deceased leave a mother and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take a moiety, and the whole if there be no widow. And if the deceased shall have been an illegitimate, and have left a mother and no child or descendant or widow, such mother shall take the whole, and shall be entitled to letters of administration in exclusion of all other persons, in pursuance of the provisions of this chapter. And if the mother of such deceased shall be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order. Where the descendants or next of kin to the deceased, entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal. When such descendants or next of kin shall be of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto according to their respective stocks, so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled. No representation shall be admitted among collaterals after brothers' and sisters' children. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relation shall take in the same manner as representatives of the whole blood. Descendants and next of kin of the deceased begotten before his death, but born thereafter, take in the same manner as if they had been born in the lifetime of the deceased and had survived him. 3 N. Y. Rev. Stat. 5th ed. 239.

11. In *North Carolina*, it is provided that every administrator shall distribute the surplus of the estate of his intestate in the manner following,

namely. If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate, and such persons as legally represent such children as may then be dead. If there are more than two children, then the widow shall share equally with all the children, and be entitled to a child's part. If there be no child nor legal representative of a deceased child, then one-half of the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin to the intestate who are in equal degree, and to those who legally represent them. If there be no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead. If there be neither widow nor children, nor any legal representative of children, the estate shall be distributed equally to every of the next of kin of the intestate who are in equal degree, and to those who legally represent them. But if, after the death of the father, and in the lifetime of the mother, any of his children shall die intestate, without wife or children, every brother and sister, and the representatives of them, shall have an equal share with the mother of the deceased child. No. C. Rev. Stat. (1855) 369.

12. In *Oregon*, it is provided that when any person shall die possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows. The widow, if any, shall be allowed all articles of her apparel or ornament, according to the degree and estate of her husband, and such provisions and other necessaries for the use of herself and the family under her care, as shall be allowed and ordered in pursuance of the provisions of this act; and this allowance shall be made as well where the widow waives the provision made for her in the will of her husband, as when he dies intestate. The personal estate remaining after such allowance shall be applied to the payment of the debts of the deceased, with the charges for his funeral and the settling of the estate. The residue, if any, of the personal estate shall be distributed among the same persons as would be entitled to the real estate by this act, and in the same proportion as there prescribed, excepting as is hereinfurther provided. If the intestate were a married woman, her husband shall be entitled to the whole of the said residue of the personal estate. If the intestate leave a widow and issue, the widow shall be entitled to one-half of the said residue. If there be no issue, the widow shall be entitled to the whole of said residue. If there be no husband, widow, or kindred of the intestate, the whole shall escheat to the territory [state]. Oreg. Rev. Stat. (1855) 382.

13. In *Rhode Island*, it is provided that the surplus of any chattels or personal estate of a deceased person, not bequeathed, after the payment of his just debts, funeral charges, and expenses of settling his estate, shall be distributed by order of the court of probate which shall have granted administration, in manner following:—*first*, one-half part thereof to the widow of the deceased forever, if the intestate died without issue; *second*, one-third part thereof to the widow of the deceased forever, if the intestate died leaving issue: *third*, the residue shall be distributed amongst the heirs of the intestate, in the same manner as real estates descend and pass by this chapter, but without having any respect to the blood of the person from whom such personal estate came or descended. R. I. Rev. Stat. (1857) 372.

14. In *Tennessee*, it is provided that the personal estate as to which any person dies intestate, after the payment of the debts and charges, shall be distributed as follows. To the widow and children, or the descendants of children representing them, equally, the widow taking a child's share. To the widow altogether, if there are no children nor the descendants of children. To the children or their descendants in equal parts, if there is no widow, the descendants taking in equal parts the share of their deceased parent. If no children, to the father. If no father, to the mother, and brothers and sisters, or the children of such brothers and sisters representing them, equally, the mother taking an equal share with each brother and sister. If no brothers and sisters or their children, exclusively to the mother; if no mother, exclusively to the brothers and sisters, or their children representing them. If no mother, brother or sister, or their children, to every of the next of kin of the intestate who are in equal degree, equally. There is no representation among collaterals after brothers' and sisters' children. Tenn. Rev. Stat. (1858) 478.

DISTRICT. A certain portion of the country, separated from the rest for some special purposes.

The United States are divided into judicial districts, in each of which is established a district court; they are also divided into election districts, collection districts, etc.

DISTRICT ATTORNEYS OF THE UNITED STATES. Officers appointed in each judicial district, whose duty it is to prosecute, in such district, all delinquents, for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court, in the district in which the court shall be holden.

DISTRICT COURT. See COURTS OF THE UNITED STATES, §§ **68–94**, and the articles on the various states.

DISTRICT OF COLUMBIA. A portion of the country, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, over which the national government has exclusive jurisdiction.

Under the constitution, congress is authorized to "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States." In pursuance of this authority, the states of Maryland and Virginia ceded to the United States a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same, for the permanent seat of the government of the United States.

By the act of July 11, 1846, congress retroceded the county of Alexandria, part of the District of Columbia, to the state of Virginia.

The seat of government was removed from Philadelphia to the district in December, 1800. As it exists at present, it constitutes but one county, called the county of Washington.

It seems that the District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts. 2 Cranch, 445; 1 Wheat. 91.

The Judicial Power.

The supreme court consists of four justices, appointed by the president of the United States, who

hold office during good behavior. Of these, one is appointed as chief justice.

The supreme court possesses the powers formerly possessed by the circuit court for the district, and the judges severally possess the powers formerly possessed and exercised by the judges of the circuit court. Any one of said judges may also hold a district court of the United States for the District of Columbia, with the powers and jurisdiction possessed and exercised by other district courts of the United States. Any one of said justices may also hold a criminal court for the trial of all crimes and offences arising within said district, with the jurisdiction formerly exercised by the criminal court for the district.

Provision is made for holding general terms by three of the justices, and special terms by one of the justices. Jury trials, and equity cases in which no jury is had, are also to be had at these special terms, except in certain cases.

The circuit court, district court, and criminal courts for the district are abolished, and the causes transferred to the supreme court. 13 U. S. Stat. at Large, 762.

Appeals from the decision of the commissioner of patents may be made to either of the judges. 10 Stat. at Large, 75. Appeals and writs of error lie from this court to the supreme court, where the matter in dispute is of the value of one thousand dollars or upwards, exclusive of costs, or where a judge of the supreme court may direct an appeal or writ of error, if the matter in dispute shall be of the value of one hundred dollars, exclusive of costs. The chief justice of this court is also authorized to deliver up fugitives from justice, or persons fleeing from service, in the same manner as the executive authority of the several states is required to do. It exercises an appellate criminal jurisdiction.

The orphans' court and *the register's court* consist each of one judge, appointed by the president and senate, to hold his office during good behavior. They have cognizance of all matters relating to the probate of wills, administration and management of the estates of decedents, and care of minors, including the appointment and regulation of the conduct of guardians. An appeal lies from their decisions to the circuit court. Law, U. S. Courts, 238. See 14 Pet. 33; 15 *id.* 1.

Levy courts are courts of limited jurisdiction, composed of the magistrates of the district. These courts possess and exercise the same powers and perform the same duties and receive the same fees and emoluments as the levy courts or commissioners of county for the state of Maryland. Law, U. S. Courts, 240.

Justices' courts may also be held by justices of the peace. See Act 1801, c. 15; 1823, c. 24; 1841, c. 11; 3 Cranch, 331.

DISTRINGAS. A writ directed to the sheriff, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him.

It is used to compel an appearance where the party cannot be found, and in equity may be availed of to compel the appearance of a corporation aggregate. 4 Bouvier, Inst. n. 4191; Comyns, Dig. *Proces* (D 7); Chitty, Pract.; Sellon, Pract.

A form of execution in the actions of detinue and assize of nuisance. Brooke Abr. pl. 26; 1 Rawle, Penn. 44.

DISTRINGAS JURATORES (Lat. that you distrain jurors). A writ commanding the sheriff to have the bodies of the jurors, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. 3 Sharswood, Blackst. Comm. 354. It issues at the same time with the *venire*, though in theory afterwards, founded on the supposed neglect of the juror to attend. 3 Stephen, Comm. 590.

DISTRINGAS NUPER VICE COMITUM (Lat. that you distrain the late sheriff). A writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Tidd, Pract. 313.

DISTURBANCE. A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it. Finch, 187; 3 Blackstone, Comm. 235; 1 Swift, Dig. 522; Comyns, Dig. *Action upon the Case, Pleader* (3 I 6); 1 Serg. & R. Penn. 298; 41 Me. 104. The remedy for a disturbance is an action on the case, or, in some instances in equity, by an injunction.

DISTURBANCE OF COMMON. Any act done by which the right of another to his common is incommoded or hindered. The remedy is by distress (where beasts are put on his common) or by action on the case, provided the damages are large enough to admit of his laying an action with a *per quod*. Croke Jac. 195; Coke, Litt. 122; 3 Blackstone, Comm. 237; 1 Saund. 546; 4 Term, 71.

DISTURBANCE OF FRANCHISE. Any acts done whereby the owner of a franchise has his property damnified or the profits arising thence diminished. The remedy for such disturbance is a special action on the case. Croke Eliz. 558; 2 Saund. 113 *b*; 3 Sharswood, Blackst. Comm. 236; 28 N. H. 438.

Equity will grant an injunction against disturbance of a franchise in certain cases. Adams, Eq. 211; 6 Paige, Ch. N. Y. 554; 12 Pet. 91; 8 Gill & J. Md. 479.

DISTURBANCE OF PATRONAGE. The hindrance or obstruction of the patron to present his clerk to a benefice. 3 Blackstone, Comm. 242. The principal remedy was a writ of right of advowson; and there were also writs of *darrein presentment* and of *quare impedit*. Coke, 2d Inst. 355; Fitzherbert, Nat. Brev. 31.

DISTURBANCE OF TENURE. Breaking the connection which subsists between lord and tenant. 3 Blackstone, Comm. 242; 2 Stephen, Comm. 513.

DISTURBANCE OF WAYS. This happens where a person who hath a right of way over another's ground by grant or prescription is obstructed by enclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least in so commodious a manner as he might have done. 3 Sharswood, Blackst. Comm. 242; 5 Gray, Mass. 409; 7 Md. 352; 23 Penn. St. 348; 29 *id.* 22.

DITTAY. In Scotch Law. A technical term in civil law, signifying the matter of charge or ground of indictment against a

person accused of crime. *Taking up dittay* is obtaining informations and presentments of crime in order to trial. Skene, *de verb. sig.*; Bell, Dict.

DIVIDEND. A portion of the principal or profits divided among several owners of a thing.

The term is usually applied to the division of the profits arising out of bank or other stocks, or to the division among the creditors of the effects of an insolvent estate.

In another sense, according to some old authorities, it signifies one part of an indenture.

DIVISIBLE. That which is susceptible of being divided.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it. 2 Penn. 454. But some contracts are susceptible of division: as, when a reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner. 3 Whart. Penn. 404. See APPORTIONMENT. But when it is to do several things at several times, an action will lie upon every default. 15 Pick. Mass. 409. See 1 Me. 316; 6 Mass. 344.

DIVISION. In English Law. A particular and ascertained part of a county. In Lincolnshire division means what riding does in Yorkshire.

DIVISION OF OPINION. Disagreement among those called upon to decide a matter.

When, in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole in favor of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. The term is especially applied to a disagreement among the judges of a court such that no decision can be rendered upon the matter referred to them.

When the judges of a court are divided into three classes, each holding a different opinion, that class which has the greatest number shall give the judgment: for example, on a *habeas corpus*, when a court is composed of four judges, and one is for remanding the prisoner, another is for discharging him on his own recognizance, and the two others are for discharging him absolutely, the judgment will be that he be discharged. Rudyard's Case; Bacon, Abr. *Habeas Corpus* (B 10), *Court*, 5. When a division of opinion exists in the United States circuit court, the cause may be certified to the supreme court for decision. Act of Congr. April 29, 1802, § 6. See COURTS OF THE UNITED STATES; CIRCUIT COURT.

DIVORCE. The dissolution or partial suspension, by law, of the marriage relation.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*. The former divorce puts an end to the marriage; the latter leaves it in full force. Bishop, Marr. & Div. § 292. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the signification of divorce to the *dissolution* of a *valid* marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptation of the term. For the other branches of the subject, see SEPARATION A MENSA ET THORO; NULLITY OF MARRIAGE.

2. Marriage being a legal relation, and not (as sometimes supposed) a mere contract, it can only be dissolved by legal authority. The relation originates in the consent of the parties, but, once entered into, it must continue until the death of either husband or wife, unless sooner put an end to by the sovereign power. Bishop, Marr. & Div. c. 3. In England, until recently, no authority existed in any of the judicial courts to grant a divorce in the strict sense of the term. The subject of marriage and divorce generally belonged exclusively to the various ecclesiastical courts; and they were in the constant habit of granting what were termed divorces *a mensa et thoro*, for various causes, and of pronouncing sentences of nullity; but they had no power to dissolve a marriage, valid and binding in its origin, for causes arising subsequent to its solemnization. For that purpose recourse must be had to parliament. 2 Burns, Eccl. Law (Phillim. ed.), 202, 203; Macqueen, Parl. Pract. 470 *et seq.* But by the statute of 20 & 21 Vict. (1857) c. 85, entitled "An act to amend the law relating to divorce and matrimonial causes in England," a new court was created, to be called "The Court for Divorce and Matrimonial Causes," upon which was conferred exclusively all jurisdiction over matrimonial matters then vested in the various ecclesiastical courts, and also the jurisdiction theretofore exercised by parliament in granting divorces.

In this country the usage has been various. Formerly it was common for the various state legislatures, like the English parliament, to grant divorces by special act. Latterly, however, this practice has fallen into disrepute, and is now much less common. In several cases, also, it has been expressly prohibited by recent state constitutions. Bishop, Marr. & Div. c. 33. Generally, at the present time, the jurisdiction to grant divorces is conferred by statute upon courts of equity, or courts possessing equity powers, to be exercised in accordance with the general principles of equity practice, subject to such modifications as the statute may direct. The

practice of the English ecclesiastical courts, which is also the foundation of the practice of the new court for divorce and matrimonial causes in England, has never been adopted to any considerable extent in this country. Bishop, Marr. & Div. § 28, and note.

3. Numerous and difficult questions are constantly arising in regard to the validity in one state of divorces granted by the courts or legislature of another state. The subject is fully and ably treated in Bishop on Marriage and Divorce, c. 32. The learned author there states the following propositions, which he elaborates with great care:—*first*, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bonâ fide* domicil within its territory; *secondly*, to entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made; *thirdly*, the place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial; *fourthly*, the domicil of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicil when the proceeding is instituted and the judgment is rendered; *fifthly*, it is immaterial to this question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated. It should be observed, however, that the last proposition but one is not sustained by authority in Pennsylvania and New Hampshire, it being held in those states that the tribunals of the country alone where the parties were domiciled when the *delictum* occurred have jurisdiction to grant a divorce. 7 Watts, Penn. 349; 8 Watts & S. Penn. 251; 6 Penn. St. 449; 34 N. H. 518, and cases there cited; 35 *id.* 474. And for the law of Louisiana, see 9 La. Ann. 317. In Pennsylvania, the rule has been changed by statute of 26th April, 1850, § 5. See 30 Penn. St. 412, 416. And in regard to the second proposition it is to be observed that without personal citation within the state the divorce is not of binding effect in any other state. See CONFLICT OF LAWS; DOMICIL, § **11.**

4. It was never the practice of the English parliament to grant a divorce for any other cause than adultery; and it was the general rule to grant it for simple adultery only when committed by the wife, and upon the application of the husband. To entitle the wife, other circumstances must ordinarily concur, simple adultery committed by the husband not being sufficient. Macqueen, Parl. Pract. 473 *et seq.* The recent English statute of 20 & 21 Vict. c. 85, before referred to, prescribes substantially the same rule,—it being provided, § 27, that the husband may apply to have his marriage dissolved "on the ground that his wife has, since the celebration thereof, been guilty of adultery," and the wife, "on the ground that, since the celebration thereof, her husband has been guilty of incestuous bigamy, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

In this country the question depends upon the statutes of the several states, the provisions of which are far from uniform. In South Carolina, a divorce is not allowed for any cause; in New York, only for adultery; but in most of the states it is allowed for several causes, *e.g.* adultery, cruelty, wilful desertion for a specified period, habitual drunkenness, etc. In some of the states, also, the matter is left, wholly or in part, to the discretion of the court. See Bishop, Marr. & Div. c. 26. For more specific information, recourse must be had to the statutes of the several states.

5. Some of the principal defences in suits for divorce are,—*Connivance*, or the corrupt consent of a party to the conduct in the other party whereof he afterwards complains. This bars the right of divorce, because no injury was received; for what a man has consented to he cannot say was an injury. Bishop, Marr. & Div. § 332. *Collusion.* This is an agreement between husband and wife for one of them to commit, or appear to commit, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act has not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance: in either case it is a bar to any claim for divorce. Bishop, Marr. & Div. § 350. *Condonation*, or the conditional forgiveness or remission by the husband or wife of a matrimonial offence which the other has committed. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned. Bishop, Marr. & Div. § 354. For the nature of the condition, and other matters, see CONDONATION. *Recrimination.* This is a defence arising from the complainant's being in like guilt with the one of whom he complains. It is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if the party complaining is guilty likewise. When the defendant sets up such violation in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination. Bishop, Marr. & Div. § 389.

The foregoing defences, though available in all divorce causes, are more frequently applicable where a divorce is sought on the ground of adultery.

6. The consequences of divorce are such as flow from the sentence by operation of law, or flow from either the sentence or the

proceeding by reason of their being directly ordered by the court and set down of record. Bishop, Marr. & Div. § 548. In regard to the former, they are chiefly such as result immediately and necessarily from the definition and nature of a divorce. Being a dissolution of the marriage relation, the parties have no longer any of the rights, nor are subject to any of the duties, pertaining to that relation. They are henceforth single persons to all intents and purposes. It is true that the statutes of some of the states contain provisions disabling the guilty party from marrying again; but these are in the nature of penal regulations, collateral to the divorce, and which leave the latter in full force. Bishop, Marr. & Div. §§ 655–659.

7. In regard to rights of property as between husband and wife, a sentence of divorce leaves them as it finds them. Consequently, all transfers of property which were actually executed, either in law or fact, continue undisturbed: for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. But it puts an end to all rights depending upon the marriage and not actually vested: as, dower in the wife, all rights of the husband in the real estate of the wife, and his right to reduce to possession her choses in action. Bishop, Marr. & Div. § 660; 27 Miss. 630, 637; 17 Mo. 87; 6 Ind. 229; 6 Watts & S. Penn. 85, 88; 4 Harr. Del. 440; 8 Conn. 541; 10 *id.* 225; 2 Md. 429; 8 Mass. 99; 10 *id.* 260; 10 Paige, Ch. N.Y. 420, 424; 5 Blackf. Ind. 309; 5 Dan. Ky. 254; 6 Watts, Penn. 131. In respect to dower, however, it should be observed that a contrary doctrine has been settled in New York, it being there held that immediately upon the marriage being solemnized the wife's right to dower becomes perfect, provided only she survives her husband. 4 Barb. N.Y. 192; 4 N.Y. 95; 6 Du. N.Y. 102, 152, 153.

8. Of those consequences which result from the direction or order of the court, the most important are—*Alimony*, or the allowance which a husband, by order of court, pays to his wife, living separate from him, for her maintenance. The allowance may be for her use either during the pendency of a suit,—in which case it is called alimony *pendente lite*,—or after its termination, called permanent alimony. Bishop, Marr. & Div. § 549. As will be seen from the foregoing definition, alimony, especially permanent alimony, pertains rather to a separation from bed and board than to a divorce from the bond of matrimony. Indeed, it is generally allowed in the latter case only in pursuance of statutory provisions. Bishop, Marr. & Div. § 563. See ALIMONY, § 2. It is provided by statute in several of our states that, in case of divorce, the court may order the husband to restore to the wife, when she is the innocent party, and sometimes even when she is not, a part or the whole of the property which he received by the marriage. In some cases, also, the court is authorized to divide the property between the parties, this being a substitute for the allowance of alimony. For further particulars, recourse must be had to the statutes in question. See, also, Bishop, Marr. & Div. cc. 28–30.

9. *The custody of children.* In this country, the tribunal hearing a divorce cause is generally authorized by statute to direct, during its pendency and afterwards, with which of the parties, or with what other person, the children shall remain, and to make provision out of the husband's estate for their maintenance. There are few positive rules upon the subject, the matter being left to the discretion of the court, to be exercised according to the circumstances of each case. The general principle is to consult the welfare of the child, rather than any supposed rights of the parents, and as between the parents to prefer the innocent to the guilty. In the absence of a controlling necessity or very strong propriety arising from the circumstances of the case, the father's claim is to be preferred. Reeve, Dom. Rel. 3d ed. 453; 40 N.H. 272; 16 Pick. Mass. 203; 3 Hill, N.Y. 299; 24 Barb. N.Y. 521; 27 *id.* 9, and cases cited; Bishop, Marr. & Div. c. 29.

By the civil law, the child of parents divorced is to be brought up by the innocent party at the expense of the guilty party. Ridley's View, pt. 1, c. 3, § 9, citing 8th Collation.

See, generally, Macqueen, Div. & Matr. Jur.; Brandt, Law of Div.; Pritchard, Marr. & Div.; Swabey, Div.; 1 Blackstone, Comm. 440, 441; 3 *id.* 94; Bacon, Abr. *Marriage;* 4 Viner, Abr. 205; 1 Brown, Civ. Law, 86; Ayliffe, Parerg. 225; Comyns, Dig. *Baron and Feme*, C; Cooper, Justin. 434 *et seq.;* 6 Toullier, no. 294, p. 308; 4 Yeates, Penn. 249; 5 Serg. & R. Penn. 375; 9 *id.* 191, 193; Gospel of Luke, xvi. 18; of Mark, x. 11, 12; of Matthew, v. 32, xix. 9; 1 Cor. vii. 15; Poynter, Marr. & Div. Index; Merlin, Rép.; *Clef des Lois Rom.* As to the effect of the laws of a foreign state where the divorce was decreed, see Story, Confl. of Laws, c. 7, § 200; and the article CONFLICT OF LAWS. With regard to the ceremony of divorce among the Jews, see 1 Mann. & G. 228. And as to divorces among the Romans, see Troplong, *De l'Influence du Christianisme sur le Droit civil des Romains*, c. 6, p. 205.

DOCK. The enclosed space occupied by prisoners in a criminal court. The space between two wharves.

DOCKET. A formal record of judicial proceedings; a brief writing. A small piece of paper or parchment having the effect of a larger. Blount. An abstract. Cowel.

To docket is said to be by Blackstone to abstract and enter into a book. 3 Blackstone, Comm. 397. The essential idea of a modern docket, then, is an entry in brief in a proper book of all the important acts done in court in the conduct of each case from its commencement to its conclusion. See Colby, Pract. 154, 155.

In common use, it is the name given to the book

containing these abstracts. The name of trial-docket is given to the book containing the cases which are liable to be tried at a specified term of the court. The docket should contain the names of the parties and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. A sheriff's docket is not a record. 9 Serg. & R. Penn. 91.

DOCTORS COMMONS. An institution near St. Paul's Cathedral, where the ecclesiastical and admiralty courts are held.

In 1768 a royal charter was obtained by virtue of which the members of the society and their successors were incorporated under the name and title of "The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts." The college consists of a president (the dean of the arches for the time-being) and of those doctors of laws who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

DOCUMENTS. The deeds, agreements, title-papers, letters, receipts, and other written instruments used to prove a fact.

In Civil Law. Evidence delivered in the forms established by law, of whatever nature such evidence may be. The term is, however, applied principally to the testimony of witnesses. Savigny, Dr. Rom. § 165.

DOG. A well-known domestic animal.

In almost all languages this word is a term or name of contumely or reproach. See 3 Bulstr. 226; 2 Mod. 260; 1 Leon. 148; and the title *Action on the Case for Defamation* in the Digests; Minsheu, Dict.

2. A dog is said *at common law* to have no intrinsic value, and he cannot, therefore, be the subject of larceny, 4 Blackstone, Comm. 236; 8 Serg. & R. Penn. 571; Bell, Cr. Cas. 36; but it is otherwise in England, by statute. But the owner has such property in him that he may maintain trespass for an injury to his dog, or trover for a conversion, 1 Metc. Mass. 555; "for a man may have property in some things which are of so base nature that no felony can be committed of them: as, of a bloodhound or mastiff." 12 Hen. VIII. 3; 18 *id.* 2; 7 Coke, 18 *a;* Comyns, Dig. *Biens*, F; 2 Blackstone, Comm. 397; Bacon, Abr. *Trover*, D; Fitzherbert, Nat. Brev. 86; Brooke, Abr. *Trespass*, pl. 407; Hob. 283; Croke Eliz. 125; Croke Jac. 463; 2 W. Blackst. 1117.

3. Dogs, if dangerous animals, may lawfully be killed when their ferocity is known to their owner, or in self-defence, 10 Johns. N. Y. 365; 13 *id.* 312; and when bitten by a rabid animal a dog may be lawfully killed by any one. 13 Johns. N. Y. 312.

When a dog, in consequence of his vicious habits, becomes a common nuisance, the owner may be indicted. And when he commits an injury, if the owner had a knowledge of his mischievous propensity he is liable to an action on the case. Buller, Nisi P. 77; 2 Strange, 1264; 1 Ld. Raym. 110; 1 Barnew. & Ald. 620; 4 Campb. 198; 2 Esp. 482; 4 Cow. N. Y. 351; 6 Serg. & R. Penn. 36; Add. Penn. 215; 1 Ill. 492; 17 Wend. N. Y. 496; 23 *id.* 354; 4 Dev. & B. No. C. 146; 10 Cush. Mass. 509.

4. A man has a right to keep a dog to guard his premises, but not to put him at the entrance of his house; because a person coming there on lawful business may be injured by him; and this, though there may be another entrance to the house. 4 Carr. & P. 297; 6 *id.* 1. But if a dog is chained, and a visitor so incautiously go near him that he is bitten, he has no right of action against the owner. 3 Sharswood, Blackst. Comm. 154.

DOGMA. In Civil Law. This word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See, also, Dig. 27. 1. 6.

DOLE. A part or portion. *Dole-meadow*, that which is shared by several. Spelman, Gloss.; Cowel.

DOLI CAPAX. Capable of mischief; having knowledge of right and wrong. 4 Blackstone, Comm. 22, 23; 1 Hale, Pl. Cr. 26, 27.

DOLI INCAPAX (Lat.). Incapable of distinguishing good from evil. A child under fourteen is, *primâ facie, incapax doli*, but may be shown to be *capax doli*. 3 Blackstone, Comm. 23.

DOLLAR (Germ. *Thaler*). The money unit of the United States.

2. It was established under the confederation by resolution of congress, July 6, 1785. This was originally represented by a silver piece only; the coinage of which was authorized by the act of congress of Aug. 8, 1786. The same act also established a decimal system of coinage and accounts. 1 Brown & D. U. S. Laws, 646. But the coinage was not effected until after the passage of the act of April 2, 1792, establishing a mint, 1 U. S. Stat. at Large, 246; and the first coinage of dollars commenced in 1794. The law last cited provided for the coinage of "dollars or units, each to be of the value of a Spanish milled dollar, as the same was then current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure silver, or four hundred and sixteen grains of standard silver."

3. The Spanish dollar known to our legislation was the dollar coined in Spanish America, North and South, which was abundant in our currency, in contradistinction to the dollar coined in Spain, which was rarely seen in the United States. The intrinsic value of the two coins was the same; but, as a general (not invariable) distinction, the American coinage bore *pillars*, and the Spanish an escutcheon or shield: all kinds bore the royal effigy.

4. The *milled dollar*, so called, is in contradistinction to the irregular, misshapen coinage nicknamed *cob*, which a century ago was executed in the Spanish-American provinces,—chiefly Mexican. By the use of a milling machine the pieces were figured on the edge, and assumed a true circular form. The pillar dollar and the milled dollar were in effect the same in value, and, in general terms, the same coin; though there are pillar dollars ("cobs") which are not milled, and there are milled dollars (of Spain proper) which have no pillars.

5. The weight and fineness of the Spanish milled and pillar dollars is eight and one-half pieces to a Castilian mark, or four hundred and seventeen and

fifteen-seventeenths grains Troy. The limitation of four hundred and fifteen grains in our law of 1806, April 10, 2 U. S. Stat. at Large, 374, was to meet the loss by wear. The legal fineness of these dollars was ten dineros, twenty granos, equal to nine hundred and two and seven-ninth thousandths; the actual fineness was somewhat variable, and always below. The Spanish dollar and all other foreign coins are ruled out by the act of congress of Feb. 21, 1857, 13 U. S. Stat. at Large, 1856–57, 163, they being no longer a legal tender. But the statements herein given are useful for the sake of comparison: moreover, many contracts still in existence provide for payment (of ground-rents, for example) in Spanish milled or pillar dollars. The following terms, or their equivalent, are frequently used in agreements made about the close of the last and the beginning of the present century: "silver milled dollars, each dollar weighing seventeen pennyweights and six grains at least." This was equal to four hundred and fourteen grains. The standard fineness of United States silver coin from 1792 to 1836 was fourteen hundred and eighty-five parts fine silver in sixteen hundred and sixty-four. Consequently, a piece of coin of four hundred and fourteen grains should contain three hundred and sixty-nine and forty-six hundredths grains pure silver. The market price of silver, based on the mint price, is now one hundred and twenty-two and one-half cents in gold per ounce of four hundred and eighty grains standard, *i.e.* nine-tenths fine. This is equivalent to one hundred and twenty-two and one-half cents for four hundred and thirty-two grains of pure silver. Then, by the rule of proportion, As 432 is to 122½, so is 369.46 to (say) $1.04.77; which is consequently the value of the silver dollar referred to, "each dollar weighing seventeen pennyweights and six grains at least."

6. By the act of Jan. 18, 1837, § 8, 5 U. S. Stat. at Large, 137, the standard weight and fineness of the dollar of the United States was fixed as follows: "of one thousand parts by weight, nine hundred shall be of pure metal, and one hundred of alloy," the alloy to consist of copper; and it was further provided that the weight of the silver dollar shall be four hundred and twelve and one-half grains (412½).

7. The weight of the silver dollar has not been changed by subsequent legislation; but the proportionate weight of the lower denomination of silver coins has been diminished by the act of Feb. 21, 1853, 11 U. S. Stat. at Large, 160. By this act the half-dollar (and the lower coins in proportion) is reduced in weight fourteen and one-quarter grains below the previous coinage: so that the silver *dollar* which was embraced in this act weighs twenty-eight and one-half grains more than *two* half-dollars. The silver dollar has, consequently, ceased to be current in the United States; but it continues to be coined to supply the demands of the West India trade and a local demand for cabinets, etc.

8. By the act of March 3, 1849, a *gold* dollar was authorized to be coined at the mint of the United States and the several branches thereof, conformably in all respects to the standard of gold coins now established by law, except that on the reverse of the piece the figure of the eagle shall be omitted. It is of the weight of 25.8 grains, and of the fineness of nine hundred thousandths.

DOLO. The Spanish form of *dolus*.

DOLUS (Lat.). **In Civil Law.** A fraudulent address or trick used to deceive some one; a fraud. Dig. 4. 3. 1. Any subtle contrivance by words or acts with a design to circumvent. 2 Kent, Comm. 560; Code, 2. 21.

Dolus differs from *culpa* in this, that the latter proceeds from an error of the understanding, while to constitute the former there must be a will or intention to do wrong. Wolffius, Inst. § 17.

It seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather that of very great negligence, than of fraud, as used in the common law.

Such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent (*malus animus*) or not. Pothier, *Traité de Dépôt*, nn. 23, 27; Story, Bailm. § 20 *a*; 2 Kent, Comm. 506, n.

DOLUS MALUS (Lat.). Fraud. Deceit with an evil intention. Distinguished from *dolus bonus*, justifiable or allowable deceit. Calvinus, Lex.; Broom, Max. 349; 1 Kaufmann, Mackeld. Civ. Law, 165. Misconduct. *Magna negligentia culpa est, magna culpa dolus est* (great negligence is a fault, a great fault is fraud). 2 Kent, Comm. 560, n.

DOM. PROC. (*Domus Procerum*). The house of lords. Wharton, Lex. 2d Lond. ed.

DOMAIN. Dominion; territory governed. Possession; estate. Land about the mansion-house of a lord. The right to dispose at our pleasure of what belongs to us.

A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence domain and property are said to be correlative terms: the one is the active right to dispose of, the other a passive quality which follows the thing and places it at the disposition of the owner. 3 Toullier, n. 83. But this distinction is too subtle for practical use. Puffendorff, *Droit de la Nat.* l. 4, c. 4, § 2. See 1 Blackstone, Comm. 105, 106; 1 Bouvier, Inst. n. 456; Clef des Lois Rom.; Domat; 1 Hill, Abr. 24; 2 *id.* 237.

DOMBOC (spelled, also, often, *Dombec*. Sax.). The name of codes of laws among the Saxons. Of these king Alfred's was the most famous. 1 Blackstone, Comm. 46; 4 *id.* 411.

The *domboc* of king Alfred is not to be confounded with the domesday-book of William the Conqueror.

DOME (Sax.). Doom; sentence; judgment. An oath. The homager's oath in the black book of Hereford. Blount

DOMESDAY, DOMESDAY-BOOK (Sax.). An ancient record made in the time of William the Conqueror, and now remaining in the English exchequer, consisting of two volumes of unequal size, containing minute and accurate surveys of the lands in England. It has been printed, also. 2 Sharswood, Blackst. Comm. 49, 50.

A variety of ingenious accounts are given of the origin of this term by the old writers. The commoner opinion seems to be that it was so called from the fulness and completeness of the survey making it a day of judgment for the value, extent, and qualities of every piece of land. See Spelman, Gloss.; Blount; Termes de la Ley.

It was practically a careful census taken and recorded in the exchequer of the kingdom of England.

DOMESMEN (Sax.). An inferior kind of judges. Men appointed to doom (judge) in matters in controversy. Cowel. Suitors in a court of a manor in ancient demesne, who are judges there. Blount; Whishaw; Termes de la Ley.

DOMESTICS. Those who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out-of-doors. 5 Binn. Penn. 167; Merlin, *Répert.* The act of congress of April 30, 1790, s. 25, uses the word domestic in this sense.

Formerly this word was used to designate those who resided in the house of another, however exalted their station, and who performed services for him. Voltaire, in writing to the French queen, in 1748, says, "Deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions, the gentlemen of the king," etc.; but librarians, secretaries, and persons in such honorable employments would not probably be considered domestics, although they might reside in the houses of their respective employers.

Pothier, to point out the distinction between a domestic and a servant, gives the following example:—A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house are his domestics; but they are not *servants.* On the contrary, your valet-de-chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant. Pothier, Proc. Cr. sect. 2, art. 5, § 5; Pothier, Obl. 710, 828; 9 Toullier, n. 314; H. de Pansey, *Des Justices de Paix,* c. 30, n. 1.

DOMICIL. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Lieber, Encyc. Am.; 10 Mass. 188; 11 La. 175; 5 Metc. Mass. 187; 4 Barb. N. Y. 505; Wall. Jr. C. C. 217; 9 Ired. No. C. 99; 1 Tex. 673; 13 Me. 255; 27 Miss. 704; 1 Bosw. N. Y. 673.

2. Domicil may be either national or domestic. In deciding the question of national domicil, the point to be determined will be in which of two or more distinct nationalities a man has his domicil. In deciding the matter of domestic domicil, the question is in which subdivision of the nation does the person have his domicil. Thus, whether a person is domiciled in England or France would be a question of national domicil, whether in Norfolk or Suffolk county, a question of domestic domicil. The distinction is to be kept in mind, since the rules for determining the two domicils, though frequently, are not necessarily the same. See 2 Kent, Comm. 449; Story, Confl. Laws, § 39 *et seq.;* Westlake, Priv. Int. Law, 15; Wheaton, Int. Law, 123 *et seq.*

3. The Romanists and civilians seem to attach about equal importance to the place of business and of residence as fixing the place of domicil. Pothier, Introd. *Gen. Cout. d' Orléans* c. 1, art. 1, § 8; Encyc. Mod. *Domicil;* Denizart; Story, Confl. Laws, § 42. This may go far towards reconciling the discrepancies of the common law and civil law as to what law is to govern in regard to contracts. But at common law the main question in deciding where a person has his domicil is to decide where he has his home and where he exercises his political rights.

Legal residence, inhabitancy, and domicil are generally used as synonymous. 1 Bradf. Surr. N. Y. 70; 1 Harr. Del. 383; 1 Spenc. N. J. 328; 2 Rich. So. C. 489; 10 N. H. 452; 3 Wash. C. C. 555; 15 Mees. & W. Exch. 433; 23 Pick. Mass. 170; 5 Metc. Mass. 298; 4 Barb. N. Y. 505; 7 Gray, Mass. 299. But much depends on the connection and purpose. 1 Wend. N. Y. 43; 5 Pick. Mass. 231; 17 *id.* 231; 15 Me. 58.

4. Two things must concur to establish domicil,—the fact of residence and the intention of remaining. These two must exist or must have existed in combination. 8 Ala. N. s. 159; 4 Barb. N. Y. 504; 6 How. 163; Story, Confl. Laws, § 44; 17 Pick. Mass. 231; 27 Miss. 704; 15 N. H. 137. There must have been an actual residence. 11 La. 175; 5 Metc. Mass. 587; 20 Johns. N. Y. 208; 12 La. 190; 1 Binn. Penn. 349. The character of the residence is of no importance, 8 Me. 203; 1 Speers, Eq. So. C. 3; 5 Eng. L. & Eq. 52; and if it has once existed, mere temporary absence will not destroy it, however long continued. 7 Clark & F. Hou. L. 842; 13 Beav. Rolls, 366; 43 Me. 426; 3 Bradf. Surr. N. Y. 267; 29 Ala. N. s. 703; 4 Tex. 187; 3 Me. 455; 8 *id.* 103; 10 Pick. Mass. 79; 3 N. H. 123; 3 Wash. C. C. 555, as in the case of a soldier in the army. 36 Me. 428; 4 Barb. N. Y. 522. And the law favors the presumption of a continuance of domicil. 5 Ves. Ch. 750; 5 Madd. Ch. 379; 5 Pick. Mass. 370; 1 Ashm. Penn. 126; Wall. Jr. C. C. 217; 1 Bosw. N. Y. 673; 21 Penn. St. 106. The original domicil continues till it is fairly changed for another, 5 Ves. Ch. 750, 757; 5 Madd. Ch. 232, 370; 10 Pick. Mass. 77; Story, Confl. Laws, 481 *a,* n.; 8 Ala. N. s. 169; 13 *id.* 58; 18 *id.* 367; 2 Swan, Tenn. 232; 1 Tex. 673; 1 Woodb. & M. C. C. 8; 15 Me. 58; Wall. Jr. C. C. 11; 10 N. H. 156, and revives on an intention to return. 1 Curt. Eccl. 856; 19 Wend. N. Y. 11; 8 Cranch, 278; 3 C. Rob. Adm. 12; 3 Wheat. 14; 8 Ala. N. s. 159; 3 Rawle, Penn. 312; 1 Gall. C. C. 275; 4 Mas. C. C. 308; 8 Wend. N. Y. 134. This principle of revival, however, is said not to apply where both domicils are domestic. 5 Madd. Ch. 379; Am. Lead. Cas. 714.

5. Mere taking up residence is not sufficient, unless there be an intention to abandon former domicil. 1 Speers, So. C. 1; 6 Mees. & W. Exch. 511; 5 Me. 143; 10 Mass. 488; 1 Curt. Eccl. 856; 4 Cal. 175; 2 Ohio, 232; 5 Sandf. N. Y. 44. Nor is intention of constituting domicil alone, unless accompanied by some acts in furtherance of such intention. 5 Pick. Mass. 370; 1 Bosw. N. Y. 673; 5 Md. 186. A subsequent intent may be grafted on a temporary residence. 2 C. Rob. Adm. 322. Removal to a place with an intention of re-

maining there for an indefinite period and as a place of fixed present domicil, constitutes domicil, though there be a floating intention to return. 2 Bos. & P. 228; 3 Hagg. Eccl. 374. Both inhabitancy and intention are to a great extent matters of fact, and may be gathered from slight indications. 17 Pick. Mass. 231; 4 Cush. Mass. 190; 1 Metc. Mass. 242; 5 *id.* 587; 1 Sneed, Tenn. 63. The place where a person lives is presumed to be the place of domicil until facts establish the contrary. 2 Bos. & P. 228, n.; 2 Kent, Comm. 532.

6. Domicil is said to be of three sorts,—domicil by birth, by choice, and by operation of law. The place of birth is the domicil by birth, if at that time it is the domicil of the parents. Story, Confl. Laws, § 46; 2 Hagg. Eccl. 405; 5 Tex. 211. See 10 Rich. So. C. 38. If the parents are on a journey, the actual domicil of the parents will generally be the place of domicil. 5 Ves. Ch. 750; Westlake, Priv. Int. Law, 17. Children of ambassadors, and children born on seas, take the domicil of their parents. Story, Confl. Laws, § 48.

The domicil of an illegitimate child is that of the mother, Story, Confl. Laws, § 46; 35 Me. 411; 8 Cush. Mass. 75; see Westlake, Priv. Int. Law, 19, where the place of birth is said to be their domicil at common law; Cald. 559; of a legitimate child, that of the father. 2 Hagg. Eccl. 405; 1 Binn. Penn. 349. The domicil by birth of a minor continues to be his domicil till changed. 1 Binn. Penn. 349; 3 Zabr. N. J. 394· 8 Blackf. Ind. 345.

7. Domicil by choice is that domicil which a person of capacity of his free will selects to be such. Residence by constraint, which is involuntary by banishment, arrest, or imprisonment, will not work a change of domicil. Story, Confl. Laws, § 47; 3 Ves. Ch. 198, 202; 11 Conn. 234; 5 Tex. 211; 1 Milw. 191.

Domicil is conferred in many cases by operation of law, either expressly or consequentially. Children born in foreign lands, of parents who are at the time citizens of the United States, have their domicil of birth in the United States. 10 Rich. Eq. So. C. 38. See 26 Barb. N. Y. 383.

The domicil of the husband is that of the wife. 9 Bligh, Hou. L. 83, 104; 2 Stockt. N. J. 238; 29 Ala. N. S. 719. A woman on marriage takes the domicil of her husband, and a husband, if entitled to a divorce, may obtain it though the wife be actually resident in a foreign state. 2 Clark & F. Hou. L. 488; 1 Add. Penn. 5, 19; 1 Dow. 117; 2 Curt. Eccl. 351. See, also, 15 Johns. N. Y. 121; 1 Dev. & B. Eq. No. C. 588; 11 Pick. Mass. 410; 14 *id.* 181; 2 Strobh. Eq. So. C. 174. But, if entitled to a divorce, the wife may acquire a separate domicil, which may be in the same jurisdiction. Bishop, Marr. & Div. § 728; 16 Jur. 366. She may rest on her husband's domicil for the purpose. 15 N. H. 159; 1 Johns. Ch. N. Y. 389; 5 Yerg. Tenn. 203; 6 Humphr. Tenn. 148; 8 Watts & S. Penn. 251. See § **10.**

8. A wife divorced *a mensa et thoro* may acquire a separate domicil so as to sue her husband in the United States courts, 21 How. 445; so where the wife is deserted. 5 Cal. 280; 2 Eng. L. & Eq. 52; 2 Kent, Comm. 573.

The domicil of a widow remains that of her deceased husband until she makes a change. Story, Confl. Laws, § 46; 18 Penn. St. 17. It seems that the domicil of the ward will follow that of the guardian, Story, Confl. Laws, § 506, n.; 1 Binn. Penn. 349; 5 Ves. Ch. 750; 3 Mer. Ch. 67; 9 Mass. 543; 5 Pick. Mass. 20; especially where the guardian is a parent. Story, Confl. Laws, § 506.

Ambassadors and other foreign ministers retain their domicil in the country to which they belong and which they represent. 3 C. Rob. Adm. 13, 27; 4 *id.* 26; 14 Beav. Rolls, 441. This does not apply to consuls and other commercial agents. 1 C. Rob. Adm. 79; Thornt. 445; 1 Barb. N. Y. 449; Encyc. Am. *Domicil.*

Commercial domicil. There may be a commercial domicil acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments. 1 Kent, Comm. 82; 2 *id.* 11, 12.

9. *Change of domicil.* Any person, *sui juris*, may make any *bonâ fide* change of domicil at any time. 5 Madd. Ch. 379; 5 Pick. Mass. 370; 35 Eng. L. & Eq. 532. And the object of the change does not affect the right, if it be a genuine change with real intention of permanent residence. 3 Wash. C. C. 546; 5 Mas. C. C. 70; 1 Paine, C. C. 594; 2 Sumn. C. C. 251. Children follow the domicil of the father, if the change be made *bonâ fide*, 2 Salk. 528; 2 Brown, Ch. 500; 6 Madd. Ch. 89; 16 Mass. 52; Ware, Dist. Ct. 464; Story, Eq. Jur. § 574; 27 Mo. 280; but there are limitations to this power in the case of alien parents, 10 Ves. Ch. 52; 5 East, 221; 8 Paige, Ch. N. Y. 47; 2 Kent, Comm. 226, and of the mother, if a widow, Burge, Comm. 38; 30 Ala. N. S. 613; see 2 Bradf. Surr. N. Y. 214; not, however, if she acquires a new domicil by remarriage. 2 Bradf. Surr. N. Y. 414; 8 Cush. Mass. 528; 11 Humphr. Tenn. 536.

10. The guardian is said to have the same power over his ward that a parent has over his child. 5 Pick. Mass. 20; 15 Mass. 239; 1 Binn. Penn. 349, n.; 3 Mer. Ch. 67· 2 Kent, Comm. 227. See 18 Ga. 5.

The domicil of a lunatic may be changed by the direction or with the assent of his guardian. 5 Pick. Mass. 20. It may be considered questionable whether the guardian can change the national domicil of his ward. 2 Kent, Comm. 226; Story, Confl. Laws, § 506.

The husband may not change his domicil after committing an offence which entitles the wife to a divorce, so as to deprive her of her remedy. 14 Pick. Mass. 181; 2 Tex. 261. And it is said the wife may not in the like case acquire a new domicil. 10 N. H. 61; 9

Me. 140; 17 Conn. 284; 5 Yerg. Tenn. 203; 2 Mass. 153; 5 Metc. Mass. 233; 2 Litt. Ky. 337; 2 Blackf. Ind. 407. See Bishop, Marr. & Div. § 730.

11. *The law of the place of domicil* governs as to all acts of the parties, when not controlled by the *lex loci contractus* or *lex rei sitæ*. Personal property of the woman follows the law of the domicil upon marriage. It passes to the husband, if at all, in such cases as a legal assignment by operation of the law of domicil, but one which is recognized extra-territorially. 2 Rose, Bank. 97; 20 Johns. N. Y. 267; Story, Confl. Laws, § 423.

A divorce valid under the law of the domicil of both parties is good everywhere. Story, Confl. Laws, § 230 *a*; 9 Me. 140; 2 Blackf. Ind. 407; 8 Ala. N. s. 45; 11 *id.* 826; 14 Mass. 227; 8 N. H. 160; 13 Johns. N. Y. 192; 8 Paige, Ch. N. Y. 406; 12 Barb. N. Y. 640; 7 Dan. Ky. 181; 3 West. Law Jour. 475; Bishop, Marr. & Div. § 720. But there must be an actual domicil of one party at least, 3 Hagg. Eccl. 639; Russ. & R. Cr. Cas. 237; 2 Clark & F. Hou. L. 567; Ferguson, Marr. & Div. 68; 8 N. H. 160; 14 Mass. 227; 13 Johns. N. Y. 192; 15 *id.* 121; 13 Wend. N. Y. 407; 8 Paige, Ch. N. Y. 406; 7 Dan. Ky. 181; 2 Blackf. Ind. 407, and personal jurisdiction over both parties, to make a divorce binding extra-territorially. 1 Dev. & B. Eq. No. C. 568; 15 Johns. N. Y. 121; 7 Dan. Ky. 181. See 9 Me. 140.

12. The state and condition of the person according to the law of his domicil will generally, though not universally, be regarded in other countries as to acts done, rights acquired, or contracts made in the place of his native domicil; but as to acts, rights, and contracts done, acquired, or made out of his native domicil, the *lex loci* will generally govern in respect to his capacity and condition. 2 Kent, Comm. 234. See Lex Loci.

If a person goes into a foreign country and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and subject for all civil purposes, whether that country be hostile or neutral, 8 Term, 31; 3 Bos. & P. 113; 3 C. Rob. Adm. 12; 4 *id.* 107; 1 Hagg. Adm. 103, 104; 1 Pet. C. C. 159; 2 Cranch, 64; and this whether the effect be to render him hostile or neutral in respect to his *bonâ fide* trade. 1 Kent, Comm. 75; 3 Bos. & P. 113; 1 C. Rob. Adm. 249.

13. The disposition of, succession to, or distribution of the personal property of a decedent, wherever situated, is to be made in accordance with the law of his actual domicil at the time of his death. 2 Kent, Comm. 429; 8 Sim. Ch. 310; 3 Stor. C. C. 755; 11 Miss. 617; 1 Speers, Eq. So. C. 3; 4 Bradf. Surr. N. Y. 127; 15 N. H. 137.

The principle applies equally to cases of voluntary transfer, of intestacy, and of testaments. 5 Barnew. & C. 451; 3 Stor. C. C. 755; 3 Hagg. Eccl. 273; 3 Curt. Eccl. 468; 1 Binn. Penn. 336; 9 Pet. 503; Story, Confl. Laws, § 381; 4 Johns. Ch. N. Y. 460; 2 Harr. & J. Md. 191; 6 Pick. Mass. 286; 9 N. H. 137; 8 Paige, Ch. N. Y. 519; 1 Mas. C. C. 381; 6 T. B. Monr. Ky. 52; 17 Ala. N. s. 286; 29 *id.* 72; 6 Vt. 374. Stocks are considered as personal property in this respect. 1 Crompt. & J. Exch. 151; Bligh, N. s. 15; 1 Jarman, Wills, 3.

14. *Wills* are to be governed by the law of the domicil as to the capacity of parties. 1 Jarman, Wills, 3, and as to their validity and effect in relation to the transfer of personal property, 4 Blackf. Ind. 53; 22 Me. 304; 2 Ill. 373; 2 Bail. So. C. 436; 5 Pet. 519; 2 B. Monr. Ky. 582; 8 Paige, Ch. N. Y. 519; 3 Curt. Eccl. 468; 11 N. H. 88; 1 M'Cord, So. C. 354; 5 Gill & J. Md. 483; but by the *lex rei sitæ* as to the transfer of real property. 1 Blackf. Ind. 372; 6 T. B. Monr. Ky. 527; 22 Me. 303; 8 Ohio, 239; 4 Me. 138. See Lex Rei Sitæ.

The forms and solemnities of the place of domicil must be observed. 2 Ves. & B. Ch. 127; 3 Ves. Ch. 192; 8 Sim. Ch. 279; 4 Hagg. Eccl. 346; 4 Mylne & C. Ch. 76; 2 Harr. & J. Md. 191; 1 Binn. Penn. 336; 4 Johns. Ch. N. Y. 460; 1 Mas. C. C. 381; 12 Wheat. 169; 9 Pet. 483.

The local law is to determine the character of property. 6 Paige, Ch. N. Y. 630; Story, Confl. Laws, § 447; Erskine, Inst. b. 3, tit. 9, § 4.

And it is held that a state may regulate the succession to personal as well as real property within its limits, without regard to the *lex domicilii*. 6 Humphr. Tenn. 116.

The interpretation of a will is to be according to the law of the place of actual domicil. 3 Clark & F. Hou. L. 544, 570; 4 Bligh, 502; 3 Sim. Ch. 298; 2 Brown, Ch. 38; Story, Eq. Jur. § 1068; 9 Pet. 483. As to the effect of a change of domicil subsequent to the making of the will, see 9 Pet. 183; Story, Confl. Laws, 479 *g*. The rules as to construction of wills apply whether they be of real or personal property, unless in case of real property it may be clearly gathered from the terms of the will that the testator had in view the *lex rei sitæ*. Story, Confl. Laws, § 479 *h*; 3 Wils. & S. Ch. 407; 2 Bligh, 60; 4 Mylne & C. Ch. 76

15. The succession to the personal property of an intestate is governed exclusively by the law of his actual domicil at the time of his death. 2 Ves. Ch. 35; 2 Bos. & P. 229; 5 Barnew. & C. 438; 8 Sim. Ch. 310; 14 Mart. La. 99; 3 Paige, Ch. N. Y. 182; 2 Harr. & J. Md. 193; 4 Johns. Ch. N. Y. 460; 1 Mas. C. C. 418; 15 N. H. 137. This includes the ascertainment of the person who is to be heir. Story, Confl. Laws, § 481; 2 Ves. Ch. 35; 2 Hagg. Eccl. 455; 2 Keen, 293. The question whether debts are to be paid by the administrator from the personalty or realty is to be decided by the law of his domicil. Story, Confl. Laws, § 528; 9 Mod. 66; Chanc. Prec. 511; 2 Ves. & B. Ch. Ir. 131; 2 Keen, 293.

16. *Insolvents and bankrupts.* An assignment of property for the benefit of cre-

ditors valid by the law of the domicil is generally recognized as valid everywhere, 4 Johns. Ch. N. Y. 471; 2 H. Blackst. 402; 4 Term, 182; 2 Rose, Bank. 97; 8 Ves. Ch. 82; 1 Crompt. M. & R. Exch. 296; see 6 Pick. Mass. 312; in the absence of positive statute to the contrary, 6 Pick. Mass. 286; 14 Mart. La. 93, 100; 6 Binn. Penn. 353; Story, Confl. Laws, § 411; but not to the injury of citizens of the foreign state in which property is situated. 5 East, 131; 17 Mart. La. 596; 6 Binn. Penn. 360; 5 Cranch, 289; 12 Wheat. 213; 5 N. H. 213; 1 Paige, Ch. N. Y. 237; 1 Harr. & M'H. Md. 236. But a compulsory assignment by force of statute is not of extra-territorial operation. 20 Johns. N. Y. 229; 6 Binn. Penn. 353; 6 Pick. Mass. 286. Distribution of the effects of insolvent or bankrupt debtors is to be made according to the law of the domicil, subject to the same qualifications. Story, Confl. Laws, § 323–328, 423 *a*. See CONFLICT OF LAWS.

DOMINANT. That to which a servitude or easement is due, or for the benefit of which it exists. Distinguished from *servient*, that from which it is due.

DOMINICUM (Lat. domain; demain; demesne). A lordship. That of which one has the lordship or ownership. That which remains under the lord's immediate charge and control.

In this sense it is equivalent to the Saxon *bordlands*. Spelman, Gloss.; Blount. In regard to lands for which the lord received services and homage merely, the *dominicum* was in the tenant.

Property; domain; any thing pertaining to a lord. Cowel.

In Ecclesiastical Law. A church, or any other building consecrated to God. Du-Cange.

DOMINIUM (Lat.). Perfect and complete property or ownership in a thing.

Plenum in re dominium,—plena in re potestas. This right is composed of three principal elements, viz.: the right to use, the right to enjoy, and the right to dispose of the thing, to the exclusion of every other person. To use a thing, *jus utendi tantum*, consists in employing it for the purposes for which it is fit, without destroying it, and which employment can therefore be repeated; to enjoy a thing, *jus fruendi tantum*, consists in receiving the fruits which it yields, whether natural or civil, *quidquid ex re nascitur;* to dispose of a thing, *jus abutendi*, is to destroy it, or to transfer it to another. Thus, he who has the use of a horse may ride him, or put him in the plough to cultivate his own soil; but he has no right to hire the horse to another and receive the civil fruits which he may produce in that way.

On the other hand, he who has the enjoyment of a thing is entitled to receive all the profits or revenues which may be derived from it, either from natural or civil fruits.

And, lastly, he who has the right of disposing of a thing, *jus abutendi*, may sell it, or give it away, etc., subject, however, to the rights of the usuary or usufructuary, as the case may be.

These three elements, *usus, fructus, abusus*, when united in the same person, constitute the *dominium;* but they may be, and frequently are, separated: so that the right of disposing of a thing may belong to *Primus*, and the rights of using and enjoying to *Secundus*, or the right of enjoying alone may belong to *Secundus*, and the right of using to *Tertius*. In that case, *Primus* is always the owner of the thing, but he is the naked owner, inasmuch as for a certain time he is actually deprived of all the principal advantages that can be derived from it. *Secundus*, if he has the use and enjoyment, *jus utendi et fruendi simul*, is called the usufructuary, *usus-fructuarius;* if he has the enjoyment only, *jus fruendi tantum*, he is the *fructuarius;* and *Tertius*, who has the right of use, *jus utendi tantum*, is called the usuary,—*usuarius*. But this dismemberment of the elements of the *dominium* is essentially temporary: if no shorter period has been fixed for its duration, it terminates with the life of the usuary, fructuary, or usufructuary; for which reason the rights of use and usufruct are called personal servitudes. Besides the separation of the elements of the *dominium* among different persons, there may also be a *jus in re*, or dismemberment, so far as real estates are concerned, in favor of other estates. Thus, a right of way over my land may exist in favor of your house; this right is so completely attached to the house that it can never be separated from it, except by its entire extinction. This class of *jura in re* is called predial or real servitudes. To constitute this servitude, there must be two estates belonging to different owners; these estates are viewed in some measure as juridical persons, capable of acquiring rights and incurring obligations. The estate in favor of which the servitude exists is the creditor-estate; and the estate by which the servitude is due, the debtor-estate. 2 Mariadé, 343 *et seq.*

DOMINIUM DIRECTUM (Lat.). Legal ownership. Ownership as distinguished from enjoyment.

DOMINIUM DIRECTUM ET UTILE (Lat.). Full ownership and possession united in one person.

DOMINIUM UTILE (Lat.). The beneficial ownership. The use of the property.

DOMINUS (Lat.). The lord or master; the owner. Ainsworth, Lat. Lex. The owner or proprietor of a thing, as distinguished from him who uses it merely. Calvinus, Lex. A master or principal, as distinguished from an agent or attorney. Story, Ag. § 3; Ferriere, Dict.

In Civil Law. A husband. A family. Vicat, Voc. Jur.

DOMINUS LITIS (Lat.). The master of a suit. The client, as distinguished from an attorney.

And yet it is said, although he who has appointed an attorney is properly called *dominus litis*, the attorney himself, when the cause has been tried, becomes the *dominus litis*. Vicat.

DOMITÆ (Lat.). Tame; subdued; not wild.

DONATARIUS (L. Lat.). One to whom something is given. A donee.

DONATIO (Lat.). A gift. A transfer of the title to property to one who receives it without paying for it. Vicat. The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration.

2. A donation is never perfected until it has been accepted; for an acceptance is re-

quisite to make the donation complete. See ASSENT; Ayliffe, Pand. tit. 9; *Clef des Lois Rom.;* 2 Kent, Comm. 438; 25 Barb. N. Y. 505; 2 E. D. Smith, N. Y. 305; 28 Ala. N. S. 641. In old English law and in the modern law, in several phrases, the word retains the extended sense it has in the civil law.

3. Its literal translation, gift, has acquired in real law a more limited meaning, being applied to the conveyance of estates tail. 2 Blackstone, Comm. 316; Littleton, § 59; West, Symb. § 254; 4 Cruise, Dig. 51. There are several kinds of *donatio:* as, *donatio simplex et pura* (simple and pure gift, without compulsion or consideration); *donatio absoluta et larga* (an absolute gift); *donatio conditionalis* (a conditional gift); *donatio stricta et coarctura* (a restricted gift: as, an estate tail).

DONATIO INTER VIVOS (Lat. a gift between living persons). A contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee, who accepts and acquires the legal title to it. This donation takes place when the giver is not in any immediate apprehension of death, which distinguishes it from a *donatio mortis causâ* (*q. v.*). 1 Bouvier, Inst. n. 712. See, also, La. Civ. Code, art. 1453; Inst. 2. 7. 2; Cooper, Inst. notes 474, 475; U. S. Dig. tit. *Gift.*

DONATIO MORTIS CAUSA (Lat. a gift in prospect of death). A gift made by a person in sickness, who, apprehending his dissolution near, delivers, or causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of the donor's decease. 2 Blackstone, Comm. 514. See La. Civ. Code, art. 1455.

The civil law defines it to be a gift under apprehension of death: as, when any thing is given upon condition that if the donor dies the donee shall possess it absolutely, or return it if the donor should survive or should repent of having made the gift, or if the donee should die before the donor. 1 Miles, Penn. 109–117.

It differs from a legacy, inasmuch as it does not require proof in the court of probate, 2 Strange, 777; see 1 Bligh, N. S. 531; and no assent is required from the executor to perfect the donee's title. 2 Ves. Ch. 120; 1 Sim. & S. Ch. 245. It differs from a gift *inter vivos* because it is ambulatory and revocable during the donor's life, because it may be made to the wife of the donor, and because it is liable for his debts.

2. To constitute a good *donatio mortis causâ: first*, the thing given must be personal property, 3 Binn. Penn. 370; a bond, 3 Binn. Penn. 370; 3 Madd. Ch. 184; bank notes, 23 Penn. St. 59; 2 Brown, Ch. 612; and a check offered for payment during the life of the donor will be so considered. 4 Brown, Ch. 286. Not so a promissory note of the sick man made in his last illness. 5 Barnew. & C. 501; 14 Pick. Mass. 204; 3 Barb. Ch. N. Y. 76; 2 Barb. N. Y. 94; 21 Vt. 238. See 24 Pick. 201; 33 N. H. 520; 18 Conn. 410; 11 Md. 424; 4 Cush. Mass. 87.

Second, the gift must be made by the donor in peril of death, and to take effect only in case the giver die. 3 Binn. Penn. 370; 4 Burn, Eccl. Law, 110.

Third, there must be an actual delivery of the subject to or for the donee, in cases where such delivery can be made. 3 Binn. Penn. 370; 2 Ves. Ch. 120; 2 Gill & J. Md. 268; 4 Gratt. Va. 472; 31 Me. 422; 14 Barb. N. Y. 243; 7 Eng. L. & Eq. 134. See 9 Ves. Ch. 1; 7 Taunt. 224. But such delivery can be made to a third person for the use of the donee. 3 Binn. Penn. 370.

It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported. 2 Ves. Ch. 120; 3 Ired. Ch. No. C. 268. By the Roman and civil law, a gift *mortis causâ* might be made in writing. Dig. lib. 39 t. 6, l. 28; 2 Ves. Sen. Ch. 440; 1 *id.* 314.

3. A *donatio causâ mortis* does not require the executor's assent, 2 Ves. Ch. 120; is revocable by the donor during his life, 2 Bradf. Surr. N. Y. 339; 27 Me. 196; 3 Woodb. & M. C. C. 519; 34 N. H. 439, by recovery, 3 Macn. & G. 664; Williams, Ex. 651, or resumption of possession, 7 Taunt. 233; 2 Ves. Sen. Ch. 433; but not by a subsequent will, Prec. Chanc. 300; but may be satisfied by a subsequent legacy. 1 Ves. Sen. Ch. 314. And see 1 Ired. Ch. No. C. 130. It may be of any amount of property. 24 Vt. 591. It is liable for the testator's debts. 1 Phill. Ch. 406. See 18 Ala. N. S. 27.

DONATIO PROPTER NUPTIAS (Lat. gift on account of marriage). **In Roman Law.** A gift made by the husband as a security for the marriage portion. The effect of the act of giving such a gift was different according to the relation of the parties at the time of making the gift. Vicat, Voc. Jur. Called, also, a mutual gift.

The name was originally applied to a gift made before marriage, and was then called a *donatio ante nuptias;* but in process of time it was allowed to be made after marriage as well, and was then called a *donatio propter nuptias.*

DONEE. He to whom a gift is made or a bequest given; one who is invested with a power of appointment: he is sometimes called an appointee. 4 Kent, Comm. 316; 4 Cruise, Dig. 51.

DONIS, STATUTE DE. The stat. Westm. 2, namely, 13 Edw. I. c. 1, called the statute *de donis conditionalibus.* This statute revives, in some sort, the ancient feudal restraints which were originally laid on alienations. 2 Blackstone, Comm. 12.

DONOR. He who makes a gift. One who gives lands in tail. Termes de la Ley.

DONUM (Lat.). A gift.

The difference between *donum* and *numus* is said to be that *donum* is more general, while *numus* is specific. *Numus* is *said* to mean *donum* with a cause for the giving (though not a legal consideration), as on account of marriage, etc. *Donum* is said to be that which is given from no necessity of law or duty, but from free will, "from the absence of which, if they are not given, no blame arises; but if they are given, praise is due." Vicat, Voc. Jur.; Calvinus, Lex.

DOOM. Judgment.

DOOR. The place of usual entrance in a house, or into a room in the house.

2. To authorize the breach of an outer door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused. 5 Coke, 93; 4 Leon. 41; T. Jones, 234; 1 N. H. 346; 10 Johns. N. Y. 263; 1 Root, Conn. 83, 134; 21 Pick. Mass. 156. The outer door may also be broken open for the purpose of executing a writ of *habere facias*. 5 Coke, 93; Bacon, Abr. *Sheriff* (N 3).

3. An outer door cannot, in general, be broken for the purpose of serving civil process, 13 Mass. 520; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him. Fost. 320; 1 Rolle, 138; Croke Jac. 555; 10 Wend. N. Y. 300; 6 Hill, N. Y. 597. When once an officer is in the house, he may break open an inner door to make an arrest. Kirb. Conn. 386; 5 Johns. N. Y. 352; 17 *id.* 127. See 1 Toullier, n. 214, p. 88.

DORMANT. Sleeping; silent; not known; not acting. He whose name and transactions as a partner are professedly concealed from the world. 2 Harr. & G. Md. 159; 5 Cow. N. Y. 534; 4 Mass. 424; Collyer, Partn. § 4; Story, Partn. Index. The term is applied, also, to titles, rights, etc.

DOS (Lat.). **In Roman Law.** That which is received by or promised to the husband from the wife, or any one else by her influence, for sustaining the burdens of matrimony. There are three classes of *dos*. *Dos profectitia* is that which is given by the father or any male relative from his property or by his act; *dos adventitia* is that which is given by any other person or from the property of the wife herself; *dos receptitia* is where there is a stipulation connected with the gift relating to the death of the wife. Vicat; Calvinus, Lex.; DuCange; 1 Washburn, Real Prop. 147.

In English Law. The portion bestowed upon a wife at her marriage by her husband. 1 Reeve, Hist. Eng. Law, 100; 1 Washburn, Real Prop. 147; 1 Cruise, Dig. 152.

Dower generally. The portion which a widow has in the estate of her husband after his death. Park, Dower.

This use of the word in the English law, though, as Spelman shows, not strictly correct, has still the authority of Tacitus (*de Mor. Germ.* 18) for its use. And if the general meaning of marriage portion is given to it, it is strictly as applicable to a gift from the husband to the wife as to one from the wife to the husband. It occurs often, in the phrase *dos de dote peti non debet* (dower should not be sought of dower). 1 Washburn, Real Prop. 209.

DOS RATIONABILIS (Lat.). A reasonable marriage portion. A reasonable part of her husband's estate, to which every widow is entitled, of lands of which her husband may have endowed her on the day of marriage. Coke, Litt. 336. Dower, at common law. 2 Blackstone, Comm. 134.

DOT (a French word adopted in Louisiana). The fortune, portion, or dowry which a woman brings to her husband by the marriage. 6 Mart. La. N. S. 460.

DOTAL PROPERTY. By the civil law in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. La. Civ. Code, art. 2315.

DOTATION. In French Law. The act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

DOTE. In Spanish Law. The property and effects which a woman brings to her husband for the purpose of aiding him with the rents and revenues thereof to support the expenses of the marriage. Loas Partidas, 4. 11. 1. "*Dos*," says Cajas, "*est pecunia marito, nuptiarum causa, data vel promissa.*" The dower of the wife is inalienable, except in certain specified cases, for which see Escriche, Dic. Raz. *Dote*.

DOTE ASSIGNANDO. In English Law. A writ which lay in favor of a widow, when it was found by office that the king's tenant was seised of tenements in fee or fee-tail at the time of his death, and that he held of the king in chief.

DOTE UNDE NIHIL HABET. Dower *unde nihil habet*, which title see.

DOUBLE COSTS. See COSTS.

DOUBLE OR TREBLE DAMAGES. In some cases it is provided by statute that a party may recover double or treble damages. In these cases the jury find such damages as they think proper, and the court enhances them in the judgment. Brooke, Abr. *Damages*, pl. 70; Coke, 2d Inst. 416; 1 Wils. 126; 1 Mass. 155. The damages are actually doubled or trebled, as the case may be,—not assessed, like double or treble costs.

DOUBLE EAGLE. A gold coin of the United States, of the value of twenty dollars or units.

It is so called because it is twice the value of the eagle, and, consequently, weighs five hundred and sixteen grains of standard fineness, namely, nine hundred thousandths fine. It is a legal tender for twenty dollars to any amount. Act of March 3, 1849, 6 U. S. Stat. at Large, 397. The double eagle is the largest coin issued in the United States, and of greater value than any now issued in any other country, except the oban of Japan, which, however, partakes more of the character of a bar of gold than of that of a coin. The first issue of the double eagle was made in 1849.

DOUBLE INSURANCE. Is where divers insurances are made upon the same interest in the same subject against the same risks in favor of the same assured, in proportions exceeding the value. 1 Phillips, Ins. §§ 359, 366.

A like excess in one policy is over-insurance. If the valuation of the whole interest in one policy

is double that in another, and half of the value is insured in each policy according to the valuation in that policy, it is not a double insurance; its being so or not depends on the aggregate of the proportions, one-quarter, one-half, etc., insured by each policy, not upon the aggregate of the amounts.

2. In England, each underwriter is liable for the whole amount insured by him until the assured is fully indemnified, and either on paying over his proportion *pro rata* is entitled to contribution from the other; but no one can be liable over the rate at which the subject is rated in his policy.

In the United States, the policies generally provide that the prior underwriters shall be liable until the assured is fully indemnified, and underwriters for the excess are exonerated; but the excess is to be ascertained by the aggregate of the proportions, as a quarter, half, etc., to make up the integer. 1 Phillips, Ins. § 361; 1 W. Blackst. 416; 1 Burr. 489; 15 B. Monr. Ky. 432, 452; 18 Ill. 553.

In the United States, by a clause usually introduced into policies, the prior underwriters are liable until the whole value is covered, and subsequent underwriters are exonerated as to the surplus amount. This clause does not apply to double insurance by simultaneous policies. 1 Phillips, Ins. § 362; 5 Serg. & R. Penn. 475.

DOUBLE PLEA. The alleging, for one single purpose, two or more distinct grounds of defence, when one of them would be as effectual in law as both or all. See DUPLICITY.

By the statute 4 Anne, c. 16, in England, and by similar statutes in most if not all of the states of the United States, any defendant in any action or suit, and any plaintiff in replevin in any court of record, may plead as many several matters as may be necessary for a defence with leave of court. This statute allows double pleading; but each plea must be single, as at common law, Lawes, Plead. 131; 1 Chitty, Plead. 512; and the statute does not extend to the subsequent pleadings. Comyns, Dig. *Pleader* (E 2); Story, Plead. 72–76; 5 Am. Jur. 260; Gould, Plead. c. 8; *Doctrina Plac.* 222. And in criminal cases a defendant cannot plead a special plea in addition to the general issue. 7 Cox, Cr. Cas. 85.

DOUBLE VOUCHER. A voucher which occurs when the person first vouched to warranty comes in and vouches over a third person. See a precedent, 2 Blackstone, Comm. App. V. p. xvii.; VOUCHER.

The necessity for double voucher arises when the tenant in tail is not the tenant in the writ, but is tenant by warranty; that is, where he is vouched, and comes in and confesses the warranty. Generally speaking, to accomplish this result a previous conveyance is necessary, by the tenant in tail, to a third person, in order to make such third person tenant to a writ of entry. Preston, Conv. 125, 126.

DOUBLE WASTE. When a tenant bound to repair suffers a house to be wasted, and then unlawfully fells timber to repair it, he is said to commit double waste. Coke, Litt. 53. See WASTE.

DOUBT. The uncertainty which exists in relation to a fact, a proposition, or other thing; an equipoise of the mind arising from an equality of contrary reasons. Ayliffe, Pand. 121.

2. The most embarrassing position of a judge is that of being in doubt; and it is frequently the lot of the wisest and most enlightened to be in this condition: those who have little or no experience usually find no difficulty in deciding the most problematical questions.

3. Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him who, having it in his power to prove facts to remove the doubt, has neglected to do so. In cases of fraud, when there is a doubt, the presumption of innocence (*q. v.*) ought to remove it. 2. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused, that doubt ought to operate in his favor. In such cases, particularly when the liberty, honor, or life of an individual is at stake, the evidence to convict ought to be clear and devoid of all reasonable doubt.

4. The term reasonable doubt is often used, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether. Per *Shaw*, C. J., in 5 Cush. Mass. 320; 1 Gray, Mass. 534. See Best, Pres. § 195; Wilson, Cir. Ev. 26; 33 Howell, St. Tr. 506; Burnett, Cr. Law of Scotl. 522; 1 Greenleaf, Ev. § 1; D'Aguesseau, Œuvres, xiii. 242.

DOVE. The name of a well-known bird.

Doves are animals *feræ naturæ*, and not the subject of larceny unless they are in the owner's custody: as, for example, in a dovehouse, or when in the nest before they can fly. 9 Pick. Mass. 15.

In a very recent case it was held that larceny may be committed of pigeons which, though they have access to the open air, are tame and unreclaimed and return to their house or box. 2 Den. Cr. Cas. 361. See 2 Den. Cr. Cas. 362, note; 4 Carr. & P. 131.

DOWAGER. A widow endowed; one who has a jointure.

In England, this is a title or addition given to the widows of princes, dukes, earls, and other noblemen, to distinguish them from the wives of the heir, who have right to bear the title.

DOWER (from Fr. *douer*, to endow). The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Coke, Litt. 30 *a;* 2 Blackstone, Comm. 130; 4 Kent, Comm. 35; Washburn, Real Prop. 146.

2. There were five species of dower in England:—

Dower by custom, where a widow became entitled to a specified portion of her husband's lands in consequence of some local or particular custom.

Dower ad ostium ecclesiæ, where a man of full age, on coming to the church-door to be married, endowed his wife of a certain portion of his lands.

Dower ex assensu fratris, which differed from dower *ad ostium ecclesiæ* only in being made out of the lands of the husband's father and with his consent.

Dower de la plus belle, where the widow, on suing the guardian in chivalry for dower, was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence. 2 Blackstone, Comm. 132, n.

Dower by common law, where the widow was entitled during her life to a third part of all the lands and tenements in fee-simple or fee-tail of which her husband was seised at any time during the coverture, and of which any issue she might have had might by possibility have been heir.

Since the passage of the Dower Act in England, 3 & 4 Will. IV. c. 105, all these species of dower, except that by custom and by the common law, have ceased to exist. 2 Sharswood, Blackst. Comm. 135, n. Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law. 1 Washburn, Real Prop. 149.

3. *Of what estates the wife is dowable.* Her right to dower is always determined by the laws of the place where the property is situate. Story, Confl. Laws, § 448; 1 Miss. 281; 4 Iowa, 381; 3 Strobh. So. C. 562.

She is entitled to one-third of all lands, tenements, or hereditaments, corporeal and incorporeal, of which her husband may have been seised during the coverture, in fee or in tail. 2 Blackstone, Comm. 131.

She was not endowable of a term of years, however long. Park, Dow. 47; 1 Md. Ch. Dec. 36. In Missouri, her right attaches to a leasehold of twenty years, Rev. Stat. 1855, 668; also to the personal estate in general, under certain conditions. Mo. Rev. Stat. (1855) 669; 16 Mo. 478. Similar statutes are found in many of the other states.

The inheritance must be an entire one, and one of which the husband may have corporeal seisin or the right of immediate corporeal seisin. Park, Dow. 47; Finch, 368; Plowd. 506; 1 Smedes & M. Ch. Miss. 107.

Dower does not attach in an estate held in joint tenancy; but the widow of the survivor has dower. Park, Dow. 72; Coke, Litt. § 45; 15 Pet. 21. But where the principle of survivorship is abolished, this disability does not exist. 9 Dan. Ky. 185; 2 Strobh. So. C. 67; Mo. Rev. Stat. (1855) 351.

An estate in common is subject to dower. Park, Dow. 42; 13 Mass. 504; 3 Paige, Ch. N. Y. 653; 3 Edw. Ch. N. Y. 500; 6 Gray, Mass. 314.

In the case of an exchange of lands, the widow may claim dower in either, but not in both, Coke, Litt. 31 *b;* if the interests are unequal, then in both. 7 Barb. N. Y. 633; 32 Me. 412; 1 N. H. 65.

She is entitled to dower in mines belonging to her husband, if opened by him in his lifetime on his own or another's land. 1 Taunt. 402; 1 Cow. 460.

She had a right of dower in various species of incorporeal hereditaments: as, rights of fishing, and rents. Coke, Litt. 32 *a;* 2 Blackstone, Comm. 132; Park, Dow. 36; 1 Bland. Ch. Mich. 227. The rents should be estates of inheritance. 2 Cruise, Dig. 291.

4. In most of the states she is dowable of wild lands. 2 Dougl. Mich. 141; 10 Ga. 321; 2 Rob. Va. 507; 3 Dan. Ky. 121; 8 Ohio, 418: *contra*, 15 Mass. 157; 1 Pick. Mass. 21; 14 Me. 409; 2 N. H. 56.

She has no right of dower in a pre-emption claim, 16 Mo. 478; 2 Ill. 314; nor, as a general thing, in shares of a corporation. 1 Washburn, Real Prop. 166. See 6 Dan. Ky. 107; Park, Dow. 113.

At law there was nothing to prevent her from having dower in lands which her husband held as trustee. But, as she would take it subject to the trust, courts of equity were in the habit of restraining her from claiming her dower in lands which she would be compelled to hold entirely to another's use, till it was finally established, and remains the same both in England and the United States, that she is not entitled to dower in any thing her husband may hold as a mere trustee. Hill, Trust. 269; 8 Ohio, 412: 2 Ohio St. 415; 5 B. Monr. Ky. 152; Park, Dow. 105.

A mortgagee's wife, although her husband has the technical seisin, has no dowable interest till the estate becomes irredeemable. 4 Dane, Abr. 671; 13 Ark. 44; 4 Kent, Comm. 42.

5. At common law she was not endowable in the estate of a *cestui qui trust*. 2 Schoales & L. Ch. Ir. 387; 4 Kent, Comm. 43; 1 Hempst. C. C. 251. But by the Dower Act this restriction was removed in England. 3 & 4 Will. IV. c. 105; Park, Dow. 138; 1 Spence, Eq. Jur. 501. In the United States the law upon this subject is not uniform. 12 Pet. 201; 19 Me. 141; 2 Serg. & R. Penn. 554; 7 Ala. 447; 1 Hen. & M. Va. 92. In

some, dower in equitable estates is given by statutes, Mo. Rev. Stat. (1855) 668; while in others the severe common-law rule has not been strictly followed by the courts. 1 Md. Ch. Dec. 452; 5 Paige, Ch. N. Y. 318; 6 Dan. Ky. 471; 8 Humphr. Tenn. 537; 1 Jones, No. C. 430; 3 Gill, Md. 304.

She is generally conceded dower in an equity of redemption. 15 Pet. 38; 34 Me. 50; 3 Pick. Mass. 475; 4 Gray, Mass. 46; 5 Johns. Ch. N. Y. 452; 2 Blackf. Ind. 262; 1 Rand. Va. 344; 1 Hill, N. Y. 200; 1 Conn. 559; 29 N. H. 564; 1 Stockt. Ch. N. J. 361.

In reference to her husband's contracts for the purchase of lands, the rule seems to be, in those states where dower is allowed in equitable estates, that her right attaches to her husband's interest in the contract, if at his death he was in a condition to enforce specific performance. 5 Paige, Ch. N. Y. 318; 5 Blackf. Ind. 406; 1 Hen. & M. Va. 92; 1 B. Monr. Ky. 93; 2 Ill. 314; 2 Ohio St. 512; 7 Gray, Mass. 533; 19 Ill. 545; 1 Jones, No. C. 430. If his interest has been assigned before his death, or forfeited, or taken on execution, her dower-right is defeated. 29 Penn. St. 71; 6 Rich. Eq. So. C. 72; 4 J. J. Marsh. Ky. 451; 16 Ala. 522; 16 B. Monr. Ky. 114; 1 Hen. & M. Va. 91.

6. She is entitled to dower in lands actually purchased by her husband and upon which the vendor retains a lien for the unpaid purchase-money, subject to that lien, 12 B. Monr. Ky. 261; 8 Blackf. Ind. 120; 2 Bland. Ch. Mich. 242; 1 Humphr. Tenn. 408; 7 *id.* 72, or upon which her husband has given a mortgage to secure the purchase-money, subject to that mortgage. 10 Rich. Eq. So. C. 285.

She is not entitled to dower in partnership lands purchased by partnership funds and for partnership purposes, until the partnership debts have been paid. 4 Metc. Mass. 537; 5 *id.* 562; 4 Miss. 372; 10 Leigh, Va. 406; 5 Fla. 350; 20 Mo. 174. She has been denied dower in land purchased by several for the purposes of sale and speculation. 3 Edw. Ch. N. Y. 428.

Sometimes she is allowed dower out of money the proceeds of real estate sold by order of court, or by the wrongful act of an agent or trustee. 14 Pick. Mass. 345; 11 Ala. N. S. 33; 3 Sandf. Ch. N. Y. 434; 12 B. Monr. Ky. 172; 7 Humphr. Tenn. 72.

Her claim for dower has been held not subject to mechanics' liens. 7 Metc. Mass. 157; 8 Ill. 511; 8 Blackf. Ind. 252; 1 B. Monr. Ky. 257.

She is not entitled to dower in an estate *pur auter vie*, 5 Cow. N. Y. 388, nor in a vested remainder. 5 N. H. 240, 469; 10 *id.* 403; 2 Leigh, Va. 29; 12 *id.* 248; 5 Paige, Ch. N. Y. 161; 1 Barb. N. Y. 500.

In some states she has dower only in what the husband died seised of. 6 McLean, C. C. 442; 1 Root, Conn. 50; 2 No. C. 253.

7. *Requisites of.* Three things are usually said to be requisite to the consummation of a title to dower, viz.: marriage, seisin of the husband, and his death. 4 Kent, Comm. 36.

The marriage must be a legal one; though, if voidable and not void, she will have her dower unless it is dissolved in his lifetime. 14 Miss. 308; Coke, Litt. 33 *a;* Lambert, Dow. 14; 1 Cruise, Dig. 164. As to the legality of marriages, see Bishop, Marr. & Div.

The husband must have been seised in the premises of an estate of inheritance at some time during the coverture. It may not be an actual seisin: a seisin in law with the right of immediate corporeal seisin is sufficient. 22 Pick. Mass. 283; 7 Mass. 253; 39 Me. 25; 1 Paige, Ch. N. Y. 635; 2 Serg. & R. Penn. 554; 1 Cruise, Dig. 166. It is not necessary that the seisin of the husband should be a rightful one. The widow of a disseisor may have dower against all who have not the rightful seisin. Park, Dow. 37; 4 Dane, Abr. 668.

So, although the estate is a defeasible one, provided it is one of inheritance, she may claim her dower until it is defeated. Coke, Litt. 241; 3 Halst. N. J. 241; 10 Coke, 95; Seymour's case; Lambert, Dow. 19.

The seisin is not required to remain in the husband any particular length of time. It is sufficient if he is seised but an instant to his own benefit and use, 11 Rich. Eq. So. C. 417; 14 Me. 290; 37 *id.* 508; 2 Blackstone, Comm. 132; but a mere instantaneous seisin for some other purpose than proprietorship will not give the wife dower. 14 Me. 290; 4 Miss. 369; 1 Johns. Cas. N. Y. 95; 27 Ala. N. S. 578; 15 Vt. 39; 2 Gill & J. Md. 318; 6 Metc. Mass. 475; 1 Atk. Ch. 442.

Where he purchases land and gives a mortgage at the same time to secure the purchase-money, such incumbrance takes precedence of his wife's dower. 15 Johns. N. Y. 458; 12 Serg. & R. Penn. 18; 4 Mass. 566; 5 N. H. 479; 10 *id.* 500; 7 Halst. N. J. 52; 1 Bay, So. C. 312; 37 Me. 11; 2 Hill, Ch. So. C. 260; 3 Cush. Mass. 551.

For the character of the seisin requisite to give dower in equitable estates, see 1 Washburn, Real Prop. 179.

The death of the husband. 1 Cruise, Dig. 168. What was known as civil death in England did not give the wife right of dower. 2 Crabb, Real Prop. 130. Imprisonment for life is declared civil death in some of the states. Mo. Rev. Stat. (1855) 642.

8. *How dower may be prevented or defeated.* At common law, *alienage* on the part of the husband or wife prevented dower from attaching. 2 Blackstone, Comm. 131; 1 Cow. N. Y. 89; 16 Wend. N. Y. 617; 2 Mo. 32. This disability is partially done away with in England, 7 & 8 Vict. c. 66, and is almost wholly abolished in the United States.

It is well established that the wife's dower is defeated whenever the seisin of her husband is defeated by a paramount title. Coke, Litt. 240 *b;* 4 Kent, Comm. 48.

The foreclosure of a mortgage given by the husband before marriage, or by the wife and husband after marriage, will defeat her right of dower. 15 Johns. N. Y. 458; 4 Edw. Ch. N. Y. 678; 12 Serg. & R. Penn. 18; 1 Ind.

527; 19 Miss. 164; 2 Rob. Va. 384; 8 Blackf. Ind. 174; 4 Harr. Del. 111. Like force would be given to a vendor's lien or mortgage for the purchase-money, or to a judgment lien outstanding at the time of marriage.

Her right to dower in the estate which she has joined with her husband in mortgaging is good against every one but the mortgagee. 3 Miss. 692; 18 Ohio St. 567; 14 Pick. Mass. 98; 1 Metc. Mass. 390; 5 N. H. 479; 29 *id.* 564; 37 Me. 509. The same is true in regard to an estate mortgaged by her husband before coverture. 3 Pick. Mass. 475; 5 *id.* 146; 14 *id.* 98. In neither case would the husband have the right to cut off her claim for dower by a release to the mortgagee, or an assignment of his equity of redemption. 5 Johns. Ch. N. Y. 452, 482; 17 Mass. 564; 2 Pick. Mass. 517; 5 *id.* 146; 14 *id.* 98; 2 Hill, Ch. So. C. 252; 8 Humphr. Tenn. 713; 1 Rand. Va. 344; 34 Me. 50; 2 Blackf. Ind. 262; 2 Halst. N. J. 392. As to a purchase and mortgage for the purchase-money before marriage, in which the husband releases the equity of redemption after marriage, see 6 Cow. N. Y. 316.

9. An agreement on the part of the husband to convey before dower attaches, if enforced, will extinguish her claim. 4 Kent, Comm. 50; 4 Hen. & M. Va. 376.

Dower will not be defeated by the determination of the estate by natural limitation: as, if the tenant in fee dies without heirs, or the tenant in tail. 8 Coke, 34; Park, Dow. 82, 157; 4 Kent, Comm. 49; 12 B. Monr. Ky. 73.

Whether it will be defeated by a conditional limitation by way of executory devise or shifting use, is not yet fully settled. Coke, Litt. 241 *a*, Butler's note, 170; Sugden, Pow. 333; Park, Dow. 168–186; 3 Bos. & P. 652; 2 Atk. Ch. 47; 1 Leon. 167. But it seems that the weight of American authority is in favor of sustaining dower out of such estates. 9 Penn. St. 190. See 1 Washburn, Real Prop. 216.

Dower will be defeated by operation of a collateral limitation: as, in the case of an estate to a man and his heirs so long as a tree shall stand, and the tree dies. 3 Preston, Abstr. 373; Park, Dow. 163; 4 Kent, Comm. 49.

In some states it will be defeated by a sale on execution for the debts of the husband. 5 Gill, Md. 94; 12 Serg. & R. Penn. 18; 8 Penn. St. 120; 1 Humphr. Tenn. 1; 11 Mo. 204; 19 *id.* 621; 3 Dev. No. C. 3. In Missouri it is defeated by a sale in partition. 22 Mo. 202. See 22 Wend. N. Y. 498; 2 Edw. Ch. N. Y. 577; 3 *id.* 500.

It is defeated by a sale for the payment of taxes. 8 Ohio St. 430.

It is also defeated by exercise of the right of eminent domain during the life of the husband. Nor has the widow the right of compensation for such taking. The same is true of land dedicated by her husband to public use. 2 Ohio, 25; 3 Ohio St. 24; 4 Sandf. N. Y. 456; 9 N. Y. 110.

10. *How dower may be barred.* *A divorce from the bonds of matrimony* was at common law a bar to dower, 2 Blackstone, Comm. 130; 4 Kent, Comm. 54; 4 Barb. N. Y. 192; but the woman's right to dower or something equivalent to it is reserved by statutes in most of the states, if she is the innocent party. Bishop, Marr. & Div. § 663; 6 Du. N. Y. 102.

By the early statute of Westminster 2d, a wife who eloped and lived in adultery with another man forfeited her dower-right. This provision has been re-enacted in several of the states, 9 Mo. 555; Mo. Rev. Stat. 1855, 672, and recognized as common law in others. 2 Brock. Va. 256; 3 N. H. 41; 13 Ired. No. C. 361; 4 Dane, Abr. 676: *contra*, 24 Wend. N. Y. 193.

The widow of a convicted traitor could not recover dower, 2 Blackstone, Comm. 130, 131; but this principle is not recognized in this country. Williams, Real Prop. 103, n.

Nor does she in this country, as at common law, forfeit her dower by conveying in fee the estate assigned to her. 4 Kent, Comm. 82; Williams, Real Prop. 121, 125, n.; 1 B. Monr. Ky. 88.

The most common mode formerly of barring dower was by jointure. 1 Washburn, Real Prop. 217; 14 Gratt. Va. 518; 8 Mo. 22; 19 *id.* 469; 23 *id.* 561; 14 Ohio St. 610; 8 Conn. 79.

Now it is usually done by joining with her husband in the act of conveying the estate. Once this was done by levying a fine, or suffering a recovery, 4 Kent, Comm. 51; 2 Blackstone, Comm. 137; now by deed executed in concurrence with her husband and acknowledged in the form required by statute, Williams, Real Prop. 189, which latter is the mode prevailing in the United States.

11. The husband must usually join in the act. 5 B. Monr. Ky. 352; 3 Dan. Ky. 316; 19 Penn. St. 361; 3 Mass. 353; 8 Pick. Mass. 532; 6 Cush. Mass. 196; 14 Me. 432; 33 *id.* 396: *contra*, 2 N. H. 507.

She should be of age at the time. 2 J. J. Marsh. Ky. 359; 1 B. Monr. Ky. 76; 6 Leigh, Va. 9; 1 Barb. N. Y. 399; 16 Wend. N. Y. 617; 8 Miss. 437; 10 Ohio St. 127.

Words of grant will be sufficient although no reference is made in the deed to dower *eo nomine*. 12 How. 256; 16 Ohio St. 236.

In most of the states her deed must be acknowledged, and that, too, in the form pointed out by statute, 6 Ohio St. 510; 2 Binn. Penn. 341; 1 Bail. So. C. 421; 1 Blackf. Ind. 379; which must appear in the certificate. 13 Barb. N. Y. 50.

She cannot release her dower by parol. See 5 T. B. Monr. Ky. 57; 3 Zabr. N. J. 62. A parol sale of lands in which the husband delivers possession does not exclude dower. 3 Sneed, Tenn. 316.

It has been held that she may bar her claim for dower by her own acts operating by way of estoppel. 2 Ohio, 506; 1 Rand. Va. 344; 2 Ohio St. 511; 4 Paige, Ch. N. Y. 94; 12 Serg. & R. Penn. 18; 8 Penn. St. 199; 1 Ind. 354; 5 Gill, Md. 94. See 22 Ala. N. s. 104;

26 *id.* 547; 2 Const. So. C. 59; 8 Penn. St. 359; 1 Rich. Eq. So. C. 222.

A release of dower has been presumed after a long lapse of time. 4 N. H. 321; 3 Yeates, Penn. 507.

At common law there was no limitation to the claim for dower. 4 Kent, Comm. 70; Park, Dow. 311. As to the statutes in the different states, see 1 Washburn, Real Prop. 217.

Upon the doctrine of *dos de dote*, see 1 Washburn, Real Prop. 209.

In some states she has the right to elect to take half of the husband's estate in lieu of dower under certain contingencies. 28 Mo. 293–300.

It seems that a contract to marry on condition that the wife should receive no portion of the husband's lands may be valid. 9 Rich. Eq. So. C. 434.

12. *How and by whom dower may be assigned.* Her right to have dower set out to her accrues immediately upon the death of her husband; but until it is assigned she has no right to any specific part of the estate. 2 Blackstone, Comm. 139. She was allowed by Magna Charta to occupy the principal mansion of her husband for forty days after his death, if it was on dowable lands. This right is variously recognized in the states. Mo. Rev. Stat. (1855) 672; 2 Mo. 163; 16 Ala. N. S. 148; 20 *id.* 662; 7 T. B. Monr. Ky. 337; 5 Conn. 462; 1 Washburn, Real Prop. 222, note. In Missouri and several other states, she may remain in possession of and enjoy the principal mansion-house and messuages thereto belonging till dower has been assigned. 5 T. B. Monr. Ky. 561; 4 Blackf. Ind. 331. This makes her tenant in common with the heir to the extent of her right of dower; and an assignment only works a severance of the tenancy. 4 Kent, Comm. 62; 2 Mo. 163.

There were two modes of assigning dower: one by "common right," where the assignment was by legal process; the other "against common right," which rests upon the widow's assent and agreement.

13. Dower of "common right" must be assigned by metes and bounds, where this is possible, unless the parties agree to a different form. 2 Penn. N. J. 521; 1 Rolle, Abr. 683; Style, 276; Perkins, 407.

If assigned "against common right," it must be by indenture to which she is a party. Coke, Litt. 34 *b*; 1 Pick. Mass. 189, 314; 1 Roper, Husb. & W. 410; 1 Bright, Husb. & W. 377.

Where assigned of common right, it must be unconditional and absolute, Coke, Litt. 34 *b*, n. 217; 1 Rolle, Abr. 682; and for her life. 1 Bright, Husb. & W. 379.

Where it is assigned not by legal process, it must be by the tenant of the freehold. Coke, Litt. 35 *a*. It may be done by an infant, 2 Blackstone, Comm. 136; 1 Pick. Mass. 314; 2 Ind. 336; or by the guardian of the heir. 2 Blackstone, Comm. 136; 37 Me. 509.

As between the widow and heir, she takes her dower according to the value of the property at the time of the assignment. 5 Serg. & R. Penn. 290; 4 Kent, Comm. 67–69; 4 Miss. 360; 15 Me. 371; 2 Harr. Del. 336; 13 Ill. 483; 9 Mo. 237.

14. As between the widow and the husband's alienee, she takes her dower according to the value at the time of the alienation. 6 Johns. Ch. N. Y. 258; 2 Edw. Ch. N. Y. 577; 4 Leigh, Va. 498. This was the ancient and well-established rule. 4 Kent, Comm. 65; 2 Johns. N. Y. 484; 9 Mass. 218; 3 Mas. C. C. 347. But in this country the rule in respect to the alienee seems to be that if the land has been enhanced in value by his labor and improvements, the widow shall not share in these, 5 Serg. & R. Penn. 289; 9 Mass. 218; 3 Mas. C. C. 347; 4 Leigh, Va. 498; 2 Blackf. Ind. 223; 4 Miss. 360; 10 Ohio St. 498; 16 Me. 80; 9 Ala. N. S. 901; 10 Md. 746; 13 Ill. 483; if it has been enhanced by extraneous circumstances, such as the rise and improvement of property in the neighborhood, she is to have the full benefit of this. 5 Blackf. Ind. 406; 3 Mas. C. C. 375; 6 McLean, C. C. 422; 5 Call, Va. 433; 1 Md. Ch. Dec. 452; Williams, Real Prop. 191, note.

There seems to be no remedy for her now in either country where the land has deteriorated in value by the waste and mismanagement of the alienee or by extraneous circumstances, 10 Mo. 746; 5 Serg. & R. Penn. 290; 3 Mas. C. C. 368; 5 Blackf. Ind. 406; 1 Md. Ch. Dec. 452; but she must be content to take her dower in the property as it was at the time of her husband's death, when her right first became consummate. 1 Washburn, Real Prop. 239.

As to the remedies afforded both by law and equity for the enforcement of dower, see 1 Washburn, Real Prop. 226.

15. *Nature of the estate in dower.* Until the death of her husband, the wife's right of dower is not an interest in real estate of which value can be predicated. 9 N. Y. 110. And although on the death of her husband this right becomes consummate, it remains a chose in action till assignment. 4 Kent, Comm. 61; 1 Barb. N. Y. 500; 5 *id.* 438; 32 Me. 424; 2 Cow. N. Y. 651; 5 J. J. Marsh. Ky. 12; 10 Mo. 746.

Until assignment, she has no estate which she can convey or which can be taken on execution for her debts. 2 Keen, 527; 1 Barb. Ch. N. Y. 500; 4 Paige, Ch. N. Y. 448; 9 Miss. 489; 1 Dev. & B. No. C. 437; 14 Mass. 378: *contra*, 10 Ala. N. S. 900.

But where she does sell or assign this right of action, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit. 4 Rich. So. C. 516; 10 Ala. N. S. 900; 7 Ired. Eq. No. C. 152.

She can release her claim to the one who is in possession of the lands, or to whom she stands in privity of estate. 11 Ill. 384; 13 *id.* 483; 17 Johns. N. Y. 167; 32 Me. 424; Park, Dow. 335; 32 Ala. N. S. 404.

But as soon as the premises have been set out and assigned to her, and she has entered

upon them, the freehold vests in her by virtue of her husband's seisin. Coke, Litt. 239 *a*; 4 Mass. 384; 6 N. Y. 394; 4 Dev. & B. No. C. 442.

Her estate is a continuation of her husband's by appointment of the law. 1 Pick. Mass. 189; 4 Me. 67; Park, Dow. 340. See Scribner, Dower (1864).

DOWRESS. A woman entitled to dower. See DOWER

DOWRY. Formerly applied to mean that which a woman brings to her husband in marriage: this is now called a portion. This word is sometimes confounded with dower. See Coke, Litt. 31; La. Civ. Code, art. 2317; Dig. 23. 3. 76; Code, 5. 12. 20.

DRAGOMAN. An interpreter employed in the east, and particularly at the Turkish court.

The act of congress of August 26, 1842, c. 201, s. 8, declares that it shall not be lawful for the president of the United States to allow a dragoman at Constantinople a salary of more than two thousand five hundred dollars.

DRAIN. To conduct water from one place to another, for the purpose of drying the former.

The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. See 3 Kent, Comm. 436; 7 Mann. & G. 354; Washburn, Easements, Index.

DRAW. To drag (on a hurdle) to the place of execution. Anciently no hurdle was allowed, but the criminal was actually dragged along the road to the place of execution. A part of the ancient punishment of traitors was the being thus drawn. 4 Sharswood, Blackst. Comm. 92, 377.

DRAWBACK. An allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. For the various acts of congress which regulate drawbacks, see Brightly, Dig. U. S. Laws.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned. See BILL OF EXCHANGE

DRAWER. The party who makes a bill of exchange.

DRAWING. Every person who applies for a patent for an invention is required, by the act of congress of July 4, 1836, sec. 6, to furnish duplicate drawings illustrative of that invention: provided from the nature of the case the invention can be so illustrated. One of these drawings is to be kept on file in the patent-office, the other is intended to be attached to the patent when issued. Drawings are also required on application for a patent for a design. See PATENTS.

DRAWLATCHES. Thieves; robbers. Cowel.

DREIT DREIT. Droit droit. Double right. A union of the right of possession and the right of property. 2 Sharswood, Blackst. Comm. 199.

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. 279; Selwyn, Nisi P. 1037; Woolrych, Ways, 1. The term is in use in Rhode Island. 2 Hilliard, Abr. Prop. 33.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another.

Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbor's land. 1 Rolle, Abr. 107. See 3 Kent, Comm. 436; Dig. 43. 23. 4, 6; 11 Ad. & E. 40.

DRIVER. One employed in conducting a coach, carriage, wagon, or other vehicle, with horses, mules, or other animals.

2. Frequent accidents occur in consequence of the neglect or want of skill of drivers of public stage-coaches, for which the employers are responsible.

3. The law requires that a driver should possess reasonable skill and be of good habits for the journey: if, therefore, he is not acquainted with the road he undertakes to drive, 3 Bingh. 314, 321; drives with reins so loose that he cannot govern his horses, 2 Esp. 533; does not give notice of any serious danger on the road, 1 Campb. 67; takes the wrong side of the road, 4 Esp. 273; incautiously comes in collision with another carriage, 1 Stark. 423; 1 Campb. 167; or does not exercise a sound and reasonable discretion in travelling on the road to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible. 2 Stark. 37; 2 Esp. 533; 11 Mass. 57; 6 Term, 659; 1 East, 106; 4 Barnew. & Ald. 590; 2 McLean, C. C. 157. See COMMON CARRIERS OF PASSENGERS.

DROF-LAND. (*Drift-land.*) A yearly payment made by some to their landlords for driving their cattle through the manor to fairs and markets. Cowel.

DROIT (Fr.). **In French Law.** Law. The whole body of law, written and unwritten.

A right. No law exists without a duty. Toullier, n. 96; Pothier, *Droit.*

In English Law. Right. Coke, Litt. 158.

A person was said to have *droit droit, plurimum juris*, and *plurimum possessionis*, when he had the freehold, the fee, and the property in him. Crabb, Hist. Eng. Law, 406.

DROIT D'ACCESSION. In French Law. That property which is acquired by making a new species out of the material of another. *Modus acquirandi quo quis ex alienâ materiâ suo nomine novam speciem faciens bona fide ejus speciei dominium consequitur.*

It is a rule of the civil law that if the thing can be reduced to the former matter it belongs to the owner of the matter, *e.g.* a statue made of gold; but if it cannot so be reduced it belongs to the person who made it, *e.g.* a statue made of marble. This subject is treated of in the Code Civil de Napoléon, art. 565, 577; Merlin, Répert. *Accession;* Malleville's Discussion, art. 565. See ACCESSION.

DROITS OF ADMIRALTY. Rights claimed by the government over the property of an enemy. In England, it has been usual in maritime wars for the government to seize and condemn, as droits of admiralty, the property of an enemy found in her ports at the breaking out of hostilities. 1 C. Rob. Adm. 196; 13 Ves. Ch. 71; 1 Edw. Adm. 60; 3 Bos. & P. 191.

DROIT D'AUBAINE. A rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased.

The word *aubaine* signifies *hospes loci, peregrinus advena*, a stranger. It is derived, according to some, from *alibi*, elsewhere, *natus*, born, from which the word *albinus* is said to be formed. Others, as Cujas, derive the word directly from *advena*, by which word aubains or strangers are designated in the capitularies of Charlemagne. See DuCange; Trévoux, Dict. See AUBAINE.

DROIT-CLOSE. The name of an ancient writ directed to the lord of ancient demesne, and which lies for those tenants in ancient demesne who hold their lands and tenements by charter in fee-simple, in fee-tail, for life, or in dower. Fitzherbert, Nat. Brev. 23.

DROITURAL. What belongs of right; relating to right: as, real actions are either droitural or possessory,—*droitural* when the plaintiff seeks to recover the property. Finch, Law. 257.

DROVE-ROAD. A road for driving cattle. A right of way for carriages does not involve necessarily a right to drive cattle, or an easement of drove-road.

DRUGGIST. One who deals in medicinal substances, vegetable, animal, or mineral, uncompounded.

In America the term druggist is used synonymously with apothecary, although, strictly speaking, a druggist is one who deals in medicinal substances, vegetable, animal, or mineral, before being compounded, which composition and combination are really the business of the apothecary. The term is here used in its double sense. In England an apothecary is a sub-physician, or privileged practitioner. He is the ordinary medical man, or family medical attendant, in that country.

The utmost care is required of those who prepare medicines or sell drugs, as the least carelessness may prove injurious to health or fatal in its results. Any mistake made by the druggist, if the result of ignorance or carelessness, renders him liable to the injured party. 13 B. Monr. Ky. 219; 7 N. Y. 397. An apothecary, or his apprentice, if guilty of criminal negligence, and fatal results follow, may be convicted of manslaughter. 1 Lew. Cr. Cas. 169.

DRUNKENNESS. In Medical Jurisprudence. The condition of a man whose mind is affected by the immediate use of intoxicating drinks.

2. This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility. In the popular phrase, the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations. In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor. In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misconceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency. Some of the intermediate stages may be easily recognized; but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small. The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

3. The habitual abuse of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned. The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others have directed them. In others it produces a permanent mental derangement, which, if the person continues to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking—may coexist; but it is no less necessary to distinguish them from each other, because their legal consequences may be very different. Moved by the latter, a person goes into the street and abuses or assaults his neighbors; moved by the former, the same person makes his will, and cuts off those who have the strongest claims upon his bounty with a shilling. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source.

4. Another remarkable form of drunkenness is called dipsomania. Rather suddenly, and perhaps without much preliminary indulgence, a person manifests an insatiable thirst for strong drink, which no considerations of propriety or prudence can induce him to control. He generally retires to some secluded place, and there, during a period of a few days or weeks, he swallows enormous quantities of liquor, until his stomach refuses to bear any more. Vomiting succeeds, followed by sickness, depression, and disgust for all intoxicating drinks. This affection is often periodical, the paroxysms recurring at periods varying from three months to several years. Sometimes the indulgence is more continuous and limited, sufficient, however, to derange the mind, without producing sickness, and equally beyond control. Dipsomania may result from moral causes, such as anxiety, dis-

appointment, grief, sense of responsibility; or physical, consisting chiefly of some anomalous condition of the stomach. Esquirol, Mal. Men. ii. 73; Marc, de la Folie, ii. 605; Ray, Med. Jur. 497; Macnish, Anatomy of Drunkenness, chap. 14.

5. The common law shows but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It has never considered mere drunkenness alone as a sufficient reason for invalidating any act. When carried so far as to deprive the party of all consciousness, strong presumption of fraud is raised; and on that ground courts may interfere. 1 Ves. Ch. 19; 18 *id.* 12. Drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will. Shelford, Lun. 274, 304. In actions for torts, drunkenness is not regarded as a reason for mitigating damages. Coke, Litt. 247 *a*. Courts of equity, too, have declined to interfere in favor of parties pleading intoxication in the performance of some civil act. 1 Story, Eq. § 232.

6. In England, drunkenness has never been admitted in extenuation for any offences committed under its immediate influence. "A drunkard who is *voluntarius demo*," says Coke, "hath no privilege thereby: whatever ill or hurt he doth, his drunkenness doth aggravate it." Lawyers have occasionally shown a disposition to distinguish between the guilt of one who commits an offence unconsciously, though in consequence of vicious indulgence, and that of another who is actuated by malice aforethought and acts deliberately and coolly. In Pennsylvania, as early as 1794, it was remarked by the courts on one occasion that, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design. Add. Penn. 257. In 1819, Justice Holroyd decided that the fact of drunkenness might be taken into consideration in determining the question whether the act was premeditated or done only with sudden heat and impulse. Rex *v.* Grundley, 1 Russell, Crimes, 8. This particular decision, however, was, a few years afterwards, pronounced to be not correct law. 7 Carr. & P. 145. Again, it was held that drunkenness, by rendering the party more excitable under provocation, might be taken into consideration in determining the sufficiency of the provocation. 7 Carr. & P. 817. More recently (1849), in Rex *v.* Monkhouse, 4 Cox, Cr. Cas. 55, it was declared that there might exist a state of drunkenness which takes away the power of forming any specific intention.

7. In this country, courts have gone still further in regarding drunkenness as incompatible with some of the elements of crime. It has been held, where murder was defined to be wilful, deliberate, malicious, and premeditated killing, that the existence of these attributes is not compatible with drunkenness. 13 Ala. N. S. 413; 4 Humphr. Tenn. 136; 9 *id.* 570; 11 *id.* 154; 1 Speers, So. C. 384.

It has been already stated that strong drink sometimes, in consequence of injury of the head, or some peculiar constitutional susceptibility, produces a paroxysm of frenzy immediately, under the influence of which the person commits a criminal act. Cases of this kind have been too seldom tried to make it quite certain how they would be regarded in law. It is probable, however, that the plea of insanity would be deprived of its validity by the fact that, sane or insane, the party was confessedly drunk. In a case where injury of the head had been followed by occasional paroxysms of insanity, in one of which the prisoner killed his wife, it appeared that he had just been drinking, and that intoxication had sometimes brought on the paroxysms, though they were not always preceded by drinking. The court ruled that if the mental disturbance were produced by intoxication it was not a valid defence; and accordingly the prisoner was convicted and executed. Trial of M'Donough, Ray, Med. Jur. 514. The principle is that if a person voluntarily deprives himself of reason, he can claim no exemption from the ordinary consequences of crime. 3 Paris & Fonbl. 39. Milder views have been advocated by writers of note, and they will sooner or later, no doubt, appear in judicial decisions. Mr. Alison, referring to the class of cases just mentioned, calls it inhuman to visit them with the extreme punishment otherwise suitable. Prin. of Crim. Law of Scotland, 654. Dipsomania would hardly be considered, in the present state of judicial opinion, a valid defence in a capital case. In minor offences, especially if attended by extenuating circumstances, it might be more favorably regarded.

8. The law does recognize two kinds of inculpable drunkenness, viz.: that which is produced by the "unskilfulness of the physician," and that which is produced by the "contrivance of enemies." Russell, Crimes, 8. To these we should be disposed to add that above described, where the party drinks no more liquor than he has habitually used without being intoxicated, but which exerts an unusually potent effect on the brain, in consequence of certain pathological conditions. See 5 Gray, Mass. 86; 11 Cush. Mass. 479; 1 Bennett & H. Lead. Crim. Cas. 113–124.

DRY EXCHANGE. A term invented for disguising and covering usury,—in which something was pretended to pass on both sides, when in truth nothing passed on one side; whence it was called *dry*. Stat. 3 Hen. VII. c. 5; Wolffius, Ins. Nat. § 657

DRY RENT. Rent-seck; a rent reserved without a clause of distress.

DUCAT. The name of a foreign coin.

The ducat, or sequin, was originally a gold coin of the middle ages, apparently a descendant from the bezant of the Greek-Roman Empire. For many centuries it constituted the principal international currency, being intended, or supposed, to be made of pure gold, though subsequently settled at a basis a little below. It is now nearly obsolete

in every part of the world. Its average value is about $2.26 of our money. It is said they appeared earliest in Venice, and that they bore the following motto: *Sit tibi, Christe, datus, quem tu regis, iste Ducatus*,—whence the name ducat.

2. The silver ducat was formerly a coin of Naples, weighing three hundred and forty-eight grains, eight hundred and forty-two thousandths fine; consequent value, in our money, about eighty-one cents; but it now exists only as a money of account.

DUCES TECUM LICET LANGUIDUS. A writ directing the sheriff to bring a person whom he returned as so sick that he could not be brought without endangering his life. Blount; Cowel. The writ is now obsolete. See SUBPŒNA DUCES TECUM.

DUE. Just and proper.

A due presentment and demand of payment must be made. See 4 Rawle, Penn. 307; 3 Leigh, Va. 389; 3 Cranch, 300.

What ought to be paid; what may be demanded.

It differs from owing in this, that sometimes what is owing is not due: a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not due until the thirty days have elapsed.

Bills of exchange and promissory notes are not due until the end of the three days of grace, unless the last of these days happen to fall on a Sunday or other holiday, when it becomes due on the Saturday before, and not on the Monday following. Story, Prom. Notes, § 440; 1 Bell, Comm. 410; Story, Bills, § 233; 2 Hill, N. Y. 587; 14 Me. 264.

DUE-BILL. An acknowledgment of a debt in writing is so called. This instrument differs from a promissory note in many particulars: it is not payable to order, nor is it assignable by mere indorsement. See IOU; PROMISSORY NOTES.

DUE PROCESS OF LAW. Law in its regular course of administration through courts of justice. 3 Story, Const. 264, 661; 18 How. 272; 13 N. Y. 378.

This term, which occurs in the amendments to the United States constitution and in the constitutions of several of the states, is considered by Coke as equivalent to the phrase "law of the land" (used in Magna Charta, c. 29), and is said by him to denote "indictment or presentment of good and lawful men." Coke, 2d Inst. 50. The full significance of the clause "law of the land" is said by *Ruffin*, C. J., to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land. 4 Dev. No. C. 15. For different definitions given to similar provisions occurring in the various state constitutions, see 19 Wend. N. Y. 659; 4 Hill, N. Y. 145; 2 Speers, So. C. 767; 2 Yerg. Tenn. 554; 10 *id.* 71; 3 Humphr. Tenn. 483. And see further, on this subject, Sullivan, Lect. 402; Comyns, Dig. *Imprisonment* (H 4); 2 Kent, Comm. 13; 1 Reeve, Hist. Eng. Law, 249; 12 N. Y. 202; 13 *id.* 378; 18 *id.* 199; R. M. Charlt. Ga. 302; 1 Curt. C. C. 311; 11 How. 437; 13 *id.* 142

DUELLING. The fighting of two persons one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

When one of the parties is killed, the survivor is guilty of murder. 1 Russell, Crimes, 443; 1 Yerg. Tenn. 228. Fighting a duel, even where there is no fatal result, is of itself a misdemeanor. See 2 Comyns, Dig. 252; Roscoe, Crim. Ev. 610; 2 Chitty, Crim. Law, 728, 848; Coke, 3d Inst. 157; 3 East, 581; 6 *id.* 464; Hawkins, Pl. Cr. b. 1, c. 31, s. 21; 3 Bulstr. 171; Const. So. C. 167; 2 Ala. 506; 20 Johns. N. Y. 457; 3 Cow. N. Y. 686. For cases of mutual combat upon a sudden quarrel, see 1 Russell, Crimes, 495; 2 Bishop, Crim. Law, § 268.

DUELLUM. Trial by battle. Judicial combat. Spelman, Gloss.

DUKE. The title given to those who are in the highest rank of nobility in England.

DUM FUIT IN PRISONA (L. Lat.). **In English Law.** A writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Coke, 2d Inst. 482.

DUM FUIT INFRA ÆTATEM (Lat.). The name of a writ which lies when an infant has made a feoffment in fee of his lands or for life, or a gift in tail.

It may be sued out by him after he comes of full age, and not before; but in the mean time he may enter, and his entry remits him to his ancestor's rights. Fitzherbert, Nat. Brev. 192; Coke, Litt. 247, 337.

DUM NON FUIT COMPOS MENTIS (Lat.). The name of a writ which the heirs of a person who was *non compos mentis*, and who aliened his lands, might have sued out to restore him to his rights.

DUM SOLA (Lat. while single or unmarried). A phrase applied to single women, to denote that something has been done, or may be done, while the woman is or was unmarried. Thus, when a judgment is rendered against a woman *dum sola*, and afterwards she marries, the *scire facias* to revive the judgment must be against both husband and wife.

DUMB. One who cannot speak; a person who is mute.

DUMB-BIDDING. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article is written, and placed by the owner under a candlestick, or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb-bidding. Babington, Auct. 44.

DUNGEON. A cell under ground; a place in a prison built under ground, dark, or but indifferently lighted. In the prisons of the United States there are few or no dungeons.

DUNNAGE. Pieces of wood placed against the sides and bottom of the hold of a vessel, to preserve the cargo from the effect of leakage, according to its nature and quality. Abbott, Shipp. 227.

DUODECIMA MANUS (Lat.). Twelve hands. The oaths of twelve men, including himself, by whom the defendant was allowed to make his law. 3 Sharswood, Blackst. Comm. 343.

DUPLEX QUERELA (Lat.). **In Ecclesiastical Law.** A complaint in the nature of an appeal from the ordinary to his next immediate superior for delaying or refusing to do justice in some ecclesiastical cause. 3 Blackstone, Comm. 247; Cowel; Jacobs.

DUPLEX VALOR MARITAGII (Lat. double the value of a marriage). Guardians in chivalry had the privilege of proposing a marriage for their infant wards, provided it were done without disparagement, and if the wards married without the guardian's consent they were liable to forfeit double the value of the marriage. Coke, Litt. 82 *b*; 2 Sharswood, Blackst. Comm. 70.

DUPLICATE (Lat. *duplex*, double). The double of any thing. A document which is essentially the same as some other instrument. 7 Mann. & G. 93.

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example, in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. When only one of the duplicates is in the possession of the testator, the destruction of that is a strong presumption of an intent to revoke both; but if he possessed both, and destroys but one, it is weaker; when he alters one, and afterwards destroys it, retaining the other entire, it has been held that the intention was to revoke both. 1 P. Will. Ch. 346; 13 Ves. Ch. 310. But that seems to be doubted. 3 Hagg. Eccl. 548.

In English Law. The certificate of discharge given to an insolvent debtor who takes the benefit of the act for the relief of insolvent debtors.

DUPLICATIO (Lat. a doubling). The defendant's second answer; that is, the answer to the plaintiff's replication.

DUPLICATUM JUS (Lat. a twofold or double right). Words which signify the same as *dreit dreit*, or *droit droit*, and which are applied to a writ of right, patent, and such other writs of right as are of the same nature, and do as it were flow from it as the writ of right. Booth, Real Act. 87.

DUPLICITY. In Pleading. (Lat. *duplex*, twofold; double.) The union of more than one cause of action in one court in a writ, or more than one defence in one place, or more than a single breach in a replication. 1 Woodb. & M. C. C. 381.

2. The union of several facts constituting together but one cause of action, or one defence, or one breach, does not constitute duplicity. 1 Woodb. & M. C. C. 381; 10 Vt. 353; 3 Harr. & M'H. Md. 455; 2 Blackf. Ind. 85; 4 Zabr. N. J. 333; 16 Ill. 133; 1 Dev. No. C. 397; 1 M'Cord, So. C. 464; 10 Me. 83; 14 Pick. Mass. 156; 33 Miss. 474; 4 Ind. 109. It must be of causes on which the party relies, and not merely matter introduced in explanation. 28 Conn. 134; 14 Mass. 157. In trespass it is not duplicity to plead to part and justify or confess as to the residue. 17 Pick. Mass. 236. If only one defence be valid, the objection of duplicity is not sustained. 2 Blackf. Ind. 385; 14 Pick. Mass. 156.

3. It may exist in any part of the pleadings, declaration, 23 N. H. 415; 2 Harr. Del. 162, pleas, 4 McLean, C. C. 267; 2 Miss. 160, replication, 5 Blackf. Ind. 451; 4 Ill. 74; 6 Mo. 460, or subsequent pleadings, 24 N. H. 120; 4 McLean, C. C. 388; 1 Wash. C. C. 446; 8 Pick. Mass. 72; and was at common law a fatal defect, 20 Mo. 229; 23 N. H. 415, to be reached on special demurrer only. 18 Vt. 363; 10 Gratt. Va. 255; 13 Ark. 721; 1 Cush. Mass. 137; 5 Gill, Md. 94; 5 Blackf. Ind. 451. The rules against duplicity did not extend to dilatory pleas so as to prevent the use of the various classes in their proper order. Coke, Litt. 304 *a*; Stephen, Plead. App. n. 56.

Owing to the statutory changes in the forms of pleading, duplicity seems to be no longer a defect in many of the states of the United States, either in declarations, 8 Ark. 378, pleas, 1 Cush. Mass. 137; 7 J. J. Marsh, Ky. 335, or replications, 32 Mass. 104; 8 Ind. 96; though in some cases it is allowed only in the discretion of the court, for the furtherance of justice. 32 Mo. 185.

DUPLY. In Scotch Law. The defendant's answer to the plaintiff's replication. The same as *duplicatio*. Maclaurin, Forms of Pract. 127.

DURANTE ABSENTIA. See ADMINISTRATION.

DURANTE BENEPLACITO (Lat.). During good pleasure. The ancient tenure of English judges was *durante beneplacito*. 1 Sharswood, Blackst. Comm. 267, 342.

DURANTE MINORE ÆTATE (Lat.). During the minority.

During his minority an infant can enter into no contracts, except those for his benefit. If he should be appointed an executor, administration of the estate will be granted, *durante minore ætate*, to another person. 2 Bouvier, Inst. n. 1555.

DURANTE VIDUITATE (Lat.). During widowhood.

DURESS. Personal restraint, or fear of personal injury or imprisonment. 2 Metc. Ky. 445.

Duress of imprisonment exists where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond. 2 Bay, So. C. 211; 9 Johns. N. Y. 201; 10 Pet. 137. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or a deed, this is not by duress of im-

prisonment, and he is not at liberty to avoid it. Coke, 2d Inst. 482; 3 Caines, N. Y. 168; 6 Mass. 511; 1 Lev. 69; 1 Hen. & M. Va. 350; 17 Me. 338. Where the proceedings at law are a mere pretext, the instrument may be avoided. Al. 92; 1 Blackstone, Comm. 136.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon a sufficient reason. 1 Blackstone, Comm. 131. In this case, a man may avoid his own act. Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces:—for fear of *loss of life; of member; of mayhem; of imprisonment.* Coke, 2d Inst. 483; 2 Rolle, Abr. 124; Bacon, Abr. *Duress, Murder*, A; 2 Strange, 856; Foster, Cr. Law, 322; 2 Ld. Raym. 1578; Savigny, Dr. Rom. § 114.

It has been held that restraint of goods under circumstances of hardship will avoid a contract. 2 Bay, So. C. 211; 9 Johns. N. Y. 201; 10 Pet. 137. But see 2 Metc. Ky. 445; 2 Gall. C. C. 337.

The violence or threats must be such as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or fortune. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration.

Violence or threats are cause of nullity, not only where they are exercised on the contracting party, but when the wife, the husband, the descendants or ascendants, of the party are the object of them.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and the circumstances of the case, are of this description. See Norris Peake's Evid. 440, and the cases cited, also, 6 Mass. Rep. 506, for the general rule at common law.

But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it; and arrest without cause of action, or a demand of bail in an unreasonable sum, or threat of such proceeding, by this rule invalidate a contract made under their pressure.

All the above articles relate to cases where there may be some other motive besides the violence or threats for making the contract. When, however, there is no other cause for making the contract, any threats, even of slight injury, will invalidate it. *Id.* 1853.

See, generally, 2 Watts, Penn. 167; 1 Bail. So. C. 84; 6 Mass. 511; 6 N. H. 508; 2 Gall. C. C. 337.

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes, embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs*, or *imposts*. Story, Const. § 949. See, for the rate of duties payable on goods and merchandise, Brightly, U. S. Dig. Index.

DUTY. A human action which is exactly conformable to the laws which require us to obey them.

It differs from a legal obligation, because a duty cannot always be enforced by the law: it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so; we ought to love our neighbors, but no law obliges us to love them.

DWELLING-HOUSE. A building inhabited by man. A house usually occupied by the person there residing, and his family. The apartment, building, or cluster of buildings in which a man with his family resides. 1 Bishop, Crim. Law, § 165.

The importance of an exact signification for this word is often felt in criminal cases; and yet it is very difficult to frame an exact definition which will apply to all cases. It is said to be equivalent to mansion-house. 3 Serg. & R. Penn. 199; 4 Strobh. So. C. 372; 13 Bost. Law Rep. 157; 7 Mann. & G. 122. See 14 Mees. & W. Exch. 181; 4 C. B. 105; 4 Call, Va. 109.

It must be a permanent structure, 1 Hale, Pl. Cr. 557; 1 Russell, Crimes, Greaves ed. 798; must be inhabited at the time. 2 East, Pl. Cr. 496; 2 Leach, Cr. Cas. 1018, n.; 33 Me. 30; 26 Ala. N. S. 145; 10 Cush. Mass. 479; 18 Johns. N. Y. 115; 4 Call, Va. 109. It is sufficient if a part of the structure only be used for an abode. Russ. & R. 185; 2 Taunt. 339; 1 Mood. Cr. Cas. 248; 11 Metc. Mass. 295; 9 Tex. 42; 2 Bos. & P. 508; 27 Ala. N. S. 31. How far a building may be separate is a difficult question. See Russ. & R. Cr. Cas. 495; 10 Pick. Mass. 293; 4 C. B. 105; 1 Dev. No. C. 253; 3 Humphr. Tenn. 379; 1 Nott. & M'C. So. C. 583; 5 Leigh, Va. 751; 2 Park. Crim. Cas. N. Y. 23; 2 Carr. & K. 322; 6 Carr. & P. 407.

DYING DECLARATIONS. See DECLARATIONS.

DYING WITHOUT ISSUE. Not having issue living at the death of the decedent. 5 Paige, Ch. N. Y. 514. In England this is the signification, by statutes 7 Will. IV., 1 Vict. c. 26, § 29. See 2 Washburn, Real Prop. 362 *et seq.*

DYNASTY. A succession of kings in the same line or family.

DYSNOMY. Bad legislation; the enactment of bad laws.

DYSPEPSIA. A state of the stomach in which its functions are disturbed, without the presence of other diseases, or when, if other diseases are present, they are of minor importance. Dunglison, Med. Dict.

Dyspepsia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable, unless the complaint has become organic dyspepsia, or was of such a degree at the time of the insurance as by its excess to tend to shorten life. 4 Taunt. 763.

DYVOUR. **In Scotch Law.** A bankrupt.

DYVOUR'S HABIT. **In Scotch Law.** A habit which debtors who are set free on a *cessio bonorum* are obliged to wear, unless in the summons and process of *cessio* it be libelled, sustained, and proved that the bankruptcy proceeds from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade. Erskine, Pract. Scot. 4, 3, 13.

E.

E CONVERSO (Lat.). On the other hand; on the contrary.

E PLURIBUS UNUM (Lat. one from more). The motto of the United States coat of arms.

EAGLE. A gold coin of the United States, of the value of ten dollars.

It weighs two hundred and fifty-eight grains of standard fineness; that is to say, of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy, the alloy consisting of silver and copper. For proportion of alloy in gold coins of the United States since 1853, see HALF-EAGLE. For all sums whatever the eagle is a legal tender of payment for ten dollars. Act of Jan. 18, 1837, § 10; 5 U. S. Stat. at Large, 138.

EALDERMAN (Sax.). A Saxon title of honor. It was a mark of honor very widely applicable, the ealdermen being of various ranks. It is the same as alderman, which see.

EAR-MARK. A mark put upon a thing for the purpose of distinction. Money in a bag tied and labelled is said to have an ear-mark. 3 Maule & S. 575.

EAR-WITNESS. One who attests to things he has heard himself.

EARL. **In English Law.** A title of nobility next below a marquis and above a viscount.

Earls were anciently called *comites*, because they were wont *comitari regem*, to wait upon the king for counsel and advice. They were also called *shiremen*, because each earl had the civil government of a shire. After the Norman conquest they were called *counts*, whence the shires obtained the names of counties. They have now nothing to do with the government of counties, which has entirely devolved on the sheriff, the earl's deputy, or *vice-comes*.

EARL MARSHAL. An officer who formerly was of great repute in England. He held the court of chivalry alone as a court of honor, and in connection with the lord high constable as a court having criminal jurisdiction. 3 Blackstone, Comm. 68; 4 *id.* 467. The duties of the office now are restricted to the settlement of matters of form merely. It would appear, from similarity of duties and from the derivation of the title, to be a relic of the ancient office of alderman of all England. See ALDERMAN.

EARLDOM. The dignity or jurisdiction of an earl. The dignity only remains now, as the jurisdiction has been given over to the sheriff. 1 Blackstone, Comm. 339.

EARNEST. The payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract.

The effect of earnest is to bind the goods sold; and, upon their being paid for without default, the buyer is entitled to them. But, notwithstanding the earnest, the money must be paid upon taking away the goods, because no other time for payment is appointed; earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given, the vendor cannot sell the goods to another without a default in the vendee, and therefore, if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then, if he does not come, pay for the goods, and take them away in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. 1 Salk. 113; 2 Blackstone, Comm. 447; 2 Kent, Comm. 389; Ayliffe, Pand. 450; 3 Campb. 426.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washburn, Real Prop. 25.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. Termes de la Ley, *Easements;* Bell, Law Dict. (ed. 1838) *Easements, Servitude;* 1 Serg. & R. Penn. 298; 3 Barnew. & C. 339; 5 *id.* 221; 3 Bingh. 118; 2 M'Cord, So. C. 451; 3 *id.* 131, 194; 14 Mass. 49; 3 Pick. Mass. 408.

In the civil law, the land against which the privilege exists is called the servient tenement; its proprietor, the servient owner; he in whose favor it exists, the dominant owner; his land, the dominant tenement. And, as these rights are not personal and do not change with the persons who may own the respective estates, it is very common to

personify the estates as themselves owning or enjoying the easements. 4 Sandf. Ch. N. Y. 72; 3 Paige, Ch. N. Y. 254; 16 Pick. Mass. 522.

2. Easements have these essential qualities. There must be two tenements owned by several proprietors: the dominant, to which the privilege is attached; the servient, upon which it is imposed. Tudor, Lead. Cas. 108; 17 Mass. 443. Easements, strictly considered, exist only in favor of, and are imposed only on, corporeal property. 2 Washburn, Real Prop. 25. They confer no right to any profits arising from the servient tenement. 4 Sandf. Ch. N. Y. 72; 4 Pick. Mass. 145; 5 Ad. & E. 758; 30 Eng. L. & Eq. 189; 3 Nev. & P. 257. They are incorporeal. By the common law, they may be temporary; by the civil law, the cause must be perpetual. They impose no duty on the servient owner, except not to change his tenement to the prejudice or destruction of the privilege. Gale, Easem. 3d ed. 1–18; Washburn, Easem. Index.

3. Easements are as various as the exigences of domestic convenience or the purposes to which buildings and land may be applied.

The following attach to land as incidents or appurtenances, viz.: the right—

Of pasture on other land; of fishing in other waters; of taking game on other land; of way over other land; of taking wood, minerals, or other produce of the soil from other land; of receiving air, light, or heat from or over other land; of receiving or discharging water over, or having support to buildings from, other land, 3 Ell. B. & E. 655; of going on other land to clear a mill-stream, or repair its banks, or draw water from a spring there, or to do some other act not involving ownership; of carrying on an offensive trade, 2 Bingh. N. C. 134; 5 Metc. Mass. 8; of burying in a church, or a particular vault. Washburn, Easem.; N. Y. Civ. Code, pp. 149, 150; 8 Hou. L. Cas. 362; 3 Barnew. & Ad. 735; 11 Q. B. 666.

4. Some of these are affirmative or positive,—*i.e.* authorizing the commission of acts on the lands of another actually injurious to it: as, a right of way,—or negative, being only consequentially injurious: as, forbidding the owner from building to the obstruction of light to the dominant tenement. Tudor, Lead. Cas. 107; 2 Washburn, Real Prop. 26.

All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring actual and uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claimed, from which a grant is implied. A negative easement does not admit of possession; and, by the civil law, it cannot be acquired by prescription, and can only be proved by grant. Use, therefore, is not essential to its existence. Gale, Easem. 23, 81, 128; 2 Blackstone, Comm. 263; Bell, Law Dict. *Servitudes.*

In this country the use of windows for upwards of twenty years seems in several of the states, contrary to the English rule and conformable to the rule of the civil law, not to be evidence of a right to continue them as against an adjoining owner. See ANCIENT LIGHTS; 19 Wend. N. Y. 309; 2 Conn. 597; 10 Ala. N. S. 63; 6 Gray, Mass. 255; 26 Me. 436; 16 Ill. 217.

5. Easements are extinguished: by release; by merger, when the two tenements in respect of which they exist are united under the same title and to the same person; by necessity, as by a license to the servient owner to do some act inconsistent with its existence; by cessation of enjoyment, when acquired by prescription,—the non-user being evidence of a release where the abandonment has continued at least as long as the user from which the right arose. In some cases a shorter time will suffice. 2 Washburn, Real Prop. 56–60, 82–85, 453–456; Washburn, Easem. See, generally, 2 Washburn, Real Prop. 25; 3 Kent, Comm. 550; Cruise, Dig. tit. 31. c. 1. 9. 17; Gale, Easem.; Washburn, Easem. (1862).

EASTERN TERM. **In English Law.** One of the four terms of the courts. It is now a fixed term, beginning on the 15th of April and ending the 8th of May in every year. It was formerly a movable term.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day;* that is, that he be dismissed. Dane, Abr. Index.

EAVES-DROPPERS. **In Criminal Law.** Such persons as wait under walls or windows or the eaves of a house, to listen to discourses and thereupon to frame mischievous tales.

The common-law punishment for this offence is fine and finding sureties for good behavior. 4 Blackstone, Comm. 167; Dane, Abr. Index; 1 Russell, Crimes, 302; 2 Ov. Tenn. 108.

ECCHYMOSIS. **In Medical Jurisprudence.** Blackness. It is an extravasation of blood by rupture of capillary vessels, and hence it follows contusion; but it may exist, as in cases of scurvy and other morbid conditions, without the latter. Ryan, Med. Jur. 172.

ECCLESIA (Lat.). An assembly. A Christian assembly; a church. A place of religious worship. Spelman, Gloss.

In the civil law this word retains its classical meaning of an assembly of whatever character. DuCange; Calvinus, Lex.; Vicat. Voc. Jur.; Acts xix. 39. Ordinarily in the New Testament the word denotes a Christian assembly, and is rendered into English by the word *church.* It occurs twice in the gospels, Matt. xvi. 18, xviii. 17, but frequently in the other parts of the New Testament, beginning with Acts ii. 47. *Ecclesia* there never denotes the building, however, as its English equivalent *church* does. In the law, generally, the word is used to denote a place of religious worship. Spelman, Gloss. See CHURCH.

ECCLESIASTIC. A clergyman; one

destined to the divine ministry: as, a bishop, a priest, a deacon. Domat, Lois Civ. liv. prél. t. 2, s. 2, n. 14.

ECCLESIASTICAL CORPORATIONS. Such corporations as are composed of persons who take a lively interest in the advancement of religion, and who are associated and incorporated for that purpose. Angell & A. Corp. § 36.

Corporations whose members are spiritual persons are distinguished from *lay* corporations. 1 Blackstone, Comm. 470. They are generally called *religious corporations* in the United States. 2 Kent, Comm. 274; Angell & A. Corp. § 37.

ECCLESIASTICAL COURTS (called, also, *Courts Christian*). **In English Ecclesiastical Law.** The generic name for certain courts in England having cognizance mainly of spiritual matters.

The jurisdiction which they formerly exercised in testamentary and matrimonial causes has been taken away. Stat. 20 & 21 Vict. c. 77, § 3, c. 85, § 2; 21 & 22 Vict. c. 95. See 3 Blackstone, Comm. 67.

They consist of the archdeacon's court, the consistory courts, the court of arches, the court of peculiars, the prerogative courts of the two archbishops, the faculty court, and, on appeal, the privy council.

ECCLESIASTICAL LAW. The law of the church.

The existence in England of a separate order of ecclesiastical courts, and a separate system of law by them administered, may be traced back to the time of William the Conqueror, who separated the civil and the ecclesiastical jurisdictions, and forbade tribunals of either class from assuming cognizance of cases pertaining to the other. The elements of the English ecclesiastical law are the canon law, the civil law, the common law of England, and the statutes of the realm. The jurisdiction of the ecclesiastical tribunals extended to matters concerning the order of clergy and their discipline, and also to such affairs of the laity as "concern the health of the soul;" and under this latter theory it grasped also cases of marriage and divorce, and testamentary causes. But in very recent times, 1830–1858, these latter subjects have been taken from these courts, and they are now substantially confined to administering the judicial authority and discipline incident to a national ecclesiastical establishment. See, also, CANON LAW.

ECLAMPSIA PARTURIENTIUM. In Medical Jurisprudence. The name of a disease accompanied by apoplectic convulsions, and which produces aberration of mind at childbirth.

The word eclampsia is of Greek origin. *Significat splendorem fulgorem* effulgentiam, *et emicationem quales ex oculis aliquando prodeunt. Metaphorice sumitur de emicatione flammæ vitalis in pubertate et ætatis vigore.* Castelli, Lex. Medic.

An ordinary person, it is said, would scarcely observe it, and it requires the practised and skilled eye of a physician to discover that the patient is acting in total unconsciousness of the nature and effect of her acts. There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care into the symptoms of this disease, in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. See two well-reported cases of this kind in the Boston Medical Journal, vol. 27, no. 10, p. 161.

EDICT (Lat. *edictum*).

A law ordained by the sovereign, by which he forbids or commands something: it extends either to the whole country or only to some particular provinces.

Edicts are somewhat similar to public proclamations. Their difference consists in this, that the former have authority and form of law in themselves, whereas the latter are, at most, declarations of a law before enacted.

Among the Romans this word sometimes signified a citation to appear before a judge. The edicts of the emperors, also called *constitutiones principium*, were new laws which they made of their own motion, either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from rescripts or decrees, which were answers given in deciding questions brought before them. These edicts contributed to the formation of the Gregorian, Hermogenian, Theodosian, and Justinian codes. See Dig. 1. 4. 1. 1; Inst. 1. 2. 7; Code, 1. 1; Nov. 139.

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the *Corpus Juris Civilis*, after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EDICTUM PERPETUUM (Lat.). The title of a compilation of all the edicts. The collection is in fifty books, and was made by Salvius Julianus, a jurist acting by command of the emperor Adrian.

Parts of this collection are cited in the Digest.

EFFECT. The operation of a law, of an agreement, or an act, is called its effect.

By the laws of the United States, a patent cannot be granted for an effect only, but it may be for a new mode or application of machinery to produce effects. 1 Gall. C. C. 478. See 4 Mas. C. C. 1; 1 Pet. C. C. 394; 2 N. H. 61.

EFFECTS. Property, or worldly substance. As thus used, it denotes property in a more extensive sense than goods. 2 Sharswood, Blackst. Comm. 284.

In a will, "effects" may carry the whole personal estate, 5 Madd. Ch. 72; 6 *id.* 119; Cowp. 299; 15 Ves. Ch. 507; but not real estate, unless the word "real" be added. 2 Powell, Dev. Jarman ed. 167; 15 Mees. & W. Exch. 450. When preceded or followed in a will by words of narrower import, if the bequest is not residuary, it will be confined to species of property of the same kind (*ejusdem generis*) with those previously described. 13 Ves. Ch. 39; 15 *id.* 326; Roper, Leg. 210. See 2 Sharswood, Blackst. Comm. 384, n.

When "the effects" passes realty, and when personalty, in a will, see 1 Jarman, Wills, Perk. ed. 585, 590, 591, n.

See, generally, 1 Chitty, Plead. 345; 7 Taunt. 188; 2 Marsh. 495; 1 Barnew. & Ald. 206; 1 Crompt. M. & R. Exch. 266.

EFFIGY. The figure or representation of a person.

To make the effigy of a person with an intent to make him the object of ridicule, is a libel (*q. v.*). Hawkins, Pl. Cr. b. 1, c. 73, s. 2; 14 East, 227; 2 Chitty, Crim. Law, 866.

In France an execution by effigy or in effigy is adopted in the case of a criminal who has fled from justice. By the public exposure or exhibition of a picture or representation of him on a scaffold, on which his name and the decree condemning him are written, he is deemed to undergo the punishment to which he has been sentenced. Since the adoption of the Code Civil, the practice has been to affix the names, qualities, or addition, and the residence, of the condemned person, together with an extract from the sentence of condemnation, to a post set upright in the ground, instead of exhibiting a portrait of him on the scaffold. Répert. de Villargues; Biret, Vocab.

EFFRACTION. A breach made by the use of force.

EFFRACTOR. One who breaks through; one who commits a burglary.

EGO. I, myself. This term is used in forming genealogical tables, to represent the person who is the object of inquiry.

EIGNE. A corruption of the French word *ainé*. Eldest, or first-born.

It is frequently used in our old law-books: *bastard eigne* signifies an elder bastard when spoken of two children, one of whom was born before the marriage of his parents and the other after: the latter is called *mulier puisne*. Littleton, sect. 399.

EIK. **In Scotch Law.** An addition: as, *eik* to a reversion, *eik* to a confirmation. Bell, Dict.

EINETIUS. **In English Law.** The oldest; the first-born. Spelman, Gloss.

EIRE, or EYRE. **In English Law.** A journey.

Justices in eyre were itinerant judges, who were sent once in seven years with a general commission into divers counties, to hear and determine such causes as were called pleas of the crown. See JUSTICES IN EYRE.

EISNE. The senior; the oldest son. Spelled, also, *eigne, einsne, aisne, eign*. Termes de la Ley; 1 Kelham.

EISNETIA, EINETIA (Lat.). The share of the oldest son. The portion acquired by primogeniture. Termes de la Ley; Coke, Litt. 166 *b*; Cowel.

EJECTIONE CUSTODIÆ (Lat.). A writ which lay for a guardian to recover the land or person of his ward, or both, where he had been deprived of the possession of them. Fitzherbert, Nat. Brev. 139, L.; Coke, Litt. 199.

EJECTIONE FIRMÆ (Lat. ejectment from a farm). This writ lay where lands or tenements were let for a term of years, and afterwards the lessor, reversioner, remainderman, or a stranger ejected or ousted the lessee of his term. The plaintiff, if he prevailed, recovered the term with damages. This writ is the original foundation of the action of ejectment. 3 Sharswood, Blackst. Comm. 199; Fitzherbert, Nat. Brev. 220, F, G; Gibson, Eject. 3; Stearns, Real Act. 53, 400.

EJECTMENT (Lat. *e*, out of, *jacere*, to throw, cast; *ejicere*, to cast out, to eject).

In Practice. A form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained.

A form of action which lies to regain the possession of real property, with damages for the unlawful detention.

In its origin, this action was an action of trespass which lay for a tenant for years, to recover damages against a person who had ousted him of his possession without right. To the judgment for damages the courts soon added a judgment for possession, upon which the plaintiff became entitled to a writ of possession. As the disadvantages of real actions as a means of recovering lands for the benefit of the real owner from the possession of one who held them without title became a serious obstacle to their use, this form of action was taken advantage of by Ch. J. Rolle to accomplish the same result.

In the original action, the plaintiff had been obliged to prove a *lease* from the person shown to have *title*, an *entry* under the *lease*, and an *ouster* by some third person. The modified action as sanctioned by Rolle was brought by a fictitious person as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with a notice annexed from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the *consent rule*, by which he confessed the fictitious *lease, entry*, and *ouster* to have been made, leaving only the *title* in question. The tenant by a subsequent statute was obliged, under heavy penalties, to give notice to his lessor of the pendency of the action.

The action has been superseded in England by a form prescribed by the Common Law Procedure Act (1852, §§ 170–220), and has been materially modified in many of the states of the United States, though still retaining the name; but is retained in its original form in others, and in the United States courts for those states in which it existed when the circuit courts were organized. In some of the United States it has never been in use. See 3 Sharswood, Blackst. Comm. 198–207.

2. The action lies for the recovery of corporeal hereditaments only, 7 Watts, Pa. 318; 5 Denio, N. Y. 389, including a room in a house, 1 Harris, N. J. 202, upon which there may have been an entry and of which the sheriff can deliver possession to the plaintiff, 9 Johns. N. Y. 298; 18 Barb. N. Y. 484; 15 Conn. 137; and not for incorporeal hereditaments, 2 Yeates, Penn. 331; 3 Green, N. J. 191: as, rights of dower, 17 Johns. N. Y. 167; 10 Serg. & R. Penn. 326, a right of way, 1 N. Chipm. Vt. 204, a rent reserved. 5 Denio, N. Y. 477. See 20 Miss. 373.

3. It may be brought upon a right to an estate in fee-simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff, 5 Ohio, 28; 2 Mo. 163; 10 *id.* 229; 2 Gill & J. Md. 173; 10 *id.* 443; 1 Wash. C. C. 207; 4 *id.* 691; 1 Blackf. Ind. 133; 1 Dev. & B. No. C. 586; 3 Dan. Ky. 289; 1 Johns. Cas. N. Y. 125; 3 Ga. 105; 4 Gratt. Va. 129; 15 Ala. 412; 17 Ill. 288; 2 Dutch. N. J. 376; 4 Cal. 278; 5 *id.* 310; 32

Penn. St. 376; but the title must be a legal one, 2 Wash. C. C. 33; 3 *id.* 546; 10 Johns. N. Y. 368; 3 Barb. N. Y. 554; 1 Blackf. Ind. 22, 29; 7 *id.* 247; 3 Harr. & J. Md. 155; 4 Vt. 105; 4 Conn. 95; 3 Litt. Ky. 32; 13 Miss. 499; 4 Gratt. Va. 129; 1 Chandl. Wisc. 52, which existed at the commencement of the suit, 5 Harr. & J. Md. 155; 4 Vt. 105; 5 Watts & S. Penn. 427; 23 Miss. 100; 13 Ill. 251; 25 Miss. 177; 20 Barb. N. Y. 559, at the date of the demise, 3 A. K. Marsh. Ky. 131; 4 *id.* 388; 2 Dev. & B. No. C. 97; 3 McLean, C. C. 302; 11 Mo. 481; 11 Ill. 547; 12 Ga. 166; 21 How. 481, and at the time of trial, 2 B. Monr. Ky. 95; 12 *id.* 32; 20 Vt. 83; 9 Gill, Md. 269, and must be actually against the person having possession. 7 Term, 327; 1 Bos. & P. 573; 1 Dev. & B. No. C. 5; 3 Hawks, No. C. 479; 4 Dan. Ky. 67; 17 Vt. 674; 26 *id.* 662; 9 Humphr. Tenn. 137; 4 McLean, C. C. 255; 8 Barb. N. Y. 244.

4. The real plaintiff must recover on the strength of his own title, and cannot rely on the weakness of the defendant's, 4 Burr. 2489; 1 East, 246; 2 Serg. & R. Penn. 65; 3 *id.* 288; 6 Vt. 631; 4 Halst. N. J. 149; 2 Ov. Tenn. 185; 3 Humphr. Tenn. 614; 2 Harr. & J. Md. 112; 1 Md. 44; 1 Blackf. Ind. 341; Walk. Miss. 119; 19 Miss. 249; 6 Ired. No. C. 159; 1 Cal. 295; 27 Ala. N. S. 586, and must show an injury which amounts in law to an ouster or dispossession, 1 Vt. 244; 5 Munf. Va. 346; 4 N. Y. 61; 15 Penn. St. 483; an entry under a contract which the defendant has not fulfilled being equivalent. 5 Wend. N. Y. 24; 4 Binn. Pa. 77; 7 Serg. & R. Penn. 297; 7 J. J. Marsh. Ky. 318; 3 B. Monr. Ky. 173; 3 Green, N. J. 371; 16 Ohio, 485; 14 Ill. 91.

It may be maintained by one joint tenant or tenants in common against another who has dispossessed him. 2 Ohio, 110; 7 Cranch, 456; 3 Conn. 191; 2 Dev. & B. No. C. 97; 17 Miss. 111; 1 Spenc. N. J. 394; 4 N. Y. 61; 24 Mo. 541. Co-tenants need not join as against a mere disseisor, 5 Day, Conn. 207; 3 Blackf. Ind. 82; 6 B. Monr. Ky. 457; 10 Ired. No. C. 146; 12 *id.* 369; but even tenants in common may, 4 Cranch, 165; 4 Bibb, Ky. 241; 11 Ired. No. C. 211; not in Missouri.

The plea of not guilty raises the general issue. 3 Penn. St. 365; 13 *id.* 433; 1 Hempst. C. C. 624; 29 Ala. N. S. 542.

The judgment is that the plaintiff recover his term and damages, Pet. C. C. 452; 18 Vt. 600; 12 Barb. N. Y. 481; 16 How. 275, or damages merely where the term expires during suit. 18 Johns. N. Y. 295.

5. Where the fictitious form is abolished, however, the possession of the land generally is recovered, and the recovery may be of part of what the demandant claims. 1 N. Chipm. Vt. 41; 6 Ohio, 391; 1 Harr. & M'H. Md. 158; 2 Barb. N. Y. 330; 1 Ind. 242; 10 Ired. No. C. 237; 9 B. Monr. Ky. 240; 14 *id.* 60; 26 Mo. 291; 4 Sneed, Tenn. 566.

The damages are, regularly, nominal merely; and in such case an action of trespass for mesne profits lies to recover the actual damages. 3 Johns. N. Y. 481; 3 Harr. & J. Md. 84; 13 Ired. No. C. 439; 25 Miss. 445. See TRESPASS FOR MESNE PROFITS.

In some states, however, full damages may be assessed by the jury in the original action. Pet. C. C. 452; 18 Vt. 600; 12 Barb. N. Y. 481. See 19 N. Y. 488.

Consult Adams, Archbold, Cole, Gilbert, and Remington, on *Ejectment;* Chitty, on *Pleading;* Stephen's Commentaries, Sharswood's Blackstone's Commentaries, Kent's Commentaries, Greenleaf, and Phillipps, on *Evidence;* the statutes of the various states, and the English Common Law Procedure Act (1852, §§ 170–220).

EJECTUM. That which is thrown up by the sea. 1 Pet. Adm. App. 43.

EJERCITORIA. In Spanish Law. The action which lies against the owner of a vessel for debts contracted by the master, or contracts entered into by him, for the purpose of repairing, rigging, and victualling the same.

EJUSDEM GENERIS (Lat.). Of the same kind.

In the construction of laws, wills, and other instruments, when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis:* as, where an act (9 Anne, c. 20) provided that a writ of *quo warranto* might issue against persons who should usurp "the offices of mayors, bailiffs, port-reeves, and *other offices*, within the cities, towns, corporate boroughs, and *places*, within Great Britain," etc., it was held that "other offices" meant offices *ejusdem generis*, and that the word "places" signified places of the same kind; that is, that the offices must be *corporate offices*, and the places must be *corporate places*. 5 Term, 375, 379; 1 Barnew. & C. 237; 5 *id.* 640; 8 Dowl. & R. 393.

So, in the construction of wills, when certain articles are enumerated, the term *goods* is to be restricted to those *ejusdem generis*. Bacon, Abr. *Legacies*, B; 3 Rand. Va. 191; 2 Atk. Ch. 113; 3 *id.* 61.

ELDEST. He or she who has the greatest age.

The laws of primogeniture are not in force in the United States: the eldest child of a family cannot, therefore, claim any right in consequence of being the eldest.

ELECTION. Choice; selection. The selection of one man from amongst more to discharge certain duties in a state, corporation, or society.

The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.

Etymologically, election denotes choice, selection *out of* the number of those choosing. Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor. In common use, however, it has come to denote such a selection made by a distinctly defined body—as a board of aldermen, a corporation, or state—conducted in such a manner that each individual of the body choosing shall have an equal voice in the choice, but without regard to the question whether the person to be chosen is a member of the body or not. The word

occurs in law frequently in such a sense, especially in governmental law and the law of corporations.

But the term has also acquired a more technical signification, in which it is oftener used as a legal term, which is substantially the choice of one of two rights or things, to each one of which the party choosing has equal right, but both of which he cannot have. This option occurs in fewer instances at law than in equity, and is in the former branch, in general, a question of practice.

At Law. In contracts, when a debtor is obliged in an alternative obligation to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do one or the other until the time of payment; he has not the choice, however, to pay a part in each. Pothier, Obl. part 2, c. 3, art. 6, no. 247; 11 Johns. N. Y. 59. Or, if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the election till the time of delivery,—it being a rule that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election." Coke, Litt. 145 *a;* 7 Johns. N. Y. 465; 2 Bibb, Ky. 171. On the failure of the person who has the right to make his election in proper time, the right passes to the opposite party. Coke, Litt. 145 *a;* Viner, Abr. *Election* (B, C); Pothier, Obl. no. 247; Bacon, Abr. *Election*, B; 1 Des. Ch. So. C. 460; Hopk. Ch. N. Y. 337. It is a maxim of law that, an election once made and pleaded, the party is concluded: *electio semel facta, et placitum testatum, non patitur regressum.* Coke, Litt. 146; 11 Johns. N. Y. 241.

Other cases in law arise: as in case of a person holding land by two inconsistent titles, 1 Jenk. Cent. Cas. 27, dower in a piece of land and that piece for which it was exchanged. 3 Leon. 271. See Sugden, Pow. 498 *et seq.*

In Equity. The doctrine of election presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. 1 Swanst. Ch. 394, note (*b*); 3 Wooddeson, Lect. 491; 2 Roper, Leg. White ed. 480–578.

Where an express and positive election is required, there is no claim, either at law or in equity, to but one of the objects between which election is to be made; but in many cases there is apparent, from the whole of an instrument, the intention that the party to be benefited shall be benefited on certain conditions. In such cases, equity will require the party to elect.

The question whether an election is required occurs most frequently in case of devises; but it extends to deeds, 1 Swanst. Ch. 400, 401; 2 Story, Eq. Jur. § 1075, n.; but there must be a clear intention by the testator to give that which is not his property, 1 Sim. Ch. 105; 18 Ves. Ch. 41; 1 Ed. Ch. 532; cases of transactions involving property of the wife, 23 Beav. Rolls, 457; 25 *id.* 97; satisfaction of dower, Ambl. Ch. 466, 682; 8 Paige, Ch. N. Y. 325; 2 Schoales & L. Ch. Ir. 452; 14 Sim. Ch. 258; 2 Ed. Ch. 237; 1 Drur. & Warr. 107. And if the testator has some interest in the thing disposed, the presumption that he intended to dispose only of his interest must be overruled to make a case of election. 6 Dow, 149, 179; 1 Ves. Ch. 515.

The doctrine does not apply to creditors. 12 Ves. Ch. 354; 1 Powell, Dev. Jarman ed. 437.

An election may be made by persons under legal disabilities as to conveyances. 4 Kay & J. Ch. 409; 9 Mod. 35; 1 Swanst. Ch. 413; 2 Mer. Ch. 483. See 1 Macn. & G. 551; 9 Beav. Rolls, 176; 6 De Gex, M. & G. 535; 2 Bland, Ch. Md. 606. Positive acts of acceptance or renunciation are not indispensable, but the question is to be determined from the circumstances of each case as it arises. 4 Beav. Rolls, 103; 21 *id.* 447; 13 Price, Exch. 782; 1 M'Clel. 541; 15 Penn. 430. And the election need not be made till all the circumstances are known. 1 Brown, Ch. 186, 445; 3 *id.* 255; 2 Ves. & B. Ch. 222; 12 Ves. Ch. 136; 1 M'Clel. & Y. 569. See, generally, 2 Story, Eq. Jur. §§ 1075–1098; 1 Swanst. Ch. 402, note; 2 Roper, Leg. White ed. 480–578.

In Practice. A choice between two or more means of redress for an injury or the punishment of a crime allowed by law.

The selection of one of several forms of action allowed by law.

The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus, a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars. Actually, however, the choice is greatly narrowed by statutory regulations in modern law, in most cases. See 1 Chitty, Plead. 207–214

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly or by necessary implication takes away the common-law remedy. 1 Serg. & R. Penn. 32; 6 *id.* 20; 5 Johns. N. Y. 175; 10 *id.* 389; 16 *id.* 220; 1 Call, 243; 2 Me. 404; 5 *id.* 38; 6 Harr. & J. Md. 383; 4 Halst. 384; 3 Chitty, Pract. 130.

In Criminal Law. In point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind. Indeed, on the face of the record every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment. In cases of felony, the courts, in the exercise of a sound discretion, are accustomed to quash indictments containing several distinct charges, when it appears, before the defendant has pleaded and the jury are charged, that the inquiry is to include several crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences,

though in law distinct, seem to constitute in fact but parts of one continuous transaction. Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it is proved that they were received at separate times, the prosecutor may be put to his election; but if it is possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation. 1 Mood. Cr. Cas. 146; 2 Mood. & R. 524. In another case, the defendant was charged in a single count with uttering twenty-two forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the king. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as amidst such a variety it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere; and all the judges subsequently held that a proper discretion had been exercised. 2 Leach, Cr. Cas. 4th ed. 877; 2 East, Pl. Cr. 934. See 8 East, 41; 2 Campb. 132; 3 Term, 106; 11 Clark & F. Hou. L. 155; Dearsl. Cr. Cas. 427; 5 Metc. Mass. 532; 12 Cush. Mass. 612, 615; 12 Serg. & R. Penn. 69; 2 Harr. & J. Md. 426; 12 Wend. N. Y. 426.

ELECTOR. One who has the right to make choice of public officers; one who has a right to vote.

The qualifications of electors are generally the same as those required in the person to be elected. To this, however, there is one exception: a naturalized citizen may be an elector of president of the United States, although he could not constitutionally be elected to that office. See the articles on the various states.

ELECTORS OF PRESIDENT. Persons elected by the people, whose sole duty is to elect a president and vice-president of the United States.

The constitution provides, Amend. art. 12, that "the electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and the house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be the majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

"The person having the greatest number of votes as vice-president shall be vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States." See 3 Story, Const. §§ 1448–1470.

ELEEMOSYNARIUS (Lat.). An almoner. There was formerly a lord almoner to the kings of England, whose duties are described in Fleta, lib. 2, cap. 23. A chief officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. Cowel.

ELEEMOSYNARY CORPORATIONS. Such private corporations as are instituted for purposes of charity, their object being the perpetual distribution of the bounty of the founder of them to such persons as he directed. Of this kind are hospitals for the relief of the impotent, indigent, sick, and deaf or dumb. Angell & A. Corp. § 39; 1 Kyd, Corp. 26; 4 Conn. 272; 3 Bland, Ch. Md. 407; 1 Ld. Raym. 5; 2 Term, 346. The distinction between ecclesiastical and eleemosynary corporations is well illustrated in the Dartmouth College case, 4 Wheat. 681. See, also, Angell & A. Corp. § 39; 1 Sharswood, Blackst. Comm. 471

ELEGIT (Lat. *eligere*, to choose). A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted.

The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied. During that term he is called tenant by elegit. Coke, Litt. 289. See Powell, Mortg. Index; Watson, Sher. 206; 1 C. B. N. S. 568.

The name was given because the plaintiff has his choice to accept either this writ or a *fi. fa.*

By statute, in England, the sheriff is now to deliver the whole estate instead of the half. See 3 Sharswood, Blackst. Comm. 418, n. The writ is still in use in the United States, to some extent, and with somewhat different modifications in the various states adopting it. 4 Kent, Comm. 431, 436; 10 Gratt. Va. 580; 1 Hill, Abr. 555, 556.

ELISORS. **In Practice.** Two persons appointed by the court to return a jury, when the sheriff and the coroner have been challenged as incompetent: in this case the elisors return the writ of venire directed to them, with a panel of the jurors' names, and their return is final, no challenge being allowed to their array. 3 Blackstone, Comm. 355; 1 Cow. N. Y. 32; 3 *id.* 296.

ELL. A measure of length.

In old English the word signifies *arm*, which sense it still retains in the word *elbow*. Nature has no standard of measure. The cubit, the ell, the span, palm, hand, finger (being taken from the individual who uses them), are variable measures. So of the foot, pace, mile, or *mille passuum*. See Report on Weights and Measures, by the secretary of state of the United States, Feb. 22, 1821.

ELOGIUM (Lat.). **In Civil Law.** A will or testament.

ELOIGNE. **In Practice.** (Fr. *éloigner*, to remove to a distance; to remove afar off.) A return to a writ of replevin, when the chattels have been removed out of the way of the sheriff.

ELONGATA. **In Practice.** The return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See, for the form of this return, Watson, Sher. Appx. c. 18, s. 3, p. 454; 3 Blackstone, Comm. 148.

On this return the plaintiff is entitled to a capias in withernam. See WITHERNAM; Watson, Sher. 300, 301. The word *éloigné* is sometimes used as synonymous with *elongata*.

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer. Cowel; Blount; Tomlin.

While the wife resides with her husband and cohabits with him, however exceptionable her conduct may be, yet he is bound to provide her with necessaries and to pay for them; but when she elopes, the husband is no longer liable for her alimony, and is not bound to pay debts of her contracting, when the separation is notorious; and whoever gives her credit does so, under these circumstances, at his peril. Chitty, Contr. 49; 4 Esp. 42; 3 Pick. Mass. 289; 1 Strange, 647, 706; 6 Term, 603; 11 Johns. N. Y. 281; 12 *id.* 293; Buller, Nisi P. 135; Starkie, Ev. pt. 4, p. 699. It has been said that the word has no legal sense, 2 W. Blackst. 1080; but it is frequently used, as is here shown, with a precisely defined meaning.

ELSEWHERE. In another place.

Where one devises all his land in A, B, and C, three distinct towns, and *elsewhere*, and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word "elsewhere;" and by Lord Chancellor King, assisted by Raymond, C. J., and other judges, the word "elsewhere" was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. 3 P. Will. Ch. 56. See, also, Chanc. Prec. 202; 1 Vern. Ch. 4, n.; 2 *id.* 461, 560; 3 Atk. Ch. 492; Cowp. 360, 808; 2 Penn. St. 912; 5 Brown, Parl. Cas. 496; 1 East, 456.

As to the effect of the word "elsewhere" in the case of lands not purchased at the time of making the will, see 3 Atk. Ch. 254; 2 Ventr. 351.

ELUVIONES. Spring-tides.

EMANCIPATION. An act by which a person who was once in the power of another is rendered free.

This is of importance mainly in relation to the emancipation of minors from the parental control. See 3 Term, 355; 6 *id.* 247; 8 *id.* 479; 3 East, 276; 10 *id.* 88; 11 Vt. 258, 477. See Cooper, Justin. 441, 480; 2 Dall. Penn. 57, 58; La. Civ. Code, b. 1, tit. 8, c. 3; Ferrière, Dict. de Jurisp. *Emancipation*.

EMBARGO. A proclamation, or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state, until further order. 2 Wheat. 148.

2. The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detainments." And whether the embargo be legally or illegally laid, the injury to the owner is the same, and the insurer is equally liable for the loss occasioned by it. Marshall, Ins. b. 1, c. 12, s. 5; 1 Kent, Comm. 60; 1 Bell, Dict. 517, 5th ed.

3. An embargo detaining a vessel at the port of departure, or in the course of the voyage, does not of itself work a dissolution of a charter-party, or of the contract with the seamen. It is only a temporary restraint imposed by authority for legitimate political purposes, which suspends for a time the performance of such contracts, and leaves the rights of parties untouched. 1 Bell, Dict. 517; 8 Term, 259; 5 Johns. N. Y. 308; 7 Mass. 325; 3 Bos. & P. 405–434; 4 East, 546–566.

EMBEZZLEMENT. **In Criminal Law.** The fraudulently removing and secreting of personal property with which the party has been intrusted, for the purpose of applying it to his own use.

2. The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in certain fiduciary relations to those who were the subject of their peculations, certain statutes have been enacted, as well in England as in this country, creating new criminal offences and annexing to them their proper punishments. The general object of these statutes doubtless was to embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party screened him from punishment. 2 Metc. Mass. 345; 9 *id.* 142.

3. A taking is requisite to constitute a larceny; an embezzlement is in substance and essentially a larceny, aggravated rather

than palliated by the violation of a trust or contract, instead of being, like larceny, a trespass. The administration of the common law has been not a little embarrassed in discriminating the two offences. But they are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and in cases of embezzlement the proper mode is to allege sufficient matter in the indictment to apprize the defendant that the charge is for embezzlement. Although the statutes declare that a party shall be deemed to have committed the crime of simple larceny, yet it is a larceny of a peculiar character, and must be set forth in its distinctive character. 8 Metc. Mass. 247; 9 *id.* 138; 9 Cush. Mass. 284.

4. When an embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and, from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favor of the crew; and the guilt of the parties must be established beyond all reasonable doubt before they can be required to contribute. 1 Mas. C. C. 104; 4 Bos. & P. 347; 3 Johns. N. Y. 17; 1 Marshall, Ins. 241; Dane, Abr. Index; Weskett, Ins. 194; 3 Kent, Comm. 151; Hard. Ky. 529; Parsons, Marit. Law, Index.

Stringent provisions are made by several acts of congress against the embezzlement of arms, munitions, and habiliments of war, property stored in public storehouses, letters, precious metals, and coins from the mint. See acts of Apr. 30, 1790, § 16, 1 Story, U. S. Laws, 86; Apr. 20, 1818, 3 *id.* 1715; Mch. 3, 1825, 3 *id.* 1991; Mch. 3, 1825, § 24, 3 *id.* 2006.

EMBLEMENTS (Fr. *embler*, or *emblaver*, to sow with corn. The profits of the land sown). The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. Coke, Litt. 55 *b*; 4 Harr. & J. Md. 139; 3 Barnew. & Ald. 118.

It is a privilege allowed to tenants for life, at will, or from year to year, because of the uncertainty of their estates and to encourage husbandry. If, however, the tenancy is for years, and its duration depends upon no contingency, a tenant when he sows a crop must know whether his term will continue long enough for him to reap it, and is not permitted to re-enter and cut it after his term has ended. 4 Bingh. 202; 10 Johns. N. Y. 361; 5 Halst. N. J. 128.

2. This privilege extends to cases where a lease has been unexpectedly terminated by *the act of God or the law;* that is, by some unforeseen event which happens without the tenant's agency: as, if a lease is made to husband and wife so long as they continue in that relation, and they are afterwards divorced by a legal sentence, the husband will be entitled to emblements. Oland's case, 5 Coke, 116 *b*. A similar result will follow if the landlord, having the power, terminates the tenancy by notice to quit. Croke Eliz. 460. See other cases of uncertain duration, 9 Johns. N. Y. 112; 8 Viner, Abr. 364; 3 Penn. St. 496. But it is otherwise if the tenancy is determined by an act of the tenant which works a forfeiture: as if, being a woman, she has a lease for a term of years provided she remains so long single, and she terminates it by marrying; for this is her own act. 2 Barnew. & Ald. 470; 1 Price, Exch. 53; 8 Wend. N. Y. 584. A landlord who re-enters for a forfeiture takes the emblements. 7 Bingh. 154.

3. All such crops as in the ordinary course of things return the labor and expense bestowed upon them within the current year become the subject of emblements,—consisting of grain, peas, beans, hemp, flax, and annual roots, such as parsnips, carrots, turnips, and potatoes, as well as the artificial grasses, which are usually renewed like other crops. But such things as are of spontaneous growth, as roots and trees not annual, and the fruit on such trees, although ripe, and grass growing, even if ready to cut, or a second crop of clover, although the first crop taken before the end of the term did not repay the expense of cultivation, do not fall within the description of emblements. Croke Car. 515; Croke Eliz. 463; 10 Johns. N. Y. 361; Coke, Litt. 55 *b;* Taylor, Landl. & Ten. § 534.

4. But although a tenant for years may not be entitled to emblements *as such*, yet by the custom of the country, in particular districts, he may be allowed to enter and reap a crop which he has sown, after his lease has expired. Dougl. 201; 16 East, 71; 7 Bingh. 465. The parties to a lease may, of course, regulate all such matters by an express stipulation; but in the absence of such stipulation it is to be understood that every demise is open to explanation by the general usage of the country, where the land lays, in respect to all matters about which the lease is silent; and every person is supposed to be cognizant of this custom and to contract in reference to it. 2 Pet. 138; 5 Binn. Penn. 285. The rights of tenants, therefore, with regard to the *away-going crop* will differ in different sections of the country: thus, in Pennsylvania and New Jersey a tenant is held to be entitled to the grain sown in the autumn before the expiration of his lease, and coming to maturity in the following summer, 1 Penn. 224; 2 Watts & S. Penn. 22; 2 South. N. J. 460; while in Delaware the same custom is said to prevail with respect to wheat, but not as to oats. 1 Harr. Del. 522.

5. Of a similar nature is the tenant's right to remove the manure made upon the

farm during the last year of the tenancy. Good husbandry, which, without any stipulation therefor, is always implied by law, requires that it should either be used by the tenant on the farm, or left by him for the use of his successor; and such is the general rule on the subject in England as well as in this country. 15 Wend. N. Y. 169; 2 Hill, N. Y. 142; 2 N. Chipm. Vt. 115; 1 Pick. Mass. 371. A different rule has been laid down in South Carolina, 2 Ired. No. C. 326; but it is clearly at variance with the whole current of American authorities upon this point. Straw, however, is incidental to the crop to which it belongs, and may be removed in all cases where the crop may be. 22 Barb. N. Y. 568; 1 Watts & S. Penn. 509.

6. There are sometimes, also, mutual privileges, in the nature of emblements, which are founded on the common usage of the neighborhood where there is no express agreement to the contrary, applicable to both outgoing and incoming tenants. Thus, the outgoing tenant may by custom be entitled to the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy for the purposes of ploughing and manuring the land. But, independent of any custom, every tenant who is entitled to emblements has a right of ingress, egress, and regress to cut and carry them away, and the same privilege will belong to his vendee,—neither of them, however, having any exclusive right of possession. Taylor, Landl. & Ten. § 543.

EMBRACEOR. In Criminal Law. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and, having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a case for their clients. Coke, Litt. 369; Termes de la Ley.

EMBRACERY. In Criminal Law. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawkins, Pl. Cr. 259; Bacon, Abr. *Juries*, M 3; Coke, Litt. 157 *b*, 369 *a*; Hob. 294; Dy. 84 *a*, pl. 19; Noy, 102; 1 Strange, 643; 11 Mod. 111, 118; Com. 601; 5 Cow. N. Y. 503.

EMENDA (Lat.). Amends. That which is given in reparation or satisfaction for a trespass committed; or, among the Saxons, a compensation for a crime. Spelman, Gloss.

EMENDALS. In English Law. This ancient word is said to be used in the accounts of the inner temple, where so much in emendals at the foot of an account signifies so much in bank, in stock, for the supply of emergencies. Cunningham, Law Dict.

EMENDATIO PANIS ET CEREVISIÆ. The power of supervising and correcting the weights and measures of bread and ale. Cowel.

EMIGRANT. One who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property, if he has any, with him. Vattel, b. 1, c. 19, § 224.

EMIGRATION. The act of removing from one place to another.

It is sometimes used in the same sense as expatriation; but there is some difference in the signification. Expatriation is the act of abandoning one's country; while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. See 2 Kent, Comm. 36.

EMINENCE. A title of honor given to cardinals.

EMINENT DOMAIN. The power to take private property for public use. 6 How. 536.

The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner.

The highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity, giving a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public good requires it. 3 Paige, Ch. N. Y. 73.

2. There seems to be no objection to considering this right, theoretically at least, as so much of the original proprietorship retained by the sovereign power in granting lands or franchises to individuals or corporations wherever the common-law theory of original proprietorship prevails. An analogical arrangement at least in support of this view is derived from the able examination and explanation of the origin of the *jus publicum* given in 7 Cush. Mass. 90. See, also, the remarks of *Daniell*, J., in 6 How. 533.

It is well settled that the power exists only in cases where the public exigency demands its exercise. See remarks of Woodbury, J., and cases cited by him, 6 How. 545.

3. This right is distinguished from public domain, which is property owned absolutely by the state in the same manner as an individual holds his property. 37 Am. Jur. 121; 2 Kent, Comm. 339; 3 Yerg. Tenn. 389; 6 How. 540.

Whether the exercise of the right is justifiable in cases where the statute does not provide compensation, is unsettled. That it may be exercised, 3 Hill, So. C. 100: *contra*, 2 Kent, Comm. 339, n.; and *dicta* in 4 Term, 794; 1 Rice, So. C. 383; 3 Leigh, Va. 337.

It makes no difference whether corporeal property, as land, or incorporeal, as a franchise, is to be affected by the exercise of the right. 23 Pick. Mass. 360; 6 How. 529; 1 Rice, So. C. 383; 11 N. H. 19; 17 Conn. 454.

For a full discussion of this subject, see 6 How. 529; 11 Pet. 420; 23 Pick. Mass. 361; 8 N. H. 398; 10 *id.* 371; 11 *id.* 20; 17 Conn. 454; 3 Paige, Ch. N. Y. 73; 14 Wend. N. Y. 51; 18 *id.* 59; 3 Hill, So. C. 100; 8 Dan. Ky. 289; 5 Watts & S. Penn. 171; 2 Miss. 21; 4 Term, 794; 11 Leigh, Va. 75; 2 Kent, Comm. 239, n.; and a very full and exhaustive essay upon the subject, by J. B. Thayer, Esq., of Boston, in 19 Bost. Law Rep. 241, 301

EMISSION. In Medical Jurisprudence. The act by which any matter whatever is thrown from the body: thus, it is usual to say, emission of urine, emission of semen, etc.

Emission is not necessary in the commission of a rape to complete the offence. 1 Hale, Pl. Cr. 628; 4 Carr. & P. 249; 5 *id.* 297; 6 *id.* 251; 9 *id.* 31; 1 Const. So. C. 354; Add. Penn. 143. See 1 East, Pl. Cr. 436–440. It is, however, essential in sodomy. 12 Coke, 36. But see 1 Va. Cas. 307.

TO EMIT. To put out; to send forth.

The tenth section of the first article of the constitution contains various prohibitions, among which is the following: "No state shall emit bills of credit." To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. 4 Pet. 410, 432; Story, Const. § 1358. See BILLS OF CREDIT.

EMMENAGOGUES. In Medical Jurisprudence. The name of a class of medicines which are believed to have the power of favoring the discharge of the menses. These are *black hellebore*, *savine* (see *Juniperus Sabina*), *madder*, *mercury*, *polygala*, *senega*, and *pennyroyal*. They are sometimes used for the criminal purpose of producing abortion (*q.v.*). They always endanger the life of the woman. 1 Beck, Med. Jur. 316; Dunglison, Med. Dict.; Parr, Med. Dict.; 3 Paris & F. Med. Jur. 88.

EMPEROR. This word is synonymous with the Latin *imperator:* they are both derived from the verb *imperare*. Literally, it signifies *he who commands*.

Under the Roman republic, the title emperor was the generic name given to the commanders-in-chief in the armies. But even then the application of the word was restrained to the successful commander, who was declared emperor by the acclamations of the army, and was afterwards honored with the title by a decree of the senate.

It is now used to designate some sovereign prince who bears this title. Ayliffe, Pand. tit. 23.

EMPHYTEOSIS. In Civil Law. The name of a contract by which the owner of an uncultivated piece of land granted it to another, either in perpetuity or for a long time, on condition that he should improve it by building, planting, or cultivating it, and should pay for it an annual rent, with a right to the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor should never re-enter as long as the rent should be paid to him by the grantee or his assigns. Inst. 3. 25. 3; 18 Toullier, n. 144.

EMPHYTEUTA. The grantee under a contract of *emphyteusis* or *emphyteosis*. Vicat, Voc. Jur.; Calvinus, Lex.; 1 Hallam, Mid. Ag. c. ii. p. 1.

EMPLAZAMIENTO. In Spanish Law. The citation given to a person by order of the judge, and ordering him to appear before his tribunal on a given day and hour.

EMPRESTIDO. In Spanish Law. A loan. Something lent to the borrower at his request. *Las Partidas*, pt. 3, tit. 18, l. 70.

EMPTIO, EMPTOR (Lat. *emere*, to buy). *Emptio*, a buying. *Emptor*, a buyer. *Emptio et venditio*, buying and selling.

In Roman Law. The name of a contract of sale. DuCange; Vicat, Voc. Jur.

EN AUTRE DROIT (Fr.). In the right of another.

EN DEMEURE (Fr.). In default. Used in Louisiana. 3 Mart. La. N. S. 574.

EN OWEL MAIN (L. Fr.). In equal hand. The word *owel* occurs also in the phrase *owelty* of partition. See 1 Washburn, Real Prop. 427.

EN VENTRE SA MERE (Fr.). In its mother's womb. For certain purposes, as of inheritance, etc., a child *en ventre sa mère* is to be considered as in being.

ENABLING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, confers upon persons not seised of the fee the right of creating interests to take effect out of it, which could not be done by the donee of the power unless by such authority, this is called an *enabling power*. 2 Bouvier, Inst. n. 1628. and others, were empowered to make leases for their lives or for twenty-one years, which they could not do before. 2 Blackstone, Comm. 319; Coke, Litt. 44 *a;* 3 Stephen, Comm. 139.

ENABLING STATUTE. The act of 32 Henry VIII. c. 28, by which tenants in tail, husbands seised in right of their wives,

ENACT. To establish by law; to perform or effect; to decree. The usual formula in making laws is, *Be it enacted*.

ENAJENACION. In Spanish Law. The act by which one person transfers to another a property, either gratuitously, as in the case of a donation, or by an owner's title, as in the case of a sale or an exchange.

ENCEINTE (Fr.). Pregnant. See PREGNANCY.

ENCLOSURE. An artificial fence around one's estate. See CLOSE.

ENCOMIENDA. A charge or mandate conferring certain important privileges on

the four military orders of Spain, to wit, those of Santiago, Calatrava, Alcantara, and Montesa. In the legislation of the Indias, it signified the concession of a certain number of Indians for the purpose of instructing them in the Christian religion and defending their persons and property.

ENCROACH. To gain unlawfully upon the lands, property, or authority of another: as if one man presseth upon the grounds of another too far, or if a tenant owe two shillings rent-service and the lord exact three. So, too, the Spencers were said to encroach the king's authority. Blount; Plowd. 94 *a*. Quite a memorable instance of punishment for encroaching (accroaching) royal power took place in 21 Edw. III. 1 Hale, Pl. Cr. 80. Taking fees by clerks of the courts has been held encroaching. 1 Leon. 5.

ENEMY. A nation which is at war with another. A citizen or a subject of such a nation. Any of the subjects or citizens of a state in amity with the United States, who have commenced or have made preparations for commencing hostilities against the United States, and also the citizens or subjects of a state in amity with the United States, who are in the service of a state at war with them. See Salk. 635; Bacon, Abr. *Treason*, G.

By the term enemy is also understood a person who is desirous of doing injury to another. The Latins had two terms to signify these two classes of persons: the first, or the public enemy, they called *hostis*, and the latter, or the private enemy, *inimicus*.

An enemy cannot, as a general rule, enter into any contract which can be enforced in the courts of law; but the rule is not without exceptions: as, for example, when a state permits expressly its own citizens to trade with the enemy; and perhaps a contract for necessaries, or for money to enable the individual to get home, might be enforced. 7 Pet. 586.

ENFEOFF. To make a gift of any corporeal hereditaments to another. See FEOFFMENT.

ENFRANCHISE. To make free; to incorporate a man in a society or body politic. Cunningham, Law Dict.

ENFRANCHISEMENT. Giving freedom to a person. Admitting a person to the freedom of a city. A denizen of England, or a citizen of London, is said to be enfranchised. So, too, a villein is enfranchised when he obtains his freedom from his lord. Termes de la Ley; 11 Coke, 91; Jacob, Law Dict.

ENFRANCHISEMENT OF COPYHOLD. The change of the tenure by which lands are held from copyhold to freehold, as by a conveyance to the copyholder or by a release of the seignorial rights. 1 Watkins, Copyholds, 362; 1 Stephen, Comm. 208; 2 *id.* 51.

ENGAGEMENT. In French Law. A contract. The obligations arising from a *quasi* contract.

The terms *obligation* and *engagement* are said to be synonymous, 17 Toullier, n. 1; but the Code seems specially to apply the term engagement to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee. Art. 1370.

ENGLESHIRE. A law was made by Canute, for the preservation of his Danes, that, when a man was killed, the hundred or town should be liable to be amerced, unless it could be proved that the person killed was an Englishman. This proof was called *Engleshire*. It consisted, generally, of the testimony of two males on the part of the father of him who had been killed, and two females on the part of his mother. 1 Hale, Pl. Cr. 447; 4 Blackstone, Comm. 195; Spelman, Gloss. See FRANCIGENA.

ENGROSS (Fr. *gros*.). To copy the rude draught of an instrument in a fair, large hand. To write out, in a large, fair hand, on parchment. The term is applied to statutes, which, after being read and acted on a sufficient number of times, are ordered to be engrossed. Anciently, also, used of the process of making the indenture of a fine. 5 Coke, 39 *b*.

In Criminal Law. To buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price. The tendency of modern English law is very decidedly to restrict the application of the law against engrossing; and it is very doubtful if it applies at all except to obtaining a monopoly of provisions. 1 East, 143. Merely buying for the purpose of selling again is not necessarily engrossing. 14 East, 406; 15 *id.* 511. See 4 Sharswood, Blackst. Comm. 159, n., for the law upon this subject.

ENGROSSER. One who engrosses or writes on parchment in a large, fair hand. One who purchases large quantities of any commodity in order to have the command of the market and to sell them again at high prices.

ENGROSSING. The offence committed by an *engrosser*. Writing on parchment in a large, fair hand. See ENGROSS

ENITIA PARS (L. Lat.). The part of the eldest. Coke, Litt. 166; Bacon, Abr. *Coparceners* (C).

When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election* (*q. v.*); and the part which she takes is called *enitia pars*. This right is purely personal, and descends: it is also said that even her assignee shall enjoy it; but this has been doubted. The word *enitia* is said to be derived from the old French *eisne*, the eldest. Bacon, Abr. *Coparceners* (C); Keilw. 1 *a*, 49 *a*; 2 And. 21; Croke Eliz. 18.

ENJOIN. To command; to require: as, private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrong-doer

escape through their negligence. 1 Hale, Pl. Cr. 587; 1 East, Pl. Cr. 298, 304; Hawkins, Pl. Cr. b. 2, c. 12, s. 13; Ry. & M. Cr. Cas. 93.

To command or order a defendant in equity to do or not to do a particular thing by writ of injunction. See INJUNCTION.

ENLARGE. To extend: as, to enlarge a rule to plead is to extend the time during which a defendant may plead. To enlarge means, also, to set at liberty: as, the prisoner was enlarged on giving bail.

ENLARGING. Extending, or making more comprehensive: as, an enlarging statute, which is one extending the common law.

ENLISTMENT. The act of making a contract to serve the government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. See, as to the power of infants to enlist, 4 Binn. Penn. 487; 5 *id.* 423; 6 *id.* 255; 1 Serg. & R. Penn. 87; 11 *id.* 93.

ENORMIA (Lat.). Wrongs. It occurs in the old Latin forms of pleading, where, after a specific allegation of the wrongs done by the defendant, the plaintiff alleges generally that the defendant did *alia enormia* (other wrongs), to the damage, etc. 2 Greenleaf, Ev. § 278; 1 Chitty, Plead. 397. See ALIA ENORMIA.

ENQUETE. In Canon Law. An examination of witnesses in the presence of a judge authorized to sit for this purpose, taken in writing, to be used as evidence in the trial of a cause. The day of hearing must be specified in a notice to the opposite party. 9 Low. C. 392. It may be opened, in some cases, before the trial. 10 Low. C. 19.

ENROLL. To register; to enter on the rolls of chancery, or other courts; to make a record.

ENROLMENT. In English Law. The registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act: as, a recognizance, a deed of bargain and sale, and the like. Jacob, Law Dict.

ENTAIL. A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs. 1 Washburn, Real Prop. 66; Cowel; 2 Sharswood, Blackst. Comm. 112, n.

To restrict the inheritance of lands to a particular class of issue. 1 Washburn, Real Prop. 66; 2 Sharswood, Blackst. Comm. 113. See ESTATES TAIL.

ENTENCION. In Old English Law. The plaintiff's declaration.

ENTER. To go upon lands for the purpose of taking possession; to take possession. In a strict use of terms, entry and taking possession would seem to be distinct parts of the same act; but, practically, entry is now merged in taking possession. 1 Washburn, Real Prop. 10, 32; Stearns, Real Act. 2.

To cause to be put down upon the record. An attorney is said to *enter* his appearance, or the party himself may enter an appearance.

ENTIRE. That which is not divided; that which is whole.

When a contract is entire, it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him: for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year, and claim compensation for the time, unless it be done by the consent or default of the party hiring. 6 Vt. 35; 2 Pick. Mass. 267; 4 *id.* 103, 114; 9 *id.* 298; 10 *id.* 209; 4 M'Cord, So. C. 26, 246; 4 Me. 454; 2 Penn. 454; 15 Johns. N. Y. 224; 19 *id.* 337; 6 Harr. & J. Md. 38. See DIVISIBLE.

ENTIRETY. This word denotes the whole, in contradistinction to moiety, which denotes the half part. A husband and wife, when jointly seised of land, are seised by entireties, and not *pur mie*, as joint tenants are. Jacob, Law Dict.; 2 Kent, Comm. 132; 4 *id.* 362; 3 Penn. 350, 367.

ENTREGA. In Spanish Law. Delivery.

ENTREPOT. A warehouse. A magazine where goods are deposited which are to be again removed.

ENTRY. In Common Law. The act of setting down the particulars of a sale, or other transaction, in a merchant's or tradesman's account-books: such entries are, in general, *primâ facie* evidence of the sale and delivery, and of work done; but unless the entry be the original one, it is not evidence.

The submitting to the inspection of officers appointed by law, who have the collection of the customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

The act of March 2, 1799, s. 36, 1 Story, U. S. Laws, 606, and the act of March 1, 1823, 3 Story, U. S. Laws, 1881, regulate the manner of making entries of goods.

In Criminal Law. The act of entering a dwelling-house, or other building, in order to commit a crime.

2. In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offence. Coke, 3d Inst. 64.

It is an entry if a person descend a chimney but is arrested before he can get low enough to enter any room; it is an entry to open a window entirely, but not to push it up or down when partly opened; putting a finger or a pistol over a threshold is an entry, but not a centre-bit or crowbar, these instruments being intended for breaking, and not for committing a felony. Sir M. Hale makes a "quære," however, with a "seeming" to

the contrary, as to an entry by a bullet fired into a house. 1 Hale, Pl. Cr. 555. It is submitted, says Wilmot (Dig. Law of Burglary, 58), that the only possible way in which the discharging a loaded gun or pistol into a dwelling-house from the outside could be held burglary would be by laying the intent to commit felony by killing or wounding, or generally to commit felony; and *quære*, whether the breaking and entry requisite to complete the burglary would be satisfied by such discharge? It is not necessary in all cases to show an actual entry by all the prisoners: there may be a *constructive* entry as well as a constructive breaking. A, B, and C come in the night by consent to break and enter the house of D to commit a felony. A only actually breaks and enters the house; B stands near the door, but does not actually enter; C stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes: this is burglary in all, and all are principals. 1 Hale, Pl. Cr. 555. See BURGLARY.

Upon Real Estate. The act of going upon the lands of another, or lands claimed as one's own, with intent to take possession.

3. In general, any person who has a right of possession may assert it by a peaceable entry, without the formality of a legal action, and, being so in possession, may retain it, and plead that it is his soil and freehold. 3 Term, 295. A notorious act of ownership of this kind was always equivalent to a feodal investiture by the lord, and is now allowed in all cases where the original entry of a wrong-doer was unlawful. But, in all cases where the first entry was lawful and an apparent right of possession was thereby gained, the owner of the estate cannot thus enter, but is driven to his action at law. 3 Blackstone, Comm. 175. See RE-ENTRY.

4. At common law, no person could make a valid sale of land unless he had lawfully entered, and could make livery of seisin,—that is, could make an actual delivery of possession to the purchaser. This provision was early incorporated into the English statutes, to guard against the many evils produced by selling pretended titles to land. A pretended title within the purview of the law is where one person claims land of which another is in possession holding adversely to the claim. 1 Plowd. 88 *a;* Littleton, § 347; 9 Wend. N. Y. 511. And now every grant of land, except as a release, is void as an act of maintenance if, at the time it is made, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor. 4 Kent, Comm. 446; 5 Johns. N. Y. 489; 6 Mass. 418.

5. In a more limited sense, an entry signifies the simply going upon another person's premises for some particular purpose. The right to land is exclusive, and every unwarranted entry thereon without the owner's leave, whether it be enclosed or not, or unless the person entering have an authority given him by law, is a trespass. 12 Johns. N. Y. 408; 19 *id.* 385; 2 Mass. 127. But the owner's license will sometimes be presumed, and then will continue in force until it is actually revoked by the owner. 10 Johns. N. Y. 246; Wilks. 195; Taylor, Landl. & Ten. § 766.

Authority to enter upon lands is given by law in many cases. See ARREST.

6. So the proprietor of goods or chattels may enter the land of another upon which they are placed, and remove them, provided they are there without his default: as, where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it. 20 Viner, Abr. 418.

A landlord also may enter, to distrain or to demand rent, to see whether waste has been committed, or repairs made, and may go into the house for either purpose, provided the outer door be open. Croke Eliz. 876; 2 Greenleaf, Ev. § 627. So, if he is bound to repair, he has a right of entry given him by law for that purpose. Moore, 889. Or if trees are excepted out of a demise, the lessee has a right of entering to prune or fell them. 11 Coke, 53; Taylor, Landl. & Ten. § 767.

7. Every traveller also has, by law, the privilege of entering a common inn, at all seasonable times, provided the host has sufficient accommodation, which if he has not it is for him to declare.

So any man may throw down a public nuisance; and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen. 5 Coke, 102. And see 1 Brownl. 212; 12 Mod. 510; W. Jones, 221; 1 Strange, 683. To this end, the abator has authority to enter the close in which it stands. See NUISANCE.

ENTRY AD COMMUNEM LEGEM. In English Law. A writ which lay in favor of the reversioner, when the tenant for term of life, tenant for term of another's life, tenant by the curtesy, or tenant in dower, had aliened and died. Tomlin, Law Dict.

ENTRY, WRIT OF. In Old Practice. A real action brought to recover the possession of lands from one who wrongfully withholds possession thereof.

Such writs were said to be in the *Quibus*, where the suit was brought against the party who committed the wrong; in the *Per*, where the tenant against whom the action was brought was either heir or grantee of the original wrong-doer; in the *Per and Cui*, where there had been two descents, two alienations, or a descent and an alienation; in the *Post*, where the wrong was removed beyond the degrees mentioned.

The above designations are derived from significant Latin words in the respective forms adapted to the cases given. A descent or alienation on the part of the disseisor constituted a degree (see Coke, Litt. 239 *a*); and at common law the writ could be brought only within the degrees (two), the demandant after that being driven to his writ of right. By

the statute of Marlbridge, 52 Hen. III. c. 30 (A. D. 1267), however, a writ of entry, after (*post*) those degrees had been passed in the alienation of the estate, was allowed. Where there had been no descent and the demandant himself had been dispossessed, the writ ran, *Præcipe A quod reddat B sex acras tenæ, etc.*, de quibus *idem A, etc.* (command A to restore to B six acres of land, etc., *of which* the same A, etc.); if there had been a descent after the description came, the clause, *in quod idem A non habet ingressum nisi per C qui illud ei demisit* (into which the said A, the tenant, has no entry but *through* C, the original wrongdoer); where there were two descents, *nisi per D cui C illud demisit* (but by D, to whom C demised it); where it was beyond the degrees, *nisi* post *disseisinam quam C* (but *after* the disseisin which C, the original disseisor, did, etc.).

The writ was of many varieties, also, according to the character of the title of the claimant and the circumstances of the deprivation of possession. Booth enumerates and discusses twelve of these, of which some are *sur disseisin, sur intrusion, ad communem legem, ad terminum qui preterit, cui in vita, cui ante divortium*, etc. Either of these might, of course, be brought in any of the four degrees, as the circumstances of the case required. The use of writs of entry has been long since abolished in England; but they are still in use in a modified form in some of the United States, as the common means of recovering possession of realty against a wrongful occupant. 2 Pick. Mass. 473; 7 *id.* 36; 10 *id.* 359; 5 N. H. 450; 6 *id.* 555. See Stearns, Real Act.; Booth, Real Act.; Reg. Brev. 229; Rastell, Entr. 279 *b*; Coke, Litt. 238 *b*.

ENURE. To take or have effect. To serve to the use, benefit, or advantage of a person. The word is often written *inure*. A release to the tenant for life *enures* to him in reversion; that is, it has the same effect for him as for the tenant for life. A discharge of the principal enures to the benefit of the surety.

ENVOY. In International Law. A minister of the second rank, on whom his sovereign or government has conferred a degree of dignity and respectability which, without being on a level with an ambassador, immediately follows, and, among ministers, yields the pre-eminence to him alone.

Envoys are either ordinary or extraordinary: by custom the latter is held in greater consideration. Vattel, liv. 4, c. 6, § 72.

EORLE (Sax.). An earl. Blount; 1 Blackstone, Comm. 398.

EPILEPSY. In Medical Jurisprudence. A disease of the brain, which occurs in paroxysms with uncertain intervals between them.

These paroxysms are characterized by the loss of sensation, and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia. It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind. 8 Ves. Ch. 87. See Dig. 50. 16. 123; 21. 1. 4. 5.

EPIQUEYA. In Spanish Law. The benignant and prudent interpretation of the law according to the circumstances of the time, place, and person. This word is derived from the Greek, and is synonymous with the word equity. See Murillo, nn. 67, 68.

EPISCOPACY. In Ecclesiastical Law. A form of government by diocesan bishops; the office or condition of a bishop.

EPISCOPALIA (L. Lat.) **In Ecclesiastical Law.** Synodals, or payments due the bishop.

EPISCOPUS (L. Lat.). **In Civil Law.** A superintendent; an inspector. Those in each municipality who had the charge and oversight of the bread and other provisions which served the citizens for their daily food, were so called. Vicat; DuCange.

A bishop. These bishops, or *episcopi*, were held to be the successors of the apostles, and have various titles at different times in history and according to their different duties. It was applied generally to those who had authority or were of peculiar sanctity. After the fall of the Roman empire they came to have very considerable judicial powers. DuCange; Vicat; Calvinus, Lex.

EPISTOLÆ (Lat.). **In Civil Law.** Rescripts; opinions given by the emperors in cases submitted to them for decision.

Answers of the emperors to petitions.

The answers of counsellors (*juris-consulta*), as Ulpian and others, to questions of law proposed to them, were also called *epistolæ*.

Opinions written out. The term originally signified the same as *literæ*. Vicat.

EQUALITY. Likeness in possessing the same rights and being liable to the same duties. See 1 Toullier, nn. 170, 193.

2. Persons are all equal before the law, whatever adventitious advantages some may possess over others. All persons are protected by the law, and obedience to it is required from all.

Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas:* a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person. Bacon, Abr., *Of the Court of Sessions, Of Justices of the Peace.*

3. In contracts, the law presumes that the parties act upon a perfect equality: when, therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions. 4 Day, Conn. 395.

It is a maxim that when the equity of the parties is equal the law must prevail, 3 Call, Va. 259, and that, as between different creditors, equality is equity. 4 Bouvier, Inst. n. 3725; 1 Paige, Ch. N. Y. 181. See Kames, Eq. 75.

EQUINOX. The name given to two periods of the year when the days and nights are equal; that is, when the space of time between the rising and setting of the sun is one-half of a natural day. Dig. 43. 13. 1. 8. See DAY.

EQUITABLE ASSETS. Such assets

as are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.

Those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. Adams, Eq. 254 *et seq.*

They are so called because they can be reached only by the aid and instrumentality of a court of equity, and because their distribution is governed by a different rule from that which governs the distribution of legal assets. 2 Fonblanque, Eq. b. 4, pt. 2, c. 2, § 1, and notes; 2 Vern. Ch. 763; Willes, 523; 3 Wooddeson, Lect. 486; Story, Eq. Jur. § 552.

The doctrine of equitable assets has been much restricted in the United States generally. 4 Johns. Ch. N. Y. 651; 5 Pet. 160; 2 Brock. C. C. 325; 3 Dan. Ky. 18; 8 B. Monr. Ky. 499; 3 Ired. Ch. No. C. 259.

See, generally, Adams, Eq. 254 *et seq.*; Story, Eq. Jur. § 552.

EQUITABLE ESTATE. A right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available.

These estates consist of uses, trusts, and powers. See 2 Bouvier, Inst. n. 1884. They possess in some respects the qualities of legal estates at modern law. 1 Pet. 508; 13 Pick. Mass. 154; 5 Watts, Penn. 113; 1 Johns. Ch. N. Y. 508; 2 Vern. Ch. 536; 1 Brown, Ch. 499; Williams, Real Prop. 134–136; 1 Spence, Eq. Jur. 501; 1 Washburn, Real Prop. 130, 161.

EQUITABLE MORTGAGE. A lien upon real estate of such a character that it is recognized in equity as a security for the payment of money and is treated as a mortgage.

Such a mortgage may arise by a deposit with the lender of money of the title-deeds to an estate. Story, Eq. Jur. § 1020; 1 Brown, Ch. Perkins ed. 269, note; 17 Ves. Ch. 230; 2 Mylne & K. Ch. 417; 5 Wheat. 277. They must have been deposited as a present, *bonâ fide* security, 1 Washburn, Real Prop. 503, and the mortgagee must show notice to affect a subsequent mortgagee of record. 24 Me. 311; 3 Hare, Ch. 416; Story, Eq. Jur. § 1020. Such mortgages are recognized in this country, 24 Me. 311; 18 Miss. 418; 25 *id.* 58; 16 Ga. 469; 2 Hill, Ch. So. C. 166; 2 Sandf. Ch. N. Y. 9; 4 R. I. 512, but during the usual registration of deeds are of infrequent occurrence.

Such a mortgage may arise in favor of the vendor of the real estate as security for purchase-money due from the purchaser. 15 Ves. Ch. 339; 1 Brown, Ch. 420.

It is generally treated of as an equitable mortgage; though it may be doubtful if it is to be so considered. See 1 Mas. C. C. 191; 5 Metc. Mass. 503; 25 Miss. 88; 1 Bland, Ch. Md. 491, 519; 3 Ired. Ch. No. C. 311; 14 Ala. 452; 18 Ala. N. s. 371; 2 Rob. Va. 384; White & T. Lead. Cas. Am. ed. 241. For a full examination of this intricate subject, see 1 Washburn, Real Prop. 505.

EQUITATURA. In Old English Law. Needful equipments for riding or travelling.

EQUITY. A branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

In the broad sense in which this term is sometimes used, it signifies natural justice.

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings, it has a more restrained and limited signification.

One division of courts is into courts of law and courts of equity. And equity, in this relation and application, is a branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

The difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render; because the pleadings cannot fully present all the matters in controversy, nor can the judgments be adapted to the special exigencies which may exist in particular cases. It is not uncommon, also, for cases to fail in those courts, from the fact that too few or too many persons have been joined as parties, or because the pleadings have not been framed with sufficient technical precision.

The remedial process of the courts of equity, on the other hand, admits, and, generally, requires, that all persons having an interest shall be made parties, and makes a large allowance for amendments by summoning and discharging parties after the commencement of the suit. The pleadings are usually framed so as to present to the consideration of the court the whole case, with its possible legal rights, and all its equities,—that is, all the grounds upon which the suitor is or is not entitled to relief upon the principles of equity. And its final remedial process may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exists, by "commanding what is right, and prohibiting what is wrong." In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, either by commanding what is to be done, or prohibiting what is threatened to be done.

The principles upon which, and the modes and forms by and through which, justice is administered in the United States, are derived to a great extent from those which were in existence in England at the time of the settlement of this country; and it is therefore important to a correct understanding of the nature and character of our own jurisprudence, not only to trace it back to its introduction here on the early settlement of the colonies, but also to trace the English jurisprudence from its earliest inception as the administration of law, founded on principles, down to that period. It is in this way that we are enabled to explain many things in our own practice which would otherwise be entirely obscure. This is particularly true of the principles which regulate the jurisdiction and practice of the courts of equity, and of the principles of equity as they are now applied and administered in the courts of law which at the

present day have equitable jurisdiction conferred upon them by statutes passed for that purpose. And for the purpose of a competent understanding of the course of decisions in the courts of equity in England, it is necessary to refer to the origin of the equitable jurisdiction there, and to trace its history, inquiring upon what principles it was originally founded, and how it has been enlarged and sustained.

The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity; the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies; the rules and maxims which regulate its administration; its remedial process and proceedings, and modes of defence; and its rules of evidence and practice.

2. ORIGIN AND HISTORY. The courts of equity may be said to have their origin as far back as the Aula or Curia Regis, the great court in which the king administered justice in person, assisted by his counsellors. Of the officers of this court, the chancellor was one of great trust and confidence, next to the king himself; but his duties do not distinctly appear at the present day. On the dissolution of that court, he exercised separate duties.

On the introduction of seals, he had the keeping of the king's seal, which he affixed to charters and deeds; and he had some authority in relation to the king's grants,—perhaps annulling those which were alleged to have been procured by misrepresentation or to have been issued unadvisedly.

As writs came into use, it was made his duty to frame and issue them from his court, which as early as the reign of Henry II. was known as the chancery. And it is said that he exercised at this period a sort of equitable jurisdiction by which he mitigated the rigor of the common law,—to what extent it is impossible to determine. He is spoken of as one who "annuls unjust laws, and executes the rightful commands of the pious prince, and puts an end to what is injurious to the people or to morals,"—which would form a very ample jurisdiction; but it seems probable that this was according to the authority or direction of the king, given from time to time in relation to particular cases. He was a principal member of the king's council, after the conquest, in which, among other things, all applications for the special exercise of the prerogative in regard to matters of judicial cognizance were discussed and decided upon. In connection with the council, he exercised a separate authority in cases in which the council directed the suitors to proceed in chancery. The court of chancery is said to have sprung from this council. But it may be said that it had its origin in the prerogative of the king, by which he undertook to administer justice, on petitions to himself, without regard to the jurisdiction of the ordinary courts, which he did through orders to his chancellor. The great council, or parliament, also sent matters relating to the king's grants, etc. to the chancery; and it seems that the chancellor, although an ecclesiastic, was the principal actor as regards the judicial business which the select or king's council, as well as the great council, had to advise upon or transact. In the reign of Edward I. the power and authority of the chancellor were extended by the statute of Westminster 2d.

3. In the time of Edward III. proceedings in chancery were commenced by petition or bill, the adverse party was summoned, the parties were examined, and chancery appears as a distinct court for giving relief in cases which required extraordinary remedies, the king having, "by a writ, referred all such matters as were of *grace* to be dispatched by the chancellor or by the keeper of the privy seal."

It may be considered as fully established, as a separate and permanent jurisdiction, from the 17th of Richard II.

In the time of Edward IV. the chancery had come to be regarded as one of the four principal courts of the kingdom. From this time its jurisdiction and the progress of its jurisdiction become of more importance to us.

It is the tendency of any system of legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. This was the case with the Roman law; and, to remedy this, edicts were issued from time to time, which enabled the consuls and prætors to correct "the scrupulosity and mischievous subtlety of the law;" and from these edicts a code of equitable jurisprudence was compiled.

So the principles and rules of the common law, as they were reduced to practice, became in their application the means of injustice in cases where special equitable circumstances existed, of which the judge could not take cognizance because of the precise nature of its titles and rights, the inflexible character of its principles, and the technicality of its pleadings and practice. And, in a manner somewhat analogous to the Roman mode of modification, in order to remedy such hardships, the prerogative of the king or the authority of the great council was exercised in ancient times to procure a more equitable measure of justice in the particular case, which was accomplished through the court of chancery.

4. This was followed by the "*invention*" of the writ of subpœna, by means of which the chancery assumed, upon a complaint made directly to that court, to require the attendance of the adverse party, to answer to such matters as should be objected against him. Notwithstanding the complaints of the commons, from time to time, that the course of proceeding in chancery "was not according to the course of the common law, but the practice of the holy church," the king sustained the authority of the chancellor, the right to issue the writ was recognized and regulated by statute, and other statutes were

passed conferring jurisdiction where it had not been taken before. In this way, without any compilation of a code, a system of equitable jurisprudence was established in the court of chancery, enlarging from time to time; the decisions of the court furnishing an exposition of its principles and of their application. It is said that the jurisdiction was greatly enlarged under the administration of Cardinal Wolsey, in the time of Henry VIII. A controversy took place between Chancellor Ellesmere and Lord Coke, C. J., of the king's bench, in the time of James I., respecting the right of the chancellor to interfere with the judgments of the courts of law. The king sustained the chancellor; and from that time the jurisdiction then claimed has been maintained.

It is from the study of these decisions and the commentaries upon them that we are enabled to determine, with a greater or less degree of certainty, the time when and the grounds upon which jurisdiction was granted or was taken in particular classes of cases, and the principles upon which it was administered. And it is occasionally of importance to attend to this; because we shall see that, chancery having once obtained jurisdiction, that jurisdiction continues until expressly taken away, notwithstanding the intervention of such changes as, if they had been made earlier, would have rendered the exercise of jurisdiction by that court incompatible with the principles upon which it is founded.

5. A brief sketch of some of the principal points in the origin and history of the court of chancery may serve to show that much of its jurisdiction exists independent of any statute, and is founded upon an assumption of a power to do equity, having its first inception in the prerogative of the king, and his commands to do justice in individual cases, extending itself, through the action of the chancellor, to the issue of a writ of summons to appear in his court without any special authority for that purpose, and, upon the return of the subpœna, to the reception of a complaint, to a requirement upon the party summoned to make answer to that complaint, and then to a hearing and decree, or judgment, upon the merits of the matters in controversy, according to the rules of equity and good conscience.

It appears as a noticeable fact that the jurisdiction of the chancery proceeded originally from, and was sustained by, successive kings of England against the repeated remonstrances of the commons, who were for adhering to the common law; though not, perhaps, approving of all its rigors, as equity had been to some extent acknowledged as a rule of decision in the common-law courts.

This opposition of the commons may have been owing in part to the fact that the chancellor was in those days usually an ecclesiastic, and to the existing antipathy among the masses of the people to almost every thing Roman.

The master of the rolls, who for a long period was a judicial officer of the court of chancery, second only to the chancellor, was originally a clerk or keeper of the rolls or records, but seems to have acquired his judicial authority from being at times directed by the king to take cognizance of and determine matters submitted to him.

6. Distinctive Principles. It is quite apparent that some principles other than those of the common law must regulate the exercise of such a jurisdiction. That law could not mitigate its rigor upon its own principles. And as, down to the time of Edward III., and, with few exceptions, to the 21st of Henry VIII., the chancellors were ecclesiastics, much more familiar with the principles of the Roman law than with those of the common law, it was but a matter of course that there should be a larger adoption of the principles of that law; and the study of it is of some importance in this connection. Still, that law cannot be said to be of *authority* even in equity proceedings. The commons were jealous of its introduction. "In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals."

This opposition of the barons and of the common-law judges furnished very sufficient reasons why the chancellors should not profess to adopt that law as the rule of decision. In addition to this, it was not fitted, in many respects, to the state of things existing in England; and so the chancellors were of necessity compelled to act upon equitable principles as expounded by themselves. In later times the common-law judges in that country have resorted to the Roman law for principles of decision to a much greater extent than they have given credit to it.

7. Since the time of Henry VIII. the chancery bench has been occupied by some of the ablest lawyers which England has produced, and they have given to the proceedings and practice in equity definite rules and forms, which leave little to the personal discretion of the chancellor in determining what equity and good conscience require. The discretion of the chancellor is a judicial discretion, to be exercised according to the principles and practice of the court.

The avowed principle upon which the jurisdiction was at first exercised was the administration of justice according to honesty, equity, and conscience,—which last, it is said, was unknown to the common law as a principle of decision.

In the 15th of Richard II. two petitions, addressed to the king and the lords of parliament, were sent to the chancery to be heard, with the direction, "Let there be done, by the authority of parliament, that which right and reason and good faith and good conscience demand in the case."

These may be said to be the general principles upon which equity is administered at the present day.

The distinctive principles of the courts of equity are shown, also, by the classes of cases in which they exercise jurisdiction and give relief,—allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law. This, however, has its limitations, some of its rules of pleading in defence being quite technical. And it is another peculiar feature that the relief is administered by a decree or process adapted to the exigencies of the particular case.

8. JURISDICTION. It is difficult to reduce a jurisdiction so extensive and of such diverse component parts to a rigid and precise classification. But an approach to it may be made. The general nature of the jurisdiction has already been indicated. It exists—

First, for the purpose of compelling a *discovery* from the defendant, respecting the truth of the matters alleged against him, by an appeal to his conscience to speak the truth. The discovery is enforced by requiring an answer to the allegations in the plaintiff's complaint, in order that the plaintiff may use the matters disclosed in the answer, as admissions of the defendant, and, thus, evidence for the plaintiff, either in connection with and in aid of other evidence offered by the plaintiff, or to supply the want of other evidence on his part; or it may be to avoid the expense to which the plaintiff must be put in procuring other evidence to sustain his case.

When the plaintiff's complaint, otherwise called a bill, prays for relief in the same suit, the statements of the defendant in his answer are considered by the court in forming a judgment upon the whole case.

To a certain extent, the statements of the defendant in answer to the bill are evidence for himself also.

The discovery which may be required is not only of facts within the knowledge of the defendant, but may, also, be of deeds and other writings in his possession.

The right to discovery is not, however, an unlimited one: as, for instance, the defendant is not bound to make a discovery which would subject him to punishment, nor, ordinarily, to discover the title upon which he relies in his defence; nor is the plaintiff entitled to require the production of all papers which he may desire to look into. The limits of the right deserve careful consideration. The discovery, when had, may be the foundation of equitable relief in the same suit, in which case it may be connected with all the classes of cases in which relief is sought; or it may be for the purpose of being used in some other court, in which case the jurisdiction is designated as an assistant jurisdiction.

9. *Second*, where the courts of law do not, or did not, recognize any right, and therefore could give no remedy, but where the courts of equity recognize equitable rights and, of course, give equitable relief. This has been denominated the exclusive jurisdiction. In this class are *trusts, charities, forfeited and imperfect mortgages, penalties* and *forfeitures, imperfect consideration.*

Uses and trusts have been supposed to have had their origin in the restrictions laid by parliament upon conveyances in mortmain,—that is, to the church for charitable, or rather for ecclesiastical, purposes.

It may well be that the doctrine of equitable titles and estates, unknown to the common law but which could be enforced in chancery, had its origin in conveyances to individuals for the use of the church in order to avoid the operation of these restrictions,—the conscience of the feoffee being bound to permit the church to have the use according to the design and intent of the feoffment.

But conveyances in trust for the use of the church were not by any means the only cases in which it was desirable to convey the legal title to one for the use of another. In many instances, such a conveyance offered a convenient mode of making provision for those who, from any circumstances, were unable to manage property advantageously for themselves, or to whom it was not desirable to give the control of it; and the propriety in all such cases of some protection to the beneficiary is quite apparent. The court of chancery, by recognizing that he had an interest of an equitable character which could be protected and enforced against the holder of the legal title, exercised a jurisdiction to give relief in cases which the courts of common law could not reach consistently with their principles and modes of procedure.

Mortgages, which were originally estates conveyed upon condition, redeemable if the condition was performed at the day, but absolute on non-performance, the right to redeem being thereby forfeited, owe their origin to the court of chancery; which, acting at first, perhaps, in some case where the non-performance was by mistake or accident, soon recognized an equitable right of redemption after the day, as a general rule, in order to relieve against the forfeiture. This became known as an equity of redemption,—a designation in use at the present day, although there has long been a legal right of redemption in such cases.

Relief against penalties and forfeitures also was formerly obtained only through the aid of the court of chancery.

In most of the cases which fall under this head, courts of law now exercise a concurrent jurisdiction.

10. *Third*, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction. This class embraces *fraud, mistake, accident, administration, legacies, contribution*, and cases where justice and conscience require the *cancellation or reformation of instruments*,

or the rescission, or the specific performance of contracts.

The courts of law relieve against fraud, mistake, and accident where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.

The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.

Transfers to defeat or delay creditors; and purchases with notice of an outstanding title; come under the head of fraud.

It has been said that there is a less amount of evidence required to prove fraud, in equity, than there is at law; but the soundness of that position may well be doubted.

The court does not relieve in all cases of accident and mistake.

In many cases the circumstances are such as to require the cancellation or reformation of written instruments or the specific performance of contracts, instead of damages for the breach of them.

Fourth, where the court of equity administers a remedy because the relations of the parties are such that there are impediments to a legal remedy. *Partnership* furnishes a marked instance. *Joint-tenancy and marshalling of assets* may be included.

From the nature of a partnership, there are impediments to suits at law between the several partners and the partnership in relation to matters involved in the partnership; and impediments of a somewhat similar character exist in other cases.

Fifth, where the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case. This class includes *account, partition, dower, ascertainment of boundaries.*

11. *Sixth*, where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: as, the relations of *parent* and *child, guardian* and *ward, attorney* and *client, principal* and *agent, executor* and *administrator, legatees* and *distributees, trustee* and *cestui que trust*, etc.

Seventh, where the court grant relief from considerations of public policy, because of the mischief which would result if the court did not interfere. *Marriage-brokage agreements, contracts in restraint of trade, buying* and *selling public offices, agreements founded on corrupt considerations, usury, gaming,* and *contracts with expectant heirs*, are of this class.

Cases of this and the preceding class are sometimes considered under the head of *constructive fraud.*

Eighth, where a party from incapacity to take care of his rights is under the special care of the court of equity, as *infants, idiots,* and *lunatics.*

This is a branch of jurisdiction of very ancient date, and of a special character, said to be founded in the prerogative of the king.

In this country the court does not, in general, assume the guardianship, but exercises an extensive jurisdiction over guardians, and may hold a stranger interfering with the property of an infant accountable as if he were guardian.

Ninth, where the court recognizes an obligation on the part of a husband to make provision for the support of his wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

This jurisdiction is not founded upon either trust or fraud, but is derived originally from the maxim that he who asks equity should do equity.

Tenth, where the equitable relief appropriate to the case consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of *injunction.*

Eleventh, the court aids in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

12. PECULIAR REMEDIES, AND THE MANNER OF ADMINISTERING THEM. Under this head are—*specific performance of contracts; re-execution, reformation, rescission,* and *cancellation*, of contracts or instruments; restraint by *injunction; bills quia timet; bills of peace;* protection of a party liable at law, but who has no interest, by bill of *interpleader; election* between two inconsistent legal rights; *conversion; priorities; tacking; marshalling of securities; application of purchase-money.*

In recent periods, the principles of the court of chancery have in many instances been acted on and recognized by the courts of law (as, for instance, in relation to mortgages, contribution, etc.) so far as the rules of the courts of law admitted of their introduction.

In some states the entire jurisdiction has, by statute, been conferred upon the courts of law, who exercise it as a separate and distinct branch of their authority, upon the principles and according to the modes and forms previously adopted in chancery.

In a few, the jurisdictions of the courts of law and of equity have been amalgamated, and an entire system has been substituted, administered more according to the principles and modes and forms of equity than the principles and forms of the common law.

13. RULES AND MAXIMS. In the administration of the jurisdiction, there are certain rules and maxims which are of special significance.

First, Equity having once had jurisdiction of a subject-matter because there is no remedy at law, or because the remedy is inadequate, *does not lose the jurisdiction* merely because the courts of law afterwards give the same or a similar relief.

Second, Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because

the rules of law would operate to sanction fraud or injustice in the particular case.

Third, When there is equal equity, the law must prevail. The ground upon which the suitor comes into the court of equity is that he is entitled to relief there. But if his adversary has an equally equitable case, the complainant has no title to relief.

Fourth, Equality is equity: applied to cases of contribution, apportionment of moneys due among those liable or benefited by the payment, abatement of claims on account of deficiency of the means of payment, etc.

Fifth, He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief.

Sixth, Equity considers that as done which ought to have been done. A maxim of much more limited application than might at first be supposed from the broad terms in which it is expressed. In favor of parties who would have had a benefit from something contracted to be done, and who have an equitable right to have the case considered as if it had been done, equity applies this maxim. Illustration: when there is an agreement for a sale of land, and the vendor dies, the land may be treated as money, and the proceeds of the sale, when completed, go to the distributees of personal estate, instead of to the heir. If the vendee dies before the completion of the purchase, the purchase-money may be treated as land for the benefit of the heir.

14. Remedial process, and defence. A suit in equity is ordinarily instituted by a complaint, or petition, called a bill; and the defendant is served with a writ of summons, requiring him to appear and answer, called a subpœna.

The forms of proceedings in equity are such as to bring the rights of all persons interested before the court; and, as a general rule, all persons interested should be made parties to the bill, either as plaintiffs or defendants.

There may be amendments of the bill; or a supplemental bill,—which is sometimes necessary when the case is beyond the stage for amendment.

In case the suit fails by the death of the party, there is a bill of revivor, and after the cause is disposed of there may be a bill of review.

The defence is made by demurrer, plea, or answer. If the defendant has no interest, he may disclaim. Discovery may be obtained from the plaintiff, and further matter may be introduced, by means of a cross-bill, brought by the defendant against the plaintiff, in order that it may be considered at the same time.

If the plaintiff elects, he may file a replication to the defendant's answer.

The final process is directed by the decree, which being a special judgment can provide relief according to the nature of the case. This is sometimes by a perpetual injunction.

There may be a bill to execute, or to impeach, a decree.

15. Evidence and practice. The rules of evidence, except as to the effect of the answer and the taking of the testimony, are, in general, similar to the rules of evidence in cases at law. But to this there are exceptions.

The answer, if made on oath, is evidence for the defendant, so far as it is responsive to the calls of the bill for discovery, and as such it prevails, unless it is overcome by something more than what is equivalent to the testimony of one witness. If without oath, it is a mere pleading, and the allegations stand for proof.

If the answer is incomplete or improper, the plaintiff may except to it, and it must be so amended as to be made sufficient and proper.

The case may be heard on the bill and answer, if the plaintiff so elects, and sets the case down for a hearing in that mode.

If the plaintiff desires to controvert any of the statements in the answer, he files a replication by which he denies the truth of the allegations in the answer, and testimony is taken.

The testimony, according to the former practice in chancery, is taken upon interrogatories filed in the clerk's office, and propounded by the examiner, without the presence of the parties. But this practice has been very extensively modified.

If any of the testimony is improper, there is a motion to suppress it.

The case may be referred to a master to state the accounts between the parties, or to make such other report as the case may require; and there may be an examination of the parties in the master's office. Exceptions may be taken to his report.

The hearing of the case is before the equity judge, who may make interlocutory orders or decrees, and who pronounces the final decree or judgment. There may be a rehearing, if sufficient cause is shown.

At the present day, in England and in several of the United States the proceedings are very much simplified.

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See, generally, Spence, Equitable Jurisdiction of the Court of Chancery; Reeve, Hist. Eng. Law; Crabb, Hist. Eng. Law; Barton, Suit in Equity; Fonblanque, Equity; Jeremy, Eq. Jurisdiction; Maddock, Chancery; Story, Eq. Jurisprudence; Adams, Eq.; Hare, Discovery; Wigram, Discovery; Mitford, Eq. Plead.; Cooper, Eq. Plead.; Lube, Eq. Plead.; Beames, Pleas in Equity; Story, Eq. Plead.; Calvert, Parties; Gresley, Eq. Evid.; Tamlyn, Evid.; 3 Greenleaf, Ev.; Eden, Injunctions; Edwards, Receivers; Van Heythuysen, Eq. Draftsman; Smith, Chanc. Practice; Daniell, Chanc. Pract.; Hoffman, Ch. Prac.; Lewin, Trusts; Hill, Trustees; Tudor, Lead. Cas. in Eq.

EQUITY EVIDENCE. See Evidence.

EQUITY PLEADING. See Plea, §§ **1–5**; Pleading.

EQUITY OF REDEMPTION. A right which the mortgagee of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.

The phrase equity of redemption is indiscriminately, though often incorrectly, applied to the right of the mortgagor to regain his estate, both *before* and *after* breach of condition. In North Carolina, by statute, the former is called a *legal right of redemption*, and the latter the *equity of redemption*, thereby keeping a just distinction between these estates. 1 No. C. Rev. Stat. 266; 4 M'Cord, So.C. 340. The interest is recognized at law for many purposes: as a subsisting estate, although the mortgagor in order to enforce his right is obliged to resort to an equitable proceeding, administered generally in courts of equity, but in some states by courts of law, 11 Serg. & R. Penn. 223, or in some states may pay the debt and have an action at law. 18 Johns. N. Y. 7, 110; 1 Halst. N. J. 466: 2 Harr. & M'H. Md. 9.

2. This estate in the mortgagor is one which he may devise or grant, 1 Washburn, Real Prop. 544, and which is governed by the same rules of devolution or descent as any other estate in lands. 10 Conn. 243; 2 Sim. & S. Ch. 323; 2 Hare, Ch. 35. He may mortgage it, 1 Pick. Mass. 485, and it is liable for his debts, 3 Metc. Mass. 81; 21 Me. 104; 7 Watts, Penn. 475; 15 Ohio, 457; 1 Caines, Cas. N. Y. 47; 4 B. Monr. Ky. 429; 31 Miss. 253; 20 Ill. 53; 7 Ark. 269; 1 Day, Conn. 93; 4 M'Cord, So. C. 336; Ala. Code, 1852, § 2455; Conn. Comp. Laws, 1854, § 197; Thompson, Dig. Fla. Laws, 355; Mich. Comp. Laws, 1857, 938; No. C. Rev. Code, 1854, c. 45, § 5; but see 7 Paige, Ch. N. Y. 437; 7 Dan. Ky. 67; 14 Ala. N. S. 476; 23 Miss. 206; 2 Dougl. Mich. 176; 24 Mo. 249; 13 Pet. 294; and in many other cases, if the mortgagor still retains possession, he is held to be the owner. 5 Gray, Mass. 470, note; 11 N. H. 293; 22 Conn. 587; 13 Ill. 469; 34 Me. 89; 5 Wend. N. Y. 603; 23 Barb. N. Y. 490.

3. Any person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes in as privy in estate with the mortgagor, may exercise the right; including heirs, devisees, executors, administrators, and assignees of the mortgagor, Coote, Mortg. 516; 2 Root, Conn. 509; 2 Hayw. No. C. 22; 14 Vt. 501; 10 Paige, Ch. N. Y. 49; 9 Mass. 422; subsequent incumbrancers, 5 Johns. Ch. N. Y. 35; 2 Barb. Ch. N. Y. 371; 1 Dan. Ky. 23; 8 Cush. Mass. 46; judgment creditors, 2 Litt. Ky. 382; 4 Hen. & M. Va. 101; 4 Yerg. Tenn. 10; 2 Cal. 595; 2 Dev. & B. Eq. No. C. 285; tenants for years, 8 Metc. Mass. 517; 7 N. Y. 44; a jointress, 1 Vern. Ch. 190; 2 White & L. Lead. Cas. 752; dowress and tenant by curtesy, 14 Pick. Mass. 98; one having an easement. 22 Pick. Mass. 401.

See, generally, Coote, Mortg. 516; 1 Washburn, Real Prop. 544; and an essay by C. F. Wolcott, Esq., of Boston, 23 Bost. Law Rep. 193, 286.

EQUIVALENT. Of the same value. Sometimes a condition must be literally accomplished in *formâ specificâ;* but some may be fulfilled by an equivalent, *per æquipolens*, when such appears to be the intention of the parties: as, if I promise to pay you one hundred dollars, and then die, my executor may fulfil my engagement; for it is equivalent to you whether the money be paid to you by me or by him. Rolle, Abr. 451; 1 Bouvier, Inst. n. 760.

EQUIVOCAL. Having a double sense. In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. See CONSTRUCTION; INTERPRETATION; Dig. 22. 1. 4, 45. 1. 80. 50. 17. 67.

EQUULEUS (Lat.). A kind of rack for extorting confessions. Encyc. Lond.

ERASURE. The obliteration of a writing. It will render it void or not under the same circumstances as an interlineation. See 5 Pet. 560; 11 Coke, 88; 4 Cruise, Dig. 368; 13 Viner, Abr. 41; Fitzg. 207; 5 Bingh. 183; 3 Carr. & P. 55; 2 Wend. N. Y. 555; 11 Conn. 531; 5 Mart. La. 190; 2 La. 291; 3 *id.* 56; 4 *id.* 270. See ALTERATION; INTERLINEATION.

ERCISCUNDUS (Lat. *erciscere*). For dividing. *Familiæ erciscundæ actio.* An action for dividing a way, goods, or any matter of inheritance. Vicat, Voc. Jur.; Calvinus, Lex.

ERECTIMUS (Lat. we have erected). A word proper to be used in the creation of a new office by the sovereign. Bacon, Abr. *Offices*, E.

EROTIC MANIA. In Medical Jurisprudence. A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind, which fills it with a crowd of voluptuous images, and hurries its victim to acts of the grossest licentiousness, in the absence of any lesion of the intellectual powers. See MANIA.

ERRANT (Lat. *errare*, to wander). Wandering. Justices in eyre were formerly said to be *errant* (itinerant). Cowel.

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment.

Error of fact will excuse the party acting illegally but honestly, in many cases, will avoid a contract in some instances, and when mutual will furnish equity with a ground for interference. 15 Me. 45; 20 Wend. N. Y. 174; 5 Conn. 71; 12 Mass. 36. See MISTAKE

Error in law will not, in general, excuse a man for its violation. A contract made under an error in law is, in general, binding; for, were it not so, error would be urged in almost every case. 2 East, 469. See 6 Johns. Ch. N. Y. 166; 8 Cow. N. Y. 195; 2 Jac. & W. Ch. 249; 1 Story, Eq. Jur. 156; 1 Younge & C. Ch. 232; 6 Barnew. & C. 671; Bowyer, Comm. 135; 3 Savigny, Dr. Rom. App. viii.

But a foreign law will for this purpose be considered as a fact. 15 Me. 45; 9 Pick. Mass. 112; 2 Pothier, Obl. Evans ed. 369, etc.

ERROR, WRIT OF. See WRIT OF ERROR.

ESCAMBIO. In Old English Law. A writ granting power to an English merchant to draw a bill of exchange on another who is in a foreign country. Reg. Orig. 194.

ESCAMBIUM. Exchange, which see.

ESCAPE. The deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. 5 Mass. 310.

The voluntarily or negligently allowing any person lawfully in confinement to leave the place. 2 Bishop, Crim. Law, § 917.

Departure of a prisoner from custody before he is discharged by due process of law.

Escape takes place without force; prison-breach, with violence; rescue, through the intervention of third parties.

Actual escapes are those which take place when the prisoner in fact gets out of prison and unlawfully regains his liberty.

Constructive escapes take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. Bacon, Abr. *Escape* (B); Plowd. 17; 5 Mass. 310; 2 Mas. C. C. 486.

Negligent escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison.

Voluntary escape takes place when the prisoner has given to him voluntarily any liberty not authorized by law. 5 Mass. 310; 2 N. Chipm. Vt. 11.

2. When a man is imprisoned in a proper place under the process of a court having jurisdiction in the case, he is lawfully imprisoned, notwithstanding the proceedings may be irregular, 1 Crawf. & D. Cr. Cas. 203; but if the court has not jurisdiction the imprisonment is unlawful, whether the process be regular or otherwise. Bacon, Abr. *Escape in Civil Cases* (A 1); 5 Johns. N. Y. 89; 13 *id.* 378; 1 Cow. N. Y. 309; 8 *id.* 192; 1 Root, Conn. 288.

Letting a prisoner, confined under final process, out of prison for any even the shortest time, is an escape, although he afterwards return, 2 W. Blackst. 1048; 1 Rolle, Abr. 806; and this may be (as in the case of imprisonment under a *ca. sa.*) although an officer may accompany him. 3 Coke, 44 *a;* Plowd. 37; Hob. 202; 1 Bos. & P. 24; 2 W. Blackst. 1048.

3. In criminal cases, the prisoner is indictable for a misdemeanor, whether the escape be negligen or voluntary, 2 Hawkins, Pl. Cr. Cumm. ed. 189; Croke Car. 209; 7 Conn. 384; 16 *id.* 47; and the officer is also indictable. 2 Bishop, Crim. Law, § 924. If the offence of the prisoner was a felony, a voluntary escape is a felony on the part of the officer, 2 Hawkins, Pl. Cr. c. 19, § 25; if negligent, it is a misdemeanor only in any case. 2 Bishop, Crim. Law, § 925. It is the duty of the officer to rearrest after an escape. 6 Hill, N. Y. 344.

4. In civil cases, a prisoner may be arrested who escapes from custody on mesne process, and the officer will not be liable if he rearrest him, Croke Jac. 419; but if the escape be voluntary from imprisonment on mesne process, and in any case if the escape be from final process, the officer is liable in damages to the plaintiff, and is not excused by retaking the prisoner. 2 Term, 172; 2 Barnew. & Ald. 56. Nothing but an act of God or the enemies of the country will excuse an escape. 24 Wend. N. Y. 381; 2 Murph. So. C. 386; 1 Brev. So. C. 146. See 5 Ired. No. C. 702; 5 Watts & S. Penn. 455; 17 Wend. N. Y. 543.

ESCAPE WARRANT. A warrant issued in England against a person who being charged in custody in the king's bench or Fleet prison, in execution or mesne process, escapes and goes at large. Jacob, Law Dict.

ESCHEAT (Fr. *escheoir*, to happen). An accidental reverting of lands to the original lord.

In case of escheat by failure of heirs, by corruption of blood, or by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. 1 Washburn, Real Prop. 24.

An obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee. 2 Sharswood, Blackst. Comm. 244.

The estate itself which so reverted was called an escheat. Spelman, Gloss. The term included also other property which fell to the lord: as, trees which fell down, etc. Cowel.

2. All escheats under the English law are declared to be strictly feudal and to import the extinction of tenure. Wright, Ten. 115–117; 1 W. Blackst. 123.

In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. 4 Kent, Comm. 424. See 10 Gill & J. Md. 450; 3 Dane, Abr. 140. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to escheat is secured by statute. 4 Kent, Comm. 424; 1 Washburn, Real Prop. 24, 27; 2 *id.* 443.

It seems to be the universal rule of civilized society that when the deceased owner has left no heirs it should vest in the public and be at the disposal of the government. Code, 10. 10. 1; Domat, Droit Pub. liv. 1, t. 6, s. 3, n. 1. See 10 Viner, Abr. 139; 1 Brown, Civ. Law, 250; 1 Swift, Dig. 156; 2 Sharswood, Blackst. Comm. 244, 245; 5 Binn. Penn. 375; 3 Dane, Abr. 140, § 24; Jones, Land Office Titles in Penna. 5, 6, 93; 27 Barb.

N. Y. 376; 9 Rich. Eq. So. C. 440; 27 Penn. St. 36; 5 Cal. 373; 1 Sneed, Tenn. 355; 4 Zabr. N. J. 566; 2 Swan, Tenn. 46; 4 Md. Ch. Dec. 167; 16 Ga. 31.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the sovereign for the purpose of recovering the escheated property. 10 Viner, Abr. 158; Coke, Litt. 13 *b*; Tomlin; Termes de la Ley. His office was to be retained but one year; and no one person could hold the office more than once in three years. Termes de la Ley.

ESCRIBANO. In Spanish Law. The public officer who is lawfully authorized to reduce to writing and verify by his signature all judicial acts and proceedings, as well as all acts and contracts entered into between private individuals.

ESCROW. A deed delivered to a stranger, to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete.

The delivery must be to a stranger. 8 Mass. 230. See 9 Coke, 137 *b*; T. Moore, 642; 5 Blackf. Ind. 18; 23 Wend. N. Y. 43; 2 Dev. & B. No. C. 530; 4 Watts, Penn. 180; 22 Me. 569. The second delivery must be conditioned, and not merely postponed. 3 Metc. Mass. 412; 8 *id.* 436; 2 Barnew. & C. 82; Sheppard, Touchst. Preston ed. 58. Care should be taken to express the intent of the first delivery clearly. 2 Johns. N. Y. 248; 10 Wend. N. Y. 310; 8 Mass. 230; 22 Me. 569; 14 Conn. 271; 3 Green, Ch. N. J. 155. An escrow has no effect as a deed till the performance of the condition, 21 Wend. N. Y. 267, takes effect from the second delivery. 1 Barb. N. Y. 500. See 3 Metc. Mass. 412; 6 Wend. N. Y. 666; 16 Vt. 563; 30 Me. 110; 10 Penn. St. 285.

See, generally, 14 Ohio St. 309; 13 Johns. N. Y. 285; 5 Mas. C. C. 60; 6 Humphr. Tenn. 405; 3 Metc. Mass. 412.

ESCUAGE. In Old English Law. Service of the shield. Tenants who hold their land by escuage hold by knight's service. 1 Thomas, Coke, Litt. 272; Littleton, § 95, 86 *b*.

ESKIPPAMENTUM. Tackle or furniture; outfit. Certain towns in England were bound to furnish certain ships at their own expense and with double *skippage* or tackle. The modern word outfit would seem to render the passage quite as satisfactorily; though the conjecture of Cowel has the advantage of antiquity

ESKIPPER, ESKIPPARE. To ship. Kelham; Rastell, Entr. 409.

ESKIPPESON. Shippage, or passage by sea. Spelled, also, *skippeson*. Cowel.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose one of the parts of the estate after it has been divided.

ESPERA. The period fixed by a competent judge within which a party is to do certain acts, as, *e.g.*, to effect certain payments, present documents, etc.; and more especially the privilege granted by law to debtors, allowing them certain time for the payment of their indebtedness.

ESPLEES. The products which the land or ground yields: as, the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents and services. Termes de la Ley. See 11 Serg. & R. Penn. 275; Dane, Abr. Index.

ESPOUSALS. A mutual promise between a man and a woman to marry each other at some other time: it differs from a marriage, because then the contract is completed. Wood, Inst. 57.

ESQUIRE. A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in law.

In England, it is a title next above that of a gentleman and below that of a knight. Camden reckons up four kinds of esquires particularly regarded by the heralds: the eldest sons of knights, and their eldest sons in perpetual succession; the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; esquires created by the king's letters patent, or other investiture, and their eldest sons; esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown.

ESSENDI QUIETAM DE THEOLONIA (Lat. of being quit of toll). A writ which lay anciently for the citizens or burgesses of a town which was entitled to exemption from toll, in case toll was demanded of them. Fitzherbert, Nat. Brev. 226, I.

ESSOIN, ESSOIGN. In Old English Law. An excuse for not appearing in court at the return of the process. Presentation of such excuse. Spelman, Gloss.; 1 Sellon, Pract. 4; Comyns, Dig. *Exoine*, B 1. *Essoin* is not now allowed at all in personal actions. 2 Term, 16; 16 East, 7 (*a*); 3 Sharswood, Blackst. Comm. 278, note.

ESSOIN DAY. Formerly, the first day in the term was essoin day; now practically abolished. Dowl. 448; 3 Sharswood, Blackst. Comm. 278, n.

ESSOIN ROLL. The roll containing the *essoins* and the day of adjournment. Roscoe, Real Act. 162 *et seq.*

ESTABLISH. This word occurs frequently in the constitution of the United States, and it is there used in different meanings. 1. To settle firmly, to fix unalterably: as, to establish justice, which is the avowed object of the constitution. 2. To make or form: as, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,—which evidently does not mean that these laws shall be unalterably established as justice. 3. To found, to create, to regulate: as, Congress shall have power to establish post-roads and post-offices. 4. To

found, recognize, confirm, or admit: as, Congress shall make no law respecting an establishment of religion. 5. To create, to ratify, or confirm: as, We, the people, etc., do ordain and establish this constitution. 1 Story, Const. § 454.

ESTABLISHMENT, ESTABLISSEMENT. An ordinance or statute. Especially used of those ordinances or statutes passed in the reign of Edw. I. Coke, 2d Inst. 156; Britton, c. 21.

Establissement is also used to denote the settlement of dower by the husband upon his wife. Britton, c. 102.

ESTADAL. In Spanish Law. In Spanish America this was a measure of land of sixteen square varas, or yards. 2 White, Coll. 139.

ESTADIA. In Spanish Law. Called, also, *Sobrestadia.* The time for which the party who has chartered a vessel, or is bound to receive the cargo, has to pay demurrage on account of his delay in the execution of the contract.

ESTATE (Lat. *status*, the condition or circumstances in which the owner stands with reference to his property). The degree, quantity, nature, and extent of interest which a person has in real property.

This word has several meanings. 1. In its most extensive sense, it is applied to signify every thing of which riches or fortune may consist, and includes personal and real property: hence we say, personal estate, real estate. 8 Ves. Ch. 504; 16 Johns. N. Y. 587; 4 Metc. Mass. 178; 3 Cranch, 97. 2. In its more limited sense, the word estate is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein: as, "my estate at A." The second, which is the proper and technical meaning of estate, is the degree, quantity, nature, and extent of interest which one has in real property: as, an estate in fee, whether the same be a fee-simple or fee-tail, or an estate for life or for years, etc. Lord Coke says, Estate signifies such inheritance, freehold, term of years, tenancy by statute merchant, staple, eligit, or the like, as any man hath in lands or tenements, etc. Coke, Litt. §§ 345, 650 *a*. See Jones, Land Office Titles in Penna. 165–170.

ESTATE PER AUTRE VIE. An estate for the life of another. 1 Washburn, Real Prop. 88; 2 Sharswood, Blackst. Comm. 120.

ESTATE IN COMMON. An estate held in joint possession by two or more persons at the same time by several and distinct titles. 1 Washburn, Real Prop. 415; 2 Blackstone, Comm. 191; 2 Flintoff, Real Prop. 345; 1 Preston, Est. 139. This estate has the single unity of possession.

ESTATE UPON CONDITION. See CONDITION.

ESTATE IN COPARCENERY. An estate which several persons hold as one heir, whether male or female. This estate has the three unities of time, title, and possession; but the interests of the coparceners may be unequal. 1 Washburn, Real Prop. 414; 2 Sharswood, Blackst. Comm. 188; 4 Kent, Comm. 366.

ESTATE BY THE CURTESY. That estate to which a husband is entitled upon the death of his wife in the lands or tenements of which she was seised in possession in fee-simple or in fee-tail during their coverture; provided they have had lawful issue born alive and possibly capable of inheriting her estate. 1 Washburn, Real Prop. 128; 2 Crabb, Real Prop. § 1074; Coke, Litt. 30 *a*; 2 Sharswood, Blackst. Comm. 126; 1 Greenleaf, Cruise, Dig. 153; 4 Kent, Comm. 373, note a. See CURTESY.

ESTATE IN DOWER. An estate which a widow has for her life in some portion of the lands and tenements of which her husband was seised at any time during coverture, and which her issue might have inherited if she had any, and which is to take effect in possession from the death of her husband. 1 Washburn, Real Prop. 149; Park, Dow. 5; 2 Sharswood, Blackst. Comm. 129; 4 Kent, Comm. 41; 1 Greenleaf, Cruise, Dig. 64. See DOWER.

ESTATE BY ELEGIT. See ELEGIT.

ESTATE IN EXPECTANCY. An estate giving a present or vested contingent right of future enjoyment. One in which the right to pernancy of the profits is postponed to some future period. 1 Greenleaf, Cruise, Dig. 701.

ESTATE IN FEE-SIMPLE. The estate which a man has where lands are given to him and to his heirs absolutely without any end or limit put to his estate. 2 Sharswood, Blackst. Comm. 106; Plowd. 557; 1 Preston, Est. 425; Littleton, § 1; 1 Washburn, Real Prop. 51. The word simple does not add any significance, but is used to mark fully the distinction between an unqualified fee and a fee-tail or any class of conditional estates. 1 Washburn, Real Prop. 51.

ESTATE IN FEE-TAIL. An inheritable estate which will descend to certain classes of heirs. The words "heirs of the body" of, etc. are the proper words of creation, 1 Washburn, Real Prop. 51, said to exist by virtue of the statute *de Donis.* Crabb, Real Prop. § 971; 1 Greenleaf, Cruise, Dig. 79. See, generally, DuCange; 1 Greenleaf, Cruise, Dig. 20, 79; Littleton, § 18; Sullivan, Lect. xvi.–xviii.; Wright, Ten. 187; 1 Washburn, Real Prop. 66; 1 Gray, Mass. 286; 5 *id.* 523; 35 N. H. 176; 26 Penn. St. 126; 8 Gill, Md. 18.

ESTATE OF INHERITANCE. An estate which may descend to heirs. 1 Washburn, Real Prop. 51; 1 Stephen, Comm. 218.

All freehold estates are estates of inheritance, except estates for life. Crabb, Real Prop. § 945.

ESTATE OF JOINT TENANCY. The estate which subsists where several persons have any subject of property jointly between them in equal shares by purchase. 1 Washburn, Real Prop. 406; Williams, Real Prop. 112; 1 Blackstone, Comm. 180. The right of survivorship is the distinguishing character-

istic of this estate. Littleton, § 280. In most of the United States the presumption is that all tenants holding jointly hold as tenants in common, unless a clear intention to the contrary be shown. 6 Gray, Mass. 428; 7 Mass. 131; 5 Halst. N. J. 42; 20 Ala. N. S. 112; 1 Root, Conn. 48; 2 Ohio, 306; 10 Ohio, 1; 11 Serg. & R. Penn. 191; 3 Vt. 543; 3 Md. Ch. Dec. 547; 1 Greenleaf, Cruise, Dig. 829; 1 Washburn, Real Prop. 408.

ESTATE FOR LIFE. A freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of a life. 1 Washburn, Real Prop. 88; 2 Crabb, Real Prop. § 1020; 1 Greenleaf, Cruise, Dig. 102; Coke, Litt. 42 *a;* Bracton, lib. 4, c. 28, § 207. When the measure of duration is the tenant's own life, it is called an estate "for the tenant's own life;" when the measure of duration is the life of another person, it is called an estate "*per* (or *pur*) *autre vie.*" 1 Washburn, Real Prop. 88; 2 Sharswood, Blackst. Comm. 120; Coke, Litt. 41 *b;* 4 Kent, Comm. 23, 24.

Estates for life may be created by act of law or by act of the parties: in the former case they are called legal, in the latter, conventional. The legal life estates are estates-tail after possibility of issue extinct, estates by dower, estates by curtesy, jointures. 34 Me. 151; 5 Gratt. Va. 499; 1 Cush. Mass. 95; 6 *id.* 87; 24 Penn. St. 162; 6 Ind. 489; 3 Eng. L. & Eq. 345; 5 Md. 219; 1 Greenleaf, Cruise, Dig. 103.

The chief incidents of life estates are a right to take reasonable estovers, and freedom from injury by a sudden termination or disturbance of the estate. Under-tenants have the same privileges as the original tenant; and acts of the original tenant which would destroy his own claim to these privileges will not affect them. See 19 Penn. St. 323.

Their right, however, does not of course, as against the superior lord, extend beyond the life of the original tenant. 2 Sharswood, Blackst. Comm. 122; 1 Rolle, Abr. 727; 1 Washburn, Real Prop. 88 *et seq.;* Coke, Litt. 41 *b et seq.;* 2 Flintoff, Real Prop. 232; 1 Greenleaf, Cruise, Dig. 102 *et seq.*

ESTATE IN POSSESSION. An estate where the tenant is in actual pernancy or receipt of the rents and other advantages arising therefrom. 2 Crabb, Real Prop. § 2322; 2 Sharswood, Blackst. Comm. 163; 1 Greenleaf, Cruise, Dig. 701.

ESTATE IN REMAINDER. An estate limited to take effect in possession, or in enjoyment, or in both, subject only to any term of years or contingent interest that may intervene immediately after the regular expiration of a particular estate of freehold previously created together with it, by the same instrument, out of the same subject of property. 2 Fearne, Cont. Rem. (Smith's ed.) § 159; 2 Sharswood, Blackst. Comm. 163; 1 Greenleaf, Cruise, Dig. 701; 4 Kent, Comm. 209. See CONTINGENT REMAINDER; REMAINDER.

ESTATE IN REVERSION. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. 2 Sharswood, Blackst. Comm. 175; Coke, Litt. 22; Crabb, Real Prop. § 2345. The residue of an estate which always continues in him who made a particular grant. Plowd. 151; 1 Greenleaf, Cruise, Dig. 817; Coke, Litt. 22 *b*, 142 *b*. It is an estate in expectancy created by law.

ESTATE IN SEVERALTY. An estate held by a person in his own right only, without any other person being joined or connected with him in point of interest during his estate. 2 Blackstone, Comm. 179; 1 Greenleaf, Cruise, Dig. 829; 1 Washburn, Real Prop. 112.

ESTATE BY STATUTE MERCHANT. An estate whereby the creditor, under the custom of London, retained the possession of all his debtor's lands until his debts were paid. 1 Greenleaf, Cruise, Dig. 515. See STATUTE MERCHANT.

ESTATE AT SUFFERANCE. The interest of a tenant who has come rightfully into possession of lands by permission of the owner and continues to occupy the same after the period for which he is entitled to hold by such permission. 1 Washburn, Real Prop. 392; 2 Blackstone, Comm. 150; Coke, Litt. 57 *b;* Smith, Landl. & T. 217; Crabb, Real Prop. § 1543. This estate is of infrequent occurrence, but is recognized as so far an estate that the landlord must enter before he can bring ejectment against the tenant. 3 Term, 292; 8 *id.* 403; 1 Mann. & G. 644. If the tenant has personally left the house, the landlord may break in the doors, 1 Bingh. 58; 17 Pick. Mass. 263, 266; and the modern rule seems to be that the landlord may use force to regain possession, subject only to indictment if any injury is committed against the public peace. 7 Term, 431; 1 Cush. Mass. 482; 7 Metc. Mass. 147; 14 Mees. & W. Exch. 437; 4 Johns. N. Y. 150; 1 Watts & S. Penn. 90; 1 Washburn, Real Prop. 390, 396; 7 Mann. & G. 316; 13 Johns. N. Y. 235; 13 Pick. Mass. 36.

ESTATE TAIL. See ESTATE IN FEE-TAIL.

ESTATE IN VADIO. Pledge. See MORTGAGE.

ESTATE AT WILL. An estate in lands which the tenant has by entry made thereon under a demise, to hold during the joint wills of the parties to the same. Coke, Litt. 55 *a;* Tudor, Lead. Cas. 10; Smith, Landl. & T. 16; 2 Sharswood, Blackst. Comm. 145; 4 Kent, Comm. 110; 1 Washburn, Real Prop. 370. Estates properly at will are of very infrequent occurrence, being generally turned into estates for years or from year to year by the decisions of the courts or by

statute. 1 Washburn, Real Prop. 370; 4 Kent, Comm. 115; Tudor, Lead. Cas. 14; 4 Rawle, Penn. 123; 1 Term, 159.

ESTATE FOR YEARS. An interest in lands by virtue of a contract for the possession of them for a definite and limited period of time. 2 Sharswood, Blackst. Comm. 140; 2 Crabb, Real Prop. § 1267; Bacon, Abr. *Leases;* Williams, Real Prop. 195; 1 Washburn, Real Prop. 298; 1 Platt, Leases, 47. Such estates are frequently called terms. The length of time for which the estate is to endure is of no importance in ascertaining its character, unless otherwise declared by statute. 15 Mass. 439; 1 N. H. 350; 13 Serg. & R. Penn. 60; 4 Kent, Comm. 93. See 1 Greenleaf, Cruise, Dig. 252, note.

ESTATES OF THE REALM. The lords spiritual, the lords temporal, and the commons of Great Britain. 1 Blackstone, Comm. 153. Sometimes called the three estates.

ESTER IN JUDGMENT. To appear before a tribunal either as plaintiff or defendant.

ESTOPPEL. The preclusion of a person from asserting a fact by previous conduct, inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Stephen, Plead. 239.

A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them. Gould, Plead. c. 2, § 39.

A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring any thing to the contrary. 3 Blackstone, Comm. 308.

Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions. 5 Ohio, 199; Rawle, Cov. 3d ed. 407.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance, viz.: a pleading that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said. This pleading is called a pleading by way of estoppel. Stephen, Plead. 240.

Formerly the questions of regarding estoppel arose almost entirely in relation to transfers of real property, and the rules in regard to one kind of estoppel were quite fully elaborated. In more modern time the principle has come to be applied to all cases where one by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position. 2 Exch. 653; 1 Zabr. N. J. 403; 28 Me. 525; 9 N. Y. 121; 16 Wend. N. Y. 531; 40 Me. 348. See, as to the reason and propriety of the doctrine, Coke, Litt. 352 *a;* 11 Wend. N. Y. 117; 13 *id.* 178; 3 Hill, N. Y. 219; 1 Dev. & B. No. C. 464; 12 Vt. 44.

2. By Deed. Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny any thing stated therein which has operated upon the other party: as, the inducement to accept and act under such deed, 1 Washburn, Real Prop. 464; 7 Conn. 214; 13 Vt. 158; 3 Mo. 373; 5 Ohio, 199; 10 Cush. Mass. 163; and see 5 Johns. Ch. N. Y. 23; 7 J. J. Marsh. Ky. 14; 15 Mass. 307; 13 Pick. Mass. 116; 3 Cal. 263; 6 *id.* 153; 2 Serg. & R. Penn. 507; 3 M'Cord, So. C. 411; 6 Ohio, 366; including a deed made with covenant of warranty, which estops even as to a subsequently acquired title. 11 Johns. N. Y. 91; 13 *id.* 316; 14 *id.* 193; 9 Cow. N. Y. 271; 3 Pick. Mass. 52; 13 *id.* 116; 24 *id.* 324; 3 Metc. Mass. 121; 13 N. H. 389; 20 Me. 260; 3 Ohio, 107; 12 Vt. 39. But see 13 Pick. Mass. 116; 5 Gray, Mass. 328; 4 Wend. N. Y. 300; 11 Ohio, 475; 14 Me. 351; 43 *id.* 432.

3. To create an estoppel, the deed must be good and valid in its form and execution, 2 Washburn, Real Prop. 41, and must convey no title upon which the warranty can operate in case of a covenant. 3 McLean, C. C. 56; 9 Cow. N. Y. 271; 2 Preston, Abstr. 216. Estoppels affect only parties and privies in blood, law, or estate. 6 Bingh. N. c. 79; 3 Johns. Ch. N. Y. 103; 6 Mass. 418; 24 Pick. Mass. 324; 35 N. H. 99; 5 Ohio, 190; 11 *id.* 478; 2 Dev. No. C. 177; 13 N. H. 389. See 2 Washburn, Real Prop. 480. Estoppels, it is said, must be reciprocal. Coke, Litt. 352 *a.* But see 4 Litt. Ky. 272; 15 Mass. 499; 11 Ark. 82; 2 Smith, Lead. Cas. 5 Hare & W. ed. 664. And see 2 Washburn, Real Prop. 458–481.

4. By Matter of Record. Such as arises from the adjudication of a competent court. Judgments in courts of record, and decrees and other final determinations of ecclesiastical, maritime, and military courts, work estoppels. 4 Kent, Comm. 10th ed. 293; 4 Mass. 625; 10 *id.* 155; 1 Munf. Va. 466; 3 East, 345, 356; 2 Barnew. & Ald. 362.

By Matter in Pays. Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself. 17 Conn. 345, 355; 18 *id.* 138; 5 Den. N. Y. 154. This principle has been applied to cases of dedication of land to the public use, 6 Pet. 438; 19 Pick. Mass. 405, of the owner's standing by and seeing land improved upon, 8 Wend. N. Y. 483; 4 Watts & S. Penn. 323, or sold, 7 Watts, Penn. 168; 11 N. H. 201; 2 Dan. Ky. 13; 13 Cal. 359; 1 Woodb. & M. C. C. 213; 21 Me. 130; 40 *id.* 348, without making claim. But see 16 Pick. Mass. 457; 2 Metc. Mass. 423; 36 Me. 178. See Admission; Confession. Consult 4 Kent, Comm. 10th ed. 293, n.; 2 Washburn, Real Prop. 458–481; 2 Smith, Lead. Cas. 5 Hare & W. ed.; Rawle, Cov. 3d ed. c. 9.

ESTOVERS (*estouviers*, necessaries; from *estoffer*, to furnish). The right or privilege

which a tenant has *to furnish himself* with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. 2 Blackstone, Comm. 35; Woodfall, Landl. & Ten. 232; 10 Wend. N. Y. 639.

2. Any tenant may claim this right, whether he be a tenant for life, for years, or at will; and that without waiting for any special leave or assignment of the lessor, unless he is restrained by some provision contained in his lease. Sheppard, Touchst. 3, n. 1. Nor does it appear to be necessary that the wood should all be consumed upon the premises, provided it is taken in good faith for the use of the tenant and his servants, and in reasonable quantities, with the further qualification, also, that no substantial injury be done to the inheritance. 1 Paige, Ch. N. Y. 573.

3. Where several tenants are granted the right of estovers from the same estate, it becomes *a common of estovers;* but no one of such tenants can, by underletting his land to two or more persons, apportion this right among them; for in this way he might surcharge the land, and the rights of his cotenants, as well as those of the landlord, would be thereby invaded. In case, therefore, of the division of a farm among several tenants, neither of the under-tenants can have estovers, and the right, consequently, becomes extinguished. 10 Wend. N. Y. 650; 4 Coke, 36; 8 *id.* 78. There is much learning in the old books relative to the creation, apportionment, suspension, and extinguishment of these rights, very little of which, however, is applicable to the condition of things in this country, except perhaps in the state of New York, where the entanglements produced by grants of the manor-lands have led to some litigation on the subject. Taylor, Landl. & Ten. § 220. See 4 Washburn, Real Prop. 99; 7 Bingh. 640; 7 Pick. Mass. 152; 17 *id.* 248; 14 Me. 221; 2 N. H. 130; 7 *id.* 341; 7 Ired. Eq. No. C. 197; 6 Yerg. Tenn. 334; 5 Mas. C. C. 13.

ESTRAYS. Cattle whose owner is unknown. 2 Kent, Comm. 359; Spelman, Gloss. Any beast, not wild, found within any lordship, and not owned by any man. Cowel; 1 Blackstone, Comm. 297; 2 *id.* 14. These belonged to the lord of the soil. Britton, c. 17.

ESTREAT. A true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, *extracted* from the record, and certified to a proper officer or officers authorized and required to collect them. Fitzherbert, Nat. Brev. 57, 76. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. 4 Blackstone, Comm. 253

ESTREPEMENT. A common-law writ for the prevention of waste.

The writ lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after judgment obtained in any real action and before possession was delivered by the sheriff.

But, as waste might be committed in some cases pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel strepementum pendente placito dicto indiscusso.*" By virtue of either of these writs, the sheriff may resist those who commit waste or offer to do so; and he might use sufficient force for the purpose. 3 Blackstone, Comm. 225, 226.

2. This writ is sometimes directed to the sheriff and the party in possession of the lands, in order to make him amenable to the court as for a contempt in case of his disobedience to the injunction of the writ. At common law the process proper to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the defendant's coming in, the plaintiff declares against him. The defendant usually pleads "that he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But, as this verdict convicts the defendant of a contempt, the court proceed against him for that cause as in other cases. Coke, 2d Inst. 329; Rastell, Entr. 317; More, 100; 1 Bos. & P. 121; 2 Lilly, Reg. *Estrepement;* 5 Coke, 119; Reg. Brev. 76, 77.

3. In Pennsylvania, by legislative enactment, the remedy by estrepement is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law; or for any purchaser at sheriff or coroner's sale of lands, etc., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment-creditor, after the lands bound by such judgment or mortgage shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*. See 10 Viner, Abr. 497; Woodfall, Landl. & Ten. 447; Archbold, Civ. Plead. 17; 7 Comyns, Dig. 659.

ETCÆTERA (Lat.). And others; and other things.

The abbreviation etc. was formerly much used in pleading to avoid the inconveniences attendant upon making full and half defence. See DEFENCE. It is not generally to be used in solemn instruments. See 6 Serg. & R. Penn. 427.

ET DE HOC PONIT SE SUPER PATRIAM (Lat.). And of this he puts himself upon the country. The Latin form of concluding a traverse. See 3 Blackstone, Comm. 313.

ET HOC PARATUS EST VERIFICARE (Lat.). And this he is prepared to verify. The Latin form of concluding a plea in confession and avoidance; that is, where the defendant has confessed all that the plain-

tiff has set forth, and has pleaded new matter in avoidance. 1 Salk. 2.

ET HOC PETIT QUOD INQUIRIATUR PER PATRIAM (Lat.). And this he prays may be inquired into *by his country*. The conclusion of a plea tendering an issue to the country. 1 Salk. 3.

ET INDE PRODUCIT SECTAM (Lat.). And thereupon he brings suit. The Latin conclusion of a declaration, except against attorneys and other officers of the court. 3 Sharswood, Blackst. Comm. 295.

ET MODO AD HUNC DIEM (Lat.). And now at this day. The Latin form of the commencement of the record on appearance of the parties.

ET NON (Lat.). And not. These words are sometimes employed in pleading to convey a pointed denial. They have the same effect as "without this," *absque hoc.*
vier, Inst. n. 2981, note.

EUNDO MORANDO ET REDEUNDO (Lat.). This Latin phrase signifies going, remaining, and returning. It is employed in cases where a person, either as a party, a witness, or one acting in some other capacity, as an elector, is privileged from arrest, in order to give him the freedom necessary to the performance of his respective obligations, to signify that he is protected from arrest *eundo morando et redeundo*. See 3 Bouvier, Inst. n. 3380.

EUNOMY. Equal laws and a well-adjusted constitution of government.

EUNUCH. A male whose organs of generation have been so far removed or disorganized that he is rendered incapable of reproducing his species. Domat, Lois Civ. liv. prél. tit. 2, s. 1, n. 10.

EVASION (Lat. *evadere*, to avoid). A subtle device to set aside the truth or escape the punishment of the law: as, if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is, nevertheless, punishable, because he becomes himself the aggressor in such a case. Hawkins, Pl. Cr. c. 31, §§ 24, 25; Bacon, Abr. *Fraud*, A.

EVICTION. Depriving a person of the possession of his lands or tenements.

Technically, the dispossession must be by judgment of law; if otherwise, it is an *ouster*.

Total eviction takes place when the possessor is wholly deprived of his rights in the premises. Partial eviction takes place when the possessor is deprived of only a portion of them: as, if a third person comes in and ejects him from the possession of half his land, or establishes a right to some easement over it, by a title which is prior to that under which he holds.

2. With respect to the demised premises, an eviction consists in taking from a tenant some part of the premises of which he was in possession, not in refusing to put him in possession of something which by the agreement with his landlord he should have enjoyed. 12 Wend. N. Y. 529. And in order to effect a suspension of rent there must be something equivalent to an expulsion from the premises, and not a mere trespass or disturbance in the enjoyment of them. 4 Wend. N. Y. 505; 5 Sandf. N. Y 542; T. Jones, 148; 1 Yerg. Tenn. 379.

3. It is not necessary, however, in order to produce the eviction of a tenant, that there should be an actual physical expulsion; for a landlord may do many acts tending to diminish the enjoyment of the premises, short of an expulsion, which will amount to an eviction in law: as, if he erects a nuisance so near the demised premises as to deprive the tenant of the use of them, or if he otherwise intentionally disturbs the tenant's enjoyment to such an extent as to injure his business or destroy the comfort of himself and family, it will amount to an eviction. 8 Cow. N. Y. 727; 2 Ired. No. C. 350; 1 Sandf. N. Y. 260; 4 N. Y. 217.

4. The remedy for an eviction depends chiefly upon the covenants in the deed under which the party held. When the grantee suffers a total eviction, if he has a covenant of seisin or for quiet enjoyment, he recovers from the grantor the consideration-money which he paid for the land, with interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause. 14 Wend. N. Y. 38; 2 Mass. 432; 2 Wheat. Penn. 62. And this seems to be the general rule in the United States. 3 Caines, N. Y. 111; 4 Johns. N. Y. 1; 13 *id.* 50; 4 Dall. Penn. 441; Cooke, Tenn. 447; 1 Hen. & M. Va. 202; 5 Munf. Va. 415; 4 Halst. N. J. 139; 2 Bibb, Ky. 272. In Massachusetts, the measure of damages on a covenant of warranty is the value of the land at the time of eviction. 3 Mass. 523; 4 *id.* 108. See, as to other states, 1 Bay, So. C. 19, 265; 3 Des. Eq. So. C. 245; 2 M'Cord, So. C. 413; 3 Call, Va. 326.

5. With respect to a lessee, however, who pays no purchase-money, the rule of damages upon an eviction is different; for he recovers nothing, except such expenses as he may have been put to in defending his possession; and as to any improvements he may have made upon the premises, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property. 2 Hill, N. Y. 105. And see 1 Du. N. Y. 343; Taylor, Landl. & Ten. § 317.

6. When the eviction is only *partial*, the damages to be recovered under the covenant of seisin are a ratable part of the original

price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration-money, but only to the amount of the relative value of the part lost. 5 Johns. N. Y. 49; 12 *id.* 126; La. Civ. Code, 2490; 4 Kent, Comm. 462. See 6 Bacon, Abr. 44; 1 Saund. 204, note 2, 322 *a*, note 2; 1 Bouvier, Inst. n. 656.

EVIDENCE. That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence. Prof. Parker, Lectures on Medical Jurisprudence, in Dartmouth College, N. H.

The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenleaf, Ev. c. 1, § 1.

That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issues, as pointed out by the pleadings, and distinguished from all comment and argument, is termed evidence. 1 Starkie, Ev. pt. 1, § 3.

2. Evidence may be considered with reference to its *instruments*, its *nature*, its *legal character*, its *effect*, its *object*, and the *modes of its introduction*.

The instruments of evidence, in the legal acceptation of the term, are:—

1. *Judicial notice* or *recognition*. There are divers things of which courts take judicial notice, without the introduction of proof by the parties: such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, etc. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See 1 Greenleaf, Ev. c. 2.

2. *Public records;* the registers of official transactions made by officers appointed for the purpose: as, the public statutes, the judgments and proceedings of courts, etc.

3. *Judicial writings:* such as inquisitions, depositions, etc.

4. *Public documents* having a semi-official character: as, the statute-books published under the authority of the government, documents printed by the authority of congress, etc.

5. *Private writings:* as, deeds, contracts, wills.

6. *Testimony of witnesses* and, sometimes, of the parties to a cause.

7. *Personal inspection*, by the jury or tribunal whose duty it is to determine the matter in controversy: as, a view of the locality by the jury, to enable them to determine the disputed fact, or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

3. In its *nature*, evidence is *direct*, or *presumptive*, or *circumstantial*.

Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. 1 Phillipps, Ev. 116; 1 Starkie, Ev. 19. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

Presumptive evidence is that which shows the existence of one fact, by proof of the existence of another or others, from which the first may be inferred; because the fact or facts shown have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be proved.

Presumptive evidence has been divided into presumptions of law and presumptions of fact.

4. *Presumptions of law*, adopted from motives of public policy, are those which arise in certain cases by force of the rules of law, directing an inference to be drawn from proof of the existence of a particular fact or facts. They may be conclusive or inconclusive.

Conclusive presumptions are those which admit of no averment or proof to the contrary. Thus, the records of a court, except in some proceeding to amend them, are conclusive evidence of the matter there recorded being presumed to be rightly made up.

Inconclusive or disputable presumptions of law are those where a fact is presumed to exist, either from the general experience of mankind, or from policy, or from proof of the existence of certain other facts, until something is offered to show the contrary. Thus, the law presumes a man to be sane until the contrary appears, and to be innocent of the commission of a crime until he is proved to be guilty. So, the existence of a person, or of a particular state of things, being shown, the law presumes the person or state of things to continue until something is offered to conflict with that presumption. See Best on Presumption, ch. ii.

But the presumption of life may be rebutted by another presumption. Where a party has been absent from his place of residence for the term of seven years, without having been heard of, this raises a presumption of his death, until it is encountered by some evidence showing that he is actually alive, or was so within that period.

5. *Presumptions of fact* are not the subject of fixed rules, but are merely natural pre-

sumptions, such as appear, from common experience, to arise from the particular circumstances of any case. Some of these are "founded upon a knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced." 1 Starkie, Ev. 27.

They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence.

Circumstantial evidence is sometimes used as synonymous with presumptive evidence; but presumptive evidence is not necessarily and in all cases what is usually understood by circumstantial evidence. The latter is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, the ordinary transaction of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established. See 1 Starkie, Ev. 478. Presumptive evidence may sometimes be the result, to some extent, of an arbitrary rule—as in the case of the presumption of death after an absence of seven years without being heard of—derived by analogy from certain statutes.

The jurists and the jury draw conclusions from circumstantial evidence, and find one fact from the existence of other facts shown to them,—some of the presumptions being so clear and certain that they have become fixed as rules of law, and others having greater or less weight according to the circumstances of the case, leaving the matter of fact inquired about in doubt until the proper tribunal to determine the question draws the conclusion.

6. In its *legal character*, evidence is *primary* or *secondary*, and *primâ facie* or *conclusive*.

Primary evidence. The best evidence, or that proof which most certainly exhibits the true state of facts to which it relates. The law requires this, and rejects secondary or inferior evidence when it is attempted to be substituted for evidence of a higher or superior nature. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be attained; and in that case no copy or other inferior evidence will be received.

This is a rule of policy, grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree.

To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident that the fullest proof that every case admits of is not requisite: if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only. 2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced: as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment. 4 Esp. 213. And see 7 Barnew. & C. 611; 1 Campb. 439; 3 Barnew. & Ald. 566.

7. *Secondary evidence.* That species of proof which is admissible when the primary evidence cannot be produced, and which becomes by that event the best evidence. 3 Yeates, Penn. 530.

But before such evidence can be allowed it must be clearly made to appear that the superior evidence is not to be had. The person who possesses it must be applied to, whether he be a stranger or the opposite party: in the case of a stranger, a subpœna and attachment, when proper, must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted. 7 Serg. & R. Penn. 116; 4 Binn. Penn. 295, note; 6 *id.* 228, 478; 7 East, 66; 8 *id.* 278; 3 Barnew. & Ald. 296. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced. 6 Term, 236. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original. Buller, Nisi P. 254; 1 Kebl. 117; 6 Binn. Penn. 234; 2 Taunt. 52; 1 Campb. 469; 8 Mass. 273. If regularly recorded, an office copy may be given in evidence. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed. 10 Mod. 8; 6 Term, 556.

But it has been decided that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that an attested copy is in existence. 6 Carr. & P. 206; 8 *id.* 389.

Primâ facie evidence is that which appears to be sufficient proof respecting the matter in question, until something appears to controvert it, but which may be contradicted or controlled.

Conclusive evidence is that which establishes the fact: as in the instance of conclusive presumptions.

Evidence may be conclusive for some purposes but not for others.

8. *Admissibility of evidence.* In considering the legal character of evidence, we are naturally led to the rules which regulate its competency and admissibility, although it is not precisely accurate to say that evidence is in its legal character competent or incom-

petent; because what is incompetent for the consideration of the tribunal which is to pronounce the decision is not, strictly speaking, evidence.

But the terms incompetent evidence and inadmissible evidence are often used to designate what is not to be heard as evidence: as, witnesses are spoken of as competent or incompetent.

As the common law excludes certain classes of persons from giving testimony in particular cases, because it deems their exclusion conducive, in general, to the discovery of the truth, so it excludes certain materials and statements from being introduced as testimony in a cause, for a similar reason. Thus, as a general rule, it requires witnesses to speak to facts within their own knowledge, and excludes hearsay evidence.

Hearsay is the evidence, not of what the witness knows himself, but of what he has heard from others.

Such mere recitals or assertions cannot be received in evidence, for many reasons, but principally for the following:—first, that the party making such declarations is not on oath; and, secondly, because the party against whom it operates has no opportunity of cross-examination. 1 Phillipps, Ev. 185. See, for other reasons, 1 Starkie, Ev. pt. 1, p. 44. The general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made.

Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. See ADMISSION.

A statement of all the distinctions between what is to be regarded as hearsay and what is to be deemed original evidence would extend this article too far.

The general principle is that the mere declaration, oral or written, of a third person, as to a fact, standing alone, is inadmissible.

9. *Res gestæ.* But where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ.* 9 N. H. 271.

So, declarations of third persons, in the presence and hearing of a party, and which tend to affect his interest, may be shown in order to introduce his answer or to show an admission by his silence.

Confessions of guilt in criminal cases come within the class of admissions, provided they have been voluntarily made and have not been obtained by the hope of favor or by the fear of punishment. And if made under such inducements as to exclude them, a subsequent declaration to the same effect, made after the inducement has ceased to operate, and having no connection with the hopes or fears which have existed, is admissible as evidence. 17 N. H. 171. See ADMISSIONS; CONFESSION.

10. *Dying declarations* are an exception to the rule excluding hearsay evidence, and are admitted, under certain limitations in cases of homicide, so far as the circumstances attending the death and its cause are the subject of them. See DECLARATION; DYING DECLARATIONS.

Opinions of persons of skill and experience, called experts, are also admissible in certain cases, when, in order to the better understanding of the evidence or to the solution of the question, a certain skill and experience are required which are not ordinarily possessed by jurors.

In several instances proof of facts is excluded from public policy: as, professional communications, secrets of state, proceedings of grand jurors, and communications between husband and wife.

Many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases affords. See BOUNDARY; CUSTOM; OPINION; PEDIGREE; PRESCRIPTION.

Consult Greenleaf, Evidence; Starkie, Evidence; Phillipps, Evidence; Best on Presumption.

Prof. Parker's MSS. Lectures on Med. Jur. in Dartmouth College.

11. The *effect* of evidence. As a general rule, a judgment rendered by a court of competent jurisdiction directly upon a point in issue is a bar between the same parties, 1 Phillipps, Ev. 242; and privies in blood, as an heir, 3 Mod. 141, or privies in estate, 1 Ld. Raym. 730; Buller, Nisi P. 232, stand in the same situation as those they represent: the verdict and judgment may be used for or against them, and is conclusive. See RES JUDICATA.

The constitution of the United States, art. 4, s. 1, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See AUTHENTICATION; 7 Cranch, 408, 481; 9 *id.* 192; 3 Wheat. 234; 10 *id.* 469; 17 Mass. 546; 2 Yeates, Penn. 532; 3 Bibb, Ky. 369; 2 Marsh. Ky. 293; 5 Day, Conn. 563.

As to the effect of foreign laws, see FOREIGN LAWS. For the force and effect of foreign judgments, see FOREIGN JUDGMENTS.

12. The *object* of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by

experience that this is done most certainly by the adoption of the following rules, which are now binding as law.—1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved; but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

It is a general rule, both in civil and criminal cases, that *the evidence shall be confined to the point in issue.* Justice and convenience require the observance of this rule, particularly in criminal cases; for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and which alone he has come prepared to answer. 2 Russell, Cr. 694; 1 Phillipps, Ev. 166.

To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence: as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could, from their date, have arrived from the place of date. 2 H. Blackst. 288.

When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and, therefore, evidence of it cannot be received; yet a damage which is a necessary result of the defendant's breach of contract may be proved notwithstanding it is not in the declaration. 11 Price, Exch. 19.

In general, evidence of the character of either party to a suit is inadmissible; yet in some cases such evidence may be given. See CHARACTER.

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received. 8 Bingh. 376. And see 1 Phillipps, Ev. 158; 2 East, Pl. Cr. 1035; 2 Leach, Cr. Cas. 985; 4 Bos. & P. 92; Russ. & R. Cr. Cas. 376; 2 Yeates, Penn. 114; 9 Conn. 47.

13. The *acts* of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but *confessions* made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. See CONFESSION: 3 Pick. Mass. 33; 10 *id.* 497; 2 Pet. 364; 2 Va. Cas. 269; 3 Serg. & R. Penn. 9, 220; 1 Rawle, Penn. 362, 458; 2 Leigh, Va. 745; 2 Day, Cas. Conn. 205; 2 Barnew. & Ald. 573, 574.

In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen, after proof of a representation to one tradesman, evidence may thereupon be given of a representation to another tradesman at a different time. 1 Campb. 399; 2 Day, Conn. 205; 1 Johns. N. Y. 99; 4 Rog. 143; 2 Johns. Cas. N. Y. 193.

To prove the guilty knowledge of a prisoner with regard to the transaction in question, evidence of other offences of the same kind committed by the prisoner, though not charged in the indictment, is admissible against him: as, in the case where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge. 2 Const. So. C. 758, 776; 1 Bail. So. C. 300; 2 Leigh, Va. 745; 1 Wheel. Cr. Cas. N. Y. 415; 3 Rog. 148; Russ. & R. Cr. Cas. 132; 1 Campb. 324; 5 Rand. Va. 701.

14. *The substance of the issue joined* between the parties *must be proved.* 1 Phillipps, Ev. 190. Under this rule will be considered the *quantity* of evidence required to support particular averments in the declaration or indictment.

And, *first*, of civil cases. 1. It is a fatal variance in a contract if it appear that a party who ought to have been joined as plaintiff has been omitted. 1 Saund. 291 *h*, n.; 2 Term, 282. But it is no variance to omit a person who might have been joined as defendant; because the non-joinder ought to have been pleaded in abatement. 1 Saund. 291 *d*, n. 2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. 6 East, 568; 4 Barnew. & Ald. 387.

15. *Secondly.* In criminal cases, it may be laid down that it is, in general, sufficient to prove what constitutes an offence. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. 2 Campb. 585; 1 Harr. & J. Md. 427. If a man be indicted for robbery, he may be found guilty of larceny and not guilty of the robbery. 2 Hale, Pl. Cr. 302. The offence of which the party is convicted must, however, be of the same class with that of which he is charged. 1 Leach, 14; 2 Strange, 1133.

When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only. 3 Stark. 35.

16. 3. When a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved. 3 Rog. 77; 3 Day, Conn. 283. For example, if a party be charged with stealing a *black* horse, the evidence must correspond with the averment, although it was unnecessary to make it. Roscoe, Crim. Ev. 77; 4 Ohio, 350.

4. The name of the prosecutor or party injured must be proved as laid; and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing.

5. *The affirmative of the issue must be proved.* The general rule with regard to the burden of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it. 2 Selwyn, Nisi P. 709. See ONUS PROBANDI; PRESUMPTION; 2 Gall. C. C. 485; 1 M'Cord, So. C. 573.

17. *Modes of proof.* Records are to be proved by an exemplification, duly authenticated (see AUTHENTICATION), in all cases where the issue is *nul tiel record*. In other cases, an examined copy, duly proved, will, in general, be evidence. Foreign laws are proved in the mode pointed out under the article FOREIGN LAWS.

Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if after attesting the paper he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write or in a course of correspondence has become acquainted with his hand. See COMPARISON OF HANDWRITING; 5 Binn. Penn. 349; 6 Serg. & R. Penn. 12, 312; 10 *id.* 110; 11 *id.* 333, 347; 3 Wash. C. C. R. 31; 1 Rawle, Penn. 223; 3 *id.* 312; 1 Ashm. Penn. 8; 3 Penn. 136.

Books of original entry, when duly proved, are *primâ facie* evidence of goods sold and delivered, and of work and labor done. See ORIGINAL ENTRY.

18. *Proof by witnesses.* The testimony of witnesses is called oral evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree. 1 Serg. & R. Penn. 27, 464; Add. Penn. 361; 2 Dall. Penn. 172; 1 Yeates, Penn. 140; 1 Binn. Penn. 616; 3 Marsh. Ky. 333; 1 Bibb, Ky. 271; 4 *id.* 473; 11 Mas. 30; 13 *id.* 443; 3 Conn. 9; 12 Johns. N. Y. 77; 20 *id.* 49; 3 Campb. 57; 1 Esp. Cas. 53; 1 Maule & S. 21; Bunb. 175.

But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, etc., or to apply it to its proper subject-matter, or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases, the parol evidence does not usurp the place, or arrogate the authority of, written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect. 1 Murph. No. C. 426; 1 Des. So. C. 465; 4 *id.* 211; 1 Bay, So. C. 247; 1 Bibb, Ky. 271; 11 Mass. 30. See 1 Pet. C. C. 85; 1 Binn. Penn. 610; 3 *id.* 587; 3 Serg. & R. Penn. 340; Pothier, Obl. pl. 4, c. 2.

See, generally, the treatises on Evidence, of Gilbert, Phillipps, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf; Best on Presumption; Bouvier, Inst. Index; and the various Digests.

EVIDENCE, CIRCUMSTANTIAL. The proof of facts which usually attend other facts sought to be proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances; and hence this is called circumstantial evidence.

2. Circumstantial evidence is of two kinds, namely, certain and uncertain. It is *certain* when the conclusion in question necessarily follows: as, where a man had received a mortal wound, and it was found that the impression of a bloody *left* hand had been made on the *left* arm of the deceased, it was certain some other person than the deceased must have made such mark. 14 How. St. Tr. 1334. But it is *uncertain* whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased. See CIRCUMSTANCES.

EVIDENCE, CONCLUSIVE. That which, while uncontradicted, satisfies the judge and jury; it is also that which cannot be contradicted.

The record of a court of common-law jurisdiction is conclusive as to the facts therein stated. 2 Wash. Va. 64; 2 Hen. & M. Va. 55; 6 Conn. 508. But the judgment

and record of a prize-court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide. 1 Conn. 429. See, as to the conclusiveness of the judgments of foreign courts of admiralty, 3 Cranch, 458; 4 *id.* 421, 434; Gilm. Va. 16; 1 Const. So. C. 381; 1 Nott & M'C. So. C. 537.

EVIDENCE, DIRECT. That which applies immediately to the *factum probandum*, without any intervening process: as, if A testifies he saw B inflict a mortal wound on C, of which he instantly died. 1 Greenleaf, Ev. § 13.

EVIDENCE, EXTRINSIC. External evidence, or that which is not contained in the body of an agreement, contract, and the like.

It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary, or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust. 14 Johns. N. Y. 1; 1 Day, Conn. 8; 6 *id.* 270.

EVOCATION. In French Law. The act by which a judge is deprived of the cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. It is like the process by writ of *certiorari*.

EWAGE. A toll paid for water-passage. Cowel. The same as *aquagium*.

EWBRICE. Adultery; spouse-breach; marriage-breach. Cowel; Tomlin, Law Dict.

EX ÆQUO ET BONO (Lat.). In justice and good dealing. 1 Story, Eq. Jur. § 965.

EX CONTRACTU (Lat.). From contract. A division of actions is made in the common and civil law into those arising *ex contractu* (from contract) and *ex delicto* (from wrong or tort). 3 Blackstone, Comm. 117; 1 Chitty, Plead. 2; 1 Mackeldy, Civ. Law, § 195.

EX DEBITO JUSTITIÆ (Lat.). As a debt of justice. As a matter of legal right. 3 Blackstone, Comm. 48.

EX DELICTO (Lat.). Actions which arise in consequence of a crime, misdemeanor, fault, or tort are said to arise *ex delicto:* such are actions of case, replevin, trespass, trover. 1 Chitty, Plead. 2. See EX CONTRACTU; ACTIONS.

EX DOLO MALO (Lat.). Out of fraud or deceit. When a cause of action arises from fraud or deceit, it cannot be supported: *ex dolo malo non oritur actio.* See MAXIMS.

EX GRATIA (Lat.). Of favor. Of grace. Words used formerly at the beginning of royal grants, to indicate that they were not made in consequence of any claim of legal right.

EX INDUSTRIA (Lat.). Intentionally. From fixed purpose.

EX MALEFICIO (Lat.). On account of misconduct. By virtue of or out of an illegal act. Used in the civil law generally, and sometimes in the common law. Browne, Stat. Frauds, 110, n.; Broom, Leg. Max. 351.

EX MERO MOTU (Lat.). Mere motion of a party's own free will. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for.

EX MORA (Lat.). From the delay; from the default. All persons are bound to make amends for damages which arise from their own default.

EX MORE (Lat.). According to custom.

EX NECESSITATE LEGIS (Lat.). From the necessity of law.

EX NECESSITATE REI (Lat.). From the necessity of the thing. Many acts may be done *ex necessitate rei* which would not be justifiable without it; and sometimes property is protected *ex necessitate rei* which under other circumstances would not be so. For example, property put upon the land of another from necessity cannot be distrained for rent. See DISTRESS; NECESSITY.

EX OFFICIO (Lat.). By virtue of his office.

Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may be *ex officio* a conservator of the peace and a justice of the peace.

EX PARTE (Lat.). Of the one part. Many things may be done *ex parte*, when the opposite party has had notice. An affidavit or deposition is said to be taken *ex parte* when only one of the parties attends to taking the same.

EX PARTE MATERNA (Lat.). On the mother's side.

EX PARTE PATERNA (Lat.). On the father's side.

EX POST FACTO (Lat.). After the act. An estate granted may be made good or avoided by matter *ex post facto*, when an election is given to the party to accept or not to accept. 1 Coke, 146.

EX POST FACTO LAW. A statute which would render an act punishable in a manner in which it was not punishable when it was committed. 6 Cranch, 138; 1 Kent, Comm. 408. A law made to punish acts committed before the existence of such law, and which had not been declared crimes by preceding laws. Mass. Declar. of Rights, pt. 1, s. 24; Md. Declar. of Rights, art. 15.

2. By the constitution of the United States, congress is forbidden to pass *ex post facto* laws. U. S. Const. art. 1, § 9. And by § 10, subd. 1, of the same instrument, as well as by the constitutions of many, if not all, of the states, a similar restriction is imposed upon the state legislatures. Such law is void as to those cases in which, if given effect, it would be *ex post facto;* but so far only. In cases arising under it, it may have effect; for as a rule for the future it is not *ex post facto.*

3. There is a distinction between *ex post facto* laws and *retrospective* laws: every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex*

post facto law; the former only are prohibited.

It is fully settled that the term *ex post facto*, as used in the constitution, is to be taken in a limited sense as referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity of the prohibition against passing *ex post facto* laws do not extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies. 3 Dall. Penn. 386; 8 Wheat. 89; 17 How. 463; 6 Cranch, 87; 8 Pet. 88; 11 *id.* 421. See 1 Cranch, 109; 9 *id.* 374; 1 Gall. C. C. 105; 2 Pet. 380, 523, 627; 3 Story, Const. 212; Sergeant, Const. Law, 356; 2 Pick. Mass. 172; 11 *id.* 28; 9 Mass. 363; 2 Root, Conn. 350; 5 T. B. Monr. Ky. 133; 1 J. J. Marsh. Ky. 563; 3 N. H. 475; 7 Johns. N. Y. 488; 6 Binn. Penn. 271; 2 Pet. 681; RETROSPECTIVE.

4. Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition: 1. Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; though it would be otherwise of a law mitigating the punishment. 3 Story, Const. 212. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender; though it might be otherwise of a law merely modifying the remedy or mode of procedure. 3 Dall. Penn. 390. See RETROSPECTIVE.

EX PROPRIO MOTU (Lat.). Of his own accord.

EX PROPRIO VIGORE (Lat.). By its own force. 2 Kent, Comm. 457.

EX RELATIONE (Lat.). At the information of; by the relation. A bill in equity, for example, may in many cases be brought for an injunction to restrain a public nuisance *ex relatione* (by information of) the parties immediately interested in or affected by the nuisance. 18 Ves. Ch. 217; 2 Johns. Ch. N. Y. 382; 6 *id.* 439; 13 How. 518; 12 Pet. 91.

EX TEMPORE (Lat.). From the time; without premeditation.

EX VI TERMINI (Lat.). By force of the term.

EX VISCERIBUS (Lat. from the bowels). From the vital part, the very essence of the thing. 10 Coke, 24 *b;* 2 Metc. Mass. 213. *Ex visceribus verborum* (from the mere words and nothing else). 10 Johns. N. Y. 494; 1 Story, Eq. § 980.

EX VISITATIONE DEI (Lat.). By or from the visitation of God. This phrase is frequently employed in inquisitions by the coroner, where it signifies that the death of the deceased is a natural one.

EXACTION. A wilful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.

Between *extortion* and *exaction* there is this difference: that in the former case the officer extorts more than his due, when something is due to him; in the latter, he exacts what is not his due, when there is nothing due to him. Coke, Litt. 368.

EXACTOR. In Old English and Civil Law. A collector. *Exactor regis* (collector for the king). A collector of taxes or revenue. Vicat, Voc. Jur.; Spelman, Gloss. The term exaction early came to mean the wrong done by an officer, or one pretending to have authority, in demanding or taking any reward or fee for that matter, cause, or thing which the law allows not. Termes de la Ley.

EXAMINATION. In Criminal Law. The investigation by an authorized magistrate of the circumstances which constitute the grounds for an accusation against a person arrested on a criminal charge, with a view to discharging the person so arrested, or to securing his appearance for trial by the proper court, and to preserving the evidence relating to the matter.

Practically, it is accomplished by bringing the person accused, together with witnesses, before a magistrate (generally a justice of the peace), who thereupon takes down in writing the evidence of the witnesses, and any statements which the prisoner may see fit to make. If no cause for detention appears, the party is discharged from arrest. If sufficient cause of suspicion appears to warrant putting him on trial, he is committed, or required to give bail or enter into a recognizance to appear at the proper time for trial. The witnesses are also frequently required to recognize for their appearance; though in ordinary cases only their own recognizance is required. The magistrate signs or certifies the minutes of the evidence which he has taken, and it is delivered to the court before whom the trial is to be had. The object of an examination is to enable the judge and jury to see whether the witnesses are consistent, and to ascertain whether the offence is bailable. 2 Leach, Cr. Cas. 552. And see 4 Sharswood, Blackst. Comm. 296.

2. At common law, the prisoner could not be interrogated by the magistrate; but under the statutes 1 & 2 Phil. & M. c. 13, 2 & 3 Phil. & M. c. 10, the provisions of which have been substantially adopted in most of the United States, the magistrate is to examine the prisoner as well as the witnesses. 1 Greenleaf, Ev. § 224; 4 Sharswood, Blackst. Comm. 296; Roscoe, Crim. Ev. 44; Ry. & M. Cr. Cas. 432.

The examination should be taken and completed as soon as the nature of the case will admit. Croke Eliz. 829; 1 Hale, Pl. Cr. 585; 2 *id.* 120. The prisoner must not be put upon oath, but the witnesses must. 1 Phillipps, Ev. 106. The prisoner has no *right* to the assistance of an attorney; but the privilege is granted at the discretion of the magistrate. 2 Dowl. & R. 86; 1 Barnew. & C. 37; Paley, Conv. Dowl. ed. 28. The magis-

trate's return and certificate are conclusive evidence, and exclude parol evidence of what the prisoner said on that occasion with reference to the charge. 2 Carr. & K. 223; 5 Carr. & P. 162; 7 *id.* 267; 8 *id.* 605; 1 Mood. & M. 403; 1 Hayw. No. C. 112. See CONFESSION; RECOGNIZANCE; Stat. 7 Geo. IV. c. 64; 11 & 12 Vict. c. 42; and the statutes of the various states.

In Practice. The interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties.

3. The *examination in chief* is that made by the party calling the witness; the *cross-examination* is that made by the other party; an examination *de bene esse* is one made out of court before trial, as a matter of precaution. See DE BENE ESSE.

The examination is to be made in open court, when practicable; but when, on account of age, sickness, or other cause, the witness cannot be so examined, then it may be made before authorized commissioners. In the examination in chief the council cannot ask leading questions, except in particular cases. See CROSS-EXAMINATION; LEADING QUESTION.

The interrogation of a person who is desirous of performing some act, or availing himself of some privilege of the law, in order to ascertain if all the requirements of the law have been complied with, conducted by and before an officer having authority for the purpose.

There are many acts which can be of validity and binding force only upon an examination. Thus, in many states, a married woman must be privately examined as to whether she has given her consent freely and without restraint to a deed which she appears to have executed, see ACKNOWLEDGMENT; an insolvent who wishes to take the benefit of the insolvent laws, one who is about to become bound for another in legal proceedings, a bankrupt, etc., must submit to an examination; though the examination of a bankrupt is rather in the nature of a criminal proceeding. See INSOLVENCY; JUSTIFICATION; BAIL.

EXAMINED COPY. A phrase applied to designate a paper which is a copy of a record, public book, or register, and which has been compared with the original. 1 Campb. 469.

Such examined copy is admitted in evidence, because of the public inconvenience which would arise if such record, public book, or register were removed from place to place, and because any fraud or mistake made in the examined copy would be so easily detected. 1 Greenleaf, Ev. § 91; 1 Starkie, Ev. 189–191. But in an answer in chancery on which the defendant was indicted for perjury, or where the original must be produced in order to identify the party by proof of handwriting, an examined copy would not be evidence. 1 Mood. & R. 189. See COPY.

EXAMINERS. Persons appointed to question students of law in order to ascertain their qualifications before they are admitted to practice.

EXAMINERS IN CHANCERY. Officers who examine, upon oath, witnesses produced on either side upon such interrogatories as the parties to any suit exhibit for that purpose. Cowel.

The examiner is to administer an oath to the party, and then repeat the interrogatories, one at a time, writing down the answer himself. 2 Daniell, Chanc. Pract. 1062. Anciently, the examiner was one of the judges of the court: hence an examination before the examiner is said to be an examination in court. 1 Daniell, Chanc. Pract. 1053.

EXANNUAL ROLL. A roll containing the illeviable fines and desperate debts, which was read yearly to the sheriff (in the ancient way of delivering the sheriff's accounts), to see what might be gotten. Hale, Sheriffs, 67; Cowel.

EXCAMB. In Scotch Law. To exchange. *Excambion*, exchange. The words are evidently derived from the Latin *excambium*. Bell, Dict. See EXCHANGE.

EXCAMBIATOR. An exchanger of lands; a broker. Obsolete.

EXCAMBIUM (Lat.). **In English Law.** Exchange; a recompense. 1 Reeve, Hist. Eng. Law, 442.

EXCEPTION (Lat. *excipere: ex*, out of, *capere*, to take).

In Contracts. A clause in a deed by which the lessor excepts something out of that which he granted before by the deed.

The exclusion of something from the effect or operation of the deed or contract which would otherwise be included.

An *exception* differs from a *reservation*,—the former being always of part of the thing granted, the latter of a thing not *in esse*, but newly created or reserved; the exception is of the whole of the part excepted; the reservation may be of a right or interest in the particular part affected by the reservation. See 5 R. I. 419; 41 Me. 177; 42 *id.* 9. An exception differs, also, from an explanation, which, by the use of a *videlicet*, *proviso*, etc., is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars. 3 Pick. Mass. 272.

To make a valid exception, these things must concur: *first*, the exception must be by apt words, as, "saving and excepting," etc., see 30 Vt. 242; 5 R. I. 419; 41 Me. 177; *second*, it must be of part of the thing previously described, and not of some other thing; *third*, it must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted, 11 Md. 339; 23 Vt. 395; 10 Mo. 426; an exception, therefore, in a lease which extends to the whole thing demised is void; *fourth*, it must be of such thing as is severable from the demised premises, and not of an inseparable incident, 33 Penn. St. 251; *fifth*, it must be of such a thing as he that excepts may have, and which properly belongs to him; *sixth*, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; *seventh*, it must be particularly described and set forth; a lease of a tract of land except one acre would be void, because that acre was not particularly described. Woodfall, Landl. & Ten. 10; Coke, Litt. 47 *a*; 12 Me. 337; Wright, Ohio, 711; 3 Johns. N. Y. 375; 5 N. Y. 33; 8 Conn. 369; 6 Pick. Mass. 499; 6 N.

II. 421; 4 Strobh. So. C. 208; 2 Tayl. No. C. 173. Exceptions against common right and general rules are construed as strictly as possible. 1 Barton, Conv. 68; 5 Jones, No. C. 63.

In Equity Practice. The allegation of a party, in writing, that some pleading or proceeding in a cause is insufficient.

In Civil Law. A plea. Merlin, Répert. *Declinatory exceptions* are such dilatory exceptions as merely decline the jurisdiction of the judge before whom the action is brought. La. Code Proc. 334.

Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.

Declinatory exceptions have this effect, as well as the exception of discussion offered by a third possessor or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. 7 Mart. La. N. S. 282; 1 La. 38, 420.

Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded *in limine litis*. Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished. These may be pleaded at any time previous to definitive judgment. *Id.* art. 343, 346; Pothier, Proc. Civ. pt. 1, c. 2, ss. 1, 2, 3. These, in the French law, are called *Fins de non recevoir*.

In Practice. Objections made to the decisions of the court in the course of a trial. See BILL OF EXCEPTION.

EXCEPTION TO BAIL. An objection to the special bail put in by the defendant to an action at law made by the plaintiff, on grounds of the insufficiency of the bail. 1 Tidd, Pract. 255.

EXCHANGE. In Commercial Law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

This transfer is made by means of an instrument which represents such funds and is well known by the name of a bill of exchange. The price above the par value of the funds so transferred is called the *premium* of exchange, and if under that value the difference is called the *discount*,—either being called the *rate* of exchange.

The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called barter.

The profit which arises from a maritime loan, when such profit is a percentage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from the difference of time and place. The term is commonly used in this sense by French writers. Hall, Mar. Loans, 56, n.

The place where merchants, captains of vessels, exchange-agents, and brokers assemble to transact their business. Code de Comm. art. 71.

The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage. The nominal par of exchange in this country on England, settled in 1799 by act of congress, is four dollars and forty-four cents for the pound sterling; but by successive changes in the coinage this value has been increased, the real mint par at present being a little over four dollars and eighty-seven cents. The *course* of exchange means the quotations for any given time: as, the course of exchange at New York on London was at 108 to 109 during the month.

In Conveyancing. A mutual grant of equal interests in land, the one in consideration of the other. 2 Blackstone, Comm, 323; Littleton, 62; Sheppard, Touchst. 289; Watkins, Conv. It is said that exchange in the United States does not differ from bargain and sale. 2 Bouvier, Inst. n. 2055.

There are five circumstances necessary to an exchange. That the estates given be equal. That the word *excambium*, or exchange, be used,—which cannot be supplied by any other word, or described by circumlocution. That there be an execution by entry or claim in the life of the parties. That if it be of things which lie in grant, it be by deed. That if the lands lie in several counties, or if the thing lie in grant, though they be in one county, it be by deed indented. In practice this mode of conveyancing is nearly obsolete.

See Cruise, Dig. tit. 32; Comyns, Dig.; Coke, Litt. 51; 1 Washburn, Real Prop. 159; Hard. Ky. 593; 1 N. H. 65; 3 Harr. & J. Md. 361; 3 Wils. 489; Watkins, Conv. b. 2, c. 5; 3 Wood, Conv. 243.

EXCHEQUER (L. Lat. *scaccarium*, Nor. Fr. *eschequier*). **In English Law.** A department of the government which has the management of the collection of the king's revenue.

The name is said to be derived from the chequered cloth which covered the table on which some of the king's accounts were made up and the amounts indicated by counters.

It consists of two divisions, one for the receipt of revenue, the other for administering justice. Coke, 4th Inst. 103–116; 3 Blackstone, Comm. 44, 45. See COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER.

EXCHEQUER BILLS. Bills of credit issued by authority of parliament.

They constitute the medium of transaction of business between the bank of England and the government. The exchequer bills contain a guarantee from government which secures the holders against loss by fluctuation. Wharton; McCulloch, Comm. Dict.

EXCISE. An inland imposition, paid sometimes upon the consumption of the com-

modity, and frequently upon the retail sale. 1 Blackstone, Comm. 318; Story, Const. § 950; Act of Congr. July 1, 1862.

EXCLUSIVE (Lat. *ex*, out, *claudere*, to shut). Shutting out; debarring from participation. Shut out; not included.

An exclusive right or privilege, as a copyright or patent, is one which may be exercised and enjoyed only by the person authorized, while all others are forbidden to interfere.

When an act is to be done within a certain period from a particular time, as, for example, within ten days, one day is to be taken inclusive and the other exclusive. See Hob. 139; Cowp. 714; Dougl. 463; 2 Mod. 280; 3 Penn. St. 200; 1 Serg. & R. Penn. 43; 3 Barnew. & Ald. 581; 3 East, 407; Comyns, Dig. *Estates* (G 8) *Temps* (A); 2 Chitty, Pract. 69, 147.

EXCOMMUNICATION. In Ecclesiastical Law. An ecclesiastical sentence pronounced by a spiritual judge against a Christian man, by which he is excluded from the body of the church, and disabled to bring any action or sue any person in the common-law courts. Bacon, Abr.; Coke, Litt. 133, 134.

In early times it was the most frequent and most severe method of executing ecclesiastical censure, although proper to be used, said Justinian (Nov. 123), only upon grave occasions. The effect of it was to remove the excommunicated person not only from the sacred rites, but from the society of men. In a certain sense it interdicted the use of fire and water, like the punishment spoken of by Cæsar (lib. 6, *de Bell. Gall.*) as inflicted by the Druids. Innocent IV. called it the nerve of ecclesiastical discipline. On repentance, the excommunicated person was absolved and received again to communion. These are said to be the powers of binding and loosing,—the keys of the kingdom of heaven. This kind of punishment seems to have been adopted from the Roman usage of interdicting the use of fire and water. Fr. Duaren, De Sacris Eccles. Ministeriis, lib. 1, cap. 3. See Ridley, View of the Civil and Ecclesiastical Law, 245, 246, 249.

EXCOMMUNICATO CAPIENDO (Lat. for taking an excommunicated person). **In Ecclesiastical Law.** A writ issuing out of chancery, founded on a bishop's certificate that the defendant had been excommunicated, returnable to the king's bench. 4 Blackstone, Comm. 415; Bacon, Abr. *Excommunication*, E. See statutes 3 Edw. I. c. 15, 9 Edw. II. c. 12, 2 & 3 Edw. VI. c. 13, 5 & 6 Edw. VI. c. 4, 5 Eliz. c. 23, 1 Hen. V. c. 5; Croke Eliz. 224, 680; Croke Car. 421; Croke Jac. 567; 1 Ventr. 146; 1 Salk. 293, 294, 295.

EXCUSABLE HOMICIDE. In Criminal Law. The killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to have been partly induced by his own act. 1 East, Pl. Cr. 220.

EXCUSATIO (Lat.). **In Civil Law.** Excuse. A cause for exemption from a duty, such as absence, insufficient age, etc. Vicat. Voc. Jur., and references there given.

EXCUSATOR (Lat.). **In English Law.** An excuser.

In Old German Law. A defendant; he who utterly denies the plaintiff's claim. Du-Cange.

EXCUSE. A reason alleged for the doing or not doing a thing.

2. This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty he is less so than he appears to be. Take, for example, the case of a sheriff who has an execution against an individual, and who, in performance of his duty, arrests him: in an action by the defendant against the sheriff, the latter may prove the facts, and this shall be a sufficient excuse for him: this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence. But suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul: the fact of his having the execution against Paul and the mistake being made will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

3. Persons are sometimes excused for the commission of acts which ordinarily are crimes, either because they had no intention of doing wrong, or because they had no power of judging, and therefore had no criminal will, or, having power of judging, they had no choice, and were compelled by necessity. Among the first class may be placed infants under the age of discretion, lunatics, and married women committing an offence in the presence of their husbands not *malum in se*, as treason or murder, 1 Hale, Pl. Cr. 44, 45; or in offences relating to the domestic concern or management of the house, as the keeping of a bawdy-house. Hawkins, Pl. Cr. b. 1, c. 1, s. 12. Among acts of the second kind may be classed the beating or killing another in self-defence, the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire to prevent its spreading to the neighboring property, and the like. See Dalloz, Dict.

EXCUSSIO (Lat.). **In Civil Law.** Exhausting the principal debtor before proceeding against the surety. Discussion is used in the same sense in Scotch law. Vicat, *Excussionis Beneficium*.

EXECUTE. To complete; to make; to perform; to do; to follow out.

The term is frequently used in law: as, to *execute* a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract. To execute a use is to merge or unite the equitable estate of the *cestui que use* in the legal estate, under the statute of uses. To execute a writ is to do the act commanded in the writ. To execute a criminal is to put him to death according to law, in pursuance of his sentence.

EXECUTED. Done; completed; effectuated; performed; fully disclosed; vested; giving present right of enjoyment. The term is used of a variety of subjects.

EXECUTED CONSIDERATION. A consideration which is wholly past. To make an executed consideration a valid foundation for a promise, there must have been an ante-

cedent request. Such request may be implied, however. 1 Parsons, Contr. 391.

EXECUTED CONTRACT. One which has been fulfilled. One which has been wholly performed: as, where A and B agree to exchange horses and do so immediately. 2 Blackstone, Comm. 443. One in which both parties have done all that they are required to do.

EXECUTED ESTATE. An estate whereby a present interest passes to and resides in the tenant, not dependent upon any subsequent circumstance or contingency. They are more commonly called estates in *possession*. 2 Sharswood, Blackst. Comm. 162.

An estate where there is vested in the grantee a present and immediate right of present or future enjoyment. An estate which confers a present right of present enjoyment.

When the right of enjoyment in possession is to arise at a future period, only the estate is executed; that is, it is merely vested in point of interest: where the right of immediate enjoyment is annexed to the estate, then only is the estate vested in possession. 1 Preston, Est. 62; Fearne, Cont. Rem. 392.

Executed is synonymous with vested. 1 Washburn, Real Prop. 11.

EXECUTED REMAINDER. One giving a present interest, though the enjoyment may be future. Fearne, Cont. Rem. 31; 2 Blackstone, Comm. 168. See VESTED REMAINDER.

EXECUTED TRUST. A trust of which the scheme has in the outset been completely declared. Adams, Eq. 151. One in which the devise or trust is *directly and wholly declared* by the testator or settler, *so as to attach* on the lands immediately under the deed or will itself. 1 Greenleaf, Cruise, Dig. 385; 1 Jac. & W. 570.

EXECUTED USE. A use with which the possession and legal title have been united by statute. 1 Stephen, Comm. 339; 2 Sharswood, Blackst. Comm. 335, note; 7 Term, 342; 12 Ves. Ch. 89; 4 Mod. 380; Comb. 312.

EXECUTED WRIT. A writ the command in which has been obeyed by the person to whom it was directed.

EXECUTION. The accomplishment of a thing; the completion of an act or instrument; the fulfilment of an undertaking. Thus, a contract is executed when the act to be done is performed; a deed is executed when it is signed, sealed, and delivered.

In Criminal Law. Putting a convict to death, agreeably to law, in pursuance of his sentence. This is to be performed by the sheriff or his deputy. See 4 Sharswood, Blackst. Comm. 403.

In Practice. Putting the sentence of the law in force. 3 Blackstone, Comm. 412. The act of carrying into effect the final judgment or decree of a court.

The writ which directs and authorizes the officer to carry into effect such judgment.

Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant.

Execution *quousque* is such as tends to an end, but is not absolutely final: as, for example, a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied his debt, etc., the imprisonment not being absolute, but until he shall satisfy the same. 6 Coke, 87.

2. Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment; and it is either for the *plaintiff* or *defendant*. For the *plaintiff* upon a judgment in *debt*, the execution is for the debt and damages; or in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; or in *detinue*, for the goods, or their value, with damages and costs. For the *defendant* upon a judgment in *replevin*, the execution at common law is for a return of the goods, to which damages are superadded by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; and in other actions upon a judgment of *non pros.*, *non suit*, or verdict, the execution is for the costs only. Tidd, Pract. 993.

After final judgment signed, and even before it is entered of record, the plaintiff may, in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out execution; provided there be no writ of error depending or agreement to the contrary, or, where this is allowed, security entered for stay of execution. But after a year and a day from the time of signing judgment (five years in Pennsylvania) the plaintiff cannot regularly take out execution without reviving the judgment by *scire facias*, unless a *fieri facias* or *capias ad satisfaciendum*, etc. was previously sued out, returned, and filed, or he was hindered from suing it out by a writ of error; and if a writ of error be brought, it is, generally speaking, a *supersedeas* of execution from the time of its allowance; provided bail, when necessary, be put in and perfected in due time. See Tidd, Pract. 994.

Writs of execution are judicial writs issuing out of the court where the record is upon which they are grounded. Hence, when the record has been removed to a higher court by writ of error or *certiorari*, or on appeal, either the execution must issue out of that court, or else the record must be returned to the inferior court by a *remittitur* (*q. v.*) for the purpose of taking out execution in the court below. The former is the practice in England; the latter, in some of the states of America.

3. The object of execution in personal actions is effected in one or more of the three following ways. 1. By the seizure and sale of personal property of the defendant. 2. By the seizure of his real property, and either selling it or detaining it until the issues and profits are sufficient to satisfy the judgment. 3. By seizing his person and holding him in custody until he pays the judgment or is judicially declared insolvent.

These proceedings, though taken at the instance and under the direction of the party for whom judgment is given, are considered the act of the law itself, and are in all cases performed by the authorized minister of the law. The party or his attorney obtains, from the office of the court where the record is, a writ, based upon and reciting the judgment, and directed to the sheriff (or, where he is interested or otherwise disqualified, to the coroner) of the county, commanding him, in the name of the sovereign or of the state, that of the goods and chattels or of the lands and tenements of the defendant in his bailiwick he cause to be *made* or *levied* the sum recovered, or that he seize the person of the defendant, as the case may be, and have the same before the court at the return-day of the writ. This writ is delivered by the party to the officer to whom it is directed, who thenceforth becomes responsible for his performance of its mandate, and in case of omission, mistake, or misconduct is liable in damages to the person injured, whether he be the plaintiff, the defendant, or a stranger to the writ.

When property is sold under execution, the proceeds are applied to the satisfaction of the judgment and the costs and charges of the proceedings; and the surplus, if there be any, is paid to the defendant in execution.

4. *Execution against personal property.* When the property consists of goods and chattels, in which are included terms for years, the writ used is the *fieri facias*. If, after levying on the goods, etc. under a *fieri facias*, they remain unsold for want of buyers, etc., a supplemental writ may issue, which is called the *venditioni exponas*. At common law, goods and chattels might also be taken in execution under a *levari facias;* though now perhaps the most frequent use of this writ is in executions against real property.

When the property consisted of *choses in action*, whether debts due the defendant or any other sort of credit or interest belonging to him, it could not be taken in execution at common law; but now, under statutory provisions in many of the states, such property may be reached by a process in the nature of an attachment, called an *attachment execution* or *execution attachment*. See ATTACHMENT.

Execution against real estate. Where lands are absolutely liable for the payment of debts, and can be sold in execution, the process is by *fieri facias* and *venditioni exponas*. In Pennsylvania the land cannot be sold in execution unless the sheriff's jury, under the *fieri facias*, find that the profits will not pay the debt in seven years. And, in general, lands are not subject to sale under execution, but, after a levy has been made under the *fieri facias*, are appraised by the sheriff's jury, and delivered to the plaintiff at the valuation until the debt is paid out of the profits. In England, only half the land can be thus taken, and the writ, though in form a *fieri facias*, is called an *elegit* (*q. v.*). If the sheriff delay to deliver lands thus appraised into the plaintiff's possession, he may be constrained by a writ called the *liberari facias*.

There are in England writs of execution against land which are not in general use here. The extent, or *extendi facias* (*q. v.*), is the usual process for the king's debt. The *levari facias* (*q. v.*) is also used for the king's debt, and for the subject on a *recognizance* or *statute staple* or *merchant* (*q. v.*), and on a judgment in *scire facias*, in which latter case it is also generally employed in this country.

5. *Execution against the person.* This is effected by the writ of *capias ad satisfaciendum*, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by process of law. See INSOLVENCY. This execution is not final, the imprisonment not being absolute; whence it has been called an execution *quousque*. 6 Coke, 87.

Besides the ordinary judgment for the payment of a sum certain, there are specific judgments, to do some particular thing. To this the execution must correspond: on a judgment for plaintiff in a real action, the writ is a *habere facias seisinam;* in ejectment it is a *habere facias possessionem;* for the defendant in replevin, as has already been mentioned, the writ is *de retorno habendo*.

Still another sort of judgment is that *in rem*, confined to a particular thing: such are judgments upon mechanics' liens and municipal claims, and, in the peculiar practice of Pennsylvania, on *scire facias* upon a mortgage. In such cases the execution is a writ of *levari facias*. A confession of judgment upon warrant of attorney, with a restriction of the lien to a particular tract, is an analogous instance; but in such case there is no peculiar form of execution; though if the plaintiff should, in violation of his agreement, attempt to levy on other land than that to which his judgment is confined, the court on motion would set aside the execution.

EXECUTION PAREE. **In French Law.** A right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney. La. Code of Proc. art. 732; 6 Toullier, n. 208; 7 *id.* 99.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.

In the United States, executions are so rare that there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE. That power in the government which causes the laws to be executed and obeyed.

It is usually confided to the hands of the chief magistrate: the president of the United States is invested with this authority under the national

government; and the governor of each state has the executive power in his hands.

The officer in whom the executive power is vested.

The constitution of the United States directs that "the executive power shall be vested in a president of the United States of America." Art. 2, s. 1. See Story, Const. b. 3, c. 36.

EXECUTOR. One to whom another man commits by his last will the execution of that will and testament. 2 Blackstone, Comm. 503.

A person to whom a testator by his will commits the *execution*, or putting in force, of that instrument and its codicils. Fonblanque, Rights and Wrongs, 307.

Lord Hardwicke, in 3 Atk. Ch. 301, says, "The proper term in the civil law, as to goods, is *hæres testamentarius*; and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id.* 300.

The word executor, taken in its broadest sense, has three acceptations. 1. *Executor a lege constitutus.* He is the ordinary of the diocese. 2. *Executor ab episcopo constitutus*, or *executor dativus*; and that is he who is called an administrator to an intestate. 3. *Executor a testator constitutus*, or *executor testamentarius*; and that is he who is usually meant when the term executor is used. 1 Williams, Exec. 185.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place or of the subject-matter.

An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin: here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinburne, Wills, pt. 4, s. 19, pl. 1.

A rightful executor is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such. 1 P. Will. Ch. 768; Williams, Exec. 173.

An executor de son tort is one who, without lawful authority, undertakes to act as executor of a person deceased. See EXECUTOR DE SON TORT.

A special executor is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

A substituted executor is a person appointed executor if another person who has been appointed refuses to act.

An executor to the tenor is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one: as, "I appoint A B to discharge all lawful demands against my will." 3 Phill. Eccl. 116; 1 Eccl. 374; Swinburne, Wills, 247; Wentworth, Exec. pt. 4, s. 4, p. 230.

2. *Qualification.* Generally speaking, all persons who are capable of making wills, and many others besides, may be executors. 2 Blackstone, Comm. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate. Toller, Exec. 30, 31. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. So may married women and infants; and even infants unborn, or *en ventre sa mère*, may be executors. 1 Dane, Abr. c. 29 *a* 2, § 3; 5 Serg. & R. Penn. 40. But in England an infant cannot act solely as executor until his full age of twenty-one years. Meanwhile, his guardian or some other person acts for him, as administrator *cum test. ann.* See ADMINISTRATION. A married woman cannot be executrix without her husband's consent. But a man by marrying an executrix becomes executor in her right, and is liable to account as such. 2 Atk. Ch. 212; 1 Des. So. C. 150.

3. Persons attainted, outlaws, insolvents, and persons of bad moral character, may be qualified as executors, because they act *en autre droit* and it was the choice of the testator to appoint them. 6 Q. B. 57; 12 B. Monr. Ky. 191; 7 Watts & S. Penn. 244; 3 Salk. 162. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security. 2 Halst. Ch. N. J. 9; 2 Barb. Ch. N. Y. 351. And in Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, and Kentucky, a bond is required from executors, similar to or identical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor; because the creditors of the estate must look to the funds in the executor's hands.

Idiots and lunatics cannot be executors; and an executor who becomes *non compos* may be removed. 1 Salk. 36. In Massachusetts, by Rev. Stat. c. 63, § 7, when any executor shall become insane, or otherwise incapable of discharging his trust, or *evidently unsuitable therefor*, the judge of probate may remove him. 11 Metc. Mass. 104. A drunkard may perform the office of executor, 12 B. Monr. Ky. 191; 7 Watts & S. Penn. 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal.

4. *Appointment.* Executors can be appointed only by will or codicil; but the word "executor" need not be used, and the appointment may be constructive. 3 Phill. Eccl. 118; 10 B. Monr. Ky. 394; 2 Bradf. Surr. N. Y. 32; 2 Speers, So. C. 97. Even a direction to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor.

The appointment of an executor may be absolute, qualified, or conditional. It is *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time. Toller, Exec. 36. It may be *qualified* as to the time or place wherein, or the subject-matters whereon, the office is to be exercised. 1 Williams, Exec. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter; or his authority may be limited to the state, as Pennsylvania; or to one class of property, as if A be made executor of goods and chattels in possession, and B of choses in action. Swinburne, Wills, pt. 4, s. 17, pl. 4; Off. Exec. 29; 3 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one. Croke Car. 293. Finally, an executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1.

5. *Assignment.* An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator *de bonis non* of the first testator succeeds to the executorship. And an administrator *de bonis non* succeeds to the executorship in both these events, in the United States generally, wherever a trust is annexed to the office of executor. 4 Munf. Va. 231; 7 Gill, Md. 81; 8 Ired. Eq. No. C. 52; 17 Me. 204; 1 Barb. Ch. N. Y. 565; 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor. 3 Phill. Eccl. 577; 4 Pick. Mass. 33; 34 Me. 37. But his acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any acts which would make him an executor *de son tort*, which see. So his refusal may be inferred from his keeping aloof from all management of the estate. 5 Johns. Ch. N. Y. 388; 16 Conn. 291; 2 Murph. Eq. No. C. 85; 9 Ala. 181; 16 Serg. & R. Penn. 416. If one of two or more appointees accepts, and the others decline, he becomes sole executor. An administrator *de bonis non* cannot be joined with an executor.

6. *Acts before probate.* The will itself is the sole source of an executor's title. Probate is the evidence of that title. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels, and pay legacies. And when he has acted before probate he may be sued before probate. 6 Term, 295; 4 Metc. Mass. 421. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession. 3 Carr. & P. 123; 7 Ark. 404; 3 Me. 174; 3 N. H. 517. So in some states he cannot sell land without letters testamentary, 7 Cranch, 115; 9 Wheat. 565; nor transfer a mortgage, 1 Pick. Mass. 81; nor remain in his own state and sue by attorney elsewhere, 12 Metc. Mass. 423; nor indorse a note so as to be sued, in some states, as New Hampshire and Maine. 5 Me. 261; 2 N. H. 291. And see 2 Pet. 239; 7 Johns. N. Y. 45; Byles, Bills, 40; Story, Prom. Notes, 304; Story, Bills, 250; Parsons, Bills.

7. *Powers of executors.* An executor may do, in general, whatever an administrator can. See ADMINISTRATOR. His authority dates from the moment of his testator's death. Comyns, Dig. *Administration* (B 10); 5 Barnew. & Ald. 745; 2 W. Blackst. 692. When once probate is granted, his acts are good until formally reversed by the court. 3 Term, 125; 15 Serg. & R. Penn. 39. In some states he has power over both real and personal estate. 3 Mass. 514; 1 Pick. Mass. 157. In the majority he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient, or by a grant of letters testamentary. 9 Serg. & R. Penn. 431; 2 Root, Conn. 438; 25 Wend. N. Y. 224; 3 M'Cord, So. C. 371; 9 Ga. 55; Gordon, Law Dec. 93. The will may direct him to sell lands to pay debts, but the money resulting is usually held to be equitable assets only. 9 Barnew. & C. 489; 3 Brev. No. C. 242; 8 B. Monr. Ky. 499. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir. 1 Williams, Exec. 555, Am. note. An executor's power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law. 4 Term, 645; 9 Coke, 88; Coke, 2d Inst. 236.

8. *Chattels real* go to the executor; but he has no interest in freehold terms or leases, unless by local statute, as in South Carolina. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executors. 1 Williams, Exec. 579, note; 5 Whart. Penn. 138; 4 Ala. N. S. 350; 7 How. Miss. 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal go to the executor. Such are emblements. Brooke, Abr. *Emblements;* 4 Harr. & J. Md. 139. Heir-looms and fixtures go to the heir; and as to what are fixtures, see FIXTURES, and 1 Williams, Exec. 615, Am. note; 2 Smith, Lead. Cas. 114, Am. note. The widow's separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property upon the executor's right, see 1 Williams, Exec. 634, Am. note 2; 2 *id.* 636, note 1; 1 Smith, Lead. Cas. 40. Donations *mortis causâ* go to the donee at

once, and not to the executor. 1 Nott & M'C. So. C. 237.

9. *Suits.* In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them. Cowp. 375; 1 Wms. Saund. 216, n. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc. for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been. 2 Brod. & B. 102; 2 Maule & S. 415; 2 Johns. Cas. N. Y. 17; 1 Md. 102; 15 Ala. N. S. 253; 5 Blackf. Ind. 232; 6 T. B. Monr. Ky. 40; 3 Ohio, 211. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family. Executors may also sue for stocks and annuities, as being personal property. So they may sue for an insurance policy. And for all these purposes they may take legal proceedings by action, suit, or summons.

10. *Wife's choses.* In general, choses in action given to the wife either before or after marriage survive to her, provided her husband have not reduced them to possession before his death. 2 Barnew. & Ald. 452. A promissory note given to the wife during coverture comes under this rule in England, 12 Mees. & W. Exch. 355; 7 Q. B. 864; but not so in this country generally. 4 Dan. Ky. 333; 15 Conn. 587; 17 Me. 301; 17 Pick. Mass. 391; 20 *id.* 556. Mere intention to reduce choses into possession is not a reduction, nor is a mere appropriation of the fund. 5 Ves. Ch. 515; 11 Serg. & R. Penn. 377; 5 Whart. Penn. 138; 2 Hill, Ch. So. C. 644; 4 Ala. N. S. 350; 14 Ohio, 100.

Other suits. For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper. 3 Nev. & M. 391; 4 Hill, N. Y. 57; 19 Pick. Mass. 432; 4 Jones, No. C. 159. So he may bring replevin in his own name, 6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor. 20 Wend. N. Y. 668; 6 Blackf. Ind. 120; 1 Pet. 686.

11. *Other powers.* An executor may sell terms for years, and may even make a good title against a specific legatee, unless the sale be fraudulent. So he may underlet a term. He may indorse a promissory note or a bill payable to the testator or his order. 10 Miss. 687.

Co-executors. Co-executors are regarded in law as one individual; and hence, in general, the acts of one are the acts of all. Comyns, Dig. *Administration* (B 12); 9 Cow. N. Y. 34; 4 Hill, N. Y. 492. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to one is a payment by or to all. 8 Blackf. Ind. 170; 10 Ired. No. C. 263; 2 Barb. Ch. N. Y. 151. But each is liable only for the assets which have come into his own hands. 11 Johns. N. Y. 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it. A power to sell land, conferred by will upon several executors, must be executed by all who proved the title. 2 Dev. & B. No. C. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be *in pais*. Croke Eliz. 80; 3 Dan. Ky. 195. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in 8 Penn. St. 417; 2 Sandf. N. Y. 512; 1 N. Y. 341. On the death of one or more of several joint executors, their rights and powers survive to the survivor. Bacon, Abr. *Executor* (D); Sheppard, Touchst. 484.

12. *Duties.* The following is a brief summary of an executor's duties:—

First. He must bury the deceased in a manner suitable to the estate left behind. 2 Blackstone, Comm. 508. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is risk of the estate's proving insolvent. 1 Barnew. & Ad. 260; 2 Carr. & P. 207; 14 Serg. & R. Penn. 64; 1 Ashm. Penn. 314. In England the present limit to funeral expenses appears to be twenty pounds where the testator dies insolvent.

Second. Within a convenient time after the testator's death, he should collect the goods of the deceased, if he can do so peaceably; if resisted, he must apply to the law for redress.

Third. He must prove the will, and take out administration. In England there are two ways of proving a will,—in *common form*, and in *form of law*, or solemn form. In the former, the executor *propounds* the will,—*i.e.* presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are summoned to show cause why execution should not issue. Fonblanque, Rights and Wrongs, p. 313.

Fourth. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also. 5 N. H. 492; 11 Mass. 190; 9 Me. 53; 1 Browne, Penn. 87.

Fifth. He must next collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay. 6 Watts, Penn. 46; 15 Ala. N. S. 328.

13. *Sixth.* He must give notice of his appointment in the statute form, and should advertise for debts and credits. 2 Ohio, St. 156. See *forms of advertisements*, 1 Chitty, Pract. 521.

Seventh. The personal effects he must deal with as the will directs, and the surplus must be turned into money and divided as if

there was no will. An administrator must at once collect, appraise, and sell the whole. The safest method of sale is a public auction.

Eighth. He must keep the money of the estate safely, but not mixed with his own, or he may be charged interest on it. He is also charged when he has misemployed funds or let them lie idle, provided a want of ordinary prudence is proved against him. 4 Mass. 205; 2 Bland, Ch. Md. 306; 1 Sumn. C. C. 14; 2 Rand, Va. 409; 4 Harr. N. J. 109; 3 Des. So. C. 241. And, generally, interest is to be charged on all money received by an executor and not applied to the use of the estate. 1 Bail. Eq. So. C. 98; 1 Dev. Eq. So. C. 369; 6 J. J. Marsh. Ky. 94. But an administrator cannot be charged with interest on money allowed him for commission. 10 Penn. St. 408; 2 Jones, No. C. 347.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account within the year generally prescribed by statute.

Tenth. He must pay the debts and legacies in the order required by law. Funeral expenses are preferred debts, and so are debts to the United States, under certain limitations respecting insolvency, by act of congress. 2 Kent, Comm. 418–421. Otherwise there is no one order of payment universal in the United States.

14. *Legacies.* Bequests to charitable uses are legal and valid. 2 Roper, Leg. 1115, Am. note; 1 Jarman, Wills, 197; 4 Kent, Comm. 285, 508; 2 Williams, Exec. 908, Am. note. The executor must give his assent to a legacy before the legatee's title is complete and perfect. 8 How. 170; 19 Ala. N. S. 666; 4 Fla. 144. If without cause he refuse this assent, he may be compelled to give it by a court of equity. But assent may be implied and presumed. 10 Hare, Ch. 177; 9 Exch. 680; 1 Bailey, Eq. So. C. 504; 6 Call, Va. 55; 10 Johns. N. Y. 30. A legatee cannot sue for his legacy until the time given to the executor for payment has expired. This time is commonly one year. 16 Beav. Rolls, 298; 15 Ala. 507; 2 Edw. Ch. N. Y. 202.

A legacy made to an infant must be paid to his guardian, and not to him or his father. 3 Atk. Ch. 629; 9 Vt. 41. A legacy made to a married woman must be paid to her husband; but to herself if it be to her sole and separate use.

A *lapsed* legacy is one which is made to a legatee who dies before the testator. 1 Eq. Cas. Abr. 295. An *ademption* occurs when a specific legacy does not remain in specie as it was described in the will. 2 Story, Eq. Jur. § 1115; 1 Johns. Ch. N. Y. 262. The great rule in legacies is, that if the testator's estate is not sufficient for paying all his debts and legacies, *first*, the debts must be paid in full; *secondly*, the specific legacies are to be paid; *thirdly*, general legacies are to be paid, in full if possible, if not, *pro rata*.

15. *Pay.* Commissions are not allowed on a legacy given in trust to an executor. 1 Bradf. Surr. N. Y. 198, 321. Reasonable expenses are always allowed an executor. 5 Gray, Mass. 26; 28 Vt. 765; 3 Cal. 287; 1 Bradf. Surr. N. Y. 248; 2 *id.* 291; 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission. 20 Barb. N. Y. 91. In England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses.

In England the jurisdiction of probate, until recently, belonged to the ecclesiastical courts. It is now exercised in the new court of probate, which holds its sittings in Westminster Hall. There is a principal registry of wills, situated in Doctors Commons, and forty *district* registries, scattered throughout England and Wales, each presided over by a district registrar, by whom probate is granted where the application is unopposed. See Fonblanque, Rights and Wrongs, 311. In the United States the jurisdiction is vested in surrogates, judges of probate, registrars of wills, county courts, etc. See ADMINISTRATION.

See, generally, Bouvier, Inst. Index; 1 Suppl. to Ves. Jr. 8, 90, 356, 438; 2 *id.* 69; 2 Phillipps, Ev. 289; Roper, Leg. Am. ed. *passim;* Williams, Executors, 4th Am. ed.; Toller, Exec.; Wentworth, Exec.; Jarman, Wills, Perkins' notes; Chitty, Pract. Index. For the complete New York law, and much of the general law, see Willard, Executors. For the origin and progress of the law in relation to executors, the reader is referred to 5 Toullier, n. 576, note; Mackeldy, Civ. Law, b. iv. sect. 4, chap. 3; Glossaire du Droit Français, par Delaurière, verb. *Exécuteurs testamentaires; id.* art. 297, *de la Coutume de Paris;* Poth. *des Donations testamentaires.*

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

2. If a stranger takes upon him to act as executor without any just authority (as, by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong, *de son tort.* 2 Blackstone, Comm. 507; 4 M'Cord, So. C. 286; 12 Conn. 213; 8 Miss. 437; 14 Eng. L. & Eq. 510; 3 Litt. Ky. 163. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc., he becomes an executor *de son tort.*

3. But a stranger may perform many acts in relation to a testator's estate without becoming liable as executor *de son tort.* Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his house, etc. Such acts are held to be offices of kindness and charity. 19 Mo. 196; 28 N. H. 473. Nor does paying the debts of the deceased with one's own

money make one an executor *de son tort*. 8 Rich. So. C. 29. As to what acts will render a person so liable, see Godolphin, Orph. Leg. 91; 1 Dane, Abr. 561; Buller, Nisi P. 48; Comyns, Dig. *Administration* (C 3); 8 Johns. N. Y. 426; 15 Serg. & R. Penn. 39; 26 Me. 361; 6 Blackf. Ind. 367.

4. An executor *de son tort* is liable only for such assets as come into his hands, and is not liable for not reducing assets to possession. 2 Rich. Eq. So. C. 247. And it has been held that he is only liable to the rightful administrator. 3 Barb. Ch. N. Y. 477. But see 9 Leigh, Va. 79; 2 M'Cord, So. C. 423, which imply that he is also liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor. 1 Brayt. Vt. 116; 11 Ired. No. C. 215; 3 Penn. St. 129; 5 J. J. Marsh. Ky. 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head seems to have been borrowed from the civil-law doctrine of *pro hæredi gestio*. See Heineccius, Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

5. An executor *de son tort* is an executor only for the purpose of being sued, and not for the purpose of suing. 11 Ired. No. C. 215. He is sued as if rightful executor. But if he defends as such he becomes thereby also an executor *de son tort*. Lawes, Plead. 190, note; 4 B. Monr. Ky. 136; 1 M'Cord, Ch. So. C. 318; 21 Miss. 688; 2 Harr. & J. Md. 435. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into his hands. 19 Mo. 196; 15 Mass. 325; 4 Harr. Del. 108; 8 Johns. N. Y. 126. But see, *contra*, 2 N. H. 475. A voluntary sale by an executor *de son tort* confers only the same title on the purchaser that he himself had. 6 Exch. 164; 20 Eng. L. & Eq. 145; 15 Jur. 63; 20 Ala. N. S. 587.

6. It is held that in regard to land no man can be an executor *de son tort*. 1 Root, Conn. 183; 7 Serg. & R. Penn. 192; 10 *id.* 144. In Arkansas it is said that there is no such thing as a technical executor *de son tort*. 17 Ark. 122, 129. Other recent cases on this subject are, 35 Me. 287; 15 N. H. 137; 17 Mo. 91; 23 Miss. 544; 13 Ga. 478; 23 Ala. N. S. 548; 25 *id.* 353; Busb. No. C. 399; 12 La. Ann. 245, 344.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased; whatever may be executed,—as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise is made, for which it is the legal equivalent. See CONSIDERATION.

EXECUTORY CONTRACT. One in which some future act is to be done: as, where an agreement is made to build a house in six months, or to do any act at a future day.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

2. In the case of *chattels* this is more properly called an executory bequest. By the executory devise no estate vests at the death of the devisor or testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one *inops consilii*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent, Comm. 257; 1 Edw. Ch. 27; 3 Term, 763.

3. If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise. *E. g.*, if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may operate as an executory devise. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease, then to C and his heirs, the limitation to B, etc. prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise. Butler's note (c) to Fearne on Cont. Rem. p. 397.

4. An executory devise differs from a remainder in three very material respects:—

First. It needs no particular estate to support it. *Second.* By it a fee-simple or other less estate may be limited on a fee-simple. *Third.* By this a remainder may be limited of a chattel interest after a particular estate for life created in the same. The first is a case of freehold commencing *in futuro*. A makes a devise of a future estate on a certain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves it to descend to his heirs at law. 1 T. Raym. 82; 1 Salk. 226; 1 Lutw. 798.

The second case is a fee upon a fee. A devises to A and his heirs forever, which is a fee-simple, and then, in case A dies before he is twenty-one years of age, to B and his heirs.

The third case: a remainder in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for life could alien the whole. An exception is made in favor of wills. 2 Kent, Comm. 285; 2 Serg. & R. Penn. 59; 1 Des. So. C. 271; 4 *id.* 340; 1 Bay, So. C. 78.

5. To prevent perpetuities, a rule has been adopted that the contingency on which an executory devise depends must take effect, if at all, during the time of a life or lives in being and twenty-one years after and the months allowed for gestation, in order to reach beyond the minority of a person not *in esse* at the time of making an executory devise. 3 P. Will. 258; 7 Term, 600; 2 Blackstone, Comm. 174; 7 Cranch, 456; 1 Gilm. Va. 194; 2 Hayw. No. C. 375. For

example, lands are devised to such unborn son of a *feme covert* as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son.

But such a bequest after an indefinite failure of issue is bad. 2 Serg. & R. Penn. 62; Watkins, Conv. 112, 116; Thomas, Coke, Litt. 515, 516, 595, 596.

6. An executory devise is generally indestructible by any alteration in the estate out of or after which it was limited.

In England, if the executory devise is limited on an estate tail, the tenant in tail can bar it, as well as the entail, by deed, under stat. 3 & 4 Will. IV. c. 74. If the executory devise be expectant on a fee, there are no means of preventing its taking effect on the contingency.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate may be an *executory devise*, or an *executory remainder*, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS (*Via Executoria*). **In Louisiana.** A process which can be resorted to in two cases, namely: 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor.

2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

EXECUTORY TRUSTS. A trust is called *executory* when some further act is requisite to be done by the author of the trust or his trustees to give it its full effect.

2. In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them: *i.e.* the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

3. The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged and liberal construction than in the case of legal limitations or trusts executed. 1 Fonblanque, Eq. b. 1; 1 Sanders, Uses and Trusts, 237; White, Lead. Cas. 18; 3 Wood, p. 479. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity. 4 Johns. Ch. N. Y. 498, 500; 4 Paige, Ch. N. Y. 305; 1 Dev. Eq. No. C. 93. But where the trust, though voluntary, has been executed in part, it will be sustained or enforced in equity. 1 Johns. Ch. N. Y. 329; 7 Penn. St. 175, 178; White, Lead. Cas. 176; 6 Ves. Ch. 656; 18 *id.* 140; 1 Keen, Reg. Cas. 551; 3 Beav. Rolls, 238.

EXECUTORY USES. Springing uses which confer a legal title answering to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise: there must be a person seised to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, if the estate of the feoffee to such use be destroyed, by alienation or otherwise, before the contingency arises, the use is destroyed forever. 1 Coke, 134, 138; Croke Eliz. 439. Whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee. Poll. 78; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See EXECUTOR.

EXEMPLARY DAMAGES. In Practice. Damages allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression.

2. The principle appears to be now well established in nearly all the states of the Union, though it is denied in some, that in actions for torts strictly so called, where gross fraud, or actual malice, or deliberate violence or oppression appears, the jury are not confined to a strict compensation for the plaintiff's loss, but may, in assessing damages, allow a sum as a punishment of the defendant for his wrong committed upon the plaintiff. Such an allowance is termed "smart-money," or "exemplary," "vindictive," or "punitive" damages. They are assessed in one sum, with any allowance the jury may think proper to make as compensation for the actual loss sustained; and the whole sum is awarded to the injured party. The propriety of allowing damages to be given by way of punishment under any circumstances has been strenuously denied in many of the cases, and the question has given rise to extensive discussion; but the weight of authority is decidedly that such allowance, in a suitable case, is proper. Actions of libel, assault and battery, seduction, false imprisonment, and the like, are those in which this principle is most frequently invoked. To trace the discussion of this subject, consult 13 Ala. N. S. 490; 27 *id.* 678; 28 *id.* 236; 15 Ark. 452; 3 Day, Conn. 447; 6 Conn. 508; 7 *id.* 274; 10 *id.* 384; 15 *id.* 225, 267; 4 Ill. 373; 7 *id.* 432; 16 *id.* 283; 5 Ind. 322; 13 B. Monr. Ky. 219; 17 *id.* 101; 2 Mart. La. 257; 7 La. Ann. 447; 11 *id.* 292; 3 Mass. 546; 10 *id.* 459; 15 Pick. Mass. 297; 21 *id.* 378; 4 Cush. Mass. 273; 27 Miss. 68; 14 Mo. 104; 21 *id.* 289; 10 N. H. 130; 3 Barb. N. Y. 42, 651; 4 Wend. N. Y. 113; 1 Abb. Pract. N. Y. 289; 1 N. Y. 18; 3 *id.* 191; 4 *id.* 452; 11 *id.* 356; Busb. No. C. 395; 6

Watts & S. Penn. 150; 5 Watts, Penn. 375; 20 Penn. St. 85, 354; 23 *id.* 424, 523; 3 Strobh. So. C. 425; 4 *id.* 34; 8 Rich. So. C. 144; 2 Sneed, Tenn. 456; 2 Tex. 460; 5 *id.* 141; 9 *id.* 358; 12 *id.* 297; 3 Wisc. 424; 4 *id.* 67; 1 Cranch, C. C. 187; 1 Wash. C. C. 152; Wall. Jr. C. C. 164; 2 Mas. C. C. 120; 3 Stor. C. C. 1; 3 Wheat. 546; 10 Pet. 81; 13 How. 363, 447; 16 *id.* 480; 2 Wils. 205; 3 *id.* 18; 5 Saund. 442; 2 Stark. 282; 5 Carr. & P. 372; 13 Mees. & W. Exch. 47; 3 Am. Jur. 387; 9 Bost. Law Rep. 529; 10 *id.* 49; 2 Greenleaf, Ev. § 253; 1 Kent, Comm. 10th ed. 630, n.

3. In some of the above cases, a qualification of the rule allowing exemplary damages has been asserted; viz., that they should be carefully denied whenever the defendant is criminally liable to punishment for the wrong done, by indictment and fine or otherwise. 4 Cush. Mass. 273; 5 Ind. 322. But compare 6 Tex. 266; 1 Cal. 54; 18 Mo. 71; 1 Abb. Pract. N. Y. 289; 4 Du. N. Y. 247; 5 Taunt. 442; 2 Stark. 282; 13 Mees. & W. Exch. 47; 1 Murr. Sc. 15, 317, 428.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. 3 Bouvier, Inst. n. 3107. See, generally, 1 Starkie, Ev. 151; 1 Phillipps, Ev. 307; 7 Cranch, 481; 9 *id.* 122; 3 Wheat. 234; 10 *id.* 469; 2 Yeates, Penn. 532; 1 Hayw. No. C. 359; 1 Johns. Cas. N. Y. 238. As to the mode of authenticating records of other states, see AUTHENTICATION.

EXEMPLUM (Lat.). **In Civil Law.** A copy. A written authorized copy. Used also in the modern sense of example: *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calvinus, Lex.; Vicat; Coke, Litt. 24 *a.*

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions: it allowed only the necessary wearing-apparel; and it was once holden that if a defendant had two gowns the sheriff might sell one of them. Comb. 356. But in modern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of the several states. 3 Bouvier, Inst. 576, § 3387.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

By act of congress Feb. 24, 1864, c. 13, sec. 10, 13 U. S. Stat. at Large, 8, it is enacted that such persons as are rejected as physically or mentally unfit for the service, all persons actually in the military or naval service of the United States at the time of the draft, and all persons who have served in the military or naval service two years during the present war and been honorably discharged therefrom, and no others, are exempt from enrolment and draft under said act, and act of congress March 3, 1863, 12 U. S. Stat. at Large, 731.

EXEQUATUR (Lat.). **In French Law.** A Latin word which was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may indorse the warrant, and then the ministerial officer may execute it in such county. This is called *backing* a warrant.

In International Law. A declaration made by the executive of a government near to which a consul has been nominated and appointed, after such nomination and appointment has been notified, addressed to the people, in which is recited the appointment of the foreign state, and that the executive, having approved of the consul as such, commands all the citizens to receive, countenance, and, as there may be occasion, favorably assist the consul in the exercise of his place, giving and allowing him all the privileges, immunities, and advantages thereto belonging. 3 Chitty, Com. Law, 56; 3 Maule & S. 290; 5 Pardessus, n. 1445.

EXERCITOR MARIS (Lat.). **In Civil Law.** One who fits out and equips a vesssel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him *exercitor* to whom all the returns come. Dig. 14. 1. 1. 15; 14. 1. 7; 3 Kent, Comm. 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband. These are the terms in use in English and American laws, to denote the same as *exercitor maris*. See MANAGING OWNER; SHIP'S HUSBAND.

EXERCITORIA ACTIO (Lat.). **In Civil Law.** An action against a managing owner (*exercitor maris*), founded on acts of the master. 3 Kent, Comm. 161; Vicat, Voc. Jur.

EXFESTUCARE (Lat.). To abdicate; to resign by passing over a staff. DuCange. To deprive oneself of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of *surrender* as practised in England formerly in courts baron. Spelman, Gloss. See, also, Vicat, Voc. Jur.; Calvinus, Lex.

EXHÆREDATIO (Lat.). **In Civil Law.** A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disherison. Occurring in the phrase, in Latin pleadings, *ad exhæredationem* (to the disherison), in case of abatement.

EXHÆRES (Lat.). **In Civil Law.** One disinherited. Vicat, Voc. Jur.; DuCange.

EXHIBERE (Lat.). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by *exhibiting*, that is, *filing* a bill against him. Stephen, Plead. 52, n. (*l*); 2 Sellon, Pract. 74.

To administer; to cause a thing to be taken by a patient. Chitty, Med. Jur. 9.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by a capital letter, and generally attached to the principal instrument. 1 Strange, 674; 2 P. Will. Ch. 410; Gresley, Eq. Ev. 98.

A paper referred to in and filed with the bill, answer, or petition in a suit in equity.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. In Scotch Law. An action for compelling the production of writings. See DISCOVERY.

EXIGENDARY. In English Law. An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. In Practice. A writ issued in the course of proceedings to outlawry, deriving its name and application from the mandatory words found therein, signifying, "that you cause to be exacted or required;" and it is that proceeding in an outlawry which, with the writ of proclamation, issued at the same time, immediately precedes the writ of *capias utlagatum*. 2 Va. Cas. 244.

EXIGENTER. An officer who made out exigents and proclamations. Cowel. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILE. Banishment. A person banished.

EXILIUM (Lat.). **In Old English Law.** Exile. Setting free or wrongly ejecting bondtenants. *Waste* is called *exilium* when bondmen (*servi*) are set free or driven wrongfully from their tenements. Coke, Litt. 536. Destruction; waste. DuCange. Any species of waste which drove away the inhabitants into exile, or had a tendency to do so. Bacon, Abr. *Waste* (*a*); 1 Reeve, Hist. Eng. Law, 386.

EXISTIMATIO (Lat.). The reputation of a Roman citizen. The decision of arbiters. Vicat, Voc. Jur.; 1 Mackeldy, Civ. Law, § 123.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it. 2 Beck, Med. Jur. 119.

EXITUS (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land.

In Pleading. The issue or the end, termination or conclusion, of the pleadings: so called because an issue brings the pleadings to a close. 3 Blackstone, Comm. 314.

EXLEX (Lat.). An outlaw. Spelman, Gloss.

EXOINE. In French Law. An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, Procéd. Crim. s. 3, art. 3.

EXONERATION. The taking off a burden or duty.

2. It is a rule in the distribution of an intestate's estate that the debts which he himself contracted, and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real.

3. But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal is not in that case to be applied in exoneration of the real estate. 2 Powell, Mortg. 780; 5 Hayw. No. C. 57; 3 Johns. Ch. N. Y. 229.

4. But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of creditors. 2 Ves. Ch. 64; 1 P. Will. 693, 729; 2 *id.* 120, 335; 3 *id.* 367. See Powell, Mortg. Index.

EXONERATUR (Lat.). **In Practice.** A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See RECOGNIZANCE.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

2. Citizens of the United States have the right to expatriate themselves until restrained by congress; but it seems that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home.

3. A citizen may acquire in a foreign country commercial privileges attached to his domicil, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. See DOMICIL; 2 Cranch, 120; Sergeant, Const. Law, 2d ed. 318; 2 Kent, Comm. 36; Grotius, b. 2, c. 5, s. 24; Puffendorff, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225; Wyckford, tom. i. 117, 119; 3 Dall. 133; 7 Wheat. 342; 1 Pet. C. C. 161; 4 Hall, Law Journ. 461; Brackenridge, Law Misc. 409; 9 Mass. 461. For the doc-

trine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281, 282, 291; 7 Coke, 16; Dy. 2, 224, 298 *b*, 300 *b*; 2 P. Will. Ch. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westlake, Priv. Int. Law; Story, Confl. Laws.

EXPECTANCY. Contingency as to possession.

Estates are said to be *in possession* when the person having the estate is in actual enjoyment of that in which his estate subsists, or *in expectancy*, when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is, in general, considered invalid. 2 Ves. Ch. 157; 1 Brown, Ch. 10; Jeremy, Eq. Jur. 397.

EXPECTANT. Contingent as to enjoyment.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer. Cart. de For. c. 17; Spelman, Gloss.; Cowel; 2 Blackstone, Comm. 393, 417.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowel.

EXPENSÆ LITIS (Lat.). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPERTS (from Latin *experti*, skilled by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, Répert. Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickland, Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346. See, generally, as to who are experts, and the admissibility of their evidence, 1 Greenleaf, Ev. 440; 3 Dougl. 157; 2 Mood. & M. 75; 12 Ala. N. s. 648; 9 Conn. 55; 17 Pick. Mass. 497; 12 La. Ann. 183.

EXPILATION. In Civil Law. The crime of abstracting the goods of a succession.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, except to those which arise from the non-fulfilment of obligations created during its existence. See PARTNERSHIP; CONTRACT.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute, the first statute is, *ipso facto*, revived by the expiration of the repealing statute, 6 Whart. Penn. 294; 1 Bland, Ch. Md. 664, unless it appear that such was not the intention of the legislature. 3 East, 212; Bacon, Abr. *Statute* (D).

EXPIRY OF THE LEGAL. In Scotch Law. The expiration of the term within which the subject of an adjudication may be redeemed on payment of the debt adjudged for. Bell, Dict.; 3 Jurid. Styles, 3d ed. 1107.

EXPLICATIO (Lat.). **In Civil Law.** The fourth pleading: equivalent to the surrejoinder of the common law. Calvinus, Lex.

EXPORTATION. In Common Law. The act of sending goods and merchandise from one country to another. 2 Mann. & G. 155; 3 *id.* 959.

In order to preserve equality among the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state." Art. 1, s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." See 12 Wheat. 419; IMPORTATION.

EXPOSE. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

EXPOSITION DE PART. In French Law. The abandonment of a child, unable to take care of itself, either in a public or private place.

If the child thus exposed should be killed in consequence of such exposure, as, if it should be devoured by animals, the person so exposing it would be guilty of murder. Rosc. Crim. Ev. 591.

EXPOSURE OF PERSON. In Criminal Law. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 2 Bishop, Crim. Law, § 318. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable as a common nuisance. An omnibus is a public place sufficient to support the indictment. 1 Den. Cr. Cas. 338; Templ. & M. Cr. Cas. 23; 2 Carr. & K. 933; 2 Cox, Cr. Cas. 376; 3 *id.* 183; Dearsl. Cr. Cas. 207. But see 1 Dev. & B. No. C. 208. See, generally, 1 Bennett & H. Lead. Crim. Cas. 442–

457; 3 Day, Conn. 103, 108; 5 *id.* 81; 18 Vt. 574; 1 Mass. 8; 2 Serg. & R. Penn. 91; 5 Barb. N. Y. 203.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law: *expressum facit cessare tacitum.* Coke, Litt. 183; 1 Bouvier, Inst. n. 97.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See ASSUMPSIT; ACTION.

EXPRESS CONSIDERATION. Consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 Blackstone, Comm. 443; 1 Parsons, Contr. 4. One made in express words. 2 Kent, Comm. 450. See CONTRACTS.

EXPRESS TRUST. One declared in express terms. See TRUSTS.

EXPRESS WARRANTY. One expressed by particular words. 2 Blackstone, Comm. 300. The statements in an application for insurance are usually allowed to constitute an express warranty. 1 Phillips, Ins. 346. See WARRANTY.

EXPROMISSIO (Lat.). **In Civil Law.** The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. 1 Bouvier, Inst. n. 802. See NOVATION.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPULSION (Lat. *expellere*, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:—

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second. That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States.

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is a sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizen as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

Sixth. In determining on expulsion, the senate is not bound by the forms of judicial proceedings or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall, Law Journ. 459, 465.

2. Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are of three kinds. 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land. 2 Binn. Penn. 448. See, also, 2 Burr. 536.

3. Members of what are called joint-stock incorporated companies, or, indeed, members of any corporation owning property, cannot, without express authority in the charter, be expelled, and thus deprived of their interest in the general fund. Angell & A. Corp. 238. See, generally, Angell & A. Corp. c. 11; Willcock, Munic. Corp. 270; 11 Coke, 99; 2 Bingh. 293; 5 Day, Conn. 329; Styles, 478; 6 Conn. 532; 6 Serg. & R. Penn. 469; 5 Binn. Penn. 486; AMOTION.

EXTENSION. In Common Law. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment.

Among the French, a similar agreement is known by the name of attermoiement. Merlin, Répert. mot *Attermoiement*.

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). **In Patent Law.** An ordinary patent was formerly granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. A fee of forty dollars was required from the applicant, and a public notice of sixty days was to be given of the application. No extension could be granted after the patent had once expired.

The extension of a patent is intended for the sole benefit of the inventor; and where it is made to appear that he will receive no benefit therefrom, it will not be granted. The assignee, grantee, or licensee of an interest in the original patent will retain no right in the extension, unless by reason of some express stipulation to that effect. But where any person has a right to use a specific machine under the original patent, he will still retain that right after the extension. See act of 1836, § 18, and act of 1848, § 1; PATENTS. By act of congress of March 2, 1861, c. 88, § 16, 12 U. S. Stat. at Large, 249, patents are to be granted for the term of seventeen years, and further extension is forbidden. This does not apply to patents for designs, which may be issued for three and a half, seven, or fourteen years, and are capable of extension.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzherbert, Nat. Brev. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple, see stat. 13 Edw. I. *de Mercatoribus*; 27 Edw. III. c. 9; and, by 33 Hen. VIII. c. 39, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. 16 Mass. 186.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Sharswood, Blackst. Comm. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown. See 2 & 3 Vict. c. 11; 5 & 6 Vict. c. 86, § 8.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cases, or of damages in those of a civil nature.

EXTERRITORIALITY (Fr.). This term (*exterritorialité*) is used by French jurists to signify the immunity of certain persons, who, although in the state, are not amenable to its laws: foreign sovereigns, ambassadors, ministers plenipotentiary, and ministers from a foreign power, are of this class. Fœlix, Droit Intern. Privé, liv. 2, tit. 2, c. 2, s. 4. See AMBASSADOR; CONFLICT OF LAWS; MINISTER; PRIVILEGE.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Preston, Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharswood, Blackst. Comm. 325, note.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives satisfaction and full payment of a debt and the creditor releases the debtor, 11 Johns. N. Y. 513, or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished, 3 Stew. 60; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct. Coke, Litt. 147 *b*.

There are numerous cases where the claim is extinguished by operation of law: for example, where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common law an extinguishment of the claim on the other debtor. 1 Pet. C. C. 301; 2 Johns. N. Y. 213.

See, generally, Bouvier, Inst. Index; Coke, Litt. 147 *b*; 1 Rolle, Abr. 933; 7 Viner, Abr. 367; 11 *id.* 461; 18 *id.* 493–515; 3 Nelson, Abr. 818; Bacon, Abr.; 5 Whart. Penn. 541; 2 Root, Conn. 492; 3 Conn. 62; 6 *id.* 373; 1 Ohio, 187; 11 Johns. N. Y. 513; 1 Halst. N. J. 190; 4 N. H. 251; 31 Penn. St. 475.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes: by the owner of the common right becoming owner of the fee; by severance from the land; by release; by approvement. 2 Hilliard, Real Prop. 75; 2 Stephen, Comm. 41; 1 Crabb, Real Prop. § 341 *et seq.*; Coke, Litt. 280; Burton, Real Prop. 437; 1 Bacon, Abr. 628; Croke Eliz. 594.

EXTINGUISHMENT OF COPYHOLD. This takes place by a union of the copyhold and freehold estates in the same person; also by any act of the tenant showing an intention not to hold any longer of his lord. Hutt. 81; Croke Eliz. 21; Williams, Real Prop. 287 *et seq.*; Watkins, Copyholds, Index.

EXTINGUISHMENT OF A DEBT.

Destruction of a debt. This may be by the creditor's accepting a higher security. Plowd. 84; 1 Salk. 304; 1 Md. 492; 5 *id.* 389; 24 Ala. N. s. 439. A judgment recovered extinguishes the original debt. 13 Mass. 148; 1 Pick. Mass. 118; Hill & D. N. Y. 392. A debt evidenced by a note may be extinguished by a surrender of the note. 10 Cush. Mass. 169; 29 Penn. St. 50; 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT. See, generally, 35 N. H. 421; 29 Vt. 488; 6 Fla. 25; 20 Ga. 403; 12 Barb. N. Y. 128

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. Termes de la Ley; Cowel; 3 Sharswood, Blackst. Comm. 325, note.

EXTINGUISHMENT OF WAYS. Destruction of a right of way, effected usually by a purchase of the close over which it lies by the owner of the right of way. 2 Washburn, Real Prop. Index.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own. 4 Cox, Cr. Cas. 387. In North Carolina the crime may be charged without using this word. 1 Hayw. No. C. 406.

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Blackstone, Comm. 141; 1 Hawkins, Pl. Cr. c. 68, s. 1; 1 Russell, Crimes, *144.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion. 2 Mass. 523; 16 *id.* 93, 94. See Bacon, Abr.; Coke, Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power. 2 Burr. 927. See 6 Cow. N. Y. 661; 1 Caines, N. Y. 130; 13 Serg. & R. Penn. 426; 3 Penn. 183; 1 Yeates, Penn. 71; 1 South. 324; 1 Pick. Mass. 171; 7 *id.* 279; 4 Cox, Cr. Cas. 387.

EXTRA-DOTAL PROPERTY. In Louisiana this term is used to designate that property which forms no part of the dowry of a woman, and which is also called paraphernal property. La. Civ. Code, art. 2315.

EXTRA-JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdiction of the subject, or where it has no jurisdiction, are said to be *extra-judicial.*

EXTRA QUATUOR MARIA (Lat. beyond four seas). Out of the realm. 1 Blackstone, Comm. 157.

EXTRA-TERRITORIALITY. That quality of laws which makes them operate beyond the territory of the power enacting them, upon certain persons or certain rights. See Wheaton, Int. Law, 6th ed. 121 *et seq.*

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam,* that the trespass was committed beyond the way, or make a new assignment. 16 East, 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the *whole* of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRADITION (Lat. *ex,* from, *traditio,* handing over). The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws.

The surrender of persons by one sovereign state or political community to another, on its demand, pursuant to treaty stipulations between them.

The surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

2. *Without treaty stipulations.* Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals was perfect, and the duty of fulfilling it, therefore, imperative, especially where the crimes of which they were accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of offence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent; the latter is maintained by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Many states have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United States has always declined to surrender criminals unless bound by treaty to do so. Wheaton, Int. Law, 171; 1 Kent, Comm. 9th ed. 39, n.; 1 Opin. Attys. Gen. 511; Hurd, Hab. Corp. 575.

3. *Under treaty stipulations.* The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume, 14

Pet. 540; and, to enable the executive to discharge such duties, congress passed the act of Aug. 12, 1848, 11 U. S. Stat. at Large, 302.

Treaties have been made between the United States and the following foreign states for the mutual surrender of persons charged with any of the crimes specified, viz.:—

4. *Great Britain.* Aug. 9, 1842 (8 U. S. Stat. at Large, 576). Crimes,—murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and utterance of forged paper.

France. Nov. 9, 1843 (8 U. S. Stat. at Large, 582). Crimes,—murder (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning), attempt to commit murder, rape, forgery, arson, and embezzlement by public officers when the same is punishable with infamous punishment.

Feb. 24, 1845 (8 U. S. Stat. at Large, 617). Robbery and burglary.

Feb. 10, 1858 (11 U. S. Stat. at Large, 741). Forging, or knowingly passing or putting in circulation counterfeit coin or bank-notes or other paper current as money, with intent to defraud any person or persons; embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Hawaiian Islands. Dec. 20, 1849 (9 U. S. Stat. at Large, 981). Crimes,—murder, piracy, arson, robbery, forgery, and the utterance of forged paper.

Prussia and certain other states of the Germanic Confederation, viz.: Saxony, Hesse-Cassel, Hesse-Darmstadt, Saxe-Weimar-Eisenach, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Brunswick, Anhalt-Dessau, Anhalt-Bernburg, Nassau, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss elder and junior, Lippe, Hesse-Homburg, and Frankfort. Nov. 16, 1852 (10 U. S. Stat. at Large, 964). Also, states subsequently acceding under art. ii. of the treaty, *Free Hanseatic city of Bremen, Mecklenburg-Strelitz, Wurtemberg, Mecklenburg-Schwerin, Oldenburg, Schaumburg-Lippe* (10 U. S. Stat. at Large, 970, 971, 972). Crimes,—murder; assault with intent to commit murder; piracy; arson; robbery; forgery; utterance of forged papers; fabrication or circulation of counterfeit money, whether coin or paper money; embezzlement of public moneys.

Bavaria. Sept. 12, 1853 (10 U. S. Stat. at Large, 1022). Crimes, the same as in the treaty with Prussia.

Hanover. Jan. 18, 1855 (10 U. S. Stat. at Large, 1138). Crimes, the same as in the treaty with Prussia.

Austria. July 3, 1856 (11 U. S. Stat. at Large, 691). Crimes,—murder; assault with intent to commit murder; piracy; arson; robbery; forgery; fabrication or circulation of counterfeit money, whether coin or paper money; embezzlement of public moneys.

Baden. Jan. 30, 1857 (11 U. S. Stat. at Large, 713). Crimes, the same as in the treaty with Austria.

Swiss Confederation. Nov. 25, 1850 (11 U. S. Stat. at Large, 587). Crimes,—murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; forgery, or the emission of forged papers; arson; robbery with violence, intimidation, or forcible entry of an inhabited house; piracy; embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Two Sicilies. Oct. 1, 1855 (11 U. S. Stat. at Large, 639). Crimes,—murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; piracy; arson; the making and uttering of false money; forgery (including forgery of evidences of public debt, bank-bills, and bills of exchange); robbery with violence, intimidation, or forcible entry of an inhabited house; embezzlement by public officers (including appropriation of public funds), where these crimes are subject, by the code of the kingdom of the Two Sicilies, to the punishment *della reclusione* or other severer punishment, and by the laws of the United States to infamous punishment.

Most of the foregoing treaties contain provisions relating to the evidence required to authorize an order of extradition; but for these and some points of practice in such cases, see FUGITIVE FROM JUSTICE.

5. The United States has made treaties for the mutual surrender of *deserting seamen* with the following foreign states: *Austria, Belgium, Brazil, Central America, Chili, China, Columbia, Ecuador, France, Greece, Guatemala, Hanover, the Hanseatic towns, Hawaiian Islands, Mecklenburg-Schwerin, Mexico, New Granada, Peru, Portugal, Prussia, Russia, Sardinia, Two Sicilies, Spain, Sweden and Norway,* and *Venezuela.*

It also made treaties with numerous Indian tribes, as nations or distinct political communities, in many of which the Indians have stipulated to surrender to the federal authorities persons accused of crime against the laws of the United States; and in some triparty treaties they have stipulated for mutual extradition of criminals to one another. 11 U. S. Stat. at Large, 612, 703.

6. *Between federal states,* by art. iv. sec. ii. § 2 of the constitution of the United States, it is provided that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, 1 U. S. Stat. at Large, 302, prescribed the mode of procedure in such cases, and imposed a like duty upon the territories northwest or south of the river Ohio.

For some points of practice relating to this

subject, see FUGITIVE FROM JUSTICE; also, Hurd, Hab. Corp. 592–633.

EXTRA-JUDICIAL. That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extra-judicial judgments and acts are absolutely void. See CORAM NON JUDICE; Merlin, Répert. *Excès de Pouvoir*.

EXTRANEUS. In Old English Law. One foreign born; a foreigner. 7 Rep. 16.

In Roman Law. An heir not born in the family of the testator. Those of a foreign state. The same as *alienus*. Vicat, Voc. Jur.; DuCange.

EXTRAVAGANTES. In Canon Law. The name given to the constitutions of the popes posterior to the Clementines.

They are thus called, *quasi vagantes extra corpus juris*, to express that they were out of the canonical law, which at first contained only the decrees of Gratian: afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII. and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat.). When a person is sick beyond the hope of recovery, and near death, he is said to be *in extremis*.

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons *in extremis*, see DYING DECLARATIONS; DECLARATIONS.

EY. A watery place; water. Coke, Litt. 6.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony; for he has the means of making known the truth.

EYOTT. A small island arising in a river. Fleta, l. 3, c. 2, s. b; Bracton, l. 2, c. 2. See ISLAND.

EYRE. See EIRE.

EYRER. To go about. See EIRE.

F.

F. The sixth letter of the alphabet. A fighter or maker of frays, if he had no ears, was to be branded in the cheek with this letter. Cowel. Those who had been guilty of falsity were to be so marked. 2 Reeve, Hist. Eng. Law, 392.

FABRIC LANDS. In English Law. Lands given for the repair, rebuilding, or maintenance of cathedrals or other churches.

It was the custom, says Cowel, for almost every one to give by will more or less to the *fabric* of the cathedral or parish church where he lived. These lands so given were called fabric lands, because given *ad fabricam ecclesiæ reparandam* (for repairing the fabric of the church). Called by the Saxons *timber-lands*. Cowel; Spelman, Gloss.

FABRICARE (Lat.). To make. Used of an unlawful making, as counterfeiting coin, 1 Salk. 342, and also of a lawful coining.

FACIAS (Lat. *facere*, to make, to do). That you cause. Occurring in the phrases *scire facias* (that you cause to know), *fieri facias* (that you cause to be made), etc. Used also in the phrases *Do ut facias* (I give that you may do), *Facio ut facias* (I do that you may do), two of the four divisions of considerations made by Blackstone, 2 Comm. 444.

FACIO UT DES (Lat. I do that you may give). A species of contract which occurs when a man agrees to perform any thing for a price either specifically mentioned or left to the determination of the law to set a value on it: as, when a servant hires himself to his master for certain wages or an agreed sum of money. 2 Blackstone, Comm. 445.

FACIO UT FACIAS (Lat. I do that you may do). A species of contract in the civil law which occurs when I agree with a man to do his work for him if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides; or it may be to forbear on one side in consideration of something done on the other. 2 Blackstone, Comm. 444.

FACT (Lat. *factum*). An action; a thing done. A circumstance.

Fact is much used in modern times in distinction from law. Thus, in every case to be tried there are facts to be shown to exist to which the law is to be applied. If law is, as it is said to be, a rule of action, the fact is the action shown to have been done, and which should have been done in accordance with the rule. Fact, in this sense, means a thing done or existing.

Material facts are those which are essential to the right of action or defence.

Immaterial facts are those which are not essential to the right of action or defence.

Material facts must be shown to exist; immaterial facts need not. The existence of facts is generally determined by the jury; but there are many facts of which a court takes cognizance. See JUDGE; JURY; COGNIZANCE. As to pleading material facts, see Gould, Plead. c. 3, § 28. And see 3 Bouvier, Inst. n. 3150.

FACTIO TESTAMENTI (Lat.). **In Civil Law.** The power of making a will, including right and capacity. Also, the power of receiving under a will. Vicat, Voc. Jur.

FACTOR. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Paley, Ag. 13; 1 Livermore, Ag. 68; Story, Ag. § 33; Comyns, Dig. *Merchant*, B; Malynes, Lex Merc. 81; Beawes, Lex Merc. 44; 3 Chitty, Com. Law, 193; 2 Kent, Comm. 3d ed. 622, note d; 1 Bell, Comm. 385, §§ 408, 409; 2 Barnew. & Ald. 143.

When the agent accompanies the ship, taking a cargo aboard, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor: he is, however, usually known by the name of a supercargo. Beawes, Lex Merc. 44, 47; Livermore, Ag. 69, 70; 1 Domat, b. 1, t. 16, § 3, art. 2.

A factor differs from a broker in some important particulars: namely, he may buy and sell for his principal in his own name, as well as in the name of his principal; on the contrary, a broker acting as such should buy and sell in the name of his principal. 3 Chitty, Com. Law, 193, 210, 541; 2 Barnew. & Ald. 143, 148; 3 Kent, Comm. 3d ed. 622, note d. Again, a factor is intrusted with the possession, management, disposal, and control of the goods to be bought and sold, and has a special property and a lien on them; the broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, nor any such special property or lien. Paley, Ag. 13, Lloyd's ed.; 1 Bell, Comm. 385. The business of factors in the United States is done by commission merchants, who are known by that name, and the term factor is but little used. 1 Parsons, Contr. 78.

2. *A domestic factor* is one who resides in the same country with his principal.

By the usages of trade, or intendment of law, when *domestic* factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit between the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale the buyer is responsible both to the factor and principal for the purchase-money; but this presumption may be rebutted by proof of exclusive credit. Story, Ag. §§ 267, 291, 293; Paley, Ag. 243, 371; 9 Barnew. & C. 78; 15 East, 62.

A foreign factor is one who resides in a different country from his principal. 1 Term, 112; 4 Maule & S. 576.

Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement. Story, Ag. § 268; Paley, Ag. 248, 373; Buller, Nisi P. 130; Smith, Merc. Law, 66; 2 Livermore, Ag. 249; 1 Bos. & P. 398; 15 East, 62; 9 Barnew. & C. 78.

3. *His duties.* He is required to use reasonable skill and ordinary diligence in his vocation. 1 Ventr. 121. He is bound to obey his instructions, 3 N. Y. 62; 14 Pet. 479; 5 C. B. 895; but when he has none he may and ought to act according to the general usages of trade, 14 Pet. 479; 7 Taunt. 164; 5 Day, Conn. 556; 3 Caines, N. Y. 226; 1 Stor. C. C. 43; to sell for cash when that is usual, or to give credit on sales when that is customary. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him.

His rights. He has the right to sell the goods in his own name; and, when untrammelled by instructions, he may sell them at such times and for such prices as, in the exercise of a just discretion, he may think best for his employer. 3 C. B. 380. He is, for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and, consequently, he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. He has a lien on the goods for advances made by him, and for his commissions. He has no right to barter the goods of his principal, nor to pledge them for the purpose of raising money for himself, or to secure a debt he may owe. 5 Cush. Mass. 111; 2 Mass. 398; 13 *id.* 178; 1 M'Cord, So. C. 1; 1 Mas. C. C. 440; 5 Johns. Ch. N. Y. 429. See 3 Den. N. Y. 472; 13 Eng. L. & Eq. 261. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to reimburse himself to the amount of his own lien. 2 Kent, Comm. 3d ed. 625–628; 4 Johns. N. Y. 103; 7 East, 5; Story, Bailm. §§ 325–327. Another exception to the general rule that a factor cannot pledge the goods of his principal is, that he may raise money by pledging the goods for the payment of duties or any other charge or purpose allowed or justified by the usages of trade. 2 Gall. C. C. 13; 6 Serg. & R. Penn. 386; Paley, Ag. 217; 3 Esp. 182.

4. It may be laid down as a general rule that when the property remitted by the principal, or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property, Cook, Bank. Laws, 400; 2 Strange, 1182; 3 Maule & S. 562, even where it is money in the factor's hands. 2 Burr. 1369; 5 Ves. Ch. 169; 5 Term, 277; 14 N. H. 38; 2 Dall. Penn. 60; 2 Pick. Mass. 86; 5 *id.* 7. And see Willes, 400; 1 Bos. & P. 539, 648, for the rule as to promissory notes.

But the rights of third persons dealing *bonâ fide* with the factor as a principal, where the name of the principal is sunk entirely, are to be protected. 7 Term, 360; 3 Bingh. 139; 6 Maule & S. 14.

The obligations and rights of factors have been made the subject of explicit legislation in some states. See Penn. Stat. Apr. 14, 1834. See, generally, 1 Parsons, Contr. 80; 2 Kent, Comm. 625 *et seq.*; Story, Bailm. §§ 325 *et seq.*

FACTORAGE. The wages or allowances paid to a factor for his services: it is more usual to call this commissions. 1 Bouvier, Inst. n. 1013; 2 *id.* n. 1288.

FACTORIZING PROCESS. A process for attaching effects of the debtor in the hands of a third party. It is substantially the same process known as the *garnishee process*, *trustee process*, process by *foreign attachment*. Drake, Attach. § 451.

FACTORY. In Scotch Law. A contract which partakes of a mandate and *locatio ad operandum*, and which is in the English and American law-books discussed under the title of Principal and Agent. 1 Bell, Comm. 259.

FACTUM. A deed; a man's own act and deed. A culpable or criminal act; an act not founded in law. A deed; a written instrument under seal: called, also, *charta*. Spelman, Gloss.; 2 Blackstone, Comm. 295.

The difference between *factum* and *charta* originally would seem to have been that *factum* denoted the thing done, and *charta* the evidence thereof. Coke, Litt. 9 *b*. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum* (he did not make it).

In wills, *factum* seems to retain an active signification and to denote a making. See 11 How. 358.

A fact. *Factum probandum* (the fact to be proved). 1 Greenleaf, Ev. § 13.

A portion of land granted to a farmer; otherwise called a hide, *bovata*, etc. Spelm.

In French Law. A memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. See Vicat, Voc. Jur.

FACULTY. In Canon Law. A license; an authority. For example, the ordinary, having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated is called a faculty, to another.

Faculties are of two kinds: first, when the grant is to a man and his heirs in gross; second, when it is to a person and his heirs as appurtenant to a house which he holds in the parish. 1 Term, 429, 432; 12 Coke, 106.

In Scotch Law. Ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property. Kames, Eq. 504.

FAESTING-MEN. Approved men who were strong-armed. Subsequently the word seems to have been used in the sense of *rich*, and hence it probably passed into its later and common meaning of pledges or bondsmen, which, by Saxon custom, were bound to answer for each other's good behavior. Cowel; DuCange.

FAIDA. In Saxon Law. Great and open hostility which arose on account of some murder committed. The term was applied only to that deadly enmity in deference to which, among the Germans and other northern nations, if murder was committed, punishment might be demanded from any one of kin to the murderer by any one of the kin of the murdered man. DuCange; Spelman, Gloss.

FAILLITE (Fr.). Bankruptcy; failure. The condition of a merchant who ceases to pay his debts. 3 Massè, Droit Comm. 171; Guyot, Répert.

FAILURE OF ISSUE. A want of issue to take an estate limited over by an executory devise.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but, if he dies without issue living *at the time of his death*, then to another, this is a failure of issue *definite*. An *indefinite* failure of issue is the very converse or opposite of this, and it signifies a general failure of issue, whenever it may happen, without fixing any time, or a certain or definite period, within which it must happen. 2 Bouvier, Inst. n. 1849. See DYING WITHOUT ISSUE.

FAILURE OF RECORD. The neglect to produce the record after having pleaded it. When a defendant pleads a matter and offers to prove it by the record, and then pleads *nul tiel record*, a day is given to the defendant to bring in the record; if he fails to do so, he is said to fail, and, there being a *failure of record*, the plaintiff is entitled to judgment. Termes de la Ley. See the form of entering it, 1 Wms. Saund. 92, n. 3.

FAINT PLEADER. A false, fraudulent, or collusory manner of pleading, to the deception of a third person.

FAIR. A public mart or place of buying and selling. 1 Blackstone, Comm. 274. A greater species of market, recurring at more distant intervals.

A fair is usually attended by a greater concourse of people than a market, for the amusement of whom various exhibitions are gotten up. McCulloch, Comm. Dict.; Wharton, Dict. 2d Lond. ed.

A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious provision of such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions. Cowel; Cunningham, Law Dict. A privileged market.

A fair is a franchise which is obtained by a grant from the crown. Coke, 2d Inst. 220; 3 Mod. 123; 3 Lev. 222; 1 Ld. Raym. 341; 2 Saund. 172; 1 Rolle, Abr. 106; Tomlin· Cunningham, Law. Dict.

In the United States, fairs are almost unknown. They are recognized in Alabama, Aiken, Dig. 409, note, and in North Carolina, where they are regulated by statute. 1 No. C. Rev. Stat. 282.

FAIR-PLAY MEN. A local irregular tribunal which existed in Pennsylvania about the year 1769.

About the year 1769 there was a tract of country in Pennsylvania, situate between Lycoming creek

and Pine creek, in which the proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded by the Indians. Although settlements were forbidden, yet adventurers settled themselves there. Being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number, whom they denominated *fair-play men*, who had authority to decide all disputes as to boundaries. Their decisions were final, and enforced by the whole community *en masse*. Their decisions are said to have been just and equitable. 2 Smith, Penn. Laws, 195; Sergeant, Land Laws, 77.

FAIR PLEADER. The name of a writ given by the statute of Marlebridge, 52 Hen. III. c. 11. See BEAU PLEADER.

FAIT. Any thing done.

A deed lawfully executed. Comyns, Dig. *Fait.*

Femme de fait. A wife *de facto.*

FAITOURS. Idle persons; idle livers; vagabonds. Termes de la Ley; Cowel; Blount; Cunningham, Law Dict.

FALCARE (Lat.). To cut or mow down. *Falcare prata*, to cut or mow down grass in meadows *hayed* (laid in for hay), was a customary service for the lord by his inferior tenants. Kennett, Gloss.

Falcator. The tenant performing the service.

Falcatura. A day's mowing. *Falcatura una.* Once mowing the grass.

Falcatio. A mowing.

Falcata. That which was mowed. Kennett, Gloss.; Cowel; Jacobs.

FALCIDIA. In Spanish Law. The fourth portion of an inheritance, which legally belongs to the heir, and for the protection of which he has the right to reduce the legacies to three fourth-parts of the succession, in order to protect his interest.

FALCIDIAN LAW. In Roman Law. A statute or law restricting the right of disposing of property by will, enacted by the people during the reign of Augustus, on the proposition of Falcidius, who was a tribune, in the year of Rome 714.

Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. Inst. 2. 22. This fourth was termed the Falcidian portion.

A similar principle has been adopted in Louisiana, where donations *inter vivos* or *mortis causâ* cannot exceed two-thirds of the property of the disposer if he leaves at his decease a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number. Civ. Code, art. 1480.

A similar principle prevailed in England in earlier times; and it was not until after the Restoration that the power of a father to dispose of all his property by will became fully established. 2 Blackstone, Comm. 11. As to the early history of testamentary law, see Maine on Ancient Law.

At the present day, by the common law, the power of the father to give all his property is unqualified. He may bequeath it to his children equally, to one in preference to another, or to a stranger in exclusion of all,—except that his widow has a right of dower in his real property. In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give, to a certain fraction of his estate.

FALDAGE. The privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called, variously, *secta faldare, fold-course, free-fold, faldagii.* Cunningham, Law Dict.; Cowel; Spelman, Gloss.

FALDFEY. A compensation paid by some customary tenants that they might have liberty to fold their own sheep on their own land. Cunningham, Law Dict.; Cowel; Blount.

FALLO. In Spanish Law. The final decree or judgment given in a lawsuit.

FALSA DEMONSTRATIO NON VOCET. See MAXIMS.

FALSE ACTION. See FEIGNED ACTION.

FALSE CLAIM. A claim made by a man for more than his due. An instance is given where the prior of Lancaster claimed a tenth part of the venison *in corio* as well as *in carne*, where he was entitled to that *in carne* only. Manwood, For. Laws, cap. 25, num. 3.

FALSE IMPRISONMENT. Any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 2 Bishop, Crim. Law, § 669; 8 N. H. 550; 9 *id.* 491; 7 Humphr. Tenn. 43; 12 Ark. 43; 7 Q. B. 742; 5 Vt. 588; 3 Blackf. Ind. 46; 9 Johns. N. Y. 117; 1 A. K. Marsh. Ky. 345.

The remedy is, in order to be restored to liberty, by writ of *habeas corpus*, and, to recover damages for the injury, by action of trespass *vi et armis.* To punish the wrong done to the public by the false imprisonment of an individual, the offender may be indicted. 4 Blackstone, Comm. 218, 219; 2 Burr. 993. See Bacon, Abr. *Trespass* (D 3); Dane, Abr. Index; 9 N. H. 491; 2 Brev. No. C. 157; 6 Ala. N. S. 778; 2 Harr. Del. 538; 3 Tex. 282; 12 Metc. Mass. 56; 10 Cush. Mass. 375.

FALSE JUDGMENT. The name of a writ which lies when a false judgment has been given in the county court, court baron, or other courts not of record. Fitzherbert, Nat. Brev. 17, 18; 3 Bouvier, Inst. n. 3364.

FALSE PERSONATION. See PERSONATION.

FALSE PRETENCES. In Criminal Law. False representations and statements, made with a fraudulent design to obtain "money, goods, wares, and merchandise," with intent to cheat. 2 Bouvier, Inst. n. 2308.

A representation of some fact or circumstance, calculated to mislead, which is not true. 19 Pick. Mass. 184.

The pretence must relate to past events. Any representation or assurance in relation to a future transaction may be a promise, or covenant, or warranty, but cannot amount to a statutory false pretence. 19 Pick. Mass. 185; 3 Term, 98. It must be such as to impose upon a person of ordinary strength of mind, 3 Hawks, No. C. 620; 4 Pick. Mass. 178; and this will doubtless be sufficient. 11 Wend. N. Y. 557. But, although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. See 14 Ill. 348; 17 Me. 211; 2 East, Pl. Cr. 828; 1 Den. Cr. Cas. 592; Russ. & R. 127. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence. 14 Wend. N. Y. 547. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them the credit would not have been given or the property delivered. 11 Wend. N. Y. 557; 13 *id.* 87; 14 *id.* 547. The false pretences must have been used before the contract was completed. 13 Wend. N. Y. 311; 14 *id.* 546.

The question is modified in the different states by the wording of the statutes, which vary from each other somewhat. It may be laid down as the general rule of the interpretation of the words "by any false pretence," which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the acts. See 1 Den. Cr. Cas. 559; 3 Carr. & K. 98.

There must be an intent to cheat or defraud some person. Russ. & R. Cr. Cas. 317; 1 Stark. 396. This may be inferred from a false representation. 13 Wend. N. Y. 87. The intent is all that is requisite: it is not necessary that the party defrauded should sustain any loss. 11 Wend. N. Y. 18; 1 Carr. & M. 516, 537; 4 Pick. Mass. 177. See, generally, 2 Bishop, Crim. Law, §§ 341 *et seq.*; 19 Pick. Mass. 179; 8 Blackf. Ind. 330; 10 Harr. Penn. 253; 24 Me. 77; 5 Ohio St. 280; 4 Barb. N. Y. 151; 7 Cox, Cr. Cas. 131; 8 *id.* 12.

FALSE RETURN. A return made by the sheriff, or other ministerial officer, to a writ, in which is stated a fact contrary to the truth, and injurious to one of the parties or some one having an interest in it.

In this case the officer is liable for damages to the party injured. 2 Esp. Cas. 475. See FALSO RETORNO BREVIUM.

FALSE TOKEN. A false document or sign of the existence of a fact,—in general used for the purpose of fraud. See 2 Starkie, Ev. 563.

FALSEHOOD. Any untrue assertion or proposition. A wilful act or declaration contrary to the truth.

It does not always and necessarily imply a lie or wilful untruth, but is generally used in the second sense here given. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful, for example, when the owner of a thing sells it twice, by different contracts, to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own when he knows that it is not so. It is committed by dissimulation when a creditor, having an understanding with his former debtor, sells the land of the latter although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true. See Roscoe, Crim. Ev. 362.

FALSIFY. In Chancery Practice. To prove that an item in an account before the court as complete, which is inserted to the debit of the person falsifying, should have been omitted.

When a bill to open an account has been filed, the plaintiff is sometimes allowed to surcharge and falsify such account; and if any thing has been inserted that is a wrong charge, he is at liberty to show it; and that is a *falsification*. 2 Ves. Ch. 565; 11 Wheat. 237. See SURCHARGE.

In Criminal Law. To alter or make false.

The alteration or making false a record is punishable at common law by statute in the states, and, if of records of the United States courts, by act of congress of April 30, 1790. 1 Story, U. S. Laws, 86.

In Practice. To prove a thing to be false. Coke, Litt. 104 *b*.

FALSING. In Scotch Law. Making or proving false. Bell, Dict.

FALSING OF DOOMS. In Scotch Law. Protesting against a sentence and taking an appeal to a higher tribunal. Bell, Dict.

An action to set aside a decree. Skene.

FALSO RETORNO BREVIUM (L. Lat.). **In Old English Law.** The name of a writ which might have been sued out against a sheriff for falsely returning writs. Cunningham, Law Dict.

FAMILIA (Lat.). **In Roman Law.** A family.

This word had four different acceptations in the Roman law. In the first and most restricted sense it designated the *pater-familias*,—his wife, his children, and other descendants subject to his paternal power. In the second and more enlarged sense it comprehended all the *agnates*,—that is to say, all the different families who would all be subject to the paternal authority of a common chief if he were still living. Here it has the same meaning as *agnatio*. In a third acceptation it comprises the slaves and those who are *in mancipio* of the chief, —although considered only as things, and without any tie of relationship. And, lastly, it signifies the whole fortune or patrimony of the chief. See PATER-FAMILIAS; 1 Ortolan, 28.

In Old English Law. A household. All the servants belonging to one master. DuCange; Cowel. A sufficient quantity of land to maintain one family. The same quantity of land is called sometimes *mansa* (a manse), *familia, carucata*. DuCange; Cunningham, Law Dict.; Cowel; Creasy, Church Hist.

FAMILIÆ ERCISCUNDÆ (Lat.). **In**

Civil Law. An action which lay for any of the co-heirs for the division of what fell to them by inheritance. Stair, Inst. l. 1, tit. 7, § 15.

FAMILY. Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. All the relations who descend from a common ancestor or who spring from a common root. La. Code, art. 3522, no. 16; 9 Ves. Ch. 323.

In the construction of wills, the word family, when applied to personal property, is synonymous with *kindred*, or *relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage. 1 Roper, Leg. 115; 1 Hov. Suppl. to Ves. Ch. 365, notes 6 and 7; 2 Ves. Ch. 110; 4 *id.* 708; 5 *id.* 156; 17 *id.* 255; 3 East, 172; 5 Maule & S. 126. See LEGATEE; Dig. 50. 16. 195. 2.

FAMILY ARRANGEMENTS. An agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.

In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chitty, Pract. 67; 1 Turn. & R. Ch. 13.

FAMILY BIBLE. A Bible containing a record of the births, marriages, and deaths of the members of a family.

An entry by a father, made in a Bible, stating that Peter, his eldest son, was born in lawful wedlock of Maria, his wife, at a time specified, is evidence to prove the legitimacy of Peter. 4 Campb. 401. But the entry in order to be evidence must be an original entry; and, when it is not so, the loss of the original must be proved before the copy can be received. 6 Serg. & R. Penn. 135. See 10 Watts, Penn. 82.

FAMILY MEETINGS (called, also, *family councils*).

In Louisiana. Meetings of at least five relations, or, in default of relations of minors or other persons on whose interest they are called upon to deliberate, then of the friends of such minors or other persons.

2. The appointment of the members of the family meeting is made by the judge. The relations or friends must be selected from among those domiciliated in the parish in which the meeting is held; the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree; and among relations of the same degree the eldest is preferred. The under-tutor must also be present. 6 Mart. La. N. S. 455.

The family meeting is held before a justice of the peace, or notary public, appointed by the judge for the purpose. It is called for a fixed day and hour, by citations delivered at least three days before the day appointed for that purpose.

3. The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge touching the interests of the person respecting whom they are called upon to deliberate. The officer before whom the family meeting is held must make a particular procès-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, and must sign it himself, and deliver a copy to the parties that they may have it homologated. La. Civ. Code, art. 305–311; Code Civ. b. 1, tit. 10, c. 2, s. 4.

FAMOSUS LIBELLUS (Lat.). Among the civilians these words signified that species of *injuria* which corresponds nearly to libel or slander.

FANEGA. In Spanish Law. A measure of land, which is not the same in every province. Diccionario de la Acad.; 2 White, Coll. 49. In Spanish America, the fanega consisted of six thousand four hundred square varas, or yards. 2 White, Coll. 138.

FARDEL. The fourth part of a yardland. Spelman, Gloss. According to others, the eighth part. Noy, Complete Lawyer, 57; Cowel. See Cunningham, Law Dict.

FARE. A voyage or passage. The money paid for a voyage or passage. The latter is the modern signification. 1 Bouvier, Inst. n. 1036.

FARM. A certain amount of provision reserved as the rent of a messuage. Spelman, Gloss.

Rent generally which is reserved on a lease; when it was to be paid in money, it was called *blanche firme*. Spelman, Gloss.; 2 Blackstone, Comm. 42.

A term. A lease of lands; a leasehold interest. 2 Sharswood, Blackst. Comm. 17; 1 Reeve, Hist. Eng. Law, 301, n.; 6 Term, 532; 2 Chitty, Plead. 879, n. e. The land itself, let to farm or rent. 2 Blackstone, Comm. 368.

A portion of land used for agricultural purposes, either wholly or in part. 18 Pick. Mass. 553; 2 Binn. Penn. 238.

It is usually the chief messuage in a village or town whereto belongs great demesne of all sort. Cowel; Cunningham, Law Dict.; Termes de la Ley.

A large tract or portion of land taken by a lease under a yearly rent payable by the tenant. Tomlin, Law Dict.

From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with out-buildings, gardens, orchard, yard, etc. Plowd. 195; Touchst. 93.

In American law, the word has almost exclusively this latter meaning of a portion of land used for agricultural purposes, either wholly or in part. 2 Binn. Penn. 238; 18 Pick. Mass. 553; 6 Metc. Mass. 529; 2 Hilliard, Real Prop. 338 *et seq.*

By the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, etc. belonging to or used with it.

Coke, Litt. 5 *a;* Sheppard, Touchst. 93; 4 Cruise, Dig. 321; Brooke, Abr. *Grants*, 155; Plowd. 167.

In a will, the word farm may pass a freehold, if it appear that such was the intention of the testator. 6 Term, 345; 9 East, 448. See 6 East, 604, n.; 8 *id.* 339; 1 Jarman, Wills, Perkins ed. 609.

FARM LET. Technical words in a lease creating a term for years. Coke, Litt. 45 *b;* 2 Mod. 250; 1 Washburn, Real Prop. Index, *Lease.*

FARM OUT. To rent for a certain term. The collection of the revenue among the Romans was farmed out.

FARMER. The lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer.* This word implies no mystery, except it be that of husbandman. Cunningham, Law Dict.; Cowel; 3 Sharswood, Blackst. Comm. 318.

In common parlance, and as a term of description in a deed, farmer means one who cultivates a farm, whether he owns it or not. There may also be a farmer of the revenue or of other personal property as well as lands. Plowd. 195; Cunningham, Law Dict.

FARRIER. One who takes upon himself the public employment of shoeing horses.

Like an innkeeper, a common carrier, and other persons who assume a *public* employment, a farrier is bound to serve the public as far as his employment goes, and an action lies against him for refusing, when a horse is brought to him at a reasonable time for such purpose, if he refuses, Oliphant, Horses, 131; and he is liable for the unskilfulness of himself or servant in performing such work, 1 Blackstone, Comm. 431, but not for the malicious act of the servant in purposely driving a nail into the foot of the horse with the intention of laming him. 2 Salk. 440.

FARVAND. Standing by itself, this word signifies "passage by sea or water." In charter-parties, it means voyage or passage by water. 18 C. B. 880.

FAST ESTATE. Real property. A term sometimes used in wills. 6 Johns. N. Y. 185; 9 N. Y. 502.

FASTERMANNES. Securities. Bondsmen. Spelman, Gloss.

FATHER. He by whom a child is begotten.

2. By law the father is bound to support his children, if of sufficient ability, even though they have property of their own, 1 Brown, Ch. 387; 4 *id.* 224; 2 Cox, N. J. 223; 4 Mass. 97; 5 Rawle, Penn. 323; 6 Ind. 67; but if the father be without means to maintain and educate his children according to their future expectations in life, courts of equity will make an allowance for these purposes out of the income of their estates, and, in an urgent case, will even break into the principal. 19 Ala. N. S. 650; 1 Ves. Ch. 160; 1 P Will. Ch. 493; 2 *id.* 22; 4 Sandf. N. Y. 568; 4 Johns. Ch. N. Y. 100; 2 Ired. No. C. 354; 2 Ashm. Penn. 332; 5 R. I. 269; 1 Coop. Eq. 52. The father is not bound, however, without some agreement, to pay another for maintaining them, 9 Carr. & P. 497; nor is he bound by their contracts, even for necessaries, unless an actual authority be proved, or a clear omission of his duty to furnish such necessaries, 2 Stark. 501; 20 Eng. L. & Eq. 281; 10 Barb. N. Y. 483; 24 *id.* 634; 15 Ark. 137; 3 N. H. 270; 2 Bradf. Surr. N. Y. 287; 18 Ga. 457, or unless he suffers them to remain abroad with their mother, or forces them from home by hard usage. 3 Day, Conn. 37. See PARENT; MOTHER. The obligation of the father to maintain the child ceases as soon as the child becomes of age, however wealthy the father may be, unless the child becomes chargeable to the public as a pauper. 1 Ld. Raym. 699. The obligation also ceases during the minority of the child, if the child voluntarily abandons the home of his father, either for the purpose of seeking his fortune in the world or to avoid parental discipline and restraint. 16 Mass. 28; 4 Ill. 179; 14 Ala. 435.

3. During the lifetime of the father, he is guardian by nature or nurture of his children. As such, however, he has charge only of the person of the ward, and no right to the control or possession either of his real or personal estate. 7 Cow. N. Y. 36; 15 Wend. N. Y. 63; 7 Johns. Ch. N. Y. 3; 3 Pick. Mass. 213; 14 Ala. 388. He is entitled to the custody of his children even in preference to the mother, 24 Barb. N. Y. 521; 6 Rich. Eq. So. C. 249, 344; 2 Serg. & R. Penn. 176; though children of very tender years will not be taken from the mother where their health requires a mother's care, 3 Binn. Penn. 320; 25 Wend. N. Y. 64; 2 Zabr. N. J. 286; and the father may be deprived of the custody of his children, if morally unfit to have it. 2 Russ. Ch. 1; 2 Bligh, Hou. L. N. S. 124; 10 Ves. Ch. 62; 12 *id.* 492; 11 Eng. L. & Eq. 281. The rights of the father, while his children remain in his custody, are to have authority over them, to enforce all his lawful commands, and to correct them with moderation for disobedience, 2 Humphr. Tenn. 283; and these rights, the better to accomplish the purposes of their education, he may delegate to a tutor or instructor. 2 Kent, Comm. 205. He may maintain an action for the seduction of his daughter, or for any injury to the person of his child, so long as he has a right to its services. 5 East, 47; 2 Mees. & W. Exch. 539; 13 Gratt. Va. 726; 6 Ind. 262; Ware, Dist. Ct. 75; 24 Wend. N. Y. 429; 7 Watts, Penn. 62. Generally, the father is entitled to the services or earnings of his children during their minority, so long as they remain members of his family, 4 Mas. C. C. 380; 7 Mass. 145; 2 Gray, Mass. 257; 17 Ala. N. S. 14; but he may relinquish this right in favor of his children, 12 Mass. 375; 2 Metc. Mass. 39; 7 Cow. N. Y. 92; 14 Ala. N. S. 753; 11 Humphr. Tenn. 104; 4 Serg. & R. Penn. 207; 2 Vt. 290; 29 *id.* 514; 21 Penn. St. 222; and he will be presumed to have thus

relinquished this right if he abandons or neglects to support and educate his children. Ware, Dist. Ct. 462; 3 Barb. N. Y. 115; 6 Ala. N. s. 501; 15 Mass. 272.

4. An agreement of the father, by which his minor child is put out to service, ceases to be binding upon the child after the father's death, unless made by indentures of apprenticeship. 34 N. H. 49. The power of the father ceases on the arrival of his children at the age of twenty-one; though if after that age they continue to live in the father's family, they will not be allowed to recover for their services to him upon an implied promise of payment. 3 Penn. St. 473; 33 N. H. 581; 22 Mo. 439; 6 Ind. 60; 10 Ill. 296.

A step-father is not bound to support and educate his step-children, nor is he entitled to their custody, labor, or earnings, unless he assumes the relation of parent. 11 Barb. N. Y. 224; 19 Penn. St. 360; 18 Ill. 46; 1 Busb. No. C. 110; 3 N. Y. 312.

FATHOM. A measure of length, equal to six feet.

The word is probably derived from the Teutonic word *fad*, which signifies the thread or yarn drawn out in spinning to the length of the arm, before it is run upon the spindle. Webster; Minsheu.

FATUOUS PERSON. One entirely destitute of reason: *is qui omnino desipit.* Erskine, Inst. b. 1, tit. 7, s. 48.

FAUBOURG. A district or part of a town adjoining the principal city: as a faubourg of New Orleans. 18 La. 286.

FAUCES TERRÆ (Lat. jaws of the land). Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea. 1 Kent, Comm. 367. Where these *fauces* approach so near that a man standing on one shore can discern what another man is doing on the other shore, the water inclosed is *infra corpus comitatum* (within the body of the county). Andr. 231; Coke, 4th Inst. 140; 2 East, Pl. Cr. 804; 5 Wheat. 106; 5 Mas. C. C. 290; 1 Stor. C. C. 259.

FAULT. An improper act or omission, which arises from ignorance, carelessness, or negligence. The act or omission must not have been meditated, and must have caused some injury to another. Leç. Elém. § 783. See DOLUS; NEGLIGENCE; 1 Miles, Penn. 40.

Gross fault or neglect consists in not observing that care towards others which a man the least attentive usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud. 2 Strange, 1099; Story, Pailm. §§ 18–22; Toullier, l. 3, t. 3, § 231.

Ordinary faults consist in the omission of that care which mankind generally pay to their own concerns; that is, the want of ordinary diligence.

A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself to, and in some cases is scarcely distinguishable from, mere accident or want of foresight.

This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, Observation générale sur le précédent Traité, et sur les suivants, printed at the end of his Traité des Obligations, where he cites Accurse, Alciat, Cujas, Duaren, D'Avezan, Vinnius, and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, Dissertationem, page 1006; Le Brun, cited by Jones, Bailm. 27; and Toullier, Droit Civil Français, liv. 3, tit. 3, § 231.

2. These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to thier contracts. They are reduced by Pothier to three.

First. In those contracts where the party derives no benefit from his undertaking, he is answerable only for his gross faults.

Second. In those contracts where the parties have a reciprocal interest, as in the contract of sale, they are responsible for ordinary neglect.

Third. In those contracts where the party receives the only advantage, as in the case of loan for use, he is answerable for his slight fault. Pothier, Observ. Générale; Traité des Oblig. § 142; Jones, Bailm. 119; Story, Bailm. 12. See, also, Ayliffe, Pand. 108; La. Civ. Code, 3522; 1 Comyns, Dig. 413; 5 *id.* 184; Weskett, Ins. 370.

FAUTOR. In Spanish Law. Accomplice; the person who aids or assists another in the commission of a crime.

FAUX. In French Law. A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret, Vocabulaire des Six Codes.

Toullier says (tom. 9, n. 188), "*Faux* may be understood in three ways: in its most extended sense, it is the alteration of truth, with or without intention; it is nearly synonymous with lying; in a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta;* and lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." See CRIMEN FALSI.

FAVOR. Bias; partiality; lenity; prejudice.

The grand jury are sworn to inquire into all offences which have been committed, and into all violations of law, without fear, *favor*, or affection. See GRAND JURY. When a juror is influenced by bias or prejudice, so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favor. See CHALLENGE; Bacon, Abr. *Juries*, E; Dig. 50. 17. 156. 4; 7 Pet. 160.

FEALTY. That fidelity which every

man who holds lands of another owes to him of whom he holds.

Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors the tenant had received them. By this connection the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord and to defend him against all his enemies. This obligation was called *fidelitas*, or fealty. 1 Blackstone, Comm. 263; 2 *id.* 86; Coke, Litt. 67 *b*; 2 Bouvier, Inst. n. 1566.

This fealty was of two sorts: that which is general, and is due from every subject to his prince; the other special, and required of such only as in respect of their fee are tied by this oath to their landlords. 1 Blackstone, Comm. 367; Cowel.

The oath or obligation of fealty was one of the essential requisites of the feudal relation. 2 Sharswood, Blackst. Comm. 45, 86; Littleton, §§ 117, 131; Wright, Ten. 35; Termes de la Ley; 1 Washburn, Real Prop. 19. Fealty was due alike from freeholders and tenants for years as an incident to their estates to be paid to the reversioner. Coke, Litt. 67 *b*. Tenants at will did not have fealty. 2 Flintoff, Real Prop. 222; Burton, Real Prop. 395, n.; 1 Washburn, Real Prop. 371.

It has now fallen into disuse, and is no longer exacted. 3 Kent, Comm. 510; Wright, Ten. 35, 55; Cowel.

FEAR. In Criminal Law. Dread; consciousness of approaching danger.

Fear in the person robbed is one of the ingredients required to constitute a robbery from the person; and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear of his own person; but fear of violence to the person of his child, 2 East, Pl. Cr. 718, or to his property, *id.* 731; 2 Russell, Crimes, 72, is sufficient. 2 Russell, Crimes, 71-90. See PUTTING IN FEAR; Ayliffe, Pand. tit. 12, p. 106; Dig. 4. 2. 3. 6.

FEASTS. Certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments and memorable events. 8 Toullier, n. 81. These are yet used in England: there they have Easter term, Hilary term, etc.

FECIALES. Amongst the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaring war and peace. Calvinus, Lex.

FEDERAL. A term commonly used to express a league or compact between two or more states.

In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness.

FEE. A reward or wages given to one for the execution of his office, or for professional services, as those of a counsellor or physician. Cowel.

Fees differ from costs in this, that the former are, as above mentioned, a recompense to the officer for his services; and the latter, an indemnification to the party for money laid out and expended in his suit. 11 Serg. & R. Penn. 248; 9 Wheat. 262. See 4 Binn. Penn. 267.

That which is held of some superior on condition of rendering him services.

A fee is defined by Spelman (Feuds, c. 1) as the right which the tenant or vassal has to the *use* of lands, while the absolute property remained in a superior. But this early and strict meaning of the word speedily passed into its modern signification of *an estate of inheritance*. 2 Blackst. Comm. 106; Cowel; Termes de la Ley; 1 Washburn, Real Prop. 51; Coke, Litt. 1 *b*; 1 Preston, Est. 420; 3 Kent, Comm. 514. The term may be used of other property as well as lands. Old Nat. Brev. 41.

The term is generally used to denote as well the land itself so held, as the estate in the land, which seems to be its stricter meaning. Wright, Ten. 19, 49; Cowel. The word fee is explained to signify that the land or other subject of property belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs; and, in the case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors. 1 Coke, Litt. 271 *b*; Wright, Ten. 147, 150; 2 Blackstone, Comm. 104, 106; Bouvier, Inst. Index.

The compass or circuit of a manor or lordship. Cowel.

A *fee-simple* is an estate belonging to a man and his heirs absolutely. See FEE-SIMPLE.

A *fee-tail* is one limited to particular classes of heirs. See ESTATE IN FEE-TAIL.

A *determinable fee* is one which is liable to be determined, but which may continue forever. 1 Plowd. 557; Sheppard, Touchst. 97; 2 Blackstone, Comm. 109; Croke Jac. 593; 10 Viner, Abr. 133; Fearne, Cont. Rem. 187; 3 Atk. Ch. 74; Ambl. Ch. 204; 9 Mod. 28. See DETERMINABLE FEE.

A *qualified fee* is an interest given to a man *and certain of his heirs* at the time of its limitation. Littleton, § 254; Coke, Litt. 27 *a*, 220; 1 Preston, Est. 449. See QUALIFIED FEE.

A *conditional fee* includes one that is either to commence or determine on some condition. 10 Coke, 95 *b*; Preston, Est. 476; Fearne, Cont. Rem. 9. See CONDITIONS.

FEE-FARM. Land held of another in fee,—that is, in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment. Cowel. Fealty, however, was incident to a holding in fee-farm, according to some authors. Spelman, Gloss.; Termes de la Ley.

Land held at a perpetual rent. 2 Sharswood, Blackst. Comm. 43.

FEE-FARM RENT. The rent reserved on granting a fee-farm. It might be one-fourth the value of the land, according to Cowel, one-third, according to other authors. Spelman, Gloss.; Termes de la Ley.

FEE-SIMPLE. An estate of inheritance. Coke, Litt. 1 *b*; 2 Blackstone, Comm.

106. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which though inheritable is subject to conditions or collateral determination. 1 Washburn, Real Prop. 51; Wright, Ten. 146; 1 Preston, Est. 420; Littleton, § 1.

It is the largest possible estate which a man can have, being an absolute estate in perpetuity. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Plowd. 557; Atkinson, Conv. 183; 2 Sharswood, Blackst. Comm. 106.

FEE-TAIL (Fr. *tailler*, to dock, to shorten). An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs "of the body" of the ancestor. It corresponds with the *feudum talliatum* of the feudal law. The estate itself is said to have been derived from the Roman system of restricting estates. 1 Spence, Eq. Jur. 21; 1 Washburn, Real Prop. 66; 2 Blackstone, Comm. 112, n. See, also, Coke, 2d Inst. 333; Tudor, Lead. Cas. 607; 4 Kent, Comm. 14 *et seq.*

FEHMGERICHTE An irregular tribunal which existed and flourished in Westphalia during the thirteenth and fourteenth centuries.

From the close of the fourteenth century its importance rapidly diminished; and it was finally suppressed by Jerome Bonaparte in 1811. See Bork, *Geschichte der Westphalichen Vehmgerichte;* Paul Wigand, *Das* Fehmgericht Westphaleus.

FEIGNED ACTION. In Practice. An action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true: it differs from *false action*, in which case the words of the writ are false. Coke, Litt. 361, § 689.

FEIGNED ISSUE. In Practice. An issue brought by consent of the parties, or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury some disputed matter of fact which the court has not the power or is unwilling to decide. 3 Blackstone, Comm. 452; Bouvier, Inst. Index.

FELAGUS (Lat.) One bound for another by oath; a sworn brother. DuCange. A friend bound in the decennary for the good behavior of another. One who took the place of the deceased. Thus, if a person was murdered, the recompense due from the murderer went to the father or mother of the deceased; if he had none, to the lord; if he had none, to his *felagus*, or sworn brother. Cunningham, Law Dict.; Cowel; DuCange.

FELO DE SE (Lat.). **In Criminal Law.** A felon of himself; a self-murderer.

To be guilty of this offence, the deceased must have had the will and intention of committing it, or else he committed no crime. As he is beyond the reach of human laws, he cannot be punished. The English law, indeed, attempted to inflict a punishment by a barbarous burial of his body, and by forfeiting to the king the property which he owned and which would belong to his relations. Hawkins, Pl. Cr. c. 9; 4 Blackstone, Comm. 189.

FELON. One convicted and sentenced for a felony.

A felon is infamous, and cannot fill any office or become a witness in any case unless pardoned, except in cases of absolute necessity for his own preservation and defence: as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party. 2 Salk. 461; 2 Strange, 1148; 1 Mart. La. 25; Starkie, Ev. pt. 2, tit. *Infamy*. As to the effect of a conviction in one state where the witness is offered in another, see 17 Mass. 515; 2 Harr. & M'H. Md. 120, 378; 1 Harr. & J. Md. 572. As to the effect upon a copartnership of one of the partners becoming a felon, see 2 Bouvier, Inst. n. 1493.

FELONIA (Lat.). Felony. The act or offence by which a vassal forfeited his fee. Spelman, Gloss.; Calvinus, Lex. *Per feloniam*, with a criminal intention. Coke, Litt. 391.

Felonicè was formerly used also in the sense of feloniously. Cunningham, Law Dict.

FELONIOUS HOMICIDE. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person. 4 Sharswood, Blackst. Comm. 188. Mere intention to commit the homicide was anciently held equally guilty with the commission of the act. But it was early held that the intention must be manifested by an act. Cald. 397; Foster, Crim. Law, 193; 1 Russell, Crimes, 46, notes.

FELONIOUSLY. In Pleading. This is a technical word which must be introduced into every indictment for a felony, charging the offence to have been committed feloniously: no other word nor any circumlocution will supply its place. Comyns, Dig. *Indictment* (G 6); Bacon, Abr. *Indictment* (G 1); 2 Hale, Pl. Cr. 172, 184; Hawkins, Pl. Cr. b. 2, c. 25, s. 55; Croke, Car. 37; Williams, Just. Indict. iv.; Croke Eliz. 193; 5 Coke, 121; 1 Chitty, Crim. Law, 242; 1 Bennett & H. Lead. Crim. Cas. 154.

FELONY. An offence which occasions a total forfeiture of either lands or goods, or both, at common law, to which capital or other punishment may be superadded, according to the degree of guilt. 4 Blackstone, Comm. 94, 95; 1 Russell, Crimes, 42; 1 Chitty, Pract. 14; Coke, Litt. 391; 1 Hawkins, Pl. Cr. c. 37; 5 Wheat. 153, 159.

In American law the word has no clearly defined meaning at common law, but includes offences of a considerable gravity. 1 Park. Crim. N. Y. 39; 4 Ohio St. 542. It is defined, however, by statute clearly and fully in many of the states.

It has been held that receiving stolen goods was a felony so as to justify arrest, 5 Cush. Mass. 281; 6 Binn. Penn. 316; 2 Term, 77, and that the following were not: adultery, 2 Bail. So. C. 149; 5 Rand. Va. 627; 16 Vt. 551; assault with intent to murder, 13 Ired. No. C. 505; impeding an officer in the discharge of his duty, 25 Vt. 415; involuntary manslaughter by negligence, 15 Ga. 349; 7 Serg. & R. Penn. 423; mayhem, 5 Ga. 404; 7 Mass. 245; perjury, 1 R. M. Charlt. Ga. 228; 5 Exch. 378; piracy. 1 Salk. 85; 10 Wheat. 495.

FEMALE. The sex which bears young.

It is a general rule that the young of female animals which belong to us are ours; *nam fœtus ventrem sequitur*. Inst. 2. 1. 19; Dig. 6. 1. 5. 2. The rule is, in general, the same with regard to slaves; but when a female slave comes into a free state, even without the consent of her master, and is there delivered of a child, the latter is free.

FEME, FEMME. A woman.

FEME COVERT. A married woman. See MARRIED WOMAN; COVERTURE.

FEMININE. Of or belonging to females.

When the feminine is used, it is generally confined to females: as, if a man bequeathed all his mares to his son, his horses would not pass. See 3 Brev. No. C. 9.

FENCE. A building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another.

Fences are regulated by local laws. In general, fences on boundaries are to be built on the line, and the expense, when made no more expensively than is required by law, is borne equally between the parties. See the following cases:—2 Miles, Penn. 337, 395; 2 Me. 72; 11 Mass. 294; 3 Wend. N. Y. 142; 2 Metc. Mass. 180; 15 Conn. 526; Bouvier, Inst. Index. For modifications of the rule, see 32 Penn. St. 65; 28 Mo. 556.

A partition fence is presumed to be the common property of both owners of the land. 8 Barnew. & C. 257, 259, note a; 20 Ill. 334. When built upon the land of one of them, it is his; but if it were built equally upon the land of both, at their joint expense, each would be the owner in severalty of the part standing on his own land. 5 Taunt. 20; 2 Greenleaf, Ev. § 617. See 2 Washburn, Real Prop. 79, 80.

In Scotch Law. To hedge in or protect by certain forms. *To fence a court*, to open in due form. Pitcairn, Cr. Law, pt. 1, p. 75.

FENCE-MONTH. A month in which it is forbidden to hunt in the forest. It begins fifteen days before midsummer and ends fifteen days after. Manwood, For. Laws, c. 23. There were also fence-months for fish. Called, also, *defence-month*, because the deer are then defended from "scare or harm." Cowel; Spelman, Gloss.; Cunningham, Law Dict.

FENGELD (Sax.). A tribute exacted for repelling enemies. Spelman, Gloss.

FEOD. Said to be compounded of the two Saxon words *feoh* (stipend) and *odh* (property); by others, to be composed of *feoh* (stipend) and *hod* (condition). 2 Blackstone, Comm. 45; Spelman, Gloss. See FEE.

FEODAL. Belonging to a fee or feud; feudal. More commonly used by the old writers than *feudal*.

FEODAL ACTIONS. Real actions. 3 Sharswood, Blackst. Comm. 117.

FEODARY. An officer in the court of wards, appointed by the master of that court, by virtue of the statute 32 Hen. VIII. c. 46, to be present with the escheator at the finding offices and to give in evidence for the king as to value and tenure. He was also to survey and receive rents of the ward-lands and assign dower to the king's widows. The office was abolished by stat. 12 Car. II. c. 24; Kennett, Gloss.; Cowel.

FEODI FIRMA (L. Lat.). Fee-farm, which see.

FEODUM. The form in use by the old English law-writers instead of *feudum*, and having the same meaning. *Feudum* is used generally by the more modern writers and by the *feudal* law writers. Littleton, § 1; Spelman, Gloss. There were various classes of *feoda*.

Feodum militaris or *militare* (a knight's fee); *feodum improprium* (an improper or derivative feud); *feodum proprium* (a pure or proper fee); *feodum simplex* (a fee-simple); *feodum talliatum* (a fee-tail). 2 Blackstone, Comm. 58, 62; Littleton, §§ 1, 13; Spelman, Gloss.

FEOFFAMENTUM. A feoffment. 2 Blackstone, Comm. 310.

FEOFFARE. To bestow a fee. 1 Reeve, Hist. Eng. Law, 91.

FEOFFEE. He to whom a fee is conveyed. Littleton, § 1; 2 Blackstone, Comm. 20.

FEOFFEE TO USES. A person to whom land was conveyed for the use of a third party. One holding the same position with reference to a use that a trustee does to a trust. 1 Greenleaf, Cruise, Dig. 333. He answers to the *hæres fiduciarius* of the Roman law.

FEOFFMENT. A gift of any corporeal hereditaments to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. Watkins, Conv. 183.

The conveyance of a corporeal hereditament either by investiture or by livery of seisin. 1 Sullivan, Lect. 143; 1 Washburn, Real Prop. 33.

The instrument or deed by which such hereditament is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather

to the perpetuity of the estate granted, than to the feudal tenure. 1 Reeve, Hist. Eng. Law, 90. The feoffment was likewise accompanied by livery of seisin. 1 Washburn, Real Prop. 33. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice. Cruise, Dig. tit. 32, c. 4, § 3; Sheppard, Touchst. c. 9; 2 Blackstone, Comm. 20; Coke, Litt. 9; 4 Kent, Comm. 467; Perkins, c. 3; Comyns, Dig.; 12 Viner, Abr. 167; Bacon, Abr.; Dane, Abr. c. 104; 1 Washburn, Real Prop. 33; 1 Sullivan, Lect. 143; Stearns, Real Act. 2; 8 Cranch, 229.

FEOFFOR. He who makes a feoffment. 2 Blackstone, Comm. 20; Litt. § 1.

FEOH (Sax.). A reward; wages; a fee. The word was in common use in these senses. Spelman, Feuds.

FERÆ BESTIÆ. Wild beasts.

FERÆ NATURÆ (Lat. of a wild nature; untamed). A term used to designate animals not usually tamed, or not regarded as reclaimed so as to become the subjects of property.

2. Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animum revertendi*, which is to be known only by their habit of returning. 2 Blackstone, Comm. 386; 3 Binn. Penn. 546; Brooke, Abr. *Propertie*, 37; Comyns, Dig. *Biens*, F; 7 Coke, 17 *b*; 1 Chitty, Pract. 87; Inst. 2. 1. 15; 13 Viner, Abr. 207.

3. Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them: if, therefore, another person kills such animal in the sight of the pursuer, he has a right to appropriate it to his own use. 3 Caines, N. Y. 175. But if the pursuer brings the animal within his own control, as by entrapping it or wounding it mortally, so as to render escape impossible, it then belongs to him, *id.*; though if he abandons it another person may afterwards acquire property in the animal. 20 Johns. N. Y. 75. The owner of land has a qualified property in animals *feræ naturæ* when, in consequence of their inability and youth, they cannot go away. See Year B. 12 H. VIII. (9 B, 10 A); 2 Blackstone, Comm. 394; Bacon, Abr. *Game*.

FERIA (Lat.). **In Old English Law.** A weekday; a holiday; a day on which process may not be served; a fair; a ferry. DuCange; Spelman, Gloss.; Cowel; 4 Reeve, Hist. Eng. Law, 17.

FERIÆ (Lat.). **In Civil Law.** Holidays. Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called. DuCange.

FERIAL DAYS. Originally and properly, days free from labor and pleading. In statute 27 Hen. VI. c. 5, working-days. Cowel.

FERME (Sax.). A farm; a rent; a lease; a house or land, or both, taken by indenture or lease. Plowd. 195; Vicat, Voc. Jur.; Cowel. See FARM.

FERMER, FERMOR. A lessee; a farmer. One who holds a term, whether of lands or an incorporeal right, such as customs or revenue.

FERRIAGE. The toll or price paid for the transportation of persons and property across a ferry.

FERRY. A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. 42 Me. 9; 3 Zabr. N. J. 206; Woolrych, Ways, 217. The term is also used to designate the place where such liberty is exercised. 4 Mart. La. N. S. 426.

2. In England, ferries are established by royal grant or by prescription, which is an implied grant; in the United States, by legislative authority, exercised either directly or by a delegation of powers to courts, commissioners, or municipalities. 7 Pick. Mass. 344; 15 *id.* 243; 11 Pet. 420; 20 Conn. 218; 8 Me. 365; 18 Ark. 19. Without such authority no one, though he may be the owner of both banks of the river, has the right to keep a public ferry, 3 Mo. 470; 13 Ill. 27; 6 Ga. 130; 11 Pet. 420; Willes, 508; though after twenty years' uninterrupted use such authority will be presumed to have been granted. 2 Dev. No. C. 402; 1 Nott & M'C. So. C. 389; 4 Ill. 53; 7 Ga. 348. The franchise of a ferry will, in preference, be granted to the owner of the soil, but may be granted to another; and by virtue of the right of eminent domain the soil of another may be condemned to the use of the ferry, upon making just compensation. 6 Barnew. & C. 703; 5 Yerg. Tenn. 189; 7 Humph. Tenn. 86; 2 Dev. No. C. 403; 9 Ga. 359; 6 Dan. Ky. 242; 8 Me. 365; 2 Cal. 262. If the termini of the ferry be a highway, the owner of the fee will not be entitled to compensation, 3 Kent, Comm. 421, n.; 4 Zabr. N. J. 718; 7 Gratt. Va. 205; 1 T.B. Monr. Tenn. 348; though in Pennsylvania a different doctrine prevails. 1 Yeates, Penn. 167; 9 Serg. & R. Penn. 31; 3 Watts, Penn. 219.

3. One state has the right to establish ferries over a navigable river separating it from another state or from a foreign territory, though its jurisdiction may extend only to the centre of such river; and the exercise of this right does not conflict with the provision in the constitution of the United States conferring upon congress the power "to regulate commerce with foreign nations and among the several states," nor with any law of congress upon that subject. 11 Wend. N. Y. 586; 3 Yerg. Tenn. 387; 3 Zabr. N. J. 206; 4 *id.* 718; 2 Gilm. Va. 197; 16 B. Monr. Ky. 699. A state may at its pleasure erect a new ferry so near an older ferry as to impair or destroy the value of the latter by drawing away its

custom, unless the older franchise be protected by the terms of its grant. 15 Pick. Mass. 243; 6 Dan. Ky. 43; 9 Ga. 517; 6 How. 507; 16 *id.* 524; 7 Ill. 197; 13 *id.* 413; 1 La. Ann. 288; 10 Ala. N. s. 37; 25 Wend. N. Y. 628. But if an individual, without authority from the state, erect a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favor of the owner of the latter. 3 Blackstone, Comm. 219; 6 Mees. & W. Exch. 234; 2 Crompt. M. & R. Exch. 432; 3 Wend. N. Y. 618; 3 Ala. 211; 17 Ala. N. s. 584; 16 B. Monr. Ky. 699; 4 Jones, No. C. 277; 3 Murph. No. C. 57.

4. The franchise of a ferry is an incorporeal hereditament, and as such it descends to heirs, is subject to dower, may be leased, sold, and assigned, 5 Comyns, Dig. 291; 12 East, 334; 2 McLean, C. C. 376; 3 Mo. 470; 7 Ala. N. s. 55; 9 *id.* 529; but, nevertheless, being a franchise in which the public have rights and interests, it is subject to legislative regulation for the enforcement and protection of such rights and interests. 10 Barb. N. Y. 223; 4 Zabr. N. J. 718; 11 B. Monr. Ky. 361; 9 Mo. 560.

5. The owners of ferries are common carriers, and liable as such for the carriage of the goods and persons which they receive upon their boats. They are bound to have their ferries furnished with suitable boats, and to be in readiness at all proper times to transport all who apply for a passage. 3 Mod. 289; 1 Salk. 12; 3 Humphr. Tenn. 245; 3 Penn. St. 342; 5 Mo. 36; 12 Ill. 344; 5 Cal. 360; 10 Mees. & W. Exch. 161; 3 Ala. N. s. 392. They must have their flats so made and so guarded with railings that all drivers with horses and carriages may safely enter thereon; and as soon as the carriage and horses are fairly on the drops or slips of the flat, and during their transportation, although driven by the owner or his servant, they are in the possession of the ferryman, and the owners of the ferry are answerable for the loss or injury of the same, unless occasioned by the fault of the driver. 1 M'Cord, So. C. 439; 16 Eng. L. & Eq. 437; 14 Tex. 290; 28 Miss. 792; 4 Ohio St. 722; 7 Cush. Mass. 154. If, however, the ferry be rented, the tenant and not the owner is subject to these liabilities, because such tenant is *pro hac vice* the owner. 1 Ala. 366; 3 *id.* 160; 12 Ired. No. C. 1; 26 Barb. N. Y. 618; 22 Vt. 170. See Washburn, Easements.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances, at a ferry. 3 Ala. 160; 8 Dan. Ky. 158. A ferryman ought to be privileged from being pressed as a soldier or otherwise.

FESTING-MAN. A bondsman; a surety; a pledge; a frank-pledge. It was one privilege of monasteries that they should be free from *festing-men*, which Cowel explains to mean not to be bound for any man's forthcoming who should transgress the law. Cowel.

FESTING-PENNY. Earnest given to servants when hired or retained. The same as *arles-penny*. Cowel.

FESTINUM REMEDIUM (Lat. a speedy remedy). A term applied to those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bacon, Abr. *Assise*, A. The action of dower is *festinum remedium*, and so is that of assise.

FETTERS. A sort of iron put on the leg of a malefactor or a person accused of crime.

When a prisoner is brought into court to plead, he shall not be put in fetters. Coke, 2d Inst. 315; Coke, 3d Inst. 34; 2 Hale, Pl. Cr. 119; Hawkins, Pl. Cr. b. 2, c. 28, s. 1; Kel. 10; 1 Chitty, Cr. Law, 417. An officer having arrested a defendant on a civil suit, or a person accused of a crime, has no right to handcuff him unless it is necessary or he has attempted to make his escape. 4 Barnew. & C. 596.

FEU. In Scotch Law. A holding or tenure where the vassal in place of military service makes his return in grain or money. Distinguished from wardholding, which is the military tenure of the country. Bell, Dict.; Erskine, Inst. lib. ii. tit. 3, § 7.

FEU ANNUALS. In Scotch Law. The *reddendo*, or annual return from the vassal to a superior in a feu holding. Wharton, Dict. 2d Lond. ed.

FEU HOLDING. A holding by tenure of rendering grain or money in place of military service. Bell, Dict.

FEUD. Land held of a superior on condition of rendering him services. 2 Blackstone, Comm. 106.

A hereditary right to use lands, rendering services therefor to the lord, while the property in the land itself remains in the lord. Spelman, Feuds, c. 1.

The same as *feod*, fief, and *fee*. 1 Sullivan, Lect. 128; 1 Spence, Eq. Jur. 34; Dalrymple, Feud. 99; 1 Washburn, Real Prop. 18.

In Scotland and the North of England, a combination of all the kin to revenge the death of any of the blood upon the slayer and all his race. Termes de la Ley; Whishaw.

FEUDA. Fees.

FEUDAL LAW, FEODAL LAW. A system of tenures of real property which prevailed in the countries of western Europe during the middle ages, arising from the peculiar political condition of those countries, and radically affecting the law of personal rights and of movable property.

2. Although the feudal system has never obtained in this country, and is long since extinct throughout the greater part of Europe, some understanding of the theory of the system is essential to an accurate knowledge of the English constitution, and of the doctrines of the common law in respect to real property. The feudal tenure was

a right to lands on the condition of performing services and rendering allegiance to a superior lord. It had its origin in the military immigrations of the Northmen, who overran the falling Roman empire. Many writers have sought to trace the beginning of the system in earlier periods, and resemblances more or less distinct have been found in the tenures prevailing in the Roman republic and empire, in Turkey, in Hindostan, in ancient Tuscany, as well as in the system of Celtic clanship. Hallam, Mid. Ag. vol. 1; Stuart, Soc. in Europe; Robertson, Hist. of Charles V.; Pinkerton, Diss. on the Goths; Montesquieu, Esp. des Lois, livre xxx. c. 2; Meyer, Esprit, Origine et Progrès des Inst. judiciaires, tom. 1, p. 4.

3. But the origin of the feudal system is so obvious in the circumstances under which it arose, that perhaps there is no other connection between it and these earlier systems than that all are the outgrowth of political conditions somewhat similar. It has been said that the system is nothing more than the natural fruit of conquest; but the fact that the conquest was by immigrants, and that the conquerors made the acquired country their permanent abode, is an important element in the case, and in so far as other conquests have fallen short of this the military tenures resulting have fallen short of the feudal system. The military chieftains of the northern nations allotted the lands of the countries they occupied among themselves and their followers, with a view at once to strengthen their own power and ascendency and to provide for their followers.

Some lands were allotted to individuals as their own proper estates, and these were termed allodial; but, for the most part, those lands which were not retained by the chieftain he assigned to his *comites*, or knights, to be held by his permission, in return for which they assured him of their allegiance and undertook for him military service.

4. It resulted that there was a general dismemberment of the political power into many petty nations and petty sovereignties. The violence and disorders of the times rendered it necessary both for the strong to seek followers and for the weak to seek a protecting allegiance; and this operated on the one hand to lead the vassals to divide again among their immediate retainers the lands which they had received from the paramount lord, upon similar terms, and by this subinfeudation the number of fiefs was largely increased; and the same circumstances operated on the other hand to absorb the allodial estates by inducing allodial proprietors to surrender their lands to some neighboring chieftain and receive them again from him under feudal tenure. Every one who held lands upon a feudal tenure was bound, when called upon by his benefactor or immediate lord, to defend him, and such lord was, in turn, subordinate to his superior, and bound to defend him, and so on upwards to the paramount lord or king, who in theory of the law was the ultimate owner of all the lands of the realm. The services which the vassals were bound to render to their lords were chiefly military; but many other benefits were required, such as the power of the lord or the good will of the tenant would sanction.

5. This system came to its height upon the continent in the empire of Charlemagne and his successors. It was completely established in England in the time of William the Norman and William Rufus his son; and the system thus established may be said to be the foundation of the English law of real property and the position of the landed aristocracy, and of the civil constitution of the realm. And when we reflect that in the middle ages real property had a relative importance far beyond that of movable property, it is not surprising that the system should have left its traces for a long time upon the law of personal relations and personal property. The feudal tenures were originally temporary, at the will of the lord, or from year to year; afterwards they came more commonly to be held for the life of the vassal; and gradually they acquired an inheritable quality, the lord recognizing the heir of the vassal as the vassal's successor in his service.

6. The chief incidents of the tenure by military service were—*Aids*,—a pecuniary tribute required by the lord in an emergency, *e.g.* a ransom for his person if taken prisoner, or money to make his son a knight or to marry his daughter. *Reliefs*,—the consideration which the lord demanded upon the death of a vassal for allowing the vassal's heir to succeed to the possession; and connected with this may be mentioned *primer seisin*, which was the compensation that the lord demanded for having entered upon the land and protected the possession until the heir appeared to claim it. *Fines upon alienation*,—a consideration exacted by the lord for giving his consent that the vassal should transfer the estate to another, who should stand in his place in respect to the services owed. *Escheat*.—Where on the death of the vassal there was no heir, the land reverted to the lord; also, where the vassal was guilty of treason; for the guilt of the vassal was deemed to taint the blood, and the lord would no longer recognize him or his heirs. *Wardship and Maritage*.—Where the heir was a minor, the lord, as a condition of permitting the estate to descend to one who could not render military service, assumed the guardianship of the heir, and, as such, exercised custody both of his person and of the property, without accounting for the profits, until the heir, if a male, was twenty-one and could undertake the military services, or, if a female, until she was of a marriageable age, when on her marriage her husband might render the services. The lord claimed, in virtue of his guardianship, to make a suitable match for his ward, and if wards refused to comply they were mulcted in damages.

7. Feudal tenures were abolished in England by the statute 12 Car. II. c. 24; but the principles of the system still remain at the foundation of the English and American law of real property. Although in many of the states of the United States all lands are held to be allodial, it is the theory of the law that the ultimate right of property is in the state; and in most of the states escheat is regulated by statute. "The principles of the feudal system are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, "that to attempt to eradicate them would be to destroy the whole." 3 Serg. & R. Penn. 447; 9 *id.* 333. "Though our property is allodial," says Ch. J. Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates: as, for instance, in precluding every limitation founded on an abeyance of the fee." 3 Watts, Penn. 71; 1 Whart. Penn. 337; 7 Serg. & R. Penn. 188; 13 Penn. St. 35.

Many of these incidents are rapidly disappearing, however, by legislative changes of the law.

8. The principles of the feudal law will be found in Littleton's Tenures; Wright's Tenures; 2 Blackstone, Comm. c. 5; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; Cruise's Digest; Le Grand Coutumier; the Salic Laws; the Capitularies; Les Etablissements de St. Louis; Assise de Jérusalem; Pothier, des Fiefs; Merlin, Rép. *Feodalité;* Dalloz, Dict. *Feodalité;* Guizot, *Essais sur l'Histoire de France*, Essai 5ème.

The principal original collection of the feudal law of continental Europe is a digest of the twelfth century, *Feudorum Consuetudines*, which is the foundation of many of the subsequent compilations. The American student will perhaps find

no more convenient source of information than Blackstone's Commentaries, Sharswood's ed. vol. 2, 43, and Greenleaf's Cruise, Dig. Introd.

FEUDUM. A feud, fief, or fee. A right of using and enjoying forever the lands of another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. Spelman, Gloss. It is not properly the land, but a right in the land. This form of the word is used by the feudal writers. The earlier English writers generally prefer the form *feodum;* but the meaning is the same.

Feudum antiquum. A fee descended from the tenant's ancestors. 2 Blackstone, Comm. 212. One which had been possessed by the relations of the tenant for four generations. Spelman, Gloss.

Feudum apertum. A fee which the lord might enter upon and resume either through failure of issue of the tenant or any crime or legal cause on his part. Spelman, Gloss.; 2 Blackstone, Comm, 245.

Feudum francum. A free feud. One which was noble and free from talliage and other subsidies to which the *plebeia feuda* (vulgar feuds) were subject. Spelman, Gloss.

Feudum hauberticum. A fee held on the military service of appearing fully armed at the *ban* and *arriere ban.* Spelman, Gloss.

Feudum improprium. A derivative fee.

Feudum individuum. A fee which could descend to the eldest son alone. 2 Blackstone, Comm. 215.

Feudum ligium. A liege fee. One where the tenant owed fealty to his lord against all other persons. Spelman, Gloss.; 1 Blackstone, Comm. 367.

Feudum maternum. A fee descending from the mother's side. 2 Blackstone, Comm. 212.

Feudum nobile. A fee for which the tenant did guard and owed fealty and homage. Spelman, Gloss.

Feudum novum. One which began with the person of the feudatory, and did not come to him by descent.

Feudum novum ut antiquum. A new fee held with the qualities and incidents of an ancient one. 2 Blackstone, Comm. 212.

Feudum paternum. A fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. One descendible to heirs on the paternal side only. 2 Blackstone, Comm. 223. One which might be held by males only. DuCange.

Feudum proprium. A genuine original feud or fee, of a military nature, in the hands of a military person. 2 Sharswood, Blackst. Comm. 57.

Feudum talliatum. A restricted fee. One limited to descend to certain classes of heirs. 2 Blackstone, Comm. 112, n.; 1 Washburn, Real Prop. 66; Spelman, Gloss. See, generally, Le Grand Coutumier; Spelman, Feuds; DuCange; Calvinus, Lex.; Dalrymple, Feuds; Pothier, *des Fiefs;* Merlin, Répert. *Feodalité.*

FIANZA (Span.). Surety. The contract by which one person engages to pay the debt or fulfil the obligations of another if the latter should fail to do so.

FIAR. In Scotch Law. One whose property is charged with a life-rent.

FIAT. An order of a judge or of an officer whose authority, to be signified by his signature, is necessary to authenticate the particular acts. A short order or warrant of the judge, commanding that something shall be done. See 1 Tidd, Pract. 100, 108.

FIAT IN BANKRUPTCY. An order of the lord chancellor that a commission of bankruptcy shall issue. 1 Deacon, Bank. 106.

Fiats are abolished by 12 & 13 Vict. c. 116.

FICTION. The legal assumption that something which is or may be false is true.

2. The expedient of fictions is sometimes resorted to in law for the furtherance of justice. The law-making power has no need to resort to fictions: it may establish its rules with simple reference to the truth; but the courts, which are confined to the administration of existing rules, and which lack the power to change those rules, even in hard cases, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are. Thus, in English law, where the administration of criminal justice is by prosecution at suit of the crown, the courts, rather than disregard the rules under which all other parties stand in respect to their neglect to appear and prosecute their suits, adopt the fiction that the king is legally ubiquitous and always in court, so that he can never be non-suited. Fictions are a singular illustration of the stability and the justice of the common law, which did not hesitate to deny plain matters of fact, if that were the only way to avoid either violating the law or using the law against justice.

3. Fictions are to be distinguished on the one hand from presumptions of law, and on the other hand from estoppels. A presumption is a rule of law prescribed for the purpose of getting at a certain conclusion, though arbitrary, where the subject is intrinsically liable to doubt from the remoteness, discrepancy, or actual defect of proofs. Thus, an infant under the age of seven years is conclusively presumed to be without discretion. Proof that he had discretion the court will not listen to. In the nature of the subject, there must be a limit, which it is better should be a general though arbitrary one than be fluctuating and uncertain in each case. An estoppel, on the other hand, is the rule by which a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to question.

4. The familiar fictions of the civil law and of the earlier common law were very numerous; but the more useful of them have either been superseded by authorized changes in the law or have gradually grown as it were into distinct principles, forming exceptions or modifications of those principles to evade which they were at first contrived. As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Bentham, Ev. 300; 2 Pothier, Obl. Evans ed. 43. But they have doubtless been of great utility in conducing to the gradual amelioration of the law; and, in this view, fiction, equity, and legislation have been named together as the three methods of the improvement of the law.

5. Theoretical writers have classified fictions as of five sorts: *abeyance*, when the fee of land is supposed to exist for a time without any particular owner during an outstanding freehold estate, 2 Blackstone, Comm. 107; 1 Cruise, Dig. 67–70; Merlin, Rép. *Abeyance;* 1 Comyns, Dig. 175; 1 Viner, Abr. 104; the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day is considered as done at a preceding time by the doctrine of *relation;* that, because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions;* that the heir, executor, and administrator stand by *representation* in place of the deceased. Again, they have been classified as of three kinds: positive, when a fact which does not exist is assumed; negative, when a fact which does exist is ignored; and fictions by relation, when the act of one person is taken as if it were the act of a different person,—*e.g.* that of a servant as the act of his master; when an act at one time or place is treated as if performed at a different time or place; and when an act in relation to a certain thing is treated as if it were done in relation to another thing which the former represents,—*e.g.* where delivery of a portion of goods sold is treated as giving possession of the whole. Best, Pres. 27.

6. Fictions being resorted to simply for the furtherance of justice, Coke, Litt. 150; 10 Coke, 42; 1 Price, Exch. 154; 1 Cowp. 177, several maxims are fundamental to them. *First*, that that which is impossible shall not be feigned. D'Aguesseau, *Œuvres*, tome iv. pp. 427, 447 *c*, *Plaidoyer;* 2 Rolle, 502. *Second*, that no fiction shall be allowed to work an injury. 3 Blackstone, Comm. 43; 17 Johns. N. Y. 348. *Third*, a fiction is not to be carried further than the reasons which introduced it necessarily require. 1 Lilly, Abr. 610; 2 Hawkins, Pl. Cr. 320; Best, Pres. § 20.

Consult Dalloz, Dict.; Burgess, Ins. 139, 140; Ferguson, Moral Phil. pt. 5, c. 10, § 3; 1 Toullier, 171, n. 203; 2 *id.* 217, n. 203; 11 *id.* 10, n. 2.

FICTITIOUS ACTION. A suit brought on pretence of a controversy when no such controversy in truth exists. Such actions have usually been brought on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice were constituted for the purpose of deciding really existing questions of right between parties; and they are not bound to answer impertinent questions which persons think proper to ask them in the form of an action on a wager. 12 East, 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys. Rep. *temp.* Hardw. 237. See, also, Comb. 425; 1 Coke, 83; 6 Cranch, 147, 148. See, also, FEIGNED ACTIONS.

FICTITIOUS PARTY. Where a suit is brought in the name of one who is not in being, or of one who is ignorant of the suit and has not authorized it, it is said to be brought in the name of a fictitious plaintiff. To bring such a suit is deemed a contempt of court. 4 Blackstone, Comm. 133.

FICTITIOUS PAYEE. When a contract, such as negotiable paper, is drawn in favor of a fictitious person, and has been indorsed in such name, it is deemed payable to bearer as against all parties who are privy to the transaction; and a holder in good faith may recover on it against them. 2 H. Blackst. 178, 288; 3 Term, 174, 182, 481; 1 Campb. 130; 19 Ves. Ch. 311. And see 10 Barnew. & C. 468; 2 Sandf. N. Y. 38; 2 Du. N. Y. 121.

FIDEI-COMMISSARIUS (L. Lat.). **In Civil Law.** One who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This term has nearly the same meaning as *cestui que trust* has in the common law. 1 Greenleaf, Cruise, Dig. 295; Story, Eq. Jur. § 966; Bouvier, Inst. Index.

Fidei-commissary and *fide-commissary*, anglicized forms of this term, have been proposed to take the place of the phrase *cestui que trust*, but do not seem to have met with any favor.

According to DuCange, the term was sometimes used to denote the executor of a will.

FIDEI-COMMISSUM (L. Lat.). **In Civil Law.** A trust. A devise was made to some person (*hæres fiduciarius*), and a request annexed that he should give the property to some one who was incapable of taking directly under the will. Inst. 2. 23. 1; 1 Greenleaf, Cruise, Dig. 295; 15 How. 357. A gift which a man makes to another through the agency of a third person, who is requested to perform the will of the giver.

2. The rights of the beneficiary were merely rights in curtesy, to be obtained by entreaty or request. Under Augustus, however, a system was commenced, which was completed by Justinian, for enforcing such trusts. The trustee or executor was called *hæres fiduciarius*, and sometimes *fide-jussor*. The beneficial heir was called *hæres fidei-commissarius*.

3. The uses of the common law are said to have been borrowed from the Roman *fidei-commissa*. 1 Greenleaf, Cruise, 295; Bacon, Read. 19; 1 Madd. Ch. 446; Story, Eq. Jur. § 966. The *fidei-commissa* are supposed to have been the origin of the common-law system of entails. 1 Spence, Eq. Jur. 21; 1 Washburn, Real Prop. 60. This has been doubted by others. See 1 Bouvier, Inst. n. 1708.

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another. This giving security does not destroy the liability of the principal, but adds to the security of the surety. Vicat, Voc. Jur.; Hallifax, Annals, b. 2, c. 16, n. 10.

FIDE-JUSSOR. In Civil Law. One who becomes security for the debt of another,

promising to pay it in case the principal does not do so.

He differs from a co-obligor in this, that the latter is equally bound to a debtor with his principal, while the former is not liable till the principal has failed to fulfil his engagement. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64; 38. 1. 37; 50. 17. 110; 6. 14. 20; Hall, Pract. 33; Dunlap, Adm. Pract. 300; Clerke, Prax. tit. 63–65.

The obligation of the fide-jussor was an accessory contract; for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. Leç. Elém. § 872; Code Nap. 2012.

FIDUCIA (Lat.). **In Civil Law.** A contract by which we sell a thing to some one—that is, transmit to him the property of the thing, with the solemn forms of emancipation—on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Pothier, Pand.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merlin, Répert. But Pothier, Pand. vol. 22, says that *fiduciarius hæres* properly signifies the person to whom a testator has sold his inheritance under the condition that he should sell it to another. Fiduciary may be defined in trust, in confidence.

FIDUCIARY CONTRACT. An agreement by which a person delivers a thing to another on the condition that he will restore it to him. The following formula was employed: *Ut inter bonos agere oportet, ne propter te fidemque tuam frauda.* Cicero, de Offic. lib. 3, cap. 13; Leç. du Dr. Civ. Rom. §§ 237, 238. See 2 How. 202, 208; 6 Watts & S. Penn. 18; 7 Watts, Penn. 415.

FIEF. A fee, feod, or feud.

FIEF D'HAUBERK. A fee held on the military tenure of appearing fully armed on the *ban* and *arriere-ban*. *Feudum hauberticum.* Spelman, Gloss.; Calvinus, Lex.; Du-Cange. A knight's fee. 2 Blackstone, Comm. 62.

FIEF TENANT. The holder of a fief or fee.

FIEL. In Spanish Law. An officer who keeps possession of a thing deposited under authority of law. Las Partidas, pt. 3, tit. 9, l. 1.

FIELDAD. In Spanish Law. Sequestration. This is allowed in six cases by the Spanish law where the title to property is in dispute. Las Partidas, pt. 3, tit. 3, l. 1.

FIERDING COURTS. Ancient Gothic courts "in the lowest instance:" so called because four were instituted within every superior district or hundred. Their jurisdiction was limited within forty shillings, or three marks. 3 Stephen, Comm. 393; 3 Blackstone, Comm. 34; Stiernhook, *De Jure Goth.* l. 1, c. 2.

FIERI FACIAS (Lat. that you cause to be made). **In Practice.** A writ directing the sheriff to cause to be made of the goods and chattels of the judgment-debtor the sum or debt recovered.

It receives its name from the Latin words in the writ (used when legal proceedings were conducted in Latin (*quod fieri facias de bonis et catallis*, that you cause to be made of the goods and chattels). It is the form of execution in common use where the judgment-debtor has personal property.

2. The foundation of this writ is a judgment for debt or damages; and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by the stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error.

3. The writ is issued in the name of the commonwealth or of the government, as required by the constitution, and directed to the sheriff, commanding him that of the goods and chattels and (where lands are liable for the payment of debts) of the lands and tenements of the defendant, therein named, in his bailiwick, he cause to be levied as well a certain debt of —— dollars, which the plaintiff (naming him), in the court of —— (naming it), recovered against him, as —— dollars, like money, which to the said plaintiff were adjudged for his damages which he had by the detention of that debt, and that he (the sheriff) have that money before the judges of the said court, on a day certain (being the return-day therein mentioned), to render to the said plaintiff his debt and damages aforesaid, whereof the said defendant is convict. It must be tested in the name of the officer, as directed by the constitution or laws, as of some day during the term, 2 Caines, N. Y. 81: as, "Witness the honorable John B. Gibson, our chief justice, at Philadelphia, the tenth day of October, in the year of our Lord one thousand eight hundred and forty-eight." It must be signed by the prothonotary or clerk of the court, and sealed with its seal. The amount of the debt, interest, and costs must also be indorsed on the writ. This form varies as it is issued on a judgment in debt, or on one obtained for damages merely.

4. The execution, being founded on the judgment, must, of course, follow and be warranted by it. 2 Saund. 72 h, k; Bingham, Ex. 186; 2 Cow. N. Y. 454. Hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants. 6 Term, 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris si, et si non, de bonis propriis.* 1 Serg. & R. Penn. 453; 4 *id.* 394; 18 Johns. N. Y. 502; 1 Hayw. No. C. 598; 2 *id.* 112.

5. At common law, the writ bound the

goods of the defendant or party against whom it was issued, from the teste day; by which is to be understood that the writ bound the property against the party himself, and all claiming by assignment from or by representation under him, 4 East, 538: so that a sale by the defendant of his goods to a *bonâ fide* purchaser did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff till after, the sale, Croke Eliz. 174; Croke Jac. 451; 1 Sid. 271; but by the statute of frauds, 29 Car. II. c. 3, § 16, it was enacted "that no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriffs, etc., their deputies or agents, shall, upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof the day of the month and year whereon he or they received the same;" and the same or similar provisions have been enacted in most of the states of the United States. 2 Serg. & R. Penn. 157; 1 Whart. Penn. 377; 8 Johns. N. Y. 446; 12 *id.* 320; 3 Harr. Del. 512.

6. The execution of the writ is made by levying upon the goods and chattels of the defendant or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises is a good seizure of the whole. 1 Ld. Raym. 725; 2 Serg. & R. Penn. 142; 4 Wash. C. C. 29; 1 Munf. Va. 269; 2 Hill, N. Y. 666; 5 Ired. No. C. 192; 7 Ala. N. s. 619. But see 1 Whart. Penn. 377; 6 Halst. N. J. 218. It may be executed at any time before and on the return-day, 13 Tex. 507, but not on Sunday, where it is forbidden by statute. Watson, Sher. 173; 5 Coke, 92; Comyns, Dig. *Execution*, C 5.

7. The sheriff cannot break the outer door of a house for the purpose of executing a *fieri facias*, 5 Coke, 92, nor unlatch an outer door, 4 Hill, N. Y. 437; nor can a window be broken for this purpose. W. Jones, 429. He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them. 4 Taunt. 619; 3 Bos. & P. 223; Cowp. 1. Although the sheriff is authorized to enter the house of the party to search for goods, he cannot enter that of a stranger for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house. Comyns, Dig. *Execution* (C 5); 1 Marsh. 565. The sheriff may break the outer door of a barn, 1 Sid. 186; 1 Kebl. 689, or of a store disconnected with the dwelling-house and forming no part of the curtilage. 16 Johns. N. Y. 287.

8. At common law a *fi. fa.* did not authorize a sheriff to seize bank-bills, checks, or promissory notes; but it is otherwise now, by stat. 1 & 2 Vict. c. 110, § 12 and 3 & 4 Vict. c. 82; and this statute law is equivalent to the law of many of the United States. 2 Va. Cas. 246; 1 Bail. So. C. 39; 14 Conn. 99; 1 Hempst. Ark. 91; 29 Penn. St. 240. Among the things which may be taken on a *fi. fa.* are growing corn, 2 Dan. Ky. 205; 2 Rawle, Penn. 161; standing timber, 4 Zabr. N. J. 150; spirituous liquors, 30 Vt. 436; 33 N. H. 441; pianos. 30 Vt. 224.

FIERI FECI (L. Lat.). **In Practice.** The return which the sheriff or other proper officer makes to certain writs, signifying, "I have caused to be made."

When the officer has made this return, a rule may be obtained upon him after the return-day, to pay the money into court, and, if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him. 3 Johns. N. Y. 183.

FIFTEENTHS. A temporary aid, consisting of a fifteenth part of the personal property in every township, borough, and city in the kingdom. The valuation of the kingdom was fixed and a record made in the exchequer of the amount (twenty-nine thousand pounds). This valuation was not increased as the property in the kingdom increased in value; whence the name came in time to be a great misnomer. Coke, 2d Inst. 77; Coke, 4th Inst. 34; 2 Sharswood, Blackst. Comm. 309; Cowel.

FIGHTNITE (Sax.). A mulct or fine for making a quarrel to the disturbance of the peace. Called also by Cowel *forisfactura pugnæ*. The amount was one hundred and twenty shillings. Cowel.

FIGURES. Numerals. They are either Roman, made with letters of the alphabet: for example, MDCCLXXVI; or they are Arabic, as follows: 1776.

2. Roman figures may be used in contracts and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited or altered, have been holden not to be sufficient to express the sum due on a contract; but it seems that if the amount payable and due on a promissory note be expressed in figures or ciphers, it will be valid. Story, Bills, § 42, note; Story, Prom. Notes, § 21.

3. Figures to express numbers are not allowable in indictments; but all numbers must be expressed in words at length, except in setting forth a copy of a written instrument. And complaints are governed by the same rule in cases over which magistrates have final jurisdiction. But the decisions on this point are not uniform. And in most of them the proper distinction between the use of figures in the caption and in the body of an indictment has not been observed. In America, perhaps the weight of authority is contrary to the law as above stated. But, at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. See 13 Viner, Abr. 210; 1 Chit. 319.

4. Bills of exchange, promissory notes, checks, and agreements of every description are usually dated with Arabic figures: it is, however, better to date deeds and other formal instruments by writing the words at length. See 5 Toullier, n. 336; 4 Yeates, Penn. 278; 2 Johns. N. Y. 233; 2 Miss. 256: 6 Blackf. Ind. 533; 1 Vt. 336.

FILACER. An officer of the common pleas, whose duty it was to file the writs on which he made process. There were fourteen of them; and it was their duty to make out all original process. Cowel; Blount. The office is now abolished.

FILE. A thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping and ready turning to the same. Spelman, Gloss.; Cowel; Tomlin, Law Dict. Papers put together and tied in bundles. A paper is said also to be filed when it is delivered to the proper officer and by him received to be kept on file. 13 Viner, Abr. 211; 1 Littleton, 113; 1 Hawkins, Pl. Cr. 7, 207.

FILIATE. To declare whose child a bastard is. 2 W. Blackst. 1017.

FILIATION. In Civil Law. The descent of son or daughter, with regard to his or her father, mother, and their ancestors.

Nature always points out the mother by evident signs, and, whether married or not, she is always certain: *mater semper certa est, etiamsi vulgò conceperit.* There is not the same certainty with regard to the father, and the relation may not know or may feign ignorance as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

2. When the mother is or has been married, her husband is presumed to be the father of the children born during the coverture, or within a competent time afterwards, whether they were conceived during the coverture or not: *pater is est quem nuptiæ demonstrant.*

This rule is founded on two presumptions: one on the cohabitation before the birth of the child; and the other that the mother has faithfully observed the vow she made to her husband.

3. This presumption may, however, be rebutted by showing either that there has been no cohabitation, or some physical or other impossibility that the husband could be the father. See ACCESS; BASTARD; GESTATION; NATURAL CHILDREN; PATERNITY; PUTATIVE FATHER. 1 Bouvier, Inst. n. 302 *et seq.*

FILIUS (Lat.). A son. A child.

As distinguished from heir, *filius* is a term of nature, *hæres* a term of law. 1 Powell, Dev. 311. In the civil law the term was used to denote a child generally. Calvinus, Lex.; Vicat, Voc. Jur. Its use in the phrase *nullius filius* would seem to indicate a use in the sense of legitimate son, a bastard being the legitimate son of nobody; though the word is usually rendered a son, whether legitimate or illegitimate. Vicat, Voc. Jur.

FILIUS FAMILIAS (Lat.). A son who is under the control and power of his father. Story, Confl. Laws § 61; Vicat, Voc. Jur.

FILIUS MULIERATUS (Lat.). The first legitimate son born to a woman who has had a bastard son by her husband before her marriage. Called, also, *mulier*, and *mulier puisne*. 2 Blackstone, Comm. 248.

FILIUS NULLIUS (Lat. son of nobody). A bastard. Called, also, *filius populi* (son of the people). 1 Blackstone, Comm. 459; 6 Coke, 65 *a*.

FILIUS POPULI (Lat.). A son of the people; a bastard.

FILUM AQUÆ (Lat. a thread of water). This may mean either the middle line or the outer line. *Altum filum* denotes high-water mark. Blount. *Filum* is, however, used almost universally in connection with *aquæ* to denote the middle line of a stream. *Medium filum* is sometimes used with no additional meaning. See 4 Pick. Mass. 468; 24 *id.* 344; 3 Caines, N. Y. 319; 6 Cow. N. Y. 579; 5 Wend. N. Y. 423; 26 Wend. N. Y. 404; 20 Johns. N. Y. 91; 4 Hill, N. Y. 369; 4 Mas. C. C. 397; 2 N. H. 369; 1 Halst. N. J. 1; 2 Conn. 481; 3 Rand. Va. 33; 8 Me. 253; 1 Ired. No. C. 535; Angell, Waterc. § 11; 3 Dane, Abr. 4; Jacob, Law Dict.; 2 Washburn, Real Prop. 445; AD MEDIUM FILUM.

FILUM FORESTÆ (Lat.). The border of the forest. 2 Sharswood, Blackst. Comm. 419; 4 Inst. 303; Manw. *Purlieu.*

FILUM VIÆ (Lat.). The middle line of the way. 2 Smith, Lead. Cas. 98.

FIN DE NON RECEVOIR. In French Law. An exception or plea founded on law, which without entering into the merits of the action shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription*, or that there has been a compromise, accord and satisfaction, or any other cause which has destroyed the right of action which once subsisted. Pothier, *Proc. Civ.* pt. 1, c. 2, s. 2, art. 2; Story, Confl. Laws, § 580.

FINAL DECREE. A decree which finally disposes of the whole question, so that nothing further is left for the court to adjudicate upon. See 2 Daniell, Chanc. Pract. Perkins ed. 1199, n.

A decree which terminates all litigation on the same right. 1 Kent, Comm. 316.

A decree which disposes ultimately of the suit. Adams, Eq. 375. After such decree has been pronounced, the cause is at an end, and no further hearing can be had. Adams, Eq. 388.

FINAL JUDGMENT. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Blackstone, Comm. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent, Comm. 316 A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon. 24 Pick. Mass. 300; 2 Pet. 294; 6 How 201, 209.

FINAL PROCESS. Writs of execution. So called to distinguish them from *mesne process*, which includes all process issuing before judgment rendered.

FINAL SENTENCE. One which puts an end to a case. Distinguished from interlocutory. See SENTENCE.

FINALIS CONCORDIA (Lat.). A decisive agreement. A fine. A final agreement.

A final agreement entered by the parties by permission of court in a suit actually brought for lands. Subsequently the bringing suit, entry of agreement, etc. became merely formal, but its entry upon record gave a firm title to the plaintiff. 1 Washburn, Real Prop. 70; 1 Spence, Eq. Jur. 143; 2 Flintoff, Real Prop. 673; Tudor, Lead. Cas. 689.

Finis est amicabilis compositio et finalis concordia ex consensu et concordia domini regis vel justiciarum (a fine is an amicable settlement and decisive agreement by consent and agreement of our lord the king or his justices). Glanville, lib. 8, c. 1.

Talis concordia finalis dicitur eo quod finem imposuit negotio, adeo ut neutra pars litigantium ab eo de cetero poterit recidere (such concord is called final because it puts an end to the business, so that neither of the litigants can afterwards recede from it). Glanville, lib. 9, c. 3; Cunningham, Law Dict.

FINANCES. The public revenue or resources of a government or state. The income or means of an individual or corporation. It is somewhat like the *fiscus* of the Romans. The word is generally used in the plural.

Money resources generally. The state of the finances of an individual or corporation, being his condition in a monetary point of view. The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay.

FINANCIER, FINANCIAN. One who manages the finances or public revenue. Persons skilled in matters appertaining to the judicious management of money affairs.

FINDER. One who lawfully comes to the possession of another's personal property, which was then lost.

2. The finder is entitled to certain rights, and liable to duties which he is obliged to perform. This is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi* deposit; and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found as any voluntary depositary *ex contractu*. Doctor & Stud. Dial. 2, c. 38; 2 Bulstr. 306, 312; 1 Rolle, 125.

3. The finder is not bound to take the goods he finds; yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property; and he will be responsible for gross negligence. Some of the old authorities laid down that "if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by his negligent keeping they be moth-eaten, no action lies." So it is if a man finds goods and lose them again. Bacon, Abr. *Bailment*, D; and in support of this position Leon. 123, 223; Ow. 141; 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would doubtless be held responsible for gross negligence.

4. On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found: as, if a man were to find an animal, he would be entitled to be reimbursed for its keeping, for advertising in a reasonable manner that he had found it, and to any reward which may have been offered by the owner for the recovery of such lost thing. Domat, l. 2, t. 9, s. 2, n. 2. See Story, Bailm. § 35.

And when the owner does not reclaim the goods lost, they belong to the finder. 1 Blackstone, Comm. 296; 2 *id.* 9; 2 Kent, Comm. 290. The acquisition of treasure by the finder is evidently founded on the rule that what belongs to none naturally becomes the property of the first occupant: *res nullius naturaliter fit primi occupantis.*

5. As to the criminal responsibility of the finder, the result of the authorities is that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. 1 Den. Cr. Cas. 335, 387; 2 *id.* 353; 2 Bennett & H. Lead. Crim. Cas. 18; Dearsl. Cr. Cas. 580; Bell, Cr. Cas. 27; 2 Carr. & K. 841; 6 Cox, Cr. Cas. 117; 7 Mees. & W. Exch. 623; 1 Hill, N. Y. 94; 22 Conn. 153. In Regina *v.* Thurborn, *Parke*, B., observes that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never be held to constitute that offence. See TAKING.

FINDING. The result of the deliberations of a jury or a court. 1 Day, Conn. 238; 2 *id.* 12.

FINE. In Conveyancing. An amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Coke, Litt. 120; 2 Blackstone, Comm. 349; Bacon, Abr. *Fines and Recoveries.*

A fine is so called because it puts an *end* not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Such concords, says Doddridge (Eng. Lawyer, 84, 85), have been in use in the civil law, and are called transactions, whereof they say thus: *Transactiones sunt de eis quæ in controversia sunt, a lite futura aut pendente ad certam compositionem reducuntur, dando aliquid vel accipiendo.* Or shorter, thus: *Transactio est de re dubia et lite ancipite ne dum ad finem*

ducta, non gratuita pactio. It is commonly defined an assurance by matter of record, and is founded upon a supposed previously existing right, and upon a writ requiring the party to perform his covenant; although a fine may be levied upon any writ by which lands may be demanded, charged, or bound. It has also been defined an acknowledgment on record of a previous gift or feoffment, and *primâ facie* carries a fee, although it may be limited to an estate for life or in fee-tail. Preston, Conv. 200, 202, 268, 269; 2 Blackstone, Comm. 348, 349.

3. The stat. 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows. The party to whom the land is conveyed or assured commences an action at law against the other, generally an action of covenant, by suing out a writ of *præcipe*, called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. The *concord*, or agreement itself, after leave obtained by the court: this is usually an acknowledgment from the deforciants that the lands in question are the lands of the complainants. The *note* of the fine, which is only an abstract of the writ of covenant and the concord; naming the parties, the parcels of land, and the agreement. The foot of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. See Cruise, Fines; Bacon, Abr. *Fines and Recoveries;* Comyns, Dig. *Fine.*

In Criminal Law. Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. See Sheppard, Touchst. 2; Bacon, Abr. *Fines and Amercements.*

4. The amount of the fine is frequently left to the discretion of the court, who ought to proportion the fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendm. to the Constitution, art. 8.

FINE FOR ALIENATION. A sum of money which a tenant by knight's service, or a tenant *in capite* by socage tenure, paid to his lord for permission to alienate his right in the estate he held to another, and by that means to substitute a new tenant for himself. 2 Blackstone, Comm. 71, 89. These fines are now abolished. In France, a similar demand from the tenant, made by the lord when the former alienated his estate, was called *lods et vente.* This imposition was abolished, with nearly every other feudal right, by the French revolution.

FINE SUR COGNIZANCE DE DROIT COME CEO QUE IL AD DE SON DONE. A fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor. By this the deforciant acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff. 2 Blackstone, Comm. 352; Cunningham, Law Dict.; Sheppard, Touchst. c. 2; Comyns, Dig. *Fine.*

FINE SUR COGNIZANCE DE DROIT TANTUM. A fine upon acknowledgment of the right merely. Generally used to pass a reversionary interest which is in the cognizor. 2 Blackstone, Comm. 351; Jacob, Law Dict.; Comyns, Dig.

FINE SUR CONCESSIT. A fine granted where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 2 Blackstone, Comm. 353; Sheppard, Touchst. c. 2.

FINE SUR DONE GRANT ET RENDER. A double fine, comprehending the fine *sur cognizance de droit come ceo* and the fine *sur concessit.* It may be used to convey particular limitations of estates and to persons who are strangers or not named in the writ of covenant; whereas the fine *sur cognizance de droit come ceo*, etc. conveys nothing but an absolute estate, either of inheritance, or at least freehold. Salk. 340. In this last species of fines the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Blackstone, Comm. 353; Viner, Abr. *Fine;* Comyns, Dig. *Fine;* 1 Washburn, Real Prop. 33.

FINE-FORCE. An absolute necessity or inevitable constraint. Old Nat. Brev. 78; Perkins, 321; Plowd. 94; 6 Coke, 11; Cowel.

FINE AND RECOVERY ACT. The statute 3 & 4 Will. IV. c. 74. This act abolished fines and recoveries. 2 Sharswood, Blackst. Comm. 364, n.; 1 Stephen, Comm. 514.

FINEM FACERE (Lat.). To make or pay a fine. Bracton, 106; Skene.

FINES LE ROY. In Old English Law. A sum of money which any one is to pay the king for any contempt or offence; which fine any one that commits any trespass, or is convict that he falsely denies his own deed, or did any thing in contempt of the law, shall pay to the king. Termes de la Ley; Cunningham, Law Dict.

FINIUM REGUNDORUM ACTIO. In Civil Law. An action for regulating boundaries. 1 Mackeldy, Civ. Law, § 271.

FIRDNITE (Sax.). A mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. Cowel. A penalty imposed for murder committed in the army. Cowel.

FIRDSOCNE (Sax.). Exemption from military service. Spelman, Gloss.

FIRE. The effect of combustion. Webster, Dict.

The legal sense of the word is the same as the popular. 1 Parsons, Marit. Law. 231 *et seq.*

2. Fire is not a peril of the sea. In Scotch law, however, fire is an inevitable accident. Bell Dict.

Whether a fire arises purely by accident, or from any other cause, when it becomes uncontrollable and dangerous to the public, a man may, in general, justify the destruction of a house on fire for the protection of the neighborhood; for the maxim *salus populi est suprema lex* applies in such case. 11 Coke, 13. See ACCIDENT; ACT OF GOD; 3 Wms. Saund. 422 *a*, note 2; 3 Coke, Litt. 57 *a*, n. 1; Hammond, Nisi P. 171; 1 Cruise, Dig. 151, 152; 1 Viner, Abr. 215; 1 Rolle, Abr. 1; Bacon, Abr. *Action on the Case*, F; 2 Lois des Bâtim. 124; Newland, Contr. 323; 1 Term, 310; 6 *id.* 489; Ambl. 619.

3. When real estate is let, and the tenant covenants to pay the rent during the term, unless there are proper exceptions to such covenants, and the premises are afterwards destroyed by fire during the term, the rent must be paid although there be no enjoyment; for the common rule prevails, *res perit domino*. The tenant, by the accident, loses his term; the landlord, the residence. Story, Eq. Jur. § 102.

FIRE AND SWORD. Letters of fire and sword were the ancient means for dispossessing a tenant who retained possession contrary to the order of the judge and diligence of the law. They were directed to the sheriff, and ordered him to call the assistance of the county to dispossess the tenant. Bell, Dict.; Erskine, Inst. lib. iv. tit. 3, § 17.

FIREBOTE. An allowance of wood or *estoves* to maintain competent firing for the tenant. A sufficient allowance of wood to burn in a house. 1 Washburn, Real Prop. 99. Tenant for life or years is entitled to it. 2 Blackstone, Comm. 35. Cutting more than is needed for present use is waste. 3 Dane, Abr. 238; 8 Pick. Mass. 312–315; Croke Eliz. 593; 7 Bingh. 640. The rules in England and in this country are different in relation to the kind of trees which the tenant may cut. 11 Metc. Mass. 504; 7 Pick. Mass. 152; 7 Johns. N. Y. 227; 6 Barb. N. Y. 9; 2 Zabr. N. J. 521; 2 Ohio St. 180; 13 Penn. St. 438; 3 Leon. 16.

FIRKIN. A measure of capacity, equal to nine gallons. The word firkin is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.

FIRM. The persons composing a partnership, taken collectively.

The name or title under which the members of a partnership transact business.

The word is used as synonymous with partnership. The words "house," "concern," and "company" are also used in the same sense. This name is in point of law conventional, and applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. A firm is usually described, in legal proceedings, as certain persons trading or carrying on business under and using the name, style, and firm of, etc. See 9 Q. B. 361; 9 Mees. & W. Exch. 347; 1 Chitt. Bail. 49.

2. It may be that the names of all the members of the partnership appear in the name or style of the firm, or that the names of only a part appear, with the addition of "and company," or other words indicating a participation of others, as partners, in the business, 16 Pick. Mass. 428, 429, or that the name of only one of the partners, without such addition, is the name of the firm. It sometimes happens that the name of neither of the partners appears in the style of the firm.

The proper style of the firm is frequently agreed upon in the partnership articles; and where this is the case, it becomes the duty of every partner, in signing papers for the firm, to employ the exact name agreed upon. Collyer, Partn. § 215; Story, Partn. § 202. This may be necessary, not only to bind the firm itself, Story, Partn. § 102, but also to prevent the partner signing from incurring a personal liability both to third persons and to his copartners. Collyer, Partn. § 215; Story, Partn. §§ 102, 202; 2 Jac. & W. Ch. 268; 11 Ad. & E. 339; Pothier, Partn. nn. 100, 101.

3. So, the name which a partnership assume, recognize, and publicly use becomes the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership, 2 Pet. 186, 198; and a partner has no implied authority to bind the firm by any other than the firm name thus acquired. 9 Mees. & W. Exch. 284. Wherefore, where a firm consisted of J B & C H, the partnership name being J B only, and C H accepted a bill in the name of "J B & Co.," it was held that J B was not bound thereby. 9 Mees. & W. Exch. 284. See Dav. Dist. Ct. 325.

4. If the firm have no fixed name, a signing by one, in the name of himself and company, will bind the partnership, 2 Ohio, 61; and a note in the name of one, and signed by him "For the firm, etc.," will bind the company. 5 Blackf. Ind. 99. Where the business of a firm is to be carried on in the name of B & D, a signature of a note by the names and surnames of the respective parties is a sufficient signature to charge the partnership. 3 C. B. 792. Where a written contract is made in the name of one, and another is a *secret* partner with him, both may be sued upon it. 2 Ala. 134; 5 Watts, Penn. 454.

5. Where partners agree that their business shall be conducted in the name of one person, whether himself interested in the partnership business or not, that is the partnership name, and the partners are bound by it. 6 Hill, N. Y. 322; 1 Den. N. Y. 405, 471, 481. Where that name is the name of one of the partners, and he does business also on his own private account, a contract signed by that name will not bind the firm, unless it appears to have been entered into for the firm; but, if there be no proof that the contract was made for the firm, the presumption will be that it was made by the partner on his own separate account, and the firm will not be responsible. Story, Partn. § 139; Collyer, Partn. § 411 and note; 5 Pick. Mass. 11; 9 *id.* 274; 1 Du. N. Y. 405; 17 Serg. & R. Penn. 165; 5 Mas. C. C. 176; 5 Pet. 529; 2 Bouvier, Inst. n. 1442 *et seq.* See PARTNERS; PARTNERSHIP.

6. The name of the firm should be distinct from the names of all other firms. When there is confusion in this respect, the partners composing one firm may, in some cases, be made responsible for the debts of another. See Peake, Cas. 80; 7 East, 210; 2 Bell, Comm. 5th ed. 670; 3 Mart. La. N. s. 39. As to the right of a surviving partner to carry on the business in the name of the firm, see 7 Sim. Ch. 127; Story, Partn. § 100, note; Collyer, Partn. § 162, note.

Merchants and lawyers have different notions respecting the nature of a firm. Merchants are in the habit of looking upon a firm as a body distinct from the members composing it. Cory, Accounts, 2d ed.; Lindley, Partn. c. vii. p. 163. The law looks to the partners themselves; any change among them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or creditor of his copartners; but he cannot be either debtor or creditor of the firm of which he is himself a member. 4 Mylne & C. Ch. 171, 172.

7. A firm can neither sue nor be sued, otherwise than in the name of the partners composing it. Consequently, no action can be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person at least would appear both as plaintiff and defendant, and it is considered absurd for any person to sue himself, even in form. 1 Barnew. & Ald. 664; 4 Mylne & C. Ch. 171, 172; 6 Taunt. 598; 6 Pick. Mass. 320, 321; 5 Gill & J. Md. 487; Collyer, Partn. § 642 and note. For the same reason, one firm cannot bring an action against another if there be one or more persons partners in both firms. 6 Taunt. 597; 2 Bos. & P. 120.

Whenever a firm is spoken of by its name or style, the courts admit evidence to show what persons did in fact constitute the firm at the time in question. 6 Taunt. 15; 4 Maule & S. 13; 2 Keen, Rolls, 255. If persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is binding as much as if real names had been used. 1 Chitt. Bail. 707; 2 Carr. & P. 296; 2 Campb. 548; Hayes & S. Exch. Ir. 43.

8. Any change in the persons composing a firm is productive of a new signification of the name. If, therefore, a legacy is left to a firm, that is a legacy to those who compose it at the time the legacy vests, see 2 Keen, Rolls, 255; 3 Mylne & C. 507; 7 De Gex, M. & G. 673; and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business. 11 Ir. Eq. 451; 1 Lindley, Partn. 166. Again, an authority given to a firm of two partners cannot, it would seem, be exercised by them and a third person afterwards taken into partnership with them. 6 Bingh. N. c. 201. See 4 Ad. & E. 832; 16 Sim. Ch. 121; 7 Hare, Ch. 351; 4 Ves. Ch. 649.

A name may be a trade-mark; and, if it is, the use of it by others will be illegal, if they pass off themselves or their own goods for the firm or the goods of the firm whose name is made use of. 2 Keen, Rolls, 213; 4 Kay & J. Ch. 747. Moreover, if this is done intentionally, the illegality will not be affected by the circumstance that the imitators of the trade-mark are themselves of the same name as those whose mark they imitate. 13 Beav. Rolls, 209; 3 De Gex, M. & G. 896.

9. An action by a firm may be defeated by a defence founded on the conduct of one of the partners. If one member of a firm is guilty of a fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. See Ry. & M. 178; 2 Smale & G. 422; 5 De Gex, M. & G. 160; 2 Beav. Rolls, 128; 10 *id.* 523; 3 Drew. Ch. 3; 3 Term, 454; 9 Barnew. & C. 241. The above rule seems not to rest upon the ground that the act of the one partner is imputable to the firm; it governs when the circumstances are such as to exclude the doctrine of agency. Thus, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still, as *he* cannot dispute the validity of his own act, he and his copartners cannot recover the property so pledged by an action at law. 5 Exch. 489. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm, yet if he actually agrees that such set-off shall be made, and it is made accordingly, he and his copartners cannot afterwards in an action recover the debt due to the firm. 7 Mees. & W. Exch. 204; 7 Mann. & G. 607; 9 Barnew. & C. 532; 1 Lindley, Partn. 169, 170; 1 Maule & S. 751.

10. If a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body, or not. If he did, his liability is not discharged by any change among the members constituting the partnership at the time he became surety, 10 Barnew. & C. 122; 12 East, 400; 2 Campb. 422; 5 Barnew. & Ald. 261; but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged, and consequently any change in it, whether by the death or the retirement of a partner, 7 Hare, Ch. 50; 3 East, 484; 4 Taunt. 673; 4 Russ. 154; 1 Bingh. 452; 3 Q. B. 703; 7 Term, 254; 10 Ad. & E. 30, or by the introduction of a new partner, 2 W. Blackst. 934, immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and, whether he has in fact been damnified by the change or not, he has a right to say,

non in hæc fœdera veni. Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm. 3 Campb. 52; 5 Mees. & W. Exch. 580; 1 Bingh. 452. See 6 Q. B. 514; 4 Bos. & P. 34; 3 Exch. 320; 9 *id.* 197; 2 Ves. & B. Ch. Ir. 79, 83; 8 Clark & F. Hou. L. 214; 1 Lindley, Partn. 172–174; 1 Glyn & J. 389, 409; 2 *id.* 246; De Gex, 300; 2 Rose, Bank. 239, 328; 4 Dow & C. Hou. L. 426; 3 Deas. 305.

FIRMA (L. Lat.). A farm or rent reserved on letting lands, anciently frequently reserved in provisions. Spelman, Gloss.; Cunningham, Law Dict.

A banquet; supper; provisions for the table. DuCange.

A tribute or custom paid towards entertaining the king for one night. Domesday; Cowel.

A rent reserved to be paid in money, called then *alba firma* (white rents, money rents). Spelman, Gloss.

A lease. A letting. *Ad firmam tradidi* (I have farm let). Spelman, Gloss.

A messuage with the house, garden, or lands, etc. connected therewith. Coke, Litt. 5 *a;* Sheppard, Touchst. 93. See FARM.

FIRMA FEODI (L. Lat.). Fee-farm. See FEODI-FIRMA.

FIRMAN. A passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.

FIRMARIUS (L. Lat.). A fermor. A lessee of a term. *Firmarii* comprehend all such as hold by lease for life or lives or for year, by deed or without deed. Coke, 2d Inst. 144, 145; 1 Washburn, Real Prop. 107; 8 Pick. Mass. 312–315; 7 Ad. & E. 637.

FIRST FRUITS. The first year's whole profits of the spiritual preferments. There were three valuations (*valor beneficium*) at different times, according to which these first fruits were estimated, made in 1253, 1288, and 1318. A final valuation was made by the 26 Hen. VIII. c. 3.

They now form a perpetual fund, called Queen Anne's bounty, the income of which is used for the augmentation of poor livings. 1 Sharswood, Blackst. Comm. 284, and notes; 2 Burn, Eccl. Law. 260.

FIRST IMPRESSION. First examination. First presentation to a court for examination or decision. A cause which presents a new question for the first time, and for which, consequently, there is no precedent, is said to be a case of the first impression.

FIRST PURCHASER. In the English law of descent, the first purchaser was he who first acquired an estate in a family which still owns it. A purchase of this kind signifies any mode of acquiring an estate, except by descent. 2 Blackstone, Comm. 220.

FISC. In Civil Law. The treasury of a prince; the public treasury. 1 Low. C. 361.

Hence, to *confiscate* a thing is to appropriate it to the *fisc.* Paillet, Droit Public, 21, n., says that *fiscus,* in the Roman law, signified the treasure of the prince, and *ærarium* the treasure of the state. But this distinction was not observed in France. See Law 10, ff. *De jure Fisci.*

FISCAL. Belonging to the fisc, or public treasury.

FISH. An animal which inhabits the water, breathes by means of gills, swims by the aid of fins, and is oviparous.

Fishes in rivers and in the sea are considered as animals *feræ naturæ;* consequently, no one has any property in them until they have been captured; and, like other wild animals, if, having been taken, they escape and regain their liberty, the captor loses his property in them.

FISH ROYAL. A whale, porpoise, or sturgeon thrown ashore on the coast of England belonged to the king as a branch of his prerogative. Hence these fish are termed royal fish. Hale, *De Jure Mar.* pt. 1, c. 7; 1 Sharswood, Blackst. Comm. 290; Plowd. 305; Bracton, l. 3, c. 3.

FISHERY. A place prepared for catching fish with nets or hooks. This is commonly applied to the place of drawing a seine or net. 1 Whart. Penn. 131, 132.

A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent, Comm. 329.

A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent, Comm. 329.

A several fishery is one by which the party claiming it has the right of fishing, independently of all others, so that no person can have a coextensive right with him in the object claimed; but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814.

A distinction has been made between a common fishery (*commune piscarium*), which may mean for all mankind, as in the sea, and a common of fishery (*communium piscariæ*), which is a right, in common with certain other persons, in a particular stream. 8 Taunt. 183. Mr. Angell seems to think that *common of fishery* and *free fishery* are convertible terms. Law of Watercourses, c. 6, ss. 3, 4.

Mr. Woolrych says that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again it is treated as distinct from either. Law of Waters, etc. 97.

A several fishery, as its name imports, is an exclusive property: this, however, is not to be understood as depriving the territorial owner of his right to a several fishery when he grants to another person permission to fish; for he would continue to be the several proprietor although he should suffer a stranger to hold a coextensive right with himself. Woolrych on Wat. 96.

These distinctions in relation to several, free, and common of fishery are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black-letter books to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal law." 1 Whart. Penn. 132.

2. The right of fishery is to be considered with reference to navigable waters and to waters not navigable; meaning, by the former, those in which the tide ebbs and flows; by the latter, those in which it does not. By the common law of England, the fisheries in all the navigable waters of the realm belong to the crown by prerogative, in such way, nevertheless, as to be common to all the subjects: so that an individual claiming an exclusive fishery in such waters must show it strictly by grant or prescription. In rivers not navigable the fisheries belong to the owners of the soil or to the riparian proprietors. 2 Blackstone, Comm. 39; Hale, *De Jure Mar.* c. 4; 1 Mod. 105; 6 *id.* 73; 1 Salk. 357; Willes, 265; 4 Term, 437; 4 Burr. 2162; Dav. 155; 7 Coke, 16 *a;* Plowd. 154 *a.* The common law has been declared to be the law in several of the United States. 17 Johns. N. Y. 195; 19 *id.* 256; 20 *id.* 90; 6 Cow. N. Y. 518; 3 N. H. 321; 1 Pick. Mass. 180; 4 *id.* 145; 5 *id.* 199; 5 Day, Conn. 72; 1 Baldw. C. C. 60; 5 Mas. C. C. 191; 5 Harr. & J. Md. 193; 2 Conn. 481. But in Pennsylvania, North Carolina, and South Carolina, the right of fishery in the great rivers of those states, though not tide-waters, is held to be vested in the state and open to all the world. 2 Binn. Penn. 475; 14 Serg. & R. Penn. 71; 1 M'Cord, So. C. 580; 3 Ired. No. C. 277. The free right of fishery in navigable waters extends to the taking of shell-fish between high and low water-mark. 2 Bos. & P. 472; 5 Day, Conn. 22; 37 Me. 472.

3. In Massachusetts and Maine, private fisheries are subject to legislative control. 5 Pick. Mass. 199; 9 *id.* 87; 2 Cush. Mass. 257; 6 *id.* 380; 13 Me. 417; 15 *id.* 9; 17 *id.* 106; see, also, 20 Johns. N. Y. 90; and public fisheries may be appropriated by towns in which the waters lie. 4 Mass. 140; 14 *id.* 488. Public fisheries are, of course, subject to legislative regulation. 37 Me. 472; 18 How. 571; 1 Baldw. C. C. 76. Private or several fisheries in navigable waters may be established by the legislatures, or may, perhaps, be acquired by prescription clearly proved, 16 Pet. 369; 6 Cow. N. Y. 369; 5 Ired. No. C. 118; 1 Wend. N. Y. 237; 4 Md. 262; 10 Cush. Mass. 369; and in some of the United States there are such private fisheries, established during the colonial state, which are still held and enjoyed as such: as, in the Delaware. 1 Whart. Penn. 145; 1 Baldw. C. C. 76. The right of private fishery may exist not only in the riparian proprietor, but also in another who has acquired it by grant or otherwise. Coke, Litt. 122 *a*, n. 7; Schultes, Aq. Rights, 40, 41; Angell, Waterc. 184. But see 2 Salk. 637. Such a right is held subject to the use of the waters as a highway, Angell, Tide-Wat. 80–83; 1 South. N. J. 61; 1 Jones, No. C. 299; 1 Campb. 516; 1 Whart. Penn. 136, and to the free passage of the fish. 7 East, 195; 1 Rice, So. C. 447; 5 Pick. Mass. 199; 10 Johns. N. Y. 236; 17 *id.* 195; 4 Mass. 522; 15 Me. 303, 378.

4. Oysters which have been taken, and have thus become private property, may be planted in a new place flowed by tide-water and where there are none naturally, and yet remain the private property of the person planting them. 14 Wend. N. Y. 42; 4 Barb. N. Y. 592; 2 R. I. 434. A state may pass laws prohibiting the citizens of other states from taking oysters within its territorial limits. 4 Wash. C. C. 371; Angell, Tide-Wat. 156.

See, generally, 2 Blackstone, Comm. 39; 3 Kent, Comm. 409; Bacon, Abr. *Prerogative;* Schultes, Aq. Rights; Washburn, Easements.

FISK. In Scotch Law. The revenue of the crown. Generally used of the personal estate of a rebel which has been forfeited to the crown. Bell, Dict.

FISTUCA (Lat.; spelled, also, *festuca;* called, otherwise, *baculum, virga, fustis*). The rod which was transferred, in one of the ancient methods of feoffment, to denote a transfer of the property in land. Spelman, Gloss.

FIXING BAIL. In Practice. Rendering absolute the liability of special bail.

The bail are fixed upon the issue of a *ca. sa.* (*capias ad satisfaciendum*) against the defendant, 2 Nott & M'C. So. C. 569; 16 Johns. N. Y. 117; 3 Harr. N. J. 9; 11 Tex. 15, and a return of *non est* thereto by the sheriff, 4 Day, Conn. 1; 2 Bail. So. C. 492; 3 Rich. So. C. 145; 1 Vt. 276; 7 Leigh, Va. 371, made on the return-day, 2 Metc. Mass. 590; 1 Rich. So. C. 421; unless the defendant be surrendered within the time allowed *ex gratiâ* by the practice of the court. 3 Conn. 316; 9 Serg. & R. Penn. 24; 2 Johns. N. Y. 101; 9 *id.* 84; 1 Dev. No. C. 91; 11 Gill & J. Md. 92; 2 Hill, N. Y. 216; 8 Cal. 552; 17 Ga. 88.

In New Hampshire, 1 N. H. 472, and Massachusetts, 2 Mass. 485, bail are not fixed till judgment on a *sci. fa.* is obtained against them, except by the death of the defendant after a return of *non est* to an execution against him.

The death of the defendant after a return of *non est* by the sheriff prevents a surrender, and fixes the bail inevitably. 5 Binn. Penn. 332; 4 Johns. N. Y. 407; 3 M'Cord, So. C. 49; 4 Pick. Mass. 120; 4 N. H. 29; 12 Wheat. 604. See 1 Ov. Tenn. 224; 1 Ohio, 35; 2 Ga. 331.

In Georgia and North Carolina, bail are not fixed till judgment is obtained against them. 3 Dev. No. C. 155; 2 Ga. 331.

FIXTURES. Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold.

2. Questions frequently arise as to whether given appendages to a house or land are to be considered part of the real estate, or whether they are to be treated as personal property: the latter are movable, the former not.

The annexation may be actual or constructive. 1st. By actual annexation is understood

every mode by which a chattel can be joined or united to the freehold. The article must not be merely laid upon the ground: it must be fastened, fixed, or set into the land, or into some such erection as is unquestionably a part of the realty; otherwise it is in no sense a fixture. Buller, Nisi P. 34; 3 East, 38; 9 *id.* 215; 1 Taunt. 21; Pothier, Traité des Choses, § 1. Locks, iron stoves set in brick-work, posts, and window-blinds, afford examples of actual annexation. See 5 Hayw. No. C. 109; 20 Johns. N. Y. 29; 1 Harr. & J. Md. 289; 3 M'Cord, So. C. 553; 9 Conn. 63; 1 Miss. 508, 620; 7 Mass. 432; 15 *id.* 159; 4 Ala. 314. Some things, however, have been held to be parcel of the realty which are not annexed or fastened to it; for example, deeds or chattels which relate to the title of the inheritance and go to the heir. Sheppard, Touchst. 469. But loose, movable machinery used in prosecuting any business to which the freehold is adapted cannot be considered part of the real estate nor in any way appurtenant to it. 12 N. H. 205. See, however, 2 Watts & S. Penn. 116, 390. So deer in a park, fish in a pond, and doves in a dove-house, go to the heir, and not to the executor, being, like keys and heirlooms, constructively annexed to the inheritance. Sheppard, Touchst. 90; Pothier, Traité des Choses, § 1.

3. The general rule is, that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions: as, first, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate; second, where it has been annexed merely for the purpose of carrying on a trade, 3 East, 88; 4 Watts, Penn. 330; for the fact that it was put up for such a purpose indicates an intention that the thing should not become part of the freehold. See 1 H. Blackst. 260. But if there is a clear intention that the thing should be permanently annexed to the realty, its being used for purposes of trade would not, perhaps, bring the case within one of the exceptions. 1 H. Blackst. 260.

4. With respect to the different classes of persons who claim the right to remove a fixture, it has been held that where the question arises between *an executor and the heir at law* the rule is strict that whatever belongs to the estate to which the fixture appertains will go to the heir; but if the ancestor manifested an intention (which it is said may be inferred from circumstances) that the things affixed should be considered personalty, they will be so treated, and will go to the executor. See Bacon, Abr. *Executor, Administrator;* 2 Strange, 1141; 1 P. Will. Ch. 94; Buller, Nisi P. 34. As between *a vendor and vendee* the same strictness applies as between an executor and an heir at law; for all fixtures which belong to the premises at the time of the sale, or which have been erected by the vendor, whether for purposes of trade or manufacture, or not, as potash-kettles for manufacturing ashes, and the like, pass to the vendee of the land, unless they have been expressly reserved by the terms of the contract. 6 Cow. N. Y. 663; 20 Johns. N.Y. 29. The same rule applies as between mortgagor and mortgagee, 15 Mass. 159; 1 Atk. Ch. 477; 16 Vt. 124; 12 N. H. 205; and as between a *devisee and the executor*, things permanently annexed to the realty at the time of the testator's death pass to the devisee,—his right to fixtures being similar to that of a vendee. 2 Barnew. & C. 80.

5. But as between a *landlord and his tenant* the strictness of the ancient rule has been much relaxed. The rule here is understood to be that a tenant, whether for life, for years, or at will, may sever at any time before the expiration of his tenancy, and carry away, all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of *ornament, domestic convenience,* or *to carry on trade;* provided, always, that the removal can be effected without material injury to the freehold. 16 Day, Conn. 322; 16 Mass. 449; 4 Pick. Mass. 310; 2 Dev. No. C. 376; 1 Bail. So. C. 541; 7 Barb. N. Y. 263; 1 Den. N. Y. 92; 19 N. Y. 234. There have been adjudications to this effect with respect to bakers' ovens; salt-pans; carding-machines; cider mills and furnaces; steam-engines; soap-boilers' vats and copper stills; mill-stones; Dutch barns standing on a foundation of brick-work set into the ground; a varnish-house built upon a similar foundation, with a chimney; and to a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil; and also in regard to things ornamental or for domestic convenience: as, furnaces; stoves; cupboards and shelves; bells and bell-pulls; gas-fixtures; pier- and chimney-glasses, although attached to the wall with screws; marble chimney-pieces; grates; window-blinds and curtains. The decisions, however, are adverse to the removal of hearth-stones, doors, windows, locks and keys; because such things are peculiarly adapted to the house in which they are affixed; also, to all such substantial additions to the premises as conservatories, greenhouses (except those of a professional gardener), stables, pig-sties and other outhouses, shrubbery and flowers planted in a garden. Nor has the privilege been extended to erections for agricultural purposes; though it is difficult to perceive why such fixtures should stand upon a less favored basis than trade fixtures, when the relative importance of the two arts is considered. Taylor, Landl. & Ten. §§ 544–550.

6. The time for exercising the right of removal is a matter of some importance. A tenant for years may remove them at any time before he gives up the possession of the premises, although it may be after his term has expired, and he is holding over. 1 Barnew. & C. 79; 2 East, 88. But tenants for life or at will, having uncertain interests in the

land, have, after the determination of their estates not occasioned by their own fault, a reasonable time within which to remove their fixtures. 3 Atk. Ch. 13.

7. If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed the tenant's right to them does not revive. If, therefore, a tenant desires to have any such things upon the premises after the expiration of his term, for the purpose of valuing them to an incoming tenant, or the like, he should take care to get the landlord's consent; otherwise he will lose his property in them entirely. 1 Barnew. & Ad. 394; 2 Mees. & W. Exch. 450. The rights of parties with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants; and in cases of this kind it becomes a proper criterion by which to determine the character of the article, and whether it is a fixture or not.

See, generally, on this subject, Viner, Abr. *Landlord and Tenant* (A); Bacon, Abr. *Executors*, etc. (H 3); Comyns, Dig. *Biens* (B, C); 2 Sharswood, Blackst. Comm. 281, n. 23; Pothier, Traité des Choses; 4 Coke, 63, 64; Coke, Litt. 53 *a*, and note 5, by Hargrave; F. Moore, 177; Bouvier, Inst. Index; 2 Washburn, Real Prop.

FLAG. A symbol of nationality carried by soldiers, ships, etc., and used in many places where such a symbol is necessary or proper.

For the law upon the subject of nationality of a cargo as determined by the flag, see 5 East, 398; 9 *id.* 283; 3 Bos. & P. 201; 1 C. Rob. Adm. 1; 5 *id.* 16; 1 Dods. Adm. 81, 131; 9 Cranch, 388; 2 Parsons, Marit. Law, 114, 118, n., 129.

FLAG, DUTY OF THE. Saluting the British flag, by striking the flag and lowering the topsails of a vessel, exacted as a tribute to the sovereignty of England over the British seas.

FLAG OF THE UNITED STATES. By the act entitled "An act to establish the flag of the United States," passed April 4, 1818, 3 Story, U. S. Laws, 1667, it is enacted—

§ 1. That, from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such admission.

FLAGRANS CRIMEN. In Roman Law. A term denoting that a crime is being or has just been committed: for example, when a crime has just been committed and the *corpus delictum* is publicly exposed, or if a mob take place, or if a house be feloniously burned, these are severally *flagrans crimen*.

The term used in France is *flagrant délit*. The Code of Criminal Instruction gives the following concise definition of it, art. 41: "Le délit qui se commet actuellement ou qui vient de se commettre, est un flagrant délit."

FLAGRANTI DELICTO (Lat.). In the very act of committing the crime. 4 Blackstone, Comm. 307.

FLAVIANUM JUS (Lat.). A treatise on civil law, which takes its name from its author, Cneius Flavius. It contains forms of actions. Vicat, Voc. Jur.

FLEDUITE. A discharge or freedom from amercements where one having been an outlawed fugitive cometh to the place of our lord of his own accord. Termes de la Ley.

The liberty to hold court and take up the amercements for beating and striking. Cowel.

The fine set on a fugitive as the price of obtaining the king's freedom. Spelman, Gloss.

FLEET. A place of running water where the tide or float comes up.

A prison in London, so called from a river or ditch which was formerly there, on the side of which it stood.

FLETA. The title of an ancient law-book, supposed to have been written by a judge while confined in the Fleet prison.

It is written in Latin, and is divided into six books. The author lived in the reigns of Edward II. and Edward III. See lib. 2, cap. 66, § *Item quod nullus*; lib. 1, cap. 20, § *qui cœperunt*; 10 Coke, pref. Edward II. was crowned A.D. 1306. Edward III. was crowned 1326, and reigned till A.D. 1377. During this period the English law was greatly improved, and the lawyers and judges were very learned. Hale, Hist. Comm. Law, 173. Blackstone, 4 Comm. 427, says of this work "that it was for the most part law until the alteration of tenures took place." The same remark he applies to Britton and Hingham.

FLIGHT. In Criminal Law. The evading the course of justice by a man's voluntarily withdrawing himself. 4 Blackstone, Comm. 387. See FUGITIVE FROM JUSTICE.

FLOAT. A certificate authorizing the party possessing it to enter a certain amount of land. 20 How. 504. See 2 Washburn, Real Prop.

FLOATABLE. A stream capable of floating logs, etc., is said to be floatable. 2 Mich. 519.

FLODEMARK. High-tide mark. Blount. The mark which the sea at flowing water and highest tide makes upon the shore. And. 189; Cunningham, Law Dict.

FLORIDA. The name of one of the new states of the United States of America.

2. It was admitted into the Union by virtue of the act of congress entitled "An act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845. The constitution was adopted January 11, 1839. It provides generally that no person shall be capable of holding or of being elected to any post of honor, profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the state, who shall fight a duel, or send or accept a challenge to fight

a duel, the probable issue of which may be death, or who shall be a second to either party, or who shall in any manner aid and assist in such duel, or shall be knowingly the bearer of such challenge or acceptance, whether the same occur or be committed in or out of the state; that no governor, justice of the supreme court, chancellor, or judge of the state, shall be eligible to election or appointment to any other and different station or office or post of honor or emolument under the state, or to the station of senator or representative in congress, until one year after he shall have ceased to be such governor, justice, chancellor, or judge; no senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit which shall have been created or the emoluments of which shall have been increased during such term, except such as may be filled by election by the people; no member of congress, or person holding or exercising any office of profit under the United States or under any foreign power, shall be eligible as a member of the general assembly or hold or exercise any office of profit under the state; and no person shall ever hold two offices of profit at the same time, except the offices of justice of the peace, notary public, constable, and militia offices. Art. 6, sects. 5–18.

The Legislative Power.

3. This is vested in a senate and a house of representatives, two distinct branches, which together constitute and are entitled "The General Assembly of the State of Florida."

The senate is to consist of not less than one-fourth nor more than one-half as many members as the house. They are elected biennially, on the first Monday of October, for the term of four years. Const. art. 4, sect. 5; Amend.

A senator must be a white citizen of the United States, twenty-five years of age or more, and have been an inhabitant of the state for the two years next preceding his election, and a resident of the district or county for which he is chosen for the last year.

No person who fights a duel in or out of the state, no banking officer of any bank in the state until one year after retiring from such office, no minister of the gospel, no person who has procured his election by bribery, no member of congress, or person holding or exercising any office of profit under the United States or under a foreign power, can be a senator.

4. *The house of representatives* is to consist of not more than sixty members, chosen by the qualified voters biennially, on the first Monday in October, for the term of two years. Representatives must be white citizens of the United States, of the age of twenty-one years or more, and have been inhabitants of the state two years next preceding their election, and the last year residents of the counties for which they are chosen. Const. art. 4, sects. 2–4. The disqualifications are the same as for senators. The sessions of the assembly are to be biennial, commencing on the fourth Monday in November. There are the usual provisions for organization of the two houses, for compelling attendance of members and exempting them from arrest, for punishment and expulsion of members, for securing freedom of debate, for preserving and publishing records of the proceedings, for holding the sessions openly, etc.

The Executive Power.

5. *The governor* is elected for four years by the qualified electors, and is to remain in office until a successor is chosen and qualified, and is not eligible for re-election at the succeeding term. He must be at least thirty years of age, a citizen of the United States (and must have been for ten years, or must have been an inhabitant of Florida at the time of the adoption of the constitution), and have resided in Florida at least five years preceding the day of election. He is commander-in-chief of the army, navy, and militia of the state, must take care that the laws are faithfully executed, may require information from the officers of the executive department, may convene the general assembly by proclamation upon particular occasions, shall from time to time give information to the general assembly, may grant pardons after conviction in all cases except treason and impeachment, and in these cases with the consent of the senate, and he may respite the sentence in these cases until the end of the next session of the senate, may approve or veto bills, and in case of disagreement between the two houses as to the time of adjournment he may adjourn them to such time and place as he may think proper, not beyond the day of the next regular meeting.

In case of a vacancy in the office of governor, the president of the senate acts in his place; and in case of his default the speaker of the house of representatives is to fill the office of governor. Const. art. 3, sect. 21.

The Judicial Power.

6. This, both as to matters of law and equity, is vested in a supreme court, courts of chancery, circuit courts, and justices of the peace. The general assembly may also vest such criminal jurisdiction as may be deemed necessary in corporation courts; but such jurisdiction will not extend to capital offences. Const. art. 5, sect. 1.

The justices of the supreme court, chancellors, and judges of the circuit courts, are elected by the qualified voters; the justices of the supreme court by general ticket, the judges of the circuit courts by districts, and the chancellors either by general ticket or by districts, as the legislature may direct. They hold their offices for the term of six years.

The supreme court is composed of one chief and two associate justices. Whenever, from any cause, any one or two justices of the supreme court are disqualified or disabled from hearing and determining any case brought before them, it shall be the duty of the justices to notify the same to any one or two judges of the circuit courts, as the case may be, and the time and place when the cause may be set for a hearing; and it is the duty of such circuit judge or judges on receiving such notice to attend at the time and place designated, and, in conjunction with the remaining justice or justices of the supreme court, hear and determine the cause of which they are notified; and the said judge or judges of the circuit court, for the time during which he or they are engaged in hearing and determining such case, constitute a part of the supreme court.

No justice can sit as judge or take any part in the appellate court in the trial or hearing of any case which has been decided by him in the court below.

7. The *supreme* court, except in cases otherwise directed in the constitution, has appellate jurisdiction only. The court, however, has power to issue writs of injunction, mandamus, *quo warranto*, *habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence and control of all other courts. Art. 5, sect. 2.

It has appellate jurisdiction in all cases brought by appeal or writ of error from the several circuit courts, when the matter in controversy exceeds in amount or value fifty dollars.

The circuit court. The state is divided into circuits, and the circuit courts held within such circuits have original jurisdiction in all matters, civil and criminal, within the state, not otherwise excepted in the constitution. The circuit courts are

to exercise equity jurisdiction until the general assembly provides otherwise.

FLORIN (called, also, *Gulder*). A coin, originally made at Florence.

The name formerly applied to coins, both of gold and silver, of different values in different countries. In many parts of Germany, the florin, which is still the integer or money-unit in those countries, was formerly a gold piece, value about two dollars and forty-two cents. It afterwards became a silver coin, variously rated at from forty to fifty-six cents, according to locality; but by the German conventions of 1837 and 1838 the rate of nine-tenths fine and one hundred and sixty-three and seven-tenths grains troy per piece was adopted, making the value forty-one cents. This standard is the only one now used in Germany; and the florin or guilder of the Netherlands is, also, coined at nearly the thousandths), the value being the same. The florin same standard (weight, one hundred and sixty-six grains; fineness, eight hundred and ninety-six of Tuscany is only twenty-seven cents in value.

FLOTAGES. Things which float by accident on the sea or great rivers. Blount.

The commissions of water-bailiffs. Cunningham, Law Dict.

FLOTSAM, FLOTSAN. A name for the goods which float upon the sea when cast overboard for the safety of the ship, or when a ship is sunk. Distinguished from *Jetsam* and *Ligan*. Bracton, lib. 2, c. 5; 5 Coke, 106; Comyns, Dig. *Wreck*, A; Bacon, Abr. *Court of Admiralty*, B; 1 Blackstone, Comm. 292.

FLOUD-MARKE. Flood-mark, which see.

FLUMEN (L. Lat.). **In Civil Law.** The name of a servitude which consists in the right of turning the rain-water, gathered in a spout, on another's land. Erskine, Inst. b. 2, t. 9, n. 9; Vicat, Voc. Jur. See STILLICIDIUM.

FOCALE (L. Lat.). **In Old English Law.** Firewood. The right of taking wood for the fire. *Fire-bote*. Cunningham, Law Dict.

FODERUM (L. Lat.). Food for horses or other cattle. Cowel.

In feudal law, fodder and supplies provided as a part of the king's prerogative for use in his wars or other expeditions. Cowel.

FŒDUS (Lat.). A league; a compact.

FŒNUS NAUTICUS (Lat.). The name given to marine interest.

The amount of such interest is not limited by law, because the lender runs so great a risk of losing his principal. Erskine, Inst. b. 4, t. 4, n. 76. See MARINE INTEREST.

FŒTICIDE. In Medical Jurisprudence. Recently this term has been applied to designate the act by which criminal abortion is produced. 1 Beck, Med. Jur. 288; Guy, Med. Jur. 133. See INFANTICIDE.

FŒTURA (L. Lat.). **In Civil Law.** The produce of animals, and the fruit of other property, which are acquired to the owner of such animals and property by virtue of his right. Bowyer, Mod. C. L. c. 14, p. 81.

FŒTUS (Lat.). **In Medical Jurisprudence.** An unborn child. An infant *in ventre sa mère*.

2. Until about the middle of the fourth month it is called embryo. At that time the development of the principal organs begins to be evident and they present something of their mature form.

Although it is often important to know the age of the fœtus, there is great difficulty in ascertaining the fact with the precision required in courts of law. We are confident that nothing on this subject can be learned solely from its weight, size, or progress towards maturity.

The great difference between children at birth, as regards their weight and size, is an indication of their condition while within the womb, and is a sufficient evidence that nothing can be decided as to the age of the fœtus by its weight and size at different periods of its existence.

3. Thousands of healthy infants have been weighed immediately after birth, and the extremes have been found to be two and eighteen pounds. It is very rare indeed to find any weighing as little as two pounds, but by no means uncommon to find them weighing four pounds. So it is with the length, which varies as much as that of the adult does from the average height of the race.

Neither can any thing positive be learned from the progress of development; for although the condition of the bones, cartilages, and other parts will generally mark with tolerable accuracy the age of a healthy fœtus, yet an uncertainty will arise when it is found to be unhealthy. It has been clearly proved, by numerous dissections of new-born children, that the fœtus is subject to diseases which interfere with the proper formation of parts, exhibiting traces of previous departure from health, which had interfered with the proper formation of parts and arrested the process of development.

4. Interesting as the different periods of development may be to the philosophical inquirer, they cannot be of much value in legal inquiries, from their extreme uncertainty in denoting precisely the age of the fœtus by unerring conditions.

An approximation may be had by grouping all the facts connected with the history of the conception, with the progress of the ovum to maturity. See Dunglison, Human Physiology, 391; 1 Beck, Med. Jur. 239; Billord on Infants, Stewart trans. 36, 37, and App.; Ryan, Med. Jur. 137; 1 Chitty, Med. Jur. 403; Dean, Med. Jur. And see the articles BIRTH; DEAD-BORN; FŒTICIDE; IN VENTRE SA MERE; INFANTICIDE; LIFE; QUICK WITH CHILD.

FOLC-GEMOTE (spelled, also, *folkmote*, *folcmote*, and *folcgemote*; from *folc*, people, and *gemote*, an assembly).

A general assembly of the people in a town, burgh, or shire.

The term was used to denote a court or judicial tribunal among the Saxons, which possessed substantially the powers afterwards exercised by the county courts and sheriff's tourn. These powers embraced the settlement of small claims, taking the oath of allegiance, preserving the laws, and making the necessary arrangements for the preservation of safety, peace, and the public weal. It appears that complaints were to be made before the folk-gemote held in London annually, of any mismanagement by the mayor and aldermen of that city. It was called, also, a *burg-gemote* when held in a *burgh*, and *shire-gemote* when held for a county. See Manwood, For. Laws; Spelman, Gloss.; De Brady, Gloss.; Cunningham, Law Dict.

FOLCLAND (Sax.). Land of the people. Spelman, Gloss. Said by Blackstone to be land held by no assurance in writing, but to have been distributed amongst the common people at the pleasure of the lord, and resumable at his discretion. 2 Blackstone, Comm. 90; Cowel.

It was, however, probably, land which belonged to the community, and which, being parcelled out for a term to people of all conditions, reverted again to the commons at the expiration of the term. 1 Spence, Eq. Jur. 8; Wharton, Law Dict. 2d Lond. ed.

FOLC-RIGHT. The common right of all the people. 1 Blackstone, Comm. 65, 67.

FOLD-COURSE. In English Law. Land used as a sheep-walk.

Land to which the sole right of folding the cattle of others is appurtenant: sometimes it means merely such right of folding. The right of folding on another's land, which is called common foldage. Coke, Litt. 6 *a*, note 1; W. Jones, 375; Croke Car. 432; 2 Ventr. 139.

FOLIO. A leaf. The references to the writings of the older law-authors are usually made by citing the folio, as it was the ancient custom to number the folio instead of the page, as is done in modern books.

A certain number of words specified by statute as a *folio*. Wharton. Originating, undoubtedly, in some estimate of the number of words which a *folio* ought to contain.

FONSADERA. In Spanish Law. Any tribute or loan granted to the king for the purpose of enabling him to defray the expenses of a war.

FOOT. A measure of length, containing one-third of a yard, or twelve inches. See ELL. Figuratively it signifies the conclusion, the end: as, the foot of the fine, the foot of the account.

FOOT OF THE FINE. The fifth part of the conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 2 Blackstone, Comm. 351.

FOOTGELD. An amercement for not cutting out the ball or cutting off the claws of a dog's feet (expeditating him). To be quit of *footgeld* is to have the privilege of keeping dogs in the forest *unlawed* without punishment or control. Manwood, For. Laws, pt. 1, p. 86; Crompton, Jur. 197; Termes de la Ley; Cunningham, Law Dict.

FOR THAT. In Pleading. Words used to introduce the allegations of a declaration. "For that" is a positive allegation; "For that whereas" is a recital. Hammond, Nisi P. 9.

FOR WHOM IT MAY CONCERN. A general clause in a policy of insurance, intended to apply to all persons who have any insurable interest. 1 Phillips, Ins. 152. This phrase, or some similar one, must be inserted, to give any one but the party named as the insured rights under the policy. See 1 Term, 313, 464; 1 Bos. & P. 316, 345; 1 Campb. 538; 2 Maule & S. 485; 12 Mass. 80; 13 *id.* 589; 6 Pick. Mass. 198; 2 Parsons, Marit. Law, 29, 477.

FORATHE. One who can take oath for another who is accused of one of the lesser crimes. Manwood, For. Laws, p. 3; Cowel.

FORBANER. To deprive forever. To shut out. 9 Ric. II. cap. 2; 6 Hen. VI. cap. 4; Cowel.

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit. See ASSUMPSIT; CONSIDERATION.

FORCE. Restraining power; validity; binding effect.

A law may be said to be in force when it is not repealed, or, more loosely, when it can be carried into practical effect. An agreement is in force when the parties to it may be compelled to act, or are acting, under its terms and stipulations.

Strength applied. Active power. Power put in motion.

Actual force is where strength is actually applied or the means of applying it are at hand. Thus, if one break open a gate by violence, it is lawful to oppose force to force. See 2 Salk. 641; 8 Term, 78, 357. See BATTERY.

Implied force is that which is implied by law from the commission of an unlawful act. Every trespass *quare clausum fregit* is committed with implied force. 1 Salk. 641; Coke, Litt. 57 *b*, 161 *b*, 162 *a*; 1 Saund. 81, 140, n. 4; 5 Term, 361; 8 *id.* 78, 358; Bacon, Abr. *Trespass*; 3 Wils. 18; Fitzherbert, Nat. Brev. 890; 6 East, 287; 5 Bos. & P. 365, 454.

Mere nonfeasance cannot be considered as force, generally. 2 Saund. 47; Coke, Litt. 161; Bouvier, Inst. Index.

If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request. 2 Salk. 641; 8 Term, 78, 357. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted. 8 Term, 357, 358; 4 Cush. Mass. 441. But in other cases the words "*vi et armis*," or "with force and arms," is sufficient.

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now necessary in declarations, to denote that the act complained of was done with violence. 2 Chitty, Plead. 846, 850.

FORCED HEIRS. In Louisiana. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. La. Civ. Code, art. 1482. As to the portion of the estate they are entitled to, see LEGITIME. As to the causes for which forced heirs may be deprived of this right, see DISINHERISON.

FORCHEAPUM. Pre-emption. Blount.

FORCIBLE ENTRY OR DETAINER. A forcible entry or detainer consists

in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law. Comyns, Dig.; Gabbett, Crim. Law.

2. To make an entry forcible, there must be such acts of violence, or such threats, menaces, or gestures, as may give reason to apprehend personal injury or danger in standing in defence of the possession. But the force made use of must be more than is implied in any mere trespass. 8 Term, 357; 10 Mass. 409; 1 Add. Penn. 14; Taylor, Landl. & Ten. § 786.

Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. And the plea of ownership is no justification for the party complained of; for no man may enter even upon his own lands in any other than a peaceable manner. Nor will he be excused if he entered to make a distress or to enforce a lawful claim, nor if possession was ultimately obtained by entreaty. 3 Mass. 215; 1 Dev. & B. No. C. 324; 8 Litt. Ky. 184; 8 Term, 361.

3. Upon an indictment for this offence at common law, the entry must appear to have been accompanied by a public breach of the peace; and, upon a conviction for either a forcible entry or detainer, the court will award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him. 1 Ld. Raym. 512; 8 Term, 360; Hawkins, Pl. Cr. b. 1, c. 64, § 45; Croke Jac. 151; Al. 50; Taylor, Landl. & Ten. § 794.

FORDAL (Sax.). A butt or headband. A piece.

FORE (Sax.). Before. (Fr.) Out. Kelham.

FORECLOSE. To shut out; to bar. Used of the process of destroying an equity of redemption. 1 Washburn, Real Prop. 589; Daniell, Chanc. Pract. 1204; Coote, Mortg. 511; 9 Cow. N. Y. 382.

FORECLOSURE. In Practice. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever.

2. This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption: in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

3. In some cases, however, the mortgagee obtains a decree for a sale of the land under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority. This practice has been adopted in Indiana, Kentucky, Maryland, South Carolina, Tennessee, and Virginia. 4 Kent, Comm. 180. When it is the practice to foreclose without a sale, its severity is mitigated by enlarging the time of redemption from six months to six months, or for shorter periods, according to the equity arising from the circumstances. *Id.* See 2 Johns. Ch. N. Y. 100; 9 Cow. N. Y. 346; 1 Sumn. C. C. 401; 7 Conn. 152; 5 N. H. 30; 1 Hayw. No. C. 482; 5 Ohio, 554; 5 Yerg. Tenn. 240; 2 Pick. Mass. 540; 4 *id.* 6; 5 *id.* 418; 2 Gall. C. C. 154; 4 Me. 495; Bouvier, Inst. Index; 1 Washburn, Real Prop. 589; Daniell, Chanc. Pract. 1204.

FOREFAULT. In Scotch Law. To forfeit; to lose.

FOREHAND RENT. In English Law. A species of rent which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent. 1 Term, 486; 3 *id.* 461; 3 Atk. Ch. 473; Crabb, Real Prop. § 155.

FOREIGN. That which belongs to another country; that which is strange. 1 Pet. 343.

Every nation is foreign to all the rest; and the several states of the American Union are foreign to each other with respect to their municipal laws. 2 Wash. C. C. 282; 4 Conn. 517; 6 *id.* 480; 2 Wend. N. Y. 411; 1 Dall. Penn. 458, 463; 6 Binn. Penn. 321; 12 Serg. & R. Penn. 203; 2 Hill, So. C. 319; 1 D. Chipm. Vt. 303; 7 T. B. Monr. Ky. 585; 5 Leigh, Va. 471; 3 Pick. Mass. 293.

But the reciprocal relations between the national government and the several states composing the United States are not considered as foreign, but domestic. 5 Pet. 398; 6 *id.* 317; 9 *id.* 607; 4 Cranch, 384; 4 Gill & J. Md. 1, 63.

FOREIGN ANSWER. An answer not triable in the county where it is made. Stat. 15 Hen. VI. c. 5; Blount.

FOREIGN APPOSER. An officer in the exchequer who examines the sheriff's *estreats*, comparing them with the records, and apposeth (interrogates) the sheriff what he says to each particular sum therein. Coke, 4th Inst. 107; Blount; Cowel, *Foreigne*. The word is written *opposer*, *opposeth*, by Lord Coke; and this signification corresponds very well to the meaning given by Blount, of examiner (interrogator) of the sheriff's accounts.

FOREIGN ATTACHMENT. A process by virtue of which the property of an absent debtor is seized for the purpose of compelling an appearance, and, in default of that, to pay the claim of the plaintiff. See ATTACHMENT.

FOREIGN COINS. Coins issued by the authority of a foreign government.

There were several acts of congress passed which rendered certain foreign gold and silver coins a legal tender in payment of debts upon certain prescribed conditions as to fineness and weight. In making a report in 1854 on this subject, the late

director of the mint, Mr. Snowdon, suggested that there was no propriety or necessity for legalizing the circulation of the coins of other countries, and that in no other nation, except in the case of some colonies, was this mixture of currencies admitted by law, either on the score of courtesy or convenience; and he recommended that if the laws which legalize foreign coins should be repealed, it would be proper to require an annual assay report upon the weight and fineness of such foreign coins as frequently reach our shores, with a view to settle and determine their marketable value. Ex. Doc. No. 68, 33d Cong. 1st Session. This suggestion was subsequently repeated, and finally led to the passage of the act of Feb. 21, 1857, 11 U. S. Stat. at Large, 163, the third section of which is as follows:—That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are repealed; but it shall be the duty of the director of the mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof.

FOREIGN COUNTY. Another county. It may be in the same kingdom, it will still be foreign. See Blount, *Foreign*.

FOREIGN ENLISTMENT ACT. The statute 59 Geo. III. c. 69, for preventing British citizens from enlisting as sailors or soldiers in the service of a foreign power. Wharton, Lex. 2d Lond. ed.; 4 Stephen, Comm. 226.

FOREIGN JUDGMENT. The judgment of a foreign tribunal.

2. The various states of the United States are in this respect considered as foreign to each other. In Louisiana it has been decided that a judgment rendered by a Spanish tribunal under the former government of that state is not a foreign judgment. 4 Mart. La. 301, 310.

Such judgments may be evidenced by *exemplifications* certified under the great seal of the state or country where the judgment is recorded, or under the seal of the court where the judgment remains, Gilbert, Ev. 26; 1 Greenleaf, Ev. § 501; by *a copy* proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. 2 Cranch, 238; 5 *id.* 335; 2 Caines, N. Y. 155; 7 Johns. N. Y. 514; 8 Mass. 273. The acts of foreign tribunals which are recognized by the law of nations, such as courts of admiralty and the like, are sufficiently authenticated by copies under seal of the tribunal. 5 Cranch, 335; 3 Conn. 171.

3. With regard to judgments in courts of sister states of the United States, it is enacted by the act of May 26, 1790, that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken; and by the act of March 27, 1804, that from and after the passage of this act all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken; and the provisions of both acts shall extend to the records, etc. of the territories.

As to the effect to be given to foreign judgments, see CONFLICT OF LAWS; Story, Conflict of Laws; Dalloz, *Etranger*.

FOREIGN LAWS. The laws of a foreign country.

2. The courts do not judicially take notice of foreign laws; and they must, therefore, be proved as facts. Cowp. 144; 3 Esp. Cas. 163; 3 Campb. 166; 2 Dow & C. Hou. L. 171; 1 Cranch, 38; 2 *id.* 187, 236, 237; 6 *id.* 274; 2 Harr. & J. Md. 193; 3 Gill & J. Md. 234; 4 Conn. 517; 4 Cow. N. Y. 515, 516, note; 1 Pet. C. C. 229; 8 Mass. 99; 1 Paige, Ch. N. Y. 220; 10 Watts, Penn. 158. The manner of proof varies according to circumstances. As a general rule, the best testimony or proof is required; for no proof will be received which presupposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received. 2 Cranch, 237.

Exemplified or sworn copies of written laws and other public documents must, as a general thing, be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admitted. *Id.*

When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence. 1 Cranch, 38; 1 Dall. Penn. 462; 6 Binn. Penn. 321; 12 Serg. & R. Penn. 203.

When foreign laws cannot be proved by some mode which the law respects as being of equal authority to an oath, they must be verified by the sanction of an oath.

3. The usual modes of authenticating them are by an exemplification under the great seal of a state, or by a copy proved by oath to be a true copy, or by a certificate of an officer authorized by law, which must itself be duly authenticated. 2 Cranch, 238; 2 Wend. N. Y. 411; 6 *id.* 475; 5 Serg. & R. Penn. 523; 15 *id.* 84; 2 Wash. C. C. 175.

Foreign unwritten laws, customs, and usages may be proved, and are ordinarily proved, by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact. 15 Serg. & R. Penn. 87; 2 La. 154.

Witnesses in Cuba examined under a commission touching the execution of a will testified, in general terms, that it was executed according to the law of that country; and, it not appearing from the testimony that there was any written law upon the subject, the proof was held sufficient. 8 Paige, Ch. N. Y. 446.

A defendant pleaded infancy in an action upon a contract governed by the law of Jamaica: held that the law was to be proven as a matter of fact, and that the burden lay upon him to show it. 8 Johns. N. Y. 190.

4. Proof of such unwritten law is usually made by the testimony of witnesses learned in the law and competent to state it correctly under oath. 2 Cranch, 237; 1 Pet. C. C. 225; 2 Wash. C. C. 175; 15 Serg. & R. Penn. 84; 4 Johns. Ch. N. Y. 520; Cowp. 174; 2 Hagg. Adm. App. 15–144.

In England, certificates of persons in high authority have been allowed as evidence in such cases. 3 Hagg. Eccl. 767, 769.

The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is of itself the highest evidence, and no further proof is required of such public seal. 2 Cranch, 238; 2 Conn. 85; 1 Wash. C. C. 363; 4 Dall. Penn. 413, 416; 6 Wend. N. Y. 475; 9 Mod. 66.

But the seal of a foreign court is not, in general, evidence without further proof, and must, therefore, be established by competent testimony. 3 Johns. N. Y. 310; 2 Harr. & J. Md. 193; 4 Cow. N. Y. 526, n.; 3 East, 221.

5. By the act of May 26, 1790, it is provided "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto." See RECORD; AUTHENTICATION. It may here be observed that the rules prescribed by acts of congress do not exclude every other mode of authentication, and that the courts may admit proof of the acts of the legislatures of the several states, although not authenticated under the acts of congress. Accordingly, a printed volume, purporting on its face to contain the laws of a sister state, is admissible as *primâ facie* evidence to prove the statute law of that state. 4 Cranch, 384; 12 Serg. & R. Penn. 203; 6 Binn. Penn. 321; 5 Leigh, Va. 571.

The effect of foreign laws when proved is properly referable to the court: the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign laws to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue. Story, Confl. Laws, § 638; 2 Harr. & J. Md. 193; 3 *id.* 234, 242; 4 Conn. 517; Cowp. 174.

FOREIGN MATTER. Matter which must be tried in another county. Blount. Matter done or to be tried in another county. Cowel.

FOREIGN PLEA. See PLEA.

FOREIGN PORT. A port or place which is wholly without the United States. 19 Johns. N. Y. 375; 2 Gall. C. C. 4, 7; 1 Brock. C. C. 235. A port without the jurisdiction of the court. 1 Dods. Adm. 201; 4 C. Rob. Adm. 1; 1 W. Rob. Adm. 29; 6 Exch. 886; 1 Blatchf. & H. Adm. 66, 71. Practically, the definition has become, for most purposes of maritime law, a port at such distance as to make communication with the owners of the ship *very* inconvenient or almost impossible. See 1 Parsons, Marit. Law, 512, n.

FOREIGN VOYAGE. A voyage whose termination is within a foreign country. 3 Kent, Comm. 177, n. The length of the voyage has no effect in determining its character, but only the place of destination. 1 Stor. C. C. 1; 3 Sumn. C. C. 342; 2 Bost. Law Rep. 146; 2 Wall. C. C. 264; 1 Parsons, Marit. Law, 31.

FOREIGNER. One who is not a citizen. Cowel.

In the Old English Law, it seems to have been used of every one not an inhabitant of a city, at least with reference to that city. 1 H. Blackst. 213. See, also, Cowel, *Foreigne.*

In the United States, any one who was born in some other country than the United States, and who owes allegiance to some foreign state or country. 1 Pet. 343, 349. An alien. See ALIEN; CITIZEN.

FOREJUDGE. To deprive a man of the thing in question by sentence of court.

Among foreign writers, says Blount, forejudge is to banish, to expel. In this latter sense the word is also used in English law of an attorney who has been expelled from court for misconduct. Cowel; Cunningham, Law Dict.

FOREMAN. The presiding member of a grand or petit jury.

FORENSIS. Forensic. Belonging to court. *Forensis homo*, a man engaged in causes. A pleader; an advocate. Vicat, Voc. Jur.; Calvinus, Lex.

FOREST. A certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his princely delight and pleasure, having a peculiar court and officers. Manwood, For. Laws, cap. 1, num. 1; Termes de la Ley; 1 Blackstone, Comm. 289.

A royal hunting-ground which lost its peculiar character with the extinction of its courts or when the franchise passed into the hands of a subject. Spelman, Gloss.; Cowel; Manwood, For. Laws, cap. 1; 2 Blackstone, Comm. 83.

FOREST COURTS. In English Law. Courts instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which the deer were lodged. They comprised the courts of attachments, of regard, of sweinmote, and of justice-seat (which several titles see); but since the revolution of 1688 these courts, it is said, have gone into absolute desuetude. 3 Stephen, Comm. 439–441; 3 Blackstone, Comm. 71–74. But see 8 Q. B. 981.

FORESTAGIUM. A tribute payable to the king's foresters. Cowel.

FORESTALL. To intercept or obstruct a passenger on the king's highway. Cowel; Blount. To beset the way of a tenant so as to prevent his coming on the premises. 3 Blackstone, Comm. 170. To intercept a deer on his way to the forest before he can regain it. Cowel.

FORESTALLER. One who commits the offence of forestalling. Used, also, to denote the crime itself: namely, the obstruction of the highway, or hindering a tenant from coming to his land. 3 Blackstone, Comm. 170. Stopping a deer before he regains the forest. Cowel.

FORESTALLING. Obstructing the way. Intercepting a person on the highway.

FORESTALLING THE MARKET. Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowel; Blount; 4 Blackstone, Comm. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions. Coke, 3d Inst. 196; Bacon, Abr.; 1 Russell, Crimes, 169; 4 Blackstone, Comm. 158; Hawkins, Pl. Cr. b. 1, c. 80, § 1. See 13 Viner, Abr. 430; 1 East, 132; 14 *id.* 406; 15 *id.* 511; 3 Maule & S. 67; Dane, Abr. Index.

FORESTARIUS. A forester. An officer who takes care of the woods and forests. *De forestario apponendo*, a writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste. Bracton, 316; DuCange.

FORESTER. A sworn officer of the *forest*, appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk. These letters patent were generally granted during good behavior; but sometimes they held the office in fee. Blount; Cowel.

FORETHOUGHT FELONY. In Scotch Law. Murder committed in consequence of a previous design. Erskine, b. iv. tit. 4, c. 50; Bell, Dict.

FORFANG. A taking beforehand. A taking provisions from any one in fairs or markets before the king's purveyors are served with necessaries for his majesty. Blount; Cowel.

FORFEIT. To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrongdoer.

This is the essential meaning of the word, whether it be that an offender is to forfeit a sum of money, or an estate is to be forfeited to a former owner for a breach of condition, or to the king for some crime. Cowel says that *forfeiture* is general and *confiscation* a particular forfeiture to the king's exchequer. The modern distinction, however, *seems* to refer rather to a difference between forfeiture as relating to acts of the owner and confiscation as relating to acts of the government. 1 Stor. C. C. 134; 13 Pet. 157; 11 Johns. N. Y. 293. Confiscation is more generally used of an appropriation of an enemy's property; forfeiture, of the taking possession of property to which the owner, who may be a citizen, has lost title through violation of law. See 1 Kent, Comm. 67; 1 Stor. C. C. 134.

FORFEITURE. A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone, or the public together with himself, hath sustained. 2 Blackstone, Comm. 267. A sum of money to be paid by way of penalty for a crime. 21 Ala. N. S. 672; 10 Gratt. Va. 700.

2. *Forfeiture by alienation.* By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. 2 Blackstone, Comm. 274.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainder-man or reversioner. 4 Kent, Comm. 81, 82, 424; 3 Dall. Penn. 486; 5 Ohio, 30; 1 Pick. Mass.

318; 1 Rice, So. C. 459; 2 Rawle, Penn. 168; 1 Wash. Va. 381; 11 Conn. 553; 22 N. H. 500; 21 Me. 372. See, also, Stearns, Real Act. 11; 4 Kent, Comm. 84; 2 Sharswood, Blackst. Comm. 121, n.; Williams, Real Prop. 25; 5 Dane, Abr. 6–8; 1 Washburn, Real Prop. 92, 197.

3. *Forfeiture for crimes.* Under the constitution and laws of the United States, Const. art. 3, § 3; Act of April 30, 1790, § 24 (1 Story, U. S. Laws, 88), forfeiture for crimes is nearly abolished. And when it occurs the state recovers only the title which the owner had. 4 Mas. C. C. 174. See, also, Dalrymple, Feuds, c. 4, pp. 145–154; Foster, Crim. Law, 95; 1 Washburn, Real Prop. 92.

4. *Forfeiture by non-performance of conditions.* An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or implied by law, from a principle of natural reason. 2 Blackstone, Comm. 281; Littleton, § 361; 1 Preston, Est. 478; Tudor, Lead. Cas. 794, 795; 5 Pick. Mass. 528; 2 N. H. 120; 5 Serg. & R. Penn. 375; 32 Me. 394; 18 Conn. 535; 12 Serg. & R. Penn. 190. Such forfeiture may be waived by acts of the person entitled to take advantage of the breach. 1 Conn. 79; 1 Johns. Cas. N. Y. 126; Walker, Am. Law, 299; 1 Washburn, Real Prop. 454.

Forfeiture by waste. Waste is a cause of forfeiture. 2 Blackstone, Comm. 283; Coke, 2d Inst. 299; 1 Washburn, Real Prop. 118.

See, generally, 2 Blackstone, Comm. ch. 18; 4 *id.* 382; Bouvier, Inst. Index; 2 Kent, Comm. 318; 4 *id.* 422; 10 Viner, Abr. 371, 394; 13 *id.* 436; Bacon, Abr. *Forfeiture;* Comyns, Dig.; Dane, Abr.; 1 Brown, Civ. Law, 252; Considerations on the Law of Forfeiture for High Treason, London ed. 1746; 1 Washburn, Real Prop. 91, 92, 197, 118.

FORFEITURE OF A BOND. A failure to perform the condition on which the obligee was to be excused from the penalty in the bond. Courts of equity and of law in modern practice will relieve from the forfeiture of a bond; and, upon proper cause shown, criminal courts will, in general, relieve from the forfeiture of a recognizance to appear. See 3 Yeates, Penn. 93; 2 Wash. C. C. 442; 2 Blackf. Ind. 104, 200; 1 Ill. 257.

FORFEITURE OF MARRIAGE. A penalty incurred by a ward in chivalry when he or she married contrary to the wishes of his or her guardian in chivalry.

2. The latter, who was the ward's lord, had an interest in controlling the marriage of his female wards, and he could exact a price for his consent; and at length it became customary to sell the marriage of wards of both sexes. 2 Blackstone, Comm. 70.

3. When a male ward refused an equal match provided by his guardian, he was obliged, on coming of age, to pay him the value of the marriage,—that is, as much as he had been *bonâ fide* offered for it, or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value although he might have made no tender of the marriage. Coke, Litt. 82 *a;* Coke, 2d Inst. 92; 5 Coke, 126 *b;* 6 *id.* 70 *b.*

4. When a male ward between the age of fourteen and twenty-one refused to accept an offer of an equal match (one without disparagement), and during that period formed an alliance elsewhere without his guardian's permission, he incurred forfeiture of marriage, —that is, he became liable to pay double the value of the marriage. Coke, Litt. 78 *b*, 82 *b.*

FORGAVEL. A small rent reserved in money; a quit-rent.

FORGERY. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. 2 Bishop, Crim. Law, § 432.

The fraudulent making and alteration of a writing to the prejudice of another man's right. 4 Blackstone, Comm. 247.

Bishop, 2 Crim. Law, § 432, has collected seven definitions of forgery, and justly remarks that the books abound in definitions. Coke says the term is "taken metaphorically from the smith, who beateth upon his anvil and forgeth what fashion and shape he will." Coke, 3d Inst. 169.

2. *The making of a whole written instrument* in the name of another with a fraudulent intent is undoubtedly a sufficient making; but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery, 1 Strange, 18; 1 And. 101; 5 Esp. 100; 5 Strobh. So. C. 581; and this, although it be afterwards executed by a person ignorant of the deceit. 2 East, Pl. Cr. 855.

The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versâ*, will also be a forgery. 11 Gratt. Va. 822; 1 Add. Penn. 44. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procure the signature of such sick person to be affixed to the paper without revealing to him the legacies thus fraudulently inserted. Noy, 101; F. Moore, 759, 760; Coke, 3d Inst. 170; 1 Hawkins, Pl. Cr. c. 70, s. 2; 2 Russell, Crimes, 318; Bacon, Abr. *Forgery* (A).

It has even been intimated by Lord Ellenborough that a party who makes a copy of a receipt and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery. 5 Esp. 100.

3. It is a sufficient making where, in the writing, the party assumes the name and character of a person in existence. 2 Russell, Crimes, 327. But the adoption of a false *description* and *addition* where a false name

is not assumed and there is no person answering the description, is not a forgery. 1 Russ. & R. 405.

Making an instrument in a fictitious name, or the name of a non-existing person, is as much a forgery as making it in the name of an existing person, 2 East, Pl. Cr. 957; 2 Russell, Crimes, 328; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person. 2 Leach, Cr. Cas. 775; 2 East, Pl. Cr. 963. But the correctness of this decision has been doubted. Roscoe, Crim. Ev. 384.

4. Though, in general, a party cannot be guilty of forgery by a mere *non-feasance*, yet if in drawing a will he should fraudulently omit a legacy which he had been directed to insert, and by the omission of such bequest it would cause a material alteration in the limitation of a bequest to another, as, where the omission of a devise of an estate for life to one causes a devise of the same lands to another to pass a present estate which would otherwise have passed a remainder only, it would be a forgery. F. Moore, 760; Noy, 101; 1 Hawkins, Pl. Cr. c. 70, s. 6; 2 East, Pl. Cr. 856; 2 Russell, Crimes, 320.

It may be observed that the offence of forgery may be complete without a publication of the forged instrument. 2 East, Pl. Cr. 855; 3 Chitty, Crim. Law, 1038.

5. *With regard to the thing forged*, it may be observed that it has been holden to be forgery at common law fraudulently to falsify or falsely make records and other matters of a public nature, 1 Rolle, Abr. 65, 68; a parish register, 1 Hawkins, Pl. Cr. c. 70; a letter in the name of a magistrate, or of the governor of a gaol directing the discharge of a prisoner. 6 Carr. & P. 129; Mood. Cr. Cas. 379.

With regard to private writings, forgery may be committed of any writing which, if genuine, would operate as the foundation of another man's liability or the evidence of his right, 3 Greenleaf, Ev. § 103; 2 Mass. 397; 12 Serg. & R. Penn. 237; 8 Yerg. Tenn. 150: as, a letter of recommendation of a person as a man of property and pecuniary responsibility, 2 Greenleaf, Ev. § 365; an acceptance of a conditional order for the delivery of goods, 3 Cush. Mass. 150; a false testimonial to character, Templ. & M. Cr. Cas. 207; 1 Den. Cr. Cas. 492; Dearsl. Cr. Cas. 285; a railway-pass, 2 Carr. & K. 604; a railroad-ticket, 3 Gray, Mass. 441; or fraudulently to testify or falsely to make a deed or will. 1 Hawkins, Pl. Cr. b. 1, c. 70, § 10. Forgery may be of a printed or engraved as well as of a written instrument. 3 Gray, Mass. 441; 9 Pick. Mass. 312. A forgery must be of some document or writing: therefore the printing an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery. 1 Dearsl. & B. Cr. Cas. 460.

6. *The intent* must be to defraud another; but it is not requisite that any one should have been injured: it is sufficient that the instrument forged might have proved prejudicial. 3 Gill & J. Md. 220; 4 Wash. C. C. 726. It has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of the defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner. Russ. & R. 291. See Russell, Crimes, b. 4, c. 32, s. 3; 2 East, Pl. Cr. 853; 1 Leach, Cr. Cas. 367; 2 *id.* 775; Roscoe, Crim. Ev. 400.

7. Most, and perhaps all, of the states in the Union have passed laws making certain acts to be forgery, and the national legislature has also enacted several on this subject, which are here referred to; but these statutes do not take away the character of the offence as a misdemeanor at common law, but only provide additional punishment in the cases particularly enumerated in the statutes. 3 Cush. Mass. 150; 3 Gray, Mass. 441; Act of March 2, 1803, 2 Story, U. S. Laws, 888; Act of March 3, 1813, 2 Story, U. S. Laws, 1304; Act of March 1, 1823, 3 Story, U. S. Laws, 1889; Act of March 3, 1825, 3 Story, U. S. Laws, 2003; Act of October 12, 1837, 9 U. S. Stat. at Large, 696.

See, generally, Hawkins, Pl. Cr. b. 1, cc. 51, 70; 3 Chitty, Crim. Law, 1022–1048; 2 Russell, Crimes, b. 4, c. 32; 2 Bishop, Crim. Law, c. 35; Roscoe, Crim. Ev.; Starkie, Ev.

FORINSECUS (Lat.), **FORINSIC.** Outward; on the outside; without; foreign; belonging to another manor. *Silio forinsecus*, the outward ridge or furrow. *Servitium forinsecum*, the payment of aid, scutage, and other *extraordinary* military services. *Forinsecum manerium*, the manor, or that part of it which lies outside the bars or town and is not included within the liberties of it. Cowel; Blount; Cunningham, Law Dict.; Jacob, *Foreign Service;* 1 Reeve, Hist. Eng. Law, 273.

FORISDISPUTATIONES. In Civil Law. Arguments in court. Disputations or arguments before a court. 1 Kent, Comm. 530; Vicat, Voc. Jur. verb. *Disputatio.*

FORISFACERE (Lat.). To forfeit. To lose on account of crime. It may be applied not only to estates, but to a variety of other things, in precisely the popular sense of the word forfeit. Spelman, Gloss.; DuCange.

To confiscate. DuCange; Spelman, Gloss.

To commit an offence; to do a wrong. To do something beyond or outside of (*foris*) what is right (*extra rationem*). DuCange. To do a thing against or without law. Coke, Litt. 59 *a.*

To disclaim. DuCange.

FORISFACTUM (Lat.). Forfeited.

Bona forisfacta, forfeited goods. 1 Blackstone, Comm. 299. A crime. DuCange; Spelman, Gloss.

FORISFACTURA (Lat.). A crime or offence through which property is forfeited. Leg. Edw. Conf. c. 32.

A fine or punishment in money.

Forfeiture. The loss of property or life in consequence of crime. Spelman, Gloss.

Forisfactura plena. A forfeiture of all a man's property. Things which were forfeited. DuCange; Spelman, Gloss.

FORISFACTUS (Lat.). A criminal. One who has forfeited his life by commission of a capital offence. Spelman, Gloss.; Leg. Rep. c. 77; DuCange. *Si quispiam forisfactus poposcerit regis misericordiam, etc.* (if any criminal shall have asked pardon of the king, etc.). Leg. Edw. Conf. c. 18.

Forisfactus servus. A slave who has been a free man but has forfeited his freedom by crime. Leg. Athelstan, c. 3; DuCange.

FORISFAMILIATED, FORISFAMILIATUS. In Old English Law. Portioned off. A son was *forisfamiliated* when he had a portion of his father's estate assigned to him during his father's life, in lieu of his share of the inheritance, when it was done at his request and he assented to the assignment. The word etymologically denotes *put out of the family*, emancipated.

One who is no longer an heir of the parent. DuCange; Spelman, Gloss.; Cowel. Similar in some degree to the modern practice of advancement.

FORISJUDICATIO (Lat.). **In Old English Law.** Forejudger. A forejudgment. A judgment of court whereby a man is put out of possession of a thing. Coke, Litt. 100 *b*; Cunningham, Law Dict.

FORISJUDICATUS (Lat.). Forejudged; sent from court; banished. Deprived of a thing by judgment of court. Bracton, 250 *b*; Coke, Litt. 100 *b*; DuCange.

FORISJURARE (Lat.). To forswear; to abjure; to abandon. *Forisjurare parentilam.* To remove oneself from parental authority. The person who did this lost his rights as heir. DuCange; Leg. Hen. I. c. 88.

Provinciam forisjurare. To forswear the country. Spelman, Gloss.; Leg. Edw. Conf. c. 6.

FORM. In Practice. The model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws.

The legal order or method of legal proceedings or construction of legal instruments.

2. Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, is that "*that* without which *the right* doth sufficiently appear to the court is *form*;" but that any defect "by reason whereof the *right appears not*" is a defect in substance. Hob. 233. A distinction somewhat more definite is that if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal. Dougl. 683.

For example, the omission of a consideration in a declaration in assumpsit, or of the performance of a condition precedent, when such condition exists, of a conversion of property of the plaintiff, in trover, of knowledge in the defendant, in an action for mischief done by his dog, of malice, in an action for malicious prosecution, and the like, are all defects in *substance*. On the other hand, duplicity, a negative pregnant, argumentative pleading, a special plea, amounting to the general issue, omission of a day, when time is immaterial, of a place, in transitory actions, and the like, are only faults in form. Bacon, Abr. *Pleas*, etc. (N 5, 6); Comyns, Dig. *Pleader* (Q 7), 10 Coke, 95 *a*; 2 Strange, 694; Gould, Plead. c. 9, §§ 17, 18; 1 Blackstone, Comm. 142.

3. At the same time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed that "infinite mischief has been produced by the facility of the courts in overlooking matters of form: it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practise the drawing of pleadings." 1 Bos. & P. 59; 2 Binn. Penn. 434. See, generally, Bouvier, Inst. Index.

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMALITY. The conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings.

FORMED ACTION. An action for which a form of words is provided which must be exactly followed. 10 Mod. 140.

FORMEDON. An ancient writ provided by stat. Westm. 2 (13 Edw. I.) c. 1, for him who hath right to lands or tenements by virtue of a gift in tail. Stearns, Real Act. 322.

It is a writ in the nature of a writ of right, and is the highest remedy which a tenant in tail can have. Coke, Litt. 316.

This writ lay for those interested in an estate-tail who were liable to be defeated of their right by a discontinuance of the estate-tail, who were not entitled to a writ of right absolute, since none but those who claimed in fee-simple were entitled to this. Fitzherbert, Nat. Brev. 255. It is called *formedon* because the plaintiff in it claimed *per formam doni.*

It is of three sorts: in the remainder; in the reverter; in the descender. 2 Preston, Abstr. 343.

The writ was abolished in England by stat. 3 & 4 Will. IV. c. 27.

FORMEDON IN THE DESCENDER. A writ of formedon which lies where a gift is made in tail and the tenant in tail aliens the lands or is disseised of them and dies, for the heir in tail to recover them, against the actual tenant of the freehold. Fitzherbert, Nat. Brev. 211; Littleton, § 595.

If the demandant claims the inheritance as an estate-tail which ought to come to him by descent from some ancestor to whom it was first given, his remedy is by a writ of *formedon in the descender*. Stearns, Real Act. 322.

It must have been brought within twenty years from the death of the ancestor who was disseised. 21 Jac. I. c. 16; 3 Brod. & B. 217; 6 East, 83; 4 Term, 300; 5 Barnew. & Ald.; 2 Sharswood, Blackst. Comm. 193, n.

FORMEDON IN THE REMAINDER. A writ of formedon which lies where lands are given to one for life or in tail with remainder to another in fee or in tail, and he who hath the particular estate dies without issue, and a stranger intrudes upon him in remainder and keeps him out of possession. Fitzherbert, Nat. Brev. 211; Stearns, Real Act. 323; Littleton, § 597; 3 Blackstone, Comm. 293.

FORMEDON IN THE REVERTER. A writ of formedon which lies where there is a gift in tail, and afterwards, by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns.

In this case the demandant must suggest the gift, his own right as derived from the donor, and the failure of heirs of the donee. 3 Sharswood, Blackst. Comm. 293; Stearns, Real Act. 323; Fitzherbert, Nat. Brev. 212; Littleton, § 597.

FORMER RECOVERY. A recovery in a former action.

2. It is a general rule that in a real or personal action a judgment unreversed, whether it be by confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or a like nature, for the same cause. Bacon, Abr. *Pleas* (I 12, n. 2); 6 Coke, 7; Hob. 4, 5; Ventr. 70.

3. There are two exceptions to this general rule. *First*, in the case of mutual dealings between the parties, when the defendant omits to set off his counter-demand, he may recover in a cross-action. *Second*, when the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit. 1 Johns. Cas. N. Y. 492, 502, 510. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature. 6 Coke, 7. See 12 Mass. 337; RES ADJUDICATA.

FORMULARIES. A collection of the forms of proceedings among the Franks and other early European nations. Coke, Litt. Butler's note 77.

FORNICATION. In Criminal Law. Unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.

Fornication is distinguished from adultery by the fact that the guilty person is not married. Four cases of unlawful intercourse may arise: where both parties are married; where the man only is married; where the woman only is married; where neither is married. In the first case such intercourse must be adultery; in the second case the crime is fornication only on the part of the woman, but adultery on the part of the man; in the third case it is adultery in the woman, and fornication (by statute in some states, adultery) in the man; in the last case it is fornication only in both parties.

In some states it is indictable by statute, 6 Vt. 311; 2 Tayl. No. C. 165; 2 Gratt. Va. 555, and where it is there may be a conviction for this offence on an indictment for adultery. 2 Dall. Penn. 124; 4 Ired. No. C. 231; 2 Bishop, Crim. Law, § 12.

FORO. In Spanish Law. The place where tribunals hear and determine causes,—*exercendarum litium locus*. This word, according to Varro, is derived from *ferendo*, and is so called because all lawsuits have reference to things that are vendible, which presupposes the administration of justice to take place in the markets.

FORPRISE. An exception; reservation; excepted; reserved. Anciently, a term of frequent use in leases and conveyances. Cowel; Blount.

In another sense, the word is taken for any exaction. Cunningham, Law Dict.

FORSPEAKER. An attorney or advocate. One who speaks for another. Blount.

FORSTAL. An intercepting or stopping in the highway. See FORESTALL.

Forstaller, forstall, forstallare, forstallment, forstaller, may all be found under FORESTALL.

FORSWEAR. In Criminal Law. To swear to a falsehood.

This word has not the same meaning as perjury. It does not, *ex vi termini*, signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be forsworn by making a false oath before an incompetent tribunal, as well as before a lawful court. Hence, to say that a man is forsworn, will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority. Heard, Libel & S. §§ 16, 34; Croke Car. 378; Lutw. 292; 1 Rolle, Abr. 39, pl. 7; Bacon, Abr. *Slander* (B 3); Croke Eliz. 609; 1 Johns. N. Y. 505; 2 *id.* 10; 13 *id.* 48, 80; 12 Mass. 496; 1 Hayw. No. C. 116.

FORTHCOMING. In Scotch Law. The action by which an arrestment (attachment) of goods is made available to the creditor or holder.

The arrestee and common debtor are called up before the judge, to hear sentence given ordering the debt to be paid or the arrested goods to be given up to the creditor arresting. Bell, Dict.

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required. 2 Wash. Va. 189; 11 Gratt. Va. 522.

FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case. 4 Tyrwh. 837; Styles, Reg. 452, 453.

FORTIA (Lat.). A word of art, signifying the furnishing a weapon of force to do the fact, and by force whereof the fact was committed, and he that furnished it was not present when the act was done. Coke, 2d Inst. 182.

The general meaning of the word is an unlawful force. Spelman, Gloss.; DuCange.

FORTUITOUS COLLISION. An accidental collision.

FORTUITOUS EVENT. In Civil Law. That which happens by a cause which cannot be resisted. La. Code, art. 2522, no. 7.

That which neither of the parties has occasioned or could prevent. Lois des Bât. pt. 2, c. 2. An unforeseen event which cannot be prevented. Dict. de Jurisp. *Cas fortuit.*

There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the act of God, is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story, Bailm. § 25; Lois des Bât. pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. Lois des Bât. pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events. For example, when to save a vessel from shipwreck it is necessary to throw goods overboard, the loss must be borne in common; there arises, in this case, between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionably the loss which has been sustained. Lois des Bât. pt. 2, c. 2, § 2.

See, in general, Dig. 50. 17. 23; *id.* 16. 3. 1; *id.* 19. 2. 11; *id.* 44. 7. 1; *id.* 18. 6. 10; *id.* 13. 6. 18; *id.* 26. 7. 50.

FORUM. In Roman Law. The paved open space in cities, particularly in Rome, where were held the solemn business assemblies of the people, the markets, the exchange (whence *cedere foro*, to retire from 'change, equivalent to "to become bankrupt"), and where the magistrates sat to transact the business of their office. It corresponded to the ἀγορα of the Greeks. Dion. Hal. l. 3, p. 200. It came afterwards to mean any place where causes were tried, *locus exercendarum litium.* Isidor. l. 18, Orig. A court of justice.

The obligation and the right of a person to have his case decided by a particular court.

It is often synonymous with that signification of *judicium* which corresponds to our word court (which see), in the sense of jurisdiction: *e.g. foro interdicere*, l. 1, § 13, D. 1, 12; C. 9, § 4, D. 48, 19; *fori præscriptio*, l. 7, pr. D. 2, 8; l. 1, C. 3, 24; *forum rei accusator sequitur*, l. 5, pr. C. 3, 13. In this sense the *forum* of a person means both the obligation and the right of that person to have his cause decided by a particular court. 5 Glück, Pand. 237. What court should have cognizance of the cause depends, in general, upon the person of the defendant, or upon the person of some one connected with the defendant.

2. *Jurisdictions depending upon the person of the defendant.* By modern writers upon the Roman law, this sort of jurisdiction is distinguished as that of common right, *forum commune*, and that of special privilege, *forum privilegiatum.*

(*A.*) *Forum commune.* The jurisdiction of common right was either general, *forum generale*, or special, *forum speciale.*

(*a.*) *Forum generale.* General jurisdiction was of two kinds, the *forum originis*, which was that of the birthplace of the party, and the *forum domicilii*, that of his domicile. The *forum originis* was either *commune* or *proprium.* The former was that legal *status* which all free-born subjects of the empire, wherever residing, had at Rome when they were found there and had not the *jus revocandi domum* (*i.e.* the right of one absent from his domicile of transferring to the *forum domicilii* a suit instituted against him in the place of his temporary sojourn). L. 2, §§ 3, 4, 5, D. 5, 1; l. 28, § 4, D. 4, 6; 3 Glück, Pand. 188. After the privilege of Roman citizenship was conferred by Caracalla upon all free-born subjects of the empire, the city of Rome was considered the common home of all, *communis omnium patria*, and every citizen, no matter where his domicile, could, unless protected by special privilege, be sued at Rome while there present. Noodt, Com. ad Dig. 5, 1, p. 153; Hofacker, Pr. Jur. Civ. § 4221. The *forum originis proprium*, or *forum originis speciale*, was the court of that place of which at the time of the party's birth his father was a citizen, though that might possibly be neither his own birthplace nor the actual domicile of his father. Except in particular places, as Delphi and Pontus, where the nativity of the mother conferred the privilege of citizenship upon her son, the birthplace of the father only was regarded. L. 1, § 2, D. 50, 1. The case of the *nullius filius* was also an exception. Such a person having no known father derived his *forum originis* from the birthplace of his mother. L. 9, D. 50, 1.

Adoption might confer a twofold citizenship, that of the natural and that of the adoptive father, l. 7, C. 8, 48; but the latter was lost by emancipation. L. 16, D. 50, 1. In general, the birthplace of the father alone fixed the *forum originis* of the son. Amaya, Com. ad Tit. Cod. *de incolis*, n. 21, *seq.* 99. The *forum originis* was unchangeable, and continued although the party had established his domicile in another place: consequently, he could always be sued in the courts of that jurisdiction whenever he was there present. 6 Glück, Pand. p. 260.

3. *Forum domicilii.* The place of the

domicile exercised the greatest influence over the rights of the party. (As to what constitutes domicile, see DOMICILE.) In general, one was subject to the laws and courts of his domicile alone, unless specially privileged. L. 29, D. 50, 1. This legal status, *forum domicilii*, was *universal*, in the sense that all suits of whatever nature, real or personal, petitory or possessory, might be instituted in the courts of the defendant's domicile even when the thing in dispute was not situated within the jurisdiction of such court, and the defendant was not present at such place at the commencement of the suit. 6 Glück, Pand. 287 *et seq.* It seems, however, that as regarded *real* actions the *forum domicilii* was concurrent with the *forum rei sitæ*, *id.* 290, and, in general, was concurrent with *special* jurisdictions of all kinds; although in some exceptional cases the law conferred exclusive cognizance upon a *special* jurisdiction, *forum speciale*. In cases of concurrence the plaintiff had his election of the jurisdiction.

In another sense the *forum domicilii* was *personal*, as it did not necessarily descend to the heir of defendant. See jurisdiction *ex persona alterius*, at the end of this article.

4. *Forum speciale*, particular jurisdiction. These were very numerous. The more important are: (1.) *Forum continentiæ causarum.* Sometimes two or more actions or disputed questions are so connected that they cannot advantageously be tried separately, although in strictness they belong to different jurisdictions. In such cases the modern civil law permits them to be determined in a single court, although such court would be incompetent in regard to a portion of them taken singly. This beneficial rule did not exist in the Roman law, though formerly supposed to be derived thence. See 11 Glück, Pand. § 750, and cases there cited. (2.) *Forum contractus*, the court having cognizance of the action on a contract. If the place of performance was ascertained by the contract, the court of that place had exclusive jurisdiction of actions founded thereon. 6 Glück, Pand. 296. If the place of performance was uncertain, the court of the place where the contract was made might have jurisdiction, provided the defendant at the time of the institution of the suit was either present at that place or had attachable property there. *Id.* 298.

(3.) *Forum delicti, forum deprehensionis*, is the jurisdiction of the person of a criminal, and may be the court of the place where the offence was committed, or that of the place where the criminal was arrested. The latter jurisdiction, *forum deprehensionis*, extended at most only to the preliminary examination of the person arrested; and even this was abolished by Justinian, Nov. lxix. c. 1, cxxxiv. c. 5, on the ground that the examination as well as the punishment should take place on the spot where the crime was committed. 6 Glück, Pand. § 517.

5. (4.) *Forum rei sitæ* is the jurisdiction of the court of that place where is situated the thing which is the object of the action. Such court had jurisdiction over all actions affecting the possession of the thing, and over all petitory actions *in rem* against the possessor in that character, and all such actions *in personam* so far as they were brought for the recovery of the thing itself. But such court had not jurisdiction of purely personal actions. *Id.* § 519.

5. *Forum arresti* is a jurisdiction unknown to the Roman law, but of frequent occurrence in the modern civil law. It is that over persons or things detained by a judicial order, and corresponds in some degree to the *attachment* of our practice. *Id.* § 519.

Forum gestæ administrationis, the jurisdiction over the accounts and administration of guardians, agents, and all persons appointed to manage the affairs of third parties. The court which appointed such *administrator*, or wherein the cause was pending in which such appointment was made, or within whose territorial limits the business of the administration was transacted, had exclusive jurisdiction over all suits arising out of his acts or brought for the purpose of compelling him to account, or brought by him to recover compensation for his outlays. L. 1, C. 3, 21; 6 Glück, Pand. § 521.

6. Privileged jurisdictions, *forum privilegiatum*. In general, the privileged jurisdiction of a person held the same rank as the *forum domicilii*, and, like that, did not supplant the particular jurisdictions above named save in certain exceptional cases. The privilege was general in its nature, and applied to all cases not specially excepted, but it only arose when the person possessing it was sued by another; for he could not assert it when he was the plaintiff, the rule being, *actor sequitur forum rei*, the plaintiff must resort to the jurisdiction of the defendant. It was in general limited to *personal* actions; all *real* actions brought against the defendant in the character of possessor of the thing in dispute followed the *forum speciale*. The privilege embraced the wife of the privileged person and his children so long as they were under his *potestas*. And, lastly, when a *forum privilegiatum* purely personal conflicted with the *forum speciale*, the former must yield. 6 Glück, Pand. 339–341. To these rules some exceptions occur, which will be mentioned below.

Privileged persons were: 1. *Personæ miserabiles*, who were persons under the special protection of the law on account of some incapacity of age, sex, mind, or condition. These were entitled, *whether as plaintiffs or defendants*, to carry their causes directly before the emperor, and, passing over the inferior courts, to demand a hearing before his supreme tribunal, whenever they had valid grounds for doubting the impartiality or fearing the procrastination of the inferior courts, or for dreading the influence of a powerful adversary. 6 Glück, Pand. § 522. On the other hand, if their adversary, on any pretext whatever, had himself passed by the inferior courts and applied directly to the supreme

tribunal, they were not bound to appear there if this would be disadvantageous to them, but, in order to avoid the increase of costs and other inconveniences, might decline answering except before their *forum domicilii*. The *personæ miserabiles* thus privileged were minor orphans, widows, whether rich or poor, persons afflicted by chronic disease or other forms of illness (*diuturno morbo fatigati et debiles*), which included paralytics, epileptics, the deaf, the dumb, and the blind, etc., persons impoverished by calamity or otherwise distressed, and the poor when their adversary was rich and powerful, *præsertim cum alicujus potentiam perhorrescant*. This privilege was, however, not available when both parties were *personæ miserabiles;* when it had been waived either expressly or tacitly; when the party had become *persona miserabilis* since the institution of the action,—except always the case of reasonable suspicion in regard to the impartiality of the judge; when the party had become *persona miserabilis* through his own crime or fraud; when the cause was trivial, or belonged to the class of unconditionally privileged cases having an exclusive *forum;* and when the cause of action was a right acquired from a *persona non miserabilis*. 6 Glück, Pand. § 522.

7. *Clerici*, the clergy. The privilege of clerical persons to be impleaded only in the episcopal courts commenced under the Christian emperors. Justinian enlarged the jurisdiction of these courts, not only by giving them exclusive cognizance of affairs and offences purely ecclesiastical, but also by constituting them the ordinary primary courts for the trial of suits brought against the clergy even for temporal causes of action. Nov. 83, Nov. 123, cap. 8, 21, 22, 23. The causes of action cognizable in the *forum ecclesiasticum* were—1. *causæ ecclesiasticæ mere tales*, purely ecclesiastical, *i.e.* those pertaining to doctrine, church services and ceremonies, and right to membership; those relating to the synodical assemblies and church discipline; those relating to offices and dignities and to the election, ordination, translation, and deposition of pastors and other office-bearers of the church, and especially those relating to the validity of marriages and to divorce; or, 2. *causæ ecclesiasticæ mixtæ*, mixed causes, *i.e.* disputes in regard to church lands, tithes, and other revenues, their management and disbursement, and legacies to pious uses, in regard to the boundaries of ecclesiastical jurisdictions, in regard to patronage and advowsons, in regard to burials and to consecrated places, as graveyards, convents, etc., and, lastly, in regard to offences against the canons of the church, as simony, etc. But the privilege here treated of was the *personal* privilege of the clergy when defendant in a suit to have the cause tried before the episcopal court; when plaintiff, the rule *actor sequitur forum rei* prevailed. All persons employed in the church service in an official capacity, even though not in holy orders, were thus privileged. But the privilege did not embrace *real* actions, nor personal actions brought to recover the possession of a thing: these must be instituted in the *forum rei sitæ*. The jurisdiction extended to all personal actions, criminal as well as civil; although in criminal actions the ecclesiastical courts had no authority to inflict corporeal or capital punishment, being restricted to the canonical judgments of deprivation, degradation, excommunication, etc. 6 Glück, Pand. § 523.

8. *Academici*. In the modern civil law the officers and students of the universities are privileged to be sued before the university courts. This species of privilege was unknown to the Roman law. See 6 Glück, Pand. § 524.

Milites. Soldiers had special military courts as well in civil as criminal cases. In civil matters, however, the *forum militare* had preference only over the courts of the place where the soldier defendant was stationed; as he did not forfeit his domicil by absence on military duty, he might always be sued for debt in the ordinary *forum domicilii*, provided he had left there a *procurator* to transact his business for him, or had property there which might be proceeded against. L. 3, C. 2, 51; l. 6, *eodem;* l. 4, C. 7, 53. Besides this, the privilege of the *forum militare* did not extend to such soldiers as carried on a trade or profession in addition to their military service and were sued in a case growing out of such trade, although in other respects they were subject to the military tribunal. L. 7, C. 3, 13. If after an action had been commenced the defendant became a soldier, the privilege did not attach, but the suit must be concluded before the court which had acquired jurisdiction of it. The *forum militare* had cognizance of *personal* actions only. Actions arising out of *real* rights could be instituted only in the *forum rei sitæ*. In the Roman law, ordinary crimes of soldiers were cognizable in the *forum delicti*. The modern civil law is otherwise. 6 Glück, Pand. 418, 421.

There are many classes of persons who are privileged in respect to jurisdiction under the modern civil law who were not so privileged by the Roman law. Such are officers of the court of the sovereign, including ministers of state and councillors, ambassadors, noblemen, etc. These do not require extended notice.

9. *Jurisdiction ex persona alterius*. A person might be entitled to be sued in a particular court on grounds depending upon the person of another. Such were—1. *The wife*, who, if the marriage had been legally contracted, acquired the *forum* of her husband, l. 65, D. 5, 1; l. ult. D. 50, 1; l. 19, D. 2, 1, and retained it until her second marriage, l. 22, § 1, D. 50, 1, or change of domicile. § 93, Voet. Com. ad Pand. D. 5, 1. 2. *Servants*, who possessed the jurisdiction of their master as regarded the *forum domicilii*, and also the *forum privilegiatum*, so far at least as the privilege was that of the class to which such master belonged and was not purely personal. Glück, Pand. § 510 *b*. 3. *The hæres*, who in

many cases retained the jurisdiction of his testator. When sued in the character of heir in respect to causes of action upon which suit had been commenced before the testator's death, he must submit to the *forum* which had acquired cognizance of the suit. Ll. 30, 34, D. 5, 1. When the cause of action accrued, but the action was not commenced, in the lifetime of the testator, the heir must submit to *special jurisdictions* to which the testator would have been subjected, as the *forum contractus* or *gestæ administrationes*, especially if personally present or possessing property within such jurisdiction. L. 19, D. 5, 1. But it is even now disputed whether in such case he was bound to submit to the general jurisdiction, *forum domicilii*, or the privileged jurisdiction, *forum privilegiatum*, of his testator; though the weight of the authorities is on the side of the negative. Glück, Pand. § 560 *b*. If the cause of action arose after the death of the testator, as in the case of the *querela inofficiosi testamenti*, of partition, of suits to recover a legacy or to enforce a testamentary trust, the heir must be pursued in his own jurisdiction, *i.e.* the *forum domicilii* or *forum rei sitæ*. 6 Glück, Pand. 252, and authorities there cited. And, *a fortiori*, if the action against the heir was not in that character, but merely in the capacity of possessor of the thing in dispute, the suit must be brought before the *forum* to which he was himself subject. *Id.* p. 251.

FORUM. At Common Law. A place. A place of jurisdiction. The place where a remedy is sought. Jurisdiction. A court of justice.

Forum conscientiæ. The conscience.

Forum contentiosum. A court. 3 Blackstone, Comm. 211.

Forum contractus. Place of making a contract. 2 Kent, Comm. 463.

Forum domesticum. A domestic court. 1 W. Blackstone, 82.

Forum domicilii. Place of domicil. 2 Kent, Comm. 463.

Forum ecclesiasticum. An ecclesiastical court.

Forum rei gestæ. Place of transaction. 2 Kent, Comm. 463.

Forum rei sitæ. The place where the thing is situated.

The tribunal which has authority to decide respecting something in dispute, located within its jurisdiction: therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title on which it professes to decide, in relation to such property. And the same principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment. Story, Confl. Laws, §§ 532, 545, 551, 591, 592; Kaimes, Eq. b. 3, c. 8, § 4; 1 Greenleaf, Ev. § 541.

Forum seculare. A secular court.

See, generally, DuCange; 2 Kent, Comm. 363; Story, Confl. Laws; Greenleaf, Ev.; Guyot, Rép. Univ.

FORWARDING MERCHANT. A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent. 12 Johns. N. Y. 232; 7 Cow. N. Y. 497. He is required to use only ordinary diligence in sending the property by responsible persons. 2 Cow. N. Y. 593. See Story, Bailm.

FOSSA (Lat.). **In English Law.** A ditch full of water, where formerly women who had committed a felony were drowned; the grave. Cowel.

FOSSATORIUM OPERATIO (Lat.). The service of laboring done by the inhabitants and adjoining tenants, for repair and maintenance of the ditches round a city or town. A contribution in lieu of such work, called *fossagium*, was sometimes paid. Kennet; Cowel.

FOUNDATION. The establishment of a charity. That upon which a charity is founded and by which it is supported.

This word, in the English law, is taken in two senses, *fundatio incipiens*, and *fundatio perficiens*. As to its political capacity, an act of incorporation is metaphorically called its foundation; but as to its dotation, the first gift of revenues is called the foundation. 10 Coke, 23 *a*.

FOUNDER. One who endows an institution. One who makes a gift of revenues to a corporation. 10 Coke, 33; 1 Sharswood, Blackst. Comm. 481.

In England, the king is said to be the founder of all civil corporations; and where there is an act of incorporation, he is called the general founder, and he who endows is called the perficient founder. 1 Sharswood, Blackst. Comm. 481.

FOUNDEROSUS. Out of repair. Croke Car. 366.

FOUNDLING. A new-born child abandoned by its parents, who are unknown. The settlement of such a child is in the place where found.

FOUR SEAS. The seas surrounding England. These were divided into The Western, including the Scotch and Irish; The Northern, or North Sea; The Eastern, being the German Ocean; The Southern, being the British Channel. Selden, Mare Clausum, lib. 2, c. 1.

Within the four seas means within the jurisdiction of England. 4 Coke, 125; Coke, 2d Inst. 253.

FOURCHER (Fr. to fork). **In English Law.** A method of delaying an action formerly practised by defendants.

When an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day, the appearance of one excused the other's default, who had a day given him to appear with the other: the defaulter, on the day

appointed, appeared; but the first then made default: in this manner they *forked* each other, and practised this for delay. See Coke, 2d Inst. 250; Booth, Real Act. 16.

FOWLS OF WARREN. Such fowls as are preserved under the game-laws in warrens. According to Manwood, these are partridges and pheasants. According to Lord Coke, they are either *campestres*, as partridges, rails, and quails, *sylvestres*, as woodcocks and pheasants, or *aquatiles*, as mallards and herons. Coke, Litt. 233.

FRACTION OF A DAY. A portion of a day. The dividing a day. Generally, the law does not allow the fraction of a day. 2 Sharswood, Blackst. Comm. 141.

The day may be divided, however, to show which of two acts was actually done first. 3 Burr. 1434; 4 Kent, Comm. 95, n.; 11 Hou. L. 411.

FRAIS DE JUSTICE. Costs incurred incidentally to the action. See 1 Troplong, 135, n., 122; 4 Low. C. 77.

FRANC. A French coin, of the value of about eighteen cents.

FRANC ALIEN. In French Law. An absolutely free inheritance. Allodial lands. Generally, however, the word denotes an inheritance free from seignorial rights, though held subject to the sovereign. Dumoulin, *Cout. de Par.* § 1; Guyot, Rép. Univ.; 3 Kent, Comm. 498, n.; 8 Low. C. 95.

FRANCHISE. A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. Angell & A. Corp. § 4.

A particular privilege conferred by grant from government and vested in individuals. 3 Kent, Comm. 458.

A branch of the king's prerogative subsisting in the hands of a subject. Finch, lib. 2, c. 14; 2 Sharswood, Blackst. Comm. 37.

In a popular sense, the word seems to be synonymous with right or privilege: as, *the elective franchise.*

In the United States they are usually held by corporations created for the purpose, and can be held only under legislative grant. 15 Pick. Mass. 243; 4 Ill. 53; 13 Pet. 519; 15 Johns. N. Y. 358. See 2 Dane, Abr. 686; 6 Barnew. & C. 703; FERRY. Franchises are held subject to the exercise of the right of eminent domain. 4 Gray, Mass. 474; 23 Pick. Mass. 360; 6 How. 507; 13 *id.* 71; 21 Vt. 590. See, also, 2 Gray, Mass. 1; 5 Johns. Ch. N. Y. 101; 4 Wheat. 518; 7 Pick. Mass. 344; 7 N. H. 59; Redfield, Railw. 131. They are also liable for the debts of the owner, 2 Washburn, Real Prop. 24, but cannot be sold or assigned without the consent of the legislature. See Redfield, Railw. Index.

FRANCIGENA. A designation formerly given to aliens in England.

FRANKALMOIGNE. A species of ancient tenure, still extant in England, whereby a religious corporation, aggregate or sole, holds its lands of the donor, in consideration of the religious services it performs.

2. The services rendered being divine, the tenants are not bound to take an oath of fealty to a superior lord. A tenant in frankalmoigne is not only exempt from all temporal service, but the lord of whom he holds is also bound to acquit him of every service and fruit of tenure which the lord paramount may demand of the land held by this tenure. The services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the poor. Of this latter class is the office of the queen's almoner, which is usually bestowed upon the archbishop of York, with the title of lord high almoner. The spiritual services which were due before the Reformation are described by Littleton, § 135; since that time they have been regulated by the liturgy, or book of common prayer of the church of England. Coke, 2d Inst. 502; Coke, Litt. 93, 494 *a.* Hargrave ed. note (b); 2 Blackstone, Comm. 101.

3. In the United States, religious corporations hold land by the same tenure with which all other corporations and individuals hold; and the only approach to a tenancy in frankalmoigne may be found in the exemption from taxation which is enjoyed by churches in common with charitable and scientific institutions. Our religious corporations are generally restricted to the holding of any more land than is required for the immediate purposes of their incorporation; nor can they make absolute sales without first obtaining the permission of a court of equity. Subject to this restriction, they have a fee-simple estate in their lands for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. On a dissolution of the corporation, the fee will revert to the original grantor and his liens; but such grantor will be forever excluded by an alienation in fee; and in that way the corporation may defeat the possibility of a reverter. 2 Kent, Comm. 281; 2 Preston, Est. 50. And see 3 Binn. Penn. 626; 1 Watts, Penn. 218; 3 Pick. Mass. 232; 12 Mass. 537; 8 Dan. Ky. 114.

FRANK FEE. Lands not held in ancient demesne. Called "lands pleadable at common law." Reg. Orig. 12, 14; Fitzherbert, Nat. Brev. 161; Termes de la Ley.

That which a man holds to himself and his heirs and not by such service as is required in ancient demesne, according to the custom of the manor. The opposite of copyhold. Cowel. A fine had in the king's court might convert demesne-lands into frank-fee. 2 Blackstone, Comm. 368.

FRANK-FERME. Lands or tenements where the nature of the *fee* is changed by *feoffment* from knight's service to yearly service, and whence no homage but such as is contained in the feoffment may be demanded. Britton, c. 66, n. 3; Cowel; 2 Blackstone, Comm. 80.

FRANK-MARRIAGE. A species of estate-tail where the donee had married one of kin (as daughter or cousin) to the donor and held the estate subject to the implied condition that the estate was to descend to the issue of such marriage. On birth of issue, as in other cases of estate-tail before the statute *De Donis*, the birth of issue was regarded as a condition performed, and the estate thereupon became alienable by the donee. 1 Cruise, Dig. 71; 1 Washburn, Real Prop. 67.

The estate is said to be in frank-marriage because given in consideration of marriage and free from services for three generations of descendants. Blount; Cowel. See, also, 2 Sharswood, Blackst. Comm. 115; 1 Stephen, Comm. 232.

FRANK-PLEDGE. A pledge or surety for freemen. Termes de la Ley.

The bond or pledge which the inhabitants of a tithing entered into for each one of their number that he should be forthcoming to answer every violation of law. Each boy, on reaching the age of fourteen, was obliged to find some such pledge, *or be committed to prison.* Blount; Cowel.

FRANKING PRIVILEGE. The privilege of sending certain matter through the public mails without payment therefor.

It is enjoyed by various officers of the federal government, theoretically for the public good. See Brightly, Dig. U. S. Laws.

FRANKLEYN (spelled, also, *Francling* and *Franklin*). A freeman; a freeholder; a gentleman. Blount; Cowel.

FRATER (Lat.). Brother.

Frater consanguineus. A brother born from the same father, though the mother *may* be different.

Frater nutricius. A bastard brother.

Frater uterinus. A brother who has the same mother but not the same father.

Blount; Vicat, Voc. Jur.; 2 Blackstone, Comm. 232. See BROTHER.

FRAUD. The unlawful appropriation of another's property, with knowledge, by design, and without criminal intent.

Fraud is sometimes used as a term synonymous with *covin, collusion,* and *deceit,* but improperly so. *Covin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. *Collusion* is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. *Deceit* is a fraudulent contrivance by words or acts to deceive a third person, who, relying thereupon, without carelessness or neglect of his own, sustains damage thereby. Coke, Litt. 357 *b;* Bacon, Abr. *Fraud.*

2. *Actual* or *positive fraud* includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186.

For instance, the misrepresentation by word or deed of material facts, by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently; the suppression of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscientious advantage in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and especially over those who are, by reason of age, infirmity, idiocy, lunacy, drunkenness, coverture, or other incapacity, unable to take due care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence, when the decree of the court can place the parties *in statu quo;* cases of surprise and sudden action, without due deliberation, of which one party takes advantage; cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; fraudulent awards with intent to do injustice; fraudulent and illusory appointments and revocations under powers; fraudulent prevention of acts to be done for the benefit of others under false statements or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments, decrees, and other judicial proceedings; frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors and other persons standing upon a like equity, are cases of actual fraud. 1 Story, Eq. Jur. c. 6.

3. *Legal* or *constructive fraud* includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.

Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons; agreements and other acts of parties which operate virtually to delay, defraud, and deceive creditors; purchases of property, with full notice of the legal or equitable title of other persons to the same property (the purchaser becoming, by construction, *particeps criminis* with the fraudulent grantor); and voluntary conveyances of real estate, as affecting the title of subsequent purchasers. 1 Story, Eq. Jur. c. 7.

According to the civilians, *positive* fraud consists in doing one's self, or causing another to do, such things as induce the opposite party into error, or retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causum contractui,* and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such that it is evident that without them the other would not have contracted. *Incidental* or *accidental* fraud is that by which a person, otherwise determined to contract, is deceived on some accessories or incidents of the contract,—for example, as to the quality of the object of the contract, or its price,—so that he has made a

bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui:* in that case the contract is void. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. § 5, n. 86, *et seq.* See, also, 1 Malleville, Analyse de la Discussion du Code Civil, pp. 15, 16; Bouvier, Inst. Index.

4. *What constitutes fraud.* 1. It must be such an appropriation as is not permitted by law. 2. It must be with knowledge that the property is another's, and with design to deprive him of it. 3. It is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. Livermore, Penal Law, 739.

Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions.

While, on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, succurrunt leges.* A misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it,—every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs.

5. An intention to violate entertained at the time of entering into a contract, but not afterwards carried into effect, does not vitiate the contract. *Per Tindal,* C. J., 2 Scott, 588, 594; 4 Barnew. & C. 506, 512; *per Parke,* B., 4 Mees. & W. Exch. 115, 122. But when one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or if it is also within the reach of the other party, is a device to induce him to refrain from inquiry, and it is shown that the concealment or other deception was practised with respect to the particular transaction, such transaction will be void on the ground of fraud. 6 Clark & F. Hou. L. 232; Comyn, Contr. 38; *per Tindal,* C. J., 3 Mann. & G. 446, 450. And even the concealment of a matter which may disable a party from performing the contract is a fraud. 9 Barnew. & C. 387; *per Littledale,* J.

6. *Equity doctrine of fraud.* It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction.*

7. What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

It is said by Lord Hardwicke, 2 Ves. Ch. 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this:—that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

8. The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce: as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce. 2 Kent, Comm. 39; 1 Johns. Ch. N. Y. 630; 1 Ball & B. Ch. Ir. 250, 251.

The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke, 2 Ves. Ch. 155.

1. Fraud, or *dolus malus,* may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on

the other. 3. It may be inferred from the circumstances and condition of the parties; for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

9. *Effect of.* Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public. 1 Fonblanque, Eq. 3d ed. 66, note; 6th ed. 122, and notes; Newland, Contr. 352; 1 W. Blackst. 465; Dougl. 450; 3 Burr. 1909; 3 Ves. & B. Ch. 42; 3 Chitty, Com. Law, 155, 306, 698; 1 Schoales & L. 209; Verplank, Contr. *passim;* Domat, Lois Civ. p. 1, l. 4, t. 6, s. 3, n. 2.

The fraud of an agent by a misrepresentation which is embodied in the contract to which his agency relates, avoids the contract. But the party committing the fraud cannot in any case himself avoid the contract on the ground of the fraud. Chitty, Contr. 590, and cases cited.

As to frauds in contracts and dealings, the common law subjects the wrong-doer, in several instances, to an action on the case, such as actions for fraud and deceit in contracts on an express or implied warranty of title or soundness, etc. But fraud gives no action in any case without damage, 3 Term, 56; and in matters of contract it is merely a defence: it cannot in any case constitute a new contract. 7 Ves. Ch. 211; 2 Miles, Penn. Rep. 229. It is essentially *ad hominem*. 4 Term, 337, 338.

10. In Criminal Law. Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence. Coke, Litt. 3 *b;* Dy. 295; Hawkins, Pl. Cr. c. 71.

In considering fraud in its *criminal* aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the *property* obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the *possession* only be parted with, and that possession be obtained by fraud, it will be felony. Bacon, Abr. *Fraud;* 2 Leach, Cr. Cas. 1066; 2 East, Pl. Cr. 673.

11. Of those gross frauds or cheats which, as being "levelled against the public justice of the kingdom," are punishable by indictment or information at the common law, 2 East, Pl. Cr. c. 18, § 4, p. 821, the following are examples:—uttering a fictitious bank bill, 2 Mass. 77; selling unwholesome provisions, 4 Blackstone, Comm. 162; *mala praxis* of a physician, 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations, Rex *v.* Bembridge, cited 2 East, 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty. Crim. Law, 666; fabrication of news tending to the public injury, Starkie, Lib. 546; Hale, Summ. 132; *et per Scroggs*, C. J., Rex *v.* Harris, Guildhall, 1680; cheats by means of false weights and measures, 2 East, Pl. Cr. c. 18, § 3, p. 820; and, generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public, 2 East, Pl. Cr. c. 18, § 2, p. 818, as with the common cases of obtaining property by false pretences.

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. II. c. 3, entitled "An Act for the Prevention of Frauds and Perjuries."

2. The multifarious provisions of this celebrated statute appear to be distributed under the following heads. 1. The creation and transfer of estates in land, both legal and equitable, such as at common law could be effected by parol, *i.e.* without deed. 2. Certain cases of contracts which at common law could be validly made by oral agreement. 3. Additional solemnities in cases of wills. 4. New liabilities imposed in respect of real estate held in trust. 5. The disposition of estates *pur auter vie*. 6. The entry and effect of judgments and executions. The first and second heads, however, comprise all that in the common professional use of the term is meant by the Statute of Frauds.

3. And they present this important feature, characterizing and distinguishing all the minor provisions which they both contain, *i.e.* that whereas prior to their enactment the law recognized only two great classes of contracts, conveyances, etc.,—those which were by deed and those which were by *parol*, including under the latter term alike what was written and what was oral,—these provisions introduced into the law a distinction between *written* parol and *oral* parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following:—conveyances, leases, and surrenders of interests in lands; declarations of trusts of interests in lands; special promises by executors or administrators to answer damages out of their own estate; special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards. All these matters must be, by the statute, put in writing, signed by the party to be charged, or his attorney.

4. In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest-money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum.

The substance of the statute, as regards

the provisions above referred to, has been re-enacted in almost all the states of the Union; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: as, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc. of a third person, which was provided in England by 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. The legislation of the different states on these matters will be found collected in the Appendix to Browne's Treatise on the Statute of Frauds.

FRAUDULENT CONVEYANCE. A conveyance the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it. 2 Kent, Comm. 440; 4 *id.* 462.

2. Fraudulent conveyances received early attention; and the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18, declared all conveyances made with intent to defraud creditors, etc. to be void. By a liberal construction, it has become the settled English law that a voluntary conveyance shall be deemed fraudulent against a subsequent purchaser even with notice. 9 East, 59; 2 Sharswood, Blackst. Comm. 296; Roberts, Fraud. Conv. 2, 3.

Voluntary conveyances are not so construed in the United States, however, where the subsequent purchaser has notice, especially if there be a *good* consideration. 2 Gray, Mass. 447.

These statutes have been generally adopted in the United States as the foundation of all the state statutes upon this subject. 1 Story, Eq. Jur. 353; 4 Kent, Comm. 462, 463.

3. But although such conveyance is void as regards purchasers and creditors, it is valid as between the parties. 6 Watts, Penn. 429, 453; 5 Binn. Penn. 109; 1 Yeates, Penn. 291; 3 Watts & S. Penn. 255; 4 Ired. No. C. 102; 9 Pick. Mass. 93; 20 *id.* 247, 354; 1 Ohio, 469; 2 South. N. J. 738; 2 Hill, So. C. 488; 7 Johns. N. Y. 161; 1 W. Blackst. 262. An offence within the 13 Eliz. c. 5, § 3, is also indictable. 6 Cox, Cr. Cas. 31.

FREDNITE. A liberty to hold courts and take up the fines for beating and wounding. Cowel; Cunningham, Law Dict.

To be free from fines.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman, Gloss.; Blount. A sum paid the magistrate for protection against the right of revenge. 1 Robertson, Charles V., App. note xxiii.

FREE. Not bound to servitude. At liberty to act as one pleases. This word is put in opposition to slave. U. S. Const. art. 1, § 2. Used in distinction from being bound as an apprentice.

The Declaration of Independence asserts that all men are born free; and in this sense the term is usually supposed to mean all mankind; though this seems to be doubted in 19 How. 393.

Certain: as, *free* services. These were also more honorable.

Confined to the person possessing, instead of being held in common: as, *free fishery.*

FREE BENCH. Copyhold lands which the wife has for dower after the decease of her husband. Kitch. 102; Bracton, lib. 4, tr. 6, cap. 13, num. 2; Fitzherbert, Nat. Brev. 150; Plowd. 411.

Dower in copyhold lands. 2 Blackstone, Comm. 129. The quantity varies in different sections of England. Coke, Litt. 110 *b.* Incontinency was a cause of forfeiture, except on the performance of a ridiculous ceremony. Cowel; Blount.

FREE BORD. An allowance of land outside the fence which may be claimed by the owner. An allowance, in some places, two and a half feet wide outside the boundary or enclosure. Blount; Cowel.

FREE CHAPEL. A chapel founded by the king and exempted from the jurisdiction of the ordinary. It may be one founded or endowed by a private person under a grant from the king. Cowel; Termes de la Ley.

FREE COURSE. Having the wind from a favorable quarter. To prevent collision of vessels, it is the duty of the vessel having the wind free to give way to a vessel beating up to windward and tacking. 3 Hagg. Adm. 215. At sea, such vessel meeting another close-hauled must give way, if necessary to prevent the danger of collision. 3 Carr. & P. 528. See 9 Carr. & P. 528; 2 W. Rob. Adm. 225; 2 Dods. Adm. 87.

FREE FISHERY. A franchise which gives an exclusive right of fishing in a public navigable river, without any ownership on the soil. 3 Kent, Comm. 329; 2 Sharswood, Blackst. Comm. 39; 1 Salk. 637; Woolrych, Law of Waters, 97. Free fishery is the same as common of fishery. Coke, Litt. Hargrave's notes, 122; 2 Sharswood, Blackst. Comm. 39; 7 Pick. Mass. 79; Angell, Waterc. c. 6, §§ 3, 4. See FISHERY.

FREE SERVICES. Such as it was not unbecoming the character of a soldier or freeman to perform: as, to serve under his lord in the wars, to pay a sum of money, and the like. 2 Blackstone, Comm. 62; 1 Washburn, Real Prop. 25.

FREE SHIPS. Neutral ships. "*Free ships make free goods*" is a phrase often used in treaties to denote that the goods on board neutral ships shall be free from confiscation even though belonging to an enemy. Wheaton, Int. Law, 507 *et seq.*; 1 Kent, Comm. 126. See 3 Phillimore, Int. Law, 3d ed. 238 *et seq.* for a full discussion of the subject.

FREE SOCAGE. Tenure in free socage is a tenure by certain and honorable services which yet are not military. 1 Spence, Eq. Jur. 52; Dalrymple, Feuds, c. 2, § 1; 1 Wash-

burn, Real Prop. 25. Called, also, free and common socage. See SOCAGE.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Sharswood, Blackst. Comm. 39, 417; Coke, Litt. 233. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Sharswood, Blackst. Comm. 39.

FREEDMAN. In Roman Law. A person who had been released from a state of servitude. See LIBERTINE.

FREEDOM. The condition of one to whom the law attributes the single individual right of personal liberty, limited only, in the domestic relations, by powers of control which are associated with duties of protection. See HUSBAND AND WIFE; PARENT AND CHILD; GUARDIAN AND WARD; MASTER AND APPRENTICE.

2. This right becomes subject to judicial determination when the law requires the public custody of the person as a means of vindicating the rights of others. The security of the liberty of the individual and of the rights of others is graduated by the intrinsic equity of the law, in purpose and application. The means of protecting this liberty of the individual without hazarding the freedom of others must be sought in the provisions of the remedial and penal law.

3. Independently of forfeiture of personal liberty under such laws and of its limitations in the domestic relations, freedom, in this sense, is a *status* which is invariable under all legal systems. It is the subject of judicial determination when a condition incompatible with the possession of personal liberty is alleged against one who claims freedom as his *status*. A community wherein law should be recognized, and wherein nevertheless this status should not be enjoyed by any private person, is inconceivable; and, wherever its possession is thus controverted, the judicial question arises of the personal extent of the law which attributes liberty to free persons. The law may attribute it to every natural person, and thereby preclude the recognition of any condition inconsistent with its possession. This universal extent of the law of free condition will operate in the international as well as in the internal private law of the state. In most European countries the right of one, under the law of a foreign country, to control the person of another who by such law had been his slave or bondman is not recognized under that international rule for the allowance of the effect of a foreign law which is called *comity*, because the law of those countries attributes personal liberty as a right to every natural person. 1 Hurd, Law of Freedom and Bondage, §§ 116, 308.

4. In other countries the power of the master under a foreign law is recognized in specified cases by statute or treaty, while an otherwise universal attribution of personal liberty precludes every other recognition of a condition of bondage. On this principle, in some of the United States, an obligation to render personal service or labor, and the corresponding right of the person to whom it is due, existing under the law of other states, are not enforced except in cases of claim within art. 4, sec. 2, ¶ 3 of the constitution of the United States. 18 Pick. Mass. 193; 20 N. Y. 562.

5. Legal rights are the effects of civil society. No legal condition is the reservation of a state of nature anterior to civil society. Freedom, as here understood, is the effect of law, not a pre-existing natural element. It is, therefore, not necessarily attributed to all persons within any one jurisdiction. But personal liberty, even though not attributed universally, may be juridically regarded as a right accordant with the nature of man in society; and the effect of this doctrine will appear in a legal presumption in favour of free condition, which will throw the burden of proof always on him who denies it. This presumption obtained in the law of Rome (XII Tab. T. vi. 5; Dig. lib. 40, tit. 5, l. 53; lib. 43, tit. 29, s. 3, l. 9; lib. 50, tit. 17. ll. 20, 22) even when slavery was derived from the *jus gentium*, or that law which was found to be received by the general reason of mankind. 1 Hurd, Law of Freedom, § 157.

6. In English law, this presumption in favor of liberty has always been recognized, not only in the penal and remedial law, but in applying the law of condition, at a time when involuntary servitude was lawful. Fortescue, cc. 42, c. 47; Coke, Litt. fol. 124 *b*; Wood, Inst. c. 1, § 5. In the slaveholding states of the Union, a presumption against the freedom of persons of negro descent has arisen or been declared by statute. Cooper, Justin. 485; 1 Dev. No. C. 336; 8 Ga. 157; 5 Halst. N. J. 275. In interpreting manumission clauses in wills, the rule differs in the states according to their prevailing policy. Cobb, Law of Slav. 298.

The condition of a private person who is legally secured in the enjoyment of those rights of action, in social relations, which might be equally enjoyed by all private persons.

7. The condition of one who may exercise his natural powers as he wills is not known in jurisprudence, except as the characteristic of those who hold the supreme power of the state. The freedom which one may have by his individual strength resembles this power in kind, and is no part of legal freedom. The legal right of one person involves correlative obligations on others. All persons must be restricted by those obligations which are essential to the freedom of others, 2 Harr. Cond. La. 208; but these are not inconsistent with the possession of rights which may be enjoyed equally by all. Such obligations constitute a condition opposed to freedom only as things which mutually suppose and require each other. Where the law imposes obligations incompatible with the possession of such rights as might be equally enjoyed by all, a condition arises which is contrary to freedom, see BONDAGE, and the condition of those who hold the rights correlative to such obligations becomes superior to freedom, as above defined, or is merged in the superiority of a class or caste. The rights and obligations of all cannot be alike; men must stand towards each other in unlike relations, since the actions of all cannot be the same. In the possession of relative rights they must be unequal. But individual (absolute) rights, which exist in relations towards the community in general, and capacity for relative rights in domestic relations, may be attributed to all in the same circumstances of natural condition. It is in the possession of these rights and this capacity that this freedom exists. As thus defined, it comprehends freedom in the narrower sense, as the greater includes the less; and when attributed to all who enjoy freedom in the narrower sense, as at the present day in the greater part of Europe and in the non-slaveholding states of the Union, the latter is not distinguished as a distinct condition. But some who enjoy personal liberty might yet be so restricted in the acquisition and use of property, so unprotected in person and limited in the exercise of relative rights, that their condition would be freedom in the narrower sense only. During the middle ages, in Europe, it was possible to discrimi-

nate the existing free conditions as thus different; and the restrictions imposed on free colored persons in the slaveholding states of the Union create a similar distinction between their freedom and that which, in all the states, is attributed to all persons of white race.

8. Freedom, in either sense, is a condition which may exist anywhere, under the civil power; but its permanency will depend on the guarantees by which it is defended. These are of infinite variety. In connection with a high degree of guarantee against irresponsible sovereign power, freedom, in the larger sense above described, may be called *civil freedom*, from the fact that such guarantee becomes the public law of the state. Such freedom acquires specific character from the particular law of some one country, and becomes the topic of legal science in the juridical application of the guarantees by which the several rights incident to it are maintained. This constitutes a large portion of the jurisprudence of modern states, and embraces, particularly in England and America, the public or constitutional law. The bills of rights in American constitutions, with their great original, Magna Charta, are the written evidences of the most fundamental of these guarantees. The provisions of the constitution of the United States which have this character operate against powers held by the national government, but not against those reserved to the states. 7 Pet. 243; Sedgwick, Const. 597. It has been judicially declared that a person "held to service or labor in one state under the laws thereof escaping into another" is not protected by any of these provisions, but may be delivered up, by national authority, to a claimant, for removal from the state in which he is found, in any method congress may direct, and that any one claimed as such fugitive may be seized and removed from such state by a private claimant, without regard either to the laws of such state or the acts of congress. 13 Pet. 597.

9. The other guarantees of freedom in either sense are considered under the titles EVIDENCE, ARREST, BAIL, TRIAL, HABEAS CORPUS, HOMINE REPLEGIANDO.

Irresponsible superiority, whether of one or of many, is necessarily antagonistic to freedom in others. Yet freedom rests on law, and law on the supreme power of some state. The possession of this power involves a liberty of action; but its possession by a body of persons, each one of whom must submit to the will of the majority, is not in itself a guarantee of the freedom of any one individual among them. Still, the more equally this power is distributed among those who are thus individually subject, the more their individual liberty of action in the exercise of this power approximates to a legal right,—though one beyond any incident to civil freedom as above defined,—and its possession may be said to constitute political freedom, so far as that may be ascribed to private persons which is more properly ascribed to communities. In proportion as this right is extended to the individual members of a community, it becomes a guarantee of civil freedom, by making a delegation of the power of the whole body to a representative government possible and even necessary, which government may be limited in its action by customary or written law. Thus, the political liberties of private persons and their civil freedom become intimately connected; though political and civil freedom are not necessarily coexistent. 1 Sharswood, Blackst. Comm. 6, n., 127, n.

10. Political freedom is to be studied in the public law of constitutional states, and, in England and America, particularly in those provisions in the bills of rights which affect the subject more in his relations towards the government than in his relations towards other private persons. See LIBERTY. The terms freedom and liberty are words differing in origin (German and Latin); but they are, in use, too nearly synonymous to be distinguished in legal definition. See CIVIL LIBERTY; Lieber, Civil Lib. etc. 37, n.

FREEHOLD. See ESTATE OF FREEHOLD.

FREEHOLD IN LAW. A freehold which has descended to a man, upon which he may enter at pleasure, but which he has not entered on. Termes de la Ley.

FREEHOLDER. The owner of a freehold estate. Such a man must have been anciently a freeman; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. See 1 Washburn, Real Prop. 29, 45, *et seq.*

FREEMAN. One who is not a slave. One born free or made so.

In Old English Law. A freeholder, as distinguished from a villein.

An inhabitant of a city. Stat. 1 Hen. VI. c. 11; 3 Stephen, Comm. 196, 197; Cunningham, Law Dict.

FREEMAN'S ROLL. A list of persons admitted as burgesses or freemen for the purposes of the rights reserved by the Municipal Corporation Act, 5 & 6 Will. IV. c. 76. Distinguished from the Burgess Roll. 3 Stephen, Comm. 197. The term was used, in early colonial history, of some of the American colonies.

FREIGHT. In Maritime Law. The sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another. 13 East, 300. All rewards or compensation paid for the use of ships. 1 Pet. Adm. 206; 2 Boulay-Paty, t. 8, s. 1; 2 Bos. & P. 321; 4 Dall. Penn. 459; 2 Johns. N. Y. 346; 3 *id.* 335; 3 Pardessus, n. 705.

2. *The amount of freight* is usually fixed by the agreement of the parties; and if there is no agreement, the amount is to be ascertained by the usage of the trade and the circumstances and reason of the case. 3 Kent, Comm. 173. Pothier is of opinion that when the parties agree as to the conveyance of the goods, without fixing a price, the master is entitled to freight at the price usually paid for merchandise of a like quality at the time and place of shipment, and if the prices vary he is to pay the mean price. Charte-part, n. 8. But there is a case which authorizes the master to require the highest price: namely, when goods are put on board without his knowledge. *Id.* n. 9. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship: he is, of course, only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the agreed freight. Roccus, notes 72–75; 1 Pet. Adm.

207; 10 East, 530; 2 Vern. Ch. 210. See DEAD FREIGHT.

3. The general rule is that the delivery of the goods at the place of destination, in fulfilment of the agreement of the charter-party or bill of lading, is required, to entitle the master or owner of the vessel to freight. 2 Johns. N. Y. 327; 3 *id.* 321. But to this rule there are several exceptions.

When a cargo consists of live stock, and some of the animals die in the course of the voyage, without any fault or negligence of the master or crew, and there is no express agreement respecting the payment of freight, it is, in general, to be paid for all that were put on board; but when the contract is to pay for the transportation of them, then no freight is due for those which die on the voyage. Molloy, b. 2, c. 4, s. 8; Dig. 14. 2. 10; Abbott, Shipp. 272.

4. An interruption of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceeds with the cargo to the place of destination, as in the case of capture and recapture. 3 C. Rob. Adm. 101.

When the ship is forced into a port short of her destination, and cannot finish the voyage, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; and if, after giving his consent, the master refuses to go on, he is not entitled to freight.

5. When the merchant accepts of the goods at an intermediate port, it is the general rule of marine law that freight is to be paid according to the proportion of the voyage performed; and the law will imply such contract. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as from it the law implies a contract that freight *pro rata parte itineris* shall be accepted and paid. 2 Burr. 883; 7 Term, 381; Abbott, Shipp. part 3, c. 7, s. 13; 3 Binn. Penn. 445; 5 *id.* 525; 2 Serg. & R. Penn. 229; 1 Wash. C. C. 530; 2 Johns. N. Y. 323; 7 Cranch, 358; 6 Cow. N. Y. 504; Marshall, Ins. 281, 691; 3 Kent, Comm. 182; Comyns, Dig. *Merchant* (E 3), note, pl. 43, and the cases there cited.

6. When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination, in this case there is a difference between a general ship and a ship chartered for a specific sum for the whole voyage. In the former case, the freight is to be paid for the goods which may be delivered at their place of destination; in the latter, it has been questioned whether the freight could be apportioned; and it seems that in such case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases. 1 Johns. N. Y. 24; 1 Bulstr. 167; 7 Term, 381; 2 Campb. 466. These are some of the exceptions to the general rule, called for by principles of equity, that a partial performance is not sufficient, and that a partial payment or ratable freight cannot be claimed.

7. If goods are laden on board, the shipper is not entitled to their return and to have them relanded without paying the expenses of unloading and the whole freight and surrendering the bill of lading, or indemnifying the master against any loss or damage he may sustain by reason of the non-delivery of the bill. 6 Du. N. Y. 194; 8 N. Y. 529. In general, the master has a lien on the goods, and need not part with them until the freight is paid; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien. His right to retain the goods may, however, be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. See LIEN; MARITIME LIEN.

If freight be paid in advance and the goods are not conveyed and delivered according to the contract, it can, *in all cases*, in the absence of an agreement to the contrary, be recovered back by the shipper. 5 Sandf. N. Y. 578.

See, generally, 3 Kent, Comm. 173; Abbott, Shipping; Parsons, Marit. Law; Marshall, Ins.; Comyns, Dig. *Merchant* (E 3 *a*); Boulay-Paty; Pothier, Charte-Part.

FREIGHTER. He to whom a ship or vessel has been hired, and who loads her under his contract. He who loads a general ship. 3 Kent, Comm. 173; 3 Pardessus, n. 704.

2. The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take: there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for; and in case of his occupying more room or putting on board a greater weight, he must pay freight on the principles mentioned under the article of FREIGHT.

3. The freighter hiring a vessel is required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade; he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state. 3 Johns. N. Y. 105. He is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRENDLESMAN (Sax.). An outlaw. So called because on his outlawry he was denied all help of friends after certain days. Cowel; Blount.

FRENDNITE. A fine exacted from him who harbored an outlawed friend. Cowel: Cunningham. A quittance for *forfang* (exemption from the penalty of taking provisions before the king's purveyors had taken enough for the king's necessities). Cowel.

FREOBORGH. A free-surety or free-pledge. Spelman, Gloss. See FRANK-PLEDGE.

FRESH DISSEISIN. Such disseisin as a man may seek to defeat of himself, and by his own power, without the help of the king or judges. There was no limit set to the time within which this might be done. It is set in one case at a disseisin committed within fifteen days. Bracton, lib. 4, cap. 5. In another case it was held a fresh disseisin when committed within a year. Britton, cap. 43, 44; Cowel.

FRESH FINE. A fine levied within a year. Stat. Westm. 2 (13 Edw. I.), cap. 45; Cowel.

FRESH FORCE. Force done within forty days. Fitzh. Nat. Brev. 7; Old Nat. Brev. 4. The heir or reversioner in a case of disseisin by *fresh force* was allowed a remedy in chancery by bill before the mayor. Cowel.

FRIBUSCULUM. In Civil Law. A slight dissension between husband and wife, which produced a momentary separation, without any intention to dissolve the marriage,—in which it differed from a divorce. Pothier, Pand. lib. 50, s. 106; Vicat, Voc. Jur. This amounted to a separation in our law. See SEPARATION.

FRIDBORG, FRITHBORG. Frank-pledge. Cowel. Security for the peace. Spelman, Gloss.

FRIDHBURGUS (Sax.). A kind of frank-pledge whereby the principal men were bound for themselves and servants. Fleta, lib. 1, cap. 47. Cowel says it is the same with frank-pledge.

FRIGIDITY. Impotence.

FRITHSOCUE. Surety of defence. Jurisdiction of the peace. The franchise of preserving the peace. Cowel; Spelman, Gloss.

FRUCTUARIUS (Lat.). One entitled to the use of profits, fruits, and yearly increase of a thing. A lessee; a fermor. Bracton, 241; Vicat, Voc. Jur.

Sometimes, as applied to a slave, he of whom any one has the usufruct. Vicat, Voc. Jur.

FRUCTUS (Lat.). The right of using the increase or fruits: equivalent to usufruct.

That which results or springs from a thing: as, rents, interest, freight from a ship, etc.

All the natural return, increase, or additions which is added by nature or by the skill of man, including all the organic products of things. Vicat, Voc. Jur.; 1 Mackeldy, Civil Law, § 154.

FRUCTUS CIVILES (Lat. civil fruits). All revenues and recompenses which, though not *fruits* properly speaking, are recognized as such by the law. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.; Vicat, Voc. Jur.

FRUCTUS INDUSTRIALES (Lat.). Those products which are obtained by the labor and cultivation of the occupant: as, corn. 1 Kauffmann, Mackeld. § 154, n. Emblements are such in the common law. 2 Stephen, Comm. 258; Vicat, Voc. Jur.

FRUCTUS NATURALES (Lat.). Those products which are produced by the powers of nature alone: as, wool, metals, milk. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.

FRUCTUS PENDENTES (Lat.). The fruits united with the thing which produces them. These form a part of the principal thing. 1 Kauffmann, Mackeld. § 154.

FRUGES (Lat.). Any thing produced from vines, underwood, chalk-pits, stone-quarries. Dig. 50. 16. 77.

Grains and leguminous vegetables. In a more restricted sense, any esculent growing in pods. Vicat, Voc. Jur.; Calvinus, Lex.

FRUIT. The produce of a tree or plant which contains the seed or is used for food.

FRUMGYLD. The first payment made to the kindred of a slain person in recompense for his murder. Blount; Termes de la Ley; Leg. Edmundi, cap. ult.

FUAGE, FOCAGE. Hearth-money. A tax laid upon each fireplace or hearth. 1 Blackstone, Comm. 324; Spelman, Gloss. An imposition of a shilling for every hearth, levied by Edward III. (the Black Prince) in the dukedom of Aquitaine.

FUERO. In Spanish Law. Compilations or general codes of law.

The usages and customs which, in the course of time, had acquired the force of unwritten law.

Letters of privilege and exemption from payment of certain taxes, etc.

Charters granted to cities or towns on condition of their paying certain dues to the owner of the land of which they had enjoyment.

Acts of donation granted by some lord or proprietor in favor of individuals, churches, or monasteries.

Ordinances passed by magistrates in relation to the dues, fines, etc. payable by the members of a community.

Letters emanating from the king or some superior lord, containing the ordinances and laws for the government of cities and towns, etc.

This term has many and very various meanings, as is shown above, and is sometimes used in other significations besides those here given. See also Schmidt, Span. Law, Hist. 64; Escriche, Dict. Razz. *Fuero.*

FUERO DE CASTILLA. In Spanish Law. The body of laws and customs which formerly governed the Castilians.

FUERO DE CORREOS Y CAMINOS. In Spanish Law. A special tribunal taking cognizance of all matters relating to the post-office and roads.

FUERO DE GUERRA. In Spanish Law. A special tribunal taking cognizance of all matters in relation to persons serving in the army.

FUERO JUZGO. In Spanish Law.

The code of laws established by the Visigoths for the government of Spain, many of whose provisions are still in force. See the analysis of this work in Schmidt's Span. Law, 30.

FUERO DE MARINA (called, also, *Jurisdiccion de Marina*). **In Spanish Law.** A special tribunal taking cognizance of all matters relating to the navy and to the persons employed therein.

FUERO MUNICIPAL. In Spanish Law. The body of laws granted to a city or town for its government and the administration of justice.

FUERO REAL. In Spanish Law. A code of laws promulgated by Alonzo el Sabio in 1255, and intended as an introduction to the larger and more comprehensive code called *Las Siete Partidas*, published eight years afterwards. For an analysis of this code, see Schmidt, Span. Law, 67.

FUGAM FECIT (Lat. he fled). **In Old English Law.** A phrase in an inquisition, signifying that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGITIVE FROM JUSTICE. One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape punishment.

2. As one state cannot pursue those who violate its laws into the territories of another, and as it concerns all that those guilty of the more atrocious crimes should not go unpunished, the practice prevails among the more enlightened nations of mutually surrendering such fugitives to the justice of the injured state. This practice is founded on national comity and convenience, or on express compact. The United States recognize the obligation only when it is created by express agreement. They have contracted the obligation with several foreign states by treaty, and with one another by their federal constitution and laws. See EXTRADITION.

OF SURRENDER UNDER TREATIES.

3. The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law, 1 Park. Crim. N. Y. 108, congress passed the act of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 U. S. Stat. at Large, 302.

This act embodies those provisions contained in the treaties relating to the procedure, and contains others designed to facilitate the execution of the duty assumed by treaty.

Before any person can be surrendered, a demand for him must be made upon the executive by the executive power of the state whose laws have been violated; and it is said to be usual to prefer this demand before instituting any judicial proceedings for the arrest of the fugitive, 8 Opin. Attys. Gen. 521; but the act of congress does not require this to be first done. *Id.* 240.

4. The following are the leading provisions of the law relating to the practice. 1. A complaint made under oath or affirmation charging the person to be arrested with the commission of one of the enumerated crimes. 2. A warrant for the apprehension of the person charged may be issued by any of the justices of the supreme court or judges of the several district courts of the United States, or the judges of the several state courts, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper gaol until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Opin. Attys. Gen. 6; 8 *id.* 521.

5. The convenient and usual method of action is for some police-officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime. 8 Opin. Attys. Gen. 521.

In all the treaties the parties stipulate upon mutual requisitions, etc. to deliver up to justice all persons who, being charged with crime, "shall seek an asylum or shall be found in the territories of the other." The terms of this stipulation embrace cases of absence without flight, as well as those of actual flight. 8 Opin. Attys. Gen. 306. After

the arrest, and until the surrender, it is the duty of the United States to provide a suitable place of confinement and safely keep the prisoner. 8 Opin. Attys. Gen. 396. If, however, the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape may be retaken, on an escape. 9 U. S. Stat. at Large, 303.

6. It is provided in all the treaties that the expense of the apprehension and delivery shall be borne and defrayed by the party making the requisition.

In the treaties with Prussia and other states of the Germanic Confederation, and with Austria and the Two Sicilies, it is provided that neither party is to surrender its own subjects or citizens to the other. In those with France, Austria, the Swiss Confederation, and the Two Sicilies, it is provided that the stipulation shall not extend to crimes committed anterior to the date of the treaty. In those with France, Austria, Baden, the Swiss Confederation, and the Two Sicilies, crimes of a political character are excluded; and in those with Prussia and other states of the Germanic Confederation, and with Austria, it is provided that if the person accused shall have committed a new crime in the territories of the state where he has sought an asylum or shall be found, he shall not be delivered up until he shall have been tried and shall have received the punishment due to such new crime or shall have been acquitted thereof.

OF SURRENDER UNDER THE FEDERAL CONSTITUTION AND LAWS.

7. In art. iv. sec. 2, of the constitution, it is provided that "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The act of congress of Feb. 12, 1793, 1 U. S. Stat. at Large, 302, prescribes the mode of procedure, and requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand.

8. In the execution of the obligation imposed by the constitution, the following points deserve attention:—

The crime, other than treason or felony, for which a person may be surrendered. Some difference of opinion has prevailed on this subject, owing to some diversity of the criminal laws of the several states; but the better opinion appears to be that the terms of the constitution extend to all acts which by the laws of the state where committed are made criminal. 6 Penn. Law Jour. 412; 1 Kent, Comm. 9th ed. 42, n.; 6 Am. Jur. 226; 9 Wend. N. Y. 212; 1 Am. Law Jour. N. S. 271; 13 Ga. 97; 3 Zabr. N. J. 311; Hurd, Hab. Corp. 597.

The accusation must be in the form of an affidavit or indictment found and duly authenticated. If by affidavit, it should be sufficiently full and explicit to justify arrest and commitment for hearing. 6 Penn. Law Jour. 412; 3 McLean, C. C. 121; 1 Sandf. N. Y. 701; 3 Zabr. N. J. 311; Hurd, Hab. Corp. 605.

9. The accused must have fled from the state in which the crime was committed; and of this the executive authority of the state upon which the demand is made should be reasonably satisfied. This is sometimes done by affidavit. In the absence of direct evidence on the question of flight, if it appear from the indictment or affidavit produced that the crime charged is atrocious in its nature, was recently committed, and the prosecution promptly instituted, the unexplained presence of the accused in another state immediately after the commission of the crime ought perhaps to be regarded as *primâ facie* evidence of flight, sufficient, at least, to warrant an order of arrest. The order of surrender is not required, by the act of congress, to be made at the same time with the order of arrest, and time, therefore, can be taken, in doubtful cases, after the accused is arrested and secured, to hear proofs to establish or rebut such *primâ facie* evidence. 6 Am. Jur. 226; 7 Bost. Law Rep. 386.

10. The surrender of the accused must be made to an agent of the executive authority of the demanding state, duly appointed to receive the fugitive.

The proceedings of the executive authorities are subject to be reviewed on *habeas corpus* by the judicial power, and if found void the prisoner may be discharged. 3 McLean, C. C. 121; 3 Zabr. N. J. 311; 9 Tex. 635; 4 Harr. N. J. 575; 2 Mo. 26; Hurd, Hab. Corp. 615.

FUGITIVE SLAVE. One who, held in bondage, flees from his master's power.

2. Prior to the adoption of the constitution of the United States, the duty of surrendering slaves fleeing beyond the jurisdiction of the state or colony where they were held to service was not regarded as a perfect obligation, though, on the ground of inter-state comity, they were frequently surrendered to the master. Instances of such surrender or permission to reclaim occur in the history of the colonies as early as 1685. Hurd. Hab. Corp. 592. As slavery disappeared in some states, the difficulty of recovering in them slaves fleeing from those where it remained was greatly increased, and on some occasions reclamation became quite impracticable. The subject engaged the attention of the convention of 1787; and, at the instance of members from slaveholding states, a provision was inserted in the constitution for the surrender of such persons escaping from the state where they owed service, into another, which provision was considered a valuable accession to the security of that species of property. 4 Elliott, Debates, 487, 492; 5 *id.* 176, 286.

This provision is contained in art. iv. sec. 2 of the constitution, and is as follows:—

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

3. Congress, conceiving it to be the duty of the federal government to provide by law, with adequate sanctions, for the execution of the duty thus enjoined by the constitution, by the act of Feb. 12, 1793, and again by the amendatory and supplementary act of Sept. 18, 1850, regulated the mode of arrest, trial, and surrender of such fugitives. Some of the states have, also, at times passed acts relating to the subject; but it has been decided by the supreme court of the United States that the power of legislation in the matter was vested exclusively in congress, and that all state legislation inconsistent with the laws of congress was unconstitutional and void. 16 Pet. 608; 11 Ill. 332.

These acts of congress have been held to be constitutional and valid in all their provisions. 16 Pet. 608; 5 Serg. & R. Penn. 62; 9 Johns. N. Y. 67; 12 Wend. N. Y. 311, 507; 2 Pick. Mass. 11; 2 Paine, C. C. 348; 7 Cush. Mass. 285; 6 McLean, C. C. 355; 16 Barb. N. Y. 268; 21 How. 506.

4. *Act of* 1793. By the 3d and 4th sections of the act of Feb. 12, 1793, 1 U. S. Stat. at Large, 302, it is provided that when a person held to labor in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labor or service may be due, his agent or attorney, may seize or arrest such fugitive and take him before any judge of the circuit or district courts of the United States residing or being within the state, or before any magistrate of a county, city, or town corporate wherein such seizure or arrest shall be made, and on proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested owed service or labor to the person claiming him, under the laws of the state or territory from which he fled, the judge or magistrate shall give a certificate thereof, which certificate shall be sufficient warrant for removing the fugitive to the state or territory from which he fled.

The knowingly and willingly obstructing or hindering the claimant, his agent or attorney, in so seizing or arresting the fugitive, the rescue of the fugitive when so arrested, and the harboring or concealing him after notice that he is such a fugitive, are declared offences, and the offender is subjected to a penalty of five hundred dollars, recoverable by and for the benefit of the claimant by action of debt in any court proper to try the same. The claimant is also entitled to his right of action for any injuries sustained by such illegal acts.

5. By the act of Sept. 18, 1850, 9 U S. Stat. at Large, 462, very full provision was made for the rendition of fugitive slaves. The marshals of the United States were required to arrest such slaves; the number of officers authorized to act as magistrates was much extended; provision was made for proof taken by affidavit in the place from which the fugitive escaped; and severe penalties were imposed upon persons harboring or concealing such a slave, or rescuing or attempting to rescue him when arrested.

This act, however, and the 3d and 4th sections of the act of 1793 were repealed by the act of June 28, 1864, 13 U. S. Stat. at Large, 200. For some decisions as to the question of the interference between the acts of 1793 and 1850, **see 5 McLean, C. C. 469; 13 How. 429.**

6. In the practical application of the provisions of the acts of 1793 and 1850 for the reclamation of fugitive slaves, it has been held that the owner is clothed with authority in every state of the Union to seize and recapture his slave wherever he can do it without any breach of the peace or illegal violence, 16 Pet. 608; that he may arrest him on Sunday, in the night-time, or in the house of another if no breach of the peace is committed, Baldw. C. C. 577; that if the arrest be by agent of the owner, he must be authorized by written power of attorney executed and authenticated as required by the act, 6 McLean, C. C. 259, and if his authority be demanded it should be shown, 3 McLean, C. C. 631; but he is not required to exhibit it to every one who may mingle in the crowd which obstructs him, 4 McLean, C. C. 402; that, if resisted by force in making the arrest, the owner may use sufficient force to overcome the unlawful resistance offered,

without being guilty of the offence of riot, 3 Am. Law Journ. 258; 7 Penn. Law Journ. 115; Baldw. C. C. 577; that whilst the examination is pending before the magistrate who has jurisdiction of the case, the party is in custody of the law, and may be imprisoned for safe-keeping, 2 Paine, C. C. 348; 4 Wash. C. C. 461; 6 McLean, C. C. 355; that the act of Sept. 18, 1850, does not operate as a suspension of the writ of *habeas corpus*, 5 Opin. Attys. Genl. 254; but that writ cannot be used by state officers to defeat the jurisdiction acquired by the federal authorities in such cases. 7 Cush. Mass. 285; 5 McLean, C. C. 92; 1 Blatchf. C. C. 635; 8 Ohio St. 599; Hurd, Hab. Corp. 202; 21 How. 506.

7. The provisions of the constitution and laws above cited extend only to cases where persons held to service or labor *in one state or territory* by the laws thereof *escape into another*. Hence, if the owner voluntarily takes his slave into such other state or territory, and the slave leaves him there or refuses to return, he cannot institute proceedings under those laws for his recovery. *Ex parte Simmons*, 4 Wash. C. C. 396. And children, born in a state where slavery prevails, of a negro woman who is a fugitive slave, are not fugitive slaves or slaves who have *escaped* from service in another state, within the meaning of the constitution and acts of Congress. 23 Ala. N. s. 155.

FULL AGE. The age of twenty-one, by common law, of both males and females, and of twenty-five by the civil law. Litt. § 259; 1 Sharswood, Blackst. Comm. 463; Vicat, Voc. Jur. Full age is completed on the day preceding the anniversary of birth. Salk. 44, 625; 1 Ld. Raym. 480; 2 *id.* 1096; 2 Kent, Comm. 263; 3 Harr. Del. 557; 4 Dan. Ky. 597.

This period is arbitrary, and is fixed by statute. In the United States the common-law period has been generally adopted. In Vermont and Ohio, however, a woman is of full age at eighteen. 2 Kent, Comm. 233.

FULL DEFENCE. See DEFENCE.

FULL PROOF. See PLENA PROBATIO.

FUNCTION. The occupation of an office: by the performance of its duties, the officer is said to fill his function. Dig. 32. 65. 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNCTUS OFFICIO (Lat.). A term applied to something which once has had life and power, but which has become of no virtue whatsoever.

For example, a warrant of attorney on which a judgment has been entered is *functus officio*, and a second judgment cannot be entered by virtue of its authority. When arbitrators cannot agree and choose an umpire, they are said to be *functi officio*. Wattson, Arb. 94. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio*, and cannot be further negotiated. 5 Pick. Mass. 85. When an agent has completed the business with which he was intrusted, his agency is *functus officio*. 2 Bouvier, Inst. n. 1382.

FUNDAMENTAL. This word is applied to those laws which are the foundation of society. Those laws by which the exercise of power is restrained and regulated are fundamental. The constitution of the United States is the fundamental law of the land. See Wolffius, Inst. Nat. § 984.

FUNDATIO (Lat.). A founding.

FUNDING SYSTEM. The practice of borrowing money to defray the expenses of government.

2. In the early history of the system it was usual to set apart the revenue from some particular tax as a *fund* to the principal and interest of the loan. The earliest record of the funding system is found in the history of Venice. In the year 1171, during a war between the republic and the Byzantine emperor Manuel Commenas, a Venetian fleet ravaged the eastern coasts, but, being detained by negotiations at Chios, suffered severely from the plague. The remnant of the expedition, returning, took with it the frightful pestilence, which ravaged Venice and produced a popular commotion in which the doge was killed. To carry on the war, the new doge, Sebastian Giani, ordered a forced loan. Every citizen was obliged to contribute one-hundredth of his property, and he was to be paid by the state five per cent. interest, the revenues being mortgaged to secure the faithful performance of the contract. To manage the business, commissioners were appointed, called the Chamber of Loans, which after the lapse of centuries grew into the Bank of Venice. Florence and the other Italian republics practised the system; and it afterwards became general in Europe. Its object is to provide large sums of money for the immediate exigencies of the state, which it would be impossible to raise by direct taxation.

3. In England the funding system was inaugurated in the reign of William III. The Bank of England, like the Bank of Venice and the Bank of Saint George at Genoa, grew out of it. In order to make it easy to procure money to carry on the war with France, the government proposed to raise a loan, for which, as usual, certain revenues were to be set aside, and the subscribers were to be made a corporation, with exclusive banking privileges. The loan was rapidly subscribed for, and the Bank of England was the corporation which it brought into existence. It was formerly the practice in England to borrow money for fixed periods; and these loans were called terminable annuities. Of late years, however, the practice is different,—loans being payable only at the option of the government: these are termed interminable annuities. The rate of interest on the earlier loans was generally fixed at three and a half per cent. and sold at such a rate below par as to conform to the state of the money-market. It is estimated that two-fifths of the entire debt of England consists of this excess over the amount of money actually received for it. The object of such a plan was to promote speculation and attract capitalists; and it is still pursued in France.

4. Afterwards, however, the government receded from this policy, and, by borrowing at high rates, were enabled, when the rate of interest declined, by offering to pay off the loan, to reduce the interest materially. The national debt of England consists of many different loans, all of which are included in the term *funds*. Of these, the largest in amount and importance are the "three per cent. consolidated annuities," or consols, as they are commonly

called. They originated in 1751, when an act was passed consolidating several separate three per cent. loans into one general stock, the dividends of which are payable on the 5th of January and 5th of July at the Bank of England. The bank, being the fiscal agent of the government, pays the interest on most of the funds, and also keeps the transfer-books. When stock is sold, it is transferred on the books at the bank to the new purchaser, and the interest is paid to those parties in whose names the stock is registered, at the closing of the books a short time previous to the dividend-day. Stock is bought and sold at the stock exchange generally through brokers. Time sales, when the seller is not the actual possessor of the stock, are illegal, but common. They are usually made deliverable on certain fixed days, called accounting-days; and such transactions are called "for account," to distinguish them from the ordinary sales and purchases for cash. Stock-jobbers are persons who act as middlemen between sellers and purchasers. They usually fix a price at which they will sell and buy, so that sellers and purchasers can always find a market for stock, or can purchase it in such quantities as they may desire, without delay or inconvenience.

5. In America the funding system has been fully developed. The general government, as well as those of all the states, have found it necessary to anticipate their revenue. The many magnificent works of internal improvement which have added so much to the wealth of the country were mainly constructed with money borrowed by the states. The canals of New York, and many railroads in the western states, owe their existence to the system. The states generally issue bonds for their debt redeemable at the expiration of twenty years, with semi-annual coupons attached for interest, which is usually payable in New York. Inscription stock, transferrable only on the transfer-books of the state, is, however, sometimes issued.

The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one. It affords a ready method of investing money on good security, and it tends to identify the interest of the state and the people. But it is open to many objections,—the principal of which is that it induces statesmen to countenance expensive and oftentimes questionable projects who would not dare to carry out their plans were they forced to provide the means from direct taxation. McCulloch, Dict. of Comm.; Sewell, Banking.

FUNDS. Cash on hand: as, A B is in funds to pay my bill on him. Stocks: as, A B has one thousand dollars in the funds. By public funds is understood the taxes, customs, etc. appropriated by the government for the discharge of its obligations.

FUNDUS (Lat.). Land. A portion of territory belonging to a person. A farm. Lands, including houses. 4 Coke, 87; Coke, Litt. 5 *a;* 3 Sharswood, Blackst. Comm. 209.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse.

2. The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumpsit, to pay them. 1 Campb. 298; Holt, 309; Comyn, Contr. 529; 1 Hawks, No. C. 394; 13 Viner, Abr. 563.

3. Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather any certain rule from the numerous cases which have been decided upon this subject. Courts of equity have taken into consideration the circumstances of each case, and when the executors have acted with common prudence and in obedience to the will, their expenses have been allowed. In a case where the testator directed that his remains should be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed. 3 Atk. Ch. 119. In another case, under peculiar circumstances, six hundred pounds were allowed. Chanc. Prec. 29. In a case in Pennsylvania, where the intestate left a considerable estate, and no children, the sum of two hundred and fifty-eight dollars and seventy-five cents was allowed, the greater part of which had been expended in erecting a tombstone over a vault in which the body was interred. 14 Serg. & R. Penn. 64.

4. It seems doubtful whether the husband can call upon the separate personal estate of his wife to pay her funeral expenses. 6 Madd. Ch. 90. See 2 Blackstone, Comm. 508; Godolph. p. 2; 3 Atk. Ch. 249; Bacon, Abr. *Executors*, etc. (L 4); Viner, Abr. *Funeral Expenses.*

FUNGIBLE. A term applicable to things that are consumed by the use, as wine, oil, etc., the loan of which is subject to certain rules, and governed by the contract called *mutuum.* See Schmidt, Civil Law of Spain & Mexico, 145; Story, Bailm.; 1 Bouvier, Inst. nn. 987, 1098.

FUR (Lat.). A thief. One who stole without using force, as distinguished from a robber. See FURTUM.

FURCA ET FLAGELLUM (Lat. gallows and whip). The meanest of servile tenures, where the bondman was at the disposal of the lord for life and limb. Cowel.

FURCA ET FOSSA (Lat. gallows and pit). A jurisdiction of punishing felons,—the men by hanging, the women by drowning. Skene; Spelman, Gloss.; Cowel.

FURIOSUS (Lat.). An insane man; a madman; a lunatic.

In general, such a man can make no contract, because he has no capacity or will: *Furiosus nullum negotium genere potest, quia non intelligit quod agit.* Inst. 3. 20. 8. Indeed, he is considered so incapable of exercising a will, that the law treats him as if he were absent: *Furiosi nulla voluntas est. Furiosus absentis loco est.* Dig. 1. ult., 40. 124. 1. See INSANE; NON COMPOS MENTIS.

FURLINGUS (Lat.). A furlong, or a furrow one-eighth part of a mile long. Coke, Litt. 5 *b.*

FURLONG. A measure of length, being forty poles, or one-eighth of a mile.

FURLOUGH. A permission given in the

army and navy to an officer or private to absent himself for a limited time.

FURNAGE (from *furnus*, an oven). A sum of money paid to the lord by the tenants, who were bound by their tenure to bake at the lord's oven, for the privilege of baking elsewhere. The word is also used to signify the gain or profit taken and received for baking.

FURNITURE. Personal chattels in the use of a family. By the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as, plate, linen, china (both useful and ornamental), and pictures. Ambl. 610; 1 Johns. Ch. N. Y. 329, 388; 1 Sim. & S. Ch. 189; 3 Russ. Ch. 301; 2 Williams, Exec. 752; 1 Roper, Leg. 203, 204; 3 Ves. Ch. 312, 313.

FURTHER ASSURANCE. This phrase is frequently used in covenants when a covenantor has granted an estate and it is supposed some further conveyance may be required. He then enters into a covenant for further assurance, that is, to make any other conveyance which may be lawfully required.

FURTHER HEARING. In Practice. Hearing at another time.

2. Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time, at the moment, to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing; and if he neglect to do so within a reasonable time, he becomes a trespasser. 10 Barnew. & C. 28; 5 Mann. & R. 53. Fifteen days was held an unreasonable time, unless under special circumstances. 4 Carr. & P. 134; 4 Day, Conn. 98; 6 Serg. & R. Penn. 427.

In Massachusetts, magistrates may, by statute, adjourn the case for ten days. Gen. Stat. c. 170, § 17. It is the practice in England to commit for three days, and then from three days to three days. 1 Chitty, Crim. Law, 74.

FURTUM (Lat.). Theft. The fraudulent appropriation to one's self of the property of another, with an intention to commit theft, without the consent of the owner. Fleta, l. 1, c. 36; Bracton, 150; Coke, 3d Inst. 107.

The thing which has been stolen. Bracton, 151.

FURTUM CONCEPTUM (Lat.). The theft which was disclosed where, upon searching any one in the presence of witnesses in due form, the thing stolen is found. Detected theft is, perhaps, the nearest concise translation of the phrase, though not quite exact. Vicat, Voc. Jur.

FURTUM GRAVE (Lat.). Aggravated theft. Formerly, there were three classes of this theft: *first*, by landed men; *second*, by a trustee or one holding property under a trust; *third*, theft of the *majora animalia* (larger animals), including children. 1 Bouvier, Civ. Law, 352, n.; Bell, Dict.

FURTUM MANIFESTUM (Lat.). Open theft. Theft where a thief is caught with the property in his possession. Bracton, 150 *b*.

FURTUM OBLATUM (Lat.). The theft committed when stolen property is offered any one and found upon him. The crime of receiving stolen property. Calvinus, Lex.; Vicat, Voc. Jur.

FUTURE DEBT. In Scotch Law. A debt which is created, but which will not become due till a future day. 1 Bell, Comm. 5th ed. 315.

FUTURE ESTATE. An estate which is to commence in possession in the future (*in futuro*). It includes remainders, reversions, and estates limited to commence *in futuro* without a particular estate to support them, which last are not good at common law, except in the case of terms for years. See 2 Sharswood, Blackst. Comm. 165. In New York law it has been defined "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time," thus excluding reversions, which cannot be said to be *created* at the same time, because they are a remnant of the original estate remaining in the grantor. 11 N. Y. Rev. Stat. 3d ed. 9, § 10.

FUTURI (Lat.). Those who are to be. Part of the commencement of old deeds. "*Sciant præsentes et futuri, quod ego, talis, dedi et concessi,*" etc. (Let all men now living and to come know that I, A B have, etc.). Bracton, 34 *b*.

FYNDERINGA (Sax.). An offence or trespass for which the fine or compensation was reserved to the king's pleasure. Leges Hen. I. c. 10. Its nature is not known. Spelman reads *fynderinga*, and interprets it *treasure trove;* but Cowel reads *fyrderinga*, and interprets it a joining of the king's *fird* or host, a neglect to do which was punished by a fine called *firdnite*. See Cowel; Spelman, Gloss. DuCange agrees with Cowel.

G.

GABEL. A tax, imposition, or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunningham, Dict. But this seems to be an error; for gabelle signified in that country, previous to its revolution, a duty upon salt. Merlin, Rép. Lord Coke says that *gabel* or *gavel*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavillettum* signify a rent, duty, or service yielded or done to the king or any other lord. Coke, Litt. 142 *a*.

GABLUM (spelled, also, *gabulum*, *gabula*). The gable-end of a building. Kennett, Paroch. Antiq. p. 201; Cowel.

A tax. DuCange.

GAFOL (spelled, also, *gabella*, *gavel*). Rent; tax; interest of money.

Gafol gild. Payment of such rent, etc. *Gafol land* was land liable to tribute or tax, Cowel; or land rented. Saxon Dict. See Taylor, Hist. of Gavelkind, pp. 26, 27, 1021; Anc. Laws & Inst. of Eng. Gloss.

GAGE, GAGER (Law Lat. *vadium*). Personal property placed by a debtor in possession of his creditor as a security for the payment of his debt a pawn or pledge (*q. v.*). Granville, lib. 10, c. 6; Britton, c. 27.

To pledge; to wage. Webster, Dict.

Gager is used both as noun and verb: e.g. *gager del ley*, wager of law, Jacobs; *gager ley*, to wage law, Britton, c. 27; *gager deliverance*, to put in sureties to deliver cattle distrained. Termes de la Ley; Kitchen, fol. 145; Fitzherbert, Nat. Brev. fol. 67, 74.

A mortgage is a *dead-gage* or pledge; for, whatsoever profit it yields, it redeems not itself, unless the whole amount secured is paid at the appointed time. Cowel.

GAGER DEL LEY. Wager of law.

GAIN. Profits.

GAINAGE. Wainage, or the draught-oxen, horses, wain, plough, and furniture for carrying on the work of tillage. Also, the land tilled itself, or the profit arising from it. Old Nat. Brev. fol. 117.

Gainor. The sokeman that hath such land in occupation. Old Nat. Brev. fol. 12.

GALENES. In Old Scotch Law. A kind of compensation for slaughter. Bell, Dict.

GALLON. A liquid measure, containing two hundred and thirty-one cubic inches, or four quarts.

GALLOWS. An erection on which to hang criminals condemned to death.

GAME. Birds and beasts of a wild nature, obtained by fowling and hunting. Bacon, Abr. See 11 Metc. Mass. 79.

GAME LAWS. Laws regulating the killing or taking of birds and beasts, as game.

The English game laws are founded on the idea of restricting the right of taking game to certain privileged classes, generally landholders. In 1831, the law was so modified as to enable any one to obtain a certificate or license to kill game, on payment of a fee. An account of the present game laws of England will be found in Appleton's New Am. Cyc. vol. viii., Eng. Cyc., Arts & Sc. Div. The laws relating to game in the United States are generally, if not universally, framed with reference to protecting the animals from indiscriminate and unreasonable havoc, leaving all persons free to take game, under certain restrictions as to the season of the year and the means of capture. The details of these regulations must be sought in the statutes of the several states.

GAMING. A contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner.

When considered in itself, and without regard to the end proposed by the players, there is nothing in it contrary to natural equity, and the contract will be considered as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last.

2. In general, at common law, all games are lawful, unless some fraud has been practised or such games are contrary to public policy. Each of the parties to the contract must have a right to the money or thing played for. He must have given his full and free consent, and not have been entrapped by fraud. There must be equality in the play. The play must be conducted fairly. But, even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play. Bacon, Abr.

3. But when fraud has been practised, as in all other cases, the contract is void; and in some cases, when the party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law, and fined and imprisoned according to the heinousness of the offence. 1 Russell, Crimes, 406.

4. Statutes have been passed in perhaps all the states forbidding gaming for money at certain games, and prohibiting the recovery of money lost at such games. See Bacon, Abr; Dane, Abr. Index; Pothier, Traité du Jeu; Merlin, Répertoire, mot *Jeu;* Barbeyrac, Traité du Jeu, tome 1, p. 104, note 4; 1 P. A. Browne, Penn. Rep. 171; 1 Ov. Tenn. 360; 3 Pick. Mass. 446; 7 Cow. N. Y. 496; 1 Bibb, Ky. 614; 1 Mo. 635; 1 Bail. So. C. 315; 6 Rand. Va. 694; 2 Blackf. Ind. 251; 3 *id.* 294; 2 Bishop, Crim. Law, § 507.

GAMING HOUSES. In Criminal

Law. Houses kept for the purpose of permitting persons to gamble for money or other valuable thing. They are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices. 1 Russell, Crimes, 299; Roscoe, Crim. Ev. 663; 3 Den. N. Y. 101.

GANANCIAL. In Spanish Law. Property held in community.

The property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions *durante el matrimonio*, and the *frutos* or rents and profits of the other property. 1 Burge, Confl. of Laws, 418, 419; Aso & M. Inst. b. 1, t. 7, c. 5, § 1.

GAOL. (This word, sometimes written *jail*, is said to be derived from the Spanish *jaula*, a cage (derived from *caula*), in French *gêole*, gaol. 1 Mann. & G. 222, note *a*.) A prison or building designated by law or used by the sheriff for the confinement or detention of those whose persons are judicially ordered to be kept in custody. See 6 Johns. N. Y. 22; 14 Viner, Abr. 9; Bacon, Abr.; Dane, Abr. Index; 4 Comyns, Dig. 619.

GAOL-DELIVERY. In English Law. To insure the trial, within a certain time, of all prisoners, a patent, in the nature of a letter, is issued from the king to certain persons, appointing them his justices and authorizing them to deliver his gaols. See GENERAL GAOL DELIVERY; OYER AND TERMINER.

GAOL LIBERTIES, GAOL LIMITS. A space marked out by limits, which is considered as a part of the prison, and within which prisoners are allowed to go at large on giving security to return. Owing to the rigor of the law which allowed *capias*, or attachment of the person, as the first process against a debtor, statutes were from time to time passed enlarging the gaol liberties, in order to mitigate the hardships of imprisonment: thus, the whole city of Boston was held the "gaol liberties" of its county gaol. And so with a large part of New York city. Act of March 13, 1830, 3 N. Y. Rev. Stat. 1829, App. 116. The prisoner, while within the limits, is considered as within the walls of the prison. 6 Johns. N. Y. 121.

GAOLER. The keeper of a gaol or prison; one who has the legal custody of the place where prisoners are kept.

It is his duty to keep the prisoners in safe custody, and for this purpose he may use all necessary force. 1 Hale, Pl. Cr. 601. But any oppression of a prisoner under a pretended necessity will be punished; for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression.

GARAUNTOR. A warrantor or vouchee, who is obliged by his warranty (*garauntie*) to warrant (*garaunter*) the title of the warrantee (*garaunte*), that is, to defend him in his seisin, and if he do not defend, and the tenant be ousted, to give him land of equal value. Britton, c. 75.

GARBALLO DECIMÆ (L. Lat.; from *garba*, a sheaf). **In Scotch Law.** Tithes of corn: such as wheat, barley, oats, pease, etc. Also called parsonage tithes (*decimæ rectoriæ*). Erskine, Inst. b. 11, tit. 10, § 13.

GARDEN. A piece of ground appropriated to raising plants and flowers.

A garden is a parcel of a house, and passes with it. 2 Coke, 32; Plowd. 171; Coke, Litt. 5 *b*, 56 *a*, *b*. But see F. Moore, 24; Bacon, Abr. *Grants*, I.

GARNISH. In English Law. Money paid by a prisoner to his fellow-prisoners on his entrance into prison.

To warn. To garnish the heir is to warn the heir. Obsolete.

GARNISHEE. In Practice. A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, and who has had notice of such attachment; he is so called because he has had warning or notice of the attachment.

From the time of the notice of the attachment, the garnishee is bound to keep the property in his hands, to answer the plaintiff's claim, until the attachment is dissolved or he is otherwise discharged. See Sergeant, Att. 88–110; Comyns, Dig. *Attachment*, E.

There are garnishees also in the action of detinue. They are persons against whom process is awarded, at the prayer of the defendant, to warn them to come in and interplead with the plaintiff. Brooke, Abr. *Detinue*.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause.

For example, in the practice of Pennsylvania, when an attachment issues against a debtor, in order to secure to the plaintiff a claim due by a third person to such debtor, notice is given to such third person, which notice is a garnishment, and he is called the garnishee.

In detinue, the defendant cannot have a *sci. fa.* to garnish a third person unless he confess the possession of the chattel or thing demanded. Brooke, Abr. *Garnishment*, 1, 5. And when the garnishee comes in, he cannot vary or depart from the allegation of the defendant in his prayer of garnishment. The plaintiff does not declare *de novo* against the garnishee; but the garnishee, if he appears in due time, may have oyer of the original declaration to which he pleads. See Brooke, Abr. *Garnishee and Garnishment*, pl. 8; ATTACHMENT.

GARNISTURA. In Old English Law. Garniture; whatever is necessary for the fortification of a city or camp, or for the ornament of a thing. 8 Rymer, 328; DuCange; Cowel; Blount.

GARSUMNE. **In Old English Law.** An amerciament or fine. Cowel. See GRESSUME; GROSSOME; GERSUMA.

GATE (Sax. *geat*), at the end of names of places, signifies way or path. Cunningham, Law Dict.

In the words *beast-gate* and *cattle-gate*, it means a right of pasture: these rights are local to Suffolk and Yorkshire respectively; they are considered as corporeal hereditaments, for which ejectment will lie, 2 Strange, 1084; 1 Term, 137, and are entirely distinct from right of common. The right is sometimes connected with the duty of repairing the *gates* of the pasture: and perhaps the name comes from this.

GAUGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GAVEL. **In Old English Law.** Tribute; toll; custom; yearly revenue, of which there were formerly various kinds. Jacob, Law Dict.; Taylor, Hist. of Gavelkind, 26, 102. See GABEL.

GAVELGELD (Sax. *gavel*, rent, *geld*, payment). That which yields annual profit or toll. The tribute or toll itself. 3 Mon. Angl. 155; Cowel; DuCange, *Gavelgida*.

GAVELHERTE. A customary service of ploughing. DuCange.

GAVELKIND. The tenure by which almost all lands in England were held prior to the Conquest, and which is still preserved in Kent.

All the sons of a tenant of gavelkind lands take equally, or their heirs male and female by representation. The wife of such tenant is dowable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat, except for treason or want of heirs. The heir of such lands may sell at fifteen years old, but must himself give livery. The rule as to division among brothers in default of sons is the same as among the sons.

Lord Coke derives *gavelkind* from "gave all kinde;" for this custom gave to all the sons alike, 1 Coke, Litt. 140 *a;* Lambard, from *gavel*, rent,—that is, land of the kind that pays rent or customary husbandry work, in distinction from lands held by knight service. Perambulations of Kent, 1656, p. 585. See Encyc. Brit.; Blount.

GAVELMAN. A tenant who is liable to tribute. Somner, Gavelkind, p. 33; Blount. Gavelingmen were tenants who paid a reserved rent, besides customary service. Cowel.

GAVELMED. A customary service of mowing meadow-land or cutting grass (*consuetudo falcandi*). Somner, Gavelkind, App.; Blount.

GAVELWERK (called also *Gavelweek*). A customary service, either *manuopera*, by the person of the tenant, or *carropera*, by his carts or carriages. Phillips, Purveyance; Blount; Somner, Gavelkind, 24; DuCange.

GEBOCIAN (from Sax. *boc*). To convey *boc land*,—the grantor being said to *gebocian* the grantee of the land. 1 Reeve, Hist. Eng. Law, 10. But the better opinion would seem to be that *boc land* was not transferable except by descent. See DuCange, *Liber*.

GELD (from Sax. *gildan;* Law Lat. *geldum*). A payment; tax, tribute. Laws of Hen. I. c. 2; Charta Edredi Regis apud Ingulfum, c. 81; Mon. Ang. t. 1, pp. 52, 211, 379; t. 2, pp. 161–163; DuCange; Blount.

The compensation for a crime.

We find geld added to the word denoting the offence, or the thing injured or destroyed, and the compound taking the meaning of compensation for that offence or the value of that thing. Capitulare 3, anno 813, cc. 23, 25; Carl. Magn. So, *wergeld*, the compensation for killing a man, or his value; *orfgeld*, the value of cattle; *angeld*, the value of a single thing; *octogeld*, the value eight times over, etc. DuCange, *Geldum*.

GEMOT (*gemote*, or *mote;* Sax., from *gemettand*, to meet or assemble; L. Lat. *gemotum*). An assembly; a mote or moot, meeting, or public assembly.

There were various kinds: as, the *witenagemot*, or meeting of the wise men; the *folcgemot*, or general assembly of the people; the *shire-gemot*, or county court; the *burg-gemot*, or borough court; the *hundred-gemot*, or hundred court; the *hali-gemot*, or court-baron; the *halmote*, a convention of citizens in their public hall; the *holy-mote*, or holy court; the *sweingemote*, or forest court; the *wardmote*, or ward court. Cunningham, Law Dict. And see the several titles.

GENEALOGY. The summary history or table of a house or family, showing how the persons there named are connected together.

It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*. Children stand to each other in the relation either of full blood or half-blood, according as they are descended from the same parents or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male or female sex in descending, and then in collateral, lines. Other tables exhibit the ancestors of a particular person in ascending lines both on the father's and the mother's side. In this way four, eight, sixteen, thirty-two, etc. ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law (*arbor consanguinitatis*), in which the progenitor is placed beneath, as if for the root or stem.

GENER (Lat.). A son-in-law.

GENERAL ASSEMBLY. A name given in some of the states to the senate and house of representatives, which compose the legislative body.

GENERAL GAOL DELIVERY. In

English Law. One of the four commissions issued to judges holding the assizes, which empowers them to try and deliverance make of every prisoner who shall be in the gaol when the judges arrive at the circuit town, whether an indictment has been preferred at any previous assize or not.

It was anciently the course to issue special writs of gaol delivery for each prisoner, which were called writs *de bono et malo;* but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. 4 Stephen, Comm. 333, 334; 2 Hawkins, Pl. Cr. 14, 28.

Under this authority the gaol must be cleared and delivered of all prisoners in it, whenever or before whomever indicted or for whatever crime. Such deliverance takes place when the person is either acquitted, convicted, or sentenced to punishment. Bracton, 110. See COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; ASSIZE.

GENERAL IMPARLANCE. In Pleading. One granted upon a prayer in which the defendant reserves to himself no exceptions.

GENERAL ISSUE. In Pleading. A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it.

It is called the general issue because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 2 Blackstone, Comm. 305. In the early manner of pleading, the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts.

But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defence which he intends to set up on trial, or obliging him to use a form of answer adapted to the plaintiff's declaration, the method varying in different systems of pleading.

In criminal cases the general issue is, not guilty. In civil cases the general issues are almost as various as the forms of action: in assumpsit, the general issue is *non assumpsit;* in debt, *nil debet;* in detinue, *non detinet;* in trespass, *non cul.* (not guilty); in replevin, *non cepit*, etc.

GENERAL LAND OFFICE. A bureau in the United States government which has the charge of matters relating to the public lands.

It was established by the act of April 25, 1812, 2 Story, U. S. Laws, 1238. Another act was passed March 24, 1824, 3 Story, 1938, which authorized the employment of additional officers. And it was reorganized by an act entitled "An act to reorganize the General Land Office," approved July 4, 1836. It was originally a bureau of the treasury department, but was transferred in 1859 to the department of the interior. See DEPARTMENT; Brightly, Dig. U. S. Laws, *Lands.*

GENERAL OCCUPANT. The man who could first enter upon lands held *pur autre vie*, after the death of the tenant for life, living the *cestui que vie.* At common law he held the lands by right for the remainder of the term; but this is now altered by statute, in England, the term going to the executors if not devised. 29 Car. II. c. 3; 14 Geo. II. c. 20; 2 Sharswood, Blackst. Comm. 258. This has been followed by some states, 1 Md. Code, 666, s. 220, art. 93; in some states the term goes to heirs, if undevised. Mass. Gen. Stat. c. 91, § 1.

GENERAL SHIP. One which is employed by the charterer or owner on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. A ship advertised for general receipt of goods to be carried on a particular voyage. The advertisement should state the name of the ship and master, the general character of the ship, the time of sailing, and the proposed voyage. See 1 Parsons, Mar. Law, 130; Abbott, Shipp. 7th Lond. ed. 123.

The shippers in a general ship generally contract with the master; but in law the owners and the master are separately bound to the performance of the contract, it being considered as made with the owners as well as with the master. Abbott, Shipp. 7th Lond. ed. 319.

GENERAL SPECIAL IMPARLANCE. In Pleading. One in which the defendant reserves to himself "all advantages and exceptions whatsoever." 2 Chitty, Plead. 408. See IMPARLANCE.

GENERAL TRAVERSE. See TRAVERSE.

GENERAL WARRANT. A process which used to issue from the state secretary's office, to take up (without naming any person in particular) the author, printer, and publisher of such obscene and seditious libels as were particularly specified in it. It was declared illegal and void for uncertainty by a vote of the house of commons. Com. Jour. 22 April, 1766; Wharton, Law Dict. 2d Lond. ed.

A writ of assistance.

The issuing of these was one of the causes of the American republic. They were a species of general warant, being directed to "all and singular justices, sheriffs, constables, and all other officers and subjects," empowering them to enter and search any house for uncustomed goods, and to command all to assist them. These writs were perpetual, there being no return to them. They were not executed, owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality. See Tudor, Life of Otis, 66.

The term occurs in modern law in a different sense. See 18 Ill. 67.

GENS (Lat.). **In Roman Law.** A union of families, who bore the same name, who were of an ingenuous birth, *ingenui*, none of whose ancestors had been a slave, and who had suffered no *capitis diminutio.*

Gentiles sunt, qui inter se eodem nomine sunt; qui ab ingenuis oriundi sunt; quorum majorum nemo servitutem servivit; qui capite non sunt deminuti. This definition is given by Cicero (Topic 6), after

Scævola, the pontifex. But, notwithstanding this high authority, the question as to the organization of the *gens* is involved in great obscurity and doubt. The definition of Festus is still more vague and unsatisfactory. He says, "*Gentilis dicitur et ex eodem genere ortus, et is, qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt, qui meo nomine appellantur.*" *Gens* and *genus* are convertible terms; and Cicero defines the latter word, "*Genus autem est quod sui similes communione quadam, specie autem differentes, duas aut plures complectitur partes.*" *De Oratore*, 1, 42. The *genus* is that which comprehends two or more particulars, similar to one another by having something in common, but differing in species. From this it may fairly be concluded that the *gens* or race comprises several families, always of ingenuous birth, resembling each other by their origin, general name,—*nomen*,—and common sacrifices or sacred rites,—*sacra gentilitia* (*sui similes communione quadam*),—but differing from each other by a *particular* name,—*cognomen* and *agnatio* (*specie autem differentes*). It would seem, however, from the litigation between the Claudii and Marcellii in relation to the inheritance of the son of a freedman, reported by Cicero, that the deceased, whose succession was in controversy, belonged to the gens Claudia, for the foundation of their claim was the gentile rights,—*gente;* and the Marcellii (plebeians belonging to the same gens) supported their pretensions on the ground that he was the son of their freedman. This fact has been thought by some writers to contradict that part of the definition of Scævola and Cicero where they say, *quorum majorum nemo servitutem servivit.* And Niebuhr, in a note to his history, concludes that the definition is erroneous: he says, "The claim of the patrician Claudii is at variance with the definition in the Topics, which excludes the posterity of freedmen from the character of gentiles: probably the decision was against the Claudii, and this might be the ground on which Cicero denied the title of gentiles to the descendants of freedmen. I conceive in so doing he must have been mistaken. We know from Cicero himself (*de Leg.* 11, 22) that no bodies or ashes were allowed to be placed in the common sepulchre unless they belonged to such as shared in the *gens* and its sacred rites; and several freedmen have been admitted into the sepulchre of the Scipios." But in another place he says, "The division into houses was so essential to the patrician order that the appropriate ancient term to designate that order was a circumlocution,—the *patrician gentes;* but the instance just mentioned shows beyond the reach of a doubt that such a gens did not consist of patricians alone. The Claudian contained the Marcellii, who were plebeians, equal to the Appii in the splendor of the honors they attained to, and incomparably more useful to the commonwealth; such plebeian families must evidently have arisen from marriages of disparagement, contracted before there was any right of intermarriage between the orders. But the Claudian house had also a very large number of insignificant persons who bore its name,—such as the M. Claudius who disputed the freedom of Virginia; nay, according to an opinion of earlier times, as the very case in Cicero proves, it contained the freedmen and their descendants. Thus, among the Gaels, the clan of the Campbells was formed by the nobles and their vassals: if we apply the Roman phrase to them, the former *had* the clan, the latter only belonged to it." It is obvious that, if what is said in the concluding part of the passage last quoted be correct, the definition of Scævola and Cicero is perfectly consistent with the theory of Niebuhr himself; for the definition, of course, refers to the original stock of the gens, and not to such as might be attached to it or stand in a certain legal relation towards it. In Smith's Dictionary of Greek and Roman Antiquities, edited by that accomplished classical scholar, Professor Anthon, the same distinction is intimated, though not fully developed, as follows:—"But it must be observed, though the descendants of freedmen might have no claim as gentiles, the members of the gens might, as such, have claims against them; and in this sense the descendants of freedmen might be gentiles." Hugo, in his History of the Roman Law, vol. 1, p. 83 *et seq.*, says, "Those who bore the same name belonged all to the same *gens:* they were gentiles with regard to each other. Consequently, as the freedmen took the name of their former master, they adhered to his *gens*, or, in other words, stood in the relation of *gentiles* to him and his male descendants. Livy refers in express terms to the *gens* of an enfranchised slave (b. 39, 19), '*Tecenia Hispalæ . . . . gentis enupsio;*' and the right of inheritance of the son of a freedman was conferred on the ground of civil relationship,—*gente.* But there must necessarily have been a great difference between those who were born in the *gens* and those who had only entered it by adoption, and their descendants; that is to say, between those who formed the original stock of the *gens*, who were all of patrician origin, and those who had entered the family by their own enfranchisement or that of their ancestors. The former alone were entitled to the rights of the *gentiles;* and perhaps the appellation itself was confined to them, while the latter were called *gentilitii*, to designate those against whom the *gentiles* had certain rights to exercise." In a lecture of Niebuhr on the Roman Gentes, vol. 1, p. 70, he says, "Such an association, consisting of a number of families, from which a person may withdraw, but into which he cannot be admitted at all, or only by being adopted by the whole association, is a *gens.* It must not be confounded with the *family*, the members of which are descended from a common ancestor; for the patronymic names of the *gentes* are nothing but symbols, and are derived from heroes." Arnold gives the following exposition of the subject:—"The people of Rome were divided into the three tribes of the Ramnenses, Titienses, and Luceres, and each of these tribes was divided into ten curiæ: it would be more correct to say that the union of ten curiæ formed the tribe. For the state grew out of the junction of certain original elements; and these were neither the tribes, nor even the curiæ, but the gentes or houses which made up the curiæ. The first element of the whole system was the *gens*, or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually, where a system of houses has existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house the bond of union between its several families was truly sameness of blood; such was likely to be the earliest acknowledged tie, although afterwards, as names are apt to outlive their meaning, an artificial bond may have succeeded to the natural one, and a house, instead of consisting of families of real relations, was made up sometimes of families of strangers, whom it was proposed to bind together by a fictitious tie, in the hope that law and custom and religion might together rival the force of nature." 1 Arnold, Hist. 31. The gentiles inherited from each other in the absence of agnates: the rule of the Twelve Tables is, "*Si adenatos nec escit, gentilis familiam nancitor,*" which has been paraphrased, "*Si agnatus non erit, tum gentilis hæres esto.*"

GENTLEMAN. **In English Law.** A person of superior birth.

According to Sir Edward Coke, he is one who bears coat-armor, the grant of which adds gentility to a man's family. The eldest son had no exclusive claim to the degree; for, according to Littleton, "every son is as great a gentleman as the eldest." Coke, 2d Inst. 667. Sir Thomas Smith, quoted by Blackstone, 1 Comm. 406, says, "As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labor, and will bear the port, charge, and countenance of a gentleman, shall be called master, and be taken for a gentleman." In the United States, this word is unknown to the law; but in many places it is applied by courtesy to all men. See Pothier, Proc. Crim. sec. 1, App. § 3.

GENTLEWOMAN. An addition formerly appropriate in England to the state or degree of a woman. Coke, 2d Inst. 667.

GENTOO LAW. See HINDU LAW.

GEORGIA. The name of one of the original thirteen states of the United States of America.

2. It was called after George II., king of Great Britain, under whose reign it was colonized.

In 1752, George II. granted a charter to a company consisting of General James Oglethorpe, Lord Percival, and nineteen others, who planted a colony, in 1753, on the bank of the Savannah river, a short distance from its mouth.

The corporation thus created was authorized, for twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The territory was to be held, as of the manor of Hampton Court in Middlesex, in free and common socage, and not *in capite*.

This charter was to expire by its own limitation in 1773; and in 1771 the trustees surrendered it up to the crown, and the colony became a royal province.

3. A registration of conveyances was provided for in 1755, and the rights of personal liberty, private property, and of public justice were protected by ample colonial regulations. The constitution of the United States was unanimously adopted by Georgia.

The present constitution, as revised, compiled, and amended, was adopted by a convention at Louisville, May 30, 1798. Among other things, it provides that no law or ordinance shall be passed containing any matter different from what is expressed in the title thereof; that there shall be no future importation of slaves; that debtors shall not be detained in prison after delivering all their estate *bonâ fide* for the use of their creditors.

The Legislative Power.

4. This is vested in a senate and house of representatives, which are separate and distinct branches, and which together constitute the general assembly.

The senate is composed of one hundred and thirty-two members, elected one from each county. A senator must be at least twenty-five years old, must have been a citizen of the United States nine years, and an inhabitant of the state, and have actually resided one year next before his election within the county for which he is chosen, except when absent on lawful business of the state or the United States.

The house of representatives is composed of one hundred and sixty-nine members, elected two from each of the thirty-seven larger counties, and one from each of the others. A representative must be at least twenty-one years old, have been a citizen of the United States seven years, and an inhabitant of the state three years, and have resided in the county for which he is chosen one year immediately preceding the election, unless absent on public business or that of the United States.

The members of both branches are elected biennially, on the first Monday in October. The sessions are held annually, commencing on the first Wednesday in November, and are limited to forty days, unless continued longer by a two-thirds vote in both houses. It is optional with the body whether any compensation shall be allowed after forty days, and what shall be the amount thereof.

The Executive Power.

5. *The governor* is elected biennially by the qualified electors, or, in case no one has a majority, is selected by the general assembly from the two receiving the largest number of votes. He must be thirty years old, have been a citizen of the United States twelve years, and an inhabitant of the state six years. He may grant reprieves for all offences against the state, except in cases of impeachment, and may grant pardons or remit any part of a sentence after conviction, except for treason and murder, in which he may respite the execution and make report thereof to the next general assembly, by whom a pardon may be granted. He has the revision of all bills passed by both houses, before the same can become laws; but two-thirds of both houses may pass a law notwithstanding his dissent. The same qualified veto applies to every "vote, resolution, or order" to which the concurrence of both houses may be necessary, except in a question of adjournment.

The Judicial Power.

6. *The supreme court for the correction of errors* was organized in 1845. It consists of three judges elected by the legislature for six years. This court sits only for trial and correction of errors in law and equity in cases brought from the superior courts. It holds ten sessions during the year, at five places. The court is required at each session, in each of the five districts, finally to determine each and every case on the docket at the first term after the writ or error is brought, unless prevented by some providential cause.

The superior court consists of sixteen judges, elected for their respective circuits, one for each, by the electors of that circuit, for the term of four years. It sits twice a year. This court has exclusive jurisdiction in all criminal cases, where the crime is committed by free white persons, except over contempts of court, and minor offences which are punishable by corporation courts and other inferior judicatures, and slaves and free persons of color who have committed capital offences. They have exclusive jurisdiction, likewise, in all cases respecting titles to land. In all other civil cases, it has concurrent jurisdiction with the inferior courts. All the powers of a court of equity are vested in the superior courts, and the judges of the superior courts have power, by writs of *mandamus, prohibition, scire facias, certiorari*, and all other necessary writs, not only to carry their own powers fully into effect, but to correct the errors of all inferior judicatories.

7. *Each county* has an inferior court, composed of five justices, who are elected every four years by the people. In addition to all county matters, such as the superintendence of roads, bridges, etc., this court has jurisdiction in all civil cases, except those involving land titles, over all cases of crimes committed by slaves and free persons of color, except capital felonies, subject to the superior court. It holds semi-annual sessions.

An ordinary is elected in each county, by the people, every four years, in whom is vested original

jurisdiction over all testates' and intestates' estates. The ordinaries are paid by fees incident to the office. An appeal lies from this court to the superior court. It has no jury.

Justices of the peace are elected by the people, two for every militia district in the state: they hold their office for four years. An appeal lies from the magistrates to the jury of the district, composed of five men. Their civil jurisdiction extends to all sums not exceeding fifty dollars.

8. *An attorney-general* for the middle circuit, and solicitors-general for each of the other circuits, are elected by the voters of these circuits, respectively, for the term of four years, to prosecute offences against the state.

Pleadings in this state are simplified to the last degree. All suits are brought by petition to the court. The petition must contain the plaintiff's charge, allegation, or demand, plainly, fully, and distinctly set forth, which must be signed by the plaintiff or his attorney, and to which the clerk annexes a process, requiring the defendant to appear at the term to which the same is returnable. A copy is served on the defendant by the sheriff. The defendant makes his answer in writing, in which he plainly, fully, and distinctly sets forth the cause of his defence. The case then goes to the jury, without any replication or further proceedings; and the penal code declares that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offence in the terms or language of the code, *or so plainly* that the nature of the offence charged may be easily understood by the jury.

In all civil cases, either party may be examined by commission or upon the stand at the instance of his adversary, both at law and in equity.

An appeal lies in the superior courts from the verdict of a petit to a special jury, constituted of twelve men taken from the grand jury; and from the verdict of one special jury to another, in equity causes. The jurors are made judges of the law, as well as of the facts, in criminal cases. Divorces are granted upon certain legal grounds, prescribed by statutes, upon the concurrent verdicts of two special juries.

GEREFA. Reeve, which see.

GERMAN. Whole or entire, as respects genealogy or descent: thus, "brother-german" denotes one who is brother both by the father's and mother's side; "cousins-german," those in the first and nearest degree, *i.e.* children of brothers or sisters. Tech. Dict.; 4 Mann. & G. 56.

GERONTOCOMI. In Civil Law. Officers appointed to manage hospitals for poor old persons. Clef des Lois Rom. *Administrateurs.*

GERSUME (Sax.). **In Old English Law.** Expense; reward; compensation; wealth; especially, the consideration or fine of a contract: e.g. *et pro hæ concessione dedit nobis prædictus Jordanus* 100 *sol. sterling de gersume.* Old charter, cited Somner, Gavelkind, 177; Tabul. Reg. Ch. 377; 3 Mon. Ang. 920; 3 *id.* 126. It is also used for a fine or compensation for an offence. 2 Mon. Ang. 973.

GESTATION, UTERO-GESTATION. In Medical Jurisprudence. The time during which a female, who has conceived, carries the embryo or fœtus in her uterus.

This directly involves *the duration of pregnancy*, questions concerning which most frequently arise in cases of contested legitimacy. The descent of property and peerage may be made entirely dependent upon the settlement of this question.

2. That which is termed the *usual period* of pregnancy is ten lunar months, forty weeks, two hundred and eighty days, equal to about nine calendar months and one week. One question that has here been much discussed is whether the period of gestation has a fixed limit, or is capable of being contracted or protracted beyond the usual term. Many have claimed that the laws of nature on this subject are immutable, and that the fœtus, at a fixed period, has received all the nourishment of which it is susceptible from the mother, and becomes as it were a foreign body. Its expulsion is, therefore, a physical necessity. Others claim, and with stronger reasons, that as all the functions of the human body that have been carefully observed are variable, and sometimes within wide limits, and as many observations and experiments in reference to the cow and horse have established the fact that in the period of utero-gestation there is more variation with them than in the human species, there should remain no doubt that this period in the latter is always liable to variation.

3. There are some women to whom it is peculiar always to have the normal time of delivery anticipated by two or three weeks, so that they never go beyond the end of the thirty-seventh or thirty-eighth week, for several pregnancies in succession. Montgomery, Preg. 264. So, also, there are many cases establishing the fact that the usual period is sometimes exceeded by one, two, or more weeks, the limits of which it is difficult or impossible to determine. Lord Coke seems inclined to adopt a peremptory rule that forty weeks is the longest time allowed by law for gestation. Coke, Litt. 123 *b.*

But although the law of some countries prescribes the time from conception within which the child must be born to be legitimate, that of England and America fixes no precise limit, but admits the possibility of the birth's occurring previous or subsequent to the usual time. The following are cases in which this question will be found discussed. 3 Brown, Ch. 349; Gardner Peerage case, Le Marchant Report.; Croke Jac. 686; 7 Hazard, Register of Pennsylvania, 363. See PREGNANCY.

GESTIO (Lat.). **In Civil Law.** The doing or management of a thing. *Negotiorum gestio*, the doing voluntarily without authority business of another. L. 20, C. *de neg. gest.* *Gestor negotiorum*, one who so interferes with business of another without authority. *Gestio pro hærede*, behavior as heir; such conduct on the part of the heir as indicates acceptance of the inheritance and makes him liable for ancestor's debts universally: *e.g.* an entry upon, or assigning, or letting any of the heritable property, releasing any of the debtors of the estate, or meddling with the title-deeds or heirship movables, etc. Erskine, Inst. 3. 8. 82 *et seq.*; Stair, Inst. 3. 6. 1.

GEWRITE. **In Saxon Law.** Deeds or charters; writings. 1 Reeve, Hist. Eng. Law, 10.

GIFT. A voluntary conveyance; that is, a conveyance not founded on the consideration of money or blood.

The word denotes rather the motive of the conveyance: so that a feoffment or grant may be called a gift when gratuitous. A gift is of the same nature as a settlement: neither denotes a form of assurance, but the nature of the transaction. Watkins, Conv. Preston ed. 199. The operative words of this conveyance are *do*, or *dedi—I give*, or *I have given*. The maker of this instrument is called the donor, and he to whom it is made, the donee. 2 Blackstone, Comm. 316; Littleton, 59; Sheppard, Touchst. c. 11.

Gifts inter vivos are gifts made from one or more persons, without any prospect of immediate death, to one or more others. *Gifts causâ mortis* are gifts made in prospect of death. See DONATIO CAUSA MORTIS.

2. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There exists repentance (the *locus pœnitentiæ*) so long as the gift is complete and left imperfect in the mode of making it. 7 Johns. N. Y. 26.

The subject of the gift must be certain; and there must be the mutual consent and concurrent will of both parties. Delivery must be according to the nature of the thing. It will have to be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed. 1 Swanst. Ch. 436; 1 Dev. No. C. 309.

3. When the gift is perfect, by delivery and acceptance, it is then irrevocable, unless it is prejudicial to creditors or the donor was under a legal incapacity or was circumvented by fraud.

If a man, intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it*, etc., and with his own hand delivers it to the party, this will be a good gift notwithstanding the ring bear any other jewel, being delivered by the party himself to the person to whom given. Bacon, Max. 87.

Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E, and wrote her name upon it, and after the ticket had drawn a prize he declared that he had given the ticket to his child E, and that the prize money was hers, this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. See 10 Johns. N. Y. 293.

GIFTOMAN. **In Swedish Law.** He who has a right to dispose of a woman in marriage.

This right is vested in the father, if living; if dead, in the mother. They may nominate a person in their place; but for want of such nomination the brothers-german, and for want of them the consanguine brothers, and in default of the latter the uterine brothers, have the right; but they are bound to consult the paternal or maternal grandfather. Swed. Code, *Marriage*, c. 1.

GILDA MERCATORIA (L. Lat.). A mercantile meeting.

If the king once grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly, this is alone sufficient to incorporate and establish them forever. 1 Sharswood, Blackst. Comm. 473, 474. A company of merchants incorporated. Stat. Will. Reg. Scot. c. 35; Leg. Burgorum Scot. c. 99; DuCange; Spelman, Gloss.; 8 Coke, 125 *a*; 2 Ld. Raym. 1134.

GILDO. **In Saxon Law.** Member of a *gild* or decennary. Oftener spelled *congildo*. DuCange; Spelman, Gloss. *Geldum*.

GILL. A measure of capacity, equal to one-fourth of a pint. See MEASURE.

GIRANTEM. **In Common Law.** An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner as the English verb to murder is transformed into *murdrare* in our old indictments. Hall, Mar. Loans, 183, n.

GIRTH. A girth, or yard, is a measure of length. The word is of Saxon origin, taken from the circumference of the human body. Girth is contracted from *girdeth*, and signifies as much as girdle. See ELL.

GIRTH AND SANCTUARY. **In Scotch Law.** A refuge or place of safety given to those who had slain a man in heat of passion (*chaude melle*) and unpremeditatedly. Abolished at the Reformation. 1 Hume, 235; 1 Ross, Lect. 331.

GIST (sometimes, also, spelled *git*).

In Pleading. The essential ground or object of the action in point of law, without which there would be no cause of action. Gould, Plead. c. 4, § 12; 19 Vt. 102. In stating the substance or gist of the action, every thing must be averred which is necessary to be proved at the trial. The moving cause of the plaintiff's bringing the action, and the matter for which he recovers the principal satisfaction, is frequently entirely collateral to the gist of the action. Thus, where a father sues the defendant for a trespass for the seduction of his daughter, the gist of the action is the trespass and the loss of his daughter's services; but the collateral cause is the injury done to his feelings, for which the principal damages are given. See 1 Viner, Abr. 598; 2 Phillipps, Ev. 1, n.; Bacon, Abr. *Pleas*, B; Doctrina Plac. 85; DAMAGES.

GIVE. A term used in deeds of conveyance. At common law, it implied a covenant. 2 Hilliard, Real Prop. 366. So in

Kentucky. 1 Pirtle, Dig. 211. In Maryland and Alabama it is doubtful. 7 Gill & J. Md. 311; 2 Ala. N. S. 555. In Ohio, in conveyance of freehold, it implies warranty for the grantor's life. 2 Hilliard, Real Prop. 366. In Maine it implies a covenant. 5 Me. 227; 23 *id.* 219. In New York it does not, by statute. See 14 Wend. 38. It does not imply covenant in North Carolina, 1 Murph. No. C. 343; nor in England, by statute 8 & 9 Vict. c. 106, § 4.

GIVER. He who makes a gift. By his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. In Louisiana. A term which signifies that a debtor, instead of paying a debt he owes in money, satisfies his creditor by giving in payment a movable or immovable. See DATION EN PAIEMENT.

GIVING TIME. An agreement by which a creditor gives his debtor a delay or time in paying his debt beyond that contained in the original agreement. When other persons are responsible to him, either as drawer, indorser, or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him. See SURETY; GUARANTY.

GLADIUS (Lat.). In old Latin authors, and in the Norman laws, this word was used to signify supreme jurisdiction: *jus gladii.*

GLEANING. The act of gathering such grain in a field where it grew, as may have been left by the reapers after the sheaves were gathered.

There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest, without being guilty of a trespass. 3 Blackstone, Comm. 212. But it has been decided that the community are not entitled to claim this privilege as a right. 1 H. Blackst. 51. In the United States, it is believed, no such right exists. It seems to have existed in some parts of France. Merlin, Rép. *Glanage.* As to whether gleaning would or would not amount to larceny, see Woodfall, Landl. & Ten. 242; 2 Russell, Cr. 99. The Jewish law may be found in the 19th chapter of Leviticus, verses 9 and 10. See Ruth ii. 2, 3; Isaiah xvii. 6.

GLEBE. In Ecclesiastical Law. The land which belongs to a church. It is the dowry of the church. *Gleba est terra qua consistit dos ecclesiæ.* 9 Cranch, 329.

In Civil Law. The soil of an inheritance. There were serfs of the glebe, called *glebæ addicti.* Code 11. 47. 7, 21; Nov. 54, c. 1.

GLOSS (Lat. *glossa*). Interpretation; comment; explanation; remark intended to illustrate a subject,—especially the text of an author. See Webster, Dict.

In Civil Law. *Glossæ,* or *glossemata,* were words which needed explanation. Calvinus, Lex. The explanations of such words. Calvinus, Lex. Especially used of the short comments or explanations of the text of the Roman Law, made during the twelfth century by the teachers at the schools of Bologna, etc., who were hence called *glossators,* of which glosses Accursius made a compilation which possesses great authority, called *glossa ordinaria.* These glosses were at first written between the lines of the text (*glossæ interlineares*), afterwards, on the margin, close by and partly under the text (*glossæ marginales*). Cushing, Introd. to Rom. Law, 130–132.

GLOSSATOR. A commentator or annotator of the Roman law. One of the authors of the Gloss.

GLOUCESTER, STATUTE OF. An English statute, passed 6 Edw. 1., A. D. 1278: so called because it was passed at Gloucester. There were other statutes made at Gloucester which do not bear this name. See stat. 2 Rich. II.

GO WITHOUT DAY. Words used to denote that a party is dismissed the court. He is said to go without day, because there is no day appointed for him to appear again.

GOAT, GOTE (Law Lat. *gota;* Germ. *gote*). A canal or sluice for the passage of water. Charter of Roger, Duke de Basingham, *anno* 1220, *in Tabularis S. Bertini;* DuCange.

A ditch, sluice, or gutter. Cowel, *Gote;* stat. 23 Hen. VIII. c. 5. An engine for draining waters out of the land into the sea, erected and built with doors and percullesses of timber, stone, or brick,—invented first in Lower Germany. Callis, Sewers, 66.

GOD AND MY COUNTRY. When a prisoner is arraigned, he is asked, How will you be tried? he answers, *By God and my country.* This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God* or by *his country,* that is, by jury. It is probable that originally it was *By God* or *my country;* for the question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chitty, Crim. Law, 416; Barrington, Stat. 73, note.

GOD BOTE. In Ecclesiastical Law. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOD'S PENNY. In Old English Law. Money given to bind a bargain; earnest-money. So called because such money was anciently given to God,—that is, to the church and the poor. See DENARIUS DEI.

GOING WITNESS. One who is going out of the jurisdiction of the court, although only into a state or country under the general sovereignty: as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. Ch. 454. See DEPOSITION; WITNESS.

GOLDSMITH'S NOTES. In English Law. Banker's notes: so called because the trades of banker and goldsmith were originally joined. Chitty, Bills, 423.

GOOD AND VALID. Legally firm: *e.g.*

a good title. Adequate; responsible: *e.g.* his security is good for the amount of the debt. Webst. A note satisfies a warranty of it as a "good" note if the makers are able to pay it, and liable to do so on proper legal diligence being used against them. 26 Vt. 406.

GOOD BEHAVIOR. Conduct authorized by law. Surety of good behavior may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behavior is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution. 1 Binn. Penn. 98, n.; 2 Yeates, Penn. 437; 14 Viner, Abr. 21; Dane, Abr. Index. As to what is a breach of good behavior, see 2 Mart. La. N. S. 683; Hawkins, Pl. Cr. b. 1, c. 61, s. 6; 1 Chitty, Pract. 676. See SURETY OF THE PEACE.

GOOD CONSIDERATION. See CONSIDERATION.

GOOD AND LAWFUL MEN. Those qualified to serve on juries; that is, those of full age, citizens, not infamous or *non compos mentis;* and they must be resident in the county where the venue is laid. Bacon, Abr. *Juries* (A); Croke Eliz. 654; Coke, 3d Inst. 30; 2 Rolle, 82; Cam. & N. No. C. 38.

GOOD WILL. The benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. Story, Partn. § 99. See 17 Ves. Ch. 336; 1 Hoffm. N. Y. 68; 16 Am. Jur. 87.

As between partners, it has been held that the good will of a partnership trade survives, 5 Ves. Ch. 539; but this appears to be doubtful, 15 Ves. Ch. 227; and a distinction in this respect has been suggested between commercial and professional partnerships,—the advantages of established connections in the latter being held to survive, unless the benefit is excluded by positive stipulations. 3 Madd. Ch. 79. As to the sale of the good will of a trade or business, see 3 Mer. Ch. 452; 1 Jac. & W. Ch. 589; 2 Swanst. Ch. 332; 1 Ves. & B. Ch. 505; 17 Ves. Ch. 346; 2 Madd. Ch. 220; Gow, Partn. 428; Collyer, Partn. 172, note; 2 Barnew. & Ad. 341; 4 *id.* 592, 596; 1 Rose, Bank. Cas. 123; 5 Russ. Ch. 29; 2 Watts, Penn. 111; 1 Chitty, Pract. 858; 1 Sim. & S. Ch. 74; 1 Term, 118. As to the effect of a bankrupt's assignment on a good will, see 5 Bos. & P. 67; 1 Brown, Ch. 160; 16 Am. Jur. 87.

GOODS. In Contracts. The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include. Coke, Litt. 118; 1 Russ. Ch. 376.

Goods will not include fixtures. 2 Mass. 495; 4 J. B. Moore, 73. In a more limited sense, goods is used for articles of merchandise. 2 Sharswood, Blackst. Comm. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds, 3 Metc. Mass. 365; but see 24 N. H. 484; 4 Dudl. So. C. 28; so stock or shares of an incorporated company, 20 Pick. Mass. 9; 3 Harr. & J. Md. 38; 15 Conn. 400; so, in some cases, bank notes and coin. 2 Stor. C. C. 52; 5 Mas. C. C. 537.

In Wills. In wills goods is *nomen generalissimum*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, money, plate, furniture, etc. 1 Atk. Ch. 180–182; 2 *id.* 62; 1 P. Will. Ch. 267; 1 Brown, Ch. 128; 4 Russ. Ch. 370; Williams, Exec. 1014; 1 Roper, Legacies, 250. But in general it will be limited by the context of the will. See 2 Belt, Suppl. Ves. Ch. 287; 1 Chitty, Pract. 89, 90; 1 Ves. Ch. 63; 3 *id.* 212; Hammond, Parties, 182; 1 Yeates, Penn. 101; 2 Dall. Penn. 142; Ayliffe, Pand. 296; Weskett, Ins. 260; Sugden, Vend. 493, 497; and the articles BIENS, CHATTELS, FURNITURE.

GOODS AND CHATTELS. In Contracts. A term which includes not only personal property in possession, but choses in action and chattels real, as a lease for years of house or land, or emblements. 12 Coke, 1; 1 Atk. Ch. 182; Coke, Litt. 118; 1 Russ. Ch. 376.

In Criminal Law. Choses in action, as bank notes, mortgage deeds, and money, do not fall within the technical definition of "goods and chattels." And if described in an indictment as goods and chattels, these words may be rejected as surplusage. 4 Gray, Mass. 416; 3 Cox, Cr. Cas. 460; 1 Den. Cr. Cas. 450; 1 Dearsl. & B. Cr. Cas. 426; 2 Zabr. N. J. 207; 1 Leach, Cr. Cas. 241, 4th ed. 468. See 5 Mas. C. C. 537.

In Wills. If unrestrained, these words will pass all personal property. Williams, Exec. 1014 *et seq.* Am. notes. See Addison, Contr. 31, 201, 912, 914.

GOODS SOLD AND DELIVERED. A phrase used to designate the action of assumpsit brought when the sale and delivery of goods furnish the cause.

A sale, delivery, and the value of the goods must be proved. See ASSUMPSIT.

GOODS, WARES, AND MERCHANDISE. A phrase used in the Statute of Frauds. Fixtures do not come within it. 1 Crompt. M. & R. Exch. 275; 3 Tyrwh. 959; 1 Tyrwh. & G. 4. Growing crops of potatoes, corn, turnips, and other annual crops, are within it. 8 Dowl. & R. 314; 10 Barnew. & C. 446; 4 Mees. & W. Exch. 347: *per contra*, 2 Taunt. 38. See Addison, Contr. 31, 32; 2 Dan. Ky. 206; 2 Rawle, Penn. 161; 5 Barnew.

& C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washburn, Real Prop. 3. Promissory notes and shares in an incorporated company, and, in some cases, money and bank-notes, have been held within it. See 2 Parsons, Contr. 330–332; GOODS AND CHATTELS.

GOUT. In Medical Jurisprudence. An inflammation of the fibrous and ligamentous parts of the joints.

In cases of insurance on lives, when there is warranty of health, it seems that a man subject to the gout is capable of being insured, if he has no sickness at the time to make it an unequal contract. 2 Park, Ins. 583.

GOVERNMENT (Lat. *gubernaculum*, a rudder. The Romans compared the state to a vessel, and applied the term *gubernator*, helmsman, to the leader or actual ruler of a state. From the Latin, this word has passed into most of the modern European languages). That institution or aggregate of institutions by which a state makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming a state.

2. We understand, in modern political science, by *state*, in its widest sense, an independent society, acknowledging no superior, and by the term *government*, that institution or aggregate of institutions by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. Government is the aggregate of authorities which rule a society. By *administration*, again, we understand in modern times, and especially in more or less free countries, the aggregate of those persons in whose hands the reins of government are for the time-being (the chief ministers or heads of departments). But the terms state, government, and administration are not always used in their strictness. The government of a state being its most prominent feature, which is most readily perceived, government has frequently been used for state; and the publicists of the last century almost always used the term government, or form of government, when they discussed the different political societies or states. On the other hand, government is often used, to this day, for administration, in the sense in which it has been explained. We shall give in this article a classification of all governments and political societies which have existed and exist to this day.

Governments, or the authorities of societies, are, like societies themselves, grown institutions. See INSTITUTION.

3. They are never actually created by agreement or compact. Even where portions of government are formed by agreement, as, for instance, when a certain family is called to rule over a country, the contracting parties must previously be conscious of having authority to do so. As society originates with the family, so does authority or government. Nowhere do men exist without authority among them, even though it were but in its mere incipiency. Men are forced into this state of things by the fundamental law that with them, and with them alone of all mammals, the period of dependence of the young upon its parents outlasts by many years the period of lactation: so that, during this period of post-lactational dependence, time and opportunity are given for the development of affection and the habit of obedience on the one hand, and of affection and authority on the other, as well as of mutual dependence. The family is a society, and expands into clusters of familes, into tribes and larger societies, collecting into communities, always carrying the habit and necessity of authority and mutual support along with them. As men advance, the great and pervading law of mutual dependence shows itself more and more clearly, and acts more and more intensely. Man is eminently a social being, not only as to an instinctive love of aggregation, not only as to material necessity and security, but also as to mental and affectional development, and not only as to a given number of existing beings, or what we will call as to *extent*, but also as to *descent* of generation after generation, or, as we may call it, transmission. Society, and its government along with it, are continuous. Government exists and continues among men, and laws have authority for generations which neither made them nor had any direct representation in making them, because the necessity of government—necessary according to the nature of social man and to his wants—is a continuous necessity. But the family is not only the institution from which once, at a distant period, society, authority, government arose. The family increases in importance, distinctness, and intensity of action as man advances, and continues to develop authority, obedience, affection, and social adhesiveness, and thus acts with reference to the state as the feeder acts with reference to the canal: the state originates daily anew in the family.

4. Although man is an eminently social being, he is also individual, morally, intellectually, and physically; and, while his individuality will endure even beyond this life, he is necessitated, by his physical condition, to appropriate and to produce, and thus to imprint his individuality upon the material world around, to create property. But man is not only an appropriating and producing, he is also an exchanging, being. He always exchanges and always intercommunicates. This constant intertwining of man's individualism and socialism creates mutual claims of protection, rights, the necessity of rules, of laws: in one word, as individuals and as natural members of society, men produce and require government. No society, no cluster of men, no individuals banded together even for a temporary purpose, can exist without some sort of government instantly springing up. Government is natural to man and characteristic. No animals have a government; no authority exists among them; instinct and physical submission alone exist among them. Man alone has laws which ought to be obeyed but may be disobeyed. Expansion, accumulation, development, progress, relapses, disintegration, violence, error, superstition, the necessity of intercommunication, wealth and poverty, peculiar disposition, temperament, configuration of the country, traditional types, pride and avarice, knowledge and ignorance, sagacity of individuals, taste, activity and sluggishness, noble or criminal bias, position, both geographical and chronological,—all that affects numbers of men affects their governments, and an endless variety of governments and political societies has been the consequence; but, whatever form of government may present itself to us, the fundamental idea, however rudely conceived, is always the protection of society and its members, security of property and person, the administration of justice therefor, and the united efforts of society to furnish the means to authority to carry out its objects,—contribution, which, viewed as imposed by authority, is taxation. Those bands of robbers which occasionally have risen in disintegrating societies, as in India, and who merely robbed and devastated, avow-

ing that they did not mean to administer justice or protect the people, form no exception, although the extent of their soldiery and the periodicity of their raids caused them to be called governments. What little of government continued to exist was still the remnant of the communal government of the oppressed hamlets; while the robbers themselves could not exist without a government among themselves.

5. Aristotle classified governments according to the seat of supreme power, and he has been generally followed down to very recent times. Accordingly, we had Monarchy, that government in which the supreme power is vested in one man, to which was added, at a later period, the idea of hereditariness. Aristocracy, the government in which the supreme power is vested in the *aristoi*, which does not mean, in this case, the *best*, but the excelling ones, the prominent, *i.e.* by property and influence. Privilege is its characteristic. Its corresponding degenerate government is the Oligarchy (from *oligos*, little, few), that government in which supreme power is exercised by a few privileged ones, who generally have arrogated the power. Democracy, that government in which supreme power is vested in the people at large. Equality is one of its characteristics. Its degenerate correspondent is the ochlocracy (from *ochlos*, the rabble), for which at present the barbarous term mobocracy is frequently used.

6. But this classification was insufficient even at the time of Aristotle, when, for instance, theocracies existed; nor is the seat of supreme power the only characteristic, nor, in all respects, by any means the chief characteristic. A royal government, for instance, may be less absolute than a republican government. In order to group together the governments and political societies which have existed and are still existing, with philosophical discrimination, we must pay attention to the chief-power-holder (whether he be one or whether there are many), to the pervading spirit of the administration or wielding of the power, to the characteristics of the society or the influencing interests of the same, to the limitation or entirety of public power, to the peculiar relations of the citizen to the state. Indeed, every principle, relation, or condition characteristically influencing or shaping society or government in particular may furnish us with a proper division. We propose, then, the following

Grouping of Political Societies and Governments.

I. *According to the supreme power-holder or the placing of supreme power, whether really or nominally so.*

The power-holder may be one, a few, many, or all; and we have, accordingly:

A. *Principalities*, that is, states the rulers of which are set apart from the ruled, or inherently differ from the ruled, as in the case of the theocracy.
  1. *Monarchy.*
    a. Patriarchy.
    b. Chieftain government (as our Indians).
    c. Sacerdotal monarchy (as the States of the Church; former sovereign bishoprics).
    d. Kingdom, or Principality proper.
    e. Theocracy (Jehovah was the chief magistrate of the Israelitic state).
  2. *Dyarchy.* It exists in Siam, and existed occasionally in the Roman empire; not in Sparta, because Sparta was a republic, although her two hereditary generals were called kings.

B. *Republic.*
  1. Aristocracy.
    a. Aristocracy proper.
    aa. Aristocracies which are democracies within the body of aristocrats (as the former Polish government).
    bb. Organic internal government (as Venice formerly).
    b. Oligarchy.
    c. Sacerdotal republic, or Hierarchy.
    d. Plutocracy; if, indeed, we adopt this term from antiquity for a government in which it is the principle that the possessors of great wealth constitute the body of aristocrats.
  2. Democracy.
    a. Democracy proper.
    b. Ochlocracy (Mob-rule), mob meaning unorganized multitude.

II. According to the unity of public power, or its division and limitation.

A. Unrestricted power, or absolutism.
  1. According to the form of government.
    a. Absolute monarchy, or despotism.
    b. Absolute aristocracy (Venice); absolute sacerdotal aristocracy, etc. etc. etc.
    c. Absolute democracy (the government of the Agora, or market democracy).
  2. According to the organization of the administration.
    a. Centralized absolutism. Centralism, called bureaucracy when carried on by writing; at least, bureaucracy has very rarely evented, if ever, without centralism.
    b. Provincial (satraps, pashas, proconsuls).

B. According to division of public power.
  1. Governments in which the three great functions of public power are separate, viz., the legislative, executive, judiciary. If a distinct term contradistinguished to centralism be wanted, we might call these co-operative governments.
  2. Governments in which these branches are not strictly separate, as, for instance, in our government, but which are nevertheless not centralized governments; as Republican Rome, Athens, and several modern kingdoms.

C. Institutional government.
  1. Institutional government comprehending the whole, or constitutional government.
    a. Deputative government.
    b. Representative government.
      aa. Bicameral.
      bb. Unicameral.
  2. Local self-government. See V. We do not believe that any substantial self-government can exist without an institutional character and subordinate self-governments. It can exist only under an institutional government (see Lieber's Civil Liberty and Self-Government, under "Institution").

D. Whether the state is the substantive or the means, or whether the principle of socialism or individualism preponderates.
  1. Socialism, that state of society in which the socialist principle prevails, or in which government considers itself the substantive; the ancient states absorbing the individual or making citizenship the highest phase of humanity; absolutism of Louis XIV. Indeed, all modern absolutism is socialistic.
  2. Individualism, that system in which the state remains acknowledged a means, and the individual the substantive; where primary claims, that is, rights, are felt to

exist, for the obtaining and protection of which the government is established,—the government, or even society, which must not attempt to absorb the individual. The individual is immortal, and will be of another world; the state is neither.

III. According to the descent or transfer of supreme power.
- A. Hereditary governments.
  - Monarchies.
  - Aristocracies.
  - Hierarchies, etc.
- B. Elective.
  - Monarchies.
  - Aristocracies.
  - Hierarchies.
- C. Hereditary—elective—governments, the rulers of which are chosen from a certain family or tribe.
- D. Governments in which the chief magistrate or monarch has the right to appoint the successor; as occasionally the Roman emperors, the Chinese, the Russian, in theory, Bonaparte when consul for life.

IV. According to the origin of supreme power, real or theoretical.
- A. According to the primordial character of power.
  1. Based on *jus divinum*.
     - *a.* Monarchies.
     - *b.* Communism, which rests its claims on a *jus divinum* or extra-political claim of society.
     - *c.* Democracies, when proclaiming that the people, because the people, can do what they list, even against the law; as the Athenians once declared it, and Napoleon III. when he desired to be elected president a second time against the constitution.
  2. Based on the sovereignty of the people.
     - *a.* Establishing an institutional government, as with us.
     - *b.* Establishing absolutism (the Bonaparte sovereignty).
- B. Delegated power.
  1. Chartered governments.
     - *a.* Chartered city governments.
     - *b.* Chartered companies, as the former great East India Company.
     - *c.* Proprietary governments.
  2. Vice-Royalties; as Egypt, and, formerly, Algiers.
  3. Colonial government with constitution and high amount of self-government,—a government of great importance in modern history.

V. Constitutions. (To avoid too many subdivisions, this subject has been treated here separately. See II.)

Constitutions, the fundamental laws on which governments rest, and which determine the relation in which the citizen stands to the government, as well as each portion of the government to the whole, and which, therefore, give feature to the political society, may be:
- A. As to their origin.
  1. Accumulative; as the constitutions of England or Republican Rome.
  2. Enacted constitutions (generally, but not philosophically, called written constitutions).
     - *a.* Octroyed constitutions (as the French, by Louis XVIII.).
     - *b.* Enacted by the people, as our constitutions. ["We the people charter governments; formerly governments chartered the liberties of the people."]
  3. Pacts between two parties, contracts, as Magna Charta, and most charters in the Middle Ages. The medieval rule was that as much freedom was enjoyed as it was possible to conquer,—*expugnare* in the true sense.
- B. As to extent or uniformity.
  1. Broadcast over the land. We may call them national constitutions, popular constitutions, constitutions for the whole state.
  2. Special charters. Chartered, accumulated and varying franchises, medieval character.

(See article Constitution in the Encyclopædia Americana.)

VI. As to the extent and comprehension of the chief government.
- A. Military governments.
  1. Commercial government; one of the first in Asia, and that into which Asiatic society relapses, as the only remaining element, when barbarous conquerors destroy all bonds which can be torn by them.
  2. Tribal government.
     - *a.* Stationary.
     - *b.* Nomadic. We mention the nomadic government under the tribal government, because no other government has been nomadic, except the patriarchal government, which indeed is the incipiency of the tribal government.
  3. City government (that is, city-states; as all free states of antiquity, and as the Hanseatic governments in modern times).
  4. Government of the Medieval Orders extending over portions of societies far apart; as the Templars, Teutonic Knights, Knights of St. John. Political societies without necessary territory, although they had always landed property.
  5. National states; that is, populous political societies spreading over an extensive and cohesive territory beyond the limits of a city.
- B. Confederacies.
  1. As to admission of members, or extension.
     - *a.* Closed, as the Amphictyonic council, Germany.
     - *b.* Open, as ours.
  2. As to the federal character, or the character of the members, as states.
     - *a.* Leagues.
       - *aa.* Tribal confederacies; frequently observed in Asia; generally of a loose character.
       - *bb.* City leagues; as the Hanseatic League, the Lombard League.
       - *cc.* Congress of deputies, voting by states and according to instruction; as the Netherlands republic and our Articles of Confederation, Germanic Confederation.
       - *dd.* Present "state system of Europe" (with constant congresses, if we may call this "system," a federative government in its incipiency).
     - *b.* Confederacies proper, with national congress.
       - *aa.* With *ecclesiæ* or democratic congress (Achæan League).
       - *bb.* With representative national congress, as ours.
- C. Mere agglomerations of one ruler.
  1. As the early Asiatic monarchies, or Turkey.
  2. Several crowns in one head; as Austria, Sweden, Denmark.

VII. As to the construction of society, the title of property and allegiance.
A. As to the classes of society.
1. Castes, hereditarily dividing the whole population, according to occupations and privileges. India, ancient Egypt.
2. Special castes.
a. Government with privileged classes or caste; nobility.
b. Government with degraded or oppressed caste; slavery.
c. Governments founded on equality of citizens (the uniform tendency of modern civilization).
B. As to property and production.
1. Communism.
2. Individualism.
C. As to allegiance.
1. Plain, direct; as in unitary governments.
2. Varied; as in national confederacies.
3. Graduated or *encapsulated*; as in the feudal system, or as is the case with the serf.
D. Governments are occasionally called according to the prevailing interests or classes; as
Military states; for instance, Prussia under Frederick II.
Maritime state.
Commercial.
Agricultural.
Manufacturing.
Ecclesiastical, &c.
VIII. According to simplicity or complexity, as in all other spheres, we have—
A. Simple governments (formerly called *pure*; as pure democracy).
B. Complex governments, formerly called mixed.
All organism is complex.

GRADUS (Lat. a step). A measure of space. Vicat, Voc. Jur. A degree of relationship (*distantia cognatorum*). Heineccius, Elem. Jur. Civ. § 153; Bracton, fol. 134, 374; Fleta, lib. 6, c. 2, § 1, lib. 4, c. 17, § 4.

A step or degree generally: e.g. *gradus honorum*, degrees of honor. Vicat, Voc. Jur. A pulpit; a year; a generation. DuCange.

A port; any place where a vessel can be brought to land. DuCange.

GRAFFER (Fr. *greffier*, a clerk, or prothonotary). A notary or scrivener. See stat. 5 Hen. VIII. c. 1.

GRAFIO. A baron, inferior to a count. 1 Marten, Anecd. Collect. 13. A fiscal judge. An advocate. Gregor. Turon, l. 1, *de Mirac.* c. 33; DuCange; Spelman, Gloss.; Cowel. For various derivations, see DuCange.

GRAFFIUM. A register; a leger-book or cartulary of deeds and evidences. 1 Annal. Eccles. Menevensio, apud. Angl. Sacr. 653.

GRAFT. In Equity. A term used to designate the right of a mortgagee in premises to which the mortgagor at the time of making the mortgage had an imperfect title, but who afterwards obtained a good title. In this case the new mortgage is considered a *graft* into the old stock, and as arising in consideration of the former title. 1 Ball & B. Ch. Ir. 40, 46, 57; 1 Powell, Mortg. 190. See 9 Mass. 34. The same principle has obtained by legislative enactment in Louisiana. If a person contracting an obligation towards another, says the Civil Code, art. 2371, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid if the debtor should ever acquire the ownership of the property, by whatever right.

GRAIN. The twenty-fourth part of a pennyweight.

For scientific purposes the grain only is used, and sets of weights are constructed in decimal progression, from ten thousand grains to one-hundredth of a grain.

Wheat, rye, barley, or other corn sown in the ground. In Pennsylvania, a tenant for a certain term is entitled to the away-going crop. 2 Binn. Penn. 487; 5 *id.* 258, 289; 2 Serg. & R. Penn. 14. See AWAY-GOING CROP.

GRAINAGE. In English Law. The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. A French weight. The gramme is the weight of a cubic centimetre of distilled water at the temperature of zero. It is equal to 15.4441 grains troy, or 5.6481 drachms avoirdupois.

GRAND ASSIZE. An extraordinary trial by jury, instituted by Henry II., by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous custom of trial by battel. For this purpose a writ *de magna assiza eliganda* was directed to the sheriff to return four knights, who were to choose twelve other knights to be joined with themselves; and these sixteen formed the grand assize, or great jury, to try the right between the parties. 3 Blackstone, Comm. 351.

GRAND BILL OF SALE. In English Law. The name of an instrument used for the transfer of a ship while she is at sea. See BILL OF SALE; 7 Mart. La. 318.

GRAND CAPE. In English Law. A writ judicial which lieth when a man has brought a *præcipe quod reddat*, of a thing that toucheth plea of lands, and the tenant makes default on the day given him in the writ original, then this writ shall go for the king, to take the land into the king's hands, and if he comes not at the day given him by the *grand cape*, he has lost his lands. Old Nat. Brev. fol. 161, 162; Regist. Judic. fol. 2 *b*; Bracton, lib. 5, tr. 3, cap. 1, nu. 4, 5, 6. So called because its Latin form began with the word *cape*, "take thou," and because it had more words than the *petit cape*, or because *petit cape* summons to answer for default only. *Petit cape* issues after appearance to the original writ, *grand cape* before.

GRAND COUTUMIER. Two collections of laws bore this title. One, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice which had been used from time immemorial in France; the other, called the Coutumier de Normandie (which indeed, with some alterations, made a part of the former), was composed, about the fourteenth of Henry III., A.D. 1229, and is a collection of the Norman laws, not as they stood at the conquest of England by William the Conqueror, but some time afterwards, and contains many provi-

sions probably borrowed from the old English or Saxon laws. Hale, Hist. Com. Law, c. 6.

GRAND DAYS. In English Practice. Those days in the term which are solemnly kept in the inns of court and chancery, viz.: Candlemas-day in Hilary Term, Ascension-day in Easter Term, St. John the Baptist's day in Trinity Term, and All Saints' day in Michaelmas Term, which are *dies non-juridici*, or no days in court, and are set apart for festivity. Jacob, Law Dict.

GRAND JURY. In Practice. A body of men, consisting of not less than twelve nor more than twenty-four, respectively returned by the sheriff of every county to every session of the peace, oyer and terminer, and general gaol delivery, to whom indictments are preferred. 4 Blackstone, Comm. 302; 1 Chitty, Crim. Law, 310, 311.

There is reason to believe that this institution existed among the Saxons. Crabb, Eng. Law, 35. By the constitutions of Clarendon, enacted 10 Hen. II. (A.D. 1164), it is provided that "if such men were suspected whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth" respecting such supposed crime, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries, if this institution did not exist before, or recognized them if they already existed. 1 Spence, Eq. Jur. 63.

2. *Of the organization of the grand jury.* The law requires that twenty-four citizens shall be summoned to attend on the grand jury; but in practice not more than twenty-three are sworn, because of the inconvenience which might arise of having twelve, who are sufficient to find a true bill, opposed to other twelve who might be against it. 2 Hale, Pl. Cr. 161; 6 Ad. & E. 236; 2 Caines, N. Y. 98. The number of jurors is a matter of local regulation. In Massachusetts it is to be not less than thirteen nor more than twenty-three, 2 Cush. Mass. 149; in Mississippi and South Carolina, not less than twelve, 15 Miss. 58; 33 *id.* 356; 11 Rich. So. C. 581; in California, not less than seventeen, 6 Cal. 214; in Texas, not less than thirteen. 6 Tex. 99.

3. Being called into the jury-box, they are usually permitted to select a foreman, whom the court appoints; but the court may exercise the right to nominate one for them. The foreman then takes the following oath or affirmation, namely: "You, A B, as foreman of this inquest for the body of the ——, of ——, do swear (or affirm) that you will diligently inquire, and true presentment make, of all such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the commonwealth's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God." It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed according to this formula:—"You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on your part." Being so sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to the room provided for them, to transact the business which may be laid before them. 2 Burr. 1088; Bacon, Abr. *Juries*, A. See 12 Tex. 210. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue, by virtue of an act of assembly, beyond a certain day. But, although they have been formally discharged by the court, if they have not separated, they may be called back and fresh bills be submitted to them. 9 Carr. & P. 43.

4. *The jurisdiction* of the grand jury is coextensive with that of the court for which they inquire, both as to the offences triable there and the territory over which such court has jurisdiction.

The mode of doing business. The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because their proceedings are to be secret. Bills of indictment against offenders are then supplied by the attorney-general, or other officer representing government. See 11 Ind. 473; 1 Hempst. Ark. 176; 2 Blatchf. C. C. 435. On these bills are indorsed the names of the witnesses by whose testimony they are supported. The jury are also required to make true presentment of all such matters as have otherwise come to their knowledge. These presentments, which are technically so called, are, in practice, usually made at the close of the session of the grand jury, and include offences of which they have personal knowledge: they should name the authors of the offences, with a view to indictment. The witnesses in support of a bill are to be examined in all cases under oath, even when members of the jury itself testify, as they may do.

5. Twelve at least must concur in order to the finding of a true bill, or the bill must be ignored. 6 Cal. 214. When a defendant is to be put upon trial, the foreman must write on the back of the indictment, "A true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorize the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman indorsing on the bill, "Ignoramus," "Not a true bill," or similar words, signing his name as before, and dating the indorsement.

As to the witnesses, and the power of the jury

over them. The jury are to examine all the witnesses in support of the bill, or enough of them to satisfy themselves of the propriety of putting the accused on trial, but none in favor of the accused. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. It is decided that when a witness, duly summoned, appears before the grand jury, but refuses to be sworn, and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance upon them to take the witness before the court, in order to obtain its aid and direction in the matter. 8 Cush. Mass. 338; 14 Ala. N. S. 450. Such a refusal, it seems, is considered a contempt. 14 Ala. N. S. 450.

6. *Of the secrecy to be observed.* This extends to the vote given in any case, to the evidence delivered by witnesses, and to the communications of the jurors to each other: the disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. The duration of the secrecy depends upon the particular circumstances of each case. 20 Mo. 326. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand juror might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury. 2 Russell, Crimes, 616; 4 Me. 439: but see, *contra*, 2 Halst. N. J. 347; 1 Carr. & K. 519. See INDICTMENT; PRESENTMENT; CHARGE.

GRAND LARCENY. In Criminal Law. By the English law, simple larceny was divided into grand and petit: the former was committed by the stealing of property exceeding twelve pence in value; the latter, when the property was of the value of twelve pence or under. This distinction was not abolished till the reign of George IV. Grand larceny was a capital offence, but clergyable unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether upon conviction or flight.

GRAND SERJEANTY. In English Law. A species of tenure *in capite*, by certain personal and honorable services to the king, called *grand* in respect of the honor of so serving the king. Instances of such services are, the carrying of the king's banner, performing some service at his coronation, etc. The honorable parts of this tenure were retained and its oppressive incidents swept away by stat. 12 Car. II. c. 24. Termes de la Ley; 2 Sharswood, Blackst. Comm. 73; 1 Stephen, Comm. 198.

GRANDCHILDREN. The children of one's children. Sometimes these may claim bequests given in a will to children; though, in general, they can make no such claim. 6 Coke, 16. See CHILD; CONSTRUCTION.

GRANDFATHER. The father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDMOTHER. The mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANT. A generic term applicable to all transfers of real property. 2 Washburn, Real Prop. 517.

A transfer by deed of that which cannot be passed by livery. Williams, Real Prop. 147, 149.

An act evidenced by letters patent under the great seal, granting something from the king to a subject. Cruise, Dig. tit. 33, 34.

A technical term made use of in deeds of conveyance of lands to import a transfer. 2 Washburn, Real Prop. 620. It is said to be construed into a general warranty. See CONSTRUCTION.

The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, though in the largest sense the term comprehends every thing that is granted or passed from one to another, and is applied to every species of property. Grant is one of the usual words in a feoffment; and a grant differs but little from a feoffment except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted."

Incorporeal rights are said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law, they cannot be transferred by livery of possession. Of course, at common law, a conveyance in writing was necessary: hence they are said to be in grant, and to pass by the delivery of the deed.

By the word *grant*, in a treaty, is meant not only a formal grant, but any concession, warrant, order, or permission to survey, possess, or settle, whether written or parol, express, or presumed from possession. Such a grant may be made by law, as well as by a patent pursuant to a law. 12 Pet. 410. See 9 Ad. & E. 532; 5 Mass. 472; 9 Pick. Mass. 80.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Private grant is a grant by the deed of a private person.

Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government.

The public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws; but many specific grants have also been made, and are the

usual method of transfer during the colonial period. See 2 Washburn, Real Prop. 517–536; 4 Kent, Comm. 450, 494; 8 Wheat. 543; 6 Pet. 548; 16 *id.* 367 ; Brightly, Dig. U. S. Laws, *Lands, Patent.*

Among the modes of conveyance included under office grant are levies and sales to satisfy execution creditors, sales by order or decree of a court of chancery, sales by order or license of court, sales for non-payment of taxes, and the like. See Blackwell, Tax, Title *passim;* 2 Washburn, Real Prop. 536–549.

With regard to private grants, see DEED.

GRANT, BARGAIN, AND SELL. Words used in instruments of conveyance of real estate. See CONSTRUCTION; 8 Barb. N. Y. 463; 32 Me. 329; 1 T. B. Monr. Ky. 30; 1 Conn. 79; 5 Tenn. 124; 2 Binn. Penn. 95; 11 Serg. & R. Penn. 109; 1 Mo. 576; 1 Murph. No. C. 343.

GRANTEE. He to whom a grant is made.

GRANTOR. He by whom a grant is made.

GRASSHEARTH. In Old English Law. The name of an ancient customary service of tenants' doing one day's work for their landlord.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS (Lat.). Without reward or consideration.

When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross negligence if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance, —between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it: in the latter case he is responsible, while in the former he would not, in general, be bound to perform his contract. 4 Johns. N. Y. 84; 5 Term, 143; 2 Ld. Raym. 913.

GRATIS DICTUM (Lat.). A saying not required; a statement voluntarily made without necessity.

GRATUITOUS CONTRACT. In Civil Law. One the object of which is for the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it: as, for example, a gift. 1 Bouvier, Inst. n. 709.

GRAVAMEN (Lat.). The grievance complained of; the substantial cause of the action. See Greenleaf, Ev. § 66.

GRAVE. A place where a dead body is interred.

The violation of the grave, by taking up the dead body, or stealing the coffin or grave-clothes, is a misdemeanor at common law, 1 Russell, Crimes, 414, and has been made the subject of statutory enactment in some of the states. See 2 Bishop, Crim. Law, §§ 1022–1024; Dearsl. & B. Cr. Cas. 160; 19 Pick. Mass. 304; 4 Blackf. Ind. 328.

A singular case, illustrative of this subject, occurred in Louisiana. A son, who inherited a large estate from his mother, buried her with all her jewels, worth two thousand dollars: he then made a sale of all he inherited from his mother for thirty thousand dollars. After this, a thief broke the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed them, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance. 6 Rob. La. 488. See DEAD BODY.

GREAT CATTLE. In English Law. All manner of beasts, except sheep and yearlings. 2 Rolle, 173.

GREAT CHARTER. See MAGNA CHARTA.

GREAT LAW. The name of an act of the legislature of Pennsylvania, passed at Chester immediately after the arrival of William Penn, December 7, 1682. Sergeant, Land Laws of Penn. 24, 230.

GREAT TITHES. In Ecclesiastical Law. The more valuable tithes: as, corn, hay, and wood. 3 Burn, Eccl. Law, 680, 681; 3 Stephen, Comm. 127.

GREEN CLOTH. An English board or court of justice, composed of the lord steward and inferior officers, and held in the royal household: so named from the cloth upon the board at which it is held.

GREEN WAX. In English Law. The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax.

GREMIO. In Spanish Law. The union of merchants, artisans, laborers, or other persons who follow the same pursuits and are governed by the same regulations. The word *guild*, in English, has nearly the same signification.

GREMIUM (Lat.). Bosom. Ainsworth, Dict. *De gremio mittere*, to send from their bosom: used of one sent by an ecclesiastical corporation or body. *A latere mittere*, to send from his side, or one sent by an individual: as, a legate sent by the pope. DuCange. In English law, an inheritance is said to be *in gremio legis*, in the bosom or under the protection of the law, when it is in abeyance. See IN NUBIBUS.

GRESSUME (variously spelled *Gressame, Gressum, Grossome;* Scotch, *grassum*). **In Old English Law.** A fine due from a copyholder on the death of his lord. Plowd. fol. 271, 285; 1 Strange, 654. Cowel derives it from *gersum.*

GRITHBRECH (Sax. *grith*, peace, and *bryck*, breaking). Breach of the king's peace, as opposed to *frithbrech*, a breach of the nation's peace with other nations. Leges Hen. I. c. 36; Chart. Willielm. Conq. Eccles. S. Pauli in Hist. ejusd. fol. 90.

GROSS ADVENTURE. In Maritime Law. A maritime or bottomry loan. It is so called because the lender exposes his money to the perils of the sea, and contributes to the gross or general average. Pothier; Pardessus, Dr. Com.

GROSS AVERAGE. In Maritime Law. That kind of average which falls on the ship, cargo, and freight, and is distinguished from particular average. See AVERAGE.

GROSS NEGLIGENCE. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Jones, Bailm.

Lata culpa, or, as the Roman lawyers most accurately call it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or fraud itself. It must not be confounded, however, with fraud; for it may exist consistently with good faith and honesty of intention, according to common-law authorities.

GROSS WEIGHT. The total weight of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROSSOME. In Old English Law. A fine paid for a lease. Corrupted from *gersum*. Plowd. fol. 270, 285; Cowel.

GROUND ANNUAL. In Scotch Law. An annual rent of two kinds: *first*, the feuduties payable to the lords of erection and their successors; *second*, the rents reserved for building-lots in a city, where *sub-feus* are prohibited. This rent is in the nature of a perpetual annuity. Bell, Dict.; Erskine, Inst. 11. 3. 52.

GROUND RENT. Rent paid for the privilege of building on another man's land. Johnson; Webster. A rent reserved by the owner of unimproved land upon a lease of the land to be built upon, as contradistinguished from the rent paid to the lessee by his tenant of the premises where the buildings are erected, and from the ordinary rent paid by the tenant to his landlord upon a demise of lands and tenements.

A rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed. See 9 Watts, Penn. 262; 8 Watts & S. Penn. 185; 2 Am. Law Reg. 577.

2. In Pennsylvania, it is real estate, and in case of intestacy goes to the heir. 14 Penn. St. 444. The interest of the owner of the rent is an estate altogether distinct and of a very different nature from that which the owner of the land has in the land itself. Each is the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee. Irwin *v.* Bank of United States, 1 Barr, 349, per *Kennedy*, J. So, the owner of the rent is not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues. 1 Whart. Penn. 72; 4 Watts, Penn. 98. Being real estate, it is bound by a judgment, and may be mortgaged like other real estate. It is a rent-service. 1 Whart. Penn. 337.

A ground-rent, being a rent-service, is, of course, subject to all the incidents of such a rent. Thus, it is distrainable of *common right*, that is, by the common law. Coke, Litt. 142 *a*; Kenege *v.* Elliott, *supra*. So, also, it may be apportioned. Ingersoll *v.* Sergeant, *supra*. And this sometimes takes place by operation of law, as when the owner of the rent purchases part of the land; in which case the rent is apportioned, and extinguished *pro tanto*. Littleton, 222. And the reason of the extinguishment is that a *rent-service* is given as a return for the possession of the land. Thus, upon the enjoyment of the land depends the obligation to pay the rent; and if the owner of the rent purchases part of the land, the tenant no longer enjoying that portion is not liable to pay rent for it, and so much of the rent as issued out of that portion is, consequently, extinguished. See 2 Blackstone, Comm. 41; 1 Whart. Penn. 235, 352; 3 *id.* 197, 365.

3. At law, the legal ownership of these two estates—that in the rent and that in the land out of which it issues—can coexist only while they are held by different persons or in different rights; for the moment they unite in one person in the same right, the rent is merged and extinguished. 2 Binn. Penn. 142; 3 Penn. Law Jour. 232; 6 Whart. Penn. 382; 5 Watts, Penn. 457. But if the one estate or intestate be legal and the other equitable, there is no merger. 6 Whart. Penn. 283. In equity, however, this doctrine of merger is subject to very great qualification.

A merger is not favored in equity; and the doctrine there is that although in some cases, where the legal estates unite in the same person in the same right, a merger will take place *against* the intention of the party whose interests are united (see 3 Whart. Penn. 421, and cases there cited), yet, as a general rule, the *intention*, actual or presumed, of such party will govern; and where no intention is expressed, if it appears most for his advantage that a merger should not take place, such will be presumed to have been his intention; and that it is only in cases where it is perfectly indifferent to the party thus interested that, in equity, a merger occurs. 5 Watts, Penn. 457; 8 *id.* 146; 4 Whart. Penn. 421; 6 *id.* 283; 1 Watts & S. Penn. 487.

4. A ground-rent being a freehold estate, created by deed and perpetual by the terms of its creation, no mere lapse of time without demand of payment raises, at common law, a presumption that the estate has been released. 1 Whart. Penn. 229.

But this is otherwise in Pennsylvania now, by act of April 27, 1855, sec. 7, Pamph. Laws, 369, whereby a presumption of a release or extinguishment is created where no payment, claim, or demand is made for the rent, nor any declaration or acknowledgment of its ex-

istence made by the owner of the premises subject to the rent, for the period of twenty-one years. This applies to the estate in the rent, and comprehends the future payments. But, independently of this act of assembly, *arrearages* of rent which had fallen due twenty years before commencement of suit might be presumed to have been paid. 1 Whart. Penn. 229. These *arrearages* are a lien upon the land out of which the rent issues; but, as a general rule, the lien is discharged by a judicial sale of the land, and attaches to the fund raised by the sale. See 2 Binn. Penn. 146; 3 Watts & S. Penn. 9; 8 *id.* 381; 9 *id.* 189; 4 Whart. Penn. 516; 2 Watts, Penn. 378; 3 *id.* 288; 1 Penn. St. 349; 2 *id.* 96.

5. As ground-rent deeds are usually drawn, the owner of the rent has three remedies for the recovery of the arrearages, viz.: by action, distress, and (for want of sufficient distress) the right to re-enter and hold the land as of the grantor's former estate. See 2 Am. Law Reg. 577; 3 *id.* 65.

GROUNDAGE. In Maritime Law. The consideration paid for standing a ship in a port. Jacob, Law Dict.

GROWING CROPS. Growing crops of grain, potatoes, turnips, and all annual crops raised by the cultivation of man, are in certain cases personal chattels, and in others, part of the realty. If planted by the owner of the land, they are a part of the realty, but may by sale become personal chattels, if they are fit for harvest, and the sale contemplates their being cut and carried off, and not a right in the vendee to enter and cultivate. So even with trees. 4 Metc. Mass. 580; 9 Barnew. & C. 561; Hob. 173; 1 Atk. Ch. 175; 7 N. H. 522; 11 Coke, 50. So, if a tenant who holds for a certain time plant annual crops, or even trees in a nursery for purposes of transplantation and sale, they are personal chattels when fit for harvest. 1 Metc. Mass. 27, 313; 2 East, 68; 4 Taunt. 316, per *Heath*, J. If planted by a tenant for uncertain period, they are regarded, whether mature or not, in many respects as personal property, but liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises. 5 Coke, 116 *a*; 5 Halst. N. J. 128; Coke, Litt. 55; 2 Johns. N. Y. 418, 421, n. See 2 Dan. Ky. 206; 2 Rawle, Penn. 161; 1 Washburn, Real Prop. 3.

GUARANTEE. He to whom a guarantee is made.

The guarantee is entitled to receive payment, in the first place, from the debtor, and, secondly, from the guarantor. He must be careful not to give time, beyond that stipulated in the original agreement, to the debtor, without the consent of the guarantor. The guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt. 2 Johns. Ch. N. Y. 554; 17 Johns. N. Y. 384; 8 Serg. & R. Penn. 116; 10 *id.* 33; 2 Brown, Ch. 579, 582; 2 Ves. Ch. 542. But the mere omission of the guarantee to sue the principal debtor will not, in general, discharge the guarantor. 8 Serg. & R. Penn. 112; 3 Yeates, Penn. 157; 6 Binn. Penn. 292, 300.

GUARANTOR. He who makes a guaranty.

A guarantor may be discharged by neglect to notify him of non-payment by the principal; but the same strictness is not required to charge him as is required to charge an indorser.

GUARANTY. An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. *Shaw*, C. J., 24 Pick. Mass. 252.

It is distinguished from suretyship in being a secondary, while that is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid.

The undertaking is essentially in the alternative. A guarantor cannot be sued as a promisor, as the surety may: his contract must be specially set forth. A guarantor warrants the solvency of the promisor, which an indorser does not. 8 Pick. Mass. 423.

Guaranty is limited to mercantile undertakings, or to instruments not under seal; suretyship applies generally.

2. At common law, a guaranty could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, re-enacted almost in terms in the several states, it is provided that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

The following classes of promises have been held not within the statute, and valid though made by parol.

First, where there is a liability pre-existent to the new promise.

1. Where the principal debtor is discharged by the new promise being made, 3 Bingh. N. C. 889; 5 Chandl. Wisc. 61; 28 Vt. 135; 29 *id.* 169; 5 Cush. Mass. 488; 8 Gray, Mass. 233; 1 Q. B. 933; 8 Johns. N. Y. 376; 13 Md. 141; 4 Bos. & P. 124; Browne, Stat. Fr. §§ 166, 193; and an entry of such discharge in the creditor's books is sufficient proof. 3 Hill, So. C. 41. This may be done by agreement to that effect, 1 All. Mass. 405, by novation, by substitution, or by discharge under final process, 1 Barnew. & Ald. 297; but mere forbearance, or an agreement to forbear pressing the claim, is not enough. 1 Smith, Lead. Cas. 5th Am. ed. 387; 6 Vt. 666.

2. Where the principal obligation is void or not enforceable when the new promise is made, and this is contemplated by the parties. But if not so contemplated, then the new pro-

mise is void. Burge, Surety. 10; 2 Ld. Raym. 1085; 1 Burr. 373. But see, on this point, 17 Md. 283; 13 Johns. N. Y. 175; 6 Ga. 14.

3. So where the promise does not refer to the particular debt, or where this is unascertained. 1 Wils. 305.

In these three classes the principal obligation ceases to exist after the new promise is made.

4. Where the promisor undertakes for his own debt. But the mere fact that he is indebted will not suffice, unless his promise refers to that debt; nor is it sufficient if he subsequently becomes indebted on his own account, if not indebted when he promises, or if it is then contingent. 4 Hill, N. Y. 211. And if his own liability is discharged or non-existent, the promise is within the statute. 14 Penn. 473.

5. Where the new promise is in consideration of property placed by the debtor in the promisor's hands. 1 Gray, Mass. 391; 41 Me. 559.

6. Where the promise does not relate to the promisor's property, but to that of the debtor in the hands of the promisor.

7. Where the promise is made to the debtor, not the creditor; because this is not the debt of "another" than the promisee. 1 Gray, Mass. 76; 11 Ad. & E. 438.

8. Where the creditor surrenders a lien on the debtor or his property, which the promisor acquires or is benefited by, Fell, Guar. c. 2; Addison, Cont. 38; 7 Johns. N. Y. 463; 3 Burr. 1886; 2 Barnew. & Ald. 613; 21 N. Y. 412; but not so where the surrender of the lien does not benefit the promisor. 3 Metc. Mass. 396; 21 N. Y. 412.

In the five last classes, the principal debt may still subsist concurrently with the new promise, and the creditor will have a double remedy; but the fulfilment of the new promise will discharge the principal debt, because he can have but one satisfaction. The repeated dicta, that if the principal debt subsists, the promise is collateral and within the statute, are not sustainable. 30 Vt. 641. But the general doctrine now is that the transaction must amount to a purchase, the engagement for the debt being the consideration therefor, in whole or in part. 1 Gray, Mass. 391; 5 Cush. Mass. 488.

3. *Second*, if the new promise is for a liability then first incurred, it is original, if exclusive credit is given to the promisor. 5 All. Mass. 370; 13 Gray, Mass. 613; 28 Conn. 544; Browne, Stat. Fr. § 195. Whether exclusive credit is so given, is a question of fact for the jury. 7 Gill, Md. 7. Merely charging the debtor on a book-account is not conclusive.

Whether promises merely to indemnify come within the statute, is not wholly settled. Browne, Stat. Fr. § 158. In many cases they are held to be original promises, and not within the statute. 15 Johns. N. Y. 425; 4 Wend. N. Y. 657. But few of the cases, however, have been decided solely on this ground, most of them falling within the classes of original promises before specified. On principle, such contracts seem within the statute if there is a liability on the part of any third person to the promisee. If not, these promises would be original under class seven, above. Where the indemnity is against the promisor's own default, he is already liable without his promise to indemnify; and to make the promise collateral would make the statute a covert fraud. 10 Ad. & E. 453; 1 Gray, Mass. 391; 10 Johns. N. Y. 242; 1 Ga. 294; 5 B. Monr. Ky. 382; 20 Vt. 205; 10 N. H. 175; 1 Conn. 519; 5 Me. 504.

4. *Third*, guaranties may be given for liabilities thereafter to be incurred, and will attach when the liability actually accrues. In this class the promise will be original, and not within the statute, if credit is given to the promisor exclusively. 2 Term, 80; 1 Cowp. 227. But where the future obligation is contingent merely, the new promise is held not within the statute, on the ground that there is no principal liability when the collateral one is incurred. Browne, Stat. Fr. § 196. But this doctrine is questionable if the agreement distinctly contemplates the contingency. 1 Cranch, C. C. 77; 5 Hill, N. Y. 483. An offer to guarantee must be accepted within a reasonable time; but no notice of acceptance is required if property has been delivered under the guaranty. 8 Gray, Mass. 211; 2 Mich. 511.

Guaranty may be made for the tort as well as the contract of another, and then comes under the term miscarriage in the statute. 2 Barnew. & Ald. 613; 2 Day, Conn. 457; 1 Wils. 305; 9 Cow. N. Y. 154; 14 Pick. Mass. 174. All guaranties need a consideration to support them, none being presumed as in case of promissory notes; and the consideration must be expressed in a written guaranty. 3 Johns. N. Y. 310; 7 Wend. N. Y. 246; 24 *id.* N. Y. 35; 21 N. Y. 316; 5 East, 10. Forbearance to sue is good consideration. 1 Kebl. 114; Croke Jac. 683; 3 Bulstr. 206; Burge, Surety. 12; Browne, Stat. Fr. § 190; 1 Cow. N. Y. 99; 4 Johns. N. Y. 257; 6 Conn. 81. Where the guaranty is contemporaneous with the principal obligation, it shares the consideration of the latter. 8 Johns. N. Y. 29; 1 Paine, C. C. 580; 14 Wend. N. Y. 246; 2 Pet. 170; 3 Mich. 396; 36 N. H. 73.

A guaranty may be for a single act, or may be continuous.

5. The authorities are not agreed as to the negotiability of a guaranty. It is held that a guaranty which is a separate and distinct instrument is not negotiable separately. 8 Watts, Penn. 361; 3 Watts & S. Penn. 272; 4 Chandl. Wisc. 151; 14 Vt. 233. But if a guaranty is on a negotiable note, it is negotiable with the note; and if the note is to bearer, the guaranty has been held to be negotiable in itself. 24 Wend. N. Y. 456; 6 Humphr. Tenn. 261. But an equitable interest passes by transfer, and the assignee may sue in the name of the assignor. 12 Serg. & R. Penn. 100; 20 Vt. 506.

It is held that a guaranty is not enforceable by others than those to whom it is di-

rected, 3 McLean, C. C. 279; 1 Gray, Mass. 317; 13 *id.* 69; 6 Watts, Penn. 182; 10 Ala. N. S. 793, although they advance goods thereon. 4 Cranch, 224.

In one case it was held that the guarantor was not bound where the guaranty was addressed to two and acted on by one of them only. 3 Tex. 199. It was held, also, that the guaranty was not enforceable by the survivor of two to whom it was addressed, for causes occurring since the decease of the other. 7 Term, 254.

In the case of promissory notes, a distinction has sometimes been made between a guaranty of payment and a guaranty of collectability; the latter requiring that the holder shall diligently prosecute the principal debtor without avail. 4 Wisc. 190; 25 Conn. 576; 2 Hill, N. Y. 139; 6 Barb. N. Y. 547; 26 Me. 358; 4 Conn. 527.

It has in some cases been held that an indorsement in blank on a promissory note by a stranger to the note was *primâ facie* a guaranty.

6. A guarantor is discharged by a material alteration in the contract without his consent.

The guarantor may also be discharged by the neglect of the creditor in pursuing the principal debtor. The same strictness as to demand and notice is not necessary to charge a guarantor as is required to charge an indorser; but in the case of a guarantied note the demand on the maker must be made in a reasonable time, and if he is solvent at the time of the maturity of the note, and remains so for such reasonable time afterwards, the guarantor does not become liable for his subsequent insolvency. 8 East, 242; 2 H. Blackst. 612; 18 Pick. Mass. 534. Notice of non-payment must also be given to the guarantor, 2 Ohio, 430; but where the name of the guarantor of a promissory note does not appear on the note, such notice is not necessary unless damage is sustained thereby, and in such case the guarantor is discharged only to the extent of such damage. 12 Pet. 497. It is not necessary that an action should be brought against the principal debtor. 7 Pet. 113. See, also, 2 Watts, Penn. 128; 11 Wend. N. Y. 629. From the close connection of guaranty with suretyship, it is convenient to consider many of the principles common to both under the head of suretyship, which article see.

Consult Fell on Guaranty; Burge, Theobald, on Suretyship; Browne on Statute of Frauds; Addison, Chitty, Parsons, Story, on Contracts.

GUARDIAN. One who legally has the care and management of the person, or the estate, or both, of a child during its minority. Reeve, Dom. Rel. 311.

A person having the control of the property of a minor without that of his person is known in the civil law, as well as in some of the states of the United States, by the name of curator. 1 Leq. él. du Droit Civ. Rom. 241; Mo. Rev. Stat. 1855, 823.

2. *Guardian by chancery.* This guardianship, although unknown at the common law, is well established in practice now. It grew up in the time of William III., and had its foundation in the royal prerogative of the king as *parens patriæ*. 2 Fonblanque, Eq. 5th ed. 246.

This power the sovereign is presumed to have delegated to the chancellor. 10 Ves. Ch. 63; 2 P. Will. Ch. 118; Reeve, Dom. Rel. 317. By virtue of it, the chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead. Coke, Litt. 89; 2 Bulstr. 679; 1 P. Will. 703; 8 Mod. 214; 1 Ves. Ch. 160; 2 Kent, Comm. 227.

This power, in the United States, resides in courts of equity, 1 Johns. Ch. N. Y. 99; 2 *id.* 439, and in probate or surrogate courts. 2 Kent, Comm. 226; 30 Miss. 458; 3 Bradf. Surr. N. Y. 133.

Guardian by nature is the father, and, on his death, the mother. 2 Kent, Comm. 220; 2 Root, Conn. 320; 7 Cow. N. Y. 36; 2 Wend. N. Y. 158; 4 Mass. 675.

This guardianship, by the common law, extends only to the person, and the subject of it is the heir apparent, and not the other children,—not even the daughter when there are no sons; for they are not heirs apparent, but presumptive heirs only, since their heirship may be defeated by the birth of a son after their father's decease. But as all the children male and female equally inherit with us, this guardianship extends to all the children, as an inherent right in their parents during their minority. 2 Kent, Comm. 220.

3. The mother of a bastard child is its natural guardian. 6 Blackf. Ind. 357; 2 Mass. 109; 12 *id.* 383; Reeve, Dom. Rel. 314, note. The power of a natural guardian over the person of his ward is perhaps better explained by reference to the relation of parent and child. See DOMICIL. It is well settled that the court of chancery may, for just cause, interpose and control the authority and discretion of the parent in the education and care of his child. 5 East, 221; 8 Paige, Ch. N. Y. 47; 10 Ves. Ch. 52.

A guardian by nature is not entitled to the control of his ward's personal property, 34 Ala. N. S. 15, 565; 1 P. Will. 285; 7 Cow. N. Y. 36; 6 Conn. 474; 7 Wend. N. Y. 354; 3 Pick. Mass. 213, unless by statute. See 19 Mo. 345. The father must support his ward. 2 Bradf. Surr. N. Y. 341. But where his means are limited, the court will grant an allowance out of his child's estate. *Id.*; 1 Brown, Ch. 387. But the mother, if guardian, is not obliged to support her child if it has sufficient estate of its own; nor is she entitled, like the father, when guardian, to its services, unless she is compelled to maintain it.

A father as guardian by nature has no right to the real or personal estate of his child: that right, whenever he has it, must be as a guardian in socage, or by some statutory provision. 15 Wend. N. Y. 631.

4. *Guardian by nurture.* This guardianship belonged to the father, then to the mother.

The subject of it extended to the younger children, not the heirs apparent. In this country it does not exist, or, rather, it is merged in the higher and more durable guardianship by nature, because all the children are heirs, and, therefore, the subject of that guardianship. 2 Kent, Comm. 221, Reeve, Dom. Rel. 315; 6 Ga. 401. It extended to the person only, 6 Conn. 494; 40 Eng. L. & Eq. 109, and terminated at the age of fourteen. 1 Blackstone, Comm. 461.

Guardian in socage. This guardianship arose when socage lands descended to an infant under fourteen years of age; at which

period it ceased if another guardian was appointed, otherwise it continued. Andr. 313; 5 Johns. N. Y. 66.

The person entitled to it by common law was the next of kin, who could not by any possibility inherit the estate. 1 Blackstone, Comm. 461. Although formerly recognized in New York, it was never common in the United States, 5 Johns. N. Y. 66; 7 *id.* 157; because, by the statute of descents generally in force in this country, those who are next of kin may eventually inherit. Wherever it has been recognized, it has been in a form differing materially from its character at common law. 15 Wend. N. Y. 631. Such guardian was also guardian of the person of his ward as well as his estate. Coke, Litt. 87, 89. Although it did not arise unless the infant was seised of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate. See Hargrave's note 67 to Coke, Litt. This guardian could lease his ward's estate and maintain ejectment against a disseisor in his own name. 2 Bacon, Abr. 683.

There was anciently a guardianship by chivalry at the common law, where lands came to an infant by descent which were holden by knight-service. Coke, Litt. 88, 11, note. That tenure being abolished by statute Car. II., the guardianship has ceased to exist in England, and has never had any existence in the United States.

5. *Guardians by statute* are of two kinds: *first*, those appointed by deed or will; *second*, those appointed by court in pursuance of some statute.

Testamentary guardians are appointed by the deed or last will of the father; and they supersede the claims of all other guardians, and have control of the person and the real and personal estate of the child till he arrives at full age.

This power of appointment was given to the father by the stat. 12 Car. II., which has been pretty extensively adopted in this country. Under it, the father might thus dispose of his children, born and unborn, 7 Ves. Ch. 315, but not of his grandchildren. 5 Johns. N. Y. 278. Nor does it matter whether the father is a minor or not. 2 Kent, Comm. 225. It continues during the minority of a male ward, both as to his estate and person, notwithstanding his marriage. Reeve, Dom. Rel. 328; 2 Kent, Comm. 224; 4 Johns. Ch. N. Y. 380. There seems to be some doubt as to whether marriage would determine it over a female ward. 2 Kent, Comm. 224. It is more reasonable that it should, inasmuch as the husband acquires in law a right to the control of his wife's person. But it would seem that a person marrying a testamentary guardian is not entitled to the money of the ward. 12 Ill. 431.

Guardians appointed by court. The greater number of guardians among us, by far, are those appointed by court, in conformity with statutes which regulate their powers and duties. In the absence of special provisions, their rights and duties are governed by the general law on the subject of guardian and ward.

6. *Appointment of guardians.* Where there is a mother, it is not the duty of the court to appoint; but where both parents are dead, it then becomes necessary.

After the age of fourteen, the ward is entitled to choose a guardian, at common law, and generally by statute. Reeve, Dom. Rel. 320; 15 Ala. N. S. 687; 30 Miss. 458. His choice is subject, however, to the rejection of the court for good reason, when he is entitled to choose again. 14 Ga. 594. If the court appoint one before the age of choice, the infant may appear and choose one at that age, without any notice to the guardian appointed. 30 Miss. 458; 15 Ala. N. S. 687. But if none be chosen, then the old one acts. It seems that in Indiana the old one can be removed only for cause shown; in which case, of course, he is entitled to notice. 8 Ind. 307. A probate, surrogate, or county court has no power to appoint, unless the minor resides in the same county. 2 Bradf. Surr. N. Y. 214; 7 Ga. 362; 9 Tex. 109; 16 Ala. N. S. 759; 27 Mo. 280. But it seems that it may appoint any one guardian who resides within the state. 11 Ired. No. C. 36; 3 Bradf. Surr. N. Y. 133.

7. Coverture is no incapacity for the office of guardian. 29 Miss. 195. Otherwise, by statute, in some states. Mo. Rev. Stat. 1855, 824. But it is necessary that the wife should obtain the consent of her husband; as till this is obtained the guardianship is voidable. 2 Dougl. 433. A single woman by her marriage loses her guardianship, it would seem; but she may be reappointed. 2 Kent, Comm. 225, n. *b*; 2 Dougl. 433. Where there is a valid guardianship unrevoked, the appointment of another is void. 23 Miss. 550.

A guardian to a lunatic could not be appointed till after a writ *de lunatico inquirendo*. 21 Ala. N. S. 504. An order removing a guardian is equivalent to an order to pay over the money in his hands to his successor. 9 Mo. 225, 227. In some states the court is authorized to revoke for non-residence of the guardian. 9 Mo. 227.

8. *Powers and liabilities of guardians.* The relation of a guardian to his ward is that of a trustee in equity, and bailiff at law. 2 Md. 111. It is a trust which he cannot assign. 1 Parsons, Contr. 116. He will not be allowed to reap any benefit from his ward's estate, 2 Comyns, 230, but must account for all profits, which the ward may elect to take or charge interest on the capital used by him. 17 Ala. N. S. 306. He can invest the money of his ward in real estate only by order of court. 3 Ind. 320; 6 *id.* 628; 3 Yerg. Tenn. 336; 21 Miss. 9; 38 Me. 47. Nor can he convert real estate into personalty without a similar order. 25 Mo. 548; 2 Jones, Eq. No. C. 411; 3 Jones, No. C. 42; 4 *id.* 15; 16 B. Monr. Ky. 289; 18 *id.* 387; 1 Rawle, Penn. 293; 1 Ohio, 232; 1 Dutch. N. J. 121; 2 Kent, Comm. 230.

9. He may lease the land of his ward, 1 Parsons, Contr. 114; 2 Mass. 56; but if the lease extends beyond the minority of the ward the latter may avoid it on coming of age. 1 Johns. Ch. 561; 10 Yerg. 160; 2 Wils. 129; 7 Johns. N. Y. 154; 5 Halst. N. J. 133. The same principle is applied to the hiring of a ward's slave. 13 Ired. No. C. 475. He may sell his ward's personalty without order of court, 27 Ala. N. S. 198; 19 Mo. 345, and dispose of and manage it as he pleases. 2 Pick. Mass. 243. He is required to put the money out at interest, or show that he was

unable to do this. 21 Miss. 9; 2 Wend. N. Y. 424; 1 Pick. Mass. 527; 18 *id.* 1; 1 Johns. Ch. N. Y. 620; 5 *id.* 497; 7 Watts & S. Penn. 48; 13 Eng. L. & Eq. 140. If he spends more than the interest and profits of the estate in the maintenance and education of the ward without permission of the court, he may be held liable for the principal thus consumed. 1 Smedes & M. Ch. Miss. 545; 26 Miss. 393; 6 B. Monr. Ky. 1292; 2 Strobh. Eq. So. C. 40; 2 Sneed, Tenn. 520.

10. If he erects buildings on his ward's estate out of his own money, without order of court, he will not be allowed any compensation. 11 Barb. N. Y. 22; 8 *id.* 48; 11 Penn. St. 326; 23 Miss. 189; 24 *id.* 204. He is not chargeable with the services of his wards if for their own benefit he requires them to work for him. 12 Gratt. Va. 608. A married woman guardian can convey the real estate of her ward without her husband joining. 2 Dougl. 433. On marriage of a female minor in Mississippi, her husband, although a minor, is entitled to receive her estate from her guardian. 3 Miss. 893.

11. Contracts between guardian and ward immediately after the latter has attained his majority are unfavorably regarded by the courts, and will be set aside where they redound to the profit of the guardian. 4 Serg. & R. Penn. 114; 5 Binn. Penn. 8; 8 Md. 230; 28 Miss. 737; 14 B. Monr. Ky. 638; 12 Barb. N. Y. 84; 10 Ala. N. S. 400. Neither is he allowed to purchase at the sale of his ward's property. 2 Jones Eq. No. C. 285; 22 Barb. N. Y. 167. But the better opinion is that such sale is not void, but voidable only. 2 Gray, Mass. 141; 10 Humphr. Tenn. 275. He is not allowed, without permission of court under some statute authority, to remove his ward's property out of the state. 24 Ala. N. S. 486. He cannot release a debt due his ward, 1 J. J. Marsh. Ky. 441; 11 Mo. 649, although he may submit a claim to arbitration. 22 Miss. 118; 11 Me. 326; 6 Pick. Mass. 269; Dy. 216; 1 Ld. Raym. 246. He cannot by his own contract bind the person or estate of his ward, 6 Mass. 58; 1 Pick. Mass. 314, nor avoid a beneficial contract made by his ward. 13 Mass. 237; Coke, Litt. 17 *b*, 89 *a*.

12. He is entitled to the care and custody of the person of his ward. 7 Humphr. Tenn. 111; 4 Bradf. Surr. N. Y. 221. If a female ward marry, the guardianship terminates both as to her person and property. It has been thought to continue over her property if she marries a minor. If a male ward marries, the guardianship continues as to his estate, though it has been held otherwise as to his person. If he marries a female minor, his guardian will also be entitled to her property. Reeve, Dom. Rel. 328; 2 Kent, Comm. 226.

13. A guardian may change the residence of his ward from one county to another in the same state. But it seems that the new county may appoint another guardian. 4 Bradf. Surr. N. Y. 221. Whether he has the right to remove his ward into a foreign jurisdiction has been a disputed question. By the common law, his authority both over the person and property of his ward was strictly local. 1 Johns. Ch. N. Y. 156; 1 N. H. 193; 12 Wheat. 169; 10 Miss. 532. And this is the view maintained in most of the states. See Story, Confl. Laws, § 540. But see, on this question, 5 Paige, Ch. N. Y. 596; 8 Ala. N. S. 789; 11 *id.* 461; 18 *id.* 34; 11 Ired. No. C. 36; 9 Md. 227; 3 Mer. Ch. 67; 5 Pick. Mass. 20; 2 Watts & S. Penn. 548.

14. Nor can a guardian in one state maintain an action in another for any claim in which his ward is interested. 11 Ala. N. S. 343; 18 Miss. 529; Story, Confl. Laws, § 499. See LEX REI SITÆ. He cannot waive the rights of his ward,—not even by neglect or omission. 2 Vern. Ch. 368; 14 Ill. 417. No guardian, except a father, is bound to maintain his ward at his own expense. It is discretionary with a court whether to allow a father any thing out of his child's estate for his education and maintenance. Reeve, Dom. Rel. 324; 6 Ind. 66.

15. *Rights and liabilities of wards.* A ward owes obedience to his guardian, which a court will aid him in enforcing. 1 Strange, 167; 3 Atk. Ch. 721. The general rule is that the ward's contracts are voidable, 13 Mass. 237; 14 *id.* 457: yet there are some contracts so clearly prejudicial that they have been held absolutely void: such as contracts of surety. 4 Conn. 376.

16. A ward cannot marry without the consent of his or her guardian. Reeve, Dom. Rel. 327. And any one marrying or aiding in the marriage of a ward without such consent is guilty of contempt of court. 2 P. Will. 562; 3 *id.* 116. Infants are liable for their torts in the same manner as persons of full age. 5 Hill, N. Y. 391; 3 Wend. N. Y. 391; 9 N. H. 441. A ward is entitled to his own earnings. 1 Bouvier, Inst. 349. He attains his majority the day before the twenty-first anniversary of his birthday. 3 Harringt. 557; 4 Dana, 597; 1 Salk. 44. He can sue in court only by his guardian or *prochein ami.* 4 Blackstone, Comm. 464. He could not bring an action at law against his guardian, but might file a bill in equity calling him to account. 2 Vern. Ch. 342; 3 P. Will. Ch. 119; 3 Atk. Ch. 25; 1 Ves. Ch. 91. By the practice in chancery, he was allowed one year to examine the accounts of his guardian after coming of age. 7 Paige, 46. The statute of limitations will not run against him during the guardianship. 34 Ala. N. S. 15. But see LIMITATIONS.

17. *Sale of infants' lands.* It is probable that the English court of chancery did not have the inherent original power to order the sale of minors' lands. 2 Ves. Ch. 23; 1 Moll. 525. But, with the acquiescence of parliament, it claims and exercises that right for the purpose of maintaining and educating the ward. This power is not conceded as belonging to our courts of chancery in this country by virtue of their equity jurisdiction, nor to our probate courts as custodians of

minors. 6 Hill, N. Y. 415; 2 Kent, Comm. 229, n. *a*. It must be derived from some statute authority. 27 Ala. N. S. 198; 7 Johns. Ch. N. Y. 154; 2 Pick. Mass. 243; Ambl. 419.

18. It has been a much-disputed question whether an infant's lands can be sold by special act of the legislature. On the ground that the state is the supreme guardian of infants, this power of the legislature has been sustained where the object was the education and support of the infant. 29 Miss. 146; 30 *id.* 246; 5 Ill. 127; 20 Wend. N. Y. 365; 8 Blackf. Ind. 10; 16 Mass. 326. So it has been sustained where the sale was merely advantageous to his interest. 11 Gill. & J. Md. 87; 14 Serg. & R. Penn. 435. There has been some opposition on the ground that it is an encroachment on the judiciary. 4 N. H. 565, 575; 10 Yerg. Tenn. 59. Such sales have been sustained where the object was to liquidate the ancestor's debts. 4 T. B. Monr. Ky. 95. This has been considered questionable in the extreme. 10 Am. Jur. 297; 10 Yerg. Tenn. 59: *contra*, 16 Ill. 548. It has also been exercised in the case of idiots and lunatics, and sustained on the same reasons as in the case of infants. 7 Metc. Mass. 388.

By statute, we have also guardians for the insane and for spendthrifts. 2 Barb. N. Y. 153; 8 Ala. N. S. 796; 18 Me. 384; 8 N. H. 569; 19 Pick. Mass. 506.

GUARDIAN AD LITEM. A guardian appointed for the purposes of a suit.

2. The appointment of such is incident to the power of every court to try a case, 2 Cow. N. Y. 430; and the power is then confined to the particular case at bar. Coke, Litt. 89, n. 16. His duty is to manage the interest of the infant when sued. In criminal cases no guardian is appointed: the court acts as guardian. Reeve, Dom. Rel. 318. A guardian *ad litem* cannot be appointed till the infant has been brought before the court in some of the modes prescribed by law. 16 Ala. N. S. 509; 1 Swan, Tenn. 75; 2 B. Monr. Ky. 453. Such guardian cannot waive service of process. 2 Ind. 74. The court will not appoint upon the nomination of the complainant. 2 Paige, 304.

3. The omission to appoint a guardian *ad litem* does not render the judgment void, but only voidable. 8 Metc. Mass. 196. It will be presumed, where the chancellor received the answer of a person as guardian *ad litem*, that he was regularly appointed, although it does not appear of record. 19 Miss. 418. See 2 Swan, Tenn. 197. It is error to decree the sale of a decedent's property on the petition of the representatives, without the previous appointment of a guardian *ad litem* for the infant heirs. 16 Ala. N. S. 41. Where the general guardian petitions for a sale of his ward's lands, the court must appoint a guardian *ad litem*. 18 B. Monr. Ky. 779; 21 Ala. N. S. 363; 30 Miss. 258; 1 Ohio St. 544.

It seems that a guardian *ad litem* can elect whether to come into hotch-pot. 15 Ala. 85. An appearance of the minor in court is not necessary for the appointment of a guardian to manage his interest in the suit. 11 Eng. L. & Eq. 156; 15 *id.* 317.

GUARDIANSHIP. The power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age renders him unable to protect himself.

GUARENTIGIO. In Spanish Law. A term applicable to the contract or writing by which courts of justice are empowered to execute and carry into effect a contract in the same manner as if it were decreed by the court after the usual legal formalities. This clause, though formerly inserted in contracts of sale, etc., stipulating the payment of a sum of money, is at present usually omitted, as courts of justice ordinarily compel the parties to execute all contracts made by authentic acts, that is, acts passed before a notary, in the presence of two witnesses.

GUBERNATOR (Lat.). A pilot of a ship.

GUERRILLA PARTY (Span. *guerra*, war; *guerrilla*, a little war).

In Military Law. Self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war, chiefly by raids, extortion, destruction, and massacre. Lieber, Guerr. Part. 18. See Halleck, Int. Law, 386; Woolsey, Int. Law, 299.

Partisan, free-corps, and guerrilla are terms resembling each other considerably in signification; and, indeed, partisan and guerrilla are frequently used in the same sense. See Halleck, Int. Law, 386.

Partisan corps and free-corps both denote bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. But he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war so long as he does not transgress it. Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. The men composing these corps are entitled to the benefit of the laws of war, under the same limitations as the partisan corps.

Guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them.

The law of war, however, would not extend a similar favor to small bodies of armed countrypeople near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits and brigandage. Lieber, Guerr. Part. 20.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bacon, Abr. *Inns*, C 5; 8 Coke, 32.

2. And if, after taking lodgings at an inn, he leaves his horse there and goes elsewhere to lodge, he is still to be considered a guest, 26 Vt. 316; but not if he merely leaves goods for keeping which the landlord receives no compensation. 1 Salk. 388; 2 Ld. Raym. 866; Croke Jac. 188. The length of time a man is at an inn makes no difference, whether he stays a day, a week, or a month, or longer, or only for temporary refreshment, so always that, though not strictly *transiens*, he retains his character as a traveller. 5 Term, 273; 5 Barb. N. Y. 560. But if a person comes upon a special contract to board at an inn, he is not, in the sense of the law, a guest, but a boarder. Bacon, Abr. *Inns*, C 5; Story, Bailm. § 477; 26 Ala. N. S. 377; 26 Vt. 332, 343. See 7 Cush. 417.

3. Innkeepers are generally liable for all goods belonging to the guest brought within the inn. It is not necessary that the goods should have been in the special keeping of the inn-keeper to make him liable. This rule is founded on principles of public utility, to which all private considerations ought to yield. 2 Kent, Comm. 459; 1 Hayw. No. C. 40; 14 Johns. N. Y. 175; Dig. 4. 9. 1. See 3 Barnew. & Ald. 283; 4 Maule & S. 306; 1 Holt, Nisi P. 209; 1 Salk. 387; Carth. 417; 1 Bell, Comm. 469; Dane, Abr. Index; Yelv. 67 *a*; 1 Smith, Lead. Cas. 47; 8 Coke, 32; 14 Barb. N. Y. 193; 1 Cal. 221; 7 Cush. Mass. 417; 26 Vt. 242.

GUIDON DE LA MER. The name of a treatise on maritime law, written in Rouen—then Normandy—in 1671, as is supposed. It was received on the continent of Europe almost as equal in authority to one of the ancient codes of maritime law. The author of this work is unknown. This tract or treatise is contained in the "Collection de Lois maritimes," by J. M. Pardessus, vol. 2, p. 371 *et seq.*

GUILD, GILD. A brotherhood or company governed by certain rules and orders made among themselves by king's license; a corporation, especially for purposes of commerce; so called because on entering the *guild* the members pay an assessment or tax (*gild*) towards defraying its charges. Termes de la Ley; DuCange. A guild held generally more or less property in common,—often a hall, called a *guild-hall*, for the purposes of the association. The name of *guild* was not, however, confined to mercantile companies, but was applied also to religious, municipal, and other corporations. A friborg (*q. v.*), that is, among the Saxons, ten families' mutual pledges for each other to the king. Spelman.

GUILD HALL (Law Lat. *gildhalla*, variously spelled *ghildhalla*, *guihalla*, *guihaula*; from Sax. *gild*, payment, company, and *halla*, hall). A place in which are exposed goods for sale. Charter of Count of Flanders; Hist. Guinensi, 202, 203; DuCange. The hall of a guild or corporation. DuCange; Spelman: *e.g. Gildhalla Teutonicorum.* The hall of the merchants of the Hanseatic League in London, otherwise called the "Stilyard." *Id.*

GUILT. In Criminal Law. That which renders criminal and liable to punishment.

That disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. See Rutherford, Inst. b. 1, c. 18, s. 10.

In general, every one is presumed innocent until guilt has been proved; but in some cases the presumption of guilt overthrows that of innocence; as, for example, where a party destroys evidence to which the opposite party is entitled. The spoliation of papers material to show the neutral character of a vessel furnishes strong presumption against the neutrality of the ship. 2 Wheat. 227.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor, or offence.

This word implies a malicious intent, and must be applied to something universally allowed to be a crime. Cowp. 275.

In Pleading. A plea by which a defendant who is charged with a crime, misdemeanor, or tort admits or confesses it. In criminal proceedings, when the accused is arraigned, the clerk asks him, "How say you, A B, are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment, he answers or pleads *guilty*.

GWABR MERCHED. Maid's fee. A British word signifying a customary fine payable to lords of some manors on marriage of tenant's daughter, or otherwise on her incontinence. Cowel, *Marchet.*

GYLTWITE (Sax.). Compensation for fraud or trespass. Grant of King Edgar, anno 964; Cowel.

H.

HABEAS CORPORA (Lat. that you have the bodies). **In English Practice.** A writ issued out of the common pleas, commanding the sheriff to compel the appearance of a jury in a cause between the parties. It answered the same purpose as a *distringas juratores* in the king's bench. It is abolished by the Common-Law Procedure Act.

HABEAS CORPUS (Lat. that you have the body). A writ directed to the person detaining another, and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

2. This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty. It takes its name from the characteristic words it contained when the process and records of the English courts were written in Latin:

Præcipimus tibi quod CORPUS *A B in custodia vestra detentum, ut dicitur, una cum causa captionis et detentionis suæ, quocunque nomine idem A B censeatur in eadem* HABEAS *coram nobis apud Westm. &c.* ad subjiciendum et recipiendum *ea, quæ curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte, etc.*

3. There were several other writs which contained the words *habeas corpus;* but they were distinguished from this and from one another by the specific terms declaring the object of the writ, which terms are still retained in the nomenclature of writs: as, *habeas corpus ad respondendum, ad testificandum, ad satisfaciendum, ad prosequendum,* and *ad faciendum et recipiendum, ad deliberandum et recipiendum.*

This writ was in like manner designated as habeas corpus *ad subjiciendum et recipiendum;* but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated the generic term to itself that it is now, by way of eminence, commonly called The Writ of Habeas Corpus.

4. The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Book 48 Ed. III. 22; and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used *against the crown* are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I. it was held an admitted constitutional remedy. Hurd, Hab. Corp. 145.

In process of time, abuses crept into the practice, which in some measure impaired the usefulness of the writ. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody. 3 Blackstone, Comm. 135.

5. Greater promptitude in its execution was required to render the writ efficacious. The subject was accordingly brought forward in parliament in 1668, and renewed from time to time until 1679, when the celebrated Habeas Corpus Act of 31 Car. II. was passed. The passage of this act has been made the theme of the highest praise and congratulation by British authors, and is even said to have "extinguished all the resources of oppression." Hurd, Hab. Corp. 93.

This act being limited to cases of commitments for "criminal or supposed criminal matters," every other species of restraint of personal liberty was left to the ordinary remedy at common law; but, doubts being entertained as to the extent of the jurisdiction of the judge to inquire into the truth of the return to the writ in such cases, an attempt was made, in 1757, in the house of lords, to render the jurisdiction more remedial. It was opposed by Lord Mansfield as unnecessary, and failed, for the time, of success. It was subsequently renewed, however; and the act of 56 Geo. III. c. 100 supplies, in England, all the needed legislation in cases not embraced by the act of 31 Car. II. Hurd, Hab. Corp.

6. The English colonists in America regarded the privilege of the writ as one of the "dearest birthrights of Britons;" and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley in 1689 to Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced, as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants, and inhabitants of Boston and the country adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel without license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In South Carolina in 1692 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign, while in the assembly of Maryland in 1725 the benefit of its provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of parliament in 1774 to extend the law of habeas corpus to Canada was denounced by the continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies. Hurd, Hab. Corp. 109–120.

7. It is provided in art. i. sec. 9, § 2 of the constitution of the United States that "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

Similar provisions are found in the constitutions of most of the states. In Virginia and Vermont, however, it is forbidden to suspend the privilege of the writ in any case; but in the constitutions of Maryland, North Carolina, and South Carolina the writ is not mentioned.

Congress, by act of March 3, 1863, authorized the president to suspend the privilege of the writ throughout the whole or any part of the United States, whenever in his judgment the public safety might require it, during the rebellion. A partial suspension took place.

Nor has the power ever been exercised by the legislature of any of the states, except that of Mas-

sachusetts, which, on the occasion of "Shays's Rebellion," suspended the privilege of the writ from November, 1786, to July, 1787.

8. Congress has prescribed the jurisdiction of the federal courts under the writ; but, never having particularly prescribed the mode of procedure for them, they have substantially followed in that respect the rules of the common law.

In most of the states statutes have been passed, not only providing what courts or officers may issue the writ, but, to a considerable extent, regulating the practice under it; yet in all of them the proceeding retains its old distinctive feature and merit,—that of a summary appeal for immediate deliverance from illegal imprisonment.

9. *Jurisdiction of state courts.* The states, being in all respects, except as to the powers delegated in the federal constitution, sovereign political communities, are unlimited as to their judicial power, except by that instrument; and they, accordingly, at will create, apportion, and limit the jurisdiction of their respective courts over the writ of habeas corpus, as well as other legal process, subject only to such constitutional restriction.

The restrictions in the federal constitution on this subject are necessarily implied from the express grants of judicial power therein to the federal courts in certain cases specified in art. iii. sec. 2, and in which the decision of the supreme court of the United States is paramount over that of all other courts and conclusive upon the parties.

10. *Jurisdiction of the federal courts.* This is prescribed by several acts of congress. By the 14th sec. of the Judiciary Act of September 24, 1789, 1 U. S. Stat. at Large, 81, it is provided that the supreme, circuit, and district courts may issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law; and that either of the justices of the supreme court, as well as judges of the district courts, may grant writs of habeas corpus for the purpose of inquiring into the cause of commitment; "provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

By the seventh section of the "Act further to provide for the collection of duties or imposts," passed March 2, 1833, 4 U. S. Stat. at Large, 634, the jurisdiction of the justices of the supreme court and judges of the district courts is extended to "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof."

This act has been held to extend to the case of a United States marshal arrested by state authorities for alleged criminal violence in the capture of a fugitive slave under the provisions of the act of congress of September 18, 1850. 2 Wall. 521; 2 Am. Law Reg. 348; 6 McLean, C. C. 355. But the supreme court of Pennsylvania have questioned the soundness of this construction of the act of March 2, 1833. 3 Am. Law Reg. 207.

11. By the "Act to provide further remedial justice in the courts of the United States," passed Aug. 29, 1842, 5 U. S. Stat. at Large, 539, the jurisdiction of the justices and judges aforesaid is further extended "to all cases of any prisoner or prisoners in jail or confinement, when he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined or in custody under or by any authority or law, or process founded thereon, of the United States, or of any of them, for or on account of any act done or omitted under any alleged right, title, or authority, privilege, protection, or exemption set up or claimed under the commission or order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By the third section of the "Act for the government and regulation of seamen in the merchant service," passed July 20, 1790, 1 U. S. Stat. at Large, 131, it is provided that refractory seamen in certain cases shall not be discharged on habeas corpus or otherwise.

12. The supreme court issues the writ by virtue of its appellate jurisdiction, 4 Cranch, 75; and it will not grant it at the instance of the subject of a foreign government to obtain the custody of a minor child detained by a citizen of one of the states; for that would be the exercise of original jurisdiction. 2 How. 65.

It will grant it on the application of one committed for trial in the circuit court on a criminal charge, 4 Cranch, 75; 3 Dall. 17; and where the petitioner is committed on an insufficient warrant, 3 Cranch, 448; and where he is detained by the marshal on a capias ad satisfaciendum after the return-day of the writ. 7 Pet. 568.

13. None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the state courts. It was refused by the supreme court where the party for whose benefit the application was made had been convicted in a state court of levying war against the state. 3 How. 103.

It was refused by the circuit court where the petitioner, a secretary attached to the Spanish legation, was confined under criminal process issued under the authority of the state of Pennsylvania, 1 Wash. C. C. 232; also where the petitioner, a British seaman, was arrested under the authority of an act of the legislature of the state of South Carolina, which was held to conflict with the constitution of the United States. 2 Wheel. Cr. Cas. N. Y. 56.

It will be granted, however, where the imprisonment, although by a state officer, is

under or by color of the authority of the United States, as where the prisoner was arrested under a governor's warrant as a fugitive from justice of another state, requisition having been regularly made. 3 McLean, C. C. 121.

14. *Proper use of the writ.* The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal.

If the imprisonment be claimed by virtue of legal process, the validity and present force of such process are the only subjects of investigation. 5 Hill, N.Y. 164; 4 Barb. N.Y. 31; 4 Harr. Del. 575; Hurd, Hab. Corp. 332.

But such process cannot, in this proceeding, be invalidated by errors which only render it irregular. The defects, to entitle the prisoner to be discharged, must be such as to render the process void; for the writ of habeas corpus is not, and cannot perform the office of, a writ of error. 3 Vt. 114; 6 *id.* 509; 4 Day, Conn. 436; 3 Hawks. No. C. 25; 2 La. 422, 587; 8 *id.* 185; 2 Park. Crim. N. Y. 650; 1 Hill, N. Y. 154; 1 Abb. Pract. Cas. N. Y. 210; 11 How. Pract. N. Y. 418; 4 Carr. & P. 415; 7 Ohio St. 81; Hurd. Hab. Corp. 334.

It cannot be used to oust another competent and acting jurisdiction, or to divert or defeat the course of justice therein. 5 Ark. 424; 1 Ill. 198; 16 Ohio, 405; 1 Md. Ch. Dec. 351; 2 *id.* 42; 19 Ala. N. s. 438; 6 Ala. 9; 2 Wheat. 532; 3 Yerg. Tenn. 167; 1 Edw. Ch. N.Y. 551; 1 Harr. Del. 392; 2 Aik. Vt. 381; 6 Miss. 80; 1 Curt. C. C. 178; 2 Green, N. J. 312; 4 M'Cord, So. C. 233; 1 Watts, Penn. 66; 6 McLean, C. C. 355; 10 Pick. Mass. 434; 7 Cush. Mass. 285; 8 Ohio St. 599; 21 How. 506; Hurd, Hab. Corp. 335.

15. The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice. But in such cases, as the just object of the proceeding is rather to remove illegal restraint than to enforce specifically the claims of private custody, the alleged prisoner, if an adult of sound mind, is generally permitted to go at large; if an infant of sufficient age and discretion, it is usually permitted to elect in whose custody it will remain, provided that it does not elect an injurious or improper custody; and if of tender years, without such discretion, the court determines its custody according to what the true interests and welfare of the child may at the time require. Hurd, Hab. Corp. 450–551.

16. *Application for the writ.* This may be made by the prisoner, or by any one on his behalf, where for any reason he is unable to make it.

It is usually made by petition in writing, verified by affidavit, stating that the petitioner is unlawfully detained, etc., and, where the imprisonment is under legal process, a copy thereof, if attainable, should be presented with the petition; for where the prisoner is under sentence on conviction for crime, or in execution on civil process, or committed for treason or felony plainly expressed in the warrant, he is not, in most of the states, entitled to the writ. Hurd, Hab. Corp. 209–228.

17. *The return.* The person to whom the writ is directed is required to produce the body of the prisoner forthwith before the court or officer therein named, and to show the cause of the caption and detention. 5 Term, 89; 2 South. N. J. 545; Hurd, Hab. Corp. 239–242.

If the writ be returned without the body, the return must show that the prisoner is not in the possession, custody, or power of the party making the return, or that the prisoner cannot, without serious danger to his life, be produced; and any evasion on this point will be dealt with summarily by attachment. 5 Term, 89; 10 Johns. N. Y. 328; 1 Dudl. Ga. 46; 5 Cranch, C. C. 622; Hurd, Hab. Corp. 244.

Where the detention is claimed under legal process, a copy of it is attached to the return. Where the detention is under a claim of private custody, all the facts relied on to justify the restraint are set forth in the return.

18. *The hearing.* The questions arising upon the return or otherwise in the proceeding, whether of fact or of law, are determined by the court or judge, and not by a jury. Hurd, Hab. Corp. 299.

The evidence on the hearing is such as is allowed in other summary proceedings in which the strictness exacted on the trial in civil actions or criminal prosecutions is somewhat relaxed, the practice sometimes permitting affidavits to be read where there has been no opportunity for cross-examination; but the introduction of such evidence rests in the sound discretion of the court. Coxe, N. J. 403; Sandf. N.Y. 701; 20 How. State Tr. 1376; 1 Burr's Trial, 97; Hurd, Hab. Corp. 303–324.

Pending the hearing the court may commit the prisoner for safe keeping from day to day, until the decision of the case. 14 How. 134; Bacon, Abr. *Habeas Corpus* (B 13); 5 Mod. 22; Hurd, Hab. Corp. 324.

If the imprisonment be illegal, it is the duty of the court to discharge the prisoner from that imprisonment; but if the court or officer hearing the *habeas corpus* be invested with the powers of an examining and committing magistrate in the particular case, and the evidence taken before the court, or regularly certified to it in the habeas corpus proceeding, so far implicate the prisoner in the commission of crime as to justify his being held for trial, it is usual for the court, in default of bail, to commit him as upon an original examination. 3 East, 157; 2 Pars. Eq. Cas. 317; 3 Penn. Law Jour. 459; 16 Penn. St. 575; 2 Cranch, C. C. 612; 5 Cow. N. Y. 12; Hurd, Hab. Corp. 416–427.

If the prisoner is not discharged or committed *de novo*, he must be remanded, or, in a proper case, let to bail; and all offences

prior to the conviction of the offender are bailable, except "capital offences when the proof is evident or presumption great." Hurd, Hab. Corp. 430–449.

19. *Recommitment after discharge.* The act of 31 Car. II. prohibited, under the penalty of five hundred pounds, the reimprisoning for the same offence of any person set at large on habeas corpus, except by the legal order and process of such court wherein such prisoner was bound by recognizance to appear, or other court having jurisdiction of the cause. Somewhat similar provisions are found in the statutes of many of the states. But these provisions are not held to prevent the subsequent arrest of the prisoner on other and more perfect process, although relating to the same criminal act. 9 Pet. 704; 2 Miss. 163.

HABEAS CORPUS CUM CAUSA. See HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM (Lat.). A writ which is issued to remove, for trial, a person confined in one county to the county or place where the offence of which he is accused was committed. Bacon, Abr. *Habeas Corpus*, A; 1 Chitty, Crim. Law, 132; Grady & S. Crown Pract. 201. Thus, it has been granted to remove a person in custody for contempt to take his trial for perjury in another county. 1 Tyrwh. 185.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM (Lat.). A writ usually issued in civil cases to remove an action from an inferior court, where the defendant is sued and imprisoned, to some superior court which has jurisdiction over the matter, in order that the cause may be determined there. This writ is commonly called *habeas corpus cum causâ*, because it commands the judges of the inferior court to return the day and cause of the caption and detainer of the prisoner. Bacon, Abr. *Habeas Corpus*, A; Bagley, Chamber Pract. 297; 3 Blackstone, Comm. 130; Tidd, Pract. 296.

This writ may also be issued at the instance of the bail of the defendant, to bring him up to be surrendered in their discharge, whether he is in custody in a civil suit or on a criminal accusation. Tidd, Pract. 298; 1 Chitty, Crim. Law, 132.

HABEAS CORPUS AD PROSEQUENDUM (Lat.). A writ which issues when it is necessary to remove a prisoner in order to *prosecute* in the proper jurisdiction wherein the fact was committed. 3 Blackstone, Comm. 130.

HABEAS CORPUS AD RESPONDENDUM (Lat.). A writ which is usually employed in civil cases to remove a person out of the custody of one court into that of another, in order that he may be sued and answer the action in the latter. 2 Sellon, Pract. 259; 2 Mod. 198; 3 Blackstone, Comm. 129; Tidd, Pract. 300.

This writ lies also to bring up a person in confinement to answer a criminal charge: thus, the court issued it to the warden of the fleet, to take the body of the prisoner confined there before a magistrate, to be examined respecting a charge of felony or misdemeanor. 5 Barnew. & Ald. 730.

But it was refused to bring up the body of a prisoner under sentence for a felony, for the purpose of having him tried for a previous felony.

HABEAS CORPUS AD SATISFACIENDUM (Lat.). A writ which is issued to bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court. 2 Sellon, Pract. 261; 3 Blackstone, Comm. 130; Tidd, Pract. 301.

HABEAS CORPUS AD SUBJICIENDUM. See HABEAS CORPUS.

HABEAS CORPUS AD TESTIFICANDUM (Lat.). A writ which lies to bring up a prisoner detained in any jail or prison, to give evidence before any court of competent jurisdiction. Tidd, Pract. 739; 3 Blackstone, Comm. 130; 2 Sellon, Pract. 261.

The allowance of this writ resting in the discretion of the court, it will be refused if the application appear to be in bad faith or a *mere contrivance*. 3 Burr. 1440.

It was refused to bring up a prisoner of war, 2 Dougl. 419, or a prisoner in custody for high treason. Peake, Add. Cas. 21.

It would of course be refused where it appeared from the application that the prisoner was under sentence for crime which rendered him incompetent as a witness.

The application for the writ is made upon affidavit, stating the nature of the suit and the materiality of the testimony, together with the general circumstances of restraint which render the writ necessary. Cowp. 672; Foster, Crim. Law, 396; 2 Cow. & Hill, Notes to Phillipps, Ev. 658.

HABENDUM (Lat. for having).

In Conveyancing. The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee. 2 Washburn, Real Prop. 642.

It commences with the words "to have and to hold." It is not an essential part of a deed, but serves to qualify, define, or control it, Coke, Litt. 6 *a*, 299; 1 Wood, Conv. 224; 4 Kent, Comm. 468; 8 Mass. 162, 174, and may be rejected if clearly repugnant to the rest of the deed. 1 Wood, Conv. 199; Sheppard, Touchst. 102; Skinn. 543. See, generally, 2 Washburn, Real Prop. 643 *et seq.*; 4 Kent, Comm. 468; 4 Greenleaf, Cruise. Dig. 273; 2 Rolle, Abr. 65; 5 Serg. & R. Penn. 375; 8 Mass. 162; 7 Me. 455; 6 Conn. 289; 6 Harr. & J. Md. 132; 3 Wend. N. Y. 99.

HABENTES HOMINES (Lat.). Rich men. DuCange.

HABERE FACIAS POSSESSIONEM (Lat.). **In Practice.** A writ of execution in the action of ejectment.

The sheriff is commanded by this writ that, without delay, he cause the plaintiff to have possession of the land in dispute which is therein described: a *fi. fa.* or *ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ is the same as on a common *fi. fa.* or *ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of the premises to the plaintiff. For this purpose, he may break an outer or inner door of the house; and, should he be violently opposed, he may raise the *posse comitatus*. Watson, Sher. 60, 215; 5 Coke, 91 *b*; 1 Leon. 145; 3 Bouvier, Inst. n. 3375.

The name of this writ is abbreviated *hab. fa. poss.* See 10 Viner, Abr. 14; Tidd, Pract. 8th Eng. ed. 1081; 2 Archbold, Pract. 58; 3 Blackstone, Comm. 412; Bingham, Exec. 115, 252; Bacon, Abr.

HABERE FACIAS SEISINAM (Lat.). **In Practice.** The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. 3 Bouvier, Inst. n. 3374.

This writ may be taken out at any time within a year and a day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem*, and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant. 5 Coke, 91 *b*; Comyns, Dig. *Execution*, E; Watson, Sher. 238. The name of this writ is abbreviated *hab. fac. seis.* See Bingham, Exec. 115, 252; Bacon, Abr.

HABERE FACIAS VISUM (Lat.). **In Practice.** The name of a writ which lies when a view is to be taken of lands and tenements. Fitzherbert, Nat. Brev. Index, *View*.

HABILIS (Lat.). Fit; suitable. 1 Sharswood, Blackst. Comm. 436. Active; useful (of a servant). DuCange. Proved; authentic (of Book of Saints). DuCange. Fixed; stable (of authority of the king). DuCange.

HABIT. A disposition or condition of the body or mind acquired by custom or a frequent repetition of the same act. See 2 Mart. La. N. S. 622; 18 Penn. St. 172; 5 Gray, Mass. 851.

The *habit of dealing* has always an important bearing upon the construction of commercial contracts. A ratification will be inferred from the *mere habit of dealing* between the parties: as, if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification: for, if the principal did not agree to such settlement, he should have declared his dissent. 2 Bouvier, Inst. 1313, 1314.

HABIT AND REPUTE. Applied in Scotch law to a general understanding and belief of something's having happened: *e. g.* marriage may be constituted by *habit and repute*. Bell, Dict.

HABITATION. In Civil Law. The right of a person to live in the house of another without prejudice to the property.

It differed from a usufruct in this, that the usufructuary might apply the house to any purpose, —as of a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family. 1 Brown, Civ. Law, 184; Domat, l. 1, t. 11, s. 2, n. 7.

In Estates. A dwelling-house; a homestall. 2 Blackstone, Comm. 4; 4 *id.* 220.

HABITUAL DRUNKARD. A person given to ebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it. 18 Penn. St. 172; 5 Gray, Mass. 85.

By the laws of some states, such persons are classed with idiots, lunatics, etc., in regard to the care of property; and in some, they are liable to punishment. See 7 Paige, Ch. N. Y. 312; 8 N. Y. 388; 15 Barb. N. Y. 520; Crabbe, Dist. Ct. 558; 18 Penn. St. 172; 5 Gray, Mass. 85; 11 Cush. Mass. 477.

HACIENDA. In Spanish Law. A generic term, applicable to the mass of the property belonging to a state, and the administration of the same.

As a science, it is defined by Dr. Jose Canga Argüells, in his "Diccionario de Hacienda," to be that part of civil economy which teaches how to aggrandize a nation by the useful employment of its wealth.

A royal estate. Newman & B. Dict.

HADBOTE. In English Law. A recompense or amends made for violence offered to a person in holy orders.

HÆREDES EXTRANEI (Lat.). **In Civil Law.** Extraneous or foreign heirs: that is, those who were not children or slaves of the testator. Those only could be extraneous heirs who had a capacity of accepting the inheritance both at the time of making the will and at the death of the testator. Hallifax, Anal. b. 11, c. 6, § 38 *et seq.*

HÆREDES NECESSARII (Lat.). **In Civil Law.** Necessary heirs. If slaves were made heirs, they had no choice, but on the death of the testator were *necessarily* free and his heirs. Calvinus, Lex.; Hallifax, Anal. b. 11, c. 6, § 38 *et seq.*; Heineccius, Elem. Jur. Civ. § 587.

HÆREDES PROXIMI (Lat.). The children or descendants of the deceased. Dalrymple, Feud. 110.

HÆREDES REMOTIORES (Lat.). The kinsmen other than children or descendants. Dalrymple, Feud. 110.

HÆREDES SUI ET NECESSARII (Lat.). **In Civil Law.** Proper and necessary heirs; heirs by relationship and necessity. The descendants of an ancestor in direct line were so called, *sui* denoting the relationship, and *necessarii* the necessity of law which made them heirs without their election, and whether the ancestor died testate or intestate. Hallifax, Anal. b. 11, c. 6, § 38 *et seq.*; Mackeldey, Civ. Law, §§ 681, 682; Heineccius, Elem. Jur. Civ. § 588.

HÆREDIPETA (Law Lat.). **In Old English Law.** Next heir. Laws of Hen. I.;

DuCange. One who seeks to be made heir (*qui cupit hæreditatem*). Concil. Compostel. anno 1114, can. 18, inter Hispan. t. 3, p. 324; DuCange.

HÆREDITAS (Lat. from *hæres*). **In Civil Law.** "*Nihil aliud est hæreditas, quam successio in universum jus, quod defunctus habuit.*" *Inheritance* is nothing else than succession to every right which the deceased possessed. Dig. 50. 17; 50. 16; 5. 2; Mackeldey, Civ. Law, § 605; Bracton, 62 *b*.

In Old English Law. An estate transmissible by descent; an inheritance. Marten, Anecd. Collect. t. 3, p. 269; Coke, Litt. 9; Glanville, lib. 7, c. 1.

HÆREDITAS JACENS (Lat.). **In Civil Law.** A prostrate inheritance. The inheritance left to a voluntary heir was so called as long as he had not manifested, either expressly or by silence, his acceptance or refusal of the inheritance, which, by a fiction of law, was said to sustain the person (*sustinere personam*) of the deceased, and not of the heir. Mackeldey, Civ. Law, § 685 *a*. An estate with no heir or legatee to take. Code, 10. 10. 1; Bell, Dict.

In English Law. An estate in abeyance: that is, after the ancestor's death and before assumption of heir. Coke, Litt. 342 *b*. An inheritance without legal owner, and therefore open to the first occupant. 2 Sharswood, Blackst. Comm. 259.

HÆRES. In Roman Law. One who succeeds to the rights and occupies the place of a deceased person, being appointed by the will of the decedent. It is to be observed that the Roman *hæres* had not the slightest resemblance to the English *heir*. He corresponded in character and duties almost exactly with the *executor* under the English law. The institution of the *hæres* was the essential characteristic of a *testament:* if this was not done, the instrument was called a *codicillus*. Mackeldey, §§ 632, 650.

2. *Who might not be instituted.* Certain persons were not permitted to be instituted in this capacity: such as, persons not Roman citizens, slaves of such persons, persons not in being at the death of the testator, and corporations, unless especially privileged. Also, the emperor could not be made *hæres* with the condition that he should prosecute a suit of the testator against a subject. Nor could a second husband or wife be instituted *hæres* to a greater portion of the estate than was left to that child of the first marriage which received least by the will. So, a widow who married before the expiration of her year of mourning could not institute her second husband as *hæres* to more than a third of her estate. And a man who had legitimate children could not institute as *hæredes* a concubine and her children to more than a twelfth of his estate, nor the mother alone to more than one-twenty-fourth. Mackeldey, § 651.

3. The institution of the *hæres* might be *absolute* or *conditional*. But the condition, to be valid, must be *suspensive* (condition precedent, see CONDITION), *possible*, and *lawful*. If, however, this rule was infringed, certain conditions, as the *resolutive* (condition subsequent, see CONDITION), the *impossible*, and the *immoral* or *indecent*, were held nugatory, while others invalidated the appointment of the *hæres*,—as the *preposterous* and *captatory*, *i.e.* the appointment of a *hæres* on condition that the appointee should, in turn, institute the testator or some other person *hæres* in his testament. In regard to limitations of time, they must, to be valid, commence *ex die incerto*. A condition that A should become *hæres* after a *certain* day, or that he should be *hæres* up to a day whether *certain* or *uncertain*, was nugatory. The testator might assign his reasons for the institution of a particular *hæres*, but a mistake in the facts upon which those reasons were based did not, in general, affect the validity of the appointment. The institution might be accompanied with a direction that the *hæres* should apply the inheritance either wholly or in part to a specified purpose, which he was bound to comply with in case he accepted the inheritance, unless it was physically impossible to do so, or unless the *hæres* himself was the only person affected by such directions. The *hæres* might be instituted either *simply*, without any interest in the estate, or with a fixed share therein, or with regard to some particular thing. Mackeldey, § 653. It was customary, in order to provide against a failure to accept on the part of the direct *hæres*, to substitute one or more *hæredes* to him. This substitution might be made in various forms; but the result was the same in all,—that if the first of the direct *hæredes* failed to accept the inheritance, whether from indisposition, permanent incapacity, or from dying before the testator, the substitute stood in his stead. There might be several degrees of substitutes, each ready to act in case of the failure of all the preceding; and the rule was, *substitutus substituto est substitutus instituto:* which meant that on a failure of all the intermediate substitutes, the lowest in rank succeeded to the position of the instituted *hæres*. This was called *substitutio vulgaris*. There was another, the *substitutio pupillaris*, which was nothing more than the appointment, by the testator, of a *hæres* to a minor child under his authority,—which appointment was good in case the child died after the testator, and still a minor. It was, in fact, making a testament for such minor,—an act which he could not perform for himself. Mackeldey, §§ 668, 669.

4. *Persons entitled to the inheritance.* Though, generally speaking, the testator might institute as *hæres* any person whatever not within the exceptions above mentioned, yet his relatives, within certain limits, were considered as peculiarly entitled to the office, and if he instituted any one else they could not be entirely excluded, but were admitted to a share of the inheritance, which share, called *portio legitima*, or *pars legitima*, was fixed by law.

The rules in regard to the persons entitled to this share of the estate, and its amount, are very intricate, and too voluminous to be introduced here. They may be found in Mackeldey, §§ 654–657. Among those entitled to the *pars legitima*, the immediate ascendants and descendants of the testator were peculiarly distinguished in this, that they must be mentioned in the testament, either by being formally instituted as *hæredes*, or by being formally excluded, while the other relatives so entitled might receive their share as a legacy, or in any other way, without being formally instituted. From this necessity of mentioning this class of relatives, they were called *successores necessarii*.

5. *Acquisition of the inheritance.* Except in the case of a slave of the testator (*hæres necessarius*), or a person under his authority (*potestas*) at his death (*hæres suus et necessarius*), the institution of a person as *hæres* did not oblige him to accept the office. A formal acceptance was requisite in the case of all other persons than the two classes just mentioned, whence such persons were called *hæredes voluntarii*, and, in opposition to the *sui hæredes, extranei hæredes*. This acceptance might be *express* (*aditio hæreditatis*), or *tacit, i.e.* by performing some act in relation to the inheritance which admitted of no other construction than that the person named as *hæres* intended to accept the office. The refusal of the office, if express, was called *repudiatio;* if tacit, through the neglect of the *hæres* to make use of his rights within a suitable period, it was called *omissio hæreditatis*. The acceptance could not be coupled with a condition; and a refusal was final and irrevocable. Mackeldey, §§ 681–683.

6. *Rights and liabilities of the hæres.* The fundamental idea of the office is that as regards the estate the *hæres* and the testator form but a single person. Hence it follows that the private estate of the *hæres* and the estate of the testator are united (*confusio bonorum defuncti et hæredis*); the *hæres* acquires all rights of property, and becomes liable to all demands, except those purely personal, to which the testator was entitled and subject, and is, consequently, responsible for all the debts of the deceased, even if the estate left by the latter is not sufficient to pay them. He must, moreover, recognize as binding upon him all acts of the testator relating to the estate. He is bound to obey the directions of the will, especially to perform the trusts and pay the legacies imposed upon him, yet this only so far as the residue of the estate, after liquidating the debts, enables him to do so.

These were the strict rules of the law; but two modes, the *spatium deliberandi* and the *beneficium inventarii*, were in course of time contrived for relieving the *hæres* from the risk of loss by an acceptance of the office.

The *spatium deliberandi* was a period of delay granted to the *hæres*, upon application to the magistrate, in order that he might investigate the condition of the estate before deciding whether to accept or reject the office. If the *hæres* was pressed by the other *hæredes*, or by the creditors of the estate, to decide whether to accept or reject the office, he must either decide immediately, or apply for the *spatium deliberandi*, which when allowed by the emperor continued for a year, and when by a judge for nine months, from the day of its allowance. If the *hæres* had not decided at the expiration of this period, he was held to have accepted. If he was not pressed to a decision by the other *hæredes* or by the creditors, he was allowed a year from the day he was notified of the inheritance having been conferred upon him, to deliberate whether to accept or not. If, after deliberating for the allotted period, he should accept the inheritance, he became responsible for the debts of the testator, without regard to whether the estate was sufficient or not to pay them.

The *beneficium inventarii* was an extension to all *hæredes* of the privilege belonging to soldiers not to be responsible for the debts beyond the assets. This privilege to the *hæres* was conditional upon his commencing an inventory within thirty days and completing it within sixty from the time he became notified of his appointment. The inventory must be prepared in the presence of a notary, and must be signed by the *hæres*, with a declaration that it included the whole estate, etc., to which fact he might be obliged to make oath. He then became liable only to the extent of the assets. He was allowed, before paying the debts, to deduct the expenses of the funeral, of establishing the testament, and of making the inventory. He could not be forced to pay debts or legacies during the preparation of the inventory, and afterwards he paid the claimants in full in the order in which they presented themselves, and when the assets were exhausted could not be required to pay any more. His own claims against the estate might be paid first, and his debts to the estate were part of the assets. If he neglected to prepare the inventory within the legal period, he forfeited the privileges of it; which also was the case if he applied for the *spatium deliberandi:* so that he must choose between the two.

7. The creditors and legatees of the testator were allowed the *beneficium separationis*, by which, when the *hæres* was deeply in debt, and, by reason of the *confusio bonorum defuncti et hæredis*, they were in danger of losing their claims, they were permitted to have a separation of the assets from the private estate of the *hæres*. Application for this privilege must have been made within five years from the acceptance of the inheritance; but it would not be granted if the creditors of the testator had in any way recognized the *hæres* as their debtor. If it was granted, they were in general restricted to the assets for payment of their claims, and the private estate of the *hæres* was discharged. If the assets were not exhausted in satisfying the creditors and legatees of the testator, the credit-

ors of the *hæres* might come in upon the balance; but these latter were not entitled to the *beneficium separationis*.

The *hæres* might transmit the inheritance by will; but, in general, he could not do so till after acceptance. To this, however, there were numerous exceptions.

8. The *remedies of the hæres* are too intimately connected with the general system of Roman jurisprudence to be capable of a brief explanation. See Mackeldey, §§ 692, 693; Dig. 5. 3; Cod. 3. 31; Gaius iv. § 144, etc.

9. *Cohæredes.* When several *hæredes* have accepted a joint inheritance, each, *ipso jure*, becomes entitled to a proportional share in the assets, and liable to a proportional share of the debts, though the testator may, if he choose, direct otherwise, and they may also agree otherwise among themselves; but in both these cases the creditors are not affected, and may pursue each *hæres* to the extent of his legal share of liability, and no further.

One of the *cohæredes* has a right to compel a partition of the assets and liabilities, subject, however, to an agreement among themselves, or a direction by the testator, that the inheritance shall remain undivided for a time. Mackeldey, Civ. Law, §§ 694, 695.

HAFNE COURTS (*hafne*, Dan. a haven, or port). Haven courts; courts anciently held in certain ports in England. Spelman, Gloss.

HALF-BLOOD. A term denoting the degree of relationship which exists between those who have one parent only in common.

By the English common law, one related to an intestate of the half-blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 & 4 Will. IV. c. 106.

In this country, the common-law principle on this subject may be considered as not in force, though in many states some distinction is still preserved between the whole and the half-blood. 4 Kent, Comm. 403, n.; 2 Yerg. Tenn. 115; 1 M'Cord, So. C. 456; 31 Penn. St. 289; Dane, Abr. Index; Reeves, *Descents, passim;* 2 Washburn, Real Prop. 411. See DESCENT.

HALF-BROTHER, HALF-SISTER. Persons who have the same father, but different mothers; or the same mother, but different fathers.

HALF-CENT. A copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills.

This coin was authorized by resolution of congress, passed July 6, 1785, as follows:—"*Resolved*, That the smallest coin be of copper, of which two hundred shall pass for one dollar." It was first issued under the act of the 2d of April, 1792, by which act the weight of the coin was fixed at one hundred and four grains. In 1796, it was reduced, by the proclamation of President Washington, under a law of that year, to ninety-four grains; at which rate it was continued to be coined until the passage of the act of Feb. 21, 1857, by which it was directed that the coinage of the half-cent shall cease. The first half-cents were issued in 1793, the last in 1857.

HALF-DEFENCE. See DEFENCE.

HALF-DIME. A silver coin of the United States, of the value of five cents, or the one-twentieth part of a dollar.

It weighs nineteen grains and two-tenths of a grain,—equal to four-hundredths of an ounce Troy,—and is of the fineness of nine hundred thousandths; nine hundred parts being pure silver, and one hundred parts copper. The fineness of the coin is prescribed by the 8th section of the general mint law, passed Jan. 18, 1837. 5 Stat. at Large, 137. The weight of the coin is fixed by the 1st section of the act of Feb. 21, 1853. 10 Stat. at Large, 160. The second section of this last-cited act directs that silver coins issued in conformity to that act shall be a legal tender in payment of debts for all sums not exceeding five dollars. This provision applies to the half-dollar and all silver coins below that denomination. The first coinage of half-dimes was in 1793. A few half "dismes," with a likeness of Mrs. Washington, the wife of the president, upon the obverse of the coin, were issued in 1792; but they were not of the regular coinage.

HALF-DOLLAR. A silver coin of the United States, of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. 1 U. S. Stat. at Large, 348. Under this law, the fineness of the silver coins of the United States was 892.4 thousandths of pure silver.

2. The weight and fineness of the silver coins were somewhat changed by the act of Jan. 18, 1837, 5 Stat. at Large, 137; the weight of the half-dollar being by this act fixed at two hundred and six and one-quarter grains, and the fineness at nine hundred thousandths; conforming, in respect to fineness, with the coinage of France and most other nations.

3. The weight of the half-dollar was reduced by the act of February 21, 1853, 10 Stat. at Large, 160, to one hundred and ninety-two grains, at which rate it continues to be issued,—the standard of fineness remaining the same.

4. The half-dollars coined under the acts of 1792 and 1837 (1 and 2, as above) are a legal tender at their nominal value in payment of debts to any amount. Those coined since the passage of the act of February 21, 1853, are a legal tender in payment of debts for all sums not exceeding five dollars. Sec. 2. The silver coins struck in the year 1853, under this last-cited act, may be distinguished from the others of that year by the arrow-heads on the right and left of the date of the piece. In 1854, and subsequent years, the arrow-heads are omitted.

HALF-EAGLE. A gold coin of the United States, of the value of five dollars.

The weight of the piece is one hundred and twenty-nine grains of standard fineness, namely, nine hundred thousandths of pure gold, and one hundred of alloy of silver and copper: "provided that the silver do not exceed one-half of the whole alloy." Act of Jan. 18, 1837, 5 U. S. Stat. at Large, 136. As the proportion of silver and copper is not fixed by law further than to prescribe that the silver therein shall not exceed fifty in every thousand parts, the proportion was made the subject of a special instruction by Mr. Snowden, the late director of the mint, as follows:—

"As it is highly important to secure uniformity in our gold coinage, all deposits of native gold, or gold not previously refined, should be assayed for silver, without exception, and refined to from nine hundred and ninety to nine hundred and ninety-three, say averaging nine hundred and ninety-one as near as may be. When any of the deposits prove to be nine hundred and ninety, or finer, they should be reserved to be mixed with the refined gold. The gold coin of the mint and its branches will then be nearly thus: gold, nine hundred; silver, eight; copper, ninety-two; and thus a greater uniformity of color will be attained than was heretofore accomplished."

The instructions on this point were prescribed by the director in September, 1853. Mint Pamphlet, "Instructions relative to the Business of the Mint," 14.

For all sums whatever the half-eagle is a legal tender of payment of five dollars. Act of Congress above cited, sec. 10, p. 138. The first issues of this coin at the mint of the United States were in 1795.

HALF-PROOF. In Civil Law. That which is insufficient as the foundation of a sentence or decree, although in itself entitled to some credit. Vicat, *Probatio.*

HALF-SEAL. A seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes.

HALF-TONGUE. A jury half of one *tongue* or nationality and half of another. Vide *De medietate linguæ*, Jacob, Law Dict.

HALF-YEAR. In the computation of time, a half-year consists of one hundred and eighty-two days. Coke, Litt. 135 *b;* N. Y. Rev. Stat. part 1, c. 19, t. 1, § 3.

HALI-GEMOTE. Halle-gemote.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public uses: as, the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALLAZCO. In Spanish Law. The finding and taking possession of something which previously had no owner, and which thus becomes the property of the first occupant. Las Partidas, 3. 5. 28, 5. 48. 49, 5. 20. 50.

HALLE-GEMOTE. Hall-assembly. A species of court baron.

HALLUCINATION. In Medical Jurisprudence. A species of mania by which an idea reproduced by the memory is associated and embodied by the imagination. This state of mind is sometimes called delusion, or waking dreams.

An attempt has been made to distinguish *hallucinations* from illusions: the former are said to be dependent on the state of the intellectual organs, and the latter on that of those of sense. Ray, Med. Jur. § 99; 1 Beck, Med. Jur. 538, note. An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthaginians, fight, in his imagination. 1 Collyer, Lun. 34. If, instead of being temporary, this affection of his mind had been permanent, he would doubtless have been considered insane. See, on the subject of spectral illusions, Hibbert, Alderson, and Farrar's Essays; Scott on Demonology, etc.; 3 Bostock, Physiology, 91, 161; 1 Esquirol, Maladies Mentales, 159.

HALMOTE. See HALLE-GEMOTE.

HALYMOTE (*Holimot, Halegemot;* from Saxon *halg*, holy, and *gemot* or *mot*, a meeting). A holy or ecclesiastical court.

A court held in London before the lord mayor and sheriffs, for regulating the bakers. It was anciently held on *Sunday* next before St. Thomas's day, and therefore called the *holymote*, or holy court. Cowel, edit. 1727; Cunningham, Law Dict. *Holymote* See Spelman, Gloss.; Coke, 4th Inst. 321.

HALYWERCFOLK. Those who held by the service of guarding and repairing a church or sepulchre, and were excused from feudal services. Hist. Dunelm. apud Whartoni Ang. Sax. pt. 1, p. 749. Especially in the county of Durham, those who held by service of defending the corpse of St. Cuthbert. Jacob, Law Dict.

HAMESUCKEN. In Scotch Law. The crime of hamesucken consists in "the felonious seeking and invasion of a person in his dwelling-house." 1 Hume, 312; Burnett, 86; Alison, Crim. Law of Scotl. 199.

2. The mere breaking into a house, without personal violence, does not constitute the offence, nor does the violence without an entry with intent to commit an assault. It is the combination of both which completes the crime. 1. It is necessary that the invasion of the house should have proceeded from forethought malice; but it is sufficient if, from any illegal motive, the violence has been meditated, although it may not have proceeded from the desire of wreaking personal revenge, properly so called. 2. The place where the assault was committed must have been the proper dwelling-house of the party injured, and not a place of business, visit, or occasional residence. 3. The offence may be committed equally in the day as in the night, and not only by effraction of the building by actual force, but by an entry obtained by fraud, with the intention of inflicting personal violence, followed by its perpetration. 4. But, unless the injury to the person be of a grievous and material character, it is not hamesucken, though the other requisites to the crime have occurred. When this is the case, it is immaterial whether the violence be done *lucri causâ* or from personal spite. 5. The punishment of hamesucken in aggravated cases of injury is death; in cases of inferior atrocity, an arbitrary punishment. Alison, Crim. Law of Scotl. ch. 6; Erskine, Inst. 4. 9. 23.

3. This term was formerly used in England instead of the now modern term *burglary*. 4 Blackstone, Comm. 223.

But in Hale's Pleas of the Crown it is said, "The common genus of offences that comes under the name of *hamsecken* is that which is usually called house-breaking; which sometimes comes under the common appellation of *burglary*, whether committed in the day or

night to the intent to commit felony: so that house-breaking of this kind is of two natures." 1 Hale, Pl. Cr. 547; 22 Pick. Mass. 4.

HAMLET. A small village; a part or member of a vill.

HAMSOCUE (from Saxon *ham*, house, *sockue*, liberty, immunity. The word is variously spelled *hamsoca, hamsocua, hamsoken, haimsuken, hamesaken*). The right of security and privacy in a man's house. DuCange. The breach of this privilege by a forcible entry of a house is breach of the peace. Anc. Laws & Inst. of Eng. Gloss.; DuCange; Bracton, lib. 3, tr. 2, c. 2, § 3. The right to entertain jurisdiction of the offence. Will. Thorn. p. 2030; Spelman; DuCange. Immunity from punishment for such offence. *Id.;* Fleta, lib. 1, c. 47, § 18. An insult offered in one's own house (*insultus factus in domo*). Brompton, p. 957; DuCange.

HANAPER. A hamper or basket in which were kept the writs of the court of chancery relating to the business of a subject, and their returns, 5 & 6 Vict. c. 113; 10 Ric. II. c. 1; equivalent to the Roman *fiscus. Id.* According to Spelman, the fees accruing on writs, etc. were there kept. Mon. Angl. to. 1, p. 943; DuCange.

HAND. A measure of length, four inches long: used in ascertaining the height of horses.

HANDBILL. A written or printed notice displayed to inform those concerned of something to be done.

HAND BOROW (from hand, and Saxon *borow*, a pledge). Nine of a decennary or friborg (*q.v.*) were so called, being inferior to the tenth or *head borow*,—a *decenna* or *friborga* being ten freemen or *frankpledges*, who were mutually sureties for each other to the king for any damage. DuCange, *Friborg, Head-borow.*

HANDHABEND. In Saxon Law. One having a thing in his hand; that is, a thief found having the stolen goods in his possession,—*latro manifestus* of the civil law. See Laws of Hen. I. c. 59; Laws of Athelstane, § 6; Fleta, lib. 1, c. 38, § 1; Britton, p. 72; DuCange, *Handhabenda.*

Jurisdiction to try such thief. *Id.*

HANDSALE. Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain,—a custom still retained in verbal contracts: a sale thus made was called *handsale, venditio per mutuam manum complexionem.* In process of time the same word was used to signify the price or earnest which was given immediately after the shaking of hands, or instead thereof. In some parts of the country it is usual to speak of hand-money, as the part of the consideration paid or to be paid at the execution of a contract of sale. 2 Blackstone, Comm. 448; Heineccius, *de Antiquo Jure Germanico*, lib. 2, § 335; Toullier, liv. 3, t. 3, c. 2, n. 33.

HANDWRITING. Any thing written by a person. The manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons.

It is sometimes necessary to prove that a certain instrument or name is in the handwriting of a particular person; that is done either by the testimony of a witness who saw the paper or signature actually written, or by one who has by sufficient means acquired such a knowledge of the general character of the handwriting of the party as will enable him to swear to his belief that the handwriting of the person is the handwriting in question. 1 Phillipps, Ev. 422; Starkie, Ev.; 2 Johns. Cas. N. Y. 211; 5 Johns. N. Y. 144; 19 *id.* 134; 1 Dall. Penn. 14; 2 Me. 33; 6 Serg. & R. Penn. 568; 1 Nott & M'C. So. C. 554; 2 *id.* 400; Anthon, Nisi P. 77; 4 Gray, Mass. 167; 5 Cush. Mass. 295; 7 Comyns, Dig. 447; Bacon, Abr. *Evidence* (M); Dane, Abr. Index.

HANGING. Death by the halter, or the suspending of a criminal, condemned to suffer death, by the neck, until life is extinct. A mode of capital punishment.

HANGMAN. An executioner. The name usually given to a man employed by the sheriff to put a man to death, according to law, in pursuance of a judgment of a competent court and lawful warrant.

HANGWITE (from Saxon *hangian*, to hang, and *wite*, fine). Fine, in Saxon law, for illegal hanging of a thief, or for allowing him to escape. Immunity from such fine. DuCange.

HANSE. A commercial confederacy for the good ordering and protection of the commerce of its members. An imposition upon merchandise. DuCange, *Hansa.*

HANSE TOWNS. A number of towns in Europe which joined in a league for mutual protection of commerce as early as the twelfth century.

Amsterdam and Bremen were the first two that formed it, and they were joined by others in Germany, Holland, England, France, Italy, and Spain, till in 1200 they numbered seventy-two. They made war and peace to protect their commerce, and held countries in sovereignty, as a united commonwealth. They had a common treasury at Lubeck, and power to call an assembly as often as they chose. For purposes of jurisdiction, they were divided into four colleges or provinces. Great privileges were granted them by Louis VI. of France and succeeding monarchs. One of their principal magazines was at London. Their power became so great as to excite the jealousy of surrounding nations, who forced the towns within their jurisdiction which belonged to the league to renounce it. Their number and power became thus gradually reduced, beginning from the middle of the fifteenth century; and at the present day only Bremen, Hamburg, Lubeck, and Frankfort-on-the-Main remain,—these being recognized by the act establishing the German Confederacy, in 1815, as free Hanseatic cities. Encyc. Brit.

HANSE TOWNS, LAWS OF THE. The maritime ordinances of the Hanseatic

towns, first published in German at Lubeck in 1597, and in May, 1614, revised and enlarged. The text of this digest, and a Latin translation, are published with a commentary by Kuricke; and a French translation has been given by Cleirac. See CODE.

HAP. To catch. Thus, "hap the rent," "hap the deed-poll," were formerly used. Tech. Dict.

HARBOR (Sax. *here-berga*, station for an army). A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven. It is public property. 1 Bouvier, Inst. n. 435.

Harbor is to be distinguished from "port," which has a reference to the delivery of cargo. See 7 Mann. & G. 870; 9 Metc. Mass. 371–377; 2 Barnew. & Ald. 460. Thus, we have the "said *harbor* basin and docks of the *port* of Hull." 2 Barnew. & Ald. 60. But they are generally used as synonymous. Webster, Dict.

In Torts. To receive clandestinely or without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same; for example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly. 10 N. H. 247; 5 Ill. 498.

The harboring of such persons will subject the harborer to an action for the injury; but, in order to put him completely in the wrong, a demand should be made for their restoration, for in cases where the harborer has not committed any other wrong than merely receiving the plaintiff's wife, child, or apprentice, he may be under no obligation to return them without a demand. 1 Chitty, Pract. 564; Dane, Abr. Index; 2 No. C. Law Rep. 249; 5 How. 215, 227.

HARD LABOR. In those states where the penitentiary system has been adopted, convicts who are to be imprisoned, as part of their punishment, are sentenced to perform *hard labor*. This labor is not greater than many freemen perform voluntarily, and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employments.

HART. A stag or male deer of the forest five years old complete.

HAT MONEY. In Maritime Law. Primage: a small duty paid to the captain and mariners of a ship.

HAUSTUS (Lat. from *haurire*, to draw). **In Civil Law.** The right of drawing water, and the right of way to the place of drawing. L. 1, D. *de Servit. Præd. Rustic.*; Fleta, l. 4, c. 27, § 9.

HAVE TO. See HABENDUM.

HAVEN. A place calculated for the reception of ships, and so situated, in regard to the surrounding land, that the vessel may ride at anchor in it in safety. Hale, *de Port. Mar.* c. 2; 2 Chitty, Com. Law, 2; 15 East, 304, 305. See CREEK; PORT; HARBOR.

HAWKER. An itinerant or travelling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish. 12 Cush. Mass. 495. To prevent impositions, hawkers are generally required to take out licenses, under regulations established by the local laws of the states.

HAYBOTE (from *haye*, hedge, and *bote*, compensation). Hedgebote: one of the estovers allowed tenant for life or for years; namely, material to repair hedges or fences. 2 Sharswood, Blackst. Comm. 35; 1 Washburn, Real Prop. 99.

HAYWARD (from *haye*, hedge, and *ward*, keeping). **In Old English Law.** An officer appointed in the lord's court to keep a common herd of cattle of a town: so called because he was to see that they did not break or injure the hedges of inclosed grounds. His duty was also to impound trespassing cattle, and to guard against pound-breaches. Kitch. 46; Cowel.

HAZARDOUS CONTRACT. A contract in which the performance of that which is one of its objects depends on an uncertain event. La. Civ. Code, art. 1769. See 1 Bouvier, Inst. n. 707; 1 J. J. Marsh. Ky. 596; 3 *id.* 84; MARITIME LOAN.

HEAD. The principal source of a stream. Webster, Dict. The head of a creek will be taken to mean the head of its longest branch, unless there be forcible evidence of common reputation to the contrary. 1 Bibb, Ky. 75; 2 *id.* 112.

HEAD-BOROUGH. In English Law. An officer who was formerly the chief officer in a borough, but who is now subordinate to the constable. St. Armand, Leg. Power of Eng. 88.

HEAD OF A FAMILY. Householder; one who provides for a family. 19 Wend. N. Y. 476. There must be the relation of father and child, or husband and wife. 3 Humph. Tenn. 216; 17 Ala. N. S. 486: *per contra*, 20 Mo. 75.

HEADLAND. In Old English Law. A narrow piece of unploughed land left at the end of a ploughed field for the turning of the plough. Called, also, *butt*. Kennett, Paroch. Antiq. 587; 2 Leon. 70, case 93; 1 Litt. 13.

HEALSFANG (from Germ. *hals*, neck, *fangen*, to catch). A sort of pillory, by which

the head of the culprit was caught between two boards, as feet are caught in a pair of stocks.

"The fine which every man would have to pay in commutation of this punishment, had it been in use,"—for it was very early disused, no mention of it occurring in the laws of the Saxon kings. Anc. Laws & Inst. of Eng. Gloss; Spelman, Gloss.

HEALTH. Freedom from pain or sickness; the most perfect state of animal life. It may be defined, the natural agreement and concordant disposition of the parts of the living body.

Public health is an object of the utmost importance, and has attracted the attention of the national and state legislatures.

By the act of Congress of the 25th of February, 1799, 1 Story, U. S. Laws, 564, it is enacted: *sect.* 1. That the quarantines and other restraints, which shall be established by the laws of any state, respecting any vessels arriving in or bound to any port or district thereof, whether coming from a foreign port or some other part of the United States, shall be observed and enforced by all officers of the United States in such place; *sect.* 4. In times of contagion the collectors of the revenue may remove, under the provisions of the act, into another district; *sect.* 5. The judge of any district court may, when a contagious disorder prevails in his district, cause the removal of persons confined in prison under the laws of the United States, into another district; *sect.* 6. In case of the prevalence of a contagious disease at the seat of government, the president of the United States may direct the removal of any or all public offices to a place of safety; *sect.* 7. In case of such contagious disease at the seat of government, the chief justice, or, in case of his death or inability, the senior associate justice, of the supreme court of the United States, may issue his warrant to the marshal of the district court within which the supreme court is by law to be holden, directing him to adjourn the said session of the said court to such other place within the same or adjoining district as he may deem convenient. And the district judges, under the same circumstances, have the same power to adjourn to some other part of their several districts.

Offences against the provisions of the health laws are generally punished by fine and imprisonment. There are offences against public health, punishable by the common law by fine and imprisonment, such, for example, as selling unwholesome provisions. 4 Blackstone, Comm. 162; 2 East, Pl. Cr. 822; 6 *id.* 133–141; 3 Maule & S. 10; 4 Campb. 10.

Injuries to the health of particular individuals are, in general, remedied by an action on the case, or perhaps, in some instances, for breach of contract, and may be also by abatement, in some cases of nuisance. See 4 Blackstone, Comm. 197; Smith, For. Med. 37–39; NUISANCE; ABATEMENT.

HEALTH OFFICER. The name of an officer invested with power to enforce the health laws. The powers and duties of health officers are regulated by local laws.

HEARING. In Chancery Practice. The trial of a chancery suit.

The hearing is conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff; after which the plaintiff's leading counsel states the plaintiff's case and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case, are read by the plaintiff's solicitor; after which the rest of the plaintiff's counsel address the court. Then the same course of proceedings is observed on the other side, excepting that no part of the defendant's answer can be read in his favor if it be replied to. The leading counsel for the plaintiff is then heard in reply; after which the court pronounces the decree. Newland, Pract. 153, 154; 14 Viner, Abr. 233; Comyns, Dig. *Chancery* (T 1, 2, 3); Daniell, Chanc. Pract.

In Criminal Law. The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused. See EXAMINATION.

HEARSAY EVIDENCE. That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. 1 Phillipps, Ev. 185.

2. The term applies to written as well as oral matter; but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus, *information* on which one has acted, 2 Barnew. & Ad. 845; 9 Johns. N. Y. 45, the *conversation* of a person suspected of insanity, 3 Hagg. Eccl. 574, 2 Ad. & E. 3; 7 *id.* 313, *replies* to inquiries, 1 Taunt. 364; 8 Bingh. 320; 9 *id.* 359; 5 Mass. 444; 11 Wend. N. Y. 110; 1 Conn. 387; 29 Ga. 718, *general reputation*, 2 Esp. 482; 3 *id.* 236; 2 Stark. 116; 2 Campb. 512; 33 Ala. N. S. 425, *expressions of feeling*, 8 Bingh. 376; 8 Watts, Penn. 355; 4 M'Cord, So. C. 38; 18 Ohio, 99; 7 Cush. Mass. 581; 1 Head, Tenn. 373; see 45 Me. 392, *general repute* in the family, in questions of pedigree, 13 Ves. Ch. 140, 514; 3 Russ. & M. 147; 1 Crompt. M. & R. Exch. 919; 2 Carr. & K. 701; 15 East, 29; 4 Rand. Va. 607; 3 Dev. & B. No. C. 91; 18 Johns. N. Y. 37; 2 Conn. 347; 6 Cal. 197; 4 N. H. 371; 17 Pet. 213; 1 How. 231; see 28 Vt. 416, a great variety of declarations, see DECLARATION, *entries* made by third persons in the discharge of official duties, 3 Barnew. & Ad. 890; 1 Bingh. N. C. 654; 3 *id.* 408; 2 Younge & C. Exch. 249; 4 Q. B. 132; 1 Crompt. M. & R. Exch. 347; and see 8 Wheat. 326; 15 Mass. 380; 6 Cow. N. Y. 162; 16 Serg. & R. Penn. 89; 4 Mart. La. N. S. 383; 6 *id.* 351; 12 Vt. 178; 15 Conn. 206, entries in the party's shop-book, 8 Watts, Penn. 544; 9 Serg. & R. Penn. 285; 6 Watts & S. Penn. 350; 4 Mass. 455; 13 *id.* 427; 2 Pick. Mass. 65; 8 Metc. Mass. 269; 1 Nott & M'C. So. C. 186; 2 M'Cord, So. C. 328; 4 *id.* 76; 1 Halst. N. J. 95; 1 Iowa, 53; 8 *id.* 163; 1 Greenleaf, Ev. §§ 119, 120, or other books kept in the regular course of business, 7 Carr. & P. 720; 10 Ad. & E. 598; 3 Campb. 305; 8 Wheat. 320; 15 Mass. 380; 20 Johns. N. Y. 168; 2 Wend. N. Y. 369, 513; 15 Conn. 206, *indorsements* of partial payments, 2 Strange, 827; 2 Campb. 321;

4 Pick. Mass. 110; 17 Johns. N. Y. 182; 2 M'Cord, So. C. 418, have been held admissible as original evidence under the circumstances, and for particular purposes.

3. As a general rule, hearsay reports of a transaction, whether oral or written, are not admissible as evidence. 1 Greenleaf, Ev. § 124; 9 Ind. 572; 16 N. Y. 381; 5 Iowa, 532; 14 La. Ann. 830; 6 Wisc. 63. The rule applies to evidence given under oath in a cause between other litigating parties. 1 East, 373, 2 *id.* 54; 3 Term, 77; 7 Cranch, 296.

Matters relating to public interest, as, for example, a claim to a ferry or highway, may be proved by hearsay testimony, 1 Starkie, Ev. 195; 6 Mees. & W. Exch. 234; 1 Maule & S. 679; 1 Crompt. M. & R. Exch. 929; 19 Conn. 250; but the matter in controversy must be of public interest, 2 Barnew. & Ad. 245; 4 *id.* 273; 29 Barb. N. Y. 593; 14 Md. 398; 6 Jones, No. C. 459; the declarations must be those of persons supposed to be dead, 11 Price, Exch. 162; 1 Carr. & K. 58; 12 Vt. 178, and must have been made before controversy arose. 13 Ves. Ch. 514; 3 Campb. 444; 4 *id.* 417. The rule extends to deeds, leases, and other private documents, 5 Esp. 60; 10 Barnew. & C. 17; 1 Maule & S. 77; 4 *id.* 486, maps, 2 Moore & P. 625; 19 Conn. 250, and verdicts. 1 East, 355; Carth. 181; 9 Bingh. 465; 10 Ad. & E. 151; 7 Carr. & P. 181.

Ancient documents purporting to be a part of the *res gestæ* are also admissible although the parties to the suit are not bound. 5 Term, 413, n.; 5 Price, Exch. 312; 4 Pick. Mass. 160. See 2 Carr. & P. 440; 3 Johns. Cas. N. Y. 283; 1 Harr. & J. Md. 174; 4 Den. N. Y. 201. See DECLARATION; DYING DECLARATIONS.

HEARTH-MONEY. A tax, granted by 13 & 14 Car. II. c. 10, abolished 1 Will. & Mary, st. 1, c. 10, of two shillings on every hearth or stove in England and Wales, except such as pay not to the church and poor. Jacob, Law Dict. Commonly called *chimney-money*. *Id.*

HEARTH-SILVER. A sort of *modus* for tithes, viz.: a prescription for cutting down and using for fuel the tithe of wood. 2 Burn, Eccl. Law, 304.

HEBBERMAN. An unlawful fisher in the Thames below London bridge; so called because they generally fished at *ebbing tide* or *water*. 4 Hen. VII. c. 15; Jacob, Law Dict.

HEBBERTHEF. The privilege of having goods of thief and trial of him within such a liberty. Cartular. S. Edmundi MS. 163; Cowel.

HEDAGIUM (Sax. *heda, hitha*, port). A toll or custom paid at the *hith*, or wharf, for landing goods, etc., from which an exemption was granted by the king to some particular persons and societies. Cartular. Abbatiæ de Redinges; Cowel.

HEDGE-BOTE. Wood used for repairing hedges or fences. 2 Blackstone, Comm. 35; 16 Johns. N. Y. 15.

HEIFER. A young cow which has not had a calf. A beast of this kind two years and a half old was held to be improperly described in the indictment as a cow. 2 East, Pl. Cr. 616; 1 Leach, Cr. Cas. 105.

HEIR. At Common Law. He who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor.

The term heir has a very different signification at common law from what it has in those states and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the heir at law, or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors —unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law, 344; Story, Confl. Laws, § 508.

No person is heir of a living person. A person occupying a relation which may be that of heirship is, however, called heir apparent or heir presumptive. 2 Blackstone, Comm. 208. A monster cannot be heir. Coke, Litt. 7 *b*. A bastard cannot be heir. 2 Kent, Comm. 208. See BASTARD; DESCENT.

In the word heirs is comprehended heirs of heirs *in infinitum*. Coke, Litt. 7 *b*, 9 *a*; Wood, Inst. 69.

According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as the word heirs. 1 Rolle, Abr. 253; Ambl. 453; Godb. 155; T. Jones, 111; Croke Eliz. 313; 1 Burr. 38; 10 Viner, Abr. 233. But see 2 Preston, Est. 9, 10. In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean the next of kin, 1 Jac. & W. Ch. 388, and children. Ambl. 273. See, further, as to the force and import of this word, 2 Ventr. 311; 1 P. Will. 229; 2 *id.* 1, 369; 3 Brown, Parl. Cas. 60, 454; 2 W. Blackst. 1010; 4 Ves. Ch. 26, 766, 794; 2 Atk. Ch. 89, 580; 5 East, 533; 5 Burr. 2615; 11 Mod. 189.

In Civil Law. He who succeeds to the rights and occupies the place of a deceased person. See the following titles, and HÆRES.

HEIR APPARENT. One who has an indefeasible right to the inheritance, provided he outlive the ancestor. 2 Blackstone, Comm. 208.

HEIRS, BENEFICIARY. In Civil Law. Those who have accepted the succession under the benefit of an inventory regularly made. La. Civ. Code, art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in

that case he is responsible only for the value of the succession.

HEIR, COLLATERAL. One who is not of the direct line of the deceased, but comes from a collateral line: as, a brother, sister, an uncle and aunt, a nephew, niece, or cousin, of the deceased.

HEIR, CONVENTIONAL. In Civil Law. One who takes a succession by virtue of a contract—for example, a marriage contract—which entitles the heir to the succession.

HEIRS, FORCED. Those who cannot be disinherited. See FORCED HEIRS.

HEIR, GENERAL. Heir at common law.

HEIRS, IRREGULAR. In Louisiana. Those who are neither testamentary nor legal, and who have been established by law to take the succession. See La. Civ. Code, art. 874. When the deceased has left neither lawful descendants nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state. *Id.* art. 911. This is called an irregular succession.

HEIR AT LAW. He who, after his ancestor's death intestate, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised. The same as heir general.

HEIR, LEGAL. In Civil Law. A legal heir is one who is of the same blood as the deceased, and who takes the succession by force of law. This is different from a testamentary or conventional heir, who takes the succession in virtue of the disposition of man. See La. Civ. Code, art. 873, 875; Dict. de Jurisp. *Héritier légitime.* There are three classes of legal heirs, to wit: the children and other lawful descendants, the fathers and mothers and other lawful ascendants, and the collateral kindred. La. Civ. Code, art. 883.

HEIR-LOOM. Chattels which, contrary to the nature of chattels, descend to the heir along with the inheritance, and do not pass to the executor of the last proprietor.

This word seems to be compounded of *heir* and *loom*, that is, a frame, viz. to weave in. Some derive the word loom from the Saxon *loma*, or *geloma*, which signifies utensils or vessels generally. However this may be, the word *loom*, by time, is drawn to a more general signification than it at the first did bear, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscots, and which, by the custom of some countries, having belonged to a house, are never inventoried after the decease of the owner as chattels, but accrue to the heir with the house itself. Minshew. The term *heir-looms* is applied to those chattels which are considered as annexed and necessary to the enjoyment of an inheritance.

Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained, the keys of a house, and fish in a fish-pond, are heir-looms. Coke, Litt. 3 *a*, 185 *b*; 7 Coke, 17 *b*; Croke Eliz. 372; Brooke, Abr. *Charters*, pl. 13; 2 Blackstone, Comm. 28; 14 Viner, Abr. 291.

HEIR, PRESUMPTIVE. One who, in the present circumstances, would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Blackstone, Comm. 208. In Louisiana, the presumptive heir is he who is the nearest relation of the deceased capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it. La. Civ. Code, art. 876.

HEIR, TESTAMENTARY. In Civil Law. One who is constituted heir by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs, who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos*. See HÆRES FACTUS; DEVISEE.

HEIRS, UNCONDITIONAL. In Louisiana. Those who inherit without any reservation, or without making an inventory, whether their acceptance be express or tacit. La. Civ. Code, art. 878.

HEIRESS. A female heir to a person having an estate of inheritance. When there are more than one, they are called *co-heiresses*, or *co-heirs*.

HEIRSHIP MOVABLES. In Scotch Law. The movables which go to the heir, and not to the executor, that the land may not go to the heir completely dismantled, such as the best of furniture, horses, cows, etc., but not fungibles. Hope, Minor Pract. p. 538; Erskine, Inst. 3. 8. 13–17 *et seq.*; Bell, Dict.

HENGHEN (*ergastulum*). **In Saxon Law.** A prison, or house of correction. Anc. Laws & Inst. of Engl. Gloss.

HEPTARCHY. The name of the kingdom or government established by the Saxons on their establishment in Britain: so called because it was composed of *seven* kingdoms, namely, Kent, Essex, Sussex, Wessex, East Anglia, Mercia, and Northumberland.

HERALD (from French, *héraut*). An officer whose business it is to register genealogies, adjust ensigns armorial, regulate funerals and coronations, and, anciently, to carry messages between princes and proclaim war and peace.

In England, there are three chief heralds, called *kings-at-arms*, of whom *Garter* is the principal, instituted by king Henry V., whose office is to attend the knights of the Garter at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by Edward IV. after he became duke of Clarence, and whose proper office is to arrange the funerals of all the lesser nobility, knights, and squires on the south side of Trent. The third is *Norroy* (*north roy*), who has the like office on the north side of Trent. There are, also, six inferior heralds, who were created to attend dukes or great lords in their military expeditions. The office, however, has grown much into disuse,—

so much falsity and confusion having crept into their records that they are no longer received in evidence in any court of justice. This difficulty was attempted to be remedied by a standing order of the house of lords, which requires *Garter* to deliver to that house an exact pedigree of each peer and his family on the day of his first admission. 3 Blackstone, Comm. 105; Encyc. Brit.

HERALDS' COLLEGE. In 1450, the heralds in England were collected into a college by Richard II. The earl marshal of England was chief of the college, and under him were three kings-at-arms (styled Garter, Clarencieux, Norroy), six heralds-at-arms (styled of York, Lancaster, Chester, Windsor, Richmond, and Somerset), and four pursuivants-at-arms (styled Blue mantle, Rouge croix, Rouge dragon, and Portcullis). This organization still continues. Encyc. Brit.

HERBAGE. In English Law. An easement which consists in the right to pasture cattle on another's ground.

HERD-WERCK. Customary uncertain services as herdsmen, shepherds, etc. Anno 1166, Regist. Ecclesiæ Christi Cant. MS.; Cowel.

HEREBANNUM. Calling out the army by proclamation. A fine paid by freemen for not attending the army. A tax for the support of the army. DuCange.

HEREDAD. In Spanish Law. A portion of land that is cultivated. Formerly it meant a farm, *hacienda de campo*, real estate.

HEREDERO. In Spanish Law. Heir; he who, by legal or testamentary disposition, succeeds to the property of a deceased person. "*Hæres censeatur cum defuncto una eademque persona.*" Las Partidas, 7. 9. 13.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and every thing thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land. Coke, Litt. 5 *b*; 2 Blackstone, Comm. 17. By this term such things are denoted as may be the subject-matter of inheritance, but not the inheritance itself: it cannot, therefore, by its own intrinsic force enlarge an estate *primâ facie* a life estate into a fee. 2 Bos. & P. 251; 8 Term, 503. See 4 Washburn, Real Prop. Index.

HEREDITARY. That which is the subject of inheritance.

HERES. See HÆRES.

HERIOT. In English Law. A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

Heriot service is such as is due upon a special reservation in the grant or lease of lands, and therefore amounts to little more than a mere rent. Heriot custom arises upon no special reservation whatsoever, but depends merely upon immemorial usage and custom. See 2 Blackstone, Comm. 97, 422; Comyns, Dig. *Copyhold* (K 18); Bacon, Abr.; 2 Saund.; 1 Vern. Ch. 441.

HERISCHILD. A species of English military service.

HERISCHULDÆ. A fine for disobedience to proclamation of warfare. Skene.

HERITABLE BOND. In Scotch Law. A bond for a sum of money to which is added, for further security of the creditor, a conveyance of land or heritage to be held by the creditor as pledge. 1 Ross, Lect. 76; 2 *id.* 324.

HERITABLE JURISDICTION. In Scotch Law. Grants of criminal jurisdiction made to great families for the better execution of justice. Abolished by 20 Geo. II. c. 43. Bell, Dict.

HERITABLE RIGHTS. In Scotch Law. Rights which go to the heir; generally, all rights in or connected with lands. Bell, Dict. *Heritable.*

HERITAGE. In Civil Law. Every species of immovable which can be the subject of property: such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase. 3 Toullier, 472. See Coke, Litt. s. 731.

HERMANDAD (called, also, *Santa Hermandad*). **In Spanish Law.** A fraternity formed among different towns and villages to prevent the commission of crimes, and to prevent the abuses and vexations to which they were subjected by men in power.

To carry into effect the object of this association, each village and town elected two *alcaldes*,—one by the nobility and the other by the community at large. These had under their order inferior officers, formed into companies, called *cuad villeros*. Their duty was to arrest delinquents and bring them before the *alcaldes*, when they were tried substantially in the ordinary form. This tribunal, established during the anarchy prevailing in feudal times, continued to maintain its organization in Spain for centuries; and various laws determining its jurisdiction and mode of proceeding were enacted by Ferdinand and Isabella and subsequent monarchs. Nov. Recop. tit. 35, b. 12. § 7. The abuses introduced in the exercise of the functions of these tribunals caused their abolition, and the *santas hermandades* of Ciudad Rodrigo, Talavera, and Toledo, the last remnants of these anomalous jurisdictions, were abolished by the law of the 7th May, 1835.

HERMAPHRODITES. Persons who have in the sexual organs the appearance of both sexes. They are adjudged to belong to that sex which prevails in them. Coke, Litt. 2, 7; Domat, Lois Civ. liv. 1, t. 2, s. 1, n. 9.

The sexual characteristics in the human species are widely separated, and the two sexes are never, perhaps, united in the same individual. 2 Dunglison, Hum. Physiol. 304; 1 Beck, Med. Jur. 94–110. Cases of malformation, however, sometimes are found, in which it is very difficult to decide to which sex the person belongs. See 2 Med. Exam. 314; 1 Briand, Med. Leg. c. 2, art. 2, § 2, n. 2; Guy, Med. Jur. 42, 47; 1 Beck, Med. Jur. 11th ed. 164 *et seq.*; Wharton & S. Med. Jur. 2d ed. § 408 *et seq.*

HERMENEUTICS (Greek, ἑρμηνεύω, to interpret). The art and science, or body of

rules, of truthful interpretation. It has been used chiefly by theologians; but Zachariæ, in "An Essay on General Legal Hermeneutics" (Versuch einer allg. Hermeneütik des Rechts), and Dr. Lieber, in his work on Legal and Political Interpretation and Construction, also make use of it. See INTERPRETATION; CONSTRUCTION.

HIDAGE. In Old English Law. A tax levied, in emergencies, on every *hide* of *land;* the exemption from such tax. Bract. lib. 2, c. 56. It was payable sometimes in money, sometimes in ships or military equipments: *e.g.* in the year 994, when the Danes landed in England, every three hundred hides furnished a ship to king Ethelred, and every eight hides one pack and one saddle. Jacob, Law Dict.

HIDALGO (spelled, also, *Hijodalgo*). **In Spanish Law.** He who, by blood and lineage, belongs to a distinguished family, or is noble by descent. Las Partidas, 2. 12. 3. The origin of this word has given rise to much controversy: for which see Escriche.

HIDE (from Sax. *hyden*, to cover; so, Lat. *tectum*, from *tegere*). **In Old English Law.** A building with a roof; a house.

As much land as might be ploughed with one plough. The amount was probably determined by usage of the locality: some make it sixty, others eighty, others ninety-six, others one hundred or one hundred and twenty, acres. Coke, Litt. 5; 1 Plowd. 167; Sheppard, Touchst. 93; DuCange.

As much land as was necessary to support a *hide*, or mansion-house. Coke, Litt. 69 *a;* Spelman, Gloss.; DuCange, *Hida;* 1 Introd. to Domesday, 145. At present the quantity is one hundred acres. Anc. Laws & Inst. of Engl. Gloss.

HIDE LANDS. In Old English Law. Lands appertaining to a *hide*, or mansion. See HIDE.

HIGH COMMISSION COURT. In English Law. An ecclesiastical court of very extensive jurisdiction, for the vindication of the peace and dignity of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities.

It was erected by stat. 1 Eliz. c. 1, and abolished by 16 Car. II. c. 11.

HIGH CONSTABLE. An officer appointed in some cities with powers generally limited to matters of police, and not more extensive, in these respects, than those of *constables*. See CONSTABLE.

HIGH COURT OF ADMIRALTY. See ADMIRALTY.

HIGH COURT OF DELEGATES. In English Law. A tribunal which formerly exercised appellate jurisdiction over cases brought from the ecclesiastical and admiralty courts.

It was a court of great dignity, erected by the statute 25 Hen. VIII. c. 19. It was abolished, and its jurisdiction transferred to the judicial committee of the privy council. See 2 & 3 Will. IV. c. 92; 3 & 4 Will. IV. c. 41; 6 & 7 Vict. c. 38; 3 Sharswood, Blackst. Comm. 66.

HIGH COURT OF ERRORS AND APPEALS. In American Law. An appellate tribunal, and the court of last resort, in the state of Mississippi. See MISSISSIPPI.

HIGH COURT OF JUSTICIARY. See COURT OF JUSTICIARY.

HIGH COURT OF PARLIAMENT. In English Law. The English parliament, as composed of the house of peers and house of commons.

The house of lords sitting in its judicial capacity.

This term is applied to parliament by most of the law writers. Thus, parliament is said by Blackstone to be the supreme court of the kingdom, not only for the making but also for the execution of the laws. 4 Blackstone, Comm. 259. Lord Coke and Lord Hale also apply the term "court" to the whole parliament; and see Finch, Law, 233; Fleta, lib. 2, c. 2. But, from the fact that in judicial proceedings generally the house of commons takes no part, but only in the trial of impeachments, and then only as prosecutor, and from the fact that the house of commons disclaimed possession of judicial powers at the deposition of Richard II., and the twelve judges made a similar decision in 1 Hen. VII., the propriety of this use of the term has been questioned. Blackstone, Comm., Warren, Abr. 215. The propriety of its application would seem to be derived from the claim of parliament to be considered as the successor of the *aula regis*, which was a judicial as well as a legislative body, and, if the succession is established, would be applicable although the judicial power may have been granted to the various courts. See COURTS.

The house of lords only acts in a judicial capacity in civil cases and in most criminal cases. See HOUSE OF LORDS; IMPEACHMENT.

HIGH SEAS. The uninclosed waters of the ocean, and also those waters on the sea-coast which are without the boundaries of low-water mark. 1 Gall. C. C. 624; 5 Mass. C. C. 290; 1 Blackstone, Comm. 110; 2 Hagg. Adm. 398; Dunlop, Adm. Pract. 32, 33.

The act of congress of April 30, 1790, s. 8, 1 Story, U. S. Laws, 84, enacts that if any person shall commit upon the *high seas*, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, etc., which if committed within the body of a county would, by the laws of the United States, be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See 4 Dall. Penn. 426; 3 Wheat. Penn. 336; 5 *id.* 184, 412; 3 Wash. C. C. 515; Sergeant, Const. Law, 334; 13 Am. Jur. 279; 1 Mas. C. C. 147, 152; 1 Gall. C. C. 624. See FAUCES TERRÆ.

HIGH TREASON. In English Law. Treason against the king, in contradistinction from petit treason, which is the treason of a servant towards his master, a wife towards her husband, a secular or religious man towards his prelate. See PETIT TREASON; TREASON.

HIGH-WATER MARK. That part of

the shore of the sea to which the waves ordinarily reach when the tide is at its highest. 6 Mass. 435; 1 Pick. Mass. 180; 1 Halst. N. J. 1; 1 Russell, Crimes, 107; 2 East, Pl. Cr. 803. See SEA-SHORE; TIDE.

HIGHWAY. A passage, road, or street which every citizen has a right to use. 1 Bouvier, Inst. n. 442; 3 Kent, Comm. 432; 3 Yeates, Penn. 421.

The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers. 6 Mod. 255; Angell, Highw. c. 1; 3 Kent, Comm. 432.

2. Highways are created either by legislative authority, by dedication, or by necessity. *First, by legislative authority.* In England, the laying out of highways is regulated by act of parliament; in this country, by general statutes, differing in different states. In England, the uniform practice is to provide a compensation to the owner of the land taken for highways. In the act authorizing the taking, in the United States, such a provision must be made, or the act will be void under the clause in the several state constitutions that "private property shall not be taken for public use without just compensation." The amount of such compensation may be determined either by a jury or by commissioners, as shall be prescribed by law. 1 Blackstone, Comm. 139; Angell, Highw. c. 2; 8 Price, Exch. 535; 12 Mass. 466; 18 Pick. Mass. 501; 2 Johns. Ch. N. Y. 162; 12 Barb. N. Y. 227; 25 Wend. N. Y. 462; 21 N. H. 358; 1 Baldw. C. C. 222; 3 Watts, Penn. 292. In case the statute makes no provision for indemnity for land to be taken, an injunction may be obtained to prevent the taking, 3 Paige, Ch. N. Y. 45; 2 Johns. Ch. N. Y. 162; or an action at law may be maintained after the damage has been committed. 5 Cow. N. Y. 165; 16 Conn. 98; and cases cited above.

3. *Second, by dedication.* This consists of two things: first, on the part of the owner of the fee, an appropriation of land to be used by the public, generally, as a common way; second, on the part of the public, an acceptance of the land, so appropriated, for such use. Against the owner, dedication may be proved by his express declaration, whether by deed or by parol, or by any act unequivocally evincing his intention to dedicate, as by his opening a way for the public over his land, or it may be implied from his acquiescence in the use of his land for a public way. Where acquiescence is the only evidence of dedication, it must ordinarily have continued for twenty years; though any shorter period will suffice, if such acquiescence cannot reasonably be accounted for except upon the supposition of an intent to dedicate. In all cases, the intent to dedicate —the *animus dedicandi*—is the indispensable ingredient of the proof against the owner of the fee. Angell, Highw. c. 3; 3 Kent, Comm. 451; 5 Taunt. 125; 30 Eng. L. & Eq. 207; 11 East, 375; 11 Mees. & W. Exch. 827; 6 Pet. 431; 19 Pick. Mass. 405; 5 Watts & S. Penn. 141. There may be a dedication to the public for a limited purpose, as for a foot-way, horse-way, or drift-way, but not to a limited part of the public; and such partial dedication will be merely void. 11 Mees. & W. Exch. 827; 8 Cush. Mass. 195. The proper proof of an acceptance is the use of the way by the public generally, 5 Barnew. & Ad. 469; 1 R. I. 93; but it has been held, in some states, that an acceptance to be effectual must be made by the body chargeable with the duty of repairing. 13 Vt. 424; 6 N. Y. 257; 16 Barb. N. Y. 251; 8 Gratt. La. 632; 2 Ind. 147.

Third, by necessity. If a highway be impassable, from being out of repair or otherwise, the public have a right to pass in another line, and, for this purpose, to go on the adjoining ground; and it makes no difference whether it be sown with grain or not. 1 Ld. Raym. 725; Croke, Car. 366; 1 Rolle, Abr. 390 *a*; 7 Cush. Mass. 408; Yelv. 142, n. 1.

4. A highway is simply an easement or servitude, carrying with it, as its incidents, the right to use the soil for the purposes of repair and improvement; and, in cities, for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and convenience. The owner of the land over which it passes retains the fee and all rights of property not incompatible with the public enjoyment, such as the right to the herbage, the trees and fruit growing thereon, or minerals below, and may work a mine, sink a drain or cellar, or carry water in pipes beneath it. 4 Viner, Abr. 502; Comyns, Dig. *Chemin* (A 2); Angell, Highw. c. 7; 1 Burr. 133; 1 N. H. 16; 1 Sumn. C. C. 21; 3 Rawle, Penn. 495; 10 Pet. 25; 6 Mass. 454; 15 Johns. N. Y. 447. He may maintain ejectment for encroachments thereon, or an assize if disseised of it, 3 Kent, Comm. 432; Adams, Eject. 19; 9 Serg. & R. Penn. 26; 1 Conn. 135; 2 Smith, Lead. Cas. 141, or trespass against one who builds on it, 2 Johns, N. Y. 357; or who digs up and removes the soil, 12 Wend. N. Y. 98, or cuts down trees growing thereon, 1 N. H. 16; or who stops upon it for the purpose of using abusive or insulting language. 11 Barb. N. Y. 390. If a railroad be laid upon a highway, even though laid by legislative authority, the owner of the fee is entitled to compensation for the additional servitude. 2 E. D. Smith, N. Y. 97; 3 Hill, N. Y. 567; 4 Zabr. N. J. 592; 16 Miss. 649. The owners on the opposite sides *primâ facie* own respectively to the centre of the highway, Angell, Highw. § 313; and a grant of land bounded "by," or "on," or "along" a highway carries, by presumption, the fee to the centre, if the grantor own so far; though this presumption may be rebutted by words showing an intention to exclude the highway, such as, "by the side of," "by the margin of," or "by the line of" the highway, or other equivalent expression. 3 Kent, Comm. 433; Angell, Highw. § 315; 11 Me.

463; 4 Day, Conn. 228; 13 N. H. 381; 8 Metc. Mass. 266; 2 R. I. 508; 2 Sandf. N. Y. 234; 2 Whart. Penn. 18. Whenever the highway is abandoned or lost, the owner of the soil recovers his original unincumbered dominion. Angell, Highw.; 4 Mass. 429; 6 Pet. 498, 513; 8 Watts. Penn. 172; 15 Johns. N. Y. 447.

5. In England, the inhabitants of the several parishes are *primâ facie* bound to repair all highways lying within them, unless by prescription or otherwise they can throw the burden upon particular persons. Shelford. Highw. 44; 1 Hawkins, Pl. Cr. 76; 5 Burr. 1700; 12 Mod. 409. In this country, the English parochial system being unknown, this feature of the common law does not prevail. The liability to repair is here determined by statute, and, in most of the states, devolves upon the towns. 8 Barb. N. Y. 645; 13 Pick. Mass. 343; 1 Humphr. Tenn. 217. The liability being thus created, its measure is likewise to be ascertained by statute, the criterion being, generally, safety and convenience for travel, having reference to the natural characteristics of the road and the public needs. Angell, Highw. § 259; 2 Woodb. & M. C. C. 337; 19 Vt. 470; 4 Cush. Mass. 307, 365; 14 Me. 198. For neglect to repair, the parish in England, and in this country the town or body chargeable, is indictable as for a nuisance, 2 Wms. Saund. 158, n. 4; 3 Term, 265; 28 N. H. 195; Angell, Highw. § 275, and, in many states, is made liable, by statute, to an action on the case for damages in favor of any person who may have suffered special injury by reason of such neglect. 17 How. 161; 3 Cush. Mass. 174; 22 Penn. St. 384; 31 Me. 299; Angell, Highw. § 286. The duty of repair may, in this country, rest on an individual to the exclusion of the town, 23 Wend. N. Y. 446, or on a corporation who, in pursuance of their charter, build a road, and levy tolls for the expense of maintaining it. 7 Conn. 86. The taking of toll is *primâ facie* evidence of the duty. 1 Hawks, No. C. 451.

6. Any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public, is a common-law nuisance, 4 Stephen, Comm. 294; 1 Hawkins, Pl. Cr. c. 76; Angell, Highw. § 345, and may be abated by any one whose passage is thereby obstructed, Angell, Highw. § 274; 3 Stephen, Comm. 5; 5 Coke, 101; or the person causing or maintaining the same may be indicted, 1 Hawkins, Pl. Cr. c. 76; 2 Saund. 158, 159, note; 7 Hill, N. Y. 575; 13 Metc. Mass. 115; or may be sued for damages in an action on the case by any one specially injured thereby. Coke, Litt. 56 *a*; 2 Bingh. 263; 1 Binn. Penn. 463; 7 Cow. N. Y. 609; 19 Pick. Mass. 147; Angell, Highw. § 285 *et seq.*

It is the duty of travellers upon highways, for the purpose of avoiding collision and accident, to observe due care in accommodating themselves to each other. To subserve this purpose, it is the rule in England that, in meeting, each party shall bear or keep to the left; and in this country the reverse,—that is, to the right. 2 Stephen, Nisi P. 984; Story, Bailm. § 599; 2 Dowl. & R. 255. This rule, however, may and ought to be varied, where its observance would defeat its purpose. 8 Carr. & P. 103; 12 Metc. Mass. 415; 23 Penn. St. 196. The rule does not apply to equestrians and foot-passengers. 24 Wend. N. Y. 465; 2 D. Chipm. Vt. 128; 8 Carr. & P. 373, 691. It is another rule that travellers shall drive only at a moderate rate of speed, furious driving on a thronged thoroughfare being an indictable offence at common law. 1 Pet. 590; 13 *id.* 181; 8 Carr. & P. 694. In case of injury by reason of the nonobservance of these rules or of other negligence, as by the use of unsuitable carriages or harness, or horses imperfectly trained, the injured party is entitled to recover his damages in an action on the case against the culpable party, unless the injury be in part attributable to his own neglect. Angell, Highw. § 345 *et seq;* 2 Taunt. 314; 1 Pick. Mass. 345; 11 East, 60; 15 Conn. 359; 5 Watts & S. Penn. 544; 5 Carr. & P. 379; 6 Cow. N. Y. 191; 19 Wend. N. Y. 399. And see BRIDGE; TURNPIKE; RAILROAD; CANAL; FERRY; RIVER; STREET; WAY.

HIGHWAYMAN. A robber on the highway.

HIGLER. In English Law. A person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIGUELA. In Spanish Law. The written acknowledgment given by each of the heirs of a deceased person, showing the effects he has received from the succession.

HILARY TERM. In English Law. A term of court, beginning on the 11th and ending on the 31st day of January in each year.

HINDU LAW. The system of native law prevailing among the Gentoos, and administered by the government of British India.

In all the arrangements for the administration of justice in India, made by the British government and the East India Company, the principle of reserving to the native inhabitants the continuance of their own laws and usages within certain limits has been uniformly recognized. The laws of the Hindus and Mohammedans have thus been brought into notice in England, and are occasionally referred to by writers on English and American law. The native works upon these subjects are very numerous. The chief English republications of the Hindu law are, Colebrooke's Digest of Hindu Law, London, 1801; Sir Wm. Jones' Institutes of Hindu Law, London, 1797. For a fuller account of the Hindu Law, and of the original Digests and Commentaries, see Morley's Law of India, London, 1858, and Macnaghten's Principles of Hindu and Mohammedan Law, London, 1860. The principal English republications of the Mohammedan Law are Hamilton's Hedaya, London, 1791; Baillie's Digest, Calcutta, 1805; Précis de Jurisprudence mussulmane selon le Rite malikite, Paris, 1848; and the treatises on Succession and Inheritance translated by Sir William Jones. An approved outline of both systems is Macnaghten's Principles of Hindu and Mohammedan Law; also contained in the

"Principles and Precedents" of the same law previously published by the same author.

HIPOTECA. **In Spanish Law.** A mortgage of real property. Johnson, Civ. Law of Spain, 156 [149]; White, New Recop. b. 2, tit. 7.

HIRE. A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent, Comm. 456; Story, Bailm. § 359. The divisions of this species of contract are denoted by Latin names.

Locatio operis faciendi is the hire of labor and work to be done or care and attention to be bestowed on the goods let by the hirer, for a compensation.

Locatio operis mercium vehendarum is the hire of the carriage of goods from one place to another, for a compensation. Jones, Bailm. 85, 86, 90, 103, 118; 2 Kent, Comm. 456; La. Civ. Code, art. 1709–1711.

Locatio rei or *locatio conductio rei* is the bailment of a thing to be used by the hirer for a compensation to be paid by him.

This contract arises from the principles of natural law: it is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being that in cases of sale the owner parts with the whole proprietary interest in the thing, and in cases of hire the owner parts with it only for a temporary use and purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object. Vinnius, lib. 3, tit. 25, *in pr.*; Pothier, Louage, nn. 2–4; Jones, Bailm. 86; Story, Bailm. § 371. See BAILMENT; Edwards, Jones, Story, Bailments; Parsons, Story, Contracts; 2 Kent, Comm. 456.

HIRER. He who hires. See BAILMENT.

HIS EXCELLENCY. A title given by the constitution of Massachusetts to the governor of that commonwealth. Mass. Const. part 2, c. 2, s. 1, art. 1. This title is customarily given to the governors of the other states, whether or not it be the official designation in their constitutions and laws.

HIS HONOR. A title given by the constitution of Massachusetts to the lieutenant-governor of that commonwealth. Mass. Const. part 2, c. 2, s. 2, art. 1. It is also customarily given to some inferior magistrates, as the mayor of a city.

HLAFORDSWICE (Sax. *hlaford*, lord, literally bread-giver, and *wice*). **In Old English Law.** Betraying one's lord; treason. Crabb, Hist. Eng. Law, 59, 301.

HLOTHBOTE (Sax. *hloth*, company, and *bote*, compensation). **In Old English Law.** Fine for presence at an illegal assembly. DuCange, *Hlotbota*.

HODGE-PODGE ACT. A name given to a legislative act which embraces many subjects. Such acts, besides being evident proofs of the ignorance of the makers of them, or of their want of good faith, are calculated to create a confusion which is highly prejudicial to the interests of justice. Instances of this wretched legislation are everywhere to be found. See Barrington, Stat. 449.

HOGHENHYNE (from Sax. *hogh*, house, and *hine*, servant). A domestic servant. Among the Saxons, a stranger guest was, the first night of his stay, called *uncuth*, or unknown; the second, *gust*, guest; the third, *hoghenhyne;* and the entertainer was responsible for his acts as for those of his own servant. Bracton, 124 *b;* DuCange, *Agenhine;* Spelman, Gloss. *Homehine.*

HOGSHEAD. A liquid measure, containing half a pipe; the fourth part of a tun, or sixty-three gallons.

HOLD. A technical word in a deed introducing with "to have" the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum.* See TENENDUM; HABENDUM.

To decide, to adjudge, to decree: as, the court in that case *held* that the husband was not liable for the contract of the wife, made without his express or implied authority.

To bind under a contract: as, the obligor is *held* and firmly bound.

In the constitution of the United States it is provided that no person *held* to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. See FUGITIVE SLAVE.

HOLD PLEAS. To hear or try causes. 3 Sharswood, Blackst. Comm. 35, 298.

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. 4 Dall. Penn. 53. And one who indorses a promissory note for collection, as an agent, will be considered the holder for the purpose of transmitting notices. 20 Johns. N. Y. 372; 2 Hall, N. Y. 112; 6 How. 248. See BILL OF EXCHANGE.

HOLDING OVER. The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired.

When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. See 2 Yeates, Penn. 523; 2 Serg. & R. Penn. 50, 486; 5 *id.* 174; 8 *id.* 459; 1 Binn. Penn. 334, n.; 5 *id.* 228; 4 Rawle, Penn. 123; FORCIBLE ENTRY AND DETAINER.

HOLOGRAFO. **In Spanish Law.** Olographi. A term applicable to the paper, document, disposition, and more particularly to the last will of a person, which in order to

be valid must be wholly written, signed, and dated by the testator. "*Holographum, apud Testum, appellatur testamentum, quod totum manu testatoris scriptum est et subsignatum.*"

HOLOGRAPH. What is written with one's own hand. See OLOGRAPH.

HOLYDAY. A religious festival; a day set apart for commemorating some important event in history; a day of exemption from labor. Webster, Dict. (Webster applies *holyday* especially to a religious, *holiday* to a secular, festival.) For the English holydays see 22 Vict. c. 2; R. H. 6 Will. IV.; 5th, 6th, and 7th Orders, 8th May, 1845. They are either by act of legislation or by ancient usage; the principal now are Sundays, the day of the nativity of our Lord and the three succeeding days, Monday and Tuesday in Easter week, Easter eve, and Good Friday, and such of the four following days as may not fall within the term, viz.: birthday and accession of sovereign, Whit Monday and Whit Tuesday. These by statute are to be allowed in common-law offices. Fasts and thanksgiving days are also occasionally appointed by the crown. See Wharton, Dict. 2d Lond. ed.; 2 Burn, Eccl. Law, 308 *et seq.* In the United States the matter of holydays is generally regulated by statute. Sundays and the 4th of July, the anniversary of the Declaration of Independence, are observed throughout the United States. A thanksgiving day and a fast day are appointed each year by the governors of most of the states.

HOLY ORDERS. In Ecclesiastical Law. The orders or dignities of the church. Those within holy orders are archbishops, bishops, priests, and deacons. The form of ordination must be according to the form in the book of Common Prayer. Besides these orders, the church of Rome had five others, viz.: subdeacons, acolyths, exorcists, readers, and ostiaries. 2 Burn, Eccl. Law, 39, 40.

HOMAGE (anciently *hominium*, from *homo*). A mere acknowledgment of tenure made by a tenant by knight-service upon investiture, in the following form:

The tenant in fee or fee-taile that holds by homage shall kneel upon both his knees, ungirded, and the lord shall sit and hold both the hands of his tenant between his hands, and the tenant shall say, "I become your man (*homo*) from this day forward of life and member, of earthly honor, and to you shall be faithful and true, and shall bear to you faith for the lands that I claim to hold of you, saving that faith that I owe to our lord the king;" and then the lord so sitting shall kiss him. The kiss is indispensable (except sometimes in the case of a woman. DuCange). After this the oath of fealty is taken; but this may be taken by the steward, homage only by the lord. Termes de la Ley. This species of homage was called *homagium planum* or *simplex*, 1 Sharswood, Blackst. Comm. 367, to distinguish it from *homagium ligium*, or liege homage, which included fealty and the services incident. DuCange; Spelman, Gloss.

Liege homage was that homage in which allegiance was sworn without any reservation, and was, therefore, due only to the sovereign; and, as it came in time to be exacted without any actual holding from him, it sunk into the oath of allegiance. Termes de la Ley.

The obligation of homage is mutual, binding the lord to protection of the vassal, as well as the vassal to fidelity. Fleta, lib. 3, c. 16.

HOMAGE ANCESTRAL. Homage was so called where time out of mind a man and his ancestors had held by homage; and in this case the lord who had received the homage was bound to acquit the tenant of all services to superior lords, and, if vouched, to warrant his title. If the tenant by homage ancestral aliened in fee, his alienee held by homage, but not by homage ancestral. Termes de la Ley; 2 Sharswood, Blackst. Comm. 300.

HOMAGE JURY. The jury of a lord's court, or court baron: so called because generally composed of those who owed homage to the lord, or the *pares curiæ*. Kitchen; 2 Sharswood, Blackst. Comm. 54, 366.

HOMAGER. One that is bound to do homage to another. Jacob, Law Dict.

HOMBRE BUENO. In Spanish Law. The ordinary judge of a district.

Hence, when the law declares that a contract, or some other act, is to be conformable to the will of the *hombre bueno*, it means that it is to be decided by the ordinary judge. Las Partidas, 7. 34. 31.

In matters of conciliation, it applies to the two persons, one chosen by each party, to assist the constitutional alcalde in forming his judgment of reconciliation. Art. 1, chap. 3, decree of 9th October, 1812.

Arbitrators chosen by litigants to determine their differences.

Persons competent to give testimony in a cause. L. 1. t. 8. b. 2, *Fuero Real.*

HOME PORT. The port where the owner of a ship resides.

HOMESTALL. The mansion-house.

HOMESTEAD. The place of the house, or home place. Homestead farm does not necessarily include all the parcels of land owned by the grantor, though lying and occupied together. This depends upon the intention of the parties when the term is mentioned in a deed and is to be gathered from the context. 7 N. H. 241; 15 Johns. 471. See MANOR; MANSION.

HOMICIDE (Lat. *homo*, a man, *cedere*, to kill). The killing any human creature. 4 Blackstone, Comm. 177.

The killing of a man by a man. 1 Hawkins, Pl. Cr. c. 8, § 2; 5 Cush. Mass. 303.

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.

Felonious homicide is that committed wilfully under such circumstances as to render it punishable.

Justifiable homicide is that committed with full intent, but under such circumstances of

duty as to render the act one proper to be performed.

According to Blackstone, 4 Comm. 177, homicide is the killing of any human creature. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense, it is always understood that the killing is by human agency; and Hawkins defines it to be the killing of a man by a man. 1 Hawkins, Pl. Cr. c. 8, s. 2. See Dalloz, Dict.; 5 Cush. Mass. 303. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. When the death has been intentionally caused by the deceased himself, the offender is called *felo de se;* when it is caused by another, it is justifiable, excusable, or felonious.

The distinction between justifiable and excusable homicide is that in the former the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty rendering the act a proper one to be performed, although the blame is so slight as not to render the party punishable. The distinction is very frequently disregarded, and would seem to be of little practical utility. See 2 Bishop, Crim. Law, §§ 538 *et seq.* But between justifiable or excusable and felonious homicide the distinction, it will be evident, is of great importance. 1 East, Pl. Cr. 260, gives the following example: "If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be *murder;* if he might have seen the danger, but did not look before him, it will be *manslaughter;* but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide." See 4 Sharswood, Blackst. Comm. 176–204; Roscoe, Crim. Ev. 580.

There must be a person in actual existence, 6 Carr. & P. 349; 7 *id.* 814, 850; 9 *id.* 25; but the destruction of human life at any period after birth is homicide, however near it may be to extinction from any other cause. 2 Carr. & K. 784; 2 Bishop, Crim. Law, § 582. The person killed, to constitute the homicide felonious, must have been entitled to his existence. Thus, a soldier of the enemy in time of war has no right to his life, but may be killed. A criminal sentenced to be hung has no right to his life; but no person can take it but the authorized officer, in the prescribed manner. See MURDER; MANSLAUGHTER; SELF-DEFENCE.

HOMINE CAPTO IN WITHERNAM. See DE HOMINE CAPTO IN WITHERNAM.

HOMINE ELIGENDO (Lat.). **In English Law.** A writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. Tech. Dict.

HOMINE REPLEGIANDO. See DE HOMINE REPLEGIANDO.

HOMO (Lat.). A human being, whether male or female. Coke, 2d Inst. 45.

In Feudal Law. A vassal; one who, having received a feud, is bound to do homage and military service for his land: variously called *vassalus, vassus, miles, cliens feudalis, tenens per servitium militare,* sometimes *baro,* and most frequently *leudes.* Spelman, Gloss. *Homo* is sometimes also used for a tenant by socage, and sometimes for any dependent. A *homo* claimed the privilege of having his cause and person tried only in the court of his lord. Kennett, Paroch. Antiq. p. 152.

HOMOLOGACION. In Spanish Law. The tacit consent and approval, inferred by law from the omission of the parties, for the space of ten days, to complain of the sentences of arbitrators, appointment of syndics, or assignees, of insolvents, settlements of successions, etc. Also, the approval given by the judge of certain acts and agreements for the purpose of rendering them more binding and executory. Escriche.

HOMOLOGATION. In Civil Law. Approbation; confirmation by a court of justice; a judgment which orders the execution of some act: as, the approbation of an award and ordering execution on the same. Merlin, Répert.; La. Civ. Code; Dig. 4. 8; 7 Toullier, n. 224. To homologate is to say the like, *similiter dicere.* 9 Mart. La. 324.

In Scotch Law. An act by which a person approves a deed, so as to make it binding on him, though in itself defective. Erskine, Inst. 3. 3. 47 *et seq.;* 2 Bligh. Hou. L. 197; 1 Bell, Comm. 144.

HONOR. In English Law. The seignory of a lord paramount. 2 Blackstone, Comm. 91.

In Common Law. To accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164; 1 Term, 172.

HONORARIUM. Something given in gratitude for services rendered.

It is so far of the nature of a gift that it cannot be sued for. 5 Serg. & R. Penn. 412; 1 Chitt. Bailm. 38; 2 Atk. Ch. 332; 3 Blackstone, Comm. 28. Of this character were formerly in England, though never in the United States, the fees of counsellors at law and of physicians. See 3 Sharswood, Blackst. Comm. 28.

HONORARY SERVICES. Services by which lands in grand serjeantry were held: such as, to hold king's banner, or to hold his head in the ship which carried him from Dover to Whitsand, etc. 2 Sharswood, Blackst. 73, and note.

HORÆ JUDICIÆ (Lat.). Hours judicial, or those in which judges sit in court. In Fortesque's time, these were from 8 to 11 A.M., and the courts of law were not open in the afternoon. Coke, Litt. 135 *a;* Coke, 2d Inst. 246; Fortesque, 51, p. 120, note.

HORN TENURE. Tenure by winding a horn on approach of enemy, called tenure by *cornage.* If lands were held by this tenure of the king, it was grand sergeantry; if of a private person, knight-service. Many anciently so held their lands towards the Picts' Wall. Coke, Litt. § 156; Camd. Britan. 609.

HORNING. In Scotch Law. A process issuing on a decree of court of sessions, or of an inferior court, by which the debtor is charged to perform, in terms of his obligation, or on failure made liable to *caption,* that is, imprisonment. Bell, Dict. *Horning, Letters*

of; Diligence. The name comes from the ancient custom of proclaiming letters of horning not obeyed, and declaring the recusant a rebel, with three blasts of a horn, called putting him to the horn. 1 Ross, Lect. 258, 308.

HORS DE SON FEE (Fr. out of his fee).

In Old English Law. A plea to an action brought by one who claimed to be lord for rent-services as issuing out of his land, by which the defendant asserted that the land in question was out of the fee of the demandant. 9 Coke, 30; 2 Mod. 104.

HORSE. Until a horse has attained the age of four years, he is called a colt. 1 Russ. & R. Cr. Cas. 416. This word is sometimes used as a generic name for all animals of the horse kind. 3 Brev. No. C. 9. See Yelv. 67 *a.*

HOSPITATOR (Lat.). A host or entertainer.

Hospitator communis. An innkeeper. 8 Coke, 32.

Hospitator magnus. The marshal of a camp.

HOSTAGE. A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

Hostages are frequently given as a security for the payment of a ransom-bill; and if they should die, their death would not discharge the contract. 3 Burr. 1734; 1 Kent, Comm. 106; Dane, Abr. Index.

HOSTELLAGIUM. In English Law. A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTILITY. A state of open enmity; open war. Wolff, Droit de la Nat. § 1191.

Permanent hostility exists when the individual is a citizen or subject of the government at war.

Temporary hostility exists when the individual happens to be domiciliated or resident in the country of one of the belligerents: in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi.* 3 C. Rob. Adm. 12; 3 Wheat. 14. See Enemy; Domicil.

HOTCHPOT (spelled, also, *hodge-podge, hotch-potch*). The blending and mixing property belonging to different persons, in order to divide it equally. 2 Blackstone, Comm. 190.

The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates.

In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given: for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given. 1 Wash. Va. 224; 17 Mass. 358; 3 Pick. Mass. 450; 2 Des. So. C. 127; 3 Rand. Va. 117, 559. See Advancement.

HOUR. The twenty-fourth part of a natural day; the space of sixty minutes of time. Coke, Litt. 135.

HOUSE. A place for the habitation and dwelling of man.

A collection of persons; an institution; a commercial firm; a family.

In a grant or demise of a house, the curtilage and garden will pass, even without the words "with the appurtenances" being added. Croke Eliz. 89; 3 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, n. 2; 4 Penn. St. 93. In a grant or demise of a house with the appurtenances, no more will pass although other lands have been occupied with the house. 1 P. Will. 603; Croke Jac. 526; 2 Coke, 32; Coke, Litt. 5 *d*, 36 *a*, *b*; 2 Wms. Saund. 401, n. 2.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses. 6 Mod. 214; Woodfall, Landl. & T. 178.

As to what the term includes in cases of arson and burglary, see Arson; Burglary; Dwelling-House. See, also, Arrest.

HOUSE OF COMMONS. One of the constituent houses of the English parliament.

It is composed of the representatives of the people, as distinguished from the house of lords, which is composed of the nobility. It consists of six hundred and fifty-four members, elected as follows: four hundred and ninety-six from England and Wales, fifty-three from Scotland, and one hundred and five from Ireland. See Parliament; High Court of Parliament.

HOUSE OF CORRECTION. A place for the imprisonment of those who have committed crimes of lesser magnitude.

HOUSE OF ILL FAME. In Criminal Law. A house resorted to for the purpose of prostitution and lewdness. 5 Ired. No. C. 603.

Keeping a house of ill fame is an offence at common law. 3 Pick. Mass. 26; 17 *id.* 80; 1 Russell, Crimes, Greaves ed. 322. So the letting of a house to a woman of ill fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law. 3 Pick. Mass. 26; 11 Cush. Mass. 600. If a lodger lets her room for the purpose of indiscriminate prostitution, she is guilty of keeping a house of ill fame, as much as if she were the proprietor of the whole house. 2 Ld. Raym. 1197. A married woman who lives apart from her husband may be indicted alone, and punished, for keeping a house of ill fame. 1 Metc. Mass. 151. See 11 Mo. 27; 10 Mod. 63. The house need not be kept for lucre, to constitute the offence. 21 N. H. 345; 2 Gray, Mass. 357; 18 Vt. 70. See 17 Pick. 80. See, also, 17 Conn. 467; 4 Cranch,

C. C. 338, 372; 6 Gill, Md. 425; 4 Iowa, 541; 2 B. Monr. Ky. 417.

HOUSE OF LORDS. One of the constituent houses of the English parliament.

It is at present (1864) composed of thirty lords spiritual (bishops and archbishops) and four hundred and twenty-six lords temporal; but the number is liable to increase by fresh creation by the crown.

This body is the supreme court of judicature in the kingdom. It has no original jurisdiction, but is the court of appeal in the last resort, with a few exceptions and under some limitations as to the right, from the inferior courts upon appeal or writ of error for mistake of law. Appeals lie to this tribunal from Scotch and Irish courts, in some cases. See stat. 4 Geo. IV. c. 85, as to Scotch, and stat. 39 & 40 Geo. III. c. 67, art. 8, as to Irish, appeals.

This body, when sitting as a court of law, is presided over by the lord chancellor, whose attendance alone is in any respect compulsory, and is composed of as many of its members who have filled judicial stations as choose to attend. Three laymen also attend in rotation, but do not vote upon judicial matters. 11 Clark & F. Hou. L. 421. In the absence of the chancellor, deputy speakers, who were members of the profession but not of the house, have been appointed. 3 Sharswood, Blackst. Comm. 56.

It sits also to try impeachments. See IMPEACHMENT; HIGH COURT OF PARLIAMENT; PARLIAMENT.

HOUSE OF REFUGE. A prison for juvenile delinquents.

HOUSE OF REPRESENTATIVES. The name given to the more numerous branch of the federal congress, and of the legislatures of several of the states of the United States.

The constitution of the United States, art. 1, s. 2, § 1, provides that the "house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." See the articles upon the various states. The constitution of the United States, however, requires no evidence of property in the representative, nor any declarations as to his religious belief. He must be free from undue bias or dependence, by not holding any office under the United States. Art. 1, s. 6, § 2. The number is not to exceed one for every thirty thousand of the population; and a reapportionment among the states is made every tenth year.

HOUSE-BOTE. An allowance of necessary timber out of the landlord's woods for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life. House-bote is said to be of two kinds, *estoveriam ædificandi et ardendi*. Coke, Litt. 41.

HOUSEBREAKING. In Criminal Law. The breaking and entering the dwelling-house of another by night or by day, with intent to commit some felony within the same, whether such felonious intent is executed or not. Housebreaking by night is burglary.

This crime is of a local character, and the evidence respecting the place must correspond with the allegation in the indictment.

HOUSEHOLD. Those who dwell under the same roof, and constitute a family. Webst. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family. 18 Johns. N. Y. 402.

Belonging to the house and family; domestic. Webster, Dict.

HOUSEHOLD FURNITURE. By this expression, in wills, all personal chattels will pass that may contribute to the use or convenience of the household or the ornament of the house: as, plate, linen, china, both useful and ornamental, and pictures. But goods or plate in the hands of testator in the way of his trade will not pass, nor books, nor wines. 1 Jarman, Wills, Perkins ed. 591, 596, notes; 1 Ves. Sen. Ch. 97; 2 Williams, Exec. Am. ed. 1017; 1 Johns. Ch. N. Y. 329.

HOUSEHOLD GOODS. In wills. This expression will pass every thing of a permanent nature (that is, articles of household which are not consumed in their enjoyment) that were used or purchased, or otherwise acquired by the testator, for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in the house, as malt, hops, or victuals, nor guns and pistols, if used in hunting or sport, and not for defence of house. A clock in the house, if not fixed to it, will pass. 1 Jarman, Wills, Perkins ed. 589; 1 Roper, Leg. 253.

HOUSEHOLD STUFF. Words sometimes used in a will. Plate will pass under the term, 2 Freem. Ch. 64, but not apparel, books, cattle, victuals, and choses in action, which do not fall within the natural meaning of the word, unless there be an intention manifest that they should pass. 15 Ves. Ch. 319. Goods, as seven hundred beds in possession of testator for purposes of trade, do not pass under utensils of "household stuff." 2 P. Will. Ch. 302. In general, "household stuff" will pass all articles which may be used for the convenience of the house. Swinburne, Wills, pt. 7, § 10, p. 484.

HOUSEHOLDER. Master or chief of a family; one who keeps house with his family. Webst. But a man who has absconded from the state, and left his wife and children remaining together as a family, was for their benefit held to be a householder. 18 Johns. N. Y. 402.

A keeper of a tavern or boarding-house, or a master or mistress of a dwelling-house. 1 Supplem. to Rev. Stat. Mass. 1836–1853, Index, p. 170. A person having and providing for a household. The character is not lost by a temporary cessation from housekeeping. 14 Barb. N. Y. 456; 19 Wend. N. Y. 475.

HOUSEKEEPER. One who occupies a house.

A person who occupies every room in the house, under a lease, except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper. 1 Chitty, Bail. 502. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant: in this case the undertenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord. *Id.* note.

In order to make the party a housekeeper, he must be in actual possession of the house, 1 Chitty, Bail. 288, and must occupy a whole house. See 1 Barnew. & C. 178; 2 Term, 406; 3 Petersdorff, Abr. 103, note; 2 Mart. La. 313.

HOVEL. A place used by husbandmen to set their ploughs, carts, and other farming-utensils, out of the rain and sun. Law Lat. Dict. A shed; a cottage; a mean house.

HOYMAN. The master or captain of a hoy.

Hoymen are liable as common carriers. Story, Bailm. § 496.

HUDE-GELD. In Old English Law. A compensation for an assault (*transgressio illata*) upon a trespassing servant (*servus*). Supposed to be a mistake or misprint in Fleta for *hinegeld*. Fleta, lib. 1, c. 47, § 20. Also, the price of one's skin, or the money paid by a servant to save himself from a whipping. DuCange.

HUE AND CRY. In Old English Law. A pursuit of one who had committed felony, by the highway.

The meaning of hue is said to be *shout*, from the Saxon *huer;* but this word also means *to foot*, and it may be reasonably questioned whether the term may not be *up foot and cry*, in other words, run and cry after the felon? We have a mention of hue and cry as early as Edward I.; and by the Statute of Winchester, 13 Edw. I., "immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and county to county, by horsemen and footmen, to the seaside. The constable (the person being described, etc.) is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who is to do the same as the first, etc. If the county will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed, etc." A person engaged in the hue and cry apprehending a felon was, on the felon's conviction, entitled to forty pounds, on a certificate of the judge or justice before whom there was conviction, as well as to the felon's horse, furniture, arms, money, and other goods taken with him, subject to the rights of other persons therein. Wood, Inst. 370–373. See 2 Hale, Pl. Cr. 100.

HUEBRA. In Spanish Law. An acre of land, or as much as can be ploughed in a day by two oxen. 2 White, New Coll. 49.

HUISSIER. An usher of the court. An officer who serves process.

In France, an officer of this name performs many of the duties of an English sheriff or constable. In Canada, there may be many huissiers in each county, whose acts are independent of each other, while there can be but one sheriff, who is presumed cognizant of the acts of his subordinates. The French huissier certifies his process; the Canadian merely serves what is put into his hands.

HUNDRED. In English Law. A division of a county, which some make to have originally consisted of one hundred hides of land others of ten *tithings*, or one hundred free families.

It differed in size in different parts of England. 1 Stephen, Comm. 122. In many cases, when an offence is committed within a hundred, the inhabitants are liable to make good the damage if they do not produce the offender. See 12 East, 244.

This system was probably introduced by Alfred (though mentioned in the Pœnitentiæ of Egbert, where it seems to be the addition of a later age), being borrowed from the continent, where it was known to the Franks, under the name *centena*, in the sixth century. See Charlemagne Capit. l. 3, c. 10.

It had a court attached to it, called the hundred court, or hundred lagh, like a court baron, except in its larger territorial jurisdiction. It was governed by the hundredary (*hundredarius*). 9 Coke, 25. The jurisdiction of this court has devolved upon the county courts. Jacob, Law Dict.; DuCange. Hundred-penny was a tax collected from the hundred by its lord or by the sheriff. Hundredsetena signified the dwellers in the hundred. Charta Edg. Reg. Mon. Angl. to. 1, p. 16.

HUNDRED COURT. An inferior court, whose jurisdiction extended to the whole territory embraced in a hundred. They were courts not of record; the freeholders were the judges; they were held before the steward of the manor as register; and they resembled courts baron in all respects except in their territorial jurisdiction. 3 Blackstone, Comm. 34, 35.

HUNDRED GEMOTE. An assembly among the Saxons of the freeholders of a hundred.

It met twelve times in the year, originally; though subsequently its meetings became less frequent.

It had an extensive jurisdiction, both civil and criminal, and was the predecessor of the county court and sheriff's tourn, and possessed very similar powers. Spelman, Gloss. *Hundredum;* 1 Reeve, Hist. Eng. Law, 7.

HUNDRED LAGH (Sax.). Liability to attend the hundred court. Spelman, Gloss. See Cowel; Blount.

HUNDREDARY (*hundredarius*). The chief magistrate of a hundred. DuCange.

HUNDREDORS. The inhabitants of a hundred, who, by several statutes, are held to be liable, in the cases therein specified, to make good the loss sustained by persons within the hundred by robbery or other violence, therein also specified. The principal of these statutes are 13 Edw. I. st. 2, c. 1, s. 4; 28 Edw. III. c. 11; 27 Eliz. c. 13; 29 Car. II. c. 7; 8 Geo. II. c. 16; 22 Geo. II. c. 24.

Persons serving on juries, or fit to be empanelled thereon, dwelling within the hundred where the land in question lies. 35 Hen. VIII. c. 6. And some such were necessarily on every panel till the 4 & 5 Anne, c. 16. 4 Stephen, Comm. 370. Him that had the jurisdiction of the hundred. The bailiff of the hundred. Horne, Mirr. of Just. lib. 1; Jacob, Law Dict.

HUNGER. The desire to eat. Hunger is no excuse for larceny. 1 Hale, Pl. Cr. 54; 4 Blackstone, Comm. 31.

When a person has died, and it is suspected he has been starved to death, an examination of his body ought to be made, to ascertain whether or not he died of hunger. The signs which usually attend death from hunger are the following. The body is much emaciated, and a fetid, acrid odor exhales from it, although death may have been very recent. The eyes are red and open,—which is not usual in cases of death from other causes. The tongue and throat are dry, even to aridity, and the stomach and intestines are contracted and empty. The gall-bladder is pressed with bile, and this fluid is found scattered over the stomach and intestines, so as to tinge them very extensively. The lungs are withered; but all the other organs are generally in a healthy state. The blood-vessels are usually empty. 2 Foderé, 276; 3 *id.* 231; 2 Beck, Med. Jur. 52. See Eunom. Dial. 2, § 47, pp. 142, 384, note.

HUNTING. The act of pursuing and taking wild animals; the chase.

2. The chase gives a kind of title by occupancy, by which the hunter acquires a right or property in the game which he captures. In the United States the right of hunting is universal, and limited only so far as to exclude hunters from committing injuries to private property or to the public: as, by shooting on public roads. See FERÆ NATURÆ; OCCUPANCY.

HURDLE. In English Law. A species of sledge, used to draw traitors to execution.

HUSBAND. A man who has a wife.

2. *As to his obligations.* He is bound to receive his wife at his home, and should furnish her with all the necessaries and conveniences which his fortune enables him to do, and which her situation requires; but this does not include such luxuries as, according to her fancy, she deems necessaries. See CRUELTY. He is bound to love his wife, and to bear with her faults, and, if possible, by mild means to correct them; and he is required to fulfil towards her his marital promise of fidelity, and can, therefore, have no carnal connection with any other woman, without a violation of his obligations. As he is bound to govern his house properly, he is liable for its misgovernment, and he may be punished for keeping a disorderly house even where his wife had the principal agency, and he is liable for her torts, as for her slander or trespass. He is also liable for the wife's debts incurred before coverture, provided they are recovered from him during their joint lives, and, generally, for such as are contracted by her, after coverture, for necessaries, or by his authority, express or implied. See Reeve, Dom. Rel.; Parsons, Story, Contr.; Hilliard, Torts.

3. *Of his rights.* Being the head of the family, the husband has a right to establish himself wherever he may please, and in this he cannot be controlled by his wife; he may manage his affairs in his own way, buy and sell all kinds of personal property, without her control, and he may buy any real estate he may deem proper, but, as the wife acquires a right in the latter, he cannot sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lie. At common law, all her *personal* property in possession is vested in him, and he may dispose of it as if he had acquired it by his own contract: this arises from the principle that they are considered one person in law, 2 Blackstone, Comm. 433; and he is entitled to all her property in action, provided he reduces it to possession during her life. *Id.* 434. He is also entitled to her *chattels real*, but these vest in him not absolutely, but *sub modo:* as, in the case of a lease for years, the husband is entitled to receive the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture, and it is liable to be taken in execution for his debts; and, if he survives her, it is to all intents and purposes his own. In case his wife survives him, it is considered as if it had never been transferred from her, and it belongs to her alone. In his wife's freehold estate he has a life estate during the joint lives of himself and wife; and at common law, when he has a child by her who could inherit, he has an estate by the curtesy. But the rights of a husband over the wife's property are very much abridged in some of the United States, by statutes. See MARRIED WOMAN.

4. One of the most striking differences between the law of Louisiana and of the other states of the Union, where the common law prevails, is with regard to the relation between husband and wife. By the common law, husband and wife are considered as one person, in the language of Blackstone: "The very being or legal existence of the woman is suspended during marriage, or, at least, is incorporated or consolidated into that of the husband." By the law of Louisiana, no such consequences flow from marriage; the parties continue to be two distinct persons, whose rights of property are not necessarily affected by the relation in which they stand to each other. When the marriage is not preceded by a marriage contract, all the property, whether movable or immovable, which the parties hold, continues to belong to them, as their separate estate. But, so far as future acquisitions are concerned, the law creates a *community of acquets* or *gains* between the husband and wife during marriage; and the property thus acquired is called *common property.*

5. Although the wife acquires an equal interest in the acquisitions made during the marriage, yet she can exercise no control in the administration or disposition of the common property. The husband is the head and master of the community; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife. La. Civ. Code, art. 2373. But "he can make no con-

veyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole or of a *quota* of the movables, unless it be for the establishment of the children of the marriage." On the dissolution of the marriage, the wife (or her heirs) may renounce the community, and thereby exonerate herself from its debts; but if she accepts, she is entitled to one-half of the property and becomes liable for one-half of the debts. The community is composed, 1, "of all of the revenues of the separate property of the husband; 2, of the revenues of the separate property of the wife, when she permits her husband to administer it; 3, of the produce of their reciprocal industry and labor; and, 4, of all property acquired by donations made jointly to the husband and wife, or by purchase, whether made in the name of the husband or wife." But donations made to them separately are the separate property of the donee. By the marriage contract, the community may be modified or entirely excluded; in the latter case the parties hold their property and its revenues as separate and distinct as if they were strangers; and both are bound to contribute to the expense of the marriage, etc. The separate property of the wife is subdivided into dotal and extra-dotal, or paraphernal. There can be no dotal property without a marriage contract; dotal property is inalienable, or *extra commercium*, during the marriage, except in a few enumerated cases. The wife may sell her paraphernal property, with the consent of her husband; and in case the husband receives the proceeds of such sales, the wife has a tacit or legal mortgage on all the immovable property of the husband, to secure the payment of the money which has thus come into his hands.

6. Although the wife does not lose her distinct and separate legal existence, nor her property, by her marriage, yet she becomes subject to the marital authority: hence in the *exercise* of her legal rights she requires the authorization or consent of the husband; she, therefore, cannot appear in a court of justice, either as plaintiff or defendant, without the authority of her husband; nor can she make contracts unless authorized by him; but under certain circumstances she may be authorized to sue or enter into contracts by a competent court, in opposition to the will of the husband.

One of the most important rules for the protection of the wife is that "she cannot, whether separated in property by contract or by judgment, or not separated, bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." The *Senatus Consultum Vellicanum* is the original fountain of the legislation of Louisiana on this subject, and it applied to all contracts and engagements whatever; and her courts have always held that, no matter in what form a transaction might be attempted to be disguised, the wife is not bound by any promise or engagement made jointly and severally with her husband, unless the creditor can show that the consideration of the contract was for her separate advantage, and not something which the husband was bound to furnish her. 9 La. 603; 7 Mart. La. N. s. 66.

All contracts entered into during the marriage must be considered as made by the husband and for his advantage, whether made in his own name or in the names of both husband and wife. This presumption can only be destroyed by positive proof that the consideration of the contract inured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself cannot avail the creditor. 5 La. Ann. 586. But see 6 How. 228.

HUSBRECE. Housebreaking; burglary.

HUSTINGS. In English Law. The name of a court held before the lord mayor and aldermen of London: it is the principal and supreme court of the city. See Coke, 2d Inst. 327; St. Armand, Hist. Essay on the Legisl. Power of England, 75.

The place of meeting to choose a member of parliament.

The term is used in Canadian as well as English law. The manner of conducting an election in Canada and England for a member of the legislative body is substantially as follows. Upon warrant from the proper officer, a writ issues from the clerk of the crown in chancery, directed to the sheriff, registrar, or other returning officer of the electoral division. He thereupon issues and posts in public places a proclamation appointing a day, place, and hour for his holding an election, and also fixing a day when a poll will be opened, if one be demanded and granted. The first day is called nomination-day. On this day he proceeds to the hustings, which must be in the open air and accessible to all the voters, proclaims the purpose of the election, and calls upon the electors present to name the person they require to represent them. The electors then make a show of hands, which may result in an election, or a poll may be demanded by a candidate or by any elector. On such demand, a poll is opened in each township, ward, or parish of the election district, at the places prescribed by statute.

HYDROMETER. An instrument for measuring the density of fluids: being immersed in fluids, as in water, brine, beer, brandy, etc., it determines the proportion of their density, or their specific gravity, and thence their quality. See Act of Congr. Jan. 12, 1825, 3 Story, U. S. Laws, 1976.

HYPOBOLUM (Lat.). **In Civil Law.** The name of the bequest or legacy given by the husband to his wife, at his death above her dowry. Tech. Dict.

HYPOTHECATION. A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds.

There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without delivery of the thing hypothecated. 2 Bell, Comm. 5th ed. 25.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is, of a pledge of a chattel without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges, rather than hypothecations. Story, Bailm. § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach as soon as the chattel has been produced. 14 Pick. Mass. 497.

Conventional hypothecations are those which arise by agreement of the parties. Dig. 20. 1. 5.

General hypothecations are those by which the debtor hypothecates to his creditor all his estate which he has or may have.

Legal hypothecations are those which arise without any contract therefor between the parties, express or implied.

Special hypothecations are hypothecations of a particular estate.

Tacit hypothecations are such as the law gives in certain cases, without the consent of the parties, to secure the creditor. They are a species of legal hypothecation.

Thus, the public treasury has a lien over the property of public debtors. Code, 8. 15. 1. The landlord has a lien on the goods in the house leased, for the payment of his rent. Dig. 20. 2. 2; Code, 8. 15. 7. The builder has a lien, for his bill, on the house he has built. Dig. 20. 1. The pupil has a lien on the property of the guardian for the balance of his account. Dig. 46. 6. 22; Code, 5. 37. 20. There is hypothecation of the goods of a testator for the security of the legacy. Code, 6. 43. 1.

See, generally, Pothier, de l'Hyp.; Pothier, Mar. Contr. Cushing ed. 145, n. 26; Merlin, Répert.; 2 Brown, Civ. Law, 195; Abbott, Shipping; Parsons, Mar. Law.

HYPOTHEQUE. In French Law. Hypothecation; the right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for his debt, although he be not placed in possession of it.

I.

I. O. U. In Common Law. A memorandum of debt in use among merchants. It is not a promissory note, as it contains no direct promise to pay. See 4 Carr. & P. 324; 1 Mann. & G. 46; 1 C. B. 543; 1 Esp. 426; Parsons, Bills & Notes.

IBIDEM (Lat.). The same. The same book or place. The same subject. See ABBREVIATIONS, *Ib.*, *Id.*

ICTUS ORBIS (Lat.). **In Medical Jurisprudence.** A maim, a bruise, or swelling; any hurt without cutting the skin.

When the skin is cut, the injury is called a wound. Bracton, lib. 2, tr. 2, c. 5 and 24.

Ictus is often used by medical authors in the sense of *percussus*. It is applied to the pulsation of the arteries, to any external lesion of the body produced by violence; also, to the wound inflicted by a scorpion or venomous reptile. *Orbis* is used in the sense of circle, circuit, rotundity. It is applied, also, to the eyeballs: *oculi dicuntur orbes*. Castelli, Lex. Med.

IDEM SONANS (Lat.). Sounding the same.

In pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient: as, *Segrave* for *Seagrave*, 2 Strange, 889; *Whynyard* for *Winyard*, Russ. & R. 412; *Benedetto* for *Beneditto*, 2 Taunt. 401; *Keen* for *Keene*, Thach. Crim. Cas. Mass. 67; *Deadema* for *Diadema*, 2 Ired. No. C. 346; *Hutson* for *Hudson*, 7 Miss. 142; *Coonrad* for *Conrad*, 8 Miss. 291. Whether or not the names are *idem sonantia* is for the jury. 2 Den. Crim. Cas. 231. See 5 Ark. 72; 6 Ala. N. S. 679. See, also, Russ. & R. Crim. Cas. 412; 2 Taunt. 401. In the following cases the variances there mentioned were declared to be fatal: Russ. & R. 351; 10 East, 83; 5 Taunt. 14; 1 Baldw. 83; 2 Crompt. & M. Exch. 189; 6 Price, Exch. 2; 1 Chitty, Bail, 659. See, generally, 3 Chitty, Pract. 231, 232; 4 Term, 611; 3 Bos. & P. 559; 1 Stark. 47; 2 *id.* 29; 3 Campb. 29; 6 Maule & S. 45; 2 N. H. 557; 7 Serg. & R. Penn. 479; 3 Caines, N. Y. 219; 1 Wash. C. C. 285; 4 Cow. N. Y. 148; 3 Starkie, Ev. § 1678.

IDENTITATE NOMINIS (Lat.). **In English Law.** The name of a writ which lies for a person taken upon a capias or exigent, and committed to prison, for another man of the same name: this writ directs the sheriff to inquire whether he be the person against whom the action was brought, and if not, then to discharge him. Fitzherbert, Nat. Brev. 267. In practice, a party in this condition would be relieved by *habeas corpus*.

IDENTITY. Sameness. In cases of larceny, trover, and replevin, the things in question must be identified. 4 Blackstone, Comm. 396. So, too, the identity of articles taken or injured must be proved in all indictments where taking property is the gist of the offence, and in actions of tort for damage to specific property. Many other cases occur in which identity must be proved in regard either to persons or things. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after a long absence, and the like. See Ryan, Med. Jur. 301; 1 Beck, Med. Jur. 509; 1 Hall, Am. Law Jour. 70; 6 Carr. & P. 677; 1 Crompt. & M. Exch. 730; 1 Hagg. Cons. 189; Shelford, Marr. & D. 226; Best, Pres. App. Case 4; Wills, Circ. Ev. 143 *et seq.*

IDES (Lat.). **In Civil Law.** A day in the month from which the computation of days was made.

The divisions of months adopted among the Romans were as follows. The calends occurred on the first day of every month, and were distinguished by adding the name of the month: as, *calendis Januarii*, the first of January. The *nones* occurred on the fifth of each month, with the exception of March, July, October, and May, in which months they occurred on the seventh. The *ides* occurred always on the ninth day after the *nones*, thus dividing the month equally. In fact, the *ides* would seem to have been the primal division, occurring in the middle of the month, nearly. Other days than the three designated were indicated by the number

of days which would elapse before the next succeeding point of division. Thus, the second of April is the *quarto nonas Aprilis;* the second of March, the *sexto nonas Martii;* the eighth of March, *octavius idus Martii;* the eighth of April, *sextus idus Aprilis;* the sixteenth of March, *decimus septimus calendis Aprilis.*

This system is still used in some chanceries in Europe; and we therefore give the following

Table of the Calends, Nones, and Ides.

	Jan., Aug., Dec., 31 days.	March, May, July, Oct., 31 days.	April, June, Sept., Nov., 30 days.	February 28, bissextile, 29 days.
1	Calendis.	Calendis	Calendis	Calendis
2	4 Nonas.	6 Nonas	4 Nonas	4 Nonas
3	3 Nonas.	5 Nonas	3 Nonas	3 Nonas
4	Prid. Non.	4 Nonas	Prid. Non.	Prid. Non.
5	Nonis	3 Nonas	Nonis	Nonis
6	8 Idus	Prid. Non.	8 Idus	8 Idus
7	7 Idus	Nonis	7 Idus	7 Idus
8	6 Idus	8 Idus	6 Idus	6 Idus
9	5 Idus	7 Idus	5 Idus	5 Idus
10	4 Idus	6 Idus	4 Idus	4 Idus
11	3 Idus	5 Idus	3 Idus	3 Idus
12	Prid. Idus	4 Idus	Prid. Idus	Prid. Idus
13	Idibus	3 Idus	Idibus	Idibus
14	19 Cal.	Prid. Idus	18 Cal.	16 Cal.
15	18 Cal.	Idibus	17 Cal.	15 Cal.
16	17 Cal.	17 Cal.	16 Cal.	14 Cal.
17	16 Cal.	16 Cal.	15 Cal.	13 Cal.
18	15 Cal.	15 Cal.	14 Cal.	12 Cal.
19	14 Cal.	14 Cal.	13 Cal.	11 Cal.
20	13 Cal.	13 Cal.	12 Cal.	10 Cal.
21	12 Cal.	12 Cal.	11 Cal.	9 Cal.
22	11 Cal.	11 Cal.	10 Cal.	8 Cal.
23	10 Cal.	10 Cal.	9 Cal.	7 Cal.
24	9 Cal.	9 Cal.	8 Cal.	6 Cal.*
25	8 Cal.	8 Cal.	7 Cal.	5 Cal.
26	7 Cal.	7 Cal.	6 Cal.	4 Cal.
27	6 Cal.	6 Cal.	5 Cal.	3 Cal.
28	5 Cal.	5 Cal.	4 Cal.	Prid. Cal.
29	4 Cal.	4 Cal.	3 Cal.	
30	3 Cal.	3 Cal.	Prid. Cal.	
31	Prid. Cal.	Prid. Cal.		

IDIOCHIRA (from Gr. ἰδιος, private, and χειρ, hand). **In Civil Law.** An instrument privately executed, as distinguished from one publicly executed. Vicat, Voc. Jur.

IDIOCY. In Medical Jurisprudence. A form of insanity, resulting either from congenital defect, or some obstacle to the development of the faculties in infancy.

2. It always implies some defect or disease of the brain, which is generally smaller than the standard size and irregular in its shape and proportions. Occasionally the head is unnaturally large, being distended by water. The senses are very imperfect at best, and one or more are often entirely wanting. None can articulate more than a few words; while many utter only cries or muttered sounds. Some make known their wants by signs or sounds which are intelligible to those who have charge of them. The head, the features, the expression, the movements,—all convey the idea of extreme mental deficiency. The reflective faculties are entirely wanting, whereby they are utterly incapable of any effort of reasoning. The perceptive faculties exist in a very limited degree, and hence they are rendered capable of being improved somewhat by education, and redeemed, in some measure, from their brutish condition. They have been led into habits of propriety and decency, have been taught some of the elements of learning, and have learned some of the coarser industrial occupations. The moral sentiments, such as self-esteem, love of approbation, veneration, benevolence, are not unfrequently manifested; while some propensities, such as cunning, destructiveness, sexual impulse, are particularly active.

3. In some parts of Europe a form of idiocy prevails endemically, called cretinism. It is associated with disease or defective development of other organs besides the head. Cretins are short in stature, their limbs are attenuated, the belly tumid, and the neck thick. The muscular system is feeble, and their voluntary movements restrained and undecided. The power of language is very imperfect, if not entirely wanting. In the least degraded forms of this disease, the perceptive powers may be somewhat developed, and the individual may evince some talent at music or construction. In Switzerland they make parts of watches. Unlike idiocy, cretinism is not congenital, but is gradually developed in the early years of childhood. It is owing chiefly to atmospherical causes, and is transmitted from one generation to another.

4. Both idiocy and cretinism exhibit various degrees of mental deficiency, but they never approximate to any description of men supposed to be rational, nor can any amount of education efface the chasm which separates them from their better-endowed fellow-men. The older law-writers, whose observation of mental manifestations was not very profound, thought it necessary to have some test of idiocy; and accordingly, Fitzherbert says, if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot. Natura Brevium, 583. Again, he says, a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. The inference was, no doubt, that such a man is responsible for his criminal acts. At the present day, such an idea would not be entertained for a moment, nor are we aware of any case on record of an idiot suffering capital punishment. Of course, they are totally incapable of any civil acts; but in this country—in some of the states, at least—they would not be debarred from exercising the right of suffrage. See INSANITY.

IDIOT. A person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. Shelford, Lun. 2.

2. It is an imbecility or sterility of mind, and not a perversion of the understanding. Chitty, Med. Jur. 327, note *s*, 345; 1 Russell, Crimes, 6; Bacon, Abr. *Idiot* (A); Brooke, Abr.; Coke, Litt. 246, 247; 3 Mod. 44; 1 Vern. Ch. 16; 4 Coke, 126; 1 Blackstone, Comm. 302. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding. Fitzherbert, Nat. Brev. 233. See 1 Dow, Parl. Cas. N. S. 392; 3 Bligh, N. S. 1. Persons born deaf, dumb, and blind are presumed to be idiots; for, the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds. Coke, Litt. 42; Shelford, Lun. 3. But this is a mere presumption, which, like most others, may be rebutted; and doubtless a person born deaf, dumb, and blind, who could be taught to read and write, would not be considered an idiot. A remarkable instance of such a one may be found in the person of Laura Bridgman, who has been taught how to converse, and even to write.

* If February is bissextile, *Sexto Calendas* (6 Cal.) is counted twice, viz., for the 24th and 25th of the month. Hence the word *bissextile.*

This young woman was, in the year 1848, at school at South Boston. See Locke, Hum. Und. b. 2, c. 11, §§ 12, 13; Ayliffe, Pand. 234; 4 Comyns, Dig. 610; 8 *id.* 644.

3. Idiots are incapable of committing crimes, or entering into contracts. They cannot, of course, make a will; but they may acquire property by descent.

See, generally, 1 Dow, Parl. Cas. N. S. 392; 3 Bligh, 1; 19 Ves. Ch. 286, 352, 353; Stock, Non. Comp.; Bouvier, Inst. Index; Story, Parsons, Contr.; Bishop, Crimes.

IDIOTA INQUIRENDO, WRIT DE. This is the name of an old writ which directs the sheriff to inquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitzherbert, Nat. Brev. 232.

IDONEUS (Lat.). Sufficient; fit; adequate. He is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility; and if an officer, etc. be not *idoneus*, he may be discharged. 8 Coke, 41. If a clerk presented to a living is not *persona idonea*, which includes ability in learning, honesty of conversation, etc., the bishop may refuse him. And to a *quare impedit* brought thereon, "*in literaturâ minus sufficiens* is a good plea, without setting forth the particular kind of learning." 5 Coke, 58; 6 *id.* 49 *b*; Coke, 2d Inst. 631; 3 Lev. 311; 1 Show. 88; Wood, Inst. 32, 33.

So of things: *idonea quantitas*, Calvinus, Lex.; *idonea paries*, a wall sufficient or able to bear the weight.

In Civil Law. Rich; solvent: *e.g. idoneus tutor, idoneus debitor.* Calvinus, Lex.

IGNIS JUDICIUM (Lat.). **In Old English Law.** The judicial trial by fire.

IGNOMINY. Public disgrace; infamy; reproach; dishonor. Ignominy is the opposite of esteem. Wolff, § 145.

IGNORAMUS (Lat. we are ignorant or uninformed). **In Practice.** The word which is written on a bill by a grand jury when they find that there is not sufficient evidence to authorize their finding it a true bill. Sometimes, instead of using this word, the grand jury indorse on the bill, *Not found.* 4 Blackstone, Comm. 305.

IGNORANCE. The lack of knowledge.

2. Ignorance is distinguishable from error. Ignorance is want of knowledge; error is the non-conformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are generally found together, and what is said of one is said of both.

Essential ignorance is ignorance in relation to some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business. For example, if A should sell his horse to B, and at the time of the sale the horse was dead, unknown to the parties, the fact of the death would render the sale void. Pothier, Vente, nn. 3, 4; 2 Kent, Comm. 367.

3. *Ignorance of fact* is the want of knowledge as to the fact in question. It would be an error resulting from ignorance of fact, if a man believed a certain woman to be unmarried and free, when, in fact, she was a married woman; and were he to marry her under that belief, he would not be criminally responsible. 6 All. Mass. 591. Ignorance of the laws of a foreign government, or of another state, is ignorance of fact. 9 Pick. Mass. 112. See, for the difference between ignorance of law and ignorance of fact, 9 Pick. Mass. 112; Clef des Lois Rom. *Fait*; Dig. 22. 6. 7; MAXIMS, *Ignorantia facti.*

Involuntary ignorance is that which does not proceed from choice, and which cannot be overcome by the use of any means of knowledge known to a person and within his power: as, the ignorance of a law which has not yet been promulgated.

4. *Ignorance of law* consists in the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know. The law forbids any one to marry a woman whose husband is living. If any man, then, imagined he could marry such a woman, he would be ignorant of the law; and if he married her he would commit an error as to a matter of law. How far a party is bound to fulfil a promise to pay, upon a supposed liability, and in ignorance of the law, see 12 East, 38; 2 Jac. & W. Ch. 263; 5 Taunt. 143; 3 Barnew. & C. 280; 1 Johns. Ch. N. Y. 512, 516; 6 *id.* 166; 9 Cow. N. Y. 674; 4 Mass. 342; 7 *id.* 452, 488; 9 Pick. Mass. 112; 1 Binn. Penn. 27. And whether he can be relieved from a contract entered into in ignorance or mistake of the law, 1 Atk. Ch. 591; 1 Ves. & B. Ch. Ir. 23, 30; 1 Chanc. Cas. 84; 2 Vern. Ch. 243; 1 Johns. Ch. N. Y. 512; 2 *id.* 51; 6 *id.* 169; 1 Pet. 1; 8 Wheat. 174; 2 Mas. C. C. 244, 342; MISTAKE.

5. *Non-essential* or accidental ignorance is that which has not of itself any necessary connection with the business in question, and which is not the true consideration for entering into the contract: as, if a man should marry a woman whom he believed to be rich, and she proved to be poor, this fact would not be essential, and the marriage would therefore be good.

Voluntary ignorance exists when a party might, by taking reasonable pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated: a neglect to become acquainted with them is, therefore, voluntary ignorance. Doctor & Stud. 1, 46; Plowd. 343.

See, generally, Eden, Inf. 7; 1 Fonblanque, Eq. b. 1, c. 2, § 7, n. *v*; 1 Story. Eq. Jur. § 137, note 1; Merlin, Répert.; Savigny, Droit Rom. App. VIII. 387–444; Doctor & Stud. Dial. 1, c. 26, p. 92, Dial. 2, c. 46, p. 303; 1 Campb. 134; 5 Taunt. 379; 2 East, 469; 12 *id.* 38; 1 Brown, Ch. 92; 14 Johns. N. Y. 501; 1 Pet. 1; 8 Wheat. 174.

IGNORE. To be ignorant of. Webster, Dict. To pass over as if not in existence. A

grand jury are said to ignore a bill when they do not find the evidence such as to induce them to make a presentment. Brande.

ILL FAME. A technical expression, which not only means bad character as generally understood, but applies to every person, whatever may be his conduct and character in life, who visits bawdy-houses, gaming-houses, and other places which are of ill fame. 1 Rog. N. Y. 67; 2 Hill, N. Y. 558; 17 Pick. Mass. 80; Ayliffe, Par. 276; 1 Hagg. Eccl. 720, 767; 1 Hagg. Cons. 302; 2 *id.* 24; 2 Greenleaf, Ev. § 44.

ILLEGAL. Contrary to law; unlawful.

ILLEGITIMATE. That which is contrary to law: it is usually applied to children born out of lawful wedlock.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied. *Nihil* set upon a debt is a mark for *illeviable*.

ILLICIT. What is unlawful; what is forbidden by the law.

This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the object is bound." The assured, having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned. 2 La. 337, 338. See INSURANCE; WARRANTY.

ILLICITE. Unlawfully.

This word has a technical meaning, and is requisite in an indictment where the act charged is unlawful: as, in the case of a riot. 2 Hawkins, Pl. Cr. 25, § 96.

ILLINOIS. One of the new states of the United States.

2. Civil government was organized under the jurisdiction of the United States, by the ordinance of the Continental congress, in 1787, being part of the Northwestern territory. In 1800 that territory was divided, and a territorial government was created in the Indiana territory, including this country. In 1809 the territory of Illinois was created, and continued under the same ordinance and the laws of the Indiana territory. For a fuller statement of the territorial history, see OHIO.

In 1818 Illinois formed a constitution, and was admitted into the Union on an equal footing with the original states, with the following boundaries, viz.: By the Ohio and Wabash rivers, from the mouth of the former to a point on the northwest bank of the latter where a line due north of Vincennes would strike said bank; thence north to the northwest corner of the state of Indiana; thence east with the line of said state to the middle of lake Michigan; thence north to latitude 42° 30′; thence west to the middle of the Mississippi river; thence down the middle of the stream to the mouth of the Ohio, with jurisdiction on the Ohio, Wabash, and Mississippi rivers with coterminous states. The state was admitted into the Union in 1818. In 1847 a convention met and formed a new constitution, which went into operation April 1, 1848.

Every white male citizen twenty-one years of age, resident one year next before any election, and every white male inhabitant of the same age, resident in the state March 6, 1848, has a right to vote in the district in which he lives. Soldiers, seamen, and marines stationed in the state are not included in the above enumeration of citizens; and the general assembly may by law exclude persons convicted of infamous crimes. No person is eligible to any office, civil or military, who is not a citizen of the United States, and who has not been one year a resident of the state. All votes must be by ballot. 3 Ill. 414.

The Legislative Power.

3. This is exercised by a senate and house of representatives, which together constitute the general assembly.

The *Senate* is composed of twenty-five members, elected by the people of the districts for the term of four years. A senator must be thirty years of age or more, a citizen of the United States, have been five years an inhabitant of the state, and one year of the county or district in which he is chosen, immediately preceding his election, if such county or district has been so long erected; but if not, then within the limits of the county or counties, district or districts, out of which the same was taken, unless he has been absent on the public business of the United States, or of this state, and must have paid a state or county tax.

The senators, at the first session, were divided into two classes, so that one-half are elected every two years.

The *House of Representatives* originally consisted of seventy-five members, with the provision that when the population of the state amounted to one million, five members should be added to the house, and five additional members for every five hundred thousand inhabitants thereafter, until the whole number of representatives should amount to one hundred; after which the number should neither be increased nor diminished; to be apportioned among the several counties according to the number of white inhabitants. The members are elected biennially, by the people, for the term of two years. Where several counties are thrown into one representative district, all the representatives for the district are to be elected on one ticket. A representative must have attained the age of twenty-five years; be a citizen of the United States, and have been three years an inhabitant of the state; have resided within the limits of the county or district in which he shall be chosen twelve months next preceding his election, if such county or district has been so long erected; but if not, then within the limits of the county or counties, district or districts, out of which the same has been taken, unless absent on public business of the United States or of this state; and must, moreover, have paid a state or county tax.

4. The general assembly holds biennial sessions, commencing on the first Monday in January.

The general assembly cannot grant divorces, authorize lotteries, revive any old bank-charter, pass a private or special law for the sale of land belonging to individuals, nor contract a debt exceeding fifty thousand dollars to meet casual deficits or failures in revenue; the moneys so borrowed shall be applied to the purposes for which they were obtained, or for repelling invasion, suppressing insurrection, or defending the state in war, for which the faith of the state shall be pledged. Laws for contracting any other debt must contain a provision to levy a tax, unless provided for by some other law, for the payment of the annual interest on such loan, and both laws shall be submitted to a vote of the people, and passed at the polls by a majority of those voting, after publishing the same three months, and shall be irrepealable.

The Executive Power.

5. The *Governor* is elected by the people on the Tuesday next after the first Monday in November, every fourth year, from 1848, for the term of four

years from the succeeding first of January. He must be a citizen of the United States, have attained the age of thirty-five years, and have been ten years a resident of the state and fourteen years a citizen of the United States. He may give information and recommend measures to the legislature, grant reprieves, commutations, and pardons, except in cases of treason and impeachment,—but in these cases he may suspend execution of the sentence until the meeting of the legislature,—require information from the officers of the executive department, and take care that the laws be faithfully executed, on extraordinary occasions, convene the general assembly by proclamation, be commander-in-chief of the army and navy of the state, except when they shall be called into the service of the United States, nominate and, by and with the consent and advice of the senate, appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointments are not otherwise provided for, and, in case of disagreement between the two houses with respect to the time of adjournment, adjourn the general assembly to such time as he thinks proper, provided it be not to a period beyond the constitutional meeting of the same. He has also the *veto* power.

A *Lieutenant-Governor* is chosen at the same time and for the same term as the governor. He is speaker of the senate by virtue of his office, may debate and vote in committee of the whole, give a casting vote at all times, and if the office of governor becomes vacant he becomes governor. He also exercises the duties of this office in case of temporary vacancy. The senate have power to elect a speaker *pro tempore*, who in like manner fills the office of speaker of the senate and lieutenant-governor, or of governor, in cases of vacancies by both the others.

The Judiciary Power.

6. The *supreme court* consists of three judges, elected by the people for a term of nine years, one in each of the three districts into which the state is divided for the purposes of this court. One term of the court is held annually in each division. The judges must be citizens of the United States, have resided in the state five years previous to their respective elections, and two years next preceding their election in the division, circuit, or county in which they are respectively elected, and not be less than thirty-five years of age at the time of their election. A judge is elected every third year in some one of the districts. Two judges constitute a quorum, and the oldest judge in commission is chief justice. The jurisdiction is appellate, except in case of writs of *habeas corpus*, mandamus, cases relating to the revenue, and a few others where original jurisdiction is given.

Circuit Courts.—At present (1864) the state is divided into twenty-eight circuits, for each of which a judge is elected by the qualified voters of the circuit to hold office for six years. Each judge holds two terms or more of court, in the district for which he is elected, each year. They must have the same qualifications as the judges of the supreme court, except that they are eligible at thirty years of age. These courts have original jurisdiction in all cases in law or in equity, and appellate jurisdiction from all inferior courts.

A *county court* is held in each county, consisting of one judge, elected by the people for the term of four years. Its jurisdiction extends to all probate and such other jurisdiction as the general assembly may confer in civil cases, and in such criminal cases as may be prescribed by law, where the punishment is by fine only, not exceeding one hundred dollars. The county judge, with such justices of the peace in each county as may be designated by law for the transaction of county business, to perform such other duty as the general assembly prescribes.

The general assembly may require that two justices, to be chosen by the qualified electors of each county, shall sit with the county judge in all cases. A clerk of the county court is elected quadrennially in each county, who is *ex-officio* recorder. The general assembly may, by law, make the clerk of the circuit court *ex-officio* recorder in lieu of the county clerk.

Justices of the peace are to be elected in sufficient number in such districts as the general assembly may direct, by the qualified electors thereof, for the term of four years, and until their successors shall have been elected and qualified.

Jurieprudence.

7. In 1807 the Indiana territory passed an act adopting the common law of England, all statutes or acts of the British parliament made in aid of the common law prior to the fourth year of the reign of King James the First, excepting stat. 43 Eliz. c. 6, sec. 2, 13 Eliz. c. 8, and 37 Hen. VIII. c. 9, and which are of a general nature and not local to that kingdom. This statute was adopted by the Illinois territory, and remains in full force in the state, and the common law and general statutes of England as adopted are still in force, except so far as modified or repealed since; and all the judicial decisions in the state are to be understood as made under this system of jurisprudence. 13 Ill. 609.

Taxation is to be made on a property basis, except in certain specified cases, including merchants, brokers, auctioneers. See 4 Ill. 130; 5 *id.* 304; 12 *id.* 140; 13 *id.* 557. No person can be imprisoned for debt, unless in case of fraud, or refusal to deliver up property for the benefit of creditors. 12 Ill. 61; 13 *id.* 664; 14 *id.* 415; 15 *id.* 361; 16 *id.* 347; 20 *id.* 291. The property of absconding, concealed, or non-resident debtors may be taken under a process provided for that purpose, as may effects and credits in the hands of third persons due such debtors. 11 Ill. 448; 12 *id.* 487; 13 *id.* 398; 14 *id.* 414; 19 *id.* 608; 20 *id.* 155; 21 *id.* 104; 22 *id.* 253. Property of a decedent is liable for his debts, except a small allowance to the widow. 12 Ill. 142; 17 *id.* 135; 18 *id.* 116; 19 *id.* 113. Conveyances of land in adverse possession are good. Scrolls answer for seals. After acquired, estates pass by grantor's deed.

Conveyances. The words "grant," "bargain," "sell," constitute a covenant that the grantor was seized of an indefeasible estate in fee-simple, free from incumbrances done or suffered from the grantor except the rents and services that may be reserved; also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words. A fee-simple shall be intended if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law. 3 Ill. 316, 373; 5 *id.* 117, 252, 465; 11 *id.* 486; 14 *id.* 304; 15 *id.* 135.

8. The real estate of the wife may be conveyed by her joining in the deed, and her acknowledgment before a proper officer, to whom she is known, or proved by a credible witness to be the same, who shall make her acquainted with, and explain to her the contents of, such deed, and examine her separately and apart from her husband, as to whether she executed the same voluntarily, freely, and without compulsion of the said husband, and if she so acknowledge its execution, and that she does not wish to retract, the officer shall grant a certificate to that effect upon the deed. 3 Ill. 307, 316, 334, 372, 553; 5 *id.* 11; 11 *id.* 321, 344, 402, 416; 12 *id.* 276; 14 *id.* 256; 15 *id.* 123, 329; 19 *id.* 395, 399. The same acts are necessary to bar her of her right of dower, both as to joining in the deed and the substance and form of acknowledgment. Deeds may be acknowledged or proved before any judge or justice of the supreme or district court of the

United States; any commissioner to take acknowledgment of deeds; any judge or justice of the supreme or circuit court of any of the United States or their territories; any clerk of a court of record, mayor of a city, or notary public; but when made before a clerk, mayor, or notary public it shall be certified by such officer under his seal of office. The officer taking such acknowledgment must certify that the person offering to make such acknowledgment is personally known to him to be the real person whose name is subscribed to the deed as having executed the same, or that he was proved to be such by credible witness.

Wills must be in writing, signed by the testator, or by some one in his presence and by his direction, and attested by two credible witnesses. *Interest* is to be at six per cent.; but any other rate up to ten may be specified for. The creditor can recover only the principal if a greater rate is specified for. Contracts made in Illinois, payable in another state, are governed by Illinois rules as to interest. 9 Ill. 521; 17 *id.* 321.

A homestead is exempted from forced sale to the amount of one thousand dollars in value. See 21 Ill. 40, 178.

ILLITERATE. Unacquainted with letters.

2. When an ignorant man, unable to read, signs a deed or agreement, or makes his mark instead of a signature, and he alleges, and can prove, that it was falsely read to him, he is not bound by it, in consequence of the fraud. And the same effect would result if the deed or agreement were falsely read to a blind man who could have read before he lost his sight, or to a foreigner who did not understand the language. For a plea of "laymen and unlettered," see 4 Rawle, Penn. 85, 94, 95.

3. To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat. 1 Yerg. Tenn. 76. See, generally, 2 Nelson, Abr. 946; 2 Coke, 3; 11 *id.* 28; F. Moore, 148.

ILLUSION. A species of mania, in which the sensibility of the nervous system is altered, excited, weakened, or perverted.

The patient is deceived by the false appearance of things, and his reason is not sufficiently active and powerful to correct the error; and this last particular is what distinguishes the sane from the insane. Illusions are not unfrequent in a state of health, but reason corrects the errors and dissipates them. A square tower seen from a distance may appear round, but on approaching it the error is corrected. A distant mountain may be taken for a cloud, but as we approach we discover the truth. To a person in the cabin of a vessel under sail, the shore appears to move; but reflection and a closer examination soon destroy this illusion. An insane individual is mistaken on the qualities, connections, and causes of the impressions he actually receives, and he forms wrong judgments as to his internal and external sensations; and his reason does not correct the error. 1 Beck, Med. Jur. 538; Esquirol, Maladies Mentales, prém. partie, iii., tome 1, p. 202; Dict. des Sciences Médicales, *Hallucination*, tome 20, p. 64. See HALLUCINATION.

ILLUSORY APPOINTMENT. Such an appointment or disposition of property under a power as is merely nominal and not substantial.

2. Illusory appointments are void in equity, Sugden, Pow. 489; 1 Vern. Ch. 67; 1 Term, 438, note; 4 Ves. Ch. 785; 16 *id.* 26; 1 Taunt. 289, but not at law. And see, also, 4 Kent, Comm. 342; 5 Fla. 52; 2 Stockt. Ch. N. J. 164.

IMAGINE. In English Law. In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence there must, however, be an overt act,—the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. Barrington, Stat. 243. See FICTION.

IMBECILITY. In Medical Jurisprudence. A form of insanity consisting in mental deficiency, either congenital or resulting from an obstacle to the development of the faculties, supervening in infancy.

2. Generally, it is manifested both in the intellectual and moral faculties; but occasionally it is limited to the latter, the former being but little, if at all, below the ordinary standard. Hence it is distinguished into intellectual and moral. In the former there are seldom any of the repulsive features of idiocy, the head, face, limbs, movements, being scarcely distinguishable, at first sight, from those of the race at large. The senses are not manifestly deficient, nor the power of articulation; though the use of language may be very limited. The perceptive faculties exhibit some activity; and thus the more obvious qualities of things are observed and remembered. Simple industrial operations are well performed, and, generally, whatever requires but little intelligence is readily accomplished. Occasionally a solitary faculty is prominently, even wonderfully, developed,—the person excelling, for instance, in music, in arithmetical calculations, or mechanical skill, far beyond the ordinary measure. For any process of reasoning, or any general observation or abstract ideas, imbeciles are totally incompetent. Of law, justice, morality, property, they have but a very imperfect notion. Some of the affective faculties are usually active, particularly those which lead to evil habits, thieving, incendiarism, drunkenness, homicide, assaults on women.

The kind of mental defect here mentioned is universal in imbecility, but it exists in different degrees in different individuals, some being hardly distinguishable, at first sight, from ordinary men of feeble endowments, while others encroach upon the line which separates them from idiocy.

3. The various grades of imbecility, however interesting in a philosophical point of view, are not very closely considered by courts. They are governed in criminal cases solely by their tests of responsibility, and in civil cases by the amount of capacity, in connection with the act in question, or the abstract question of soundness or unsoundness.

4. Touching the question of responsibility, the law makes no distinction between imbecility and insanity. See 1 Carr. & K. 129.

In civil cases, the effect of imbecility is differently estimated. In cases involving the validity of the contracts of imbecile persons, courts have declined to gauge the measure of their intellects, the only question with them being one of soundness or unsoundness, and "no distinction being made between important and common affairs, large or small property." 4 Dane, Abr. 561. See 4 Cow. N. Y. 207. Courts of equity, also, have declined

to invalidate the contracts of imbeciles, except on the ground of fraud. 1 Story, Eq. Jur. § 238. Of late years, however, courts have been governed by other considerations. If the contract were for necessaries, or showed no mark of fraud or unfair advantage, or if the other party, acting in good faith and ignorant of the other's mental infirmity, cannot be put into *statu quo*, the contract has been held to be valid. Chitty, Contr. 112; Story, Contr. § 27; 4 Exch. 17.

5. The same principles have governed the courts in cases involving the validity of the marriage contract. If suitable to the condition and circumstances of the party, and manifestly tending to his benefit, it has been confirmed, notwithstanding a considerable degree of incompetency. If, on the other hand, it has been procured by improper influences, manifestly for the advantage of the other party, it has been invalidated. 1 Hagg. 355; Ray, Med. Jur. 100. The law has always showed more favor to the wills of imbeciles than to their contracts. "If a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were, betwixt a wise man and a fool,—yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be called *grossum caput*, a dull pate, or a dunce,—such a one is not prohibited to make a testament." Swinburne, Wills, part 2, s. 4. Whether the testament be established or not, depends upon the circumstances of the case; and the English ecclesiastical courts have always assumed a great deal of liberty in their construction of these circumstances. The general principle is that if the will exhibits a wise and prudent disposition of property, and is unquestionably the will of the testator, and not another's, it should be established, in the face of no inconsiderable deficiency. 1 Hagg. 384. Very different views prevailed in a celebrated case in New York. 26 Wend. N. Y. 256. The mental capacity must be equal to the act; and if that fact be established, and no unfair advantage have been taken of the mental deficiency, the will, the marriage, the contract, or whatever it may be, is held to be valid.

6. The term moral imbecility is applied to a class of persons who, without any considerable, or even appreciable, deficiency of intellect, seem to have never been endowed with the higher moral sentiments. They are unable to appreciate fully the distinctions of right and wrong, and, according to their several opportunities and tastes, they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. While young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rickety, or epileptic, or, if not obviously suffering from these diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous, and this morbid peculiarity has become, unquestionably, by hereditary transmission, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment; for though they may recognize the distinctions of right and wrong in the abstract, yet they have been denied by nature those faculties which prompt men more happily endowed to pursue the one and avoid the other. In practice, however, they have been regarded with no favor by the courts. Ray, Med. Jur. 112–130. See INSANITY.

IMMATERIAL AVERMENT. **In Pleading.** A statement of unnecessary particulars in connection with, and as descriptive of, what is material. Gould, Plead. c. 3, § 186. Such averments must, however, be proved as laid, it is said, Dougl. 665; though not if they may be struck out without striking out at the same time the cause of action, and when there is no variance. Gould, Pl. c. 3, § 188. See 1 Chitty, Plead. 282.

IMMATERIAL ISSUE. **In Pleading.** An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action. For example, if in an action of debt on bond, conditioned for the payment of ten dollars and fifty cents at a certain day, the defendant pleads the payment of ten dollars according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon the payment, it is manifest that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled to maintain his action, or not; for in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and the question of payment of a part is a question quite beside the legal merits. Hob. 113; 5 Taunt. 386; Croke Jac. 585; 2 Wms. Saund. 319 *b*. A repleader will be ordered when an immaterial issue is reached, either before or after verdict. 2 Wms. Saund. 319 *b*, note; 1 Rolle, Abr. 86; Croke Jac. 585. See REPLEADER.

IMMEMORIAL POSSESSION. **In Louisiana.** Possession of which no man living has seen the beginning, and the existence of which he has learned from his elders. La. Civ. Code, art. 762; 2 Mart. La. 214; 7 La. 46; 3 Toullier, p. 410; Poth. Contr. de Société, n. 244; 3 Bouvier, Inst. n. 3069, note.

IMMIGRATION. The removing into one place from another. It differs from emigration, which is the moving from one place into another.

IMMORAL CONSIDERATION. One contrary to good morals, and therefore invalid. Contracts for an immoral consideration are generally void. An agreement in consideration of future illicit cohabitation between the parties, 3 Burr. 1568; 1 Esp. 13; 1 Bos. & P. 340, 341, an agreement for the value of libellous and immoral pictures, 4 Esp. 97, or for printing a libel, 2 Stark. 107, or for an immoral wager, Chitty, Contr. 156, cannot, therefore, be enforced. For whatever arises from an immoral or illegal consideration is void: *quid turpi ex causâ promissum est non valet.* Inst. 3. 20. 24.

It is a general rule that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution. 4 Ohio, 419; 4 Johns. N. Y. 419; 11 *id.* 388; 12 *id.* 306; 19 *id.* 341; 3 Cow. N. Y. 213; 2 Wils. 341.

IMMORALITY. That which is *contra bonos mores.*

In England, it is not punishable, in some cases, at the common law, on account of the ecclesiastical jurisdictions: *e.g.* adultery. But except in cases belonging to the ecclesiastical courts the court of king's bench is the *custos morum*, and may punish *delicto contra bonos mores.* 3 Burr. 1438; 1 W. Blackst. 94; 2 Strange, 788.

IMMOVABLES. In Civil Law. Property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed. Pothier, des Choses, § 1; Clef des Lois Rom. *Immeubles.*

IMMUNITY. An exemption from serving in an office, or performing duties which the law generally requires other citizens to perform. See Dig. lib. 50. t. 6; 1 Chitty, Crim. Law, 821; 4 Harr. & M'H. Md. 341.

IMPAIRING THE OBLIGATION OF CONTRACTS. The constitution of the United States, art. 1, § 10, cl. 1, contains this provision, among others: "No state shall pass . . . . any bill of attainder, *ex post facto* law, or *law impairing the obligation of contracts.*"

2. This article of the constitution only forbids the *states* to pass any law impairing the obligation of contracts; but there is nothing in that instrument which prohibits *congress* from passing such a law: on the contrary, it would seem to have been impliedly reserved to congress; for in the prohibitions of general application as well to the United States as to the states, art. 1, § 9, cl. 3, it is declared that "no bill of attainder or *ex post facto* law shall be passed." 1 Pet. 322. The omission of the prohibition in the one case, and the expression of it in the other, would imply that such power remained in congress; though the exercise of it is said to be contrary to the first principles of the social compact, and to every principle of sound legislation. Federalist, no. 44. This provision is not applicable to laws enacted by the states before the first Wednesday of March, A.D. 1787. 5 Wheat. 420.

3. All *contracts*, whether executed or executory, express or implied, are within the provisions of this clause. 6 Cranch, 135; 7 *id.* 164. A state law annulling private conveyances is within the prohibition, as are laws repealing grants and corporate franchises. 3 Hill, N. Y. 531; 1 Pick. Mass. 224; 2 Yerg. Tenn. 534; 13 Miss. 112; 9 Cranch, 43, 292; 2 Pet. 657; 4 Wheat. 656; 6 How. 301.

With regard to grants, it is also necessarily the case that this clause of the constitution was not intended to control the exercise of the ordinary functions of government. It was not intended to apply to public property, to the discharge of public duties, to the exercise or possession of public rights, nor to any changes or qualifications in these which the legislature of a state may at any time deem expedient. 1 Ohio St. 603, 609, 657; 4 Ohio, 427; 5 Me. 339; 5 Ill. 486; 13 *id.* 27; 11 Ired. No. C. 558; 13 *id.* 175; 1 Green, N. J. 553; 1 Dougl. Mich. 225; 17 Conn. 79; 13 Wend. N. Y. 325; 10 Barb. N. Y. 223; 2 Den. N. Y. 272; 2 Sandf. N. Y. 355; 6 N. Y. 285; 6 Serg. & R. Penn. 322; 5 Watts & S. Penn. 416; 4 Penn. St. 51; 13 *id.* 133; 1 Harr. & J. Md. 236; 6 How. 548; 10 *id.* 402; 1 Sumn. C. C. 277. See 4 Wheat. 427; 19 Penn. St. 258; 4 N. Y. 419; 3 How. 133.

In general, only contracts are embraced in this provision which respect property, or some object of value, and confer rights which can be asserted in a court of justice.

4. The grant of exclusive privileges by the state governments are all subject to the exercise of the right of eminent domain by the state.

The legislature has full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the state, and to make all the provisions necessary to the exercise of this right or power, but no authority whatever to give this away, or take it out of the people, directly or indirectly. 6 How. 532; 13 *id.* 71; 20 Johns. N. Y. 75; 3 Paige, Ch. N. Y. 72, 73; 17 Conn. 61; 23 Pick. Mass. 360; 15 Vt. 745; 16 *id.* 446; 21 *id.* 591; 8 N. H. 398; 10 *id.* 369; 11 *id.* 19; 8 Dan. Ky. 289; 9 Ga. 517. See EMINENT DOMAIN; FRANCHISE.

The power of one legislature to exempt altogether from taxation certain lands or property, and in this way to bind subsequent legislatures and take from the people one of their sovereign rights, is not yet definitively settled; though the supreme court of the United States is disposed now to hold that particular property may be exempted, where a consideration has been given; but the abandonment of this taxing power is not to be presumed where the deliberate purpose of the state does not appear. 4 Pet. 514; 3 How. 133; 10 *id.* 376; 4 Mass. 305; 12 *id.* 252; 25 Wend. N. Y. 486; 1 Hill, N. Y. 616; 2 *id.* 353; 10 N. H. 138; 11 *id.* 24; 5 Gill, Md. 231; 13 Vt. 525; 15 *id.* 751; 10 Penn. St. 442; 1 Ohio St. 563, 591, 603; 7 Cranch,

164; 6 Conn. 223; 7 *id.* 335; 10 *id.* 495; 11 *id.* 251.

5. In relation to marriage and divorce, upon which it is now settled that this clause may act. A legislature, it would seem, may pass a law for divorces, limiting its effect to marriages which shall take place after the law is enacted, or limiting its effect as to existing marriages to transactions which occur subsequent to its passage. 10 N. H. 380; 3 Johns. Cas. N. Y. 73. But any law creating new grounds or new facilities for the divorce of parties married before the law was passed, would impair the obligation of the marriage contract, and therefore be void.

It is said, however, that divorce may be granted for what is absolutely a breach of the marriage contract; for when the contract is broken no obligation remains to be impaired. 4 Wheat. 518. See 7 Dan. Ky. 184, where it is held that marriage is so much more than a mere contract as not to be within the scope of this clause of the constitution. 5 Barb. N. Y. 474; 2 N. H. 268.

6. In relation to bankruptcy and insolvency. The constitution, art. 1, § 8, cl. 4, gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not exclusive; because the several states may also make distinct bankrupt laws, —though they have generally been called *insolvency* laws,—which will only be superseded when congress chooses to exercise its power by passing a bankruptcy law. 4 Wheat. 122; 12 *id.* 213; 13 Mass. 1. See 3 Wash. C. C. 313.

Exemption from *arrest* affects only remedy; an exemption from attachment of the property, or a subjection of it to a stay law or appraisement law, impairs the obligation of the contract. Such a statute can only be enforced as to contracts made subsequently to the law. 1 How. 311; 2 *id.* 608; 8 Wheat. 1, 75.

It is admitted that a state may make partial exemptions of property, as of furniture, food, apparel, or even a homestead. 1 Den. N. Y. 128; 3 *id.* 594; 1 N. Y. 129; 6 Barb. N. Y. 327; 2 Dougl. Mich. 38; 4 Watts & S. Penn. 218; 4 Miss. 50; 17 Miss. 310.

Nothing in the constitution prevents a state from passing a valid law to divest rights which have been vested by law in an individual, because this was not a contract, 3 Dall. 386; 2 Pet. 412; 8 *id.* 89; 5 Barb. N. Y. 48; 9 Gill, Md. 299; 1 Md. Ch. Dec. 66, unless such law operates as a direct grant.

7. Insolvent laws are valid which are in the nature of a *cessio bonorum*, leaving the debt still existing, or which provide for the discharge of the debt, but refer only to subsequent contracts, or which merely modify or affect the remedy, as by exempting the person from arrest, but still leave means of enforcing. But a law exempting the person from arrest and the goods from attachment on mesne process or execution would be void, as against the constitution of the United States. 6 Pet. 348; 6 How. 328; 16 Johns. N. Y. 233; 7 Johns. Ch. N. Y. 297; 6 Pick. Mass. 440; 9 Conn. 314; 1 Ohio, 236; 9 Barb. N. Y. 382; 4 Gilm. Va. 221; 13 B. Monr. Ky. 285. The state insolvent laws in practice operate in favor of the citizens of the particular state only, as to other citizens of the same state, and not against citizens of other states, unless they have assented to the relief or discharge of the debtor expressly, or by some equivalent act, as by becoming a party to the process against him under the law, taking a dividend, and the like. 1 Gall. C. C. 371; 3 Mas. C. C. 88; 5 Mass. 509; 10 *id.* 337; 13 *id.* 18, 19; 2 Blackf. Ind. 366; 7 Cush. Mass. 15; 3 Pet. 41.

Some states refuse to aid a citizen of another state in enforcing a debt against a citizen of their own state, when the debt was discharged by their insolvent law. In such cases the creditor must resort to the court of the United States within the state. 1 Gall. C. C. 168; 8 Pick. Mass. 194; 2 Blackf. Ind. 394; 1 Baldw. C. C. 296; 9 N. H. 478. See INSOLVENT LAWS.

8. The law of place acts upon a contract, and governs its construction, validity, and obligation, but constitutes no part of it. The law explains the stipulations of parties, but never supersedes or varies them.

This is very different from supposing that every law applicable to the subject-matter, as statutes of limitation and insolvency, enters into and becomes a part of the contract. This can neither be drawn from the terms of the contract, nor presumed to be contemplated by the parties *ex contractu*.

There is a broad distinction taken as to the obligation of a contract and the remedy upon it. The abolition of all remedies by a law operating in *præsenti* is, of course, an impairing of the obligation of the contract. But it is admitted that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, and bar suits not brought within such times as may be prescribed. A reasonable time within which rights are to be enforced must be given by laws which bar certain suits. 3 Pet. 290; 1 How. 311; 2 *id.* 608; 2 Gall. C. C. 141; 8 Mass. 430; 1 Blackf. Ind. 36; 2 Me. 293; 14 *id.* 344; 7 Ga. 163; 21 Miss. 395; 1 Hill, So. C. 328; 7 B. Monr. Ky. 162; 9 Barb. N. Y. 489.

9. The meaning of obligation is important with regard to the distinction taken between the laws existing at the time the contract is entered into and those which are enacted afterwards. The former are said to have been in contemplation of the parties, and so far entered into their contract. The latter are said to impair, provided they affect the contract at all. See cases *supra*.

The weight of authority is that this clause of the constitution, like that which relates to the regulation of commerce by the congress of the United States, does not limit the power of a state to enact general police regulations for the preservation of public health and morals. 8 How. 163; 1 Ohio St. 15; 12 Pick.

Mass. 194; 7 Cow. N. Y. 349, 585; 24 Am. Jur. 279, 280. See 8 Mo. 607, 697; 9 *id.* 389; 3 Harr. Del. 442; 4 *id.* 427; 5 How. 504; 7 *id.* 283; 11 Pet. 102. See, generally, Story, Const. §§ 1368–1391; Sergeant, Const. Law, 356; Rawle, Const.; Dane, Abr. Index; 10 Am. Jur. 273–297; 8 Watts & S. Penn. 219 2 Penn. St. 22; 16 Miss. 9; 3 Rich. So. C. 389; 8 Wheat. 1; 8 Ark. 150; 4 Fla. 23; 4 La. Ann. 94; 2 Dougl. Mich. 197; 10 N. Y. 281; 2 Gray, Mass. 43; 3 *id.* 551; 3 Mart. La. 588; 4 *id.* 292; 26 Me. 191; 2 Parsons, Contr. 509.

IMPANEL. In Practice. To write the names of jurors on a *panel* (*q. v.*), which is a schedule or list, in England of parchment: this is done by the sheriff, or other officer lawfully authorized.

In American practice, the word is used of a jury drawn for trial of a particular cause by the clerk, as well as of the general list of jurors returned by the sheriff. Graham, Pract. 275. See 1 Archbold, Pract. 365; 3 Sharswood, Blackst. Comm. 354.

IMPARLANCE (from Fr. *parler*, to speak).

In Pleading and Practice. Time given by the court to either party to answer the pleading of his opponent: as, either to plead, reply, rejoin, etc.

It is said to be nothing else but the continuance of the cause till a further day. Bacon, Abr. *Pleas* (C). In this sense imparlances are no longer allowed in English practice. 3 Chitty, Gen. Pract. 700.

Time to plead. This is the common signification of the word. 2 Wms. Saund. 1, n. 2; 2 Show. 310; Barnes, 346; Lawes, Civ. Pl. 93. In this sense imparlances are not recognized in American law, the common practice being for the defendant to enter an appearance, when the cause stands continued, until a fixed time has elapsed within which he may file his plea. See CONTINUANCE.

A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception: so that after such an imparlance the defendant cannot object to the jurisdiction of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another.

A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender, and that he was always ready to pay, because by craving time he admits that he is not ready, and so falsifies his plea. Tidd, Pract. 418, 419.

A special imparlance reserves to the defendant all exception to the writ, bill, or count; and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court.

See Comyns, Dig. *Abatement* (I) 19, 20, 21), *Pleader* (D); 1 Chitty, Plead. 420; 1 Sellon, Pract. 265; Bacon, Abr. *Pleas* (C).

IMPEACHMENT. A written accusation by the house of representatives of the United States to the senate of the United States against an officer.

2. The constitution declares that the house of representatives shall have the sole power of impeachment, art. 1, s. 2, cl. 5, and that the senate shall have the sole power to try all impeachments. Art. 1, s. 3, cl. 6.

3. The persons liable to impeachment are the president, vice-president, and all civil officers of the United States. Art. 2, s. 4. A question arose upon an impeachment before the senate, in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution; and it was decided by the senate, by a vote of fourteen against eleven, that he was not. Senate Jour. Jan. 10, 1799; Story, Const. § 791; Rawle, Const. 213, 214; Sergeant, Const. Law, 376.

4. The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors. Art. 2, s. 4. The constitution defines the crime of treason. Art. 3, s. 3. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are. Story, Const. § 795.

5. The mode of proceeding in the institution and trial of impeachments is as follows. When a person who may be legally impeached has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges and recommend that he be impeached. When the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. The house then agree upon the articles of impeachment, and they are presented to the senate by a committee appointed by the house to prosecute the impeachment. The senate then issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and a return is made of it to the senate under oath. On the return-day of the process, the senate resolves itself into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer,

and either appears or does not appear. If he does not appear, his default is recorded, and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present. Const. art. 1, s. 2, cl. 6. See "Chase's Trial" and "Trial of Judge Peck;" and also proceedings against Judge Humphreys, June 26, 1862, Congress. Globe, pt. 4, 2d sess., 32d Congress, pp. 2942–2953.

6. When the president is tried, the chief justice shall preside. The judgment, in cases of impeachment, shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Proceedings on impeachments under the state constitutions are somewhat similar. See COURTS OF THE UNITED STATES.

In Evidence. An allegation, supported by proof, that a witness who has been examined is unworthy of credit.

Every witness is liable to be impeached as to his character for truth; and, if his general character is good, he is presumed at all times to be ready to support it. 3 Bouvier, Inst. n. 3224 *et seq.*

IMPEACHMENT OF WASTE. A restraint from committing waste upon lands or tenements; or, a demand of compensation for waste done by a tenant who has but a particular estate in the land granted, and, therefore, no right to commit waste.

All tenants for life or any less estate are liable to be impeached for waste, unless they hold *without impeachment of waste:* in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done. 11 Coke, 82.

IMPEDIMENTO. In Spanish Law. A prohibition to contract marriage, established by law between certain persons.

2. The disabilities arising from this cause are twofold, viz.:—

Impedimento Dirimente.—Such disabilities as render the marriage null, although contracted with the usual legal solemnities. The disabilities arising from this source are enumerated in the following Latin verses:—

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Raptave sit mulier, nec parti reddita tutæ,
Hæc facienda vetant connubia, facta retractant."

Among these impediments, some are *absolute*, others *relative*. The former cannot be cured, and render the marriage radically null; others may be removed by previous dispensation.

3. In Spain, marriage is regarded in the twofold aspect of a civil and a religious contract. Hence the disabilities are of two kinds, viz.: those created by the local law and those imposed by the church.

In the earlier ages of the church, the emperors prohibited certain marriages: thus, Theodosius the Great forbade marriages between cousins-german; Justinian, between spiritual relations; Valentinian, Valens, Theodosius, and Arcadius, between persons of different religions.

The Catholic church adopted and extended the disabilities thus created, and by the third canon at the twenty-fourth session of the Council of Trent, the church reserved to itself the power of dispensation. As the Council of Trent did not determine, being divided, who had the power of granting dispensation, it is accorded in Italy to the pope, and in France and Spain, with few exceptions, to the bishops. The dispositions of the Council of Trent being in force in Spain (see Schmidt, Civ. Law of Spain, p. 6, note *a*), the ecclesiastical authority is alone invested with this power in Spain.

For the cases in which it may be granted, see Schmidt, Civ. Law, c. 2, s. 14.

4. *Impedimento, Impediente,* or *Prohibitivo.*—Such disabilities as impede the contracting of a marriage, but do not annul it when contracted.

Anciently, the impediments expressed in the following Latin verses were of this nature:—

"Incestus, raptus, sponsalia, mors muliebris,
Susceptus propriæ sobolis, mors presbyterialis,
Vel si pœniteat solemniter, aut monialem
Accipiat quisquam, votum simplex, catechismus,
Ecclesiæ vetitum, nec non tempus feriarum,
Impediunt fieri, permittunt facta temeri."

For the effects of these impediments, see Escriche, Dict. Raz. *Impedimente Prohibitivo.*

IMPEDIMENTS. Legal hindrances to making contracts. Some of these impediments are minority, want of reason, coverture, and the like. See CONTRACT; INCAPACITY.

In Civil Law. Bars to marriage.

Absolute impediments are those which prevent the person subject to them from marrying at all, without either the nullity of marriage or its being punishable.

Dirimant impediments are those which render a marriage void: as, where one of the contracting parties is already married to another person.

Prohibitive impediments are those which do not render the marriage null, but subject the parties to a punishment.

Relative impediments are those which regard only certain persons with regard to each other: as, the marriage of a brother to a sister.

IMPENSÆ (Lat.). **In Civil Law.** Expense; outlay. Divided into *necessariæ*, for necessity, *utiles*, for use, and *voluptuariæ*, for luxury. Dig. 79. 6. 14; Voc. Jur.

IMPERFECT OBLIGATIONS. Those which are not, in view of the law, of binding force.

IMPERIUM. The right to command, which includes the right to employ the force of the state to enforce the laws: this is one of the principal attributes of the power of the executive. 1 Toullier, n. 58.

IMPERTINENT (Lat. *in*, not, *pertinens*, pertaining or relating to).

In Pleading. IN EQUITY. A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular stage of the suit. 1 Sumn. C. C. 506; 3 Stor. C. C. 13; 1 Paige, Ch. N. Y. 555; 5 Blackf. Ind. 439. Impertinent matter is not necessarily scandalous; but all scandalous matter is impertinent.

2. The rule against admitting impertinent

matter is designed to prevent oppression, not to become oppressive. 1 Turn. & R. 489; 6 Beav. Rolls, 444; 27 N. H. 38. No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted. 3 Paige, Ch. N. Y. 606; 5 *id.* 523; 12 Beav. Rolls, 44; 10 Sim. Ch. 345; 13 *id.* 583.

A pleading may be referred to a master to have impertinent matter expunged at the cost of the offending party, Story, Eq. Plead. § 266; 19 Me. 214; 4 Hen. & M. Va. 414; 2 Hayw. No. C. 407; but a bill may not be after the defendant has answered. Cooper, Eq. Plead. 19. See, generally, Gresley, Eq. Ev.; Story, Eq. Plead.; 1 Johns. Ch. N. Y. 103; 11 Price, Exch. 111; 1 Russ. & M. 28.

At Law. A term applied to matters not necessary to constitute the cause of action or ground of defence. Cowp. 683; 5 East, 275; 2 Mass. 283. It constitutes surplusage, which see.

In Practice. A term applied to evidence of facts which do not belong to the matter in question. That which is immaterial is, in general, impertinent, and that which is material is not, in general, impertinent. 1 M'Clell. & Y. Ch. 337. Impertinent matter in the interrogatories to witnesses or their answers, in equity, will be expunged after reference to a master at the cost of the offending party. 2 Younge & C. Ch. 445.

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes it signifies a pre-obtaining of church benefices in England from the church of Rome which belonged to the gift of the king or other lay patrons.

IMPLEAD. In Practice. To sue or prosecute by due course of law. 9 Watts, Penn. 47.

IMPLEMENTS (Lat. *impleo*, to fill). Such things as are used or *employed* for a trade, or furniture of a house. 11 Metc. Mass. 82.

Whatever may supply wants: particularly applied to tools, utensils, vessels, instruments of labor: as, the *implements* of trade or of husbandry. Webster, Dict. Things of necessary use in any trade or mystery, without which the work cannot be performed; also, the furniture of a house, as all household goods and implements, such as tables, presses, cupboards, etc. Termes de la Ley; Jacobs; Tomlin; Williams. This definition is quoted and approved by *Wilde*, J., in 11 Metc. Mass. 79, where he holds implement and apparatus to be synonymous, and not applicable to living things.

IMPLICATA (Lat.). Small adventures for which the freight contracted for is to be received although the cargo may be lost. Targa, c. 34; Emerigon, Mar. Loans, § 5.

IMPLICATION. An inference of something not directly declared, but arising from what is admitted or expressed. See Contract; Deed; Easement; Way; Will.

IMPORTATION. In Common Law. The act of bringing goods and merchandise into the United States from a foreign country. 5 Cranch, 368; 9 *id.* 104, 120; 2 Mann. & G. 155, note *a*.

To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. 1, s. 10, provides as follows: "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." Story, Const. §§ 1616–1625. Under this section it has been held that a state law imposing a license tax on importers of foreign liquors was unconstitutional. 12 Wheat. 419. See 5 How. 504–633; 7 *id.* 283; 12 *id.* 299; 11 Pet. 102.

IMPORTS. Goods or other property imported or brought into the country from foreign territory. Story, Const. § 949. See U. S. Const. art. 1, § 10; 7 How. 477.

IMPORTUNITY. Urgent solicitation, with troublesome frequency and pertinacity.

Wills and devises are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the devisor of the freedom of his will, the devise becomes fraudulent and void. Dane, Abr. c. 127, a. 14, s. 5, 6, 7; 2 Phill. Eccl. 551, 552.

IMPOSITIONS. Imposts, taxes, or contributions.

IMPOSTS. Taxes, duties, or impositions. A duty on imported goods or merchandise. Federalist, no. 30; Elliott, Deb. 289; Story, Const. § 949.

The constitution of the United States gives congress power "to lay and collect taxes, duties, excises, and imposts," and prohibits the states from laying "any imposts or duties on exports or imports" without the consent of congress. U. S. Const. art. 1, § 8, n. 1; art. 1, § 10, n. 2. See Bacon, Abr. *Smuggling;* Davis, Imp.; Coke, 2d Inst. 62; Dig. 165, n.

IMPOTENCE. In Medical Jurisprudence. The incapacity for copulation or propagating the species. It has also been used synonymously with *sterility*.

2. Impotence may be considered as incurable, curable, accidental, or temporary. Absolute or incurable impotence is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Where this defect existed at the time of the marriage, and was incurable, by the ecclesiastical law and the law of several of the American states the marriage may be declared void *ab initio*. Comyns, Dig. *Baron and Feme* (C 3); Bacon, Abr. *Marriage, etc.* (E 3); 1 Blackstone, Comm. 440; 1 Beck, Med. Jur. 67; Code, 5. 17. 10; Poynter, Marr.

& Div. c. 8; 5 Paige, Ch. N. Y. 554; Merlin, Rep. *Impuissance.* But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce. 3 Phill. Eccl. 147; 1 Eng. Eccl. 384. See 2 Phill. Eccl. 10; 3 *id.* 325; 1 Eng. Eccl. 408; 1 Chitty, Med. Jur. 377; Ryan, Med. Jur. 95–111; Bishop, Marr. & Div.; 1 Blackstone, Comm. 440; 1 Hagg. 725. See, as to the signs of impotence, 1 Briand, Méd. Leg. c. 2, art. 2, § 2, n. 1; Dictionnaire des Sciences médicales, art. *Impuissance;* and, generally, Trebuchet, Jur. de la Méd. 100–102; 1 State Tr. 315; 8 *id.* App. no. 1, p. 23; 3 Phill. 147; 1 Hagg. Eccl. 523; Foderé, Méd. Lég. § 237.

IMPRESCRIPTIBILITY. The state of being incapable of prescription.

A property which is held in trust is imprescriptible: that is, the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time, unless he claims an adverse right to it during the time required by law.

IMPRIMATUR (Lat.). A license or allowance to one to print.

At one time, before a book could be printed in England, it was requisite that a permission should be obtained: that permission was called an *imprimatur.* In some countries where the press is liable to censure, an *imprimatur* is required.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing-office, the art of printing, a print or impression.

IMPRIMIS (Lat.). In the first place. It is commonly used to denote the first clause in an instrument, especially in wills, *item* being used to denote the subsequent clauses. This is also its classical and literal meaning. Ainsworth, Dict. See Fleta, lib. 2, c. 54. *Imprimitus* and *imprimum* also occur. DuCange, Prec. Ch. 430; Cases *temp.* Talb. 110; 6 Madd. Ch. 31; Magna Cart. 9 Hen. III.; 2 Anc. Laws & Inst. of Eng. 506.

IMPRISONMENT. The restraint of a man's liberty. 2 Bishop, Crim. Law, § 669.

The restraint of a person contrary to his will. Coke, 2d Inst. 589; 1 Baldw. C. C. 239, 600.

It may be in a place made use of for purposes of imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 9 N. H. 491; 7 Humphr. Tenn. 43; 13 Ark. 43; 1 W. Blackst. 19; 7 Q. B. 742; 1 Russell, Crimes, Greaves ed. 753. A forcible detention in the street, or the touching of a person by a peace-officer by way of arrest, are also imprisonments. Bacon, Abr. *Trespass* (D 3); 1 Esp. 431, 526. See 7 Humphr. Tenn. 43. It has been decided that lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprisonment, 1 Chitty, Pract. 48; and the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party, to avoid it, next day attend at a police, 1 Esp. 431; 3 Bos. & P. 211; 1 Carr. & P. 153; and if, in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest. 6 Barnew. & C. 528; Dowl. & R. 233.

See, generally, Comyns, Dig. *Imprisonment;* 1 Chitty, Pract. 47; 3 Sharswood, Blackst. Comm. 127; 2 Bishop, Crim. Law, §§ 669 *et seq.;* 1 Russell, Crimes, Greaves ed. 753 *et seq.*

IMPROBATION. In Scotch Law. An act by which falsehood and forgery are proved. Erskine, Inst. 4. 119; Stair, Inst. 4. 20; Bell, Dict.

IMPROPRIATION. In Ecclesiastical Law. The act of employing the revenues of a church living to one's own use: it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict.

IMPROVE. To impeach as false or forged. To cultivate. 4 Cow. N. Y. 190.

In Scotch Law. To improve a lease means to grant a lease of unusual duration to encourage a tenant, when the soil is exhausted, etc. Bell, Dict.; Stair, Inst. p. 676, § 23.

IMPROVEMENT. An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.

As between the rightful owner of lands and an occupant who in good faith has put on improvements, the land *with its improvements* belongs to the rightful owner of the land, without compensation for the increased value at common law, 8 Wheat. 1; 1 Dan. Ky. 481; 3 Ohio St. 463; 4 McLean, C. C. 489; 5 Johns. N. Y. 272; 2 Paine, C. C. 74; though the rule is otherwise in equity, 3 Atk. Ch. 134; 3 Sneed, Tenn. 228; 1 Yerg. Tenn. 360; 24 Vt. 560; 2 Johns. Cas. N. Y. 441, and by statute in some of the states, 12 Mass. 314; 10 Cush. Mass. 451; 2 N. H. 115; 4 Vt. 37; 20 *id.* 614; 13 Ala. N. s. 31; 9 Me. 62; 13 Ohio, 308; 9 Ill. 87; 9 Ga. 133; 12 B. Monr. Ky. 195; 16 La. 423; 3 Cal. 69; 1 Zabr. N. J. 248; and their value may be offset to an action for mesne profits at common law. 2 Wash. C. C. 165; 4 Cow. N. Y. 168; 4 Dev. No. C. 95; 6 Humphr. Tenn. 324; 1 Story, C. C. 478; 2 Greene, Iowa, 151; 3 Iowa, 63.

In Patent Law. An addition of some useful thing to a machine, manufacture, or composition of matter.

The patent law of July 4, 1836, authorizes the granting of a patent for any new and useful improvement on any art, machine, manufacture, or composition of matter. Sec. 6. It is often very

difficult to say what is a new and useful improvement, the cases often approaching very near to each other. In the present improved state of machinery it is almost impracticable not to employ the same elements of motion, and, in some particulars, the same manner of operation, to produce any new effect. 1 Gall. C. C. 478; 2 *id.* 51. See 4 Barnew. & Ald. 540; 2 Kent, Comm. 370.

IMPUBER (Lat.). **In Civil Law.** One who is more than seven years old, or out of infancy, and who has not attained the age of puberty; that is, if a boy, till he has attained his full age of fourteen years, and if a girl, her full age of twelve years. Domat, Liv. Prél. t. 2, s. 2, n. 8.

IMPUTATION OF PAYMENT. In Civil Law. The application of a payment made by a debtor to his creditor.

The *debtor* may apply his payment as he pleases, with the exception that in case of a debt carrying interest it must be first applied to discharging the interest.

The *creditor* may apply the funds by informing the debtor at the time of payment.

The *law* imputes in the neglect of the parties to do so, and in favor of the debtor. It directs that imputation which would have been best for the debtor at the time of payment. Hence it applies the funds to obligations most burdensome to the debtor: *e.g.* to a mortgage rather than to a book-account, and to a debt which would render the debtor insolvent if unpaid, rather than to any less important one. If nothing else appears to control it, the rule of priority prevails.

In Louisiana the preceding civil law rules are in force. The statutory enactment, Civ. Code, art. 2159 *et seq.*, is a translation of the Code Napoléon, art. 1253–1256, slightly altered. See Pothier on Obligations, n. 528, trans. by Evans, and the notes. Payment is imputed first to the discharge of interest. 1 Mart. La. N. s. 571; 10 Rob. La. 51; 5 La. Ann. 738. But if the interest was not binding, being usurious, the payment must go to the principal. 2 La. Ann. 363; 5 *id.* 616. The law applies a payment to the most burdensome debt. 6 Mart. La. N. s. 28; 10 La. 357; 10 *id.* 1; 2 La. Ann. 405, 520. A creditor's receipt is an irrevocable imputation, except in cases of surprise or fraud. 2 La. Ann. 24; 3 *id.* 351, 810. See, also, late cases of imputation in 6 La. Ann. 774; 9 *id.* 455; 12 *id.* 20. The cases arise under the Civil Code, art. 2159–2162. See APPROPRIATION OF PAYMENTS.

IN ACTION. A thing is said to be *in action* when it is not in possession, and for its recovery, the possessor unwilling, an action is necessary. 2 Sharswood, Blackst. Comm. 396. See CHOSE IN ACTION.

IN ÆQUALI JURE (Lat.). In equal right. See MAXIMS.

IN ALIO LOCO. See CEPIT IN ALIO LOCO.

IN AUTRE DROIT (L. Fr.). In another's right. As representing another. An executor, administrator, or trustee sues *in autre droit.*

IN BLANK. Without restriction. Applied to indorsements on promissory notes where no indorsee is named.

IN CAPITA (Lat.). To or by the heads or polls. Thus, where persons succeed to estates *in capita*, they take each an equal share; so, where a challenge to a jury is *in capita*, it is to the polls, or to the jurors individually, as opposed to a challenge to the array. 3 Sharswood, Blackst. Comm. 361. *Per capita* is also used.

IN CAPITE (Lat.). In chief. A tenant *in capite* was one who held directly of the crown, 2 Sharswood, Blackst. Comm. 60, whether by knight's service or socage. But tenure *in capite* was of two kinds, general and special; the first from the king (*caput regni*), the second from a lord (*caput feudi*). A holding of an honor in king's lands, but not immediately of him, was yet a holding *in capite.* Kitchen, 127; Dy. 44; Fitzherbert, Nat. Brev. 5. Abolished by 12 Car. II. c. 24.

IN CHIEF. Principal; primary; directly obtained. A term applied to the evidence obtained from a witness upon his examination in court by the party producing him, in relation to the matter in issue at the trial. The examination so conducted for this purpose.

Evidence or examination *in chief* is to be distinguished from evidence given on *cross*-examination and from evidence given upon the *voir dire.*

Evidence *in chief* should be confined to such matters as the pleadings and the opening warrant; and a departure from this rule will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have been the assault in January; he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both. 1 Campb. 473. See, also, 6 Carr. & P. 73; 1 Mood. & R. 282.

This matter, however, is one of practice; and a great variety of rules exist in the different states of the United States, the leading object, however, being in all cases the same, —to prevent the plaintiff from introducing in evidence a different case from the one which he had prepared the defendant to expect from the pleadings.

IN COMMENDAM (Lat.). The state or condition of a church living which is void or vacant, and which is commended to the care of some one. In Louisiana there is a species of partnership called partnership *in commendam.* See COMMENDAM.

IN CUSTODIA LEGIS (Lat.). In the custody of the law. In general, when things are *in custodia legis*, they cannot be distrained, nor otherwise interfered with by a private person, or by another officer acting under

authority of a different court or jurisdiction. 10 Pet. 400; 20 How. 583, and cases cited.

IN ESSE (Lat.). In being. In existence. An event which may happen is *in posse;* when it has happened, it is *in esse.* The term is often used of liens or estates. A child in its mother's womb is, for some purposes, regarded as *in esse.*

IN EXTREMIS (Lat.). At the very end. In the last moments.

IN FACIE ECCLESIÆ (Lat.). In the face or presence of the church. A marriage is said to be made *in facie ecclesiæ* when made in a consecrated church or chapel, or by a clerk in orders elsewhere; and one of these two things is necessary to a marriage in England in order to the wife's having dower, unless there be a dispensation or license. Bright, Husb. & Wife, pp. 370, 371, 391. But see 6 & 7 Will. IV. c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72. It was anciently the practice to marry at the church-door, and there make a verbal assignment of dower. These verbal assignments, to prevent fraud, were necessarily held valid only when made *in facie et ad ostium ecclesiæ.* See 2 Sharswood, Blackst. Comm. 103; Taylor, Gloss.

IN FACIENDO (Lat.). In doing. Story, Eq. Jur. § 1308.

IN FAVOREM LIBERTATIS (Lat.). In favor of liberty.

IN FAVOREM VITÆ (Lat.). In favor of life.

IN FIERI (Lat.). In being done; in process of completion. A thing is said to rest *in fieri* when it is not yet complete: *e.g.* the records of a court were anciently held to be *in fieri,* or incomplete, till they were recorded on parchment, but now till the giving of judgment, after which they can be amended only during the same term. 2 Barnew. & Ad. 791; 3 Sharswood, Blackst. Comm. 407. It is also used of contracts.

IN FORMA PAUPERIS (Lat.). In the character or form of a poor man.

When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis,* in the manner of a pauper; that is, he is allowed to have original writs and subpœnas gratis, and counsel assigned him without fee. 3 Blackstone, Comm. 400. See 3 Johns. Ch. N. Y. 65; 1 Paige, Ch. N. Y. 588; 3 *id.* 273; 5 *id.* 58; 2 Moll. 475.

IN FORO CONSCIENTIÆ (Lat.). Before the tribunal of conscience; conscientiously. The term is applied to moral obligations as distinct from the obligations which the law enforces. In the sale of property, for example, the concealment of facts by the vendee which may enhance the price is wrong *in foro conscientiæ,* but there is no legal obligation on the part of the vendee to disclose them, and the contract will be good if not vitiated by fraud. Pothier, Vent. part. 2, c. 2, n. 233; 2 Wheat. 185, note *c.*

IN FRAUDEM LEGIS (Lat.). In fraud of the law; contrary to law. Taylor, Gloss. Using process of law for a fraudulent purpose; and if a person gets an affidavit of service of declaration in ejectment, and thereupon gets judgment and turns the tenant out, when he has no manner of title in a house, he is liable as a felon, for he used the process of law *in fraudem legis.* 1 Ld. Raym. 276; Sid. 254.

An act done *in fraudem legis* cannot give right of action in the courts of the country whose laws are evaded. 1 Johns. N. Y. 433.

IN FULL LIFE. Neither physically nor civilly dead. The term life alone has also been taken in the same sense, as including natural and civil life: *e.g.* a lease made to a person *during life* is determined by a civil death, but if *during natural life* it would be otherwise. 2 Coke, 48. It is a translation of the French phrase *en plein vie.* Law Fr. & Lat. Dict.

IN GENERALI PASSAGIO (L. Lat.). In the general passage; *passagium* being a journey, or, more properly, a voyage, and especially when used alone or with the adjectives *magnum, generale,* etc.,—the journey to Jerusalem of a crusader, especially of a king. 36 Hen. III.; 3 Prynne, Collect. 767; DuCange.

In generali passagio was an excuse for non-appearance in a suit, which put off the hearing *sine die;* but *in simplici peregrinatione* or *passagio*—*i.e.* being absent on a private pilgrimage to the Holy Land—put off the hearing for a shorter time. Bracton, 338.

IN GENERE (Lat.). In kind; of the same kind. Things which when bailed may be restored *in genere,* as distinguished from those which must be returned *in specie,* or specifically, are called *fungibles.* Kaufman, Mackeldey, Civ. Law, § 148, note.

Heineccius, Elem. Jur. Civ. § 619, defines *genus* as what the philosophers call *species,* viz.: a kind. See Dig. 12. 1. 2. 1.

IN GREMIO LEGIS (Lat.). In the bosom of the law. This is a figurative expression, by which is meant that the subject is under the protection of the law: as, where land is in abeyance.

IN GROSS. At large; not appurtenant or appendant, but annexed to a man's person: *e.g.* common granted to a man and his heirs by deed is common in gross; or common in gross may be claimed by prescriptive right. 2 Blackstone, Comm. 34.

IN INITIALIBUS (Lat.). **In Scotch Law.** In the preliminaries. Before a witness is examined as to the cause in which he is to testify, he must deny bearing malice or ill will, being instructed what to say, or having been bribed, and these matters are called *initialia testimonii,* and the examination on them is said to be *in initialibus:* it is similar to our *voir dire.* Bell, Dict. *Initialia Testimonii;* Erskine, Inst. p. 451; Halkerston, Tech. Terms.

IN INTEGRUM (Lat.). The original condition. See RESTITUTIO IN INTEGRUM. Vicat, Voc. Jur. *Integer*.

IN INVITUM (Lat.). Unwillingly. Taylor, Gloss. Against an unwilling party (or one who has not given his consent), by operation of law. Wharton, Dict. 2d Lond. ed.

IN ITINERE (Lat.). On a journey; on the way. Justices *in itinere* were justices in eyre, who went on circuit through the kingdom for the purpose of hearing causes. 3 Sharswood, Blackst. Comm. 351; Spelman, Gloss. *In itinere* is used in the law of lien, and is there equivalent to *in transitu;* that is, not yet delivered to vendee.

IN JUDICIO (Lat.). In or by a judicial proceeding; in court. *In judicio non creditur nisi juratis*, in judicial proceedings no one is believed unless on oath. Croke Car. 64. See Bracton, fol. 98 *b*, 106, 287 *b*, *et passim*.

In Civil Law. The proceedings before a prætor, from the bringing the action till issue joined, were said to be *in jure;* but after issue joined, when the cause came before the *judex*, the proceedings were said to be *in judicio*. See JUDEX.

IN JURE (Lat. in law). **In Civil Law.** A phrase which denotes the proceedings in a cause before the prætor, up to the time when it is laid before a *judex;* that is, till issue joined (*litis contestatio*); also, the proceedings in causes tried throughout by the prætor (*cognitiones extraordinariæ*). Vicat, Voc. Jur. *Jus*.

In English Law. In law; rightfully; in right. *In jure, non remota causa, sed proxima, spectatur*. Broom, Max. 104. Incorporeal hereditaments, as right of jurisdiction, are said to exist only *in jure*, in right, or contemplation of law, and to admit of only a symbolical delivery. See Halkerston, Tech. Terms.

IN LIMINE (Lat.). In or at the beginning. This phrase is frequently used: as, the courts are anxious to check crimes *in limine*.

IN LITEM (Lat. *ad litem*). For a suit; to the suit. Greenleaf, Ev. § 348.

IN LOCO PARENTIS (Lat.). In the place of a parent: as, the master stands towards his apprentice *in loco parentis*.

IN MERCY. To be in mercy is to be at the discretion of the king, lord, or judge in punishing any offence not directly censured by the law. Thus, to be in the *grievous mercy* of the king is to be in hazard of a great penalty. 11 Hen. VI. c. 6. So, where the plaintiff failed in his suit, he and his pledges were in the mercy of the lord, *pro falso clamore suo*. This is retained nominally on the record. 3 Sharswood, Blackst. Comm. 376. So the defendant is in mercy if he fail in his defence. *Id.* 398.

IN MISERICORDIA (Lat. in mercy). The entry on the record where a party was in mercy was, *Ideo in misericordia*, etc. The phrase was used because the punishment in such cases ought to be moderate. See Magna Cart. c. 14; Bracton, lib. 4, tr. 5, c. 6. Sometimes *misericordia* means the being quit of all amercements.

IN MITIORI SENSU (Lat. in a milder acceptation).

A phrase denoting a rule of construction formerly adopted in slander suits, the object of which was to construe phrases, if possible, so that they would not support an action. Ingenuity was continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, "He is a base, broken rascal; he has broken twice, and I'll make him break a third time," was gravely asserted not to be actionable,—"ne poet dar porter action, car poet estre intend de *burstness de belly*." Latch, 114. And to call a man a thief was declared to be no slander, for this reason: "perhaps the speaker might mean he had stolen a lady's heart."

2. The rule now is to construe words agreeably to the meaning usually attached to them. It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words, and before the favorite doctrine of construing words in their mildest sense, in direct opposition to the finding of the jury, was finally abandoned by the courts. "For some inscrutable reason," said Gibson, J., in a very recent case, "the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of *mitiori sensu*, and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But, as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute, inasmuch that the precedents in Croke's Reports are beginning to be considered apocryphal." 20 Penn. St. 162; 7 Serg. & R. Penn. 451; 1 Nott & M'C. So. C. 217; 2 *id.* 511; 8 Mass. 248; 1 Wash. Va. 152; 1 Kirb. Conn. 12; Heard, Lib. & Slaud. § 162.

IN MORA (Lat.). In delay.

IN MORTUA MANU (Lat. in a dead hand). Property owned by religious societies was said to be held *in mortua manu*, or in mortmain, since religious men were *civiliter mortui*. 1 Sharswood, Blackst. Comm. 479; Taylor, Gloss.

IN NUBIBUS (Lat.). In the clouds; in abeyance; in custody of law. *In nubibus, in mare, in terrâ vel in custodiâ legis:* in the air, earth, or sea, or in the custody of the law. Taylor, Gloss. In case of abeyance, the inheritance is figuratively said to rest *in nubibus*, or *in gremio legis: e.g.* in case of a grant of life estate to A, and afterwards to heirs of Richard, Richard in this case, being alive, has no heirs until his death, and, consequently, the inheritance is considered as resting *in nubibus*, or in the clouds, till the

death of A, when the contingent remainder either vests or is lost, and the inheritance goes over. See 2 Sharswood, Blackst. Comm. 107, n.; 1 Coke, 137.

IN NULLO EST ERRATUM (Lat.). **In Pleading.** A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see 1 Ventr. 252; 1 Strange, 684; 9 Mass. 532; 1 Burr. 410; T. Raym. 231. It is a general rule that the plea *in nullo est erratum* confesses the fact assigned for error, Yelv. 57; Dane, Abr. Index, but not a matter assigned contrary to the record. 7 Wend. N.Y. 55; Bacon, Abr. *Error* (G).

IN ODIUM SPOLIATORIS (Lat.). In hatred of a despoiler. All things are presumed against a despoiler or wrong-doer: *in odium spoliatoris omnia præsumuntur.*

IN PAPER. In English Practice. A term used of a record until its final enrolment on the parchment record. 3 Sharswood, Blackst. Comm. 406; 10 Mod. 88; 2 Lilly, Abr. 322; 4 Geo. II.

IN PARI CAUSA (Lat.). In an equal cause. It is a rule that when two persons have equal rights in relation to a particular thing, the party in possession is considered as having the better right: *in pari causa possessor potior est.* Dig. 50. 17. 128; 1 Bouvier, Inst. n. 952. See MAXIMS.

IN PARI DELICTO (Lat.). In equal fault; equal in guilt. Neither courts of law nor of equity will interpose to grant relief to the parties, when an illegal agreement has been made and both parties stand *in pari delicto.* The law leaves them where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis et possidendis.* 1 Bouvier, Inst. n. 769. See MAXIMS.

IN PARI MATERIA (Lat.). Upon the same matter or subject. Statutes *in pari materia* are to be construed together.

IN PERPETUAM REI MEMORIAM (Lat.). For the perpetual memory or remembrance of a thing. Gilbert, For. Rom. 118.

IN PERSONAM (Lat.). A remedy where the proceedings are against the person, in contradistinction to those which are against specific things, or *in rem.* 1 Bouvier, Inst. n. 2646.

IN POSSE (Lat.). In possibility; not in actual existence: used in contradistinction to *in esse.*

IN PRÆSENTI (Lat.). At the present time: used in opposition to *in futuro.* A marriage contracted in words *de præsenti* is good: as, I take Paul to be my husband, is a good marriage; but words *de futuro* would not be sufficient, unless the ceremony was followed by consummation. 1 Bouvier, Inst. n. 258. See DEBITUM IN PRÆSENTI.

IN PRINCIPIO (Lat.). At the beginning. This is frequently used in citations: as, Bacon, Abr. *Legacies, in pr.*

IN PROPRIA PERSONA (Lat.). In his own person; himself: as, the defendant appeared *in propriâ personâ;* the plaintiff argued the cause *in propriâ personâ.*

IN RE (Lat.). In the matter: as, *in re* A B, in the matter of A B.

IN REBUS (Lat.). In things, cases, or matters.

IN REM (Lat.). A technical term used to designate proceedings or actions instituted *against the thing,* in contradistinction to personal actions, which are said to be *in personam.*

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. 1 Greenleaf, Ev. §§ 525, 541.

Courts of admiralty enforce the performance of a contract, when its performance is secured by a maritime lien or privilege, by seizing into their custody the very subject of hypothecation. In these suits, generally, the parties are not personally bound, and the proceedings are confined to the thing *in specie.* Brown, Civ. & Adm. Law, 98. And see 2 Gall. C. C. 200; 3 Term, 269, 270.

There are cases, however, where the remedy is either *in personam* or *in rem.* Seamen, for example, may proceed against the ship or freight for their wages, and this is the most expeditious mode; or they may proceed against the master or owners. 4 Burr. 1944; 2 Brown, Civ. & Adm. Law, 396. See, generally, 1 Phillipps, Ev. 254; 1 Starkie, Ev. 228; Dane, Abr.; Sergeant, Const. Law, 202, 203, 212; Parsons, Marit. Law.

IN RENDER. A thing in a manor is said to lie *in render* when it must be rendered or given by the tenant, *e.g.* rent; to lie *in prender,* when it may be taken by the lord or his officer when it chance. West, Symbol. pt. 2, *Fines,* § 126.

IN RERUM NATURA (Lat.). In the nature (or order) of things; in existence. Not *in rerum naturâ* is a dilatory plea, importing that the plaintiff is a fictitious person.

In Civil Law. A broader term than *in rebus humanis: e.g.* before quickening, an infant is *in rerum naturâ,* but not *in rebus humanis;* after quickening, he is *in rebus humanis* as well as *in rerum naturâ.* Calvinus, Lex.

IN SOLIDUM, IN SOLIDO (Lat.). **In Civil Law.** For the whole; as a whole. An obligation or contract is said to be *in solido* or *in solidum* when each is liable for the whole, but so that a payment by one is payment for all: *i.e.* it is a joint and several contract.

Possession is said to be *in solidum* when it

is exclusive. "*Duo in solidum precario habere non magis possunt, quam duo in solidum vi possidere aut clam; nam neque justæ neque injustæ possessiones duæ concurrere possunt.*" Savigny, lib. 3, § 11.

IN SPECIE (Lat.). In the same form: *e.g.* a ship is said to no longer exist *in specie* when she no longer exists *as a ship*, but as a mere *congeries* of planks. 8 Barnew. & C. 561; Arnould, Ins. 1012. To decree a thing *in specie* is to decree the performance of that thing *specifically*.

IN STATU QUO (Lat.). In the same situation as; in the same condition as.

IN TERROREM (Lat.). By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not, in general, obligatory, but only *in terrorem:* if, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be a forfeiture. 2 Vern. Ch. 90; 1 Hill, Abr. 253; 3 P. Will. Ch. 344; 1 Atk. Ch. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only *quousque* the legatee shall refrain from disturbing the will. 2 P. Will. Ch. 52; 2 Ventr. Ch. 352. For cases of legacies given to a wife while she shall continue unmarried, see 1 Madd. Ch. 590; 1 Roper, Leg. 558.

IN TERROREM POPULI (Lat. to the terror of the people).

A technical phrase necessary in indictments for riots. 4 Carr. & P. 373.

Lord Holt has given a distinction between those indictments in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consist in going about armed, etc. without committing any act, the words are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is *committed*, the words are useless. 11 Mod. 116; 10 Mass. 518.

IN TOTIDEM VERBIS (Lat.). In just so many words: as, the legislature has declared this to be a crime *in totidem verbis*.

IN TOTO (Lat.). In the whole; wholly; completely: as, the award is void *in toto*. In the whole the part is contained: *in toto et pars continetur*. Dig. 50. 17. 123.

IN TRANSITU (Lat.). During the transit, or removal from one place to another. See STOPPAGE IN TRANSITU.

IN VADIO (Lat.). In pledge; in gage.

IN VENTRE SA MERE (L. F.). In his mother's womb.

2. In law a child is, for all beneficial purposes, considered as born while *in ventre sa mère*. 5 Term, 49; Coke, Litt. 36; 1 P. Will. Ch. 329; La. Civ. Code, art. 948. But a stranger can acquire no title by descent through a child *in ventre sa mère* who is not subsequently born alive. Such a child is enabled to have an estate limited to his use, 1 Blackstone, Comm. 130; may have a distributive share of intestate property, 1 Ves. Ch. 81; is capable of taking a devise of lands, 2 Atk. Ch. 117; 1 Freem. Ch. 224, 293; takes under a marriage settlement a provision made for children living at the death of the father, 1 Ves. Ch. 85; is capable of taking a legacy, and is entitled to a share in a fund bequeathed to children under a general description of "children," or of "children living at the testator's death," 2 H. Blackst. 399; 2 Brown, Ch. 320; 2 Ves. Ch. 673; 1 Sim. & S. Ch. 181; 1 Bos. & P. 243; 5 Term, 49; see, also, 1 Ves. Sen. Ch. 85, 111; 1 P. Will. 244, 341; 2 *id.* 446; 2 Bro. C. C. 63; Ambl. 708, 711; 1 Salk. 229; 2 Atk. Ch. 114; Prec. Ch. 50; 2 Vern. Ch. 710; 7 Term, 100; Bacon, Abr. *Legacies, etc.* (A); 3 Ves. Ch. 486; 4 *id.* 322; 1 Roper, Leg. 52, 53; 5 Serg. & R. Penn. 40; may be appointed executor. Bacon, Abr. *Infancy* (B).

3. A bill may be brought in its behalf, and the court will grant an injunction to stay waste. 2 Vern. Ch. 710; Prec. Ch. 50.

The mother of a child *in ventre sa mère* may detain writings on its behalf. 2 Vern. Ch. 710.

The destruction of such a child is a high misdemeanor. 1 Blackstone, Comm. 129, 130. See 2 Carr. & K. 784; 7 Carr. & P. 850.

See POSTHUMOUS CHILD; CURTESY; DOWER.

IN WITNESS WHEREOF. These words, which, when conveyancing was in the Latin language, were *in cujus rei testimonium*, are the initial words of the concluding clause in deeds: "In witness whereof the said parties have hereunto set their hands," etc.

INADEQUATE PRICE. A term applied to indicate the want of a sufficient consideration for a thing sold, or such a price as, under ordinary circumstances, would be considered insufficient.

2. Inadequacy of price is frequently connected with fraud, gross misrepresentations, or an intentional concealment of defects in the thing sold. In these cases it is clear that the vendor cannot compel the buyer to fulfil the contract. 1 Lev. 111; 1 Brown, Parl. Cas. 187; 6 Johns. N. Y. 110; 3 Cranch, 270; 4 Dall. Penn. 250; 6 Yerg. Tenn. 508; 11 Vt. 315; 1 Metc. Mass. 93; 20 Me. 462; 3 Atk. Ch. 283; 1 Brown, Ch. 440.

3. In general, however, inadequacy of price is not sufficient ground to avoid an executed contract, particularly when the property has been sold by auction. 7 Ves. Ch. 30, 35, n.; 3 Brown, Ch. 228. But if an uncertain consideration, as a life annuity, be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration. 7 Brown, Parl. Cas. 184; 1 Brown, Ch. 156. See 1 Yeates, Penn. 312; Sugden, Vend. 189–199; 1 Ball & B. 165; 1 M'Cord, Ch. So. C. 383, 389, 390; 4 Des. Ch. So. C. 651. And if the price be so grossly inadequate and given under such

circumstances as to afford a necessary presumption of fraud or imposition, a court of equity will grant relief. 6 Ga. 515; 19 Miss. 21; 8 B. Monr. Ky. 11; 2 Harr. & G. Md. 114; 11 N. H. 9; 1 Metc. Mass. 93; 3 McLean, C. C. 332; Story, Eq. Jur. §§ 244, 245.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is inadmissible to contradict a written agreement.

INÆDIFICATIO (Lat.). **In Civil Law.** Building on another's land with own materials, or on own land with another's materials. L. 7, §§ 10 & 12, D. *de Acquis. Rer. Domin.*; Heineccius, Elem. Jur. Civ. § 363. The word is especially used of a private person's building so as to encroach upon the public land. Calvinus, Lex. The right of possession of the materials yields to the right to what is on the soil. *Id.*

INALIENABLE. A word denoting the condition of those things the property in which cannot be lawfully transferred from one person to another. Public highways and rivers are inalienable. There are also many rights which are inalienable, as the rights of liberty or of speech.

INAUGURATION. A word applied by the Romans to the ceremony of dedicating a temple, or raising a man to the priesthood, after the *augurs* had been consulted.

It was afterwards applied to the *installation* of emperors, kings, and prelates, in imitation of the ceremonies of the Romans when they entered the temple of the augurs. It is applied in the United States to the installation of the chief magistrate of the republic, and of the governors of the several states.

INCAPACITY. The want of a quality legally to do, give, transmit, or receive something.

In general, the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end. See LIMITATIONS, STATUTE OF.

INCENDIARY (Lat. *incendium*, a kindling). One who maliciously and wilfully sets another person's building on fire; one guilty of the crime of arson. See ARSON; BURNING.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Coke, 31 *b*; Plowd. 343.

INCEST. The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. Bishop, Marr. & D. 214–221. It is punished by fine and imprisonment, under the laws of the respective states. See Dane, Abr. Index; 6 Conn. 446; 11 Ga. 53; 1 Park. Crim. N. Y. 344; 2 Bishop, Crim. Law, § 15.

INCH (Lat. *uncia*). A measure of length, containing one-twelfth part of a foot.

INCHOATE. That which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties who ought to have executed them. For example, a covenant which purports to be tripartite, and is executed by only two of the parties, is incomplete, and no one is bound by it. 2 Halst. N. J. 142. See LOCUS PŒNITENTIÆ.

INCIDENT. This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion, 1 Hilliard, Real Prop. 243; while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant. 1 Washburn, Real Prop. 54. So a court baron is inseparably incident to a manor, in England. Kitch. 36; Coke, Litt. 151. All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. See Jacob, Law Dict.

INCIPITUR (Lat.). **In Practice.** This word, which means "it is begun," signifies the commencement of the entry on the roll on signing judgment, etc.

INCLUSIVE. Comprehended in computation. In computing time, as ten days from a particular time, one day is generally to be included and one excluded. See EXCLUSIVE.

INCOME. The gain which proceeds from property, labor, or business: it is applied particularly to individuals; the income of the government is usually called revenue.

It has been holden that a devise of the income of land is in effect the same as a devise of the land itself. 9 Mass. 372; 1 Ashm. Penn. 136.

INCOMMUNICACION. In Spanish Law. The condition of a prisoner who is not permitted to see or to speak with any person visiting him during his confinement. A person accused cannot be subjected to this treatment unless it be expressly ordered by the judge, for some grave offence, and it cannot be continued for a longer period than is absolutely necessary. Art. 7, Reglamento de 26 Setiembre, 1835. This precaution is resorted to for the purpose of preventing the accused from knowing beforehand the testimony of the witnesses, or from attempting to corrupt them and concert such measures as will efface the traces of his guilt. As soon, therefore, as the danger of his doing so has ceased, the interdiction ceases likewise. Escriche.

INCOMPATIBILITY. Incapability of existing or being exercised together.

Thus, the relations of landlord and of tenant cannot exist in one man at the same time in reference to the same land. Two offices may be incompatible either from their nature or by statutory provisions. See U. S. Const. art. 6, § 3, n. 5, art. 1, § 6, n. 2; 4 Serg. & R. Penn. 277; 17 *id.* 219; OFFICE.

INCOMPETENCY. Lack of ability or fitness to discharge the required duty.

At Common Law. Judges and jurors are said to be incompetent from having an interest in the subject-matter. A judge is also incompetent to give judgment in a matter not within his jurisdiction. See JURISDICTION. With regard to the incompetency of a judge from interest, it is a maxim in the common law that no one should be a judge in his own cause (*aliquis non debet esse judex in propriâ causâ*). Coke, Litt. 141 *a*. See 14 Viner, Abr. 573; 4 Comyns, Dig. 6. The greatest delicacy is constantly observed on the part of judges, so that they never act when there is the possibility of doubt whether they can be free from bias; and even a distant degree of relationship has induced a judge to decline interfering. 1 Knapp, 376. The slightest degree of pecuniary interest is considered an insuperable objection. But at common law, interest forms the only ground for challenging a judge. It is not a ground of challenge that he has given his opinion before. 2 Binn. Penn. 454; 4 *id.* 349. See 4 Mod. 226; Comb. 218; Hard. 44; Hob. 87; 13 Mass. 340; 5 *id.* 92; 6 Pick. Mass. 109; 1 Peck, Tenn. 374; Coxe, N. J. 190; 3 Ohio, 289; 3 Cow. N. Y. 725; 17 Johns. N. Y. 133; 12 Conn. 88; 1 Penn. N. J. 185; 4 Yeates, Penn. 466; Salk. 396; Bacon, Abr. *Courts* (B); JURY; COMPETENCY; INTEREST.

In Evidence. A witness may be at common law incompetent on account of a want of understanding, a defect of religious principles, a conviction of certain crimes, infamy of character, or interest. 1 Phillipps, Ev. 15. The latter source of incompetency is removed to a considerable degree in some states; and the second is greatly limited in modern practice.

In French Law. Inability or insufficiency of a judge to try a cause brought before him, proceeding from lack of jurisdiction.

INCONCLUSIVE. Not finally decisive. Inconclusive presumptions are capable of being overcome by opposing proof. 3 Bouvier, Inst. 3063.

INCONTINENCE. Impudicity; indulgence in unlawful carnal connection.

INCORPORATION. The act of creating a corporation.

In Civil Law. The union of one domain to another.

INCORPOREAL HEREDITAMENTS. Any thing, the subject of property, which is inheritable and not tangible or visible. 2 Wooddeson, Lect. 4. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. 2 Sharswood, Blackst. Comm. 20; 1 Washburn, Real Prop. 10.

2. Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently the objects of the bodily senses. Coke, Litt. 9 *a;* Pothier, Traité des Choses, § 2. According to Sir William Blackstone, there are ten kinds of incorporeal hereditaments: viz., advowsons; tithes; commons; ways; offices; dignities; franchises; corodies; annuities; rents. 2 Blackstone, Comm. 20.

But in the United States there are no advowsons, tithes, dignities, nor corodies, commons are rare, offices rare or unknown, and annuities have no necessary connection with land. 3 Kent, Comm. 402–404, 454. And there are other incorporeal hereditaments not included in this list, as remainders and reversions dependent on a particular estate of freehold, easements of light, air, etc., and equities of redemption. 1 Washburn, Real Prop. 11; 1 Hilliard, Real Prop. 443.

3. Incorporeal hereditaments were said *to be in grant;* corporeal, *in livery:* since a simple deed or grant would pass the former, of which livery was impossible, while livery was necessary to a transfer of the latter. But this distinction is now done away with, even in England. See 8 & 9 Vict. c. 106, § 2; 1 Washburn, Real Prop. 10; 13 Mass. 483.

INCORPOREAL PROPERTY. In Civil Law. That which consists in legal right merely. The same as choses in action at common law.

INCUMBENT. In Ecclesiastical Law. A clerk resident on his benefice with cure: he is so called because he does, or ought to, bend the whole of his studies to his duties. In common parlance, it signifies one who is in possession of an office: as, the present incumbent.

INCUMBRANCE. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. 2 Greenleaf, Ev. § 242.

2. A public highway, 2 Mass. 97; 3 N. H. 335; 10 Conn. 431; 12 La. Ann. 541; 27 Vt. 739; a private right of way, 15 Pick. Mass. 68; 7 Gray, Mass. 83; 5 Conn. 497; a claim of dower, 4 Mass. 630; 23 Ala. N. S. 616, though inchoate only, 2 Me. 22; 22 Pick. Mass. 447; 3 N. J. 260; an outstanding mortgage, 5 Me. 94; 30 *id.* 392, other than one which the covenantee is bound to pay, 2 N. H. 458; 12 Mass. 304; 8 Pick. Mass. 547; 11 Serg. & R. Penn. 109; 4 Halst. N. J. 139; a liability under the tax laws, 30 Vt. 655; 5 Ohio St. 271; 5 Wisc. 407, have been held incumbrances within the meaning of the covenant against incumbrances, contained in conveyances. The term does not include a condition on which an estate is held. 3 Gray, Mass. 515; 6 *id.* 572.

The vendor of real estate is bound to disclose incumbrances, and to deliver to the purchaser the instruments by which they were created or on which the defects arise; and the neglect of this is to be considered fraud. Sugden, Vend. 6; 1 Ves. Sen. Ch. 96. See 6 Ves. 193; 10 *id.* 470; 1 Schoales & L. Ch. Ir. 227; 7 Serg. & R. Penn. 73.

3. The interest on incumbrances is to be kept down by the tenant for life, 1 Washburn, Real Prop. 95–97, 257, 573; 3 Edw. Ch. N. Y.

312; 5 Johns. Ch. N. Y. 482; 5 Ohio, 28, to the extent of rents accruing, 31 Eng. L. & Eq. 345; Tudor, Lead. Cas. 60; and for any sum paid beyond that he becomes a creditor of the estate. 2 Atk. Ch. 463; 1 Bail. Eq. So. C. 397.

When the whole incumbrance is removed by a single payment, the share of the tenant for life is the present worth of an annuity for the life of the tenant equal to the annual amount of the interest which he would be obliged to pay. 1 Washburn, Real Prop. 96, 573. The rule applies to estates held in dower, 10 Mass. 315, n.; 5 Pick. Mass. 146; 10 Paige, Ch. N. Y. 71, 158; 3 Md. Ch. Dec. 324; 7 Harr. & J. Md. 367; in curtesy, 1 Washburn, Real. Prop. 142; in tail only in special cases. 1 Washburn, Real Prop. 80; Tudor, Lead. Cas. 613; 2 Law Mag. 265, 270; 3 P. Will. 229.

INDEBITATUS ASSUMPSIT (Lat.). **In Pleading.** That species of action of assumpsit in which the plaintiff alleges, in his declaration, first a debt, and then a promise in consideration of the debt to pay the amount to the plaintiff.

It is so called from the words in which the promise is laid in the Latin form, translated in the modern form, *being indebted he promised.* The promise so laid is generally an implied one only. See 1 Chitty, Plead. 334; Stephen, Plead. 318; 4 Robinson, Pract. 490 *et seq.*; Yelv. 21; 4 Coke, 92 *b.* This form of action is brought to recover in damages the amount of the debt or demand: upon the trial the jury will, according to evidence, give verdict for whole or part of that sum. 3 Sharswood, Blackst. Comm. 155; Selwyn, Nisi P. 68, 69, *et seq.*

Indebitatus assumpsit is in this distinguished from *debt* and *covenant,* which proceed directly for the debt, damages being given only for the detention of the debt. Debt lies on contracts by specialty as well as by parol, while *indebitatus assumpsit* lies only on parol contracts, whether express or implied. Browne, Actions at Law, 317.

For the history of this form of action, see 3 Reeve, Hist. Com. Law; 2 Comyns, Contr. 549–556; 1 H. Blackst. 550, 551; 3 Blackstone, Comm. 154; Yelv. 70. See ASSUMPSIT.

INDEBITI SOLUTIO (Lat.). **In Civil Law.** The payment to one of what is not due to him. If the payment was made by mistake, the civilians recovered it back by an action called *condictio indebiti;* with us, such money may be recovered by an action of *assumpsit.*

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. 343; 2 Hill, Abr. 421.

But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on the award. 1 Mass. 134.

INDECENCY. An act against good behavior and a just delicacy. 2 Serg. & R. Penn. 91.

The law, in general, will repress indecency as being contrary to good morals; but, when the public good requires it, the mere indecency of disclosures does not suffice to exclude them from being given in evidence. 3 Bouvier, Inst. n. 3216.

The following are examples of indecency: the exposure by a man of his naked person on a balcony, to public view, or bathing in public, 2 Campb. 89; 3 Day, Conn. 103; 1 Dev. & B. No. C. 208; 18 Vt. 574; 5 Barb. N. Y. 203; or the exhibition of bawdy pictures. 2 Chitty, Crim. Law, 42; 2 Serg. & R. Penn. 91. This indecency is punishable by indictment. See 1 Sid. 168; 1 Kebl. 620; 2 Yerg. Tenn. 482, 589; 1 Mass. 8; 2 Chanc. Cas. 110; 1 Russell, Crimes, 302; 1 Hawkins, Pl. Cr. c. 5, s. 4; 4 Blackstone, Comm. 65, n.; 1 East, Pl. Cr. c. 1, s. 1; Burn, Just. *Lewdness.*

INDECIMABLE. Not tithable.

INDEFEASIBLE. That which cannot be defeated or undone. This epithet is usually applied to an estate or right which cannot be defeated.

INDEFENSUS (Lat.). One sued or impleaded who refuses or has nothing to answer.

INDEFINITE FAILURE OF ISSUE. See FAILURE OF ISSUE.

INDEFINITE NUMBER. A number which may be increased or diminished at pleasure.

When a corporation is composed of an indefinite number of persons, any number of them consisting of a majority of those present may do any act, unless it be otherwise regulated by the charter or by-laws.

INDEFINITE PAYMENT. That which a debtor who owes several debts to a creditor makes without making an *appropriation:* in that case the creditor has a right to make such appropriation.

INDEMNITY. That which is given to a person to prevent his suffering damage. 2 M'Cord, So. C. 279.

It is a rule established in all just governments that when private property is required for public use, indemnity shall be given by the public to the owner. This is the case in the United States. See La. Civ. Code, art. 545; EMINENT DOMAIN.

Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, or an agreement to compensate a public officer for doing an act which is forbidden by law, or for omitting to do one which the law commands, are absolutely void. But when the agreement with an officer was not to induce him to neglect his duty, but to test a legal right, as to indemnify him for not executing an execution, it was held to be good. 1 Bouvier, Inst. n. 780.

INDENT (Lat. *in,* and *dens,* tooth). To cut in the shape of teeth.

Deeds of *indenture* were anciently written on the same parchment or paper as many times as there

were parties to the instrument, the word *chirographum* being written between, and then the several copies cut apart in a *zigzag or notched line* (whence the name), part of the word *chirographum* being on either side of it; and each party kept a copy. The practice now is to cut the top or side of the deed in a waving or notched line. 2 Sharswood, Blackst. Comm. 295.

To bind by indentures; to apprentice: as, to indent a young man to a shoemaker. Webster, Dict.

In American Law. An indented certificate issued by the government of the United States at the close of the revolution, for the principal or interest of the public debt. Ramsay, Hamilton, Webster; Eliot, Funding System, 35; 5 McLean, C. C. 178; Acts of April 30, 1790, sess. 2, c. 9, § 14, and of March 3, 1825, sess. 2, c. 65, § 17. The word is no longer in use in this sense.

INDENTURE. A formal written instrument made between two or more persons in different interests, as opposed to a deed poll, which is one made by a single person, or by several having similar interests.

Its name comes from a practice of *indenting* or scolloping such an instrument on the top or side in a waving line. This is not necessary in England at the present day, by stat. 8 & 9 Vict. c. 106, § 5, but was in Lord Coke's time, when no words of indenture would supply its place. 5 Coke, 20. In this country it is a mere formal act, not necessary to the deed's being an indenture. See Bacon, Abr. *Leases, etc.* (E 2); Comyns, Dig. *Fait* (C, and note *d*); Littleton, § 370; Coke, Litt. 143 *b*, 229 *a*; Cruise, Dig. t. 32, c. 1, s. 24; 2 Sharswood, Blackst. Comm. 294; 2 Washburn, Real Prop. 587 *et seq.*; 1 Stephen, Comm. 447. The ancient practice was to deliver as many copies of an instrument as there were parties to it. And as early as king John it became customary to write the copies on the same parchment, with the word *chirographum*, or some other word, written between them, and then to cut them apart through such word, leaving part of each letter on either side the line, which was at first straight, afterwards *indented* or notched. 1 Reeve, Hist. Eng. Law, 89; DuCange; 2 Washburn, Real Prop. 587 *et seq.* See INDENT.

INDEPENDENCE. A state of perfect irresponsibility to any superior. The United States are free and independent of all earthly power.

Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have contracted no ties except those which flow from the three great natural rights of safety, liberty, and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the disposition of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. See DECLARATION OF INDEPENDENCE.

INDEPENDENT CONTRACT. One in which the mutual acts or promises have no relation to each other, either as equivalents or considerations. La. Civ. Code, art. 1762; 1 Bouvier, Inst. n. 699.

INDETERMINATE. That which is uncertain, or not particularly designated: as, if I sell you one hundred bushels of wheat, without stating what wheat. 1 Bouvier, Inst. n. 950. See CONTRACT.

INDIAN. One of the aboriginal inhabitants of America.

In general, Indians have no political rights in the United States; they cannot vote at the general elections for officers, nor hold office. In New York they are considered as citizens and not as aliens, owing allegiance to the government and entitled to its protection. 20 Johns. N. Y. 188, 633. But it was ruled that the Cherokee nation in Georgia was a distinct community. 6 Pet. 515. See 8 Cow. N. Y. 189; 9 Wheat. 673; 14 Johns. N. Y. 181, 332; 18 *id.* 506. The title of the Indians to land was that of occupation merely, but could be divested only by purchase or conquest. 2 Humphr. Tenn. 19; 1 Dougl. Mich. 546; 2 McLean, C. C. 412; 8 Wheat. 571; 2 Washburn, Real Prop. 521.

INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state,—that is, a distinct political society, capable of self-government; but it is not deemed a foreign state in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupilage; and its relation to the United States resembles that of a ward to a guardian. 5 Pet. 1, 16, 17; 20 Johns. N. Y. 193; 3 Kent, Comm. 308–318; Story, Const. § 1096; 4 How. 567; 1 McLean, C. C. 254; 6 Hill, So. C. 546; 8 Ala. N. S. 48. Several Indian tribes within the limits of the United States have an organized government. See CHOCTAW NATION; CHEROKEE NATION.

INDIANA. The name of one of the new states of the United States.

2. This state was admitted into the Union by virtue of a resolution of congress, approved Dec. 11, 1816.

The boundaries of the state are defined, and the state has concurrent jurisdiction with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash. As to the soil, the southern boundary of Indiana is low-water mark on the Ohio river.

The first constitution of the state was adopted in the year 1816, and has since been superseded by the present constitution, which was adopted in the year 1851. This contains a bill of rights, which provides, amongst other things, that no law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience; that no preference shall be given by law to any creed, religious society, or mode of worship, and that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no religious test shall be required as a qualification for any office of trust or profit; that no money shall be drawn from the treasury for the benefit of any religious or theological institution; that no person shall be rendered incompetent as a

witness in consequence of his opinions on matters of religion.

The Legislative Power.

3. This is vested in a general assembly, consisting of a senate and house of representatives.

The *Senate* is composed of fifty members, elected by the people for the term of four years. A senator must be at least twenty-five years of age, a citizen of the United States, for two years next preceding his election an inhabitant of the state, and for one year next preceding his election an inhabitant of the county or district whence he may be chosen.

The *House of Representatives* consists of one hundred members, elected by the people for the term of two years. To be eligible as a member of this body, the citizen must be at least twenty-one years of age, and possess the same qualifications as a senator in other respects.

The sessions of the general assembly are to be held biennially, at the capital of the state, commencing on the Thursday next after the first Monday of January of every odd year, unless a different day or place is appointed by law. But if in the opinion of the governor the public welfare shall require it, he may at any time, by proclamation, call a special session.

The general assembly may modify the grand-jury system, 12 Ind. 641; have power to adopt a revised system of pleading and practice,—which has been done, 2 Rev. Stat. 1852; are to provide for a uniform rate of taxation of all property, with special exemptions by law; may pass a general banking law, but may not incorporate for banking purposes. 10 Ind. 137; 11 *id.* 139, 424, 449.

The Executive Power.

4. The *governor* is elected quadrennially, at the annual election in October, to serve for the term of four years. He is not eligible to re-election. He must be at least thirty years of age, have been a citizen of the United States for five years, have resided in the state five years next preceding his election, and must not hold any office under the United States or this state. He must take care that the laws be faithfully executed; and he exercises the pardoning power at his discretion.

The *lieutenant-governor* shall be chosen at every election for a governor, in the same manner, continue in office for the same time, and possess the same qualifications. In voting for governor and lieutenant-governor, the electors shall distinguish for whom they vote as governor and for whom as lieutenant-governor. He shall, by virtue of his office, be president of the senate; have a right, when in committee of the whole, to debate and vote on all subjects, and, when the senate are equally divided, to give the casting vote. In case of the removal of the governor from office, death, resignation, or inability to discharge the duties of the office, the lieutenant-governor shall exercise all the powers and authority appertaining to the office of governor. Whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senate shall elect one of their own members as president for that occasion. And the general assembly shall, by law, provide for the case of removal from office, death, resignation, or inability, both of the governor and lieutenant-governor, declaring what officer shall then act as governor; and such officer shall act accordingly, until the disability be removed or a governor be elected. The lieutenant-governor, while he acts as president of the senate, shall receive for his services the same compensation as the speaker of the house of representatives. The lieutenant-governor shall not be eligible to any other office during the term for which he shall have been elected.

5. A *Secretary of State*, an *Auditor*, a *Treasurer*, and a *Superintendent of Education* are elected biennially, for the term of two years. They are to perform such duties as may be enjoined by law; and no person is eligible to either of said offices more than four years in any period of six years.

The qualifications and elections of county and township officers are specified and provided for by the constitution. Const. art. 7.

The Judicial Power.

The *supreme court* shall consist of not less than three nor more than five judges (there are now, 1864, four judges), a majority of whom form a quorum, which shall have jurisdiction coextensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer, and upon the decision of every case shall give a statement, in writing, of each question arising in the record of such case, and the decision of the court thereon.

6. The *circuit courts* shall each consist of one judge. The state shall, from time to time, be divided into judicial circuits. There are (1864) fourteen circuits. They shall have such civil and criminal jurisdiction as may be prescribed by law. The general assembly may provide, by law, that the judge of one circuit may hold the court of another circuit in case of necessity or convenience; and, in case of temporary inability of any judge, from sickness or other cause, to hold the courts in his circuit, provision shall be made by law for holding such courts.

Tribunals of conciliation may be established, with such powers and duties as shall be prescribed by law, or the powers and duties of the same may be conferred on other courts of justice; but such tribunals, or other courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide by the judgment of such tribunal or court.

The judges of the supreme court are elected by the qualified voters to serve for a term of seven years. The circuit judges are elected for terms of six years, and the judges of the courts of common pleas, of which there are twenty-one in the state, are elected for terms of four years.

All judicial officers shall be conservators of the peace in their respective jurisdictions.

The state shall be divided into as many districts as there are judges of the supreme court; and such districts shall be formed of contiguous territory as nearly equal in population as, without dividing a county, the same can be made. One of said judges shall be elected from each district, and reside therein; but said judges shall be elected by the electors of the state at large.

7. A *clerk of the supreme court* is elected for four years, and a *prosecuting attorney* is elected for two years, in each judicial circuit.

Justices of the peace, in sufficient numbers, are to be elected for the term of four years in each township. Their courts are courts of record.

Attorneys at law. For admission to practice as an attorney in all the courts, it is required only that the applicant be a voter and of good moral character.

A school fund is provided for, and the benefits of the school system are limited to white children.

No debt can be contracted on behalf of the state except to meet casual deficits in the revenue, to pay the interest on the state debt, to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defence.

The provisions of the constitution in regard to banking are as follows:—

If the general assembly shall enact a general banking law, such law shall provide for the registry and countersigning, by an officer of state, of all paper credit designed to be circulated as money, and ample collateral security, readily convertible into specie, for the redemption of the same in gold or silver, shall be required; which collateral security shall be under the control of the proper officer or officers of state. Sec. 3.

The general assembly may also charter a bank with branches, without collateral security, as required in the preceding section. Sec. 4.

If the general assembly shall establish a bank with branches, the branches shall be mutually responsible for each other's liabilities upon all paper credit issued as money. Sec. 5.

The stockholders in every bank or banking company shall be individually responsible, to an amount over and above their stock equal to their respective shares of stock, for all debts or liabilities of said bank or banking company. Sec. 6.

All bills or notes issued as money shall be, at all times, redeemable in gold or silver; and no law shall be passed sanctioning, directly or indirectly, the suspension, by any bank or banking company, of specie payments. Sec. 7.

Holders of bank-notes shall be entitled, in case of insolvency, to preference of payment over all other creditors. Sec. 8.

No bank shall receive, directly or indirectly, a greater rate of interest than shall be allowed by law to individuals loaning money. Sec. 9.

Every bank or banking company shall be required to cease all banking operations within twenty years from the time of its organization, and promptly thereafter to close its business. Sec. 10.

The general assembly is not prohibited from investing the trust funds in a bank with branches; but in case of such investment the safety of the same shall be guaranteed by unquestionable security. Sec. 11.

The state shall not be a stockholder in any bank after the expiration of the present bank charter; nor shall the credit of the state ever be given, or loaned, in aid of any person, association, or corporation; nor shall the state hereafter become a stockholder in any corporation or association. Sec. 12.

Corporations other than banking shall not be created by special act, but may be formed under general laws. Sec. 13.

Dues from corporations other than banking shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law. Sec. 14.

Negroes and *mulattoes* are prohibited ingress; contracts with them are declared void, and it is made a criminal offence to employ them or to encourage them to remain in the state. Fines collected for these offences are appropriated to the colonization of negroes and mulattoes. See the cases referring to this subject collected in the Ind. Dig. 273, 592.

In Indiana, dower and curtesy estates are abolished, with some qualifications in cases of second marriages, and one-third of the estate is held in fee-simple instead. 11 Ind. 380; 12 *id.* 37.

Property cannot be sold on execution at less than two-thirds of its appraised value, except in cases of breach of trust and where the law is waived by agreement. Ind. Pract. 381.

All crimes are defined by statute. Ind. Pract. 20 *et seq.*

INDICIA (Lat.). Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth.

The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather than the inferences themselves. However numerous indicia may be, they only show that a thing may be, not that it has been. An indicium can have effect only when a connection is essentially necessary with the principal. Effects are known by their causes, but only when the effects can arise only from the causes to which they are attributed. When several causes may have produced one and the same effect, it is, therefore, unreasonable to attribute it to any particular one of such causes.

The term is much used in common law of signs or marks of identity: for example, in replevin it is said that property must have *indicia*, or ear-marks, by which to distinguish it from other property of the same kind. So it is much used in the phrase "*indicia* of crime," in a sense similar to that of the civil law.

INDICTED. Having had an indictment found against him.

INDICTION. The space of fifteen years.

It was used in dating at Rome and in England. It began at the dismission of the Nicene council, A.D. 312. The first year was reckoned the first of the first indiction, and so on till fifteen years afterwards. The sixteenth year was the first year of the second indiction; the thirty-first year was the first year of the third indiction, etc.

INDICTMENT. In Criminal Practice. A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by, a grand jury legally convoked. 4 Blackstone, Comm. 299; Coke, Litt. 126; 2 Hale, Pl. Cr. 152; Bacon, Abr.; Comyns, Dig.; 1 Chitty, Crim. Law, 168.

An accusation at the suit of the crown, found to be true by the oaths of a grand jury.

A written accusation of a crime presented upon oath by a grand jury.

The word is said to be derived from the old French word *inditer*, which signifies *to indicate, to show, or point out.* Its object is to indicate the offence charged against the accused. Rey, des Inst. l'Angl. tome 2, p. 347.

2. *The essential requisites* of a valid indictment are,—*first*, that the indictment be presented to some court having jurisdiction of the offence stated therein; *second*, that it appear to have been found by the grand jury of the proper county or district; *third*, that the indictment be found a true bill, and signed by the foreman of the grand jury; *fourth*, that it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, Cowp. 682; 2 Hale, Pl. Cr. 167; 1 Binn. Penn. 201; 3 *id.* 533; 4 Serg. & R. Penn. 194; 6 *id.* 398; 4 Sharswood, Blackst. Comm. 301; 4 Cranch, 167; *fifth*, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily

introduced, it should be set out in the original tongue, and then translated, showing its application. 6 Term, 162.

3. *The formal requisites* are,—*first*, that the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge be in its nature transitory, as a battery. Hawkins, Pl. Cr. b. 2, c. 25, s. 35. The venue is stated in the margin thus: "City and county of——, to wit." *Second*, the *presentment*, which must be in the present tense, and is usually expressed by the following formula: "the grand inquest of the commonwealth of ——, inquiring for the city and county aforesaid, upon their oaths and affirmations present." See, as to the venue, 1 Ark. 171; 9 Yerg. Tenn. 357; 6 Metc. Mass. 225. *Third*, the *name and addition of the defendant;* but in case an error has been made in this respect, it is cured by the plea of the defendant. Bacon, Abr. *Misnomer* (B), *Indictment* (G 2); 2 Hale, Pl. Cr. 175; 1 Chitty, Pract. 202; Russ. & R. 489. *Fourth*, the *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient, in some cases, to state "a certain person or persons to the jurors aforesaid unknown." Hawkins, Pl. Cr. b. 2, c. 25, s. 71; 2 East, Pl. Cr. 651, 781; 2 Hale, Pl. Cr. 181; Plowd. 85; Dy. 97, 286; 8 Carr. & P. 773. *Fifth*, the *time* when the offence was committed should, in general, be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated, 2 Wash. C. C. 328; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment. 5 Serg. & R. Penn. 316. See 11 Serg. & R. Penn. 177; 1 Chitty, Crim. Law, 217, 224; 1 Chitty, Plead. Index, *Time;* 17 Wend. N. Y. 475; 2 Dev. No. C. 567; 6 Miss. 14; 4 Dan. Ky. 496; 1 Cam. & N. No. C. 369; 1 Hawks, No. C. 460. *Sixth*, the *offence should be properly described.* This is done by stating the substantial circumstances necessary to show the nature of the crime, and, next, the formal allegations and terms of art required by law.

4. As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises, should be set forth; but there should be no unnecessary matter, nor any thing which on its face makes the indictment repugnant, inconsistent, or absurd. And if there is no necessary ambiguity, the court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible. It is a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation of ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of ordinary life. Per *Erle*, J., 16 Q. B. 846; 1 Ad. & E. 448; 2 Hale, Pl. Cr. 183; Hawkins, Pl. Cr. b. 2, c. 25, s. 57; Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 3); 2 Leach, Cr. Cas. 660; 2 Strange, 1226. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, as indictments against a common barrator, a common scold, and the keeper of a common bawdy-house: such persons may be indicted by these general words. 1 Chitty, Crim. Law, 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely as an accusation: as, that the defendant erected *or* caused to be erected a nuisance. 2 Gray, Mass. 501; 6 Dowl. & R. 143; 2 Strange, 900; 2 Rolle, Abr. 31.

5. There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously (*q. v.*), in treason; feloniously (*q. v.*), in felony; burglariously (*q. v.*), in burglary; maim (*q. v.*), in mayhem, etc.

Seventh, the conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania, Const. art. 5, s. 11, which provides that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude *against the peace and dignity of the same.*" As to the necessity and propriety of having several counts in an indictment, see 1 Chitty, Crim. Law, 248; COUNT; as to joinder of several offences in the same indictment, see 1 Chitty, Crim. Law, 253; Archbold, Crim. Plead. 60. Several defendants may, in some cases, be joined in the same indictment. Archbold, Crim. Plead. 59. When an indictment may be amended, see 1 Chitty, Crim. Law, 297; Starkie, Crim. Plead. 286; or quashed, 1 Chitty, Crim. Law, 298; Starkie, Crim. Plead. 331; Archbold, Crim. Plead. 66.

After verdict in a criminal case, it will be presumed that those facts without proof of which the verdict could not have been found were proved, though they are not distinctly alleged in the indictment; provided it contains terms sufficiently general to comprehend them in reasonable intendment. 1 Den. Cr. Cas. 356; 2 Carr. & K. 868; 1 Taylor, Ev. § 73. After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count. 2 Den. Cr. Cas. 340.

See, generally, Train & H. Prec. of Jud.; Archbold, Starkie, Crim. Plead.; Chitty, Russell, Crim. Law.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictee.

INDIFFERENT. To have no bias or partiality. 7 Conn. 229. A juror, an arbitrator, and a witness ought to be indifferent; and when they are not so they may be challenged. See 9 Conn. 42.

INDIGENA (Lat. from *inde*, in, and *geno*, *gigno*, to beget). A native; born or bred in the same country or town. Ainsw. A subject born, or naturalized by act of parliament. Opposed to *alienigena*. Rymer, to. 15, p. 37; Coke, Litt. 8 *a*.

INDIRECT EVIDENCE. Evidence which does not prove the fact in question, but one from which it may be presumed.

Inferential evidence as to the truth of a disputed fact, not by testimony of any witness to the fact, but by collateral circumstances ascertained by competent means. 1 Starkie, Ev. 15; Wills, Circumst. Ev. 24; Best, Ev. 21, 22, § 27, note; 1 Greenleaf, Ev. § 13.

INDIVISIBLE. Which cannot be separated.

It is often important to ascertain when a consideration or a contract is or is not indivisible. When a consideration is entire and indivisible, and it is against law, the contract is void *in toto*. 11 Vt. 592; 2 Watts & S. Penn. 235. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto*.

To ascertain whether a contract is divisible or indivisible is to ascertain whether it may or may not be *enforced in part*, or *paid in part*, without the consent of the other party. See 1 Bouvier, Inst. n. 694; ENTIRETY.

INDIVISUM (Lat.). That which two or more persons hold in common without partition; undivided.

INDORSE. To write on the back. Bills of exchange and promissory notes are indorsed by a party's writing his name on the back. Writs in Massachusetts are indorsed in some cases by a person's writing his name on the back, in which case he becomes liable to pay the costs of the suit.

INDORSEMENT. In Commercial Law. That which is written on the back of an instrument in writing and which has relation to it.

Writing one's name on the back of a promissory note or other negotiable instrument. 20 Vt. 499.

2. An indorsement is generally made primarily for the purpose of transferring the rights of the holder of the instrument to some other person. It has, however, various results, such as rendering the indorser liable in certain events; and hence an indorsement is sometimes made merely for the purpose of additional security. This is called an accommodation indorsement when done without consideration other than an exchange of indorsements.

A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back, 13 Serg. & R. Penn. 315; but a writing across the face may answer the same purpose. 18 Pick. Mass. 63; 16 East, 12.

A conditional indorsement is one made subject to some condition without the performance of which the instrument will not be or remain valid. 4 Taunt. 30.

An indorsement in full is one in which mention is made of the name of the indorsee. Chitty, Bills, 170.

A qualified indorsement is one which restrains, or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty, Bills, 8th ed. 261; 7 Taunt. 160. The words commonly used are *sans recours*, without recourse. 3 Mass. 225; 12 *id.* 14.

A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose. 1 Rob. La. 222.

3. The effect of the indorsement of a negotiable promissory note or bill of exchange is to transfer the property in the note to the person mentioned in the indorsement when it is made in full, or to any person to whose possession it may lawfully come thereafter even by mere delivery, when it is made in blank, so that the possessor may sue upon it in his own name at law, as well as if he had been named as the payee. 11 Pet. 80; 2 Hill, N. Y. 80.

And any person who has possession of the instrument is presumed to be the legal *bonâ fide* owner for value, until the contrary is shown.

When the indorsement is made before the note becomes due, the indorsee and all subsequent holders are entitled to recover the face of the note against the maker, without any right on his part to offset claims which he may have against the payee; or, as it is frequently stated, the indorsee takes it free of all equities between the antecedent parties of which he had no notice. 3 Term, 80, 83; 7 *id.* 423; 8 Mees. & W. Exch. 504; 8 Conn. 505; 13 Mart. La. 150; 16 Pet. 1.

4. Indorsers also, unless the indorsement be qualified, become liable to pay the amount demanded by the instrument upon the failure of the principal, the *maker* of a *note*, the *acceptor* of a *bill*, upon due notification of such failure, to any subsequent indorsee who can legally claim to hold through the particular indorsee. Story, Bills, § 224; Parsons, Bills.

The effect of acceptance upon a bill is to remove the acceptor to the head of the list as as principal, while the drawer takes his place first indorser.

See GUARANTY; BILLS OF EXCHANGE; PROMISSORY NOTES. Consult Chitty, Story, on Bills of Exchange; Story on Promissory Notes; Byles, Parsons, on Bills and Notes.

In Criminal Law. An entry made upon the back of a writ or warrant.

When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary, in some states, that it should be indorsed by a justice of the county where it is to be executed: this indorsement is called backing.

INDORSER. The person who makes an indorsement.

2. The indorser of a bill of exchange, or other negotiable paper, by his indorsement undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand from the payer, and, in default of payment, give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will operate as a transfer of the bill if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer. Chitty, Bills, 179, 180.

3. To make an indorser liable on his indorsement to parties subsequent to his own indorsee, the instrument must be commercial paper; for the indorsement of a bond or single bill will not, *per se*, create a responsibility. 13 Serg. & R. Penn. 311. See Story, Bills, 202; 11 Pet. 80.

When there are several indorsers, the first in point of time is generally, but not always, first responsible: there may be circumstances which will cast the responsibility, in the first place, as between them, on a subsequent indorsee. 5 Munf. Va. 252.

INDUCEMENT. In Contracts. The benefit which the obligor is to receive from a contract is the inducement for making it.

In Criminal Law. The motive. Confessions are sometimes made by criminals under the influence of promises or threats. When these promises or threats are made by persons in authority, the confessions cannot be received in evidence. See CONFESSION.

In Pleading. The statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Such matter as is not introductory to, or necessary to elucidate the substance or gist of, the declaration, plea, etc., nor collaterally applicable to it, is surplusage.

2. An inducement is, in general, more a matter of convenience than of necessity, since the same matter may be stated in the body of the declaration; but by its use confession of statement is avoided. 1 Chitty, Plead. 259.

But in many cases it is necessary to lay a foundation for the action by a statement, by way of inducement, of the extraneous or collateral circumstances which give rise to the plaintiff's claim. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstance of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance. Lawes, Plead. 66, 67; 1 Chitty, Plead. 292; Stephen, Plead. 257; 14 Viner, Abr. 405; 20 *id.* 345; Bacon, Abr. *Pleas, etc.* (I 2).

When a formal traverse is adopted, it should be introduced with an inducement, to show that the matter contained in the traverse is material. 1 Chitty, Plead. 38. See TRAVERSE; INNUENDO; COLLOQUIUM.

3. In an indictment there is a distinction between the allegation of facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. An "inducement to an offence does not require so much certainty." Comyns, Dig. *Indictment* (G 5). In an indictment for an escape, "*debito modo* commissus" is enough, without showing by what authority; and even "commissus" is sufficient. 1 Ventr. 170. So, in an indictment for disobedience to an order of justices for payment of a church-rate, an averment, by way of inducement, that a rate was duly made as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient. 1 Den. Cr. Cas. 222.

INDUCIÆ (Lat.). **In Civil Law.** A truce; cessation from hostilities for a time agreed upon. Also, such agreement itself. Calvinus, Lex. So in international law. Grotius, de Jure Bell. lib. 3, c. 2, § 11; Huber, Jur. Civit. p. 743, § 22.

In Old Practice. A delay or indulgence allowed by law. Calvinus, Lex.; DuCange; Bract. fol. 352 *b*; Fleta, lib. 4, c. 5, § 8. See Bell, Dict.; Burton, Law of Scotl. 561. So used in old maritime law: *e.g.* an *inducæ* of twenty days after safe arrival of vessel was allowed in case of a bottomry bond, to raise principal and interest. Locceivus, de Jure Marit. lib. 2, c. 6, § 11.

INDUCIÆ LEGALES (Lat.). **In Scotch Law.** The days between the citation of the defendant and the day of appearance; the days between the teste day and day of return of the writ.

INDUCTION. In Ecclesiastical Law. The giving a clerk, instituted to a benefice, the actual possession of its temporalties, in the nature of livery of seisin. Ayliffe, Parerg. 299.

INDULGENCE. A favor granted.

It is a general rule that where a creditor gives indulgence, by entering into a binding contract with a principal debtor, by which the surety is or may be damnified, such surety is discharged, because the creditor has put it out of his power to enforce immediate payment, when the surety would have a right to require him to do so. 6 Dow, Parl. Cas. 238; 3 Mer. Ch. 272; Bacon, Abr. *Oblig.* (*D*).

But mere inaction by the creditor, if he do not deprive himself of the right to sue the principal, does not, in general, discharge the surety. See FORBEARANCE.

INDULTO. In Spanish Law. The condonation or remission of the punishment imposed on a criminal for his offence. L. 1, t. 32, pt. 7. This power is exclusively vested in the king.

The right of exercising this power has been often contested, chiefly as impolitic, for the reason set forth in the following Latin verses:—

"Plus sæpe nocet patientia regis
Quam rigor: ille nocet paucis; hæc incitat omnes,
Dum se ferre suos sperant impune reatus."

INELIGIBILITY. The incapacity to be lawfully elected.

This incapacity arises from various causes; and a person may be incapable of being elected to one office who may be elected to another: the incapacity may also be perpetual or temporary.

Among perpetual inabilities may be reckoned, the inability of women to be elected to a public office; and of a citizen born in a foreign country to be elected president of the United States.

Among the temporary inabilities may be mentioned, the holding of an office declared by law to be incompatible with the one sought; the non-payment of the taxes required by law; the want of certain property qualifications required by the constitution; the want of age, or being too old.

INEVITABLE ACCIDENT. A term used in the civil law, nearly synonymous with *fortuitous event*. 10 Miss. 572.

Any accident which cannot be foreseen and prevented. Though used as synonymous with *act of God*, it would seem to have a wider meaning, the *act of God* being any cause which operates without aid or interference from man. 4 Dougl. 287, 290, *per Lord Mansfield;* 21 Wend. N. Y. 198, *per Cowen*, J.; 3 Blackf. Ind. 222; 2 Ga. 349; 10 Miss. 572; 1 Parsons, Contr. 635.

INFAMIS (Lat.). **In Roman Law.** One who, in consequence of the application of a general rule, and not by virtue of an arbitrary decision of the censors, lost his political rights but preserved his civil rights. Savigny, Droit Rom. § 79.

INFAMOUS CRIME. A crime which works infamy in one who has committed it.

INFAMY. That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness.

2. When a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty, or property. Gilbert, Ev. 256; 2 Bulstr. 154; 1 Phillipps, Ev. 23; Buller, Nisi P. 291. The crimes which render a person incompetent are treason, 5 Mod. 16, 74; felony, 2 Bulstr. 154; Coke, Litt. 6; 1 T. Raym. 369; receiving stolen goods, 7 Metc. Mass. 500; 5 Cush. Mass. 287; all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law, Leach, 496; as perjury and forgery, Coke, Litt. 6; Fost. 209; piracy, 2 Rolle, Abr. 886; swindling, cheating, Fost. 209; barratry, 2 Salk. 690; conspiracy, 1 Leach, Cr. Cas. 442; and the bribing a witness to absent himself from a trial, in order to get rid of his evidence. Fost. 208. From the decisions Professor Greenleaf deduces the rule "that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud." 1 Greenleaf, Ev. § 373. A conviction of the offence of obtaining goods by false pretences does not render the party an incompetent witness. 11 Metc. Mass. 302.

3. It is the crime, and not the punishment, which renders the offender unworthy of belief. 1 Phillipps, Ev. 25. In order to incapacitate the party, the judgment must be proved as pronounced by a court possessing competent jurisdiction. 1 Sid. 51; 2 Stark. 183; Starkie, Ev. pt. 2, p. 144, note 1, pt. 4, p. 716. But it has been held that a conviction of an infamous crime in another country, or another of the United States, does not render the witness incompetent on the ground of infamy. 17 Mass. 515; 11 Metc. Mass. 304. See 2 Harr. & M'H. Md. 380; 3 Hawks, No. C. 393; 10 N. H. 22. Though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicil accompanies him everywhere. Story, Confl. Laws, § 620, and the authorities there cited; Fœlix, Traité de Droit Intern. Privé, § 31; Merlin, Répert. *Loi*, § 6, n. 6.

The objection to competency may be answered by proof of pardon (see PARDON), and by proof of a reversal by writ of error, which must be proved by the production of the record. As to the effect of serving out the term of punishment, see stat. 6 & 7 Vict. c. 85, § 1; 3 Ind. 16; 4 *id.* 128; 14 Mo. 348; 31 N. H. 314; 24 Conn. 363; 2 Paine, C. C. 168; 2 Gray, Mass. 562; 13 Tex. 168; 23 Ala. N. S. 44. See 2 Bennett & H. Lead. Crim. Cas. 394.

4. The judgment for an infamous crime, even for perjury, does not preclude the party from making an affidavit with a view to his own defence. 2 Salk. 461; 2 Strange, 1148. He may, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he is a party; for otherwise he would be without a remedy. But the rule is confined to defence; and he cannot be heard upon oath as complainant. 2 Salk. 461; 2 Strange, 1148. When the witness becomes incompetent from infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness,

previous to his conviction, evidence may be given of his handwriting. 2 Strange, 833; Starkie, Ev. pt. 2, § 193, pt. 4, p. 723.

INFANT. One under the age of twenty-one years. Coke, Litt. 171.

2. But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended. Savigny, Dr. Rom. § 182; 6 Ind. 447. If, for example, a person were born at any hour of the first day of January, 1810 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first of December, 1830, although nearly forty-eight hours before he had actually attained the full age of twenty-one years according to years, days, hours, and minutes, because there is in this case no fraction of a day. 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44; Raym. 84; 1 Sharswood, Blackst. Comm. 463, 464; 1 Lilly, Reg. 57; Comyns, Dig. *Enfant* (A); Savigny, Dr. Rom. §§ 383, 384.

3. A curious case occurred in England, of a young lady who was born after the house-clock had struck, while the parish clock was striking, and before St. Paul's had begun to strike, twelve, on the night of the fourth and fifth of January, 1805; the question was whether she was born on the fourth or fifth of January. Mr. Coventry gives it as his opinion that she was born on the fourth, because the house-clock does not regulate any thing but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with "implicit acquiescence." Coventry, Ev. 182. It is conceived that this can only be *primâ facie;* because, if the fact were otherwise, and the parochial and metropolitan clocks should both have been wrong, they would undoubtedly have had no effect in ascertaining the age of the child.

4. The sex makes no difference at common law: a woman is, therefore, an infant until she has attained the age of twenty-one years. Coke, Litt. 171. It is otherwise, however, in some of the United States. 18 Ill. 209; 4 Ind. 464. Before arriving at full age, an infant may do many acts. A *male* at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian, and, if his discretion be proved, may, at common law, make a will of his personal estate; he may act as executor at the age of seventeen years. A *female* at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve she may consent or disagree to marriage; and, at common law, at seventeen she may act as executrix. Considerable changes of the common law have taken place in many of the states. In Pennsylvania, to act as an executor the party must be of full age.

5. In general, an infant is not bound by his contracts, unless to supply him necessaries, Selwyn, Nisi P. 137; Chitty, Contr. 31; Bacon, Abr. *Infancy, etc.* (I 3); 9 Viner, Abr. 391; 1 Comyns, Contr. 150, 151; 3 Rawle, Penn. 351; 8 Term, 335; 1 Kebl. 905, 913; 1 Sid. 129, 258; 1 Lev. 168; 1 South. N. J. 87; but see 6 Cranch, 226; 3 Pick. Mass. 492; 1 Nott & M'C. So. C. 197; or unless, by some legislative provision, he is empowered to enter into a contract; as, with the consent of his parent or guardian to put himself apprentice, or enlist in the service of the United States. 4 Binn. 487; 5 *id.* 423; 30 Vt. 357.

6. Contracts made with him may be enforced or avoided by him on his coming of age, 20 Ark. 600; 12 Ind. 76; 4 Sneed, Tenn. 118; 13 La. Ann. 407; 32 N. H. 345; 24 Mo. 541; but must be avoided within a reasonable time. 15 Gratt. Va. 329; 29 Vt. 465; 25 Barb. N. Y. 399. But to this general rule there may be an exception in case of contracts for necessaries; because these are for his benefit. See NECESSARIES. 2 Head, Tenn. 33; 18 Ill. 63; 13 Md. 140; 32 N. H. 345; 11 Cush. Mass. 40; 14 B. Monr. Ky. 232. The privilege of avoiding a contract on account of infancy is strictly personal to the infant, and no one can take advantage of it but himself. 3 Green, N. J. 343; 2 Brev. No. C. 438; 6 Jones, No. C. 494; 23 Tex. 252; 30 Barb. N. Y. 641; 31 Miss. 32. When the contract has been performed, and it is such as he would be compellable by law to perform, it will be good and bind him. Coke, Litt. 172 *a*. And all the acts of an infant which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding. 3 Burr. 1794; Fonblanque, Eq. b. 1, c. 2, § 5, note c.

The contract cannot be avoided by an adult with whom the infant deals. 29 Barb. N. Y. 160; 12 Ind. 76; 32 *id.* 537; 5 Sneed, Tenn. 659.

7. The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others. An infant is, therefore, responsible for his torts, as for slander, trespass, and the like, 29 Barb. N. Y. 218; 29 Vt. 465; but he cannot be made responsible in an action *ex delicto*, where the cause arose on a contract. 3 Rawle, Penn. 351; 6 Watts, Penn. 9; 15 Wend. N. Y. 233; 25 *id.* 399; 9 N. H. 441; 32 *id.* 101; 10 Vt. 71; 5 Hill, So. C. 391. But see 6 Cranch, 226; 15 Mass. 359; 4 M'Cord, So. C. 387.

8. With regard to the responsibility of infants for crimes, the rule is that no infant within the age of seven years can be guilty of felony or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion; and against this presumption no averment shall be received. This legal incapacity, however, ceases when the infant attains the age of fourteen years, after which period his act becomes subject to the same rule of construction as that of any other person. Between the ages of seven and fourteen years an infant is deemed *primâ facie* to be *doli incapax;* but in this case the maxim applies, *malitia supplet ætatem:* malice supplies the want of mature years. 1 Russell, Crimes, 2, 3; 31 Ala. N. s. 323.

INFANTICIDE. In Medical Jurisprudence. The murder of a new-born infant. It is thus distinguishable from *abortion* and *fœticide*, which are limited to the destruction of the life of the *fœtus in utero*.

2. The crime of infanticide can be committed only after the child is wholly born. 5 Carr. & P. 329; 6 *id.* 349. This question involves an inquiry, *first*, into the signs of maturity, the data for which are—the length and weight of the fœtus, the relative position of the centre of its body, the proportional development of its several parts as compared with each other, especially of the head as compared with the rest of the body, the degree of growth of the hair and nails, the condition of the skin, the presence or absence of the *membrana pupillaris*, and, in the male, the descent or non-descent of the testicles. Dean, Med. Jur. 140.

3. *Second*, was it born alive? The second point presents an inquiry of great interest both to the legal and medical professions and to the community at large. In the absence of all direct proof, what organic facts proclaim the existence of life subsequent to birth? These facts are derived principally from the circulatory and respiratory systems. From the former the proofs are gathered—from the *character of the blood*, that which is purely fœtal being wholly dark, like venous blood, destitute of fibrous matter, and forming coagula much less firm and solid than that which has been subjected to the process of respiration; so, also, the coloring-matter is darker, and contains no phosphoric acid, and its proportion of serum and red globules is comparatively small. *From the condition of the heart and blood-vessels.* The circulation anterior and subsequent to birth must necessarily be entirely different. That anterior, by means of the fœtal openings,—the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*,—is enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxygenation. When the extra-uterine life commences, and the double circulation is established, these openings gradually close: so that their closure is considered clear evidence of life subsequent to birth. 1 Beck, Med. Jur. 478 *et seq.*; Dean, Med. Jur. 142 *et seq.* *From the difference in the distribution* of the blood in the different organs of the body. The two organs in which this difference is most perceptible are the liver and the lungs,—especially the latter. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly doubled, and any incision into them will be followed by a free effusion.

4. From the respiratory system proofs of life subsequent to birth are derived. *From the thorax:* its size, capacity, and arch are increased by respiration. *From the lungs:* they are increased in size and volume, are projected forward, become rounded and obtuse, of a pinkish-red hue, and their density is inversely as their volume. Dean, Med. Jur. 149 *et seq.* The fact of the specific gravity of the lungs being diminished in proportion to their diminution in density gives rise to a celebrated test,—the hydrostatic,—the relative weight of the lungs with water. 1 Beck, Med. Jur. 459 *et seq.* The rule is, that lungs which have not respired are specifically heavier than water, and if placed within it will sink to the bottom of the vessel. If they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it they will float. There are several objections to the sufficiency of this test; but it is fairly entitled to its due weight in the settlement of this question. Dean, Med. Jur. 154 *et seq.* *From the state of the diaphragm.* Prior to respiration it is found high up in the thorax. The act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends.

5. The fact of life at birth being established, the next inquiry is, how long did the child survive? The proofs here are derived from three sources. *The fœtal openings*, their partial or complete closure. The more perfect the closure, the longer the time. *The series of changes* in the umbilical cord. These are—1, the *withering* of the cord; 2, its *desiccation* or *drying*, and, 3, its *separation* or *dropping off*,—occurring usually four or five days after birth; 4, *cicatrization of the umbilicus*,—occurring usually from ten to twelve days after birth. *The changes in the skin*, consisting in the process of exfoliation of the epidermis, which commences on the abdomen, and extends thence successively to the chest, groin, axillæ, interscapular space, limbs, and, finally, to the hands and feet.

6. As to the modes by which the life of the child may have been destroyed. The criminal modes most commonly resorted to are—1, suffocation; 2, drowning; 3, cold and exposure; 4, starvation; 5, wounds, fractures, and injuries of various kinds; a mode not unfrequently resorted to is the introduction of sharp-pointed instruments in different parts of the body; also, luxation and fracture of the neck, accomplished by forcibly twisting the head of the child, or pulling it backwards; 6, strangulation; 7, poisoning; 8. intentional neglect to tie the umbilical cord; and, 9, causing the child to inhale air deprived of its oxygen, or gases positively deleterious. All these modes of destroying life, together with the natural or accidental ones, will be found fully discoursed by the writers on medical jurisprudence. 1 Beck, Med. Jur. 509 *et seq.*; Dean, Med. Jur. 179 *et seq.*; Ryan, Med. Jur. 137; Dr. Cummins, Proof of Infanticide Considered.

INFANZON. In Spanish Law. A person of noble birth, who exercises within his domains and inheritance no other rights and privileges than those conceded to him.

INFEOFFMENT. The act or instrument of feoffment. In Scotland it is syno-

nymous with *saisine*, meaning the instrument of possession: formerly it was synonymous with investiture. Bell, Dict.

INFERENCE. A conclusion drawn by reason from premises established by proof.

It is the province of the judge who is to decide upon the facts to draw the inference. When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, it is their duty to do so. The witness is not permitted, as a general rule, to draw an inference and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions.

INFERIOR. One who in relation to another has less power and is below him; one who is bound to obey another. He who makes the law is the superior; he who is bound to obey it, the inferior. 1 Bouvier, Inst. n. 8.

INFERIOR COURTS. By this term are understood all courts except the supreme courts. An inferior court is a court of limited jurisdiction, and it must appear on the face of its proceedings that it has jurisdiction, or its proceedings will be void. 3 Bouvier, Inst. n. 2529.

INFICIATIO (Lat.). **In Civil Law.** Denial. Denial of fact alleged by plaintiff,—especially, a denial of debt or deposit. Voc. Jur. Utr.; Calvinus, Lex.

INFIDEL. One who does not believe in the existence of a God who will reward or punish in this world or that which is to come. Willes, 550. One who professes no religion that can bind his conscience to speak the truth. 1 Greenleaf, Ev. § 368.

This term has been very indefinitely applied. Under the name of infidel Lord Coke comprises Jews and heathens, Coke, 2d Inst. 506; Coke, 3d Inst. 165; and Hawkins includes among infidels such as do not believe either in the Old or New Testament. Hawkins, Pl. Cr. b. 2, c. 46, s. 148.

The objection to the competency of witnesses who have no religious belief is removed in *Maine*, Stat. 1847, c. 64; *Massachusetts*, Gen. Stat. c. 131, § 12; Michigan, Rev. Stat. 1846, c. 142, § 96; *Missouri*, Rev. Stat. 1845, c. 186, § 21. In other states a witness must believe in the *existence* of a Supreme Being, as in Connecticut, Rev. Stat. 1849, tit. 1, § 140; *New Hampshire*, Rev. Stat. 1842, c. 188, § 9, who will punish false swearing. 2 N. Y. Rev. Stat. 3d ed. 505.

It has been held that at common law it is only requisite that the witness should believe in the existence of a God who will punish and reward according to desert. 1 Atk. Ch. 21; 2 Cow. N. Y. 431, 433, n.; 5 Mas. C. C. 18; 13 Vt. 362; 26 Penn. St. 274; that it is sufficient if the punishment is to be in this world. 14 Mass. 184; 4 Jones, No. C. 25: *contra*, 7 Conn. 66. And see 17 Wend. N. Y. 460; 2 Watts & S. Penn. 262; 10 Ohio, 121. A witness's belief is to be presumed till the contrary appear, 2 Dutch. N. J. 463, 601; and his disbelief must be shown by declarations made previously, and cannot be inquired into by examination of the witness himself. 1 Greenleaf, Ev. § 370, n.; 17 Me. 157; 14 Vt. 535. See 17 Ill. 541.

INFIHT (Sax.). An assault upon an inhabitant of same dwelling. Gloss. Anc. Inst. & Laws of Eng.

INFIRM. Weak, feeble.

When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Will. Ch. 117. See AGED WITNESS; GOING WITNESS.

INFIRMATIVE. Weakening. Webster, Dict. Tending to weaken or render infirm; disprobabilizing. 3 Bentham, Jud. Ev. 13, 14. Exculpatory is used by some authors as synonymous. See Wills, Circ. Ev. 120 *et seq.*; Best, Pres. § 217 *et seq.*

INFORMATION. In French Law. The act or instrument which contains the depositions of witnesses against the accused. Pothier, Proc. Civ. sect. 2, art. 5.

In Practice. A complaint or accusation exhibited against a person for some criminal offence. 4 Blackstone, Comm. 308.

It differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury. 4 Blackstone, Comm. 308. The process has not been formally put in motion by congress for misdemeanors, but is common in civil prosecutions for penalties and forfeitures. 3 Story, Const. 659. The information is usually made upon knowledge given by some other person than the officer, called the relator.

2. Under *United States* laws, informations are resorted to for illegal exportation of goods, 1 Gall. C. C. 3; in cases of smuggling, 1 Mass. c. c. 482; and a libel for seizure is in the nature of an information. 3 Wash. C. C. 464; 1 Wheat. 9; 9 *id.* 381. The provisions of the U. S. constitution have been held to apply only to the proceedings in the federal courts.

In *Connecticut*, informations may be made by the attorneys of the state in their respective counties for all crimes not punishable with death or imprisonment for life. Rev. Stat. 1854, c. 12, § 155.

In *Louisiana*, at the option of the state. 14 La. Ann. 364.

In *Massachusetts*, all misdemeanors less than felonies may be prosecuted by information. 5 Mass. 257; 81 Gray, Mass. 329.

In *Missouri*, for misdemeanors. 29 Mo. 330.

In *New Hampshire*, an information lies in all cases not punishable by death or confinement at hard labor. Rev. Stat. 457.

In *New York*, it lies for all crimes not infamous or punishable capitally. N. Y. Const. art. 1, § 6.

In *Pennsylvania* and *South Carolina*, an information cannot be brought where any indictment lies. Penn. Const. art. 9, § 10; 1 M'Cord, So. C. 35.

In *Vermont*, the state's attorney may prose-

cute by information all crimes not capital and for which the punishment does not exceed seven years in the state prison. Vt. Rev. Stat. c. 3, § 1.

In *Virginia*, an information cannot be used for felonies or in any case except by leave of the court and where the accused fails to show cause to the contrary. Va. Code, c. 207, § 2.

3. An information is sufficiently formal if it follows the words of the statute, 9 Wheat. 381; 14 Conn. 487; but enough must appear to show whether it is found under the statute or at common law. 3 Day, Conn. 103. It must, however, allege the offence with sufficient fulness and accuracy, 10 Ind. 404, and must show all the facts demanding a forfeiture, as in a penal action, when it is to recover a penalty. 4 Mass. 462; 10 Conn. 461. Where it is for a first offence, the fact need not be stated, 9 Conn. 560; otherwise, where it is for a second or subsequent offence for which an additional penalty is provided. 2 Metc. Mass. 408. It cannot be amended by adding charges. 1 Dan. Ky. 466.

A part of the defendants may be acquitted and a part convicted, 1 Root, Conn. 226; and a conviction may be of the whole or a part of the offence charged. 4 Mass. 137. In some states it is a proceeding by the state officer, filed at his own discretion, 9 N. H. 468; 6 Ind. 281; 4 Wisc. 567; in others, leave of court may be granted to use the state officer's name to any relator, upon cause shown. 7 Halst. N. J. 84; 2 Dall. Penn. 112; 1 M'Cord, So. C. 35, 52.

INFORMATION OF INTRUSION. A proceeding instituted by the state prosecuting officer against intruders upon the public domain. See Mass. Gen. Stat. c. 141; 3 Pick. Mass. 224; 6 Leigh, Va. 588.

INFORMATION IN THE NATURE OF A QUO WARRANTO. A proceeding against the usurper of a franchise or office. See QUO WARRANTO.

INFORMATUS NON SUM (Lat.). In Practice. I am not informed: a formal answer made in court or put upon record by an attorney when he has nothing to say in defence of his client. Styles, Reg. 372.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute.

2. When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not a competent witness, according as the statute creating the penalty has or has not made him so. 1 Phillipps, Ev. 97; Roscoe, Crim. Ev. 107; 5 Mass. 57; 1 Dall. Penn. 68; 1 Saund. 262, c.

INFORTIATUM (Lat.). In Civil Law. The second part of the Digest or Pandects of Justinian. See DIGEST.

This part, which commences with the third title of the twenty-fourth book and ends with the thirty-eighth book, was thus called because it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it because it treats of successions, substitutions, and other important matters, and, being more used than the others, produced greater fees to the lawyers.

INFRA (Lat.). Below, under, beneath, underneath. The opposite of *supra*, above. Thus, we say, *primo gradu est*—supra, *pater, mater*, infra, *filius, filia:* in the first degree of kindred in the ascending line, above is the father and the mother, below, in the descending line, son and daughter. Inst. 3. 6. 1.

In another sense, this word signifies *within:* as, *infra corpus civitatis*, within the body of the county; *infra præsidia*, within the guards. So of time, *during: infra furorem*, during the madness. This use is not classical. The sole instance of the word in this sense in the Code, *infra anni spatium*, Code, b. 5, tit. 9, § 2, is corrected to *intra anni spatium*, in the edition of the Corpus Jur. Civ. of 1833 at Leipsic. The use of *infra* for *intra* seems to have sprung up among the barbarians after the fall of the Roman empire. In Italian, the preposition *fra*, which is a corruption of *infra*, is used in the sense of *intra*. Bonetti, Ital. Dict.

INFRA ÆTATEM (Lat.). Within or under age.

INFRA ANNUM LUCTUS (Lat.). Within the year of grief or mourning. 1 Sharswood, Blackst. Comm. 457; Cod. 5. 9. 2. But *intra anni spatium* is the phrase used in the passage in the Code referred to. See Corp. Jur. Civ. 1843, Leipsic. *Intra tempus luctus* occurs in Novella 22, c. 40. This *year* was at first ten months, afterwards twelve. 1 Beck, Med. Jur. 612.

INFRA BRACHIA (Lat.). Within her arms. Used of a husband *de jure* as well as *de facto*. Coke, 2d Inst. 317. Also, *inter brachia*. Bracton, fol. 148 *b*. It was in this sense that a woman could only have an appeal for murder of her husband *inter brachia sua*. Woman's Lawyer, pp. 332, 335.

INFRA CORPUS COMITATUS (Lat.). Within the body of the county.

The common-law courts have jurisdiction *infra corpus comitatus:* the admiralty, on the contrary, has no such jurisdiction, unless, indeed, the tide-water may extend within such county. 5 How. 441, 451. See ADMIRALTY; FAUCES TERRÆ.

INFRA DIGNITATEM CURIÆ (Lat.). Below the dignity of the court. Example: in equity a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. See 4 Johns. Ch. N. Y. 183; 4 Paige, Ch. N. Y. 364; 4 Bouvier, Inst. n. 4237.

INFRA HOSPITIUM (Lat.). Within the inn. When once a traveller's baggage comes *infra hospitium*, that is, in the care and under the charge of the innkeeper, it is at his risk. See 1 Coke, 32; 14 Johns. N. Y. 175; 21 Wend. N. Y. 282; 25 *id.* 642; 8 N. H. 408; 1 Smith, Lead. Cas. 47; 9 Pick. Mass. 280; 7 Cush. Mass. 417; 1 Ad. & E. 522; 3

Nev. & M. 576; 2 Kent, Comm. 593, 9th ed.; Story, Bailm. § 478; 1 Parsons, Contr. 631, notes. See GUEST; INNKEEPER.

INFRA PRÆSIDIA (Lat. within the walls). A term used in relation to prizes, to signify that they have been brought completely in the power of the captors; that is, within the towns, camps, ports, or fleet of the captors. Formerly the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia* changed the property; but the rule now established is that there must be a sentence of condemnation to effect this purpose. 1 C. Rob. Adm. 134; 1 Kent, Comm. 104; Chitty, Law of Nat. 98; Abbott, Shipp. 14; Hugo, Droit Romain, § 90.

INFRACTION (Lat. *infrango*, to break in upon). The breach of a law or agreement; the violation of a compact. In the French law this is the generic expression to designate all actions which are punishable by the Code of France.

INFRINGEMENT. In Patent Law. A word used to denote the act of trespassing upon the incorporeal right secured by a patent. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account. The subject is discussed in the article PATENTS.

INFUSION. In Medical Jurisprudence. A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract. The product of this operation.

Although *infusion* differs from *decoction*, they are said to be *ejusdem generis;* and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial. 3 Campb. 74.

INGENIUM (Lat. of middle ages). A net or hook, DuCange; hence, probably, the meaning given by Spelman of artifice, fraud (*ingin*). A machine, Spelman, Gloss., especially for warlike purposes; also, for navigation of a ship. DuCange.

INGENUI (Lat.). **In Civil Law.** Those freemen who were born free. Vicat, Vocab.

They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom: the latter were called, at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRESS, EGRESS, AND REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go upon, and return from the lands in question.

INGRESSU (Lat.). An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Tech. Dict.

INGROSSING. In Practice. The act of copying from a rough draft a writing in order that it may be executed: as, ingrossing a deed.

INHABITANT (Lat. *in*, in, *habeo*, to dwell). One who has his domicil in a place; one who has an actual fixed residence in a place.

2. A mere intention to remove to a place will not make a man an inhabitant of such place, although, as a sign of such intention, he may have sent his wife and children to reside there. 1 Ashm. Penn. 126. Nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant. 1 Dall. Penn. 480. See 10 Ves. 339; 14 Viner, Abr. 420; 1 Phillipps, Ev.; Mass. Gen. Stat. 51; Kyd, Corp. 321; Anal. des Pand. de Pothier, *Habitans;* Pothier, Pand. l. 50, t. 1, s. 2; 6 Ad. & E. 153.

3. The inhabitants of the United States are native or foreign born. The *natives* consist, *first*, of white persons, and these are all citizens of the United States, unless they have lost that right; *second*, of the aborigines, and these are not, in general, citizens of the United States, nor do they possess any political power; *third*, of negroes, or descendants of the African race; *fourth*, of the children of foreign ambassadors, who are citizens or subjects as their fathers are or were at the time of their birth.

4. *Inhabitants born out of the jurisdiction of the United States* are, *first*, children of citizens of the United States, or of persons who have been such; they are citizens of the United States, provided the father of such children shall have resided within the same, Act of Congress of April 14, 1802, § 4; *second*, persons who were in the country at the time of the adoption of the constitution; these have all the rights of citizens; *third*, persons who have become naturalized under the laws of any state before the passage of any law on the subject of naturalization by congress, or who have become naturalized under the acts of congress, are citizens of the United States, and entitled to vote for all officers who are elected by citizens, and to hold any office except those of president and vice-president of the United States; *fourth*, children of naturalized citizens, who were under the age of twenty-one years at the time of their parent's being so naturalized, or admitted to the rights of citizenship, are, if then dwelling in the United States, considered as citizens of the United States, and entitled to the same rights as their respective fathers; *fifth*, persons who resided in a territory which was annexed to the United States by treaty, and the territory became a state; as, for example, a person who, born in France, moved to Louisiana in 1806, and settled there, and remained in the territory until it was admitted as a state, it was held that, although not naturalized under the acts of congress, he was a citizen of the United States, Desbois' case, 2 Mart. La. 185;

sixth, aliens or foreigners, who have never been naturalized, and these are not citizens of the United States, nor entitled to any political rights whatever. See ALIEN; CITIZEN; DOMICIL; NATURALIZATION.

INHERENT POWER. An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another.

INHERITABLE BLOOD. Blood of an ancestor which, while it makes the person in whose veins it flows a relative, will also give him the legal rights of inheritance incident to that relationship. See 2 Sharswood, Blackst. Comm. 254, 255. Descendants can derive no title through a person whose blood is not inheritable. Such, in England, are persons attainted and aliens. But attainder is not known in this country. *Id.* See 4 Kent, Comm. 413, 424; 1 Hilliard, Real Prop. 148; 2 *id.* 190.

INHERITANCE. A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. Dig. 50. 16. 24. The term is applied to lands.

The property which is inherited is called an inheritance.

The term inheritance includes not only lands and tenements which have been acquired by descent, but every fee-simple or fee-tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it. Littleton, § 9. See ESTATES.

In Civil Law. The succession to all the rights of the deceased. It is of two kinds: that which arises by testament, when the testator gives his succession to a particular person; and that which arises by operation of law, which is called succession *ab intestat.* Heineccius, Leç. El. §§ 484, 485.

INHERITANCE ACT. The English statute of 3 & 4 Will. IV. c. 106, regulating the law of inheritance. 2 Chitty, Stat. 575; 2 Sharswood, Blackst. Comm. 37; 1 Stephen, Comm. 500.

INHIBITION. In Civil Law. A prohibition which the law makes or a judge ordains to an individual. Halifax, Anal. p. 126.

In English Law. The name of a writ which forbids a judge from further proceeding in a cause depending before him: it is in the nature of a prohibition. Termes de la Ley; Fitzherbert, Nat. Brev. 39.

In Scotch Law. A personal prohibition which passes by letters under the signet, prohibiting the party inhibited to contract any debt or do any act by which any part of the heritable property may be aliened or carried off, in prejudice of the creditor inhibiting. Erskine, Pract. b. 2, tit. ii. s. 2. See DILIGENCES.

INHIBITION AGAINST A WIFE. In Scotch Law. A writ in the sovereign's name, passing the signet, which prohibits all and sundry from having transactions with a wife or giving her credit. Bell, Dict.; Erskine, Inst. 1. 6. 26.

INITIAL (from Lat. *initium*, beginning). Beginning; placed at the beginning. Webster. Thus, the initials of a man's name are the first letters of his name: as, G. W. for George Washington. A middle name or initial is not recognized by law. 2 Cow. N. Y. 463; 1 Hill, N. Y. 102; 14 Barb. N. Y. 261; 4 Watts, Penn. 329; 26 Vt. 599; 28 N. H. 561; 8 Tex. 376; 14 *id.* 402; Wharton, Am. Crim. Law, 68. But see 1 Pick. Mass. 388. In an indictment for forgery, an instrument signed "T. Tupper" was averred to have been made with intent to defraud Tristam Tupper. Held good. 1 McMull. So. C. 236. Signing of initials is good signing within the Statute of Frauds. 12 J. B. Moore, 219; 1 Campb. 513; 2 Bingh. N. s. 780; 2 Mood. & R. 221; Addison, Contr. Am. ed. 46, n; 1 Den. N. Y. 471. But see Erskine, Inst. 3. 2. 8. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity. 3 Ves. Ch. 148.

INITIALIA TESTIMONII (Lat.). **In Scotch Law.** A preliminary examination of a witness to ascertain what disposition he bears towards the parties,—whether he has been prompted what to say, whether he has received a bribe, and the like. It resembles in some respects an examination on *voir dire* in English practice.

INITIATE. Commenced.

A husband was, in feudal law, said to be tenant by the curtesy *initiate* when a child who might inherit was born to his wife, because he then first had an inchoate right as tenant by the curtesy, and did homage to the lord as one of the *pares curtis* (peers of the court); whence *curtesy.* This right became consummated on the death of the wife before the husband. See 2 Sharswood, Blackst. Comm. 127; 1 Stephen, Comm. 247.

INITIATIVE. In French Law. The name given to the important prerogative conferred by the *charte constitutionnelle*, art. 16, on the late king to propose through his ministers projects of laws. 1 Toullier, n. 39. See VETO.

INJUNCTION. A prohibitory writ, issued by the authority of, and generally under the seal of, a court of equity, to restrain one or more of the defendants or parties, or *quasi* parties, to a suit or proceeding in equity, from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be unjust or inequitable so far as regards the rights of some other party or parties to such suit or proceedings in equity. Eden, Inj. c. 1; Jeremy, Eq. Jur. b. 3, c. 2, § 1; Story, Eq. Jur. § 861; Willard, Eq. Jur. 341; 4 Bouvier, Inst. 120; 2 Green, Ch. N. J. 136; 1 Madd. Ch. 126.

The interdict of the Roman law resembles, in many respects, our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called edictal: *edictale, quod prætoris*

edictis proponitur, ut sciant omnes eâ formâ posse implorari. 2. It was used to signify his order or decree, applying the remedy in the given case before him, and was then called decretal: *decretale, quod prætor re natâ implorantibus decrevit.* It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case, 5 Am. Law Jour. 271; 2 Story, Eq. Jur. § 865.

2. *Preliminary injunctions* are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitively settled by the decision and decree of the court in such suit or proceeding.

Final or *perpetual injunctions* are awarded, or directed to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated and disposed of by the decision and the order or decree of the court. 2 Freem. Ch. 106; 4 Johns. Ch. N. Y. 69; 3 Yerg. Tenn. 366; 1 Bibb, Ky. 184; 4 Bouvier, Inst. 123.

3. In England, injunctions were divided into common injunctions and special injunctions. Eden, Inj. 3d Am. ed. 178, n.; Willard, Eq. Jur. 342; Saxt. Ch. N. J. 504. The common injunction was obtained of course when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill within the times prescribed by the practice of the court. Eden, Inj. 3d Am. ed. 59–61, 68–72, 93, n.; Story, Eq. Jur. § 892; 18 Ves. Ch. 523; Jeremy, Eq. Jur. b. 3, ch. 2, § 1, p. 339; Gilbert, For. Roman. 194; Newby, Chanc. Pr. c. 4, § 7. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in his bill of complaint. They were obtained upon a special application to the court or to the officer of the court who was authorized to allow the issuing of such injunction, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined. Story, Eq. Jur. § 892; 4 Eden, Inj. 78, 290; Jeremy, Eq. Jur. 339, 341, 342; 3 Mer. Ch. 475; 18 Ves. Ch. 522, 523. In the United States courts and in the equity courts of most of the states of the Union, the English practice of granting the common injunction has been discontinued or superseded, either by statute or by the rules of the courts. And the preliminary injunctions are, therefore, all special injunctions in the courts of this country where such English practice has been superseded.

4. *When used.* The injunction is used in a great variety of cases, of which cases the following are some of the most common: to stay proceedings at law by the party enjoined, Eden, Inj. c. 2; Story, Eq. Jur. §§ 51, 874–877; Jereray, Eq. Jur. 338 *et seq.*; Willard, Eq. Jur. 345 *et seq.*; R. M. Charlt. Ga. 93; 6 Gill & J. Md. 122; 1 Sumn. C. C. 89; 4 Johns. Ch. N. Y. 17; 23 How. 500; 27 Conn. 579; 4 Jones, Eq. No. C. 32; 5 R. I. 171; 23 Ga. 139; see 1 Beasl. N. J. 223; 13 Cal. 596; 20 Tex. 661; 35 Miss. 77; to restrain the transfer of stocks, of promissory notes, bills of exchange, and other evidences of debt, Eden, Inj. c. 14; Story, Eq. Jur. §§ 906, 907, 955; Willard, Eq. Jur. 358, 359; 2 Ves. Ch. 445; 1 Russ. Ch. 412; 4 *id.* 550; 2 Swanst. Ch. 180; 2 Vern. Ch. 122; 3 Brown, Ch. 476; 9 Wheat. 738; 4 Jones, Eq. No. C. 257; to restrain the transfer of the title to property, 1 Beasl. N. J. 252; 14 Md. 69; 7 Iowa, 33; 6 Gray, Mass. 562, or the parting with the possession of such property, Eden, Inj. c. 14; Story, Eq. Jur. §§ 953, 954; 16 Ves. Ch. 267; 3 Ves. & B. Ch. 168; 4 Cow. N. Y. 440; 6 Madd. Ch. 10; to restrain the party enjoined from setting up an unequitable defence in a suit at law, Story, Eq. Jur. §§ 903, 904; Mitford, Eq. Plead. Jeremy ed. 134, 135; Eden, Inj. c. 16; Cooper, Eq. Plead. 143; to restrain the infringement of a patent, Eden, Inj. c. 12; Phillipps, Pat. p. 451; Story, Eq. Jur. §§ 930, 934; 3 Mer. Ch. 624; 1 Vern. Ch. 137; 1 Ves. Ch. 112; 3 *id.* 140; 3 P. Will. 355; 2 Blatchf. C. C. 39; 4 Wash. C. C. 259, 514, 534; 1 Paine, C. C. 441; 9 Johns. N. Y. 507, or a copyright, or the pirating of trademarks, Story, Eq. Jur. §§ 935–942; Willard, Eq. Jur. 383, 403, 404; 6 Ves. Ch. 225; 1 Jac. 314, 472; 17 Ves. Ch. 424; 1 Hill, N. Y. 119; 2 Bosw. N. Y. 1; to prevent the removal of property, 3 Jones, Eq. No. C. 253, or the evidences of title to property, or the evidences of indebtedness, out of the jurisdiction of the court; to restrain the committing of waste, Eden, Inj. c. 9; 2 Story, Eq. Jur. § 909 *et seq.*; Willard, Eq. Jur. 369 *et seq.*; 4 Kent, Comm. 161; 2 Johns. Ch. N. Y. 148; 11 Paige, Ch. N. Y. 503; 3 Atk. Ch. 723; 12 Md. 1; 14 *id.* 152; 4 Jones, Eq. No. C. 174; 2 Iowa, 496; 32 Ala. N. S. 723; 1 McAll. C. C. 271; to prevent the creation or the continuance of a private nuisance, 12 Cush. Mass. 454; 28 Ga. 30; 11 Cal. 104, or of a public nuisance particularly noxious to the party asking for the injunction, Eden, Inj. c. 11; Mitford, Eq. Plead. 124; Story, Eq. §§ 874, 903, etc.; Willard, Eq. Jur. 388; 2 Sugden, Vend. Appx. 9th ed. 361; 2 Wils. Ch. 101, 102; 1 Coop. Sel. Cas. 333; Jeremy, Eq. Jur. 309; 6 Johns. Ch. N. Y. 46; 28 Barb. N. Y. 228; 3 Paige, Ch. N. Y. 210, 213; 6 *id.* 83; 8 *id.* 351, 354; 9 *id.* 575; 14 La. Ann. 247; to restrain illegal acts of municipal officers, 12 Cush. Mass. 410; 29 Barb. N. Y. 396; 8 Wisc. 485; 10 Cal. 278; see 23 Ga. 402; 30 Ala. N. S. 135; to prevent a purpresture. 12 Ind. 467.

5. It is necessary to the obtaining an injunction, as to other equitable relief, that there should be no plain, adequate, and complete remedy at law. 30 Barb. N. Y. 549; 5 R. I. 472; 31 Penn. St. 387; 32 Ala. N. S. 723; 37 N. H. 254. An injunction will not be granted while the rights between the parties are undetermined, except in cases where material and irreparable injury will be done, 3 Bosw. N. Y. 607; 1 Beasl. N. J. 247, 542; 15 Md. 22; 13 Cal. 156, 190; 10 *id.* 528; 6 Wisc. 680; 1 Grant, Cas. Penn. 412; 16 Tex. 410; 28 Mo. 210; but where it is irreparable and of a nature which cannot be compen-

sated, and where there will be no adequate remedy, an injunction will be granted which may be made perpetual. 39 N. H. 182; 12 Cush. Mass. 410; 27 Ga. 499; 1 McAll. C. C. 271.

Injunctions are used by courts of equity in a great number and variety of special cases; and in England and in the United States this writ was formerly used by such courts as the means of enforcing their decisions, orders, and decrees. But subsequent statutes have in most cases given to courts of equity the power of enforcing their decrees by the ordinary process of execution against the property of the party: so that an injunction to enforce the performance of a decree is now seldom necessary.

6. Injunctions may be used by courts of equity, in the United States as well as in England, to restrain the commencement or the continuance of proceedings in foreign courts, upon the same principles upon which they are used to restrain proceedings at law in courts of the same state or country where such injunction is granted. 3 Myl. & K. Ch. 104; Story, Eq. Jur. § 899. But a state court will not grant an injunction to stay proceedings at law previously commenced in one of the United States courts. Nor will a United States court grant an injunction to stay proceedings at law previously commenced in a state court. 4 Cranch, 179; 7 *id.* 279; Willard, Eq. Jur. 348. And upon the ground of comity, as well as from principles of public policy, the equity courts of one state of the Union will not grant an injunction to stay proceedings previously commenced in a court of a sister state, where the courts of such sister state have the power to afford the party applying for the injunction the equitable relief to which he is entitled. 2 Paige, Ch. N. Y. 401; Willard, Eq. Jur. 348; 2 Barb. Ch. N. Y. 280; 31 Barb. N. Y. 364. In the United States, an injunction bill is generally sworn to by the complainant, or is verified by the oath of some other person who is cognizant of the facts and charges contained in such bill, so far at least as relates to the allegations in the bill upon which the claim for a preliminary injunction is founded. And an order allowing such injunction is thereupon obtained by a special application to the court, or to some officer authorized by statute, or by the rules and practice of the court, to allow the injunction, either with or without notice to the party enjoined, and with or without security to such party, as the law or the rules and practice of the court may have prescribed in particular cases of classes. Woodb. & M. C. C. 280.

The bill must disclose a primary equity in aid of which this secondary remedy is asked. 4 Jones, Eq. No. C. 29; 28 Ga. 585; 14 La. Ann. 108; 1 Grant, Cas. Penn. 412; 12 Mo. 315.

7. An injunction upon its face should contain sufficient to apprize the party enjoined what he is restrained from doing or from permitting to be done by those who are under his control, without the necessity of his resorting to the complainant's bill on file to ascertain what he is to refrain from doing or from permitting to be done. 10 Cal. 347. And where a preliminary injunction is wanted, the complainant's bill should contain a proper prayer for such process. 2 Edw. Ch. N. Y. 188; 4 Paige, Ch. N. Y. 229, 444; 3 Sim. Ch. 273.

The remedy of the party injured by the violation of an injunction by the party enjoined is by an application to the court to punish the party enjoined for his contempt in disobeying the process of the court. See CONTEMPT.

See, generally, Eden, Inj.; 1 Maddox, Chanc. Pract. 125–165; Blake, Chanc. Pract. 330–344; 1 Chitty, Pract. 701–731; Cooper, Eq. Plead. Index; Mitford, Eq. Plead. Index; Smith, Chanc. Pract.; 14 Viner, Abr. 442; 2 Hov. Supp. Ves. Jr. 173, 431, 442; Comyns, Dig. *Chancery* (D 8); Newland, Pract. c. 4, s. 7; Bouvier, Inst. Index; Drewry, Inj.; Supplement to Drewry on Inj.; Walker, Am. Law; 2 Story, Eq. Jur.; Dunlop, Chanc. Pract.; and the books on Chancery Practice generally.

INJURIA ABSQUE DAMNO (Lat.). Wrong without damage. Wrong done without damage or loss will not sustain an action. The following cases illustrate this principle. 6 Mod. 46, 47, 49; 1 Show. 64; Willes, 74, note; 1 Ld. Raym. 940, 948; 2 Bos. & P. 86; 5 Coke, 72; 9 *id.* 113; Buller, Nisi P. 120.

INJURIOUS WORDS. In Louisiana. Slander, or libellous words. La. Civ. Code, art. 3501.

INJURY (Lat. *in*, negative, *jus*, a right). A wrong or tort.

Absolute injuries are injuries to those rights which a person possesses as being a member of society.

Private injuries are infringements of the private or civil rights belonging to individuals considered as individuals.

Public injuries are breaches and violations of rights and duties which affect the whole community as a community.

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbance of right of way, and the like.

Relative injuries are injuries to those rights which a person possesses in relation to the person who is immediately affected by the wrongful act done.

It is obvious that the divisions overlap each other, and that the same act may be, for example, a relative, a private, and a public injury at once. For many injuries of this character the offender may be obliged to suffer punishment for the public wrong and to recompense the sufferer for the particular loss which he has sustained. The distinc-

tion is more commonly marked by the use of the terms *civil injuries* to denote private injuries, and of *crimes, misdemeanors, etc.* to denote the public injury done: though not always; as, for example, in case of a public nuisance which may be also a private nuisance.

2. Injuries arise in three ways: *first*, by nonfeasance, or the not doing what was a legal obligation, or duty, or contract, to perform; *second*, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; *third*, malfeasance, or the unjust performance of some act which the party had no right or which he had contracted not to do.

The remedies are different as the injury affects private individuals or the public. *When the injuries affect a private right* and a private individual, although often also affecting the public, there are three descriptions of remedies: *first*, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, etc.; *second*, remedies for compensation, which may be by arbitration, suit, action, or summary proceedings before a justice of the peace; *third*, proceedings for punishment, as by indictment, or summary proceedings before a justice. *When the injury is such as to affect the public*, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment or summary conviction for the public injury, and by civil action at the suit of the party for the private wrong. But in cases of felony the remedy by action for the private injury is generally *suspended* until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is *merged* in the felony. 1 Chitty, Pract. 10; Ayliffe, Pand. 592.

3. There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible physical injury inflicted, while it leaves almost totally unprotected the whole class of the most malignant mental injuries and sufferings, unless in a few cases where, by a fiction, it supposes some pecuniary loss, and sometimes affords compensation to wounded feelings. A parent, for example, cannot sue, in that character, for an injury inflicted on his child, and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction he lost the benefit of her services. Another instance may be mentioned. A party cannot recover damages for *verbal* slander in many cases: as, when the facts published are true; for the defendant would justify, and the party injured must fail. Nor will the law punish *criminally* the author of *verbal* slander imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. See 1 Chitty, Med. Jur. 320.

4. The true and sufficient reason for these rules would seem to be the uncertain character of the injury inflicted, the impossibility of compensation, and the danger, supposing a pecuniary compensation to be attempted, that injustice would be done under the excitement of the case. The sound principle, as the experience of the law amply indicates, is to inflict a punishment for crime, but not put up for sale, by the agency of a court of justice, those wounded feelings which would constitute the ground of the action.

In Civil Law. A delict committed in contempt or outrage of any one, whereby his body, his dignity, or his reputation is maliciously injured. Voet, Com. ad Pand. 47, t. 10, n. 1.

A *real injury* is inflicted by any fact by which a person's honor or dignity is affected: as, striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction, proper to another, etc. The composing and publishing defamatory libels may be reckoned of this kind. Erskine, Pract. 4. 4. 45.

A *verbal injury*, when directed against a private person, consists in the uttering contumelious words, which tend to injure his character by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet even in that case the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral character or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, the crime then becomes slander, agreeably to the distinction of the Roman law, Dig. 15, § 12, *de Injur.*

INLAGARE, INLEGIARE. To restore to protection of law. Opposed to *utlagare*. Bracton, lib. 3, tr. 2, c. 14, § 1; Du-Cange.

INLAGATION. Restoration to the protection of law.

INLAND. Within the same country. As to what are inland bills of exchange, see BILLS OF EXCHANGE.

INMATE. One who dwells in a part of another's house, the latter dwelling, at the same time, in the said house. Kitchen, 45 *b*; Comyns, Dig. *Justices of the Peace* (B 85); 1 Barnew. & C. 578; 8 *id.* 71; 9 *id.* 335; 2 Dowl. & R. 743; 2 Mann. & R. 227; 4 *id.* 151; 2 Russell, Crimes, 937; 1 Deacon, Crim. Law, 185; 2 East, Pl. Cr. 499, 505; 1 Leach, Crim. Law, 90, 237, 427; Alc. Reg. Cas. 21; 1 Mann. & G. 83. See LODGER.

INN. A house where a traveller is fur-

nished with every thing he has occasion for while on his way. Bacon, Abr. *Inns* (B); 12 Mod. 255; 3 Barnew. & Ald. 283; 4 Campb. 77; 2 Chitt. Bail. 484; 9 B. Monr. Ky. 72; 3 Chitty, Comm. Law, 365, n. 6. A public house of entertainment for all who choose to visit it. 5 Sandf. N. Y. 247.

INNAVIGABLE. A term applied in foreign insurance law to a vessel not navigable, through irremediable misfortune by a peril of the sea. The ship is relatively innavigable when it will require almost as much time and expense to repair her as to build a new one. Targa, c. 54, p. 238, c. 60, p. 256; Emerigon, to. 1. pp. 577, 591; 3 Kent, Comm. 323, note.

INNINGS. Lands gained from the sea by draining. Cunningham, Law Dict.; Law of Sewers, 31.

INNKEEPER. The keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. Bacon, Abr. *Inns, etc.;* Story, Bailm. § 475. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper. 2 Dev. & B. No. C. 424; 7 Ga. 296; 1 Morr. Tenn. 184. See GUEST; BOARDER.

He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation, 5 Term, 274; 3 Barnew. & Ald. 285; 1 Carr. & K. 404; 7 Carr. & P. 213; 4 Exch. 367; and he must guard their goods with proper diligence. He is liable only for the goods which are brought within the inn. 8 Coke, 32; Jones, Bailm. 91. A delivery of the goods into the personal custody of the innkeeper is not, however, necessary in order to make him responsible; for, although he may not know any thing of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person, 8 Coke, 32; 1 Hayw. No. C. 41; 14 Johns. N. Y. 175; 23 Wend. N. Y. 642; 5 Barb. N. Y. 560; 7 Cush. Mass. 114; see 25 Eng. L. & Eq. 91; 27 Miss. 668; 1 Bell, Comm. 469; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract, and the money paid for the apartments as extending to the care of the box and portmanteau. Jones, Bailm. 94; Story, Bailm. § 470; 1 Blackstone, Comm. 430; 2 Kent, Comm. 458–463. The liability of an innkeeper is the same in character and extent with that of a common carrier. 9 Pick. Mass. 280; 7 Cush. Mass. 417; 9 Humphr. Tenn. 746; 1 Cal. 221; 8 Barnew. & C. 9; 31 Me. 478; 8 Blackf. Ind. 535. See 5 Q. B. 164; 23 Vt. 177; 26 *id.* 317; 14 Ill. 129. He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost, 7 Cush. Mass. 417; 5 Barb. N. Y. 560; but he is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own co-operation or consent. 8 Coke, 32. The innkeeper will be excused whenever the loss has occurred through the fault of the guest. Story, Bailm. § 483; 4 Maule. & S. 306; 1 Stark. 251, n.; 2 Kent, Comm. 461; 1 Yeates, Penn. 34. He must furnish reasonable accommodations. See 8 Mees. & W. Exch. 269.

The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and, to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods brought into the inn by the guest, and, it has been said, upon the person of his guest, for his compensation, 3 Barnew. & Ald. 287; 8 Mod. 172; 1 Show. 270; see 7 Carr. & P. 67; 3 Hill, N. Y. 485; 1 Rich. So. C. 213; 26 Vt. 335; 3 Mees. & W. Exch. 248; Bacon, Abr. *Inns, etc.* (D); and this though the goods belong to a third person, if he was ignorant of the fact. 3 Stark. 172; 12 Q. B. 197; 7 Carr. & P. 208; 11 Barb. N. Y. 41. As to detaining the horse of a guest, see 25 Wend. N. Y. 654; 9 Pick. Mass. 280. The landlord may also bring an action for the recovery of his compensation.

See, generally, 1 Viner, Abr. 224; 14 *id.* 436; Bacon, Abr.; Yelv. 67 *a*, 162 *a;* 2 Kent, Comm. 458; Ayliffe, Pand. 266.

An innkeeper in a town through which lines of stages pass has no right to exclude the driver of one of these lines from his yard and the common public rooms where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach and without doing any injury to the innkeeper. 8 N. H. 523.

INNOCENCE. The absence of guilt.

The law presumes in favor of innocence, even against another presumption of law: for example, when a woman marries a second husband within the space of twelve months after her husband had left the country, the presumption of innocence preponderates over the presumption of the continuance of life. 2 Barnew. & Ald. 386; 3 Starkie, Ev. 1249. See 2 Ad. & E. 540; 1 Q. B. 449; 1 Hou. L. Cas. 498. An exception to this rule respecting the presumption of innocence has been made in the case of the publication of a libel, the principal being presumed to have authorized the sale, when a libel is sold by his agent in his usual place of doing business. The same rule applies to publishers of newspapers. 1 Russell, Crimes, 341; 10 Johns. N. Y. 443; Buller, Nisi P. 6; 1 Green. leaf, Ev. § 36. See 4 Nev. & M. 341; 2 *id.* 219; 2 Ad. & E. 540; 5 Barnew. & Ad. 86; 1 Stark. 21.

INNOCENT CONVEYANCES. In English Law. A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture: these are conveyances by lease and release, bargain and sale, and a covenant to stand seised by a tenant for life. 1 Chitty, Pract. 243, 244.

INNOMINATE CONTRACTS. In Civil Law. Contracts which have no particular names, as permutation and transaction. Inst. 2. 10. 13. There are many innominate contracts; but the Roman lawyers reduced them to four classes, namely, *do ut des, do ut facias, facio ut des*, and *facio ut facias*. Dig. 2. 14. 7. 2.

INNOTESCIMUS (Lat.). **In English Law.** An epithet used for letters-patent, which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per præsentes, etc.* Tech. Dict.

INNOVATION. In Scotch Law. The exchange of one obligation for another, so that the second shall come in the place of the first. Bell, Dict. The same as NOVATION.

INNS OF COURT. The name given to the colleges of the English professors and students of the common law.

The four principal Inns of Court are the Inner Temple and Middle Temple (formerly belonging to the Knights Templar), Lincoln's Inn, and Gray's Inn (anciently belonging to the earls of Lincoln and Gray). The other inns are the two Sergeants' Inns. The Inns of Chancery were probably so called because they were once inhabited by such clerks as chiefly studied the forming of writs, which regularly belonged to the cursitors, who are officers of chancery. These are Thavie's Inn, the New Inn, Symond's Inn, Clement's Inn, Clifford's Inn, Staple's Inn, Lion's Inn, Furnival's Inn, and Barnard's Inn.

INNUENDO (Lat. *innuere*, to nod at, to hint at; meaning. The word was used when pleadings were in Latin, and has been translated by "meaning").

In Pleading. A clause in a declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.

It derives its name from the leading word by which it was always introduced when pleadings were in Latin. It is mostly used in actions of slander, and is then said to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Starkie, Sland. 431.

2. Its object is to explain the defendant's meaning by reference to previous matter. See COLLOQUIUM. It may be used to point to the plaintiff as the person intended in the defendant's statement. It may show that a general imputation of crime is intended to apply to the plaintiff, Heard, Sland. § 226; 1 Hou. L. Cas. 637; 2 Hill, N. Y. 282; but it cannot be allowed to give a new sense to words where there is no such charge. 8 Q. B. 825; 7 C. B. 280.

3. It may point to the injurious and actionable meaning, where the words complained of are susceptible of two meanings, 8 Q. B. 841; Moore & S. 727, and generally explain the preceding matter, 1 Dowl. N. S. 602; 7 C. B. 251; 15 *id.* 360; 1 Mees. & W. Exch. 245; 5 Bingh. 17; 10 *id.* 250; 12 Ad. & E. 317; but cannot enlarge and point the effect of language beyond its natural and common meaning in its usual acceptation, Heard, Sland. § 219; Metc. Yelv. 22; 2 Salk. 513; 1 Ld. Raym. 256; 2 Cowp. 688; 4 Perr. & D. 161; 6 Barnew. & C. 154; 4 Nev. & M. 841; 4 Dowl. 703; 9 Ad. & E. 282; 12 *id.* 719; 15 Pick. Mass. 335, unless connected with the proper introductory averments. 1 Crompt. & J. Exch. 143; 1 Ad. & E. 554; 9 *id.* 282, 286, n.; 1 C. B. 728; 6 *id.* 239; 1 Saund. 242; 2 Pick. Mass. 320; 13 *id.* 198; 15 *id.* 321; 16 *id.* 1; 11 Metc. Mass. 473; 8 N. H. 246; 12 Vt. 51; 1 Binn. Penn. 537; 5 *id.* 218; 11 Serg. & R. Penn. 343; 5 Johns. N. Y. 211. These introductory averments need not be in the same count. 2 Wils. 114; 2 Pick. Mass. 329.

4. For the innuendo in case of an ironical libel, see 7 Dowl. 210; 4 Mees. & W. Exch. 446.

If not warranted by preceding allegations, it may be rejected as superfluous, Heard, Sland. § 225; but only where it is bad and useless,—not where it is good but unsupported by evidence, even though the words would be actionable without an innuendo. 3 Hou. L. Cas. 395; 1 Crompt. & M. Exch. 675; 1 Ad. & E. 558; 2 Bingh. N. C. 402; 4 Barnew. & C. 655; 3 Campb. 461; 9 East, 93; Croke Car. 512; Croke Eliz. 609.

INOFFICIOSUM (Lat.). **In Civil Law.** Inofficious; contrary to natural duty or affection. Used of a will of a parent which disinherited a child without just cause, or of that of a child which disinherited a parent, and which could be contested by *querela inofficiosi testamenti*. Dig. 2. 5. 3, 13; Paulus, lib. 4, tit. 5, § 1.

INOFICIOCIDAD. In Spanish Law. Every thing done contrary to a duty or obligation assumed, as well as in opposition to the piety and affection dictated by nature: *inofficiosum dicitur id omne quod contra pietatis officium factum est.* The term applies especially to testaments, donations, dower, etc., which may be either revoked or reduced when they affect injuriously the rights of creditors or heirs.

INOPS CONSILII (Lat.). Destitute or without counsel. In the construction of wills a greater latitude is given, because the testator is supposed to have been *inops consilii*.

INQUEST. A body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the *grand inquest*.

The judicial inquiry itself, by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition.

INQUEST OF OFFICE. An inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chat-

tels. It is done by a jury of no determinate number,—either twelve, or more, or less. 3 Sharswood, Blackst. Comm. 258; Finch, Law, 323–325. An inquest of office was bound to find for the king upon the direction of the court. The reason given is that an inquest concluded no man of his right, but only gave the king an opportunity to enter, so that he could have his right tried. 3 Sharswood, Blackst. Comm. 260; 4 Stephen, Comm. 61; F. Moore, 730; Vaugh. 135; 3 Hen. VII. 10; 2 Hen. IV. 5; 3 Leon. 196. An inquest of office was also called, simply, "office." As to "office" in the United States, see 1 Caines, N. Y. 426; 7 Cranch, 603; 2 Kent, Comm. 16, 23.

INQUIRY, WRIT OF. A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the *venue* is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment. 2 Archbold, Pract. Waterman ed. 952; 3 Sharswood, Blackst. Comm. 398; 3 Chitty, Stat. 495, 497.

INQUISITION. In Practice. An examination of certain facts by a jury impanelled by the sheriff for the purpose. The instrument of writing on which their decision is made is also called an inquisition. The sheriff or coroner, and the jury who make the inquisition, are called the inquest.

An inquisition on an untimely death, if omitted by the coroner, may be taken by justices of gaol delivery and oyer and terminer, or of the peace; but it must be done publicly and openly: otherwise it will be quashed. Inquisitions either of the coroner or of the other jurisdictions are traversable. 1 Burr. 18, 19.

INQUISITOR. A designation of sheriffs, coroners *super visum corporis*, and the like, who have power to inquire into certain matters.

In Ecclesiastical Law. The name of an officer who is authorized to inquire into heresies, and the like, and to punish them. A judge.

INROLMENT, ENROLLMENT (Law Lat. *irrotulatio*). The act of putting upon a roll.

Formerly, the record of a suit was kept on skins of parchment, which, best to preserve them, were kept upon a roll or in the form of a roll; what was written upon them was called the inrolment. After, when such records came to be kept in books, the making up of the record retained the old name of inrolment. Thus, in equity, the *inrolment* of a decree is the recording of it, and will prevent the rehearing of the cause, except on appeal to the house of lords or by bill of review. The decree may be inrolled immediately after it has been passed and entered, unless a *caveat* has been entered. 2 Freem. 179; 4 Johns. Ch. 199; 14 Johns. N. Y. 501. And before signing and inrolment a decree cannot be pleaded in bar of a suit, though it can be insisted on by way of answer. 3 Atk. Ch. 809; 2 Ves. Ch. 577; 4 Johns. Ch. N. Y. 199. See Saunders, Orders in Chanc. *Inrolment.*

Transcribing upon the records of a court deeds, etc. according to the statutes on the subject. See 1 Chitty, Stat. 425, 426; 2 *id.* 69, 76–78; 3 *id.* 1497. Placing on file or record generally, as annuities, attorneys, etc.

INSANITY. In Medical Jurisprudence. The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.

2. Of late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms *lunacy, idiocy,* and *unsoundness of mind.* Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz.: *lunatics* and *idiots.* The former were supposed to embrace all who had lost the reason which they once possessed, and their disorder was called *dementia accidentalis;* the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis.* Lunatics were supposed to be much influenced by the moon; and another prevalent notion respecting them was that in a very large proportion there occurred *lucid intervals,* when reason shone out, for a while, from behind the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term lucid interval signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval that does occasionally occur.

It began to be found at last that a large class of persons required the protection of the law, who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no lucid intervals. Their mental impairment consisted in a loss of intellectual power, of interest in their usual pursuits, of the ability to comprehend their relations to persons and things. A new term—*unsoundness of mind*—was, therefore, introduced to meet this exigency; but it has never been very clearly defined.

3. The law has never held that *all* lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than a brute, and to idiots who cannot number twenty pence nor tell how old they are. Theoretically the law has changed but little, even to the present day; but practically it exhibits considerable improvement: that is, while the general doctrine remains unchanged, it is qualified, in one way or another, by the courts, so as to produce less practical injustice.

Insanity implies the presence of disease or con-

genital defect in the brain, and though it may be accompanied by disease in other organs, yet the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by mental disorder which may affect the legal relations of the patient.

4. To give a definition of insanity not congenital, or, in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sententious descriptions of the disease, rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but wherein consists the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entity to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations, insomuch that conduct and conversation perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself. When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners, and dispositions,—the man of plain practical sense indulging in speculative theories and projects, the miser becoming a spendthrift and the spendthrift a miser, the staid, quiet, unobtrusive citizen becoming noisy, restless, and boisterous, the gay and joyous becoming dull and disconsolate even to the verge of despair, the careful, cautious man of business plunging into hazardous schemes of speculation, the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact, the principle has been laid down, with the sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual when in health, which is the essential feature of insanity. Gooch, Lond. Quart. Rev. xliii. 355; Combe, Ment. Derang. 196; Meidway *vs.* Croft, 3 Curt. Eccl. 671.

5. That insanity, in some of its forms, annuls all criminal responsibility, and, in the same or other forms, disqualifies its subject from the performance of certain civil acts, is a well-established doctrine of the common law. In the application of this principle there has prevailed, for many years, the utmost diversity of opinion. The law as expounded by Hale, Pleas of the Crown, 30, was received without question until the beginning of the present century. In the trial of Hadfield, Mr. Erskine contended that the true test of such insanity as annulled responsibility for crime was delusion; and accordingly the prisoner was acquitted with the approbation of the court. Subsequently, in Bellingham's case, 5 Carr. & P. 168, the court declared that the prisoner was responsible if he knew right from wrong, or knew that murder was a crime against the laws of God and nature. Similar language was used in Reg. *vs.* Higginson, 1 Carr. & K. 129; Reg. *vs.* Stokes, 3 Carr. & K. 185. This test has sometimes been modified so as to make the knowledge of right and wrong refer solely to the act in question. Rex *vs.* Offord, 5 Carr. & P. 168; 9 *id.* 525; Reg. *vs.* Vaughan, 1 Cox, Crim. Cas. 80; Reg. *vs.* Barton, 3 Cox, Crim. Cas. 275; Reg. *vs.* Pate, Lond. Times, July 12, 1850; State *vs.* Spencer, 1 Zabr. N. J. 196; People *vs.* Freeman, 4 Den. N. Y. 29. This was formally pronounced to be the law of the land by the English judges, in their reply to the questions propounded by the house of lords on occasion of the McNaughton trial. 10 Clark & F. Hou. L. 200. A disposition to multiply the tests, so as to recognize essential facts in the nature of insanity, has been occasionally manifested in this country. In Com. *vs.* Rogers, 7 Metc. Mass. 500, the jury were directed to consider, in addition to the above test, whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; and this case has been much relied on in American courts. Ray, Med. Jur. 58. Occasionally the court has thought it sufficient for the jury to consider whether the prisoner was sane or insane,—of sound memory and discretion, or otherwise. State *vs.* Wilson; State *vs.* Cory; State *vs.* Prescott; Ray, Med. Jur. 55.

6. To this remarkable diversity of views may be attributed, in some measure, no doubt, the actual diversity of results. To any one who has followed with some attention the course of criminal justice in trials where insanity has been pleaded in defence, it is obvious that, if some have been properly convicted, others have just as improperly been acquitted. It must be admitted, however, that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts.

Side by side with this doctrine of the criminal law which makes the insane responsible for their criminal acts is another equally well authorized, viz.: that a kind and degree of insanity which would not excuse a person for a criminal act may render him legally incompetent to the management of himself or his affairs. Bellingham's case, Collinson, 657. This implies that the mind of an insane person acts more clearly and deliberately, and with a sounder view of its relations to others, when about to commit a great crime than when buying or selling a piece of property. It is scarcely necessary to add that no ground for this distinction can be found in our knowledge of mental disease. On the contrary, we know that the same person who destroys his neighbor, under the delusion that he has been disturbing his peace or defaming his character, may, at the very time, dispose of his property with as correct an estimate of its value and as clear an insight into the consequences of the act as he ever had. If a person is incompetent to manage property, it is because he has lost

some portion of his mental power; and this fact cannot be justly ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough: it should be proved by the party who affirms it.

7. More clearly reflecting the light of science, the French penal code says there can be no crime nor offence if the accused were in a state of madness at the time of the act. Art. 64. The same provision was introduced into Livingston's Code and into the Revised Statutes of New York, vol. 2, § 697. The law of Arkansas provides that a lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged. Rev. Stat. 236. In New York, however, in spite of this clear and positive provision of law, the courts have always acted upon the doctrines of the common law, and instructed the jury respecting the tests of that kind of insanity which annuls criminal responsibility. Freeman in Error *vs.* The People, 10 Bost. Law Rep. 12. In this case, the court (C. J. Beardsley) declared that the insanity mentioned in the statute means only insanity in reference to the criminal act, and therefore its qualities must be defined.

8. The effect of the plea of insanity has sometimes been controlled by the instructions of the court in regard to the burden of proof and the requisite amount. The older doctrine was that the person is to be considered sane until proved beyond a doubt to be insane. Thus, in State *vs.* Spencer, 1 Zabr. N. J. 196, the court (C. J. Hornblower) said, "Where it is admitted, or clearly proved, that he [the prisoner] committed the act, but it is insisted that he was insane at the time,—and the evidence leaves the question of insanity in doubt,—there the jury ought to find against him." Of late years, and especially in this country, a very different doctrine has prevailed to some extent. Thus, on an appeal for a new trial in People *vs.* McCann, 16 N. Y. 58, it was held, all the judges concurring, "that it was an error in the judge to charge the jury that, sanity being the normal state, there is no presumption of insanity; that the burden of proving it is upon the prisoner; that a failure to prove it, like a failure to prove any other fact, is the misfortune of the party attempting the proof, and thus they must be satisfied of his insanity beyond a reasonable doubt, or otherwise must convict." So, too, in Com. *vs.* Rogers, 7 Metc. Mass. 500, the court (C. J. Shaw) told the jury "that if the preponderance of the evidence were in favor of his insanity,—if its bearing and leaning, as a whole, inclined that way,—they would be authorized to find him insane." See, also, Cr. Cas. 239; 4 Den. N. Y. 9; Elwell, Malp. 420; 1 Russ. Crimes, 9; 1 Mood. & R. 75; 9 Carr. & P. 667; 8 Scott, N. R. 595; 19 N. Y. 58; 1 Park. Crim. N. Y. 649; 3 *id.* 272, 274; 30 Miss. 600; 5 Ohio St. 77; 6 McLean, C. C. 121; 21 Mo. 464; 16 B. Monr. Ky. 587; 17 Ala. N. S. 434; 1 Curt. 1; 29 Eng. L. & Eq. 38; 2 Barb. N. Y. 566; 6 Humphr. Tenn. 199; 4 Penn. St. 264; 7 Metc. Mass. 500; 4 M'Cord, So. C. 183; 4 Cow. N. Y. 207.

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See APOPLEXY AND PARALYSIS; DELIRIUM

FEBRILE; DELIRIUM TREMENS, or MANIA-À-POTU; DEMENTIA; DRUNKENNESS; IDIOCY; IMBECILITY; LUCID INTERVALS; MANIA; SOMNAMBULISM; SUICIDE.

INSCRIPTION. In Civil Law. An engagement which a person who makes a solemn accusation of a crime against another enters into that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, 9. 1. 10; 9. 2. 16 and 17.

In Evidence. Something written or engraved.

Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree. Buller, Nisi P. 233; Cowp. 591; 10 East, 120; 13 Ves. Ch. 145. See DECLARATION; HEARSAY.

INSCRIPTIONES (Lat.). The name given by the old English law to any written instrument by which any thing was granted. Blount.

INSENSIBLE. In Pleading. That which is unintelligible is said to be insensible. Stephen, Plead. 378.

INSIDIATORES VIARUM (Lat.). Persons who lie in wait in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT (Lat.). They had accounted together. See ACCOUNT STATED.

INSINUACION. In Spanish Law. The presentation of a public document to a competent judge, in order to obtain his approbation and sanction of the same, and thereby giving it judicial authenticity.

"*Insinuatio est ejus quod traditur, sive agitur, coram quocumque judice in scripturam redactio.*"

This formality is requisite to the validity of certain donations *inter vivos*. Escriche, voc. *Insinuacion*.

INSINUATION. In Civil Law. The transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation but that appropriated to the purpose of donation. Inst. 2. 7. 2; Pothier, Traité des Donations, Entre Vifs, sec. 2, art. 3, § 3; Encyclopédie; 8 Toullier, n. 198.

INSINUATION OF A WILL. In Civil Law. The first production of it; or, leaving it in the hands of the register in order to its probate. 21 Hen. VIII. c. 5; Jacob, Law Dict.

INSOLVENCY (Lat. *in*, privative, *solvo*, to free, to pay). The state of a person who is insolvent or unable from any cause to pay his debts, 2 Blackstone, Comm. 285, 471, or who is unable to pay his debts as they fall due in the usual course of trade or business. 2 Kent, Comm. 389; La. Civ. Code, art. 1980; 3 Dowl. & R. 218; 1 Maule & S. 338; 1 Campb. 492, n.; Sugden, Vend. 487; 3 Gray, Mass. 600.

2. The distinction between bankruptcy and insolvency which is taken by jurists and accurate law writers seems to be little regarded in common use, or even by the courts, in many of the American states. In its primary sense, insolvency has a much more extensive signification than bankruptcy. The latter, which is one species or phase of the former, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business, 2 Bell, Comm. 5th ed. 162; 1 Maule & S. 338; 5 Dowl. & R. 218; 4 Hill, N. Y. 850; 4 Cush. Mass. 134. (Hence its derivation from *bancus ruptus*, signifying the broken bench or counter, *per Story*, J., 3 Stor. C. C. 453; art. *Banker*, Encyc. Brit. (1860), or from *banqueroute*, a word of disputed etymology.) The bankrupt, says Blackstone, "is a *trader* who secretes himself, or does certain other acts tending to *defraud* his creditors." (Fraud is also implied in France by the use of *banqueroutier* as distinguished from the simple *failli*.) And the preamble to the statute 34 & 35 Hen. VIII. cap. 6 (A. D. 1542), is as follows: "Whereas divers and sundry persons, craftily obtaining into their own hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but, at their own wills and pleasures, consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience." From these passages it appears that originally the word bankrupt could only be applied to a *dishonest merchant* or *trader*. The meaning, however, is now so far changed that no dishonesty is implied from the status of bankruptcy; but the word is still properly applied only to *traders* or *merchants*. Therefore the parliamentary commissioners of 1840 report, "The immediate object of the bankrupt law is the equal distribution of the debtor's property among his creditors, and the discharge of the honest trader. The object of the law for the relief of insolvent debtors is the personal discharge of honest debtors, prolonged imprisonment for the dishonest and fraudulent, and a fair distribution of their present and *future* acquired property among their creditors." Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts; and insolvent laws are distinguished from strict bankruptcy laws by the following characteristics.

3. Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are *not* traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor, 12 Wheat. 230; 4 *id.* 122, 209; 2 Mas. C. C. 161; 2 Blackf. Ind. 394; 3 Caines, N. Y. 154; 26 Wend. N. Y. 43; 1 East, 6, 11; 5 *id.* 124; 4 Barnew. & Ald. 654; 1 Baldw. C. C. 296. Insolvent laws discharge the person of the debtor from arrest and imprisonment, but leave the future acquisitions of the debtor still liable to the creditor. 4 Wheat. 122; 3 Harr. & J. Md. 61. Both laws contemplate an equal, fair, and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law. *Per Marshall*, C. J., 4 Wheat. 195; 1 Woodb. & M. C. C. 115. And insolvent laws quite coextensive with the English bankrupt system have not been unfrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies. Story, Comm. on Const. U. S. vol. 3, p. 11. By art. 1, § 8, of the constitution of the United States, "congress shall have power to establish an uniform rule on the subject of . . . bankruptcies throughout the

United States." From a desire of avoiding what might seem to be an infringement upon an exclusive right of congress, the laws passed by the various states—with the exception of Texas—upon the subject, whether properly insolvent or bankrupt laws, have been termed insolvent laws. In Texas there is a "bankrupt law." And when congress exercised its constitutional right to pass a bankruptcy law, by the act "to establish a uniform system of bankruptcy throughout the United States," 19 August, 1841, all persons were included within its operation, and were allowed, upon petition, to be discharged from their debts. The law of congress rendered inoperative the state insolvent laws; and, under certain circumstances, *traders* could be proceeded against upon petition of their creditors. The provision in the bankrupt act rendering it properly an *insolvent* act, being exclusively in operation, gave rise to serious doubts whether the act was within the purview of the constitution (5 Hill, N. Y. 317, 327, Bronson, J., dissenting; 1 Barb. Ch. N. Y. 404; 12 Metc. Mass. 428; 6 Ark. 35; 25 Me. 232; 3 Gilm. Va. 225, hold the act constitutional; *contra*, 2 N. Y. Leg. Obs. 184), and finally led to its repeal, March 3, 1843. Encyc. Brit. *Bankruptcy;* 2 Kent, Comm. 391, n. *a*. Therefore, in the United States, both the legislation of congress and of the separate states has tended to obliterate the true distinction between bankruptcy and insolvency. The first bankrupt law, passed by congress in 1800, limited to five years, and expiring with its limitation, was modelled upon the English bankruptcy acts then in operation, and, like them, was only applicable to merchants. See Act March 3, 1791, 1 Story, Laws U. S. 465; Act March 2, 1799, 1 Story, Laws U. S. 630; Act March 3, 1841, 4 Sharswood, Cont. Sto. L. U. S. 2236; Act Jan. 7, 1834, 4 Sharswood, Cont. Sto. L. U. S. 2258; Act March 2, 1837, 4 Sharswood, Cont. Sto. L. U. S. 2536.

4. Besides the power vested in congress of making uniform laws for the regulation of bankruptcies, Const. of U. S. art. 1, § 8, it is provided, art. 1, § 10, Const. of U. S., that "no state shall pass any . . . law impairing the obligation of contracts" (*q. v.*). By these clauses it was generally understood that congress possessed the exclusive regulation of both bankruptcy and insolvency. But the question how far the states may legislate upon these subjects came to be fully discussed in the celebrated case Ogden *vs.* Saunders, 12 Wheat. 218. The decision of that case recognized much larger powers in the states than had previously been supposed to exist. It was held that the power of making a bankrupt law which shall be applicable and binding upon all creditors and all descriptions of debts resides in congress; when congress exercises its power, it is exclusive, and by its exercise the state insolvent laws (so called) are rendered inoperative, 9 Metc. Mass. 16; *contra*, 2 Ired. No. C. 463; but that a state insolvent law, whereby it is provided that a debtor on giving up his property to his creditors is absolutely discharged from further liability, will, as long as there is no act of congress on bankruptcy, be valid in respect to creditors residing in such state, and to contracts made in the state subsequently to the passage of such insolvent law. 5 How. 295; 1 Cush. 430–434, n.; 14 N.H. 38; 10 Metc. Mass. 594; 12 *id.* 470; 26 Me. 110; 1 Woodb. & M. C. C. 115; 5 Gill, Md. 437. Therefore such an insolvent law cannot be made to apply to contracts made within the state between a citizen of the state and one who is a citizen of another state, 12 Wheat. 213, nor to contracts not made within the state. 1 M'All. C. C. 226, 523. Consequently, an insolvent law of a state, however general its provisions, can have only a partial and limited effect as a bankrupt law. In cases where the state has complete jurisdiction, such a law may have all the essential operation of a bankrupt law, not being limited to a mere discharge of the person of the debtor on surrendering his effects. If a creditor out of a state voluntarily makes himself a party to proceedings under the insolvent laws of the state, and accepts a dividend, he is bound by his own act, and is deemed to have waived his ex-territorial immunity and right. 4 Wheat. 122; 12 *id.* 213; 8 Pick. Mass. 194; 3 Pet. C. C. 411; 3 Story, Const. 252–256; 9 Conn. 314; 2 Blackf. Ind. 394; 1 Baldw. C. C. 296; 9 N. H. 478. See 8 Barnew. & C. 477; 3 Caines, N. Y. 154; 4 Barnew. & Ald. 654; 26 Wend. N. Y. 43; 2 Gray, Mass. 43; 3 Gray, N. J. 551; 7 Cush. Mass. 15; 4 Bosw. N. Y. 459; 32 Miss. 246. Insolvency may of course be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all his property: as, making an assignment, applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws. 1 Pet. 195; 2 Wheat. 396; 7 Toullier, n. 45; Domat, liv. 4, tit. 5, nn. 1, 2; 2 Bell, Comm. 5th ed. 165.

5. It is with regard to the latter that the *insolvency laws* (so called) are operative. They are generally statutory provisions by which the property of the debtor is surrendered for his debts; and upon this condition, and the assent of a certain proportion of his creditors, he is discharged from all further liabilities. 9 Mass. 431; 16 *id.* 53; 2 Kent, Comm. 321; Ingraham, Insolv. 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. (See definition, 2d branch, beginning of this article.) 3 Gray, Mass. 600. Insolvency, according to some of the state statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditor *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the insolvent laws, and petitions for that purpose.

6. Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor forced into insolvency. The circumstances entitling either debtor or creditors to invoke the aid of the insolvent law are in a measure peculiar to each state. But their general characteristics are as follows. In cases of voluntary insolvency, the debtor must owe a certain amount,—which amount, with his inability to pay the same, must be set forth in his petition. The creditors are usually entitled to proceed *in invitum* to petition to have the debtor declared insolvent and his effects taken possession of and distributed, upon the following grounds: that the creditor has fraudulently concealed his property, or has conveyed it away, or has allowed it to be attached and to remain so for a certain length of time without dissolving the attachment. The officers before whom insolvency proceedings may be had are, in the different states, judges (who are frequently judges of probate also), commissioners in insolvency, masters in chancery, etc. They are appointed for the purpose, and proceedings are commenced by petition, which set forth the facts upon which the claim for relief is founded. Upon a petition of a debtor the facts are commonly taken to be true as set forth in the petition. A messenger or officer of the court is immediately sent to take possession of the property of the debtor, and a call is issued to the various creditors to attend a meeting. In a proceeding *in invitum* by the creditors, the facts alleged must be proved before the warrant can be issued.

And the debtor is usually entitled to notice of the proceedings instituted against him, and may appear and show cause, if any he has, why a commission should not issue against him. The first step taken by the magistrate in a case properly before him is to take possession, by means of his officer, of the debtor's effects, which in some cases the messenger may be directed to sell for the benefit of all concerned (as in the case of perishable articles, etc.). Then, a meeting of creditors being called, an assignee is chosen in a way provided by statute. In his choice the creditors are considered both with regard to their numbers and amounts due them. To the assignee all the property is transferred, or ordered to be transferred, by the magistrate, by virtue of the powers by law vested in him. This assignee becomes to all intents and purposes the owner of the property of the debtor, and, as agent for his creditors, has power to sell, dispose of, collect, and reduce to money all the property of the debtor. He calls meetings of the creditors, when directed so to do by the magistrate, and transacts all the other business and performs all the duties by law imposed upon him. The right of a debtor to a discharge is very different in the various states of America. In some the honest debtor may obtain a discharge, however small a percentage of his debts he may pay. In others he is entitled to a discharge upon the payment of a certain percentage, or upon obtaining the assent of a majority of the creditors. It is also provided by the statutes of some of the states that the second or third discharge shall not be obtained at all, or as easily as in the first instance of insolvency.

The refusing to discharge a debtor upon the ground that he has been guilty of fraudulent conduct is also subject to state legislation. Certain acts are made presumptive evidence of fraud: as, the securing of debts within a certain time before the application for the discharge. Such times are regulated by the statutes, and, commonly, the times limited are six months or one year. In some states, if a pre-existing debt has been paid or secured within a year prior to being declared insolvent, the *debtor having reasonable cause at the time to suppose himself insolvent*, his discharge will not be granted.

7. In England, besides the Bankrupt Act, 34 & 35 Hen. VIII. cap. 6, A.D. 1542, which has been mentioned, there have been many acts of parliament amending and revising previous legislation upon the subject. Among the most important of these are the act of 1570; the act of 1825 (6 Geo. IV. cap. 16), called the Samuel Romilly's Act, act of 1831 (1 & 2 Will. IV. cap. 56), called Lord Brougham's Act; the act of 1849 (12 & 13 Vict. cap. 106, § 178). Although this system has been the growth of more than three centuries, and has been matured by the talents and experience of the wisest and most distinguished men in chancery, Lord Eldon, as late as 1801, upon succeeding to the great seal, expressed his indignation against the frauds committed under cover of the system. He said that its abuse was a disgrace to the country, and that it would be better at once to repeal all the statutes than to suffer them to be applied to such purposes. There was no mercy to the estate. Nothing was less thought of than the object of the commission. As they were frequently conducted in the country, they were little more than stock in trade for the commissioners, the assignees, and the solicitor. 6 Ves. Ch. 1. The act 34 Geo. III. ch. 69, was called an insolvent debtors' act; but the first act of insolvency properly so called was passed in 1826. And the act of 7 & 8 Vict. cap. 70, called "an act for facilitating arrangements between *debtor* and *creditor*," is properly an insolvency law. This provides for the discharge of non-trading debtor if he has a certain concurrence from his creditors. This is one-third, both in value and number, to the initiatory steps. To the discharge, a proportional consent at an initiatory meeting, and, finally, the consent of three-eighths in both number and value, or nine-tenths in value of creditors to the sum of twenty pounds and upwards. In England there are now two lords justices of insolvency and bankruptcy, five London commissioners, and district commissioners. Ireland follows the English system, as does Scotland in most respects, with a change in nomenclature. But for the latter greater excellence is claimed. 1 Bell. Comm. 17.

8. The French bankruptcy code, says M. Dupin, is equally complained of by debtors and creditors. A bill is now before parliament in England (introduced by Sir Richard Bethel, late attorney-general, now Lord Chancellor Westbury) for a general bankrupt act applicable to non-traders as well as to traders. The bill has already (July, 1861) passed the house of commons; but much discussion has arisen in the house of lords with regard to the manner in which the assignee of the debtor's estate shall be chosen or elected. It has been the practice in England to have the assignee elected by the creditors; and it was so provided by Sir Richard Bethel's bill. It was proposed in the house of lords to have the assignee appointed by the magistrate. That the magistrate should control the election of the assignee we consider a wise provision in an insolvent or bankrupt law. But the creditors are better satisfied to elect him among themselves; and this is the feeling among the commercial community in Great Britain. In Massachusetts, the election of the assignee by the creditors is subject to the approval of the judge. Below we give a synopsis of the insolvent laws of the various states of the United States which have legislated upon the subject.

9. Many of the states have laws for the distribution of insolvent estates, and also laws for the relief of poor debtors. These are neither properly called insolvent laws in the sense in which we have used the words,—though the latter relieve the debtor's body from restraint upon a surrender of his goods and estate, and leave his future acquisitions still liable. See articles INSOLVENT ESTATES, EXECUTORS AND ADMINISTRATORS, and POOR DEBTOR. When there are found statute provisions upon either of these subjects, they will be mentioned.

10. *Who may petition.* In California, Maryland, Minnesota, New York, and Wisconsin, every insolvent debtor may be discharged upon petition and upon making an assignment of all his property (except certain articles necessary for the support of the debtor or his family) for the benefit of his creditors equally. In *Alabama*, a person imprisoned on a judgment or for failing to pay a fine. In *Arkansas* and *Illinois*, one imprisoned or liable to be arrested. In *Connecticut*, one owing one hundred dollars. In *Delaware*, a resident of the state for one year who is in prison, unless committed by chancery court. In *Georgia*, one who has not within a year lost money by gambling. In *Massachusetts*, an inhabitant who owes more than two hundred dollars. In *Missouri*, one imprisoned for fine, or costs, or breach of the peace. In *North Carolina*, one imprisoned twenty days. In *Ohio*, a resident of the state for two years, or of the county for six months, or in custody after sixty days. In *Pennsylvania*, a resident of the

state six months, or who has been in jail three months, detained on civil process, held on bail prise, or not arrested. In *Rhode Island*, an inhabitant for three years (which the court may dispense with) owing more than one hundred dollars. In *South Carolina*, one sued, or within one month after being in custody. In *Texas*, a citizen, male twenty-one years of age, female eighteen years of age, may be bankrupt.

11. *The petition may be addressed to whom.* In Alabama and Missouri, the petition is addressed to the county court. In Arkansas, to the judge of the county court or circuit court. In California, Iowa, and Minnesota, to the district court. In Connecticut, Illinois, and Massachusetts, to the court of probate. In Delaware and New Jersey, to the supreme court of the county where the debtor is imprisoned. In Georgia, to a justice of the inferior, or a judge of the superior. In Maryland, to the circuit court of the county, or the court of common pleas in Baltimore. In Michigan, to a judge of the supreme court, county judge, circuit court, or a commissioner. In Mississippi, to a judge of the high court of errors and appeals, of the circuit court, or the probate court, or the president of the board of county police. In New York, to the supreme judicial court, county judge, recorder or mayor of the city of New York. In North Carolina, to a judge of the superior or inferior court. In Ohio, to a commissioner of insolvency appointed by the court of common pleas of each county, who gives bonds and may be removed. In Pennsylvania and South Carolina, to the court of common pleas. In Rhode Island, to the superior court of the county. In Texas, to the chief justice of the county. In Wisconsin, to a judge of the supreme judicial court, or circuit court.

The petition must, by statute, contain, in Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Ohio, Rhode Island, South Carolina, Texas, and Wisconsin, a schedule under oath of the debtor's property, of the sums due, a list of creditors, and the causes of insolvency, an affidavit of honesty and inability to pay debts, and an offer to deliver up his property for the benefit of his creditors. In Michigan and New York, two-thirds in value of the creditors residing in the United States, or their representatives, must join in the petition and make oath that they are honest and no reward has been taken. In Missouri, the debtor makes an affidavit of assets and honesty.

12. *Notice.* In Alabama, the plaintiff in the suit has one day's notice; and in Arkansas, notice is ordered and the petitioner set free on giving bonds. 1 English, 219. In California and Connecticut, thirty days' notice is required. In Delaware, Michigan, and Minnesota, the creditors are summoned to show cause why a discharge should not be granted. In Minnesota, notice is given in the papers. In Maryland, there is a notice and examination. In New York and North Carolina, there is a notice and summons, in New York, a notice also in the papers. In Massachusetts, the messenger gives notice. In Rhode Island, there is a special order of notice, which is given by the clerk of the court. In Texas, the notice is published three weeks. In Wisconsin, if one-fourth of the creditors are foreign, a notice is ordered where they are; if they are domestic, six weeks' notice is given; if some but less than one-fourth are foreign, ten weeks' notice is given by publication in the papers.

Proceedings upon petition. In Alabama, if the plaintiff swears the schedule of the insolvent is false, a jury is summoned. In Arkansas, if the court is satisfied of the debtor's honesty, on transfer to the sheriff till a trustee is appointed, the debtor is discharged from arrest. In California a receiver, in Massachusetts a messenger, takes possession till debts are proved on oath. In Michigan, Minnesota, North Carolina, and Wisconsin, if the officer is satisfied of the honesty of the debtor (in the two former a jury may be had by any creditor), then an assignment is made. In New York and South Carolina, an order is passed for an assignment. In the former state there are certain exceptions.

13. *The assignment.* The assignment in Arkansas, California, and Massachusetts stops liens, attachment, and processes. In Arkansas, it frees from arrest, and the debtor may be discharged if arrested upon a writ of habeas corpus. In Connecticut, attachments are dissolved and the creditor may be enjoined from attaching. In Minnesota, the moneys are paid to the clerk of the court, or the court appoints an assignee. In Texas, a deed is ordered to trustees.

The assignee or trustee. He in general gives bonds, has the same power as an owner in disposing of the estate, may be discharged by the court, has great discretionary power with regard to the settlement of claims, and returns account into court, calls meetings of creditors, and makes distribution of money among them. In Alabama and Missouri, the sheriff of the county sells the property. In Arkansas, Connecticut, Delaware, Maryland, North Carolina, South Carolina, and Texas, the assignees are appointed by the court. In California and Rhode Island, a majority in value of the creditors elect not more than three assignees, whose bonds, in California, are determined by the creditors and the court; and fraud in the choice of an assignee may be tried by a jury. In Georgia, the sheriff of the county is the assignee, except of the choses in action, of which the nominee of the majority of creditors takes possession.

In Massachusetts, Michigan, and New York, a majority in value of the creditors elect the assignees. In Massachusetts, if there are less than five creditors there are not

more than two assignees, if there are ten creditors three assignees may be elected, and all elections are subject to the approval of the judge who himself conveys to the assignee. In Massachusetts and Michigan, if there is no election by the majority of the creditors, the court appoints the assignee. In Ohio, the commissioners take the property and have the usual powers. In Pennsylvania, two-thirds in number and value of the creditors elect the trustees, as they are called. In general, the assignees, or trustees, may examine the insolvent under oath, and may bring actions in their own names for the insolvent property. In South Carolina, the assignees must pay dividends every six months. In Texas, they distribute all moneys in land within one year, excepting five per cent. thereof, and make a full settlement within two years, and only make a partial sale if the assets exceed the debts. In Wisconsin, all contingent interests vesting within three years in the insolvent are taken by the assignees.

14. *Fraud or fraudulent preferences of creditors before assignment.* These, in general, prevent the insolvent from procuring a discharge. So in Arkansas frauds prevent the insolvent from holding office; so a discharge is refused if there has been a preference within three months; so if the debtor has no property, or less than one-third the amount of debts, or has been insolvent within one year, unless two disinterested persons swear that his misfortunes have happened as alleged. In Delaware, Maryland, Michigan, and New York, a jury may be called upon the question of fraud. In Michigan, if the jury disagree the court decides. In Georgia, and in most of the states, fraudulent preferences are void as to the assignees, and dishonesty may be punished. In Georgia and Pennsylvania, the debtor's having lost money by gambling prevents his discharge; in Maryland, having been an applicant for the benefit of the insolvent laws within two years previous (in South Carolina, within three), making a preference within one year of the time of insolvency, or (as also in New York) in contemplation of insolvency. In Arkansas, the discharge may be rendered void, and the insolvent forever deprived of the benefits of the act, by a jury finding fraud within two years after the discharge was granted. In Massachusetts, Michigan, Minnesota, North Carolina, New York, Rhode Island, South Carolina, and Wisconsin, frauds render the discharge void; and fraud includes concealments, perjuries, and deceits of all kinds. In Missouri, fraud excludes the prisoner forever from the benefits of the act. In North Carolina the question may be tried by jury. In New York, a preference within two years before insolvency or contemplation thereof. In South Carolina, the fraud must be tried within four years after the discharge. In Rhode Island, the validity of a discharge may be disputed on notice, and the dishonesty must be proved. In Arkansas, a creditor assisting a fraudulent debtor loses his debt and becomes equally liable with the debtor. In Maryland, a dishonest creditor forfeits his debt; in Rhode Island, double the amount of his debt. In Massachusetts, a fraudulent grantee will take no title as against the assignees. In Ohio, all transfers of property by the debtor after arrest are void. In South Carolina, mortgagees are deemed fraudulent unless they account. In most of the states, the assignees of the insolvent may recover from the fraudulent creditor of the insolvent for the benefit of the rest of the creditors.

15. *A discharge.* This in Arkansas, California, Connecticut, Maryland, Massachusetts, Michigan, Minnesota, New York, Rhode Island, Texas, and Wisconsin, exonerates the debtor from arrest and from debts due at the time of the insolvent's discharge or petition. In Arkansas, the debtor who has become entitled to the benefit of the act may be freed from arrest upon a writ of habeas corpus. In California, Connecticut, and Massachusetts, fiduciary debts are not discharged. In Maryland, a judgment for seduction or defamation of an unmarried female is not affected by a discharge. In Michigan, debts accruing previous to A. D. 1838, unless the creditors choose to come in, are not discharged. In Rhode Island, all contracts are discharged, except the contract of marriage. In Alabama, Delaware, Georgia (16 Ga. 137), Illinois, Missouri, North Carolina, Ohio, and Pennsylvania, a discharge protects the person of the debtor from arrest, but subsequently acquired property is still liable for the debt, unless paid. In Rhode Island, the goods of the debtor are exempt from attachment. In South Carolina, a discharge exonerates the debtor, except in an action of tort, or against a creditor who did not receive a dividend. Such a creditor is allowed to perpetuate his debt, against which the debtor is not allowed to plead the statute of limitations as a bar. Nor is the debtor allowed to serve as a juror for one year after his discharge. In Maryland, the discharge of the insolvent as surety does not discharge other sureties. In Massachusetts, there is no discharge unless fifty per cent. of the debt is paid, unless a majority of the creditors both in number and value assent thereto. A second discharge of an insolvent must be assented to by three-quarters of the creditors in number and value. There can be no third discharge unless the previous debts are paid. The debtor receives an allowance of five per cent. of the estate above fifty per cent. of the debts. In Connecticut, the debtor receives twenty-five per cent. of the estate above fifty per cent., not exceeding one thousand dollars. In Michigan, a discharge may be plead upon general issue and notice of such pleading. In general, it is the rule that the debtor may be examined on oath by the creditors or assignees, and may be compelled to answer such questions as are put to him with regard to his property, conveyances, etc. In New

York, the wife of the debtor may be summoned in if she can be found. In California, a creditor can only object to a dividend within fifteen days after it is declared. Even the homestead is surrendered, and the judge makes an allowance for support. All the debtor's suits are transferred to the county in which he petitions. In Delaware, a discharge has no effect upon mortgage or judgment liens. In Texas, the debtor may plead discharge granted in another state, and will be discharged on producing the certificate. In Iowa, no general assignment in contemplating insolvency shall be good unless for the benefit of all creditors. But if so, the creditors' assent is presumed. 1 Iowa, 460, 582; 6 *id.* 61; 8 *id.* 96; 4 G. 287, 443. All property passes to the assignee, who gives private notice to the creditors, and six weeks' notice in the papers. The creditors file their claims in three months. The property is divided within one year by the assignee, who is subject to the court and renders account. In Delaware, a negro who is unable to pay his debts may be made by decree of the court to serve not more than seven years. In Illinois, an insolvent judge goes before the county commissioner for the benefit of the act.

17. *Proceedings in invitum as regulated in some states.* In Connecticut, a creditor may petition the court of probate where he has taken out a writ for a debt of one hundred dollars, sworn to be due or to become due, when an officer cannot find sufficient property to attach. The court appoints trustees, and the subsequent proceedings are regulated as stated above, where the debtor petitions.

In Massachusetts, when a debtor has not given bail for one hundred dollars or upwards, has been in jail thirty days, has not dissolved attachment for seven days after the return day, been guilty of fraud, or removed from the state, a creditor to the amount of one hundred dollars may petition under oath, when proper notice must be given to the debtor; and the other proceedings are the same as when the insolvent petitions.

In New York, when a debtor has been actually imprisoned more than sixty days, a creditor to the amount of twenty-five dollars may petition, with affidavit of these facts, and that he fears the estate will be embezzled. Other creditors are notified, to see if they will join. The debtor has notice, and the magistrate hears the parties. If the creditors unite, the debtor is examined, and on refusal imprisoned, and the magistrate proceeds to other proof. If two-thirds of the creditors in the United States join, the debtor is ordered to make a conveyance. If the debtor refuses, officers make it, and then the debtor cannot be discharged except upon a petition *de novo* with his creditors.

In Illinois, a debtor is arrested upon refusal to surrender his goods. If arrested upon an affidavit of fraud, the probate court is to summon a jury of seven members; if found guilty, the debtor is imprisoned till he makes a schedule. The assignee advertises the goods and settles within eighteen months.

Florida, Kentucky, Louisiana, Maine, New Hampshire, Oregon, Tennessee, Vermont, Virginia, Kansas, the territories of Arizona, Nebraska, New Mexico, Utah, and Washington, and the Choctaws and Chickasaws, have no insolvent laws.

18. The following compilations of the statutes of the various states have been consulted. The references are made to both insolvent and poor debtor laws.

Alabama: Code 1852, §§ 27, 41, p. 498; Act Jan. 20, 1858 (Ins. Est. § 27, 41, p. 498).

Arkansas: Digest of Stat. 1858, ch. 90.

California: Compiled Laws 1850–1853.

Columbia, Dist. of: Revised Code 1857, § 62.

Connecticut: Statutes of Connecticut, Compilation of 1854; Laws of 1855, p. 30; Acts June 23, 1860; June 9 and July 2, 1856.

Delaware: Revised Code 1852.

Florida (no laws on these subjects): Thompson's Digest 1847; Insolvent Estates, 1852.

Georgia: Statutes 1851 (T. R. R. Cobb's New Dig. Law of Georgia); Constitution, art. iv. § vii.; Act Feb. 2, 1856.

Illinois: Statutes, p. ii. 583, 1858; 13 Illinois, 660.

Indiana: Revised Statutes 1852; 2 Blackf. Ind. 394.

Iowa: Revision 1860.

Kansas (no laws on these subjects): Kan. Territory, 1855.

Kentucky (no laws on these subjects): Revised Statutes 1852.

Louisiana (no laws on these subjects): Revised Statutes 1856.

Maine: Revised Statutes, ch. 113.

Maryland: Public General Laws, art. 48, p. 344, 1860.

Massachusetts: General Statutes, ch. 118.

Michigan: Compiled Laws, 1417 (1857), ch. CLV., CLVII., CLVIII.

Minnesota: Statutes Territory Minnesota, 1851, ch. 89, 445 (Ins. Estates, 254, ch. 57); Statutes 1847, 1858 (Ins. Estates § 36, p. 444; Ins. Debtor, § 1, p. 665, ch. 89 Revised Statutes).

Mississippi: Revised Code 1857, 536 (448, § 11, Insolvent Estates).

Missouri: Criminal Court of the County, or Justice or Clerk of County Court.

New Hampshire: Compiled Statutes, ch. 171, p. 411.

New Jersey: Laws of New Jersey from 1709–1855.

New York: Statutes 1852, part ii. ch. v. 198; ch. 147, Apr. 4, 1854, 5 vol. 79.

North Carolina: Revised Code 1854, ch. 59, § 1.

Ohio: Revised Statutes 1854, ch. 57, p. 466.

Oregon: Statutes of 5th and 6th Sessions.

Pennsylvania: Purdon's Digest 1700–1862.

Rhode Island: Revised Statutes 1857 (Insolv. Deceased, 369; Poor Debtor, 481).

South Carolina: 3d vol. South Carolina, 173, 662, 663; 4th vol. 92.

Tennessee: 1850, Code.

Texas: Digest 1859.

Vermont: Laws 1850, 251, 253, §§ 70–79, ch. 42, p. 355 (Ins. Estates).

Virginia: Revised Code 1854.

Wisconsin: Revised Statutes 1858, ch. 161, p. 920.

19. In Upper Canada (Consolidated Statutes, chap. 18, p. 117), any person in debt or imprisoned may apply to the judges of the county court for relief. The petition contains a proposal to pay the debts in whole or in part, a sworn schedule, etc., and a petition for protection. Notice is published in the Canada Gazette and the county paper, and given to one-fourth in value and number of the creditors personally. An official assignee is appointed by the judge, in whom the estate and the usual powers vest. Notice is then given; the majority in number and value of the creditors choose an assignee subject to the judge's approval, who has a right to six days to accept. The discharge protects both person and property; though the latter may be made liable on petition of the assignees. The judge has great discretionary power, and may commit witnesses for refusing to answer. All acts of the official assignee are made legal though the petition be not finally granted. The assignees may sue in their own or their petitioners' name.

In Nova Scotia (Revised Statutes 1851), any person imprisoned on mesne process, execution, or attachment for costs may petition judge of superior court, or two commissioners who are appointed by the governor in council. A schedule of property is filed, the creditors summoned, who may have the debtor put on oath. This may be waived on crown debts, and the attorney-general may discharge crown debts. A creditor may make an affidavit of cause, and the prisoner may be remanded, and detained for a year, if fraud appear. If a process be issued by a justice of the peace, two justices of the peace may relieve the prisoner. The supreme court, or the judges thereof, constitute a court of appeals. The prisoner is discharged from arrest, but his subsequent property is liable. The provinces of Lower Canada and New Brunswick have no insolvent court or poor debtor laws.

INSOLVENT ESTATES OF PERSONS DECEASED. In some states, the distribution of the estates of deceased insolvent debtors is specially provided for by statute. In others, these estates are left to the general regulations existing in most states with regard to administration.

In some states, special regulations have been made. These regulations frequently provide that certain claims shall be privileged, and insure the fair division of the remainder of the assets of the deceased among all his creditors *pro rata*. The following states have statutory provisions, and the statute is cited after each state. Alabama, Code 1852, § 2741, p. 498; Connecticut, Comp. Stat. 1854; Illinois, Stat. 1858, 1209–1213 Kentucky, Rev. Stat. 52, 713.

In Maine and Massachusetts, a petition is addressed to the judge of probate, who appoints two commissioners to decide upon the claims. Rev. Stat. of Me. ch. 66, p. 324, Feb. 21, 1860; Gen. Laws of Mass. ch. 99, p. 496; Minnesota, ch. 57, 254 New Hampshire, Comp. Stat. ch. 171, p. 411. In Vermont, the distribution of insolvent estates is provided for. Stat. of Vt. ch 42, p. 355.

INSPECTION (Lat. *inspicere*, to look into). The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. The decision of the inspectors is not final: the object of the law is to protect the community from fraud, and to preserve the character of the merchandise abroad. 8 Cow. N. Y. 45. See 1 Johns. N. Y. 205; 13 *id.* 331; 2 Caines, 312; 3 *id.* 207.

In Practice. Examination.

The inspection of all public records is free to all persons who have an interest in them, upon payment of the usual fees. 7 Mod. 129; 1 Strange, 304; 2 *id.* 260, 954, 1005. But it seems a mere stranger, who has no such interest, has no right at common law. 8 Term, 390.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect things over which they have jurisdiction: as, inspector of bark, one who is by law authorized to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government: as to their duties, see 1 Story, U. S. Laws, 590, 605, 609, 610, 612, 619, 621, 623, 650; 2 *id.* 1490, 1516; 3 *id.* 1650, 1790.

INSPEXIMUS (Lat.). We have seen. A word sometimes used in letters patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim: it then grants such further privileges as are thought convenient. 5 Coke, 54.

INSTALLATION, INSTALMENT. The act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the requisition of the constitution and laws.

INSTALMENT. A part of a debt due by contract, and agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January and the other on the first day of July, each of these payments or obligations to pay will be an instalment.

In such case, each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due. 3 Dane, Abr.

493, 494; 1 Esp. 129, 226; 2 *id.* 235; 3 Salk. 6, 18; 1 Maule & S. 706.

A debtor who by failing to pay three instalments of rent due on a lease would forfeit his estate, may, in order to save it, tender one instalment to prevent the forfeiture, although there may be two due at the time; and he is not bound to tender both. 6 Toullier, n. 688.

INSTANCE (literally, standing on: hence, urging, solicitation. Webster, Dict.).

In Civil and French Law. In general, all sorts of actions and judicial demands. Dig. 44. 7. 58.

In Ecclesiastical Law. Causes of *instance* are those proceeded in at solicitation of some party, as opposed to causes of office, which run in the name of the judge. Halif. Anal. p. 122.

In Scotch Law. That which may be insisted on at one diet or course of probation. Whart.

INSTANCE COURT. In English Law. That branch of the admiralty court which has the jurisdiction of all matters except those relating to prizes.

The term is sometimes used in American law for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction. 3 Dall. 6; 1 Gall. C. C. 563; 3 Kent, Comm. 355, 378.

See ADMIRALTY.

INSTANCIA. In Spanish Law. The institution and prosecution of a suit from its inception until definitive judgment. The first instance, "*primera instancia,*" is the prosecution of the suit before the judge competent to take cognizance of it at its inception; the second instance, "*secunda instancia,*" is the exercise of the same action before the court of appellate jurisdiction; and the third instance, "*tercera instancia,*" is the prosecution of the same suit, either by an application of revision before the appellate tribunal, that has already decided the cause, or before some higher tribunal, having jurisdiction of the same.

All civil suits must be tried and decided, in the first instance, within three years; and *all criminal*, within two years.

As a general rule, three instances are admitted in all civil and criminal cases. Art. 285, Const. 1812.

INSTANTER (Lat.). Immediately; presently. This term, it is said, means that the act to which it applies shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term instanter as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court, or "before the shutting of the office the same night," when the act is to be done there. 1 Taunt. 343; 6 East, 587, n. *e;* Tidd, Pract. 3d ed. 508, n.; 3 Chitty, Pract. 112. See 3 Burr. 1809; Coke, Litt. 157; Styles, Reg. 452.

INSTAR (Lat.). Like; resembling; equivalent: as, *instar dentium*, like teeth; *instar omnium*, equivalent to all.

INSTIGATION. The act by which one incites another to do something, as, to injure a third person, or to commit some crime or misdemeanor, to commence a suit, or to prosecute a criminal. See ACCOMPLICE.

INSTITOR (Lat.). **In Civil Law.** A clerk in a store; an agent.

He was so called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. *Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit tabernæ sit præpositus, an cuilibet alii negotiationi.* Dig. lib. 14, tit. 3, l. 3. Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power. 1 Bell, Comm. 479, 5th ed.; Erskine, Inst. 3. 3. 46; 1 Stair, Inst. by Brodie, b. 1, tit. 11, §§ 12, 18, 19; Story, Ag. § 8.

INSTITUTE. In Scotch Law. The person first called in the tailzie; the rest, or the heirs of tailzie, are called substitutes. Erskine, Pract. 3. 8. 8. See TAILZIE, HEIR OF; SUBSTITUTES.

In Civil Law. One who is appointed heir by testament, and is required to give the estate devised to another person, who is called the substitute.

To name or to make an heir by testament. Dig. 28. 5. 65. To make an accusation; to commence an action.

INSTITUTES. Elements of jurisprudence; text-books containing the principles of law made the foundation of legal studies.

The word was first used by the civilians to designate those books prepared for the student and supposed to embrace the fundamental legal principles arranged in an orderly manner. Two books of Institutes were known to the civil lawyers of antiquity,—Gaius and Justinian.

I. COKE'S INSTITUTES. Four volumes of commentaries upon various parts of the English law.

2. Sir Ed. Coke hath written four volumes of Institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive commentary upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edw. IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment on many old acts of parliament, without any systematical order; the third, a more methodical treatise on the pleas of the crown; and the fourth, an account of the several species of courts. These Institutes are usually cited thus: the first volume as Co. Litt., or 1 Inst.; the second, third, and fourth as, 2, 3, or 4 Inst., without any author's name. 1 Blackstone, Comm. 72.

II. GAIUS' INSTITUTES. A tractate upon the Roman law, ascribed to Caius or Gaius.

3. Of the personal history of this jurist nothing is known. Even the spelling of his name is mat-

ter of controversy, and he is known by no other title than Gaius, or Caius. He is believed to have lived in the reign of Marcus Aurelius. The history of Gaius's Institutes is remarkable. In 1816, Niebuhr was sent to Rome by the king of Prussia. On his way thither, he spent two days in the cathedral library of Verona, and at this time discovered these Institutes, which had been lost to the jurists of the middle ages. In 1817, the Royal Academy of Berlin charged Goeschen, Bekker, and Hollweg with the duty of transcribing the discovered manuscript. In 1819, Goeschen gave the first completed edition, as far as the manuscript could be deciphered, to his fellow-jurists. It created an unusual sensation, and became a fruitful source of comment. It formed a new era in the study of Roman law. It gave the modern jurist the signal advantage of studying the source of the Institutes of Justinian. It is believed by the best modern scholars that Gaius was the first original tractate of the kind, not being compiled from former publications. The language of Gaius is clear, terse, and technical,—evidently written by a master of law and a master of the Latin tongue. The Institutes were unquestionably *practical*. There is no attempt at criticism or philosophical discussion: the disciple of Sabinus is content to teach law as he finds it. Its arrangement is solid and logical, and Justinian follows it with an almost servile imitation.

4. The best editions of Gaius are Goeschen's 2d ed., Berlin, 1824, in which the text was again collated by Bluhme, and the 3d ed. of Goeschen, Berlin, 1842, edited by Lachman from a critical revision by Goeschen which had been interrupted by his death. In France, Gaius attracted equal attention, and we have three editions and translations: Boulet, Paris, 1824; Domenget, 1843; and Pellat, 1844. We are also promised a commentary by the last very distinguished civilian, which will give us a complete critical text and elaborate notes,—a thing much to be desired.

In 1859, Francesco Lisi, a learned Italian scholar, published, at Bologna, a new edition of the first book of Gaius, with an Italian translation *en régard*. The edition is accompanied and enriched by many valuable notes, printed in both Latin and Italian. Perhaps this must be considered, so far as printed, the most complete edition of the old civilian that modern scholars have yet produced.

The reader who may wish to pursue his Gaiian studies should consult the list of some thirty-odd treatises and commentaries mentioned in Mackeldey's Lehrbuch des Röm. Rechts, p. 47, note (b), 13th ed., Wien, 1851; Huschke, Essay Zur Kritik und Interp. von Gaius Inst., Breslau, 1830; Haubold's Inst. Juris Rom. Prev. Line., pp. 151, 152, 505, 506, Lipsiæ, 1826; Boecking's Gaius, Preface, pp. 11–18, Leps., 1845; Lisi's Gaius, Prefaoe, pp. x. xi., Bologna, 1859.

III. JUSTINIAN'S INSTITUTES are an abridgment of the Code and Digest, composed by order of that emperor and under his guidance, with an intention to give a summary knowledge of the law to those persons not versed in it, and particularly to students. Inst. Proem. § 3.

5. The lawyers employed to compile it were Tribonian, Theophilus, and Dorotheus. The work was first published on the 21st of November in the year 533, and received the sanction of statute law by order of the emperor. They are divided into four books: each book is divided into titles, and each title into separate paragraphs or sections, preceded by an introductory part. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered, and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. The method of citing the Institutes should be understood, and is now commonly by giving the number of the book, title, and section, thus: Inst. I. 2. 5.—thereby indicating book I. title 2, section 5. Where it is intended to indicate the first paragraph, or principium, thus: Inst. B. I. 2. pr. Frequently the citation is simply I. or J. I. 2. 5. A second mode of citation is thus: § 5, Inst. or I. I. 2.—meaning book I, title 2, paragraph 5. A third method of citation, and one in universal use with the older jurists, was by giving the name of the title and the first words of the paragraph referred to, thus: § senatusconsultum est I de jure nat. gen. et civil.—which means, as before, Inst. B. I. tit. 2, § 5. See 1 Colquhoun, s. 61.

6. The first printed edition of the Institutes is that of Schoyffer, fol., 1468. The last critical German edition is that of Schrader, 4to, Berlin, 1832. This work of Schrader is the most learned and most elaborate commentary on the text of Justinian in any language, and was intended to form a part of the Berlin Corpus Juris; but nothing further has been yet published. It is impossible in this brief article to name all the commentaries on these Institutes, which in all ages have commanded the study and admiration of jurists. More than one hundred and fifty years ago one Homberg printed a tract De Multitudine nimia Commentatorum in Institutiones Juris. But we must refer the reader to the best recent French and English editions. Ortolan's Institutes de l'Empereur Justinien avec le texte, la traduction en regard, et les explications sous chaque paragraphe, Paris, 1857, 3 vols. 8vo, sixth edition. This is, by common consent of scholars, regarded as the best historical edition of the Institutes ever published. Du Caurroy's Institutes de Justinien traduites et expliquées par A. M. Du Caurroy, Paris, 1851, 8th ed. 2 vols. 8vo. The Institutes of Justinian: with English Introduction, Translation, and Notes, by Thomas Collet Sandars, M.A., London, 1853, 8vo; 2d ed., 1860. This work has been prepared expressly for beginners, and is founded mainly upon Ortolan, with a liberal use of LaGrange, Du Caurroy, Warnkoenig, and Puchta, as well as Harris and Cooper. A careful study of this edition will result in the student's abandoning its pages and betaking himself to Schrader and Ortolan. The English edition of Harris, and the American one of Cooper, have ceased to attract attention.

IV. THEOPHILUS' INSTITUTES. A paraphrase of Justinian, made, it is believed, soon after A.D. 533.

7. It is generally supposed that in A.D. 534, 535, and 536, Theophilus read his commentary in Greek to his pupils in the law school of Constantinople. He is conjectured to have died some time in A.D. 536. This paraphrase maintained itself as a manual of law until the eighth or tenth century. This text was used in the time of Hexabiblos of Harmenipulus, the last of the Greek jurists. It is also conjectured that Theophilus was not the editor of his own paraphrase, but that it was drawn up by some of his pupils after his explanations and lectures, inasmuch as it contains certain barbarous phrases, and the texts of the manuscripts vary greatly from each other.

It has, however, always been somewhat in use, and jurists consider that its study aids the text of the Institutes; and Cujas and Hugo have both praised it. The first edition was that of Zuichem, fol., Basle, 1531; the best edition is that of Reitz, 2 vols. 4to, 1751, Haag. There is a German translation by Wüsterman, 1823, 2 vols. 8vo; and a French

translation by Mons. Ilrégier, Paris, 1847, 8vo, whose edition is prefaced by a learned and valuable introduction and dissertation. Consult Mortreuil, Hist. du Droit Byzan., Paris, 1843; Smith, Dict. Biog. London, 1849, 3 vols. 8vo; 1 Kent, Comm. 533; Profession d'Avocat, tom. ii. n. 536, page 95; Introd. à l'Etude du Droit Romain, p. 124; Dict. de Jurisp.; Merlin, Répert.; Encyclopédie de d'Alembert.

INSTITUTION (Lat. *instituere*, to form, to establish).

In Civil Law. The appointment of an heir; the act by which a testator nominates one or more persons to succeed him in all his rights, active and passive. Halifax, Anal. 39; Pothier, Tr. des Donations testamentaires, c. 2, s. 1, § 1; La. Civ. Code, 1598; Dig. 28. 5. 1; l. 28. 6. 1, 2. § 4.

In Ecclesiastical Law. To become a parson or vicar, four things are necessary, viz.: holy orders, presentation, institution, induction. Institution is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk,—previous to which the oath against simony and of allegiance and supremacy are to be taken. By institution the benefice is full: so that there can be no fresh presentation (except the patron be the king), and the clerk may enter on parsonage-house and glebe and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. See 1 Sharswood, Blackst. Comm. 389–391; 1 Burn, Eccl. Law, 169–172.

In Political Law. A law, rite, or ceremony enjoined by authority as a permanent rule of conduct or of government: as, the Institutions of Lycurgus. Webster, Dict. An organized society, established either by law or the authority of individuals, for promoting any object, public or social. Webster, Dict.

In Practice. The commencement of an action: as, A B has instituted a suit against C D to recover damages for trespass.

INSTRUCTIONS. In Common Law. Orders given by a principal to his agent in relation to the business of his agency.

The agent is bound to obey the instructions he has received; and when he neglects so to do he is responsible for the consequences, unless he is justified by matter of necessity. 4 Binn. Penn. 361; 1 Livermore, Ag. 368. See AGENT.

In Practice. The statements of a cause of action given by a client to his attorney, and which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warren, Law Stud. 284.

Instructions to counsel are their indemnity for any aspersions they may make on the opposite party; but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such unjustifiable conduct the counsel will be held responsible. Eunom. Dial. 2, § 43, p. 132. For a form of instructions, see 3 Chitty, Pract. 117, 120, n.

In French Law. The means used and formality employed to prepare a case for trial. It is generally applied to criminal cases, and is then called criminal instruction; it is then defined the acts and proceedings which tend to prove positively a crime or delict, in order to inflict on the guilty person the punishment which he deserves.

INSTRUMENT. The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon. The agreement and the instrument in which it is contained are very different things,—the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud. See Ayliffe, Parerg. 305; Dunlop, Adm. Pract. 220.

INSTRUMENTA (Lat.). That kind of evidence which consists of writings not under seal: as, court-rolls, accounts, and the like. 3 Coke, Litt. Thomas ed. 487.

INSUFFICIENCY. In Chancery Practice. After filing of defendant's answer, the plaintiff has six weeks in which to file exceptions to it for *insufficiency*,—which is the fault of not replying specifically to specific charges in the bill. Smith, Chanc. Pract. 344; Mitford, Eq. Plead. 376, note; Sanders, Ord. in Chanc. Index.

INSULA (Lat. island). A house not connected with other houses, but separated by a surrounding space of ground. Calvinus, Lex.

INSURABLE INTEREST. Such an interest in a subject of insurance as will entitle the person possessing it to obtain insurance.

2. It is essential to the contract of insurance, as distinguished from a wager, that the assured should have a legally recognizable interest in the insured subject, the pecuniary value of which may be appreciated and computed or valued. It is not requisite that the insured party should have an absolute property in the insured subject, or that the subject or interest should be one that can be exclusively possessed or be transferable by tradition or assignment. The subject or interest must, however, be such that it may be destroyed, lost, damaged, diminished, or intercepted by the risks insured against. The interests usually insured are those of the owner in any species of property, of mortgagor, mortgagee, holder of bottomry or respondentia bond, of an agent, consignee, lessee, factor, carrier, bailee, or party having a lien or entitled to a rent or income, or being liable to a loss depending upon certain conditions or contingencies, or having the certainty or probability of a profit or pecuniary benefit depending on the insured subject. 1 Phillips, Ins. c. 3; 11 Eng. L. & Eq. 2; 28 *id.* 312; 34 *id.* 116; 48 *id.* 292; 5 N. Y. 151; 19 *id.* 184; 11 Penn. St. 429; 10 Cush. Mass. 37; 6 Gray, Mass. 192; 2 Md. 111; 13 B.

Monr. Ky. 311; 16 *id.* 242; 5 Sneed, Tenn. 139.

3. The certainty or probability, direct or incidental, of pecuniary benefit by the living, or pecuniary loss or damage to any one by the decease, of another, gives an insurable interest in his life. 1 Phillips, Ins. c. 3, sec. xiv.; 10 Cush. Mass. 244; 22 Penn. 65; 27 *id.* 268; 23 Conn. 244; 22 Barb. N. Y. 9; 28 Mo. 383; 28 Eng. L. & Eq. 312.

The amount of insurable interest is the value of the insured subject as agreed by the policy, or its market value, or the pecuniary loss to which the assured is liable by the risks insured against, though the insured subject—for example, life or health—has not a market value. 2 Phillips, Ins. c. 14; 13 Barb. N. Y. 206; 7 N. Y. 530; 13 *id.* 31; 24 N. H. 234; 2 Parsons, Marit. Law, c. 2, sec. 2.

INSURANCE (also called *Assurance*). A contract whereby, for an agreed premium, one party undertakes to indemnify the other against loss on a specified subject by specified perils. The party agreeing to make the indemnity is usually called the *insurer* or *underwriter;* the other, the *insured* or *assured;* the agreed consideration, the *premium;* the written contract, a *policy;* the events insured against, *risks* or *perils;* and the subject, right, or interest to be protected, the *insurable interest.* 1 Phillips, Ins. §§ 1–5.

Insurance on risks in navigation is on vessels and other navigable craft, freight, cargo, and liens on either by bottomry, respondentia, mortgage for commissions or otherwise, and on profits.

Insurance against fire on land is upon buildings, and all species of property, real and personal, that is subject to destruction or direct damage by fire. Insurance *on lives* is applicable mostly to human life, but is also made on domestic animals, or such as are in possession. See ABANDONMENT; ADJUSTMENT; AVERAGE; DEVIATION; INSURABLE INTEREST; MEMORANDUM; VALUATION; POLICY; WARRANTY.

INSURANCE AGENT. An agent for effecting insurance may be such by appointment or the recognition of his acts done as such. 2 Phillips, Ins. § 1848; 4 Cow. N. Y. 645. He may be agent for either of the parties to the policy, or for distinct purposes for both. 16 T. B. Monr. Ky. 252; 20 Barb. N. Y. 68.

An insurance agency may be more or less extensive according to the express or implied stipulations and understanding between him and his principals. It may be for filling up and issuing policies signed in blank by his principals, for transmitting applications to his principals filled up by himself, as their agent or that of the applicant, for receiving and transmitting premiums, for adjusting and settling losses, or granting liberties and making new stipulations, or for any one or more of these purposes. 2 Phillips, Ins. ch. xxiii. sects. 1, 2, 3; 2 Dutch. N. J. 268; 6 Gray, Mass. 497; 7 *id.* 261; 25 Barb. N. Y. 497; 18 N. Y. 376; 19 *id.* 305; 25 Conn. 53, 465, 542; 26 *id.* 42; 12 La. 122; 37 N. H. 35; 12 Md. 348; 1 Grant, Cas. Penn. 472; 23 Penn. St. 50, 72; 26 *id.* 50.

Notice to an agent of matters within his commission is such to the company. 16 Barb. N. Y. 159; 1 Eng. L. & Eq. 140; 6 Gray, Mass. 14.

INSURANCE COMPANY. A company which issues policies of insurance,—an incorporated company, and either a stock company, a mutual one, or a mixture of the two. In a stock company, the members or stockholders pay in a certain capital which is liable for the contracts of the company. In a mutual company, the members are themselves the parties insured; in other words, all the members contribute premiums to the fund, which is liable for indemnity to each member for loss, according to the terms of the contract; and much the greater number of American companies for all descriptions of insurance are of this class. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.

INSURED. The person who procures an insurance on his property.

It is the duty of the insured to pay the premium, and to represent fully and fairly all the circumstances relating to the subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract. 1 Marshall, Ins. 464; Park, Ins. See CONCEALMENT; MISREPRESENTATION; WARRANTY.

INSURER. The underwriter in a policy of insurance; the party agreeing to make indemnity to the other. Sometimes applied improperly to denote the party insured.

INSURGENT. One who is concerned in an insurrection. He differs from a rebel in this, that rebel is always understood in a bad sense, or one who unjustly opposes the constituted authorities; insurgent may be one who justly opposes the tyranny of constituted authorities. The colonists who opposed the tyranny of the English government were insurgents, not rebels.

INSURRECTION. A rebellion of citizens or subjects of a country against its government.

The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

By the act of congress of the 28th of February, 1795, 1 Story, U. S. Laws, 389, it is provided:—

§ 1. That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection.

§ 2. That, whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of congress.

§ 3. That whenever it may be necessary, in the judgment of the president, to use the military force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.

Further important provisions relative to insurrection are contained in the acts of Congress of July 13, 1861, 12 U. S. Stat. at Large, 257; Jan. 31, 1862, 12 *id.* 334; May 20, 1862, 12 *id.* 404; July 17, 1862, 12 *id.* 590; July 14, 1862, 12 *id.* 625; March 3, 1863, 12 *id.* 755; March 3, 1863, 12 *id.* 762; March 3, 1863, 12 *id.* 820.

INTAKERS. In English Law. The name given to receivers of goods stolen in Scotland, who take them to England. 9 Hen. V. c. 27.

INTEGER (Lat.). Whole; untouched. *Res integra* means a question which is new and undecided. 2 Kent, Comm. 177.

INTENDANT. One who has the charge, management, or direction of some office, department, or public business.

INTENDED TO BE RECORDED. This phrase is frequently used in conveyancing, in deeds which recite other deeds which have not been recorded. In Pennsylvania, it has been construed to be a covenant, on the part of the grantor, to procure the deed to be recorded in a reasonable time. 2 Rawle, Penn. 14.

INTENDENTE. In Spanish Law. The immediate agent of the minister of finance, or the chief and principal director of the different branches of the revenue, appointed in the various departments in each of the provinces of the Spanish monarchy. See Escriche, *Intendente.*

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention, of the law; a presumption or inference made by the courts. Coke, Litt. 78.

It is an intendment of law that every man is innocent until proved guilty, see INNOCENCE; that every one will act for his own advantage; that every officer acts in his office with fidelity; that the children of a married woman, born during the coverture, are the children of the husband. See BASTARDY. Many things are intended after verdict, in order to support a judgment; but intendment cannot supply the want of certainty in a charge in an indictment for a crime. 5 Coke, 121. See Comyns, Dig. *Pleader* (C 25), (S 31); Dane, Abr. Index; 14 Viner, Abr. 449; 1 Halst. Ch. N. J. 132.

INTENT. Intention, which see.

INTENTIO (Lat.). **In Civil Law.** The formal complaint or claim of a plaintiff before the prætor. "*Reus exceptionem velut intentionem implet:*" *id est, reus in exceptione actor est.* The defendant makes up his plea as if it were a declaration; *i.e.* the defendant is plaintiff in the plea.

In Old English Law. A count or declaration in a real action (*narratio*). Bracton, lib. 4, tr. 2, c. 2; Fleta, lib. 4, c. 7; DuCange.

INTENTION. A design, resolve, or determination of the mind.

2. In Criminal Law. To render an act criminal, a wrongful intent must exist. Hob. 134; Ambl. 307; Russ. & R. 196, 154; 1 Leach, Cr. Cas. 4th ed. 280, 284; 2 *id.* 1019; 7 Carr. & P. 428; 8 *id.* 136; 1 Den. Cr. Cas. 387; Paine, C. C. 16; 2 McLean, C. C. 14; 2 Ind. 207; 30 Me. 132; 1 Rice, So. C. 145; 4 Harr. Del. 315; 19 Vt. 564; 3 Dev. No. C. 114; 1 Bishop, Crim. Law, § 221 *et seq.* And with this must be combined a wrongful act; as mere intent is not punishable, Cald. 397; 1 Strange, 644; 2 *id.* 1074; 9 Coke, 81 *a;* 1 Ell. & B. 435; 2 Carr. & P. 414; 7 *id.* 156; 2 Mass. 138; 2 B. Monr. Ky. 417; 1 Dall. Penn. 33; 9 Ark. 42; 10 Vt. 353; 1 Dev. & B. No. C. 121; Gilp. Dist. Ct. 306; 5 Cranch, 311; but see Jebb, Cr. Cas. 48 n.; Russ. & R. 308; 1 Ell. & B. 435; 1 Lew. Cr. Cas. 42; 1 Russell, Crimes, Greaves ed. 48; but a wrongful intent may render an act otherwise innocent, criminal. 1 Carr. & K. 600; Carr. & M. 236; 2 All. Mass. 181; 1 East, Pl. Cr. 255; 1 Bishop, Crim. Law, §§ 229, 253.

3. Generally, where any wrongful act is committed, the law will infer conclusively that it was intentionally committed, 2 Gratt.

Va. 594; 4 Ga. 14; 2 All. Mass. 179; and also that the natural, necessary, and even probable consequences were intended. 1 Greenleaf, Ev. § 18; 3 *id.* 13; 3 Dowl. & R. 464; 2 Lew. Cr. Cas. 237; 3 Maule & S. 11, 15; 5 Carr. & P. 538; 8 *id.* 143, 148; 9 *id.* 258, 499; 3 Wash. C. C. 515; 13 Wend. N. Y. 87; 3 Pick. Mass. 304; 15 *id.* 337; 9 Metc. Mass. 410; 2 Gratt. Va. 594; 1 Bay, So. C. 245; 9 Humphr. Tenn. 66; 1 Ov. Tenn. 305. See, also, 8 Carr. & P. 143, 274, 582; 2 Carr. & K. 356, 777; Baldw. C. C. 370; 4 N. H. 239; 8 *id.* 240; 1 Ired. No. C. 76; 2 *id.* 153; 5 *id.* 350; 18 Johns. N. Y. 115; 6 Blackf. Ind. 299; 3 Harr. Del. 571; 13 Ala. N. S. 413.

When by the common law, or by the provision of a statute, a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegations with proof. On the other hand, if the offence does not rest merely in tendency or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved. *Bigelow*, C. J., 2 All. Mass. 180. See 1 Starkie, Crim. Plead. 165; 1 Chitty, Crim. Law, 233; 6 East, 474; 5 Cush. Mass. 306.

4. This proof may be of external and visible acts and conduct from which the jury may infer the fact, 8 Coke, 146; or it may be by proof of an act committed: as, in case of burglary with intent to steal, proof of burglary and stealing is conclusive. 1 Bishop, Crim. Law, §§ 250, 251; 5 Carr. & P. 510; 7 *id.* 518; 9 *id.* 729; 2 Mood. & R. Cr. Cas. 40. When a man intending one wrong fails, and accidentally commits another, he will, except where the particular intent is a substantive part of the crime, be held to have intended the act he did commit. Eden, Pen. Law, 3d ed. 229; 13 Wend. N. Y. 159; 21 Pick. Mass. 515; 2 Metc. Mass. 329; 1 Gall. C. C. 624; 1 Carr. & K. 746; Roscoe, Crim. Ev. 272.

In Contracts. An intention to enter into the contract is necessary: hence the person must have sufficient mind to enable him to intend.

In Wills and Testaments. The intention of the testator governs unless the thing to be done be opposed to some unbending rule of law. 6 Cruise, Dig. 295; Jarman, Wills, Index; 6 Pet. 68. This intention is to be gathered from the instrument, and from every part of it. 3 Ves. Ch. 105; 4 *id.* 610. See WILLS; CONSTRUCTION.

INTER ALIA (Lat.). Among other things: as, "the said premises, which, *inter alia*, Titius granted to Caius."

INTER ALIOS (Lat.). Between other parties, who are strangers to the proceeding in question.

INTER APICES JURIS. See APEX JURIS.

INTER CANEM ET LUPUM (Lat. between the dog and the wolf). The twilight; because then the dog seeks his rest, and the wolf his prey. Coke, 3d Inst. 63.

INTER PARTES (Lat. between the parties). A phrase signifying an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons: as, for example, "This indenture, made the —— day of ——, 1848, between A B of the one part, and C D of the other." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned. Addison, Contr. 9.

2. This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others: so that should a stipulation be found in the body of a deed by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite intentions are expressed in a contract, the first in order shall prevail. 8 Mod. 116; 1 Show. 58; 3 Lev. 138; Carth. 76; Rolle, 196; 7 Mees. & W. Exch. 63. But this rule does not apply to simple contracts *inter partes*. 2 Dowl. & R. 277; 3 *id.* 273; Addison, Contr. 244, 256.

3. When there are more than two sides to a contract *inter partes*, for example, a deed, as, when it is made between A B of the first part, C D of the second, and E F of the third, there is no objection to one covenanting with another in exclusion of the third. See 5 Coke, 182; 8 Taunt. 245; 4 Q. B. 207; Addison, Contr. 267.

INTER SE, INTER SESE (Lat.). Among themselves. Story, Partn. § 405.

INTER VIVOS (Lat.). Between living persons: as, a gift *inter vivos*, which is a gift made by one living person to another. See GIFTS INTER VIVOS. It is a rule that a fee cannot pass by grant or transfer *inter vivos*, without appropriate words of inheritance. 2 Preston, Est. 64. See DONATIO CAUSA MORTIS.

INTERCOMMON. To enjoy a right of common mutually with the inhabitants of a contiguous town, vill, or manor. 2 Sharswood, Blackst. Comm. 33; Termes de la Ley.

INTERDICT. In Civil Law. The formula according to which the prætor ordered or forbade any thing to be done in a cause concerning true or *quasi* possession until it should be decided definitely who had a right to it. But in modern civil law it is an extraordinary action, by which a summary decision is had in questions of possession or *quasi* possession. Heineccius, Elem. Jur. Civ. § 1287. Interdicts are either prohibitory, restorative,

or exhibitory: the first being a prohibition, the second a decree for restoring possession lost by force, the third a decree for the exhibiting of accounts, etc. *Id.* 1290. Interdicts were decided by the prætor without the intervention of a *judex*, differing in this from actions (*actiones*).

The etymology of the word, according to Justinian, is *quod inter duos dicitur;* according to Isidorus, *quod interim dicitur.* Voc. Jur. Utr.; Sand. Just. 589; Mackeldey, Civ. Law, §§ 195, 230, 235. Like an injunction, the interdict was merely personal in its effects; and it had also another similarity to it, by being temporary or perpetual. Dig. 43. 1. 1, 3, 4. See Story, Eq. Jur. § 865; Halifax, Anal. ch. 6. See INJUNCTION.

In Ecclesiastical Law. An ecclesiastical censure, by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have been abolished in England since the reformation, and were never known in the United States. See 2 Burn, Eccl. Law, 340, 341. Baptism was allowed during an interdict; but the holy eucharist was denied, except in the article of death, and burial in consecrated ground was denied, unless without divine offices.

INTERDICTION. In Civil Law. A judicial decree, by which a person is deprived of the *exercise* of his civil rights.

The condition of the party who labors under this incapacity.

2. There can be no voluntary interdiction, as has been erroneously stated by some writers: the *status* of every person is regulated by the law, and can in no case be affected by contract.

It is to be observed that interdiction is one of those beneficent measures devised by the law for the special protection of the rights and persons of those who are unable to administer them themselves, and that although the person interdicted is not permitted to *exercise* his legal rights, he is by no means deprived of their *enjoyment.* These rights are exercised for his benefit by a *curator,* who is held to a strict accountability, and the fidelity of whose administration is secured, in most cases, by a bond of security, and always by a tacit mortgage on all his property.

3. By the law of the *twelve tables, prodigals* alone could be interdicted. Curators were appointed to those afflicted with mental aberration, idiocy, or incurable diseases, *qui perpetuo morbo laborant;* but no decree of interdiction was pronounced against them. By the modern civil law, prodigality and profligacy are not sufficient reasons for interdiction; but whenever a person is prostrated, either by *mental* or *physical* diseases, to such a degree as to be permanently disabled from administering his estate, he may be interdicted.

No decree of interdiction can be pronounced against a person except by a court whose jurisdiction extends over his domicil.

All the relations of the party are bound to apply for his interdiction when the exigency arises. The same duty is imposed on husband and wife with regard to each other; and their failure to discharge it exposes them to all the damages which may result from such neglect. In the absence of relatives or spouse, or if they refuse to act, the law authorizes even a stranger to make the application.

4. The mode of proceeding is by a petition addressed to the court, in which the reasons which render the interdiction necessary are specifically and explicitly set forth. It is not sufficient to allege in vague and general terms that the party is rendered incapable of administering his estate by mental or physical maladies; but their nature, character, and symptoms must be stated with such legal accuracy as to give the party or his representative notice of the real state of facts on which the application is based. A copy of this petition is communicated to the person sought to be interdicted; and if he fails to employ counsel the court appoints one to assist in the defence of the action. After the *contestatio litis* has been formed by the answer of the defendant and his counsel, a careful investigation of the condition of the party is entered upon.

No decree of interdiction can be rendered unless it be conclusively proved that the party is subject to an habitual state of idiocy, madness, insanity, or bodily infirmities to such a degree as to disable him from administering his estate; but the mere fact that the person laboring under mental aberration has lucid intervals is no objection to the interdiction.

5. With regard to the nature of the evidence, it consists chiefly in the report, under oath, of physicians who are appointed to examine into the condition of the party, his answers to such interrogatories as the judge propounds to him, and of his recent acts and conduct. Courts act with great caution and circumspection in applications for interdiction, and will never render the decree unless it clearly appears to be absolutely necessary that it should be done for the protection of the interest of the party to be interdicted.

During the pendency of the proceedings, the court will appoint a provisional administrator if, in its discretion, such an appointment is deemed necessary.

Immediately after the interdiction has been decreed, the court proceeds to appoint a curator or permanent administrator to take care of the person and to administer the estate of the interdicted party. In the appointment of the curator, the nearest male relation is entitled to the preference, and is compelled to accept the trust, unless he offers a legal excuse. When the wife is interdicted, the husband is entitled to the curatorship; but a curator *ad litem* is appointed to act for her in suits where her interest comes in conflict with that of the husband. The wife has also the right of claiming the curatorship of her husband who has been interdicted. Neither the husband

nor the wife is required to give security; but a tacit mortgage exists on their property to secure the faithful execution of the trust. A judicial inventory is taken of all the property belonging to the interdicted person, which must be homologated and approved by the court, and forms a part of the record of the proceedings.

6. The powers vested in the curator are administrative only: he has no power of alienation whatever. Whenever there is a necessity for the sale of any part of the property, an application must be made to the court, and if the reasons alleged are considered sufficient the sale is ordered to be made at public auction, and a return thereof made to the court. Nor is the curator permitted to mix the funds belonging to the interdicted person with his own, but he is compelled to keep them separate and distinct, under severe penalties.

The decree of interdiction has a retroactive operation, or relation back to the date of the application. From that period the party ceases to be *sui juris*, and becomes *alieni juris:* consequently, all legal transactions he may enter into are null and void, and no evidence is admissible to show that the acts were done during a lucid interval. The incapacity thus created can only be removed by a formal judgment, rendered by the same court, revoking the interdiction. In order to obtain this revocation, it must be alleged and proved that the cause for the interdiction has ceased.

7. It is made the duty of the curator to publish the decree of interdiction in the newspapers; and if he should neglect to do so he is liable in damages to those who may contract with the interdicted person in ignorance of his incapacity.

During the continuance of the interdiction the law expresses the most tender solicitude for the care and protection of the interdicted person, and directs every possible step to be taken for the alleviation of his sufferings and the cure of his disease. His revenues are all to be applied for the attainment of these ends. A superintendent is appointed, whose duty it is to visit the sufferer from time to time and make a report of his condition to the court. Besides, the judge of the court is bound to visit him. Nor can he be taken out of the state, except on the recommendation of a family meeting, based on the certificate of at least two physicians, that they consider his removal necessary for the restoration of his health.

The foregoing rules on the subject of interdiction, found in the Law of Louisiana, are substantially the same in all the modern codes having the civil law for their basis.

INTERESSE TERMINI (Lat.). An interest in the term. The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or *interesse termini*. See Coke, Litt. 46; 2 Blackstone, Comm. 144; 10 Viner, Abr. 348; Dane, Abr. Index; Watkins, Conv. 15; 1 Washburn, Real Prop. Index.

INTEREST (Lat. it concerns; it is of advantage).

In Contracts. The right of property which a man has in a thing. See INSURABLE INTEREST.

On Debts. The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

2. *Who is bound to pay interest.* The *contractor* who has expressly or impliedly undertaken to pay interest is, of course, bound to do so.

Executors, 12 Conn. 350; 7 Serg. & R. Penn. 264, *administrators*, 4 Gill & J. Md. 453; 35 Miss. 321, *assignees of bankrupts or insolvents*, 2 Watts & S. Penn. 557, *guardians*, 29 Ga. 82; 14 La. Ann. 764, *and trustees*, 1 Pick. Mass. 528; 10 Gill & J. Md. 175; 15 Md. 75; 29 Ga. 82; 11 Cal. 71, who have kept money an unreasonable length of time, 18 Pick. Mass. 1; 1 Ashm. Penn. 305; 29 Ga. 82, and have made or might have made it productive, 4 Gill & J. Md. 453; 1 Pick. Mass. 530, are chargeable with interest.

Tenants for life must pay interest on incumbrances on the estate. 4 Ves. Ch. 33; 1 Vern. Ch. 404, n.; 1 Washburn, Real Prop. 96, 257, 573; Story, Eq. Jur. § 487; 5 Johns. Ch. N. Y. 482. In Pennsylvania, the heir at law is not bound to pay interest on a mortgage given by his ancestor.

In Massachusetts, a bank is liable, independently of the statute of 1809, c. 37, to pay interest on their bills if not paid when presented for payment. 8 Mass. 445.

Revenue officers must pay interest to the United States from the time of receiving the money. 6 Binn. Penn. 266.

3. *Who are entitled to receive interest.* The lender upon an express or implied contract for interest. Executors, administrators, etc. are in some cases allowed interest for advances made by them on account of the estates under their charge. 10 Pick. Mass. 77; 6 Halst. Ch. N. J. 44. See 9 Mass. 37. The rule has been extended to trustees, 1 Binn. Penn. 488, and compound interest, even, allowed them. 16 Mass. 228.

On what claims allowed. On express contracts. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action. 1 Esp. N. P. 110; 3 Johns. 220. See 1 Campb. 50; 1 Dall. 315; Stark. Ev. pt. iv. 787; 45 Me. 542; 9 Ohio St. 452.

4. *On implied contracts* where, from the course of dealings between the parties, a promise to pay is implied. 1 Campb. 50; 3 Brown, Ch. 436; Kirb. Conn. 207; 2 Wend. N. Y. 501; 4 *id.* 483; 2 Penn. N. J. 548; 33 Ala. N. S. 459; 8 Iowa, 163. *On an account stated*, or other liquidated sum, whenever

the debtor knows precisely what he is to pay and when he is to pay it. 2 W. Blackst. 761; Wils. 205; 2 Ves. Ch. 365; 8 Brown, Parl. Cas. 561; 2 Burr. 1085; 5 Esp. 114; 2 Comyns, Contr. 207; 1 Hayw. No. C. 173; 2 Cox, N. J. 219; 12 Johns. N. Y. 156; 20 N. Y. 463; 13 Ind. 475; 8 Fla. 161. But interest is not due for unliquidated damages, or on a running account where the items are all on one side, unless otherwise agreed upon. 1 Dall. Penn. 265; 2 Wend. N. Y. 501; 4 Cow. N. Y. 496; 5 *id.* 187; 6 *id.* 193; 5 Vt. 177; 1 Speers, So. C. 209; 1 Rice, So. C. 21; 2 Blackf. Ind. 313; 1 Bibb, Ky. 443; 20 Ark. 410. *On the arrears of an annuity* secured by a specialty, 14 Viner, Abr. 458, pl. 8; 3 Atk. Ch. 579; 9 Watts, Penn. 530, or given in lieu of dower. 1 Harr. Del. 106; 3 Watts & S. Penn. 437. *On bills and notes.* If payable at a future day certain, after due, 3 Dev. & B. No. C. 70; 5 Humphr. Tenn. 406; 19 Ark. 690; 13 Mo. 252; if payable on demand, after a demand made. Bunb. 119; 6 Mod. 138; 1 Strange, Ch. 649; 2 Ld. Raym. 733; 2 Burr. 1081; 5 Ves. Ch. 133; 15 Serg. & R. Penn. 264; 1 M'Cord, So. C. 370; 6 Dan. Ky. 70; 1 Hempst. C. C. 155; 18 Ala. N. S. 300. See 4 Ark. 210. Where the terms of a promissory note are that it shall be payable by instalments, and on the failure of any instalment the whole is to become due, interest on the whole becomes payable from the first default. 4 Esp. 147. Where, by the terms of a bond or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due. 1 Binn. 165; 2 Mass. 568; 3 *id.* 221. See 2 Parsons, Notes & B. 391 *et seq.*

5. *On a deposit* by a purchaser, which he is entitled to recover back, paid either to a principal or an auctioneer. Sugden, Vend. 327; 3 Campb. 258; 5 Taunt. 625. But see 4 Taunt. 334, 341. *For goods sold and delivered,* after the customary or stipulated term of credit has expired. Dougl. 376; 2 Bos. & P. 337; 2 Dall. Penn. 193; 4 *id.* 289; 6 Binn. Penn. 162; 11 Ala. 451; 1 McLean, C. C. 411; 12 N. H. 474; 26 Ga. 465; 8 Iowa, 163. *On judgment debts.* 14 Viner, Abr. 458, pl. 15; 4 Dall. Penn. 251; 2 Ves. Ch. 162; 5 Binn. Penn. 61; 1 Harr. & J. Md. 754; 3 Wend. N. Y. 496; 4 Metc. Mass. 317; 6 Halst. N. J. 91; 3 Mo. 86; 4 J. J. Marsh, Ky. 244; T. U. P. Charlt. Ga. 138. See 3 M'Cord, So. C. 166; 1 Ill. 52; 14 Mass. 239. *On judgments affirmed* in a higher court. 2 Burr. 1097; 2 Strange, 931; 4 Burr. 2128; Dougl. 752, n. 3; 2 H. Blackst. 267, 284; 2 Campb. 428, n.; 3 Taunt. 503; 4 *id.* 30. See 3 Hill, N. Y. 426. *On money obtained by fraud,* or where it has been wrongfully detained. 9 Mass. 504; 1 Campb. 129; 3 Cow. N. Y. 426. *On money paid by mistake,* or recovered on a *void* execution. 1 Pick. Mass. 212; 4 Metc. Mass. 181; 1 Watts & S. Penn. 235; 9 Serg. & R. Penn. 409; 3 Sumn. C. C. 336. *On money lent* or laid out for another's use. Bunb. Exch. 119; 2 W. Blackst. 761; 1 Ves. Ch. 63; 1 Binn. Penn. 488; 6 *id.* 163; 1 Dall. Penn. 349; 2 Hen. & M. Va. 381; 1 Hayw. No. C. 4; 9 Johns. N. Y. 71; 2 Wend. N. Y. 413; 1 Conn. 32; 7 Mass. 14; 11 *id.* 504; 1 Mo. 718; 2 Metc. Mass. 168. *On money had and received* after demand. 1 Ala. N. S. 452; 4 Blackf. Ind. 21, 164. *On purchase-money* which has lain dead, where the vendor cannot make a title. Sugden, Vend. 327. *On purchase-money* remaining in purchaser's hands to pay off incumbrances. 1 Schoales & L. Ir. Ch. 134. See 1 Wash. Va. 125; 5 Munf. Va. 342; 6 Binn. Penn. 435. *Rent in arrear* due by covenant bears interest, unless under special circumstances, which may be recovered in action, 1 Yeates, Penn. 72; 4 *id.* 264; 6 Binn. Penn. 159; but no distress can be made for such interest. 2 Binn. Penn. 246. Interest cannot, however, be recovered for arrears of rent payable in wheat. 1 Johns. N. Y. 276. See 2 Call, Va. 249, 253; 3 Hen. & M. Va. 463; 4 *id.* 470; 5 Munf. Va. 21.

6. *On legacies.* On specific legacies interest is to be calculated from the date of the death of testator. 2 Ves. Sen. Ch. 563; 6 Ves. Ch. 345; 5 Binn. Penn. 475; 5 Watts & S. Penn. 30; 3 Munf. Va. 10.

A *general* legacy, when the time of payment is *not* named by the testator, is not payable till the end of one year after testator's death, at which time the interest commences to run. 1 Ves. Ch. 308, 366; 13 *id.* 333; 1 Schoales & L. Ir. Ch. 10; 5 Binn. Penn. 475; 3 Ves. & B. Ch. 183. But where only the interest is given, no payment will be due till the end of the second year, when the interest will begin to run. 7 Ves. Ch. 89.

Where a general legacy is given, and the time of payment is named by the testator, interest is not allowed before the arrival of the appointed period of payment, and that notwithstanding the legacies are vested. Prec. in Chanc. 337. But when that period arrives the legatee will be entitled although the legacy be charged upon a dry reversion. 2 Atk. Ch. 108. See, also, 3 Atk. Ch. 101; 3 Ves. Ch. 10; 4 *id.* 1; 4 Brown, Ch. 149, n.; 1 Cox, Ch. 133. Where a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives. McClel. Exch. 141. And a bequest of a sum to be paid annually for life bears interest from the death of testator. 5 Binn. Penn. 475.

7. Where the legatee is a child of the testator, or one towards whom he has placed himself in *loco parentis,* the legacy bears interest from the testator's death, whether it be particular or residuary, vested but payable at a future time, or contingent if the child have no maintenance. In that case the court will do what in common presumption the father would have done,—provide necessaries for the child. 2 P. Will. Ch. 31; 3 Ves. Ch. 13, 287; Bacon, Abr. *Legacies* (K 3); Fonblanque, Eq. 431, n. j; 1 Eq. Cas.

Abr. 301, pl. 3; 3 Atk. Ch. 432; 1 Dick. Ch. 310; 2 Brown, Ch. 59; 2 Rand. Va. 409. In case of a child *in ventre sa mère* at the time of the father's decease, interest is allowed only from its *birth*. 2 Cox, Ch. 425. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified. 3 Atk. Ch. 697, 716; 3 Ves. Ch. 286, n. And see, further, as to interest in cases of legacies to children, 15 Ves. Ch. 363; 1 Brown, Ch. 267; 4 Madd. Ch. 275; 1 Swanst. Ch. 553; 1 P. Will. Ch. 783; 1 Vern. Ch. 251; 3 Ves. & B. Ch. Ir. 183.

8. Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator, 3 Ves. Ch. 10; 4 *id.* 1, unless the testator has put himself *in loco parentis*. 1 Schoales & L. Ir. Ch. 5, 6. A wife, 15 Ves. Ch. 301, a niece, 3 Ves. Ch. 10, a grandchild, 6 Ves. Ch. 546; 12 *id.* 3; 15 *id.* 301; 1 Cox, Ch. 133, are, therefore, not entitled to interest by way of maintenance. Nor is a legitimate child entitled to such interest if he have a maintenance, although it may be less than the amount of the interest of the legacy. 1 Schoales & L. Ir. Ch. 5; 3 Ves. Ch. 17. But see 4 Johns. Ch. N. Y. 103; 2 Roper, Leg. 202.

Where an intention, though not expressed, is fairly inferable from the will, interest will be allowed. 1 Swanst. Ch. 561, n.

Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him, be of sufficient ability: so that the interest will accumulate for the child's benefit until the principal becomes payable. 3 Atk. Ch. 399; 1 Brown, Ch. 386; 3 *id.* 60, 416. But to this rule there are some exceptions. 3 Ves. Ch. 730; 4 Brown, Ch. 223; 4 Madd. Ch. 275, 289; 4 Ves. Ch. 498.

9. Where a fund, particular or residuary, is given upon a contingency, the intermediate interest undisposed of—that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency—will sink into the residue for the benefit of the next of kin, or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee. 1 Brown, Ch. 57; 4 *id.* 114; Mer. Ch. 384; 2 Atk. Ch. 329; Forr. Exch. 145; 2 Roper, Leg. 224.

Where a legacy is given by immediate bequest, whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet, as the legacy was payable at the end of a year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy. 1 P. Will. Ch. 500; 2 *id.* 504; Ambl. 448; 5 Ves. Ch. 335, 522.

10. Where a residue is given, so as to be vested but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life or until the happening of the contingency. 2 P. Will. Ch. 419; 1 Brown, Ch. 81, 335; 3 Mer. Ch. 335.

Where a residue of personal estate is given, generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be now settled that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary for the payment of debts. And it is immaterial whether the residue is only given generally, or directed to be laid out, with all convenient speed, in funds or securities, or to be laid out in lands. See 6 Ves. Ch. 520; 9 *id.* 89, 549, 553; 2 Roper, Leg. 234.

11. But where a residue is directed to be laid out in land, to be settled on one for life, with the remainder over, and the testator directs the interest to accumulate in the mean time until the money is laid out in land, or otherwise invested on security, the accumulation shall cease at the end of one year from the testator's death, and from that period the tenant for life shall be entitled to the interest. 6 Ves. Ch. 520, 528, 529; 7 *id.* 95; 2 Sim. & S. Ch. 396.

Where no time of payment is mentioned by the testator, annuities are considered as commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event: if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period. 2 Roper, Leg. 249; 5 Binn. Penn. 475. See 6 Mass. 37; 1 Hare & W. Sel. Dec. 356.

12. *How much interest is to be allowed. As to time.* In actions for money had and received, interest is allowed from the date of service of the writ. 1 Mass. 436; 15 Pick. Mass. 500; 12 N. H. 474. On debts payable on demand, interest is payable only from the demand. Add. Penn. 137; 15 Pick. Mass. 500; 5 Conn. 222; 1 Mas. C. C. 117. See 12 Mass. 4. The words "with interest for the same" carry interest from date. Add. Penn. 323, 324; 1 Stark. 452, 507.

The mere circumstance of war existing between two nations is not a sufficient reason for abating interest on debts due by the sub-

jects of one belligerent to another. 1 Pet. C. C. 524; 4 Harr. & McH. Md. 161. But a prohibition of all intercourse with an enemy during war furnishes a sound reason for the abatement of interest until the return of peace. See, on this subject, 2 Dall. Penn. 102, 132; 4 *id.* 286; 1 Wash. Va. 172; 1 Call, Va. 194; 3 Wash. C. C. 396; 8 Serg. & R. Penn. 103; § **18**, beyond.

A debt barred by the statute of limitations and revived by an acknowledgment bears interest for the whole time. 16 Vt. 297.

13. *As to the allowance of simple and compound interest.* Interest upon interest is not allowed, except in special cases, 1 Eq. Cas. Abr. 287; Fonblanque, Eq. b. 1, c. 2, § 4, note a; 31 Vt. 679; 34 Penn. St. 210; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury. 1 Johns. Ch. N. Y. 14; Cam. & N. No. C. 361; 13 Vt. 430. By the civil law, interest could not be demanded beyond the principal sum, and payments exceeding that amount were applied to the extinguishment of the principal. Ridley's View of the Civil, etc. Law, 84; Authentics, 9th Coll.

Where a partner has overdrawn the partnership funds, and refuses, when called upon to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made. 2 Johns. Ch. N. Y. 213.

14. When executors, administrators, or trustees convert the trust-money to their own use, or employ it in business or trade, or fail to invest, they are chargeable with compound interest. 1 Pick. Mass. 528; 1 Johns. Ch. N. Y. 620.

In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid. 2 Mass. 568; 8 *id.* 445; 1 N. H. 179; 16 Vt. 45. See, as to charging compound interest, the following cases: 1 Johns. Ch. N. Y. 550; Cam. & N. No. C. 361; 1 Binn. Penn. 165; 4 Yeates, Penn. 220; 1 Hen. & M. Va. 4; 3 *id.* 89; 1 Viner, Abr. 457, *Interest* (C); Comyns, Dig. *Chancery* (3 S 3); 1 Hare & W. Sel. Dec. 371. An infant's contract to pay interest on interest after it has accrued will be binding upon him when it is for his benefit. 1 Eq. Cas. Abr. 286; 1 Atk. Ch. 489; 3 *id.* 613; Newland, Contr. 2.

15. *As limited by the penalty of a bond.* It is a general rule that the penalty of a bond limits the amount of the recovery. 2 Term, 388. But in some cases the interest is recoverable beyond the amount of the penalty. 4 Cranch, 333; 15 Wend. N. Y. 76; 10 Conn. 95; Paine, C. C. 661; 6 Me. 14; 8 N. H. 491. The recovery depends on principles of law, and not on the arbitrary discretion of a jury. 3 Caines, N. Y. 49.

The exceptions are—where the bond is to account for moneys to be received, 2 Term, 388; where the plaintiff is kept out of his money by writs of error, 2 Burr. 1094, or delayed by injunction, 1 Vern. Ch. 349; 16 Viner, Abr. 303; if the recovery of the debt be delayed by the obligor, 6 Ves. Ch. 92; 1 Vern. Ch. 349; Show. Parl. Cas. 15; if extraordinary emoluments are derived from holding the money, 2 Brown, Parl. Cas. 251, or the bond is taken only as a collateral security, 2 Brown, Parl. Cas. 333, or the action be on a judgment recovered on a bond. 1 East, 436. See, also, 4 Day, Conn. 30; 3 Caines, N. Y. 49; 1 Taunt. 218; 1 Mass. 308; Comyns, Dig. *Chancery* (3 S 2); Viner, Abr. *Interest* (E).

But these exceptions do not obtain in the administration of the debtor's assets where his other creditors might be injured by allowing the bond to be rated beyond the penalty. 5 Ves. Ch. 329. See Viner, Abr. *Interest* (C 5).

16. *As to the allowance of foreign interest.* The rate of interest of the place of performance is to be allowed, where such place is specified, 10 Wheat. 367; 4 Pet. 111; 20 Johns. N. Y. 102; 8 Pick. Mass. 194; 6 Paige, Ch. N. Y. 627; 3 N. Y. 266; 12 La. Ann. 815; 1 B. Monr. Ky. 29; 2 Watts & S. Penn. 327; 23 Vt. 286; 21 Ga. 135; 22 Tex. 108; 7 Ired. No. C. 424; 5 Clark & F. Hou. L. 1–12; otherwise, of the place of making the contract. 2 Atk. Ch. 382; 11 Ves. Ch. 314; 2 Vern. Ch. 395; 1 Wash. C. C. 521; 2 *id.* 253; 4 *id.* 296; 3 Wheat. 101; 12 Mass. 4; 1 J. J. Marsh. Ky. 406; 5 Ired. No. C. 590; 17 Johns. N. Y. 511; 1 Paige, Ch. N. Y. 220; 2 N. H. 42; 25 *id.* 474; 1 Ala. 387; 13 La. 91; 25 Harr. & J. Md. 193; 3 Conn. 253; 5 Tex. 87, 262. But the rate of interest of either place may be reserved; and this provision will govern, if an honest transaction and not a cover for usury. 26 Barb. N. Y. 208; 2 Penn. St. 85; 14 Vt. 33; 20 Mart. La. 1; 2 Johns. Cas. N. Y. 355; 10 Wheat. 367. See 2 Parsons, Notes & B. 337, 375.

17. *How computed.* In casting interest on notes, bonds, etc. upon which partial payments have been made, every payment is to be first applied to keep down the interest; but the interest is never allowed to form a part of the principal so as to carry interest. 2 Wash. C. C. 167; 1 Halst. N. J. 408; 2 Hayw. No. C. 17; 17 Mass. 417; 1 Dall. Penn. 378. See 14 Conn. 445.

When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment. 1 Pick. Mass. 194; 4 Hen. & M. Va. 431; 8 Serg. & R. Penn. 458; 2 Wash. C. C. 167. See 3 Wash. C. C. 350, 396; 3 Cow. N. Y. 86.

The same rule applies to judgments. 2 N. H. 169; 8 Serg. & R. Penn. 452.

Where a partial payment is made *before* the debt is due, it cannot be apportioned part to the debt and part to the interest. As, if there be a bond for one hundred dollars, pay-

able in one year, and at the expiration of six months fifty dollars be paid in, this payment shall not be apportioned part to the principal and part to the interest, but at the end of the year interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months. 1 Dall. Penn. 124.

18. *When interest will be barred.* When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases. 3 Campb. 296. See 8 East, 168; 3 Binn. Penn. 295.

Where the plaintiff was absent in foreign parts beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence. 1 Call, Va. 133; 3 M'Cord, So. C. 340; 1 Root, Conn. 178. But see 9 Serg. & R. Penn. 263.

Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable. 2 Dall. Penn. 102; 1 Pet. C. C. 524. See, also, 2 Dall. Penn. 132; 4 *id.* 286.

If the plaintiff has accepted the principal, he cannot recover the interest in a separate action. 1 Esp. 110; 3 Johns. N. Y. 229. See 14 Wend. N. Y. 116.

19. The rate of interest allowable has been fixed in the various states of the United States, by statutory enactments, as follows:

Alabama. Eight per centum per annum is allowed. Notes not exceeding one dollar bear interest at the rate of one hundred per centum per annum. Some of the bank charters prohibit certain banks from charging more than six per cent. upon bills of exchange, and notes negotiable at the bank, not having more than six months to run; and over six and under nine, not more than seven per cent.; and over nine months, to charge not more than eight per cent. Aiken, Dig. 236. Contracts for more than the legal rate are void only as to the interest; and the taking of usury does not affect the principal sum.

Arkansas. Six per centum per annum is the legal rate of interest; but the parties may agree in writing for the payment of interest not exceeding ten per centum per annum on money due and to become due on any contract, whether under seal or not. Rev. Stat. c. 80, ss. 1, 2. Contracts where a greater amount is reserved are declared to be void, except bills of exchange and negotiable notes in the hands of a *bonâ fide* holder. Rev. Stat. c. 80, § 7.

20. *California.* Ten per cent. per annum is the legal rate; but parties may agree for any rate. Comp. Laws, c. 13; 11 Cal. 14.

Connecticut. Six per centum per annum is the amount allowed by law. The party stipulating for more cannot recover any interest, but he may recover the principal. Comp. Stat. 1854, tit. 56.

Delaware. The legal rate is six per centum per annum. The person taking more than the legal rate shall forfeit a sum equal to the money lent, one-half to any person suing for the same, and one-half to the state. Rev. Code, c. 63, §§ 1–3.

Florida. Eight per cent. is allowed: if a higher rate is reserved, interest is forfeited. Thompson, Dig. 1847, 234.

21. *Georgia.* Eight per cent. is the legal rate; and where more is reserved the principal sum is alone recoverable. Prince, Dig. Ga. Laws, 294.

Illinois. Legal interest is six per cent. Parties may contract for conventional interest not exceeding ten per cent. Usurious contracts are void for all interest, but the principal sum may be recovered. See 20 Ill. 137.

Indiana. Six per centum per annum is the rate fixed by law, except in Union county. On the following funds loaned out by the state, namely, sinking, surplus, revenue, saline, and college funds, seven per cent.; on the common school fund, eight per cent. Act of January 31, 1842. Contracts for more than the legal rate are void as to the interest only. Rev. Stat. 1852, c. 57.

22. *Iowa.* Six per centum per annum is the legal rate; but parties may contract for any rate not exceeding ten per cent. The person taking usury forfeits ten per cent. on the sum loaned, to the school fund, but he may recover his principal sum without interest. Rev. Code, 1860, §§ 1787–1793.

Kansas. Ten per cent. is the legal rate; but twenty may be stipulated for. Banks are not to receive more than six per cent. or the amount fixed by charter. Payments of more than twenty per cent. are to be held payments toward the principal. Comp. Law, 1862, c. 116.

Kentucky. Six per cent. per annum is the legal rate. Contracts for more are void as to the excess above this rate only. The principal and legal interest may be recovered. Rev. Stat. 1860, Stanton ed. c. 53.

23. *Louisiana.* Legal interest is fixed at the following rates, to wit: at five per cent. on all sums which are the object of a judicial demand,—whence this is called judicial interest,—and sums discounted by banks, at the rate established by their charters. The amount of conventional interest cannot exceed ten per cent. The same must be fixed in writing; and the testimonial proof of it is not admitted. Usurers forfeit all interest; and if usurious interest has been paid, it may be recovered back if sued for within a year. Civ. Code, 1930–1939, 2895.

Maine. Six per centum per annum is the legal interest; and any contract for more is voidable as to the excess, except in case of letting cattle, and other usages of a like nature in practice among farmers, or maritime contracts among merchants, as bottomry, insurance, or course of exchange, as has been heretofore practised. Me. Rev. Stat. 1857, c. 45. The innocent indorsee of negotiable paper may recover thereon though usurious in its inception.

Maryland. Six per centum per annum is the amount limited by law, in all cases. Usurious contracts are void; and persons stipulating for more than lawful interest forfeit treble the amount lent, one half to the state and the other to the prosecutor. Md. Rev. Code, 1860, art. 95.

24. *Massachusetts.* Six per cent. per annum is the lawful rate for all sums, for whatever time lent. Usury subjects the lender to a forfeiture of three times the interest and costs, but does not avoid the contract, 12 Cush. Mass. 156; 6Metc. Mass. 296; 7 *id.* 14; 11 *id.* 526; 7 Pick. Mass. 40; and where usurious interest has been paid threefold, the unlawful interest may be recovered by action within two years. Gen. Stat. c. 53, §§ 3–5; 3 Gray, Mass. 225; 4 *id.* 593; 7 Metc. Mass. 525.

Michigan. Seven per cent. is the legal rate of interest; but on stipulation in writing, interest is allowed to any amount not exceeding ten per cent. on loans of money, but only on such loans. Rev. Stat. 160, 161. The *bonâ fide* holder of negotiable paper may recover although usurious in its inception. The security by which usurious interest is reserved is not void, but may be made the foundation of an action for the principal and legal interest.

25. *Minnesota.* The legal rate is seven per cent.; but parties may agree for any rate. Comp. Stat. 1858, c. 30.

Mississippi. The legal interest is six per cent.;

but on all bonds, notes, or contracts in writing signed by the debtor for the *bonâ fide* loan of money, expressing therein the rate of interest fairly agreed on between the parties for the use of money so loaned, eight per cent. interest is allowed. Rev. Code, 1857, c. 50; 35 Miss. 540. Usury does not avoid the contract: the lender can recover his principal and lawful interest.

Missouri. When no contract is made as to interest, six per cent. per annum is allowed. But the parties may agree to pay any higher rate, not exceeding ten per cent. Rev. Code, 333.

26. *New Hampshire.* No person shall take interest for the loan of money, wares, or merchandise, or any other personal estate whatsoever, above the value of six pounds, for the use or forbearance of one hundred pounds, for a year, and after that rate for a greater or lesser sum or for a longer or shorter time. Provided that nothing in this act shall extend to the letting of cattle, or other usages of a like nature in practice among farmers, or to maritime contracts among merchants, as bottomry, insurance, or course of exchange, as hath been heretofore used. Act of February 12, 1791, s. 2. The person who takes a higher rate forfeits three times the amount taken. Comp. Stat. 1853, c. 203.

New Jersey. The legal rate is six per cent. per annum; and a usurious contract is void. In Hudson and Essex counties, and in the cities of Rahway, Paterson, Hoboken, and Jersey City, seven per cent. may be taken, provided one of the parties reside within those places or out of the state. Nixon, Dig. N. J. Laws, 173.

27. *New York.* Seven per cent. is the rate fixed by statute for interest in all cases except bottomry and respondentia bonds, and contracts, and loans by some moneyed corporations for a short period, for which latter class the rate is restricted to six per cent. Contracts wherein more is reserved are void, and the lender is guilty of a misdemeanor punishable by fine or imprisonment. 3 N. Y. Rev. Stat. 5th ed. 72.

North Carolina. Six per cent. per annum is the interest allowed by law. The banks are allowed to take the interest off at the time of making a discount. Usurious contracts are void. Persons taking more than legal interest forfeit double the money lent, one-half to the state and one-half to the prosecutor. No. C. Rev. Code, 1854, c. 114.

28. *Ohio.* The legal rate is six per cent.; but any parties except banks may contract for ten per cent. Usurious contracts are void as to the excess of interest only. 7 Ohio, 80. Banks are obliged to pay twelve per cent. interest during a suspension of specie payment. Swan, Stat. 1860, c. 60.

Oregon. Legal interest is ten per cent. per annum; but parties may agree for any rate, and for compound interest.

Pennsylvania. Interest is allowed at the rate of six per cent. per annum for the loan or use of money or other commodities. Act of March 2, 1723. And lawful interest is allowed on judgments. Act of 1700; 1 Smith, Penn. Laws, 12. See 6 Watts, Penn. 53; 12 Serg. & R. Penn. 47; 13 *id.* 221; 4 Whart. Penn. 221; 6 Binn. Penn. 435; 1 Dall. Penn. 378, 407; 2 *id.* 92; 2 Pet. 538, 8 Wheat. 355. Any person taking more than legal interest forfeits the amount lent, one half to the government and the other to the prosecutor; but the contract is valid.

29. *Rhode Island.* Six per cent. is the lawful rate on all loans of money. The principal and lawful interest may be recovered on usurious contracts. R. I. Rev. Stat. 1857, c. 121.

South Carolina. Seven per cent. per annum is the legal rate of interest. The taking of usury does not avoid the contract, but all interest is forfeited and the principal only recoverable.

Tennessee. The interest allowed by law is six per cent. per annum. When more is charged, it is not recoverable; but the principal and legal interest may be recovered. Tenn. Code, 1848, §§ 1943-1954.

Texas. The legal rate is eight per cent.; but parties may agree for any rate not exceeding twelve. Usurious contracts are void only to the extent of all interest. Hartley, Dig. Tex. Laws, art. 1606–1611; 20 Tex. 465.

30. *Vermont.* Six per cent. per annum is the legal interest. If more be charged and paid, it may be recovered back in an action of assumpsit. But these provisions do not extend "to the letting of cattle, and other usages of a like nature among farmers, or maritime contracts, bottomry, or course of exchange, as has been customary." Vt. Comp. Stat. 1850, c. 76.

Virginia. Interest is allowed at the rate of six per cent. per annum. Usurious contracts are void. Persons taking usury forfeit double the money or property lent, and the borrower may file a bill in equity and compel the lender to disclose the terms of the loan, and if usurious the lender recovers his principal without interest. Va. Rev. Code, c. 141.

Wisconsin. Seven per cent. per annum is the legal rate; but parties may contract in writing for any rate not exceeding ten per cent.; usurious contracts are void. Wisc. Rev. Stat. 1858, c. 61.

31. In Practice. Concern; advantage; benefit.

Such a relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit. 11 Metc. Mass. 395, 396.

A person may be disqualified to act as a judge, juror, or witness in a cause by reason of an interest in the subject-matter in dispute.

As to the disqualifying interest of judges, see JUDGE; as to the disqualifying interest of jurors, see JUROR.

An interest disqualifying a witness must be *legal*, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced, Leach, Cr. Cas. 154; 2 How. St. Tr. 334, 891; 2 Hawkins, Pl. Cr. 46, s. 25; must be *present*, 1 Hoffman, N. Y. 21; 14 La. Ann. 417; must be *certain*, *vested*, and not uncertain and contingent, Dougl. 134; 2 P. Will. 287; 3 Serg. & R. Penn. 132; 4 Binn. Penn. 83; 2 Yeates, Penn. 200; 5 Johns. N. Y. 256; 7 Mass. 25; 25 Ga. 337; 2 Metc. Ky. 608; 2 Iowa, 580; 35 Penn. St. 351; must be an interest in the *event* of the cause, or the verdict must be lawful evidence *for or against him* in another suit, or the record must be an instrument of evidence for or against him. 22 Tex. 295; 3 John. Cas. 83; 1 Phillipps, Ev. 36. But an interest in the *question* does not disqualify the witness. 1 Caines, N. Y. 171; 4 Johns. N. Y. 302; 5 *id.* 255; 1 Serg. & R. Penn. 32, 36; 6 Binn. Penn. 266; 1 Hen. & M. Va. 165, 168.

32. The magnitude of the interest is altogether immaterial: a liability for costs is sufficient. 5 Term, 174; 2 Vern. Ch. 317; 2 Me. 194; 11 Johns. N. Y. 57.

Interest will not disqualify a person as a witness if he has an equal interest on both sides. 7 Term, 480, 481, n.; 1 Bibb, Ky.

298; 2 Mass. 108; 2 Serg. & R. Penn. 119; 6 Penn. St. 322.

The objection to incompetency on the ground of interest may be removed by an extinguishment of that interest by means of a release, executed either by the witness, when he would receive an advantage by his testimony, or by those who have a claim upon him, when his testimony would be evidence of his liability. The objection may also be removed by payment. Starkie, Ev. pt. 4, p. 757. Under the statutes of some of the states, it is no longer a cause of objection to the *competency* of witnesses that they have an interest in the subject-matter in issue. See, generally, Greenleaf, Starkie, Phillipps, Evidence.

INTEREST, MARITIME. See MARITIME INTEREST.

INTEREST OR NO INTEREST. A provision in a policy of insurance, which imports that the policy is to be good though the insured have no insurable interest in the subject-matter. This constitutes a *wager policy*, which is bad in England, by statute 19 Geo. II. c. 37, and, generally, from the policy of the law. 2 Parsons, Mar. Law, 89, note.

INTERFERENCE. The state of things which exists when a person applies for a patent which if granted would cover any of the patentable ground occupied by any existing patent, or by any patent for which an application is then pending. An investigation is ordered by the commissioner of patents, for the purpose of determining which of the parties was the first to make the invention, or that portion of it from which the interference results. When the controversy is between two applications, a patent will be finally granted to him who is shown to be the first inventor, and will be denied to the other applicant so far as the point thus controverted is concerned. But if the interference is between an application on the one hand and an actual patent on the other, as there is no power in the patent office to cancel the existing patent, all that can be done is to grant or withhold from the applicant the patent he asks. If the patent is granted to him, there will be two patents for the same thing. The two parties will stand upon a footing of equality, and must settle their rights by a resort to the courts, in the manner provided by the act of congress. In interference cases, each party is allowed to take the testimony of witnesses in accordance with rules established by the patent office. See Act of July 4, 1836, §§ 8, 16.

INTERIM (Lat.). In the mean time; meanwhile. An assignee *ad interim* is one appointed between the time of bankruptcy and appointment of the regular assignee. 2 Bell, Comm. 355.

INTERLINEATION. Writing between two lines.

Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previously to its execution; those made after are made either by the party in whose favor they are, or by strangers.

When made by the party himself, whether the interlineation be material or immaterial, they render the deed void, 1 Gall. C. C. 71, unless made with the consent of the opposite party. See 11 Coke, 27 *a;* 9 Mass. 307; 15 Johns. N. Y. 293; 1 Dall. Penn. 57; 1 Halst. N. J. 215. But see 1 Pet. C. C. 364; 5 Harr. & J. Md. 41; 2 La. 290; 4 Bingh. 123; Fitzg. 207, 223; 2 Penn. St. 191.

When the interlineation is made by a stranger, if it be immaterial it will not vitiate the instrument, but if it be material it will, in general, avoid it. See Cruise, Dig. tit. 32, c. 26, s. 8; Comyns, Dig. *Fait* (F 1). See ALTERATION; ERASURE.

INTERLOCUTORY. Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue: as, interlocutory judgments, or decrees, or orders. See DECREE; JUDGMENT.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERNATIONAL LAW. The system of rules which Christian states acknowledge to be obligatory upon them in their relations to each other and to each other's subjects. It is the *jus inter gentes*, as distinguished from the *jus gentium*.

2. The scientific basis of these rules is to be found in natural law, or the doctrine of rights and of the state; for nations, like smaller communities and individuals, have rights and correlative obligations, moral claims and duties. Hence it might seem as if the science consisted simply of deductions from certain fundamental propositions of natural right; but this is far from being the case, for national intercourse is the most voluntary possible, and takes a shape widely different from a system of natural justice. It would be true to say that this science, like every department of moral science, can require nothing unjust; but, on the other hand, the actual law of nations contains many provisions which imply a waiver of just rights; and, in fact, a great part of the modern improvements in this code are due to the spirit of humanity controlling the spirit of justice, and leading the circle of Christian nations freely to abandon the position of rigorous right for the sake of mutual convenience or good will.

3. So much for the general foundation of international law. The particular sources are the *jural* and the *moral*. The jural elements are, *first*, the rights of states as such, deducible from the nature of the state and from its office of a protector to those who live under its law; *second*, those rights which the state shares with individuals, and in part with artificial persons, as the rights of pro-

perty, contract, and reputation; and, *third*, the rights which arise when it is wronged, as those of self-protection and redress. To these have been joined by some the rights of punishment and of conquest,—the latter, at least, without good reason; for there is and can be no naked right of conquest, irrespective of redress and self-protection. The moral elements are the duties of humanity, comity, and intercourse.

4. Various divisions of international law have been proposed, but none are of any great importance. One has been into natural and voluntary law, in which latter conventional or treaty law and customary are embraced. Another, somewhat similar, separates international rules into those which are deducible from general natural *jus*, those which are derived from the idea of estate, and those which grow out of simple compact. Whatever division be made, it is to be observed that nations are voluntary, *first*, in deciding the question what intercourse they will hold with each other; *second*, that they are voluntary in defining their rights and obligations, moral claims and duties, although these have an objective existence beyond the control of the will of nations; and, *third*, that when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with natural law—which requires the observance of contracts—as if natural law had been intuitively discerned or revealed from heaven and no consent had been necessary at the outset.

5. The aids in ascertaining what international law is or has been, are derived from the sea-codes of medieval Europe, especially the Consolato del Mare; from treaties, especially those in which a large part of Europe has had a share, like the Treaties of Westphalia; from judicial decisions, state papers on controverted points, and the treatises of text-writers. Among the latter, Grotius led the way in the seventeenth century, while Puffendorf, fifty years afterwards, from his having confounded the law of nature with that of nations, has sunk into deserved oblivion. In the next century, Cornelius van Bynkershoek, although the author of no continuous work embracing the whole of our science, ranks among its ablest expounders, through his treatises entitled, *De Dominio Maris*, *De Foro Legatorum*, and *Quæstiones Juris Publici*. In the middle of the eighteenth century, Vattel, a disciple of the Wolfian philosophy, published a clear but somewhat superficial treatise, which has had more than its due share of popularity down to the present day. Of the very numerous modern works we can only name that of Klüber, in French and German (1819 and since), that of De Martens, which came to a fifth edition in 1855, and those of Wheaton (1855, 6th ed.) and of Heffter (1855, 3d ed.), which two last are the leading authorities,—the former for the English-speaking lands, the latter for the Germans. The literature of the science must be drawn from Von Ompteda and his continuator, Von Kamptz, or from the more recent work of Von Mohl (Erlangen, 1855–58), in which, also, an exposition of the history is included. The excellent works of Ward (Inquiry into the Foundation and History of the Law of Nations, etc.) and of Wheaton (History of the Law of Nations from the Earliest Times to the Treaty of Washington in 1842) are of the highest use to all who would study the science, as it ought to be studied, as the offshoot and index of a progressive Christian civilization.

6. Among the provisions of international law, we naturally start from those which grow out of the essence of the individual state. The rights of the state, as such, may be comprised under the term sovereignty, or be divided into sovereignty, independence, and equality; by which latter term is intended equality of rights. Sovereignty and independence are two sides of the same property, and equality of rights necessarily belongs to sovereign states, whatever be their size or constitution; for no reason can be assigned why all states, as they have the same powers and destination in the system of things, should not have identically the same rights. States are thus, as far as other states are concerned, masters over themselves and over their subjects, free to make such changes in their laws and constitutions as they may choose, and yet incapable by any change, whether it be union, or separation, or whatever else, of escaping existing obligations. With regard to every state, international law only asks whether it be such in reality, whether it actually is invested with the properties of a state. With forms of government international law has nothing to do. All forms of government, under which a state can discharge its obligations and duties to others, are, so far as this code is concerned, equally legitimate.

7. Thus, the rule of non-intervention in the affairs of other states is a well-settled principle of international law. In the European system, however, there is an acknowledged exception to this rule, and also a claim on the part of certain states to a still wider departure from the rule of non-intervention, which other states have not as yet admitted.

It is conceded that any *political* action of any state or states which seriously threatens the existence or safety of others, any disturbance of the balance of power, may be resisted and put down. This must be regarded as an application of the primary principle of self-preservation to the affairs of nations.

But when certain states claim a right to interfere in the internal affairs of others in order to suppress constitutional movements and the action of a people without its own sphere, this is as yet an unauthorized ground of interference. The plea here is, on the part of those states which have asserted such a right, especially of Austria, Prussia, Russia, and at times of France, that internal revolutions are the result of wide-spread conspi-

racies, and if successful anywhere are fatal to the peace and prosperity of all absolute or non-constitutional governments. The right, if admitted, would destroy by an international law all power of the people in any state over their government, and would place the smaller states under the tutelage of two or three of the larger. England has always protested against this enlargement of the right of interference, and France has established more than one revolutionary government in spite of it.

8. In the notion of sovereignty is involved paramount exclusive jurisdiction within a certain territory. As to the definition of territory, international law is tolerably clear. Beside the land and water included within the line of boundary separating one state from another, it regards as territory the coast-water to the distance of a marine league, and the portions of sea within lines drawn between headlands not very remote, or, in other words, those parts of the sea which are closely connected with a particular country when it needs to defend itself against attack and its laws are exposed to violation. The high sea, on the other hand, is free, and so is every avenue from one part of the sea to another, which is necessary for the intercourse of the world. It has been held that rivers are exclusively under the jurisdiction of countries through which they flow, so that the dwellers on their upper waters have no absolute right of passage to and from the sea; but practically, at present, all the rivers which divide or run through different states are free for all those who live upon them, if not for all mankind. It has been claimed that ships are territory; but it is safer to say that they are under the jurisdiction of their own state until they come within that of another state. By comity, public vessels are exempt from foreign jurisdiction, whether in foreign ports or elsewhere.

9. The relations of a state to aliens, especially within its borders, come next under review. Here it cannot be affirmed that a state is obligated, in strict right, to admit foreigners into or to allow them transit across its territory, or even to hold intercourse with them. All this may be its duty and perhaps, when its territory affords the only convenient pathway to the rest of the world or its commodities are necessary to others of mankind, transit and intercourse may be enforced. But, aside from these extreme cases, intercourse is only a duty, and not definable with precision, as is shown by the endless varieties of commercial treaties. It can only be said that the practice of Christian states is growing more and more liberal, both as regards admitting foreigners into their territories and to the enjoyment of those rights of person and property which the natives possess, and as regards domiciliating them, or even incorporating them, afterwards, if they desire it, into the body politic. See ALIEN.

The multiplied and very close relations which have arisen between nations in modern times, through domiciled or temporary residents, have given rise to the question, What law, in particular cases involving personal status, property, contracts, family rights, and succession, shall control the decisions of the courts? Shall it be always the *lex loci*, or sometimes some other? The answers to these questions are given in *private international law*, or the *conflict of law*, as it is sometimes called,—a very interesting branch of law, as showing how the Christian nations are coming from age to age nearer to one another in their views of the private relations of men. See CONFLICT OF LAWS.

10. Intercourse needs its agents, both those whose office it is to attend to the relations of states and the rights of their countrymen in general, and those who look after the commercial interests of individuals. The former share with public vessels, and with sovereigns travelling abroad, certain exemptions from the law of the land to which they are sent. Their persons are ordinarily inviolate; they are not subject to foreign civil or criminal jurisdiction; they are generally exempt from imposts; they have liberty of worship, and a certain power over their trains, who likewise share their exemptions. Only within five centuries have ambassadors resided permanently abroad,—a change which has had an important effect on the relations of states. Consuls have almost none of the privileges of ambassadors, except in countries beyond the pale of Christianity.

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law. An interesting description of treaties are those of guaranty, by which sometimes a right of intervention in the affairs of other states is secured beforehand.

But treaties may be broken, and all other rights invaded; and there is no court of appeal where wrongs done by states can be tried. The rights of self-defence and of redress now arise, and are of such importance that but for redress by force or war, and to prevent war, international law would be a very brief science. The laws and usages of modern warfare show a great advance of the nations in humanity since the middle ages. The following are among the leading principles and usages:—

That declarations of war, as formerly practised, are unnecessary; the change in this respect being due chiefly to the intimate knowledge which nations now have, through resident ambassadors and in other ways, of each other's movements and dispositions.

That at the opening of war the subjects of one hostile state within the territory of another are protected in their persons and property, and this notwithstanding it is conceded that by strict right such property is liable to confiscation.

That war is waged between states, and by the active war agents of the parties, but that

non-combatants are to be uninjured in person and property by an invading army. Contributions or requisitions, however, are still collected from a conquered or occupied territory, and property is taken for the uses of armies at a compensation.

That combatants, when surrendering themselves in battle, are spared, and are to be treated with humanity during their captivity, until exchanged or ransomed.

That even public property, when not of a military character, is exempt from the ordinary operations of war, unless necessity requires the opposite course.

That in the storming of inhabited towns great license has hitherto been given to the besieging party; and this is one of the blots of modern as well as of ancient warfare. But humane commanders avoid the bombardment of fortified *towns* as far as possible; while mere fortresses may be assailed in any manner.

The laws of sea-warfare have not as yet come up to the level of those of land-warfare. Especially is capture allowed on the sea in cases where it would not occur on the land. Yet there are indications of a change in this respect: privateering has been abandoned by many states, and there is a growing demand that all capture upon the sea, even from enemies, except for violations of the rules of contraband, blockade, and search, shall cease. See CAPTURE.

11. When captures are made on the sea, the title, by modern law, does not fully vest in the captor at the moment, but needs to pass under the revision of a competent court. The captured vessel may be ransomed on the sea, unless municipal law forbids, and the ransom is of the nature of a safe-conduct. If a vessel is recaptured, or rescued from other perils, a compensation is due to the rescuer, which is called salvage; which see.

In modern international law, questions of neutrality play a great part. A neutral is one, strictly, who affords assistance to *neither* party; for assistance afforded to *both alike*, in almost every case, would benefit one party and be of little use to the other. The neutral territory, on land and sea, must be untouched by the war; and for all violations of this rule the neutral can take or demand satisfaction.

The principal liabilities of neutral trade are the following:—

In regard to the nationality of goods and vessels, the rule, *on the whole*, has been that enemy's goods were exposed to capture on any vessel, and neutral's safe on any, and that the neutral vessel was not guilty for having enemy's goods on board. Owing to the declaration of the Peace of Paris in 1856, the humane rule that free ships make free goods will no doubt become universal.

Certain articles of especial use in war are called contraband, and are liable to capture. But the list has been stretched by belligerents, especially by England, so as to include naval stores and provisions; and then, to cure the hardship of the rule, another—the rule of pre-emption—has been introduced. The true doctrine with regard to contraband seems to be that nothing can be so called unless nations have agreed so to consider it; or, in other words, that articles cannot become occasionally contraband owing to the convenience of a belligerent. See CONTRABAND.

An attempt of a neutral ship to enter a blockaded place is a gross violation of neutrality; and, as in cases of contraband trade the goods, so here the guilty vessel is confiscated. But blockade must exist in fact, and not alone upon paper, must be made known to neutrals, and, if discontinued, must be resumed with a new notification. See BLOCKADE.

To carry out the rights of war, the right of search is indispensable; and such search ought to be submitted to without resistance. Search is exclusively a war right, excepting that vessels in peace can be arrested near the coast on suspicion of violating revenue laws, and anywhere on suspicion of piracy. The slave-trade not being piracy by the law of nations, vessels of other nations cannot be searched on suspicion of being engaged in this traffic. And here comes in the question which has agitated the two leading commercial states of Christendom:—How shall it be known that a vessel is of a nationality which renders search unlawful? The English claim, and justly, that they have a right to ascertain this simple fact by detention and examination; the United States contend that if in so doing mistakes are committed, compensation is due, and to this England has agreed.

INTERNUNCIO. A minister of a second order, charged with the affairs of the court of Rome, where that court has no nuncio under that title.

INTERPELATION. In Civil Law. The act by which, in consequence of an agreement, the party bound declares that he will not be bound beyond a certain time. Wolff, Inst. Nat. § 752.

In the case of a lease from year to year, or to continue as long as both parties please, a notice given by one of them to the other of a determination to put an end to the contract would bear the name of interpelation.

INTERPLEADER. In Practice. A proceeding in the action of detinue, by which the defendant states the fact that the thing sued for is in his hands, and that it is claimed by a third person, and that whether such person or the plaintiff is entitled to it is unknown to the defendant, and thereupon the defendant prays that a process of garnishment may be issued to compel such third person so claiming to become defendant in his stead. 3 Reeve, Hist. Eng. Law, c. 23; Mitford, Eq. Pl. Jeremy ed. 141; Story, Eq. Jur. §§ 800, 801, 802. Interpleader is allowed to avoid inconvenience; for two parties claiming adversely to each other cannot be entitled to the same thing, Brooke, Abr.

Interpleader, 4; hence the rule which requires the defendant to allege that different parties demand the same thing.

If two persons sue the same person in detinue for the thing, and both actions are depending in the same court at the same time, the defendant may plead that fact, produce the thing (*e.g.* a deed or charter) in court, and aver his readiness to deliver it to either as the court shall adjudge, and thereupon pray that they may interplead. In such a case it has been settled that the plaintiff whose writ bears the earliest teste has the right to begin the interpleading, and the other will be compelled to answer. Brooke, Abr. *Interpleader*, 2.

For the law in regard to interpleader in equity, see BILL OF INTERPLEADER.

INTERPRETATION. The discovery and representation of the true meaning of any signs used to convey ideas. Lieber, Leg. and Pol. Hermeneutics.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. A person adopting or sanctioning them "uses" them as well as their immediate author. Both parties to an agreement equally make use of the signs declaratory of that agreement, though one only is the originator, and the other may be entirely passive. The most common signs used to convey ideas are words. When there is a contradiction in signs intended to agree, resort must be had to construction,—that is, the drawing of conclusions from the given signs, respecting ideas which they do not express. Construction is usually confounded with interpretation. A distinction between the two, first made in the Leg. and Pol. Hermeneutics, has been adopted by Greenleaf and other American and European jurists. Hermeneutics includes both.

Close interpretation (*interpretatio restricta*) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called literal, but the term is inadmissible. Lieber, Herm. 66.

Extensive interpretation (*interpretatio extensiva*, called, also, *liberal interpretation*) adopts a more comprehensive signification of the word.

Extravagant interpretation (*interpretatio excedens*) is that which substitutes a meaning evidently beyond the true one: it is, therefore, not genuine interpretation.

Free or unrestricted interpretation (*interpretatio soluta*) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle.

Limited or restricted interpretation (*interpretatio limitata*) is when we are influenced by other principles than the strictly hermeneutic ones. Ernesti, Institutio Interpretis.

Predestined interpretation (*interpretatio predestinata*) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vafer*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended.

2. The civilians divide interpretation into:—

Authentic (*interpretatio authentica*), which proceeds from the author himself.

Usual (*interpretatio usualis*), when the interpretation is on the ground of usage.

Doctrinal (*interpretatio doctrinalis*), when made agreeably to rules of science. Doctrinal interpretation is subdivided into extensive, restrictive, and declaratory: extensive, whenever the reason of a proposition has a broader sense than its terms, and it is consequently applied to a case which had not been explained: restrictive, when the expressions have a greater latitude than the reasons; and declaratory, when the reasons and terms agree, but it is necessary to settle the meaning of some term or terms to make the sense complete.

3. The following are the elementary principles and rules of interpretation and construction, which are here given together on account of their intimate connection and the difficulty of separating them.

There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words; for *verba ita sunt intelligenda ut res magis valeat quam pereat.* Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification, unless there is some good reason for supposing otherwise, as where technical terms are used: *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.* When words have two senses, of which one only is agreeable to the law, that one must prevail, Cowp. 714; when they are inconsistent with the evident intention, they will be rejected, 2 Atk. Ch. 32; when words are inadvertently omitted, and the meaning is obvious, they will be supplied by inference from the context. Impossible things cannot be required. The subject-matter and nature of the context, or its objects, causes, effects, consequences, or precedents, or the situation of the parties, must often be consulted in order to arrive at their intention, as when words have, when literally construed, either no meaning at all or a very absurd one. The whole of an instrument must be viewed together, and not each part taken separately; and effect must be given to every part, if possible. Assistance must be sought from the more near before proceeding to the remote. When one part is totally repugnant to the rest, it will be stricken out; but if it is only explanatory it will operate as a limitation. Reference to the *lex loci* or the usage of a particular place or trade is frequently necessary in order to explain the meaning. 4 East, 135; 2 Bos. & P. 164; 3 Starkie, Ev. 1036; 6 Term, 320; 16 Serg. & R. Penn. 126.

4. Words spoken cannot vary the terms of a written agreement; they may overthrow it. Words spoken at the time of the making of

a written agreement are merged in the writing. 5 Coke, 26; 2 Barnew. & C. 634; 4 Taunt. 779. But there are exceptions to this rule, as in a case of fraud. 1 Serg. & R. Penn. 464; 10 *id.* 292. Where there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument, it may be supplied by other proof; *ambiguitas verborum latens verificatione suppletur.* 1 Dall. Penn. 426; 4 *id.* 340; 3 Serg. & R. Penn. 609. The rule that an agreement is to be construed most strongly against the party benefited can only be applied in doubtful cases. The more the text partakes of a solemn compact, the stricter should be its construction. Penal statutes must be strictly interpreted; remedial ones liberally, 1 Blackstone, Comm. 88; 6 Watts & S. Penn. 276; 3 Taunt. 377; and generally, in regard to statutes, the construction given them in the country where they were enacted will be adopted elsewhere. The general expressions used in a contract are controlled by the special provisions therein. In agreements relating to real property, the *lex rei sitæ* prevails, in personal contracts the *lex loci contractus*, except when they are to be performed in another country, and then the law of the latter place governs. 2 Mass. 88; 1 Pet. 317; Story, Confl. of Laws, § 242; 4 Cow. N. Y. 410, note; 2 Kent, Comm. 39, 457, notes; 3 Conn. 253, 472; 4 *id.* 517; 1 Wash. C. C. 253. See 12 Mass. 4. When there are two repugnant clauses in a deed, which cannot stand together, the first prevails. With a will the reverse is the case. In all instruments the written part controls the printed.

5. In addition to the above rules, there are many presumptions of law relating to agreements, such as, that the parties to a simple contract intend to bind their personal representatives; that where several parties contract without words of severalty, they are presumed to bind themselves jointly; that every grant carries with it whatever is necessary to its enjoyment; when no time is mentioned, a reasonable time is meant; and other presumptions arising out of the nature of the case. It is the duty of the court to interpret all written instruments, see 3 Binn. Penn. 337; 4 Serg. & R. Penn. 279; 7 *id.* 372; 15 *id.* 100; 10 Mass. 384; 3 Cranch, 180; 3 Rand. 586; written evidence, 2 Watts, Penn. 347; and foreign laws. 1 Penn. 388. For the rules respecting interpretation and construction in general, see 1 Blackstone, Comm. 59; 2 Kent, Comm. 552; 4 *id.* 419; Pothier, Obl.; 1 Bouvier, Inst. n. 4419 *et seq.*; Lieber, Leg. & Pol. Hermeneutics; Encyc. Amer. *ad verbum* Law, appendix of vol. vii.; 2 Comyns, Contr. 23–28; 2 Story, Contr. 1; 2 Parsons, Contr. 3; Long, Sales, 106; Story, Sales; Story, Const. §§ 397–456; 1 Bishop, Crim. Law, §§ 51–59; Barrington, Stat.; 1 Bell, Comm. 5th ed. 431; CONSTRUCTION.

INTERPRETER. One employed to make a translation.

An interpreter should be sworn before he translates the testimony of a witness. 4 Mass. 81; 5 *id.* 219; 2 Caines, N. Y. 155.

A person employed between an attorney and client to act as interpreter is considered merely as the organ between them, and is not bound to testify as to what he has acquired in those confidential communications. 1 Pet. C. C. 356; 4 Munf. Va. 273; 3 Wend. N. Y. 337.

INTERREGNUM (Lat.). The period, in case of an established government, which elapses between the death of a sovereign and the election of another, is called interregnum. The vacancy which occurs when there is no government.

INTERROGATOIRE. In French Law. An act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Pothier, Proc. Crim. s. 4, art. 2, § 1.

INTERROGATORIES. Material and pertinent questions, in writing, to necessary points, not confessed, exhibited for the examination of witnesses or persons who are to give testimony in the cause.

They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories.

The form which interrogatories assume is as various as the minds of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop-holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence interrogatories will, under certain circumstances, be suppressed. See Wills, Int. *passim;* Gresley, Eq. Ev. pt. 1, c. 3, s. 1; Viner, Abr.; Hind, Chanc. Pract. 317; 4 Bouvier, Inst. n. 4419 *et seq.;* Daniell, Chanc. Pract.

INTERRUPTION. The effect of some act or circumstance which stops the course of a prescription or act of limitations. 3 Bligh, N. s. 444; 4 Mees. & W. Exch. 497.

Civil interruption is that which takes place by some judicial act.

Natural interruption is an interruption in fact. 4 Mas. C. C. 404; 2 Younge & J. Exch. 285. See EASEMENTS; LIMITATIONS; PRESCRIPTION.

In Scotch Law. The true proprietor's claiming his right during the course of prescription. Bell, Dict.

INTERVENTION (Lat. *intervenio*, to come between or among). **In Civil Law.** The act by which a third party becomes a party in a suit pending between other persons.

The intervention is made either to be joined

to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Pothier, Proc. Civ. 1ere part. ch. 2, s. 6, § 3.

In English Ecclesiastical Law. The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pract. 492; 3 Chitty, Com. Law, 633; 2 Hagg. Cons. 137; 3 Phill. Eccl. 586; 1 Add. Eccl. 5; 4 Hagg. Eccl. 67; Dunlop, Adm. Pract. 74. The intervener may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment. 2 Hagg. Cons. 137; 1 Eng. Eccl. 480; 2 *id.* 13.

INTESTABLE. One who cannot lawfully make a testament.

An infant, an insane person, or one civilly dead, cannot make a will, for want of capacity or understanding; a married woman cannot make such a will without some special authority, because she is under the power of her husband. They are all intestable.

INTESTACY. The state or condition of dying without a will.

INTESTATE. One who, having lawful power to make a will, has made none, or one which is defective in form. In that case, he is said to die intestate, and his estate descends to his heir at law.

This term comes from the Latin *intestatus*. Formerly, it was used in France indiscriminately with *de-confess*; that is, without confession. It was regarded as a crime, on account of the omission of the deceased person to give something to the church, and was punished by privation of burial in consecrated ground. This omission, according to Fournet, Hist. des Avocats, vol. 1, p. 116, could be repaired by making an ampliative testament in the name of the deceased. See Vely, tom. 6, page 145; Henrion de Pansey, Authorité judiciaire, 129, and note; DESCENT; DISTRIBUTION; WILL.

INTIMATION. In Civil Law. The name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party, that the sentence will be reviewed by the superior judge.

In Scotch Law. An instrument of writing, made under the hand of a notary, and notified to a party, to inform him of a right which a third person had acquired: for example, when a creditor assigns a claim against his debtor, the assignee or cedent must give an intimation of this to the debtor, who, till then, is justified in making payment to the original creditor. Kames, Eq. b. 1, p. 1, s. 1.

INTRODUCTION. That part of a writing in which are detailed those facts which elucidate the subject.

INTROMISSION. In Scotch Law. The assuming possession of property belonging to another, either on legal grounds, or without any authority: in the latter case it is called *vicious* intromission. Bell. Dict.

INTRONISATION. In French Ecclesiastical Law. The installation of a bishop in his episcopal see. Clef des Lois Rom.; André.

INTRUDER. One who, on the death of the ancestor, enters on the land, unlawfully, before the heir can enter.

INTRUSION. The entry of a stranger after the determination of a particular estate of freehold, before the entry of him in reversion or remainder.

This entry and interposition of the stranger differs from an abatement in this, that an abatement is always to the prejudice of an heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. 3 Sharswood, Blackst. Comm. 169; Fitzherbert, Nat. Brev. 203; Archbold, Civ. Plead. 12; Dane, Abr. Index; 3 Stephen, Comm. 443.

The name of a writ brought by the owner of a fee-simple, etc. against an intruder. New Nat. Brev. 453. Abolished by 3 & 4 Will. IV. c. 57.

INUNDATION. The overflow of waters by coming out of their bed.

Inundations may arise from three causes: from public necessity, as in defence of a place it may be necessary to dam the current of a stream, which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream, or by a natural flood or freshet; or they may result from the erections of works on the stream. In the first case, the injury caused by the inundation is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inundation. 9 Coke, 59; 1 Barnew. & Ald. 258; 1 Sim. & S. Ch. 203; 4 Day, Conn. 244; 17 Serg. & R. Penn. 383; 1 Rawle, Penn. 218; 3 Mas. C. C. 172; 4 *id.* 400; 7 Pick. Mass. 198; 9 Mass. 316; 7 Cow. N. Y. 266; 17 Johns. N. Y. 306; 3 Hill, N. Y. 531; 5 N. H. 232; 30 *id.* 478; 32 *id.* 90, 316; 1 Coxe, N. J. 460; 3 Harr. & J. Md. 231; 27 Ala. N. S. 127; 3 Strobh. So. C. 348. See Schultes, Aq. R. 122; Angell, Wat. C. §§ 330–388; 5 Ohio, 322, 421; DAM; BACKWATER.

INURE. To take effect; to result.

INVADIATIO (L. Lat.). A pledge or mortgage.

INVALID. Not valid. Of no binding force.

INVASION. The entry of a country by a public enemy, making war.

The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling the militia to execute the laws of

the Union, suppress insurrections, and repel invasions." See INSURRECTION.

INVECTA ET ILLATA (Lat.). **In Civil Law.** Things carried and brought in. Things brought into a building hired (*ædes*), or into a hired estate in the city (*prædium urbanum*), which are held by a tacit mortgage for the rent. Voc. Jur. Utr.; Domat, Civ. Law.

INVENTION. In Patent Law. The act or operation of finding out something new; the contrivance of that which did not before exist. The word is also used to denote the thing itself which has been so contrived and which is the subject-matter of a patent.

An invention differs from a discovery, inasmuch as this latter term is used to signify the finding out of something which existed before. Thus, we speak of the *discovery* of the properties of steam, or of electricity; but the first contrivance of any machinery by which those discoveries were applied to practical use was an *invention:* the former always existed, though not before known; the latter did not previously exist.

2. Patents are sometimes granted for simple discoveries, or, rather, for the sole use of the thing which has been discovered. The discoverer of some substance which can be usefully employed in the arts, as in making a dye, or a paint, or a cement, may obtain a patent therefor. But in almost all cases the subject-matter of a patent is an invention. The discovery of any truth in science cannot, as a general rule, be patented; but he who reduces those truths to a practically useful shape can obtain a patent for the contrivances by which he produces the results: they are inventions, and it matters not for this purpose whether these inventions were the result of an accident or a blunder, or whether they were wrought out by scientific research and the highest exhibition of inductive reasoning.

3. Whenever a change in a pre-existing machine or process, and its consequences, taken together and viewed as a sum, are considerable, there must be a sufficiency of invention to support a patent: thus, when the change, however minute, leads to results of great practical utility, this condition is satisfied; but if the consequence be inconsiderable, the change also being inconsiderable, and such as would most readily suggest itself to any one, the condition is not fulfilled, and the invention is not sufficient to support a patent. The change and its consequences must, therefore, be considered in connection. Webster, Pat. 24, 29.

By the laws of the United States, a patent can only be allowed to the original and first inventor himself, or to his assignee or executor, and not to one who imports an invention from abroad; although it is otherwise in England. See PATENTS.

4. *Abandonment of invention.* The right to a patent may be lost by an abandonment of the invention.

The earlier patent laws of the United States did not permit the granting of a patent in any case where the invention had been in public use or on sale, with the consent and allowance of the inventor, prior to his making an application for such patent. (See especially the act of 1836, § 6.) The use in public by way of trial or experiment was not held to be a "public use" within the meaning of the law; but a single sale of one of the machines invented, with a design or expectation that it would go into common use, was sufficient to prevent the granting of a patent on any application subsequently made.

But the seventh section of the act of 1839 declared that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for the patent, as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

5. As the law now stands, therefore, the public use of an invention for more than two years prior to the date of an application for a patent amounts to an inflexible bar to the granting of such patent, and is in substance an abandonment of the invention to the public by operation of law.

But there are many other ways in which an invention may be abandoned even within the two years. This may be done directly and at once, or it may be inferred from circumstances. But, in whatever way it is made, if once completed it can never be recalled, and will entirely prevent the granting of a valid patent for that invention forever afterwards.

6. Abandonment is a question of intention: it is never to be presumed, but must always be proved before it can be regarded as established. But, under certain circumstances, a public use for a much less period than two years will amount to sufficient proof of that fact. If a person treats his invention as though it belonged to the public, or if he stands silently by while it is so treated by others, by reason whereof the actions of third persons have been influenced in relation to it, he will be estopped from afterwards setting up any exclusive privilege in that invention. Wherever the conduct of an inventor has been such that it would be a breach of good faith with the public for him to enforce his exclusive privilege, such conduct will generally amount to an abandonment.

The following are the principal authorities on the subject: 1 Gall. C. C. 476; 1 Stor. C. C. 278; 3 Sumn. C. C. 514; 1 Pet. C. C. 394; 4 Mas. C. C. 108; 1 Blatchf. C. C. 250; 2 *id.* 229, 240, 279; 2 Pet. 1; 7 *id.* 202; 1 How. 202; 6 N. H. 477.

INVENTIONES. A word used in some ancient English charters to signify *treasure-trove.*

INVENTOR. One who finds out something new, or who contrives or produces a

thing which did not before exist. One who makes an invention. The word is generally used to denote the author of such contrivances as are by law patentable. See INVENTION.

INVENTORY. A list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the lands and tenements, of a person or persons. A conservatory act, which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it.

2. When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed.

In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued.

3. The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees, or next of kin, and, in their default and absence, of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. See, generally, 14 Viner, Abr. 465; Bacon, Abr. *Executors, etc.* (E 11); Ayliffe, Pand. 414; Ayliffe, Parerg. 305; Comyns, Dig. *Administration* (B 7); 3 Burr. 1922; 2 Add. Eccl. 319; 2 Eccl. 322; Lovelace, Wills, 38; 2 Blackstone, Comm. 514; 8 Serg. & R. Penn. 128; Williams, Exec. Index.

INVEST (Lat. *investire*, to clothe). To put in possession of a fief upon taking the oath of fealty or fidelity to the prince or superior lord.

INVESTITURE. The act of giving possession of lands by actual seisin.

When livery of seisin was made to a person by the common law, he was invested with the whole fee: this the foreign feudists, and sometimes our own law writers, call investiture; but, generally speaking, it is termed by the common-law writers the seisin of the fee. 2 Blackstone, Comm. 209, 313; Fearne, Cont. Rem. 223, n. (z).

By the canon law, investiture was made *per baculum et annulum*, by the ring and crosier, which were regarded as symbols of the episcopal jurisdiction. Ecclesiastical and secular fiefs were governed by the same rule in this respect,—that previously to investiture neither a bishop, abbot, or lay lord could take possession of a fief conferred upon them by the prince.

Pope Gregory VI. first disputed the right of sovereigns to give investiture of ecclesiastical fiefs, A.D. 1045; but Pope Gregory VII. carried on the dispute with much more vigor, A.D. 1073. He excommunicated the emperor Henry IV. The popes Victor III., Urban II., and Paul II. continued the contest. This dispute, it is said, cost Christendom sixty-three battles, and the lives of many millions of men. De Pradt.

INVIOLABILITY. That which is not to be violated. The persons of ambassadors are inviolable. See AMBASSADOR.

INVITO DOMINO (Lat.). **In Criminal Law.** Without the consent of the owner.

In order to constitute larceny, the property stolen must be taken *invito domino;* this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, as to whether they are larcenies or not: the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino.* 2 Bail. So. C. 569; 2 Russell, Crimes, 66, 105; 2 Leach, Cr. Cas. 913; 2 East, Pl. Cr. 666; Bacon, Abr. *Felony* (C); Alison, Pract. 273; 2 Bos. & P. 508; 1 Carr. & M. 217; LARCENY.

INVOICE. In Commercial Law. An account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars, are set forth, Marshall, Ins. 408; Dane, Abr. Index. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality, and price of the things sold, deposited, etc. 1 Pardessus, Dr. Com. n. 248. See BILL OF LADING; 2 Wash. C. C. 113, 155.

INVOICE BOOK. A book in which invoices are copied.

INVOLUNTARY. An involuntary act is that which is performed with constraint (*q.v.*), or with repugnance, or without the will to do it. An action is involuntary, then, which is performed under duress. Wolffius, Inst. § 5.

IOWA (an Indian word, denoting "*the place*, or *final resting-place*"). The name of one of the new western states of the United States.

2. This state was admitted into the Union by an act of congress approved December 28, 1846.

The right of suffrage is extended only to white male citizens of the United States, of the age of twenty-one years, having a residence of six months in the state next preceding the election, and of sixty days in the county where they claim to vote. Art. 2, sec. 1.

No person in the military, naval, or marine service of the United States is to be considered a resident of the state by being stationed in any garrison, barrack, military or naval place or station within the state. And no idiot or insane person, or person convicted of any infamous crime, is entitled to the privilege of an elector. Const. art. 3.

The Legislative Power.

3. This is vested in a Senate and House of Representatives, together constituting the General Assembly.

The *Senate* is composed of not less than one-third nor more than one-half as many members as the House, elected quadrennially, for the term of four years, on the first Monday in August. Senators must be at least twenty-five years of age, must

have resided in the state one year next preceding their election, and possess the qualifications of electors. They are so classified that one-half the senate is elected every two years. Const. art. 4, sec. 3–6.

The *House of Representatives* is composed of members elected for two years, who must be at least twenty-one years of age, and otherwise possess the same qualifications as senators. The number is not limited by the constitution. Each house of the general assembly has power to choose its own officers and judge of the qualification of its members, sit upon its adjournments, keep a journal of its proceedings and publish the same, punish members for disorderly behavior, and, with the consent of two-thirds, expel a member, but not a second time for the same offence, and has all other powers necessary for a branch of the general assembly of a free and independent state.

4. The general assembly is possessed of the powers usually incident to such bodies. Amongst other provisions are the following: that no act shall embrace more than one subject, and matters germane thereto, which shall be expressed in the title; that no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question of the final passage thereof to be taken by yeas and nays, which are to be entered upon the journal; that no divorces or lotteries shall be granted or authorized by the general assembly; local and special laws cannot be passed for laying out, opening, and working roads and highways, for the assessment and collection of taxes for state, county, or road purposes, for changing the names of persons, for the incorporation of cities and towns, for vacating roads, town plats, streets, alleys, or public squares, for locating county seats. Upon these subjects all laws are to be general and of uniform operation throughout the state. Const. art. 3, sec. 17, 27, 28, 29, 30.

The Executive Power.

5. The *Governor* is elected for the term of four years from his installation, and till a successor is duly qualified. He must be a citizen of the United States, thirty years old at least, and a resident of the state for two years next preceding his election. The governor is commander-in-chief of the militia, army, and navy of the state; transacts executive business with the officers of the government; is to see that the laws are faithfully executed; may fill vacancies by granting temporary commissions; on extraordinary occasions, convenes the general assembly by proclamation; communicates with the general assembly at every session; adjourns the two houses when they cannot agree upon the time of an adjournment; grants reprieves and pardons, and commutes punishment after conviction, except in cases of impeachment; shall be keeper of the great seal, and sign all commissions; and is invested with the veto power.

A *Lieutenant-Governor* is also chosen, whose qualifications, time of election, and term of service are the same as the governor's. He is *ex officio* president of the senate; and the duties of the governor devolve upon him in the usual contingencies.

A *Secretary of State*, a *Treasurer*, an *Auditor*, an *Attorney-General*, and a *Register of the Land Office*, are also chosen by the electors, at the same time, for the term of two years.

The Judicial Power.

6. The *Supreme Court* consists of three judges, who are elected by the people for the term of six years, and were so classified that one judge goes out of office every two years, and the one holding the shortest term of office under such classification is chief justice of the court during his term; and so on, in rotation. This court has appellate jurisdiction in cases in chancery, and is constituted a court for the correction of errors at law, exercising a supervisory control over all the inferior judicial tribunals throughout the state, but under such restrictions as the legislature may by law prescribe. The sessions are held at such times and places as the law may prescribe.

The *District Court* is composed of a single judge, who is elected by the people of his district for the term of four years, possessing original jurisdiction in civil and criminal matters arising in his particular district; and is a court both of law and equity, which are separate and distinct jurisdictions. Const. art. 5, sec. 5, 6. The code of procedure in this state has recently (March, 1860) been revised and modified.

IPSE (Lat.). I (before verbs of first person); thou (before verbs of second person); he himself, she herself, he alone, etc.; the very one: e.g. *ipsum corpus*, the very thing itself. Halkerst. Tech. Terms. *Ipsæ* [*etenim*] *leges cupiunt ut jure regantur*, for the very laws themselves wish that they should be ruled by right,—a line, quoted from Cato, which occurs in the decision of Ch. J. Wray and the whole court in The Case of Bankrupts, 2 Coke, 25 *b*.

IPSISSIMIS VERBIS (Lat.). In the identical words: opposed to *substantively*. 7 How. 719; 5 Ohio St. 346.

IPSO FACTO (Lat.). By the fact itself. By the mere fact.

IPSO JURE (Lat.). By the operation of law. By mere law.

IRE AD LARGUM (Lat.). To go at large.

IRREGULAR DEPOSIT. That kind of deposit where the thing deposited need not be returned: as, where a man deposits, in the usual way, money in bank for safe-keeping; for in this case the title to the identical money becomes vested in the bank, and he receives in its place other money.

IRREGULARITY. In Practice. The doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done.

2. A party entitled to complain of irregularity should except to it previously to taking any step by him in the cause, Lofft, 323, 333; because the taking of any such step is a waiver of any irregularity. 1 Bos. & P. 342; 5 *id.* 509; 1 Taunt. 58; 2 *id.* 243; 3 East, 547; 2 Wils. 380. See ABATEMENT.

3. The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damage appears. 1 Chitty, Bail, 133, n. And see Baldw. C. C. 246; 3 Chitty, Pract. 509.

In Canon Law. Any impediment which prevents a man from taking holy orders.

IRRELEVANT EVIDENCE. That which does not support the issue, and which, of course, must be excluded. See EVIDENCE.

IRREPLEVIABLE. That cannot be

replevied or delivered on sureties. Spelled, also, irreplevisable. Coke, Litt. 145; 13 Edw. I. c. 2.

IRRESISTIBLE FORCE. A term applied to such an interposition of human agency as is, from its nature and power, absolutely uncontrollable: as, the inroads of a hostile army. Story, Bailm. § 25; Lois des Bâtim. pt. 2, c. 2, § 1. It differs from *inevitable accident*, which title see.

IRREVOCABLE. Which cannot be revoked or recalled. A power of attorney in which the attorney has an interest granted for consideration is irrevocable. See WILL.

IRRIGATION. The act of wetting or moistening the ground by artificial means.

The owner of land over which there is a current stream is, as such, the proprietor of the current. 4 Mas. C. C. 400. It seems the riparian proprietor may avail himself of the river for irrigation, provided the river be not thereby materially lessened and the water absorbed be imperceptible or trifling. Angell, Wat. C. 34. And see Washburn, Easements, Index; 1 Root, Conn. 535; 2 Conn. 584; 7 Mass. 136; 13 *id.* 420; 5 Pick. Mass. 175; 9 *id.* 59; 8 Me. 266; 6 Bingh. 379; 5 Esp. 56. The French law coincides with our own. 1 Lois des Bâtimens, sec. 1, art. 3, page 21.

IRRITANCY. In Scotch Law. The happening of a condition or event by which a charter, contract, or other deed, to which a clause irritant is annexed, becomes void. Erskine, Inst. b. 2, t. 5, n. 25. Irritancy is a kind of forfeiture. It is legal or conventional. Burton, Real Prop. 298.

IRROTULATIO (Law Lat.). An inrolling; a record. 2 Rymer, Foed. 673; Du-Cange; Law Fr. & Lat. Dict.; Bracton, fol. 293; Fleta, lib. 2, c. 65, § 11.

ISLAND. A piece of land surrounded by water.

When new islands arise in the open sea, they belong to the first occupant; but when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state.

Islands which arise in rivers when in the middle of the stream belong in equal parts to the riparian proprietors. When they arise mostly on one side, they will belong to the riparian owners up to the middle of the stream. See ACCESSION; ACCRETION; BOUNDARY; 2 Washburn, Real Prop.; Kent, Comm.

ISSINT (Norm. Fr. thus, so). **In Pleading.** A term formerly used to introduce a statement that special matter already pleaded amounts to a denial.

In actions founded on deeds, the defendant may, instead of pleading *non est factum* in the common form, allege any special matter which admits the execution of the writing in question, but which, nevertheless, shows that it is not in law his deed, and may conclude with, "and so it is not his deed;" as, that the writing was delivered to A B as an escrow, to be delivered over on certain conditions, which have not been complied with, "and *so* it is not his act;" or that at the time of making the writing the defendant was a feme covert, "and *so* it is not her act." Bacon, Abr. *Pleas* (H 3), (I 2); Gould, Plead. c. 6, pt. 1, § 64.

An example of this form of plea, which is sometimes called the special general issue, occurs in 4 Rawle, Penn. 83, 84.

ISSUABLE. In Practice. Leading or tending to an issue. An issuable plea is one upon which the plaintiff can take issue and proceed to trial.

ISSUABLE TERMS. Hilary and Trinity Terms are so called from the making up of the issues, during those terms, for the assizes, that they may be tried by the judges, who generally go on circuit to try such issues after these two terms. But for town causes all four terms are issuable. 3 Sharswood, Blackst. Comm. 350; 1 Tidd, Pract. 121.

ISSUE. In Real Law. Descendants. All persons who have descended from a common ancestor. 3 Ves. Ch. 257; 17 *id.* 481; 19 *id.* 547; 1 Roper, Leg. 90.

In a will it may be held to have a more restricted meaning, to carry out the testator's intention. 7 Ves. Ch. 522; 19 *id.* 73; 1 Roper, Leg. 90. See Bacon, Abr. *Curtesy* (D), *Legatee*.

In Pleading. A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other.

The entry of the pleadings. 1 Chitty, Plead. 630.

Several connected matters of fact may go to make up the point in issue.

An actual issue is one formed in an action brought in the regular manner, for the purpose of trying a question of right between the parties.

A collateral issue is one framed upon some matter not directly in the line of the pleadings: as, for example, upon the identity of one who pleads diversity in bar of execution. 4 Blackstone, Comm. 396.

A common issue is that which is formed upon the plea of *non est factum* to an action of covenant broken.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Plead. 482; Lawes, Plead. 113; Gould, Plead. c. 6, pt. 1, §§ 7–10.

An issue in fact is one in which the truth of some fact is affirmed and denied.

In general, it consists of a direct affirmative allegation on one side and a direct negative on the other. Coke, Litt. 126 *a*; Bacon, Abr. *Pleas* (G 1); 2 W. Blackst. 1312; 8 Term, 278; 5 Pet. 149. But an affirmative allegation which completely excludes the truth of the preceding may be sufficient. 1 Wils. 6; 2 Strange, 1177. Thus, the general issue in a *writ of right* (called the mise) is formed by two affirmatives, the demandant claiming a greater right than the tenant, and the tenant a greater than the demandant. 3 Blackstone, Comm. 195, 305. And

in an action of dower the count merely demands the third part of [ ] acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.; which mode of denial, being argumentative, would not, in general, be allowed. 2 Saund. 329.

A feigned issue is one formed in a fictitious action, under direction of the court, for the purpose of trying before a jury some question of fact.

Such issues are generally ordered by a court of equity, for which no jury is summoned, to ascertain the truth of some disputed fact. They are also frequently used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause. 3 Blackstone, Comm. 452. Suppose, for example, it is desirable to settle a question of the validity of a will in a court of equity. For this purpose an action is brought, in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A, then avers it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of A; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity.

The name is a misnomer, inasmuch as the *issue* itself is upon a real, material point in question between the parties, and the circumstances only are fictitious. It is a contempt of the court in which the action is brought to bring such an action, except under the direction of some court. 4 Term, 402.

A formal issue is one which is framed according to the rules required by law, in an artificial and proper manner.

A general issue is one which denies in direct terms the whole declaration: as, for example, where the defendant pleads *nil debet* (that he owes the plaintiff nothing), or *nul* disseisin (no disseisin committed). 3 Greenleaf, Ev. § 9; 3 Blackstone, Comm. 305. See GENERAL ISSUE.

An immaterial issue is one formed on some immaterial matter, which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss how to give judgment. 2 Wms. Saund. 319, n. 6. See IMMATERIAL ISSUE.

An informal issue is one which arises when a material allegation is traversed in an improper or inartificial manner. Bacon, Abr. *Pleas* (G 2), (N 5); 2 Wms. Saund. 319 *a*, n. 6. The defect is cured by verdict, by the statute 32 Hen. VIII. c. 30.

A material issue is one properly formed on some material point which will, when decided, decide the question between the parties.

A special issue is one formed by the defendant's selecting any one substantial point and resting the weight of his cause upon that. It is contrasted with the general issue. Comyns, Dig. *Pleader* (R 1, 2).

ISSUE ROLL. In English Law. The name of a record which contains an entry of the term of which the demurrer book, issue, or paper book is entitled, and the warrants of attorney supposed to have been given by the parties at the commencement of the cause, and then proceeds with the transcript of the declaration and subsequent pleadings, continuances, and award of the mode of the decision as contained in the demurrer, issue, or paper book. Stephen, Plead. 98, 99. After final judgment the issue roll is no longer called by that name, but assumes that of *judgment roll*. 2 Archbold, Pract. 206.

ISSUES. In English Law. The goods and profits of the lands of a defendant against whom a writ of *distringas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues*. 3 Blackstone, Comm. 280; 1 Chitty, Crim. Law, 351.

ITA EST (Lat.). So it is.

Among the civilians, when a notary dies, leaving his register, an officer who is authorized to make official copies of his notarial acts writes, instead of the deceased notary's name, which is required when he is living, *ita est*.

ITA QUOD (Lat.). The name or condition in a submission, which is usually introduced by these words, "so as the award be made of and upon the premises," which, from the first words, is called the *ita quod*.

When the submission is with an *ita quod*, the arbitrator must make an award of all matters submitted to him of which he had notice, or the award will be entirely void. 7 East, 81; Croke Jac. 200; 2 Vern. Ch. 109; Rolle, Abr. *Arbitrament* (L 9).

ITEM (Lat.). Also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb.

It is used to introduce a new paragraph, or chapter, or division; also, to denote a particular in an account. It is used when any article or clause is added to a former, as if there were here a new beginning. DuCange. Hence the rule that a clause in a will introduced by *item* shall not influence or be influenced by what precedes or follows, if it be sensible taken independently, 1 Salk. 239, or there is no plain intent that it should be taken in connection, in which cases it may be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences. If, therefore, a testator bequeath a legacy to Peter, payable out of a particular fund or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property. 1 Atk. Ch. 436; 3 *id.* 256; 1 Brown, Ch. 482; 1 Rolle, Abr. 844; 1 Mod. 100; Croke Car. 368; Vaugh. 262; 2 Roper, Leg. 349; 1 Salk. 234.

ITER (Lat.). **In Civil Law.** A way; a right of way belonging as a servitude to an estate in the country (*prædium rusticum*). The right of way was of three kinds: 1, *iter*, a right to walk, or ride on horseback or in a litter; 2, *actus*, a right to drive a beast or vehicle; 3, *via*, a full right of way, comprising right to walk or ride, or drive beast

or carriage. Heineccius, Elem. Jur. Civ. § 408. Or, as some think, they were distinguished by the width of the objects which could be rightfully carried over the way: *e.g. via*, 8 feet; *actus*, 4 feet, etc. Mackeldy, Civ. Law, § 290; Bracton, 232; 4 Bell, Hou. L. 390.

In Old English Law. A journey, especially a circuit made by a justice in eyre, or itinerant justice, to try causes according to his own mission. DuCange; Bracton, lib. 3, c. 11, 12, 13; Britton, c. 2; Cowel; JUSTICES IN EYRE.

ITINERANT. Wandering; travelling; who makes circuits. See JUSTICES IN EYRE.

J.

JACTITATION OF MARRIAGE. In English Ecclesiastical Law. The boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other.

The ecclesiastical courts may in such cases entertain a libel by the party injured, and, on proof of the facts, enjoin the wrong-doer to perpetual silence, and, as a punishment, make him pay the costs. 3 Blackstone, Comm. 93; 2 Hagg. Cons. 423, 285; 2 Chitty, Pract. 459.

JACTURA (Lat. *jaceo*, to throw). A jettison.

JACTUS (Lat.). A throwing goods overboard to lighten or save the vessel, in which case the goods so sacrificed are a proper subject for general average. Dig. 14. 2, *de lege Rhodia de jactu;* 1 Pardessus, Collec. des Lois marit. 104 *et seq.;* Kuricke, Inst. Marit. Hanseat. tit. 8; 1 Parsons, Mar. Law, 288, note.

JAIL, GAOL (fr. Lat. *caveola*, a cage for birds). A place for the confinement of persons arrested for debt or for crime and held in the custody of the sheriff. Webster, Dict. It may be used also for the confinement of witnesses; and, in general, now there is no distinction between a jail and a prison, except that the latter belongs to a greater extent of country: thus, we say a state's prison and a county jail. Originally, a jail seems to have been a place where persons were confined to await further proceeding,—*e.g.* debtors till they paid their debts, witnesses and accused persons till a certain trial came on, etc.,—as opposed to prison, which was for confinement, as punishment.

A jail is an *inhabited dwelling-house*, and a *house* within the statutes against arson. 2 W. Blackst. 682; 1 Leach, Cr. Cas. 4th ed. 69; 2 East, Pl. Cr. 1020; 2 Cox, Cr. Cas. 65; 18 Johns. N. Y. 115; 4 Call, Va. 109; 4 Leigh, Va. 683. See GAOL; PRISON.

JAMUNLINGI, JAMUNDILINGI. Freemen who delivered themselves and property to the protection of a more powerful person, in order to avoid military service and other burdens. Spelman, Gloss. Also, a species of serfs among the Germans. DuCange. The same as *commendati*.

JEOFAILE (L. Fr.). I have failed; I am in error.

Certain statutes are called statutes of amendments and jeofailes, because, where a pleader perceives any slip in the form of his proceedings, and acknowledges the error (jeofaile), he is at liberty, by those statutes, to amend it. The amendment, however, is seldom made; but the benefit is attained by the court's overlooking the exception. 3 Blackstone, Comm. 407; 1 Saund. 228, n. 1; Doctrina Plac. 297; Dane, Abr. These statutes do not apply to indictments.

JEOPARDY. Peril; danger.

The term is used in this sense in the act establishing and regulating the post-office department. The words of the act are, "or if. in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender shall suffer death." 3 Story, Laws U. S. 1992. See Baldw. C. C. 93-95.

The situation of a prisoner when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. 1 Bail. So. C. 655; 7 Blackf. Ind. 191; 1 Gray, Mass. 490; 38 Me. 574; 8 Serg. & R. Penn. 586; 23 Penn. St. 12; 12 Vt. 93; 1 Bishop, Crim. Law, § 660. See 18 Johns. N. Y. 206; 2 Sumn. C. C. 60; 4 Wash. C. C. 402.

This is the sense in which the term is used in the United States constitution: "no person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const. art. v. Amend., and in the statutes or constitutions of most if not all of the states. 1 Bishop, Crim. Law, § 650.

2. As to the effect of conviction or acquittal of a crime in a foreign state, or in a state or federal court, as preventing further punishment by another jurisdiction, see 14 Ala. N. s. 486; 11 Wend. N. Y. 129; 7 N. Y. 295; 5 Wheat. 184; 5 How. 410; 14 *id.* 13; 8 Metc. Mass. 313; 1 Dougl. Mich. 207; 1 Park. Cr. Cas. N. Y. 659; 5 Leigh, Va. 707; 1 Bishop, Crim. Law, 655 *b*.

It is a privilege which may be waived. 6 Cush. Mass. 560; 37 Me. 156; 2 Hawks. Tenn. 443; 2 Barb. N. Y. 427; 4 Dev. No.

C. 305; 16 Miss. 587; 1 Bishop, Crim. Law, § 672 *et seq.* See DISCHARGE OF A JURY.

JERGUER. In English Law. An officer of the custom-house, who oversees the waiters. Techn. Dict.

JETTISON, JETSAM. The casting out of a vessel, from necessity, a part of the lading. The thing so cast out.

It differs from flotsam in this, that in the latter the goods float, while in the former they sink, and remain under water. It differs also from ligan.

The jettison must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies.

If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have brought at the place of delivery on the ship's arrival there, freight, duties, and other charges being deducted. Marshall, Ins. 246; 3 Kent, Comm. 185–187; Park. Ins. 123; Pothier, *Chartepartie*, n. 108 *et suiv.*; Boulay-Paty, Dr. Com. tit. 13; Pardessus, Dr. Com. n. 734; 1 Ware, Dist. Ct. 9. The owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share from the vessel on an adjustment of the average, which may be enforced by a proceeding *in venue* in the admiralty. 19 How. 162; 2 Parsons, Marit. Law, 373. See AVERAGE; ADJUSTMENT.

JEUX DE BOURSE. In French Law. A kind of gambling or speculation, which consists of sales and purchases which bind neither of the parties to deliver the things which are the object of the sale, and which are settled by paying the difference in the value of the things sold between the day of the sale and that appointed for delivery of such things. 1 Pardessus, Droit Com. n. 162.

JOB. The whole of a thing which is to be done. In this sense it is employed in the Civil Code of Louisiana, art. 2727: "To build by plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Duranton, du Contr. de Louage, liv. 3, t. 8, nn. 248, 263; Pothier, Contr. de Louage, nn. 392, 394; DEVIATION.

JOBBER. In Commercial Law. One who buys and sells articles for others. Stock-jobbers are those who buy and sell stocks for others. This term is also applied to those who speculate in stocks on their own account.

JOCALIA (Lat.). Jewels. This term was formerly more properly applied to those ornaments which women, although married, call their own. When these *jocalia* are not suitable to her degree, they are assets for the payment of debts. 1 Rolle, Abr. 911.

JOINDER. In Pleading. Union; concurrence.

Of Actions. IN CIVIL CASES. The union of two or more causes of action in the same declaration.

At common law, to allow a joinder, the form of actions must be such that the same plea may be pleaded and the same judgment given on all the counts of the declaration, or, the counts being of the same nature, that the same judgment may be given on all. 2 Saund. 177 *c.*; 1 Term, 276; Comyns, Dig. *Actions* (G); 16 N. Y. 548; 6 Du. N. Y. 43; 4 Cal. 27; 12 La. Ann. 873; 33 N. H. 495. And all the causes of action must have accrued to the plaintiff or against the defendant, 12 La. Ann. 44, in the same right, though it may have been by different titles. Thus, a plaintiff cannot join a demand in his own right to one as representative of another person, or against the defendant himself to one against him in a representative capacity. 2 Viner, Abr. 62; Bacon, Abr. *Action in General* (C); 21 Barb. N. Y. 245. See 25 Mo. 357.

In *real actions* there can be but one count.

In *mixed actions* joinder occurs, though but infrequently. 8 Coke, 876; Poph. 24; Croke Eliz. 290.

In *personal actions* joinder is frequent. By statutes, in many of the states, joinder of actions is allowed and required to a greater extent than at common law.

2. IN CRIMINAL CASES. Different offences of the same general nature may be joined in the same indictment, 1 Chitty, Crim. Law, 253, 255; 29 Ala. N. S. 62; 10 Cush. Mass. 530; 28 Miss. 267; 4 Ohio St. 440; 6 McLean, C. C. 596; 4 Den. N. Y. 133; 18 Me. 103; 1 Cheves, So. C. 103; 4 Ark. 56; see 14 Gratt. Va. 687; and it is no cause of arrest of judgment that they have been so joined, 29 Eng. L. & Eq. 536; 29 N. H. 184; 11 Ga. 225; 3 Woodb. & M. C. C. 164; see 1 Strobh. So. C. 455; but not in the same count, 5 R. I. 385; 24 Mo. 353; 1 Rich. So. C. 260; 4 Humphr. Tenn. 25; and an indictment may be quashed, in the discretion of the court, where the counts are joined in such manner as will confound the evidence. 17 Mo. 544; 19 Ark. 563, 577; 20 Miss. 468.

No count, it is said, will, however, permit a prisoner to be tried upon one indictment for two distinct and separate crimes. 29 N. H. 184. See 5 Serg. & R. Penn. 59; 12 *id.* 69; 10 Cush. Mass. 530.

In Demurrer. The answer made to a demurrer. Coke, Litt. 71 *b.* The act of making such answer is merely a matter of form, but must be made within a reasonable time. 10 Rich. So. C. 49.

Of Issue The act by which the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "and of this he puts him-

self upon the country," the party denying the fact may immediately subjoin, "And the said A B does the like;" when the issue is said to be joined.

Of Parties. In Civil Cases.

In Equity.

3. All parties materially interested in the subject of a suit in equity should be made parties, however numerous. Mitford, Eq. Plead. 144; 2 Eq. Cas. Abr. 179; 3 Swanst. Ch. 139; 1 Pet. 299; 2 *id.* 482; 13 *id.* 359; 7 Cranch, 72; 2 Mas. C. C. 181; 5 McLean, C. C. 444; 2 Paine, C. C. 536; 1 Johns. Ch. N. Y. 349; 2 Paige, Ch. N. Y. 278; 3 *id.* 466; 11 *id.* 321; 4 Cow. N. Y. 682; 2 Bibb, Ky. 184; 4 J. J. Marsh. Ky. 447; 24 Me. 20; 36 *id.* 50; 3 Vt. 160; 11 *id.* 290; 7 Conn. 342; 11 *id.* 112; 11 Gill & J. Md. 426; 4 Rand. Va. 451; 1 Bail. Ch. So. C. 384; 2 Dev. & B. Eq. No. C. 31; 7 Ired. Eq. No. C. 261; 1 M'Cord, So. C. 301; 2 Stew. Ala. 280; 6 Blackf. Ind. 223; 15 Ill. 257; 11 Ga. 645. But, where the parties are very numerous, a portion may appear for all in the same situation. 16 Ves. 321; 16 How. 288; 11 Conn. 112; 3 Paige, Ch. 222; 19 Barb. 517.

Mere possible or contingent interest does not render its possessor a necessary party. 6 Wheat. 550; 3 Conn. 354; 5 Cow. N. Y. 719. And see 3 Bibb, Ky. 86; 6 J. J. Marsh. Ky. 425.

There need be no connection but community of interests. 2 Ala. N. s. 209.

Plaintiffs.

4. All persons having a unity of interest in the subject-matter, 3 Barb. Ch. N. Y. 397; 2 Ala. N. s. 209, and in the object to be attained, 2 Iowa, 55; 3 *id.* 443, who are entitled to relief, 14 Ala. N. s. 135; 17 *id.* 631, may join as plaintiffs. The claims must not arise under different contracts, 8 Pet. 123; 5 J. J. Marsh. Ky. 154; 6 *id.* 33; or to the same person in different capacities. 1 Busb. Eq. No. C. 196. And see 1 Paige, Ch. N. Y. 637; 4 *id.* 23; 5 Metc. Mass. 118; 1 Monr. Ky. 206.

Assignor and *assignee.* The assignor of a contract for the sale of lands should be joined in a suit by the assignee for specific performance, 3 Sandf. Ch. N. Y. 614; and the assignor of part of his interest in a patent in a suit by assignee for violation. 3 McLean, C. C. 350.

But he should not be joined where he has parted with all his legal and beneficial interest. 32 Me. 203, 343; 13 B. Monr. Ky. 210. The assignee of a mere chose in action may sue in his own name, in equity. 17 How. 43; 5 Wisc. 270; 6 B. Monr. Ky. 540; 7 *id.* 273.

Corporations. Two or more may join if their interest is joint. 8 Ves. Ch. 706. A corporation may join with its individual members to establish an exemption on their behalf. 3 Anstr. 738.

Husband and *wife* must join where the husband asserts an interest in behalf of his wife, 6 B. Monr. Ky. 514; 3 Hayw. No. C. 252; 5 Johns. Ch. N. Y. 196; 9 Ala. 133; 4 J. J. Marsh. Ky. 49: as, for a legacy, 5 Johns. Ch. N. Y. 196, or for property devised or descended to her during coverture, 5 J. J. Marsh. Ky. 179, 600; or where he applies for an injunction to restrain a suit at law against both, affecting her interest. 1 Barb. Ch. N. Y. 313.

5. *Idiots* and *lunatics* may be joined or not in bills by their committees, at the election of the committee to set aside acts done by them whilst under imbecility. 1 Chanc. Cas. 112; 1 Jac. 377; 7 Johns. Ch. N. Y. 139; 3 Barb. Ch. N. Y. 24. They must be joined in suits brought for the partition of real estate. 3 Barb. Ch. 24. In England it seems to be the custom to join. 2 Vern. Ch. 678. See Story, Eq. Plead. § 64, and note; Story, Eq. Jur. § 1336, and note; Edwards, Partn. 294–316.

Infants. Several may join in the same bill for an account of the rents and profits of their estate. 2 Bland, Ch. Md. 68.

Trustee and *cestui que trust* should join in a bill to recover the trust fund, 5 Dan. Ky. 128; but need not to foreclose a mortgage, 5 Ala. 447; 4 Abb. Pract. N. Y. 106, nor to redeem one made by the trustee. 2 Gray, Mass. 190. And see, also, 3 Edw. Ch. N. Y. 175; 7 Ala. N. s. 386.

Defendants.

6. In general, all persons interested in the subject-matter of a suit who cannot be made plaintiffs should be made defendants. They may claim under different rights if they possess an interest centring in the point in issue. 4 Cow. N. Y. 682.

Bills for discovery need not contain all the parties interested as defendants, 1 M'Cord, Ch. So. C. 301; and a person may be joined merely as defendant in such bill. 3 Ala. 214. A person should not be joined as a party to such bill who may be called as a witness on trial. 13 Ill. 212; 3 Barb. Ch. N. Y. 482. And see 1 Chandl. Wisc. 286.

Assignor and *assignee.* An assignor who retains even the slightest interest in the subject-matter must be made a party. 2 Dev. & B. Eq. No. C. 395; 1 Greene, Ch. N. J. 347; 2 Paige, Ch. N. Y. 289; 11 Cush. Mass. 111: as, a covenantee in a suit by a remote assignee, 1 Dan. 585; and the original plaintiff in a creditors' bill by the assignee of a judgment. 4 B. Monr. Ky. 594.

A fraudulent assignee need not be joined in a bill by a creditor to obtain satisfaction out of a fund so transferred. 1 Paige, Ch. N. Y. 637. The assignee of a judgment must be a party in a suit to stay proceedings. 11 Paige, Ch. N. Y. 438.

A party who acquires his interest *pendente lite* cannot be made a party. 5 Ill. 354. Otherwise of an assignee in insolvency, who must be made a party. 3 Johns. N. Y. 543; 1 Johns. Ch. N. Y. 339; 10 Paige, Ch. N. Y. 20.

7. *Corporations* and *associations*. A corporation charged with a duty should be joined with the trustees it has appointed, in a suit for a breach. 1 Gray, Mass. 399; 7 Paige, Ch. N. Y. 281. Where the legal title is in part of the members of an association, no others need be joined. 1 Gilm. Va. 187.

Officers and agents may be made parties merely for purposes of discovery. 9 Paige, Ch. N. Y. 188.

Creditors who have repudiated an assignment and pursued their remedy at law are properly made parties to a bill brought by the others against the trustee for an account and the enforcement of the trust. 3 Wisc. 367. So, when judgments are impeached and sought to be set aside for fraud, the plaintiffs therein are indispensable parties to the bill. 20 Ala. 200. To a bill brought against an assignee by a creditor claiming the final balance, the preferred creditors need not be made parties. 28 Vt. 465. See, also, 20 How. 94; 1 Md. Ch. Dec. 299; 3 Metc. Mass. 474; 11 Paige, Ch. N. Y. 49; 22 Barb. N. Y. 597.

Debtors must in some cases be joined with the executor in a suit by a creditor; though not ordinarily. Story, Eq. Plead. § 227; 1 Johns. Ch. N. Y. 305. Where there are several debtors, all must be joined, 1 M'Cord, Ch. So. C. 301, unless utterly irresponsible. 1 Mich. 446. Judgment debtors must in some cases be joined in suits between the creditor and assignees or mortgagees. 3 Barb. Ch. N. Y. 630; 5 Sandf. N. Y. 271.

8. *Executors* and *administrators* should be made parties to a bill to dissolve a partnership, 21 Ga. 6; to a bill against heirs to discover assets, 7 B. Monr. Ky. 127; to a bill by creditors to subject lands fraudulently conveyed by the testator their debtor, to the satisfaction of their debt. 9 Mo. 304. See, also, 21 Ga. 433; 6 Munf. Va. 520; 7 Eng. L. & Eq. 54.

Foreclosure suits. All persons having an interest, legal or equitable, existing at the commencement of a suit to foreclose mortgaged premises, must be made parties, or they will not be bound, 4 Johns. Ch. N. Y. 605; 10 Paige, Ch. N. Y. 307; 10 Ala. N. S. 283; 3 Ark. 364; 6 McLean, C. C. 416; 11 Tex. 526; including the mortgagor within a year after the sale of his interest by the sheriff, 4 Johns. Ch. 649, and his heirs and personal representatives after his death. 2 Bland, 684. A person claiming adversely to mortgagor and mortgagee cannot be made a defendant to such suit. 3 Barb. Ch. N. Y. 438.

9. *Heirs*, *distributees*, and *devisees*. All the heirs should be made parties to a bill respecting the real estate of the testator, 3 N. Y. 261; 2 Ala. N. S. 571; 3 Litt. Ky. 365; 4 J. J. Marsh. Ky. 231; 7 *id.* 432; 5 Ill. 452, although the testator was one of several mortgagees of the vendee, and the bill be brought to enforce the vendor's lien, 6 B. Monr. Ky. 74; but need not to a bill affecting personalty. 1 M'Cord, Ch. So. C. 280. All the devisees are necessary parties to a bill to set aside the will, 2 Dan. Ky. 155, or to enjoin executors from selling lands belonging to the testator's estate. 2 T. B. Monr. Ky. 30. All the distributees are necessary parties to a bill for distribution, 1 B. Monr. Ky. 27; to a bill by the widow of the intestate against the administrator to recover her share of the estate, 4 Bibb, Ky. 543; and to a bill against an administrator to charge the estate with an annual payment to preserve the residue. 1 Hill, Ch. 51. See, also, 2 Litt. Ky. 48; 11 Paige, Ch. N. Y. 49; 2 T. B. Monr. Ky. 95; 5 *id.* 573.

Idiots and *lunatics* should be joined with their committees when their interests conflict and must be settled in the suit. 2 Johns. Ch. N. Y. 242; 3 Paige, Ch. N. Y. 470.

10. *Partners* must, in general, be all joined in a bill for dissolution of the partnership, but need not if without the jurisdiction. 17 How. 468; 12 Metc. Mass. 329. And see 3 Stor. C. C. 335.

Assignees of insolvent partners must be joined. 10 Me. 255.

Dormant partners need not be joined when not known in the transaction on which the bill is founded. 7 Blackf. Ind. 218.

Principal and *agent* should be joined if there be a charge of fraud in which the agent participated, 3 Stor. C. C. 611; 12 Ark. 720; and the agent should be joined where he binds himself individually. 3 A. K. Marsh. Ky. 484.

See, also, 5 Harr. & J. Md. 147; 8 Ired. Eq. No. C. 229; 2 Dev. & B. No. C. 357; 1 Barb. Ch. N. Y. 157.

Trustee and *cestui que trust*. A trustee may or not, at the plaintiff's election, be joined in a bill by the *cestui que trust* to recover the fund. 2 Paige, Ch. N. Y. 278.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties to a suit for that purpose. 39 Eng. L. & Eq. 76. See, also, 39 Eng. L. & Eq. 225; 24 Miss. 597; 19 How. 376; 5 Du. N. Y. 168; 8 Md. 34.

At Law.

In actions ex contractu.

11. All who have a joint legal interest or are jointly entitled must join in an action on a contract, even though it be in terms several, or be entered into by one in behalf of all, Brown, Partn. 18; 1 Saund. 153; Archbold, Civ. Pl. 58; Metc. Yelv. 177, n. 1; 10 East, 418; 8 Term, 140; 8 Serg. & R. Penn. 308; 10 *id.* 257; 15 Me. 295; 23 *id.* 111; 3 Brev. No. C. 249; 3 Ark. 565; 16 Barb. N. Y. 325; 6 Du. N. Y. 182; 3 Bosw. N. Y. 516: as, where the consideration moves from several jointly. 2 Wms. Saund. 116 *a*; 4 Mees. & W. Exch. 295; 5 *id.* 698, or was taken from a joint fund. 19 Johns. N. Y. 218; 1 Meigs, Tenn. 394.

One of several joint obligees, payees, or assignees may sue in the name of all. 10 Yerg. Tenn. 235. See 4 Saund. 657.

Some contracts may be considered as either joint or several, and in such case all may join, or each may sue separately; but part cannot join leaving the others to sue separately.

In an action for a breach of a joint contract made by several, all the contracting parties should be made defendants, 1 Saund. 158 n., even though one or more be bankrupt or insolvent, 2 Maule & S. 33; but see 1 Wils. 89; or an infant; but not if the contract be utterly void as to him. 3 Taunt. 307; 5 Johns. N. Y. 160, 280; 11 *id.* 101; 5 Mass. 270; 1 Pick. Mass. 500.

On a joint and several contract, each may be sued separately, or all together. 1 Pet. 73; 1 Wend. N. Y. 524.

12. *Executors* and *administrators* must bring their actions in the joint names of all, 3 Bouvier, Inst. 146; Hammond, Partn. 272; Broom, Part. 103; 5 Scott, N. R. 728; 1 Saund. 291 *g*; 2 *id.* 213; 2 Nott & M'C. So. C. 70; 2 Penn. St. 721; 1 Dutch. N. J. 374; even though some are infants. Broom, Part. 104.

All the executors who have proved the will are to be joined as defendants in an action on the testator's contract. Broom, Part. 196; 1 Lev. 161; 3 Term, 560; 1 Crompt. M. & R. Exch. 74; 2 Crompt. & J. Exch. 548; 4 Bingh. 704. But an executor *de son tort* is not to be joined with the rightful executor. And the executors are not to be joined with other persons who were joint contractors with the deceased. P. A. Browne, Penn. 31; 2 Wheat. 344; 6 Serg. & R. Penn. 272; 5 Cal. 173.

Administrators are to be joined, like executors. Comyns, Dig. *Administrators* (B 12). Foreign executors and administrators are not recognized as such, in general. 2 Jones, Eq. No. C. 276; 10 Rich. So. C. 393; 7 Ind. 211.

13. *Husband* and *wife* must join to recover rent due the wife before coverture on her lease while sole, Coke, Litt. 55 *b*; Croke Eliz. 700; on the lease by both of lands in which she has a life estate, where the covenant runs to both, 20 Barb. N. Y. 269; but on a covenant generally to both, the husband may sue alone, 2 Mod. 217; 1 Barnew. & C. 443; 1 Bulstr. 331; in all actions in implied promises to the wife acting *in autre droit*, Comyns, Dig. *Baron & F.* (V); 9 Mees. & W. Exch. 694; 4 Tex. 283; as to suit on a bond to both, see 2 Penn. St. 827; on a contract running with land of which they are joint assignees, Woodfall, Landl. & Ten. 190; Croke Car. 503; in general, to recover any of the wife's choses in action where the cause of action would survive to her. Comyns, Dig. *Baron & F.* (V); 1 Chitty, Plead. 17; Broom, Part. 82; 1 Maule & S. 180; 1 Yeates, Penn. 551; 1 P. A. Browne, Penn. 263; 13 Wend. N. Y. 271; 10 Pick. Mass. 470; 9 Ired. No. C. 163; 21 Conn. 557; 5 Miss. 204; 24 Miss. 245; 2 Wisc. 22.

14. They may join at the husband's election in suit on a covenant to repair, when they become joint grantees of a reversion, Croke Jac. 399; Broom, Part. 78; to recover the value of the wife's choses in action, 5 Harr. Del. 57; 24 Conn. 45; 2 Wisc. 22; 2 Mod. 217; 2 Ad. & E. 30; 2 Maule & S. 396, n.; in case of joinder the action survives to her, 6 Mees. & W. Exch. 426; 10 Barnew. & C. 558; in case of an express promise to the wife, or to both where she is the meritorious cause of action. Croke Jac. 77, 205; Broom, Part. 80; 1 Chitty, Plead. 18; 5 Harr. Del. 57; 32 Ala. N. S. 30.

They must, in general, be joined in actions on contracts entered into by the wife *dum sola*, 1 Kebl. 281; 2 Term, 480; 7 *id.* 348; 1 Taunt. 217; 7 *id.* 432; 8 Johns. N. Y. 149; 1 Grant, Cas. Penn. 21; 5 Harr. Del. 357; 25 Vt. 207; see 1 Chitty, Plead. 45; 15 Johns. N. Y. 403; 17 *id.* 167; 7 Mass. 291, where the cause of action accrues against the wife *in autre droit*. Croke Car. 518. They may be joined when the husband promises anew to pay the debt of the wife contracted *dum sola*, 7 Term, 349; for rent or breaches of covenant on a joint lease to both for the wife's benefit. Broom, Part. 178, 179.

15. *Joint tenants* must join in debt or an avowry for rent, Broom, Part. 24; but one of several may make a separate demise, thus severing the tenancy, Bacon, Abr. *Joint Ten.* (H 2); 12 East, 39, 57, 61; 3 Campb. 190; and one may maintain ejectment against his co-tenants. Woodfall, Landl. & Ten. 789.

Partners must all join in suing strangers on partnership transactions, Broom, Part. 61; 1 Esp. 183; 2 Campb. 302; 18 Barb. N. Y. 534; 4 Du. N. Y. 416; 7 Rich. So. C. 118; including only those who were such at the time the cause of action accrued, Broom, Part. 65; although one or more may have become insolvent, 2 Crompt. & M. Exch. 318; but not joining the personal representative of a deceased partner, 2 Salk. 444; 2 Maule & S. 225; 4 Barnew. & Ald. 374; 9 Barnew. & C. 538; with a limitation to the actual parties to the instrument in case of specialties, 6 Maule & S. 75; and including dormant partners or not, at the election of the ostensible partners. 2 Esp. 468; 2 Taunt. 324; 10 Barnew. & C. 671; 4 Barnew. & Ald. 437. See 4 Wend. N. Y. 628. Where one partner contracts in his name for the firm, he may sue alone, or all may join, 4 Barnew. & Ad. 815; 4 Barnew. & Ald. 437; but alone if he was evidently dealt with as the sole party in interest. 1 Maule & S. 249.

16. The surviving partners, 3 Ball & B. Ch. Ir. 30; 1 Barnew. & Ald. 29, 522; 18 Barb. N. Y. 592, must all be joined as defendants in suits on partnership contracts. Broom, Part. 163; 1 East, 30. And third parties are not bound to know the arrangements of partners amongst themselves. 9 East, 527; 4 Maule & S. 482; 8 Mees. & W. Exch. 703, 710.

A partner need not be joined if he was not known as such at the time of making the contract and there was no indication of his being a partner. 1 Bosw. N. Y. 28; 19 Ark. 701. And see PARTNERSHIP.

Tenants in common should join in an action on any joint contract. Comyns, Dig. *Abatement* (E 10).

Trustees must all join in bringing an action. 1 Wend. N. Y. 470.

In actions ex delicto.

17. Joint owners must, in general, join in an action for a tortious injury to their property, 1 Salk. 31; 1 Saund. 291 *g;* 6 Term, 766; 7 *id.* 297; 11 N. H. 141; in trover, for its conversion, 5 East, 407; in replevin, to get possession, 6 Pick. Mass. 571; 8 Mo. 522; 15 Me. 245; or in detinue, for its detention, or for injury to land. 3 Bingh. 455; 29 Barb. N. Y. 9.

So may several owners who sustain a joint damage. 1 Woodb. & M. C. C. 223.

For injury to the *person*, plaintiffs cannot, in general, join. 2 Wms. Saund. 117 *a.;* Croke Car. 512; Croke Eliz. 472.

Partners may join for slanders, 3 Bingh. 452; 10 *id.* 270; 1 Carr. & K. 568; 8 Carr. & P. 708; for false representations, 17 Mass. 182, injuring the partnership.

In cases where several can join in the commission of a tort, they may be joined in an action as defendants, 3 East, 62; 5 Term, 651; 7 *id.* 259; 6 Taunt. 29; 14 Johns. N. Y. 462; 19 *id.* 381: as, in trover, 1 Maule & S. 588; in trespass, 2 Wms. Saund. 117 *a;* for libel, Broom, Part. 249,—not for slander, Croke Jac. 647; in trespass. 1 Carr. & M. 96.

18. *Husband* and *wife* must join in action for direct damages resulting from personal injury to the wife, 3 Blackstone, Comm. 140; 4 Iowa, 420; in detinue, for the property which was the wife's before marriage, 2 Tayl. No. C. 266; see 30 Ala. N. s. 582; for injury to the wife's property before marriage, 2 Jones, No. C. 59; where the right of action accrues to the wife *in autre droit*, Comyns, Dig. *Baron & F.* (V); 11 Mod. 177; 2 Bos. & P. 407; and, generally, in all cases where the cause of action by law survives to the wife. 4 Barnew. & Ald. 523; 10 Pick. Mass. 470; 35 Me. 89.

They may join for slander of the wife, if the words spoken are actionable *per se*, for the direct injury, 4 Mees. & W. Exch. 5; 22 Barb. N. Y. 396; 2 Du. N. Y. 633; 2 Hill, N. Y. 309; 2 T. B. Monr. Ky. 56; 25 Mo. 580; 4 Iowa, 420; 11 Cush. Mass. 10; and in ejectment for lands of the wife. Broom, Part. 235; 1 Bulstr. 21.

19. They *must* be joined as defendants for torts committed by the wife before marriage, 2 Roper, Husb. & Wife, 127; Coke, Litt. 351 *b;* 5 Binn. Penn. 43, or during coverture, Broom, Part. 299; 19 Barb. N. Y. 321; 2 E. D. Smith, N. Y. 90; or for libel or slander uttered by her, 5 Carr. & P. 484; and in action for waste by the wife, before marriage, as administratrix. 2 Williams, Exec. 1441.

They may be joined in trespass for their joint act. 2 Strange, 1094; 4 Bingh. N. c. 96; 3 Barnew. & Ald. 687; 6 Gratt. Va. 213.

Joint tenants and parceners, during the continuance of the joint estate, must join in all actions *ex delicto* relative thereto, as in trespass to their land, and in trover or replevin for their goods. Broom, Part. 215; 2 Blackstone, Comm. 182, 188; Bacon, Abr. *Joint Ten.* (K); 2 Salk. 205; 2 Lev. 113; 29 Barb. N. Y. 29. Joint tenants may join in an action for slander of the title to their estate. Broom, Part. 211; 3 Bingh. 455. They should be sued jointly, in trespass, trover, or case, for any thing respecting the land held in common. Broom, Part. 251, 255; 5 Term, 651; Comyns, Dig. *Abatement* (F 6); 1 Wms. Saund. 291 *e.* Joint tenants should join in an avowry or cognizance for rent, 3 Salk. 207; 1 *id.* 390; or for taking cattle damage feasant, Bacon, Abr. *Joint Ten.* (K); or one joint tenant should avow in his own right, and as bailiff to the other. 3 Salk. 207. But a tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his co-tenant. 2 H. Blackst. 388, 389; Bacon, Abr. *Replevin* (K).

20. *Master* and *servant*, where co-trespassers, should be joined though they be not equally culpable. 2 Lev. 172; 1 Bingh. 418; 5 Barnew. & C. 559. *Partners* may join for a joint injury in relation to the joint property. 2 Bouvier, Inst. 110; 3 Carr. & P. 196. They may be joined as defendants where property is taken by one of the firm for its benefit, 1 Carr. & M. 93; and where the firm makes fraudulent representations as to the credit of a third person, whereby the firm gets benefit. 17 Mass. 182.

Tenants in common must join for a trespass upon the lands held in common, Littleton, § 315; 15 Johns. N. Y. 497; 1 Wend. N. Y. 380; 8 Cow. N. Y. 304; 28 Me. 136; or for taking away their common property, Croke Eliz. 143; or for detaining it, 1 Hill, N. Y. 234; or for a nuisance to their estate. 14 Johns. N. Y. 246.

In Criminal Cases. Two or more persons who have committed a crime may be jointly indicted therefor, 7 Gratt. Va. 619; 6 McLean, C. C. 596; 10 Ired. No. C. 153; 8 Blackf. Ind. 205, only where the offence is such that it may be committed by two jointly. 3 Sneed, Tenn. 107.

They may have a separate trial, however, in the discretion of the court, 15 Ill. 536; 1 Park. Crim. N. Y. 424; 7 Gratt. Va. 619; 10 Cush. Mass. 530; 5 Strobh. So. C. 85; 9 Ala. N. s. 137; and in some states as a matter of right. 1 Park. Crim. N. Y. 371.

JOINT ACTION. An action brought by two or more as plaintiffs or against two or more as defendants. See 1 Parsons, Contr.; Actions; Joinder, § 1.

JOINT BOND. The bond of two or more obligors, the action to enforce which must be joint against them all.

JOINT AND SEVERAL BOND. A bond of two or more obligors, who bind them-

selves jointly and severally to the obligees, who can sue all the obligors jointly, or any one of them separately, for the whole amount, but cannot bring a joint action against part,—that is, treat it as joint as to some and several as to others. Upon the payment of the whole by one of such obligors, a right to contribution arises in his favor against the other obligors.

JOINT CONTRACT. One in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.

2. It is a general rule that a joint contract survives, whatever may be the beneficial interests of the parties under it. When a partner, covenantor, or other person entitled, having a joint interest in a contract not running with the land, dies, the right to sue survives in the other partner, etc. 1 Dall. Penn. 65, 248; Addison, Contr. 285. And when the obligation or promise is to perform something jointly by the obligors or promissors, and one dies, the action must be brought against the survivor. Hammond, Partn. 156; Barbour, Partn.

3. When all the parties interested in a joint contract die, the action must be brought by the executors or administrators of the last surviving obligee against the executors or administrators of the last surviving obligor. Addison, Contr. 285. See CONTRACTS; PARTIES TO ACTIONS; CO-OBLIGOR.

JOINT EXECUTORS. Those who are joined in the execution of a will.

2. Joint executors are considered in law as but one person representing the testator; and, therefore, the acts of any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed, as regards the persons with whom they contract, the acts of all. Bacon, Abr.; 11 Viner, Abr. 358; Comyns, Dig. *Administration* (B 12); 1 Dane, Abr. 583; 2 Litt. Ky. 315; God. 314; Dy. 23, in marg.; 16 Serg. & R. Penn. 337. But an executor cannot, without the knowledge of his co-executor, confess a judgment for a claim part of which was barred by the act of limitations, so as to bind the estate of the testator. 6 Penn. St. 267.

3. As a general rule, it may be laid down that each executor is liable for his own wrong or *devastavit* only, and not for that of his colleague. He may be rendered liable, however, for the misplaced confidence which he may have reposed in his co-executor: as, if he signs a receipt for money, in conjunction with another executor, and he receives no part of the money, but agrees that the other executor shall retain it, and apply it to his own use, this is his own misapplication, for which he is responsible. 1 P. Will. Ch. 241, n. 1; 1 Schoales & L. Ch. Ir. 341; 2 *id.* 231; 7 East, 256; 11 Johns. N. Y. 16; 11 Serg. & R. Penn. 71; 5 Johns. Ch. N. Y. 283. And see 2 Brown, Ch. 116; 3 *id.* 112; 2 Penn. 421; Fonblanque, Eq. b. 2, c. 7, s. 5, n. k.

Upon the death of one of several joint executors, the right of administering the estate of the testator devolves upon the survivor. 3 Atk. Ch. 509; Comyns, Dig. *Administration* (B 12); Hammond, Partn. 148.

JOINT INDICTMENT. One indictment brought against two or more offenders, charging the defendants jointly. It may be where there is a joint criminal act, without any regard to any particular personal default or defect of either of the defendants: thus, there may be a joint indictment against the joint keepers of a gaming-house. 1 Ventr. Ch. 302; 2 Hawkins, Pl. Cr. 240.

JOINT STOCK BANKS. In English Law. A species of *quasi corporations*, or companies regulated by deeds of settlement.

In some respects they stand in the same situation as other unincorporated bodies; but they differ from the latter in this, that they are invested by certain statutes with powers and privileges usually incident to corporations. These enactments provide for the continuance of the partnership notwithstanding a change of partners. The death, bankruptcy, or the sale by a partner of his share, does not affect the identity of the partnership: it continues the same body, under the same name, by virtue of the act of parliament, notwithstanding these changes. 7 Geo. IV. c. 46, s. 9.

JOINT STOCK COMPANY. A *quasi* partnership, invested by statutes, in England and many of the states, with some of the privileges of a corporation. There is in such a company no *dilectus personarum*, that is, no choice about admitting partners: the shares into which the capital is divided are transferable at the pleasure of the person holding them, and the assignee becomes a partner by virtue of the transfer, and the rights and duties of the partners or members are determined by articles of association, or, in England, by a deed of settlement. A partnership whereof the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of all the co-partners. 1 Parsons, Contr. 121. The 7 & 8 Vict. includes within the term *joint stock company* all life, fire, and marine insurance companies, and every partnership consisting of more than twenty-five members. In this country, where there are no statutes providing for joint stock companies, they are rather to be regarded as partnerships. 1 Parsons, Contr. 121; 3 Kent, Comm. 262. See Wordsworth, Pub. Comp.

JOINT TENANTS. Two or more persons to whom are granted lands or tenements to hold in fee-simple, fee-tail, for life, for years, or at will. 2 Blackstone, Comm. 179. The estate which they thus hold is called an estate in joint tenancy. See ESTATE IN JOINT TENANCY; JUS ACCRESCENDI; SURVIVOR.

JOINT TRUSTEES. Two or more persons who are intrusted with property for the benefit of one or more others.

Unlike joint executors, joint trustees cannot act separately, but must join both in conveyances and receipts; for one cannot sell without the others, or receive more of the

consideration-money or be more a trustee than his partner. The trust having been given to the whole, it requires their joint act to do any thing under it. They are not responsible for money received by their co-trustees, if the receipt be given for the mere purposes of form. But if receipts be given under circumstances purporting that the money, though not received by both, was under the control of both, such a receipt shall charge, and the consent that the other shall misapply the money, particularly where he has it in his power to secure it, renders him responsible. 11 Serg. & R. Penn. 71. See 1 Schoales & L. Ch. Ir. 341; 5 Johns. Ch. N. Y. 283; Fonblanque, Eq. b. 2, c. 7, s. 5; Bac. Abr. *Uses and Trusts*, K; 2 Brown, Ch. 116; 3 *id.* 112.

JOINTRESS, JOINTURESS. A woman who has an estate settled on her by her husband, to hold during her life, if she survive him. Coke, Litt. 46.

JOINTURE. A joint estate limited to both husband and wife. A competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

Jointures are regulated by the statute of 27 Hen. VIII. c. 10, commonly called the statute of *uses*.

To make a good jointure, the following circumstances must concur, namely. It must take effect, in possession or profit, immediately from the death of the husband. It must be for the wife's life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife's whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of dower; or, rather, it prevents its ever arising. But there are other modes of limiting an estate to a wife, which, Lord Coke says, are good jointures within the statute, provided the wife accepts of them after the death of the husband. She may, however, reject them, and claim her dower. Cruise, Dig. tit. 7; 2 Blackstone, Comm. 137; Perkins. In its more enlarged sense, a jointure signifies a joint estate limited to both husband and wife. 2 Blackstone, Comm. 137. See 14 Viner, Abr. 540; Bacon, Abr.; 2 Bouvier, Inst. n. 1761 *et seq.*; Washburn, Real Prop.

JOUR. A French word, signifying day. It is used in our old law-books: as, *tout jours*, forever. It is also frequently employed in the composition of words: as, *journal*, a day-book; *journeyman*, a man who works by the day; *journeys account*.

JOURNAL. In Maritime Law. The book kept on board of a ship or other vessel, which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for log-book. Chitty, Law of Nat. 199.

In Commercial Law. A book used among merchants, in which the contents of the waste-book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

In Legislation. An account of the proceedings of a legislative body.

The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy." See 2 Story, Const. 301.

The constitutions of the several states contain similar provisions.

The journal of either house is evidence of the action of that house upon all matters before it. 7 Cow. N. Y. 613; Cowp. 17.

JOURNEYS ACCOUNT. In English Practice. A new writ which the plaintiff was permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in *journeying* to reach the court: hence the name of *journeys account*, that is, journeys *accomptes* or *counted*. This writ was *quasi* a continuance of the first writ, and so related back to it as to oust the defendant or tenant of his voucher, plea of *non-tenure*, *joint tenancy fully administered*, or any other plea arising upon matter happening after date of the first writ. Coke, Litt. fol. 9 *b*.

2. This mode of proceeding has fallen into disuse, the practice now being to permit that writ to be quashed, and to sue out another. See Termes de la Ley; Bacon, Abr. *Abatement* (Q); 14 Viner, Abr. 558; 4 Comyn, Dig. 714; 7 Mann. & G. 762; 8 Cranch, 84.

JUBILACION. In Spanish Law. The right of a public officer to retire from office, retaining his title and his salary, either in whole or in part, after he has attained the age of fifty years and been in public service at least twenty years, whenever his infirmities prevent him from discharging the duties of his office.

JUDAISMUS (Lat.). The religion and rites of the Jews. DuCange. A quarter set apart for residence of Jews. DuCange. A usurious rate of interest. 1 Mon. Angl. 839; 2 *id.* 10, 665. *Sex marcus sterlingorum ad acquietandam terram prædictum de Judaismo, inquo fuit impignorata.* DuCange. An income anciently accruing to the king from the Jews. Blount.

JUDEX (Lat.). **In Roman Law.** One who, either in his own right or by appointment of the magistrate for the special case, judged causes.

Thus, the *prætor* was formerly called *judex*. But, generally, prætors and magistrates who judge of their own right are distinguished from *judices*, who are private persons, appointed by the prætor, on application of the plaintiff, to try the cause, as soon as issue is joined, and furnished by him with instructions as to the legal principles involved. They

were variously called *judices delegati*, or *pedanei*, or *speciales*. They resemble in many respects jurors: thus, both are private persons, brought in at a certain stage of the proceedings, viz., issue joined, to try the cause, under instructions from the judge as to the law of the case. But civilians are not clear whether the *judices* had to decide the fact alone, or the law and fact. The *judex* resembles in many respects the *arbitrator*, or arbiter, the chief differences being, *first*, that the latter is appointed in cases of trust and confidence, the former in cases where the relations of the parties are governed by strict law (*in pactionibus strictis*); *second*, the latter has the whole control of case, and decides according to equity and good conscience, the former by strict formulæ; *third*, that the latter may be a magistrate, the former must be a private person; *fourth*, that the award of the arbiter derives its force from the agreement of submission, while the decree of the *judex* has its sanction in the command of the prætor to try the cause. Calvinus, Lex.; 1 Spence, Eq. Jur. 210, note; Mackeldey, Civ. Law, Kaufmann ed. § 193, note.

There was generally one *judex*, sometimes three,—in which case the decision of two, in the absence of the third, had no effect. Calvinus, Lex. Down to the time of handing over the cause to the *judex*, that is, till issue joined, the proceedings were before the prætor, and were said to be *in jure;* after that, before the *judex*, and were said to be *in judicio*. In all this we see the germ of the Anglo-Saxon system of judicature. 1 Spence, Eq. Jur. 67.

In Civil Law. A judge who conducts the trial from beginning to end; *magistratus*. The practice of calling in *judices* was disused before Justinian's time: therefore, in the Code, Institutes, and Novels, *judex* means judge in its modern sense. Heineccius, Elem. Jur. Civ. § 1327.

In Old English Law. A juror. Spelman, Gloss. A judge, in modern sense, especially—as opposed to *justiciarius*, *i.e.* a common-law judge—to denote an ecclesiastical judge. Bracton, fol. 401, 402.

JUDEX ORDINARIUS (Lat.). **In Civil Law.** A judge who had jurisdiction by his own right, not by another's appointment. Calvinus, Lex.; Vicat, Voc. Jur. Blackstone says that *judices ordinarii* decided only questions of fact, while questions of law were referred to the *centumviri;* but this would seem to be rather the definition of *judices selecti;* and not all questions of law were referred to the *centumviri*, but particular actions: *e.g. querela inofficiosi testamenti*. See 2 Sharswood, Blackst. Comm. 315; Vicat, Voc. Jur. Utr. *Centumviri*.

JUDGE. A public officer lawfully appointed to decide litigated questions according to law.

An officer so named in his commission, and who presides in some court.

In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of the facts. 4 Dall. Penn. 229; 3 Yeates, Penn. 300. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given, 15 Ill. 388, unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning. See 3 Cush. Mass. 584.

2. Judges are appointed or elected in a variety of ways in the United States. For the federal courts they are appointed by the president, by and with the consent of the senate; in some of the states they are appointed by the governor, the governor and senate, or by the legislature. See 11 Ind. 357; 29 Penn. St. 129; 2 Greene, Iowa, 458; 6 Ired. No. C. 5. The judges of the federal courts and of the courts of some of the states hold their offices during good behavior, see 3 Cush. Mass. 584; of others, as in New York, during good behavior, or until they shall attain a certain age; and of others, for a limited term of years. See 30 Miss. 206.

Impartiality is the first duty of a judge: if he has any (the slightest) interest in the cause, he is disqualified from sitting as judge; *aliquis non debet esse judex in propriâ causâ*, 8 Coke, 118; 6 Pick. Mass. 109; 21 *id.* 101; 5 Mass. 92; 13 *id.* 340; 14 Serg. & R. Penn. 157; 4 Ohio St. 675; 17 Ga. 253; 17 Barb. N. Y. 414; 22 N. H. 473; 19 Conn. 585; see 32 Miss. 148; 16 Ark. 196; 27 Ala. N. S. 423; 22 Conn. 178; 5 N. Y. 389; 1 Spence, N. J. 457; and when he is aware of such interest, he ought himself to refuse to sit on the case. It seems it is discretionary with him whether he will sit in a cause in which he has been of counsel. 2 A. K. Marsh. Ky. 517; Coxe, N. J. 164. See 2 Binn. Penn. 454; 5 Ind. 230. But the delicacy which characterizes the judges in this country, generally, forbids their sitting in such a cause. Judges consider it their duty, also, to declare and expound the law, not to make it. 10 Ga. 190.

3. While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake he may commit as judge, Coke, Litt. 294; 2 Dall. Penn. 160; 2 Nott & M'C. So. C. 168; 1 Day, Conn. 315; 1 Root, Conn. 211; 5 Johns. N. Y. 282; 9 *id.* 395; 11 *id.* 150; 3 A. K. Marsh. Ky. 76; 1 South. N. J. 74; 1 N. H. 374; but when he acts corruptly he may be impeached. 5 Johns. N. Y. 282; 8 Cow. N. Y. 178; 4 Dall. Penn. 225.

A judge is not competent as a witness in a cause trying before him, for this among other reasons, that he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another. 2 Mart. La. N. S. 312; 2 Cal. 358. See Comyn, Dig. *Courts* (B 4), (C 2), (E 1), (P 16), *Justices* (I 1, 2, 3); Bacon, Abr. *Courts* (B); 1 Kent, Comm. 291; Story, Const.; CHARGE.

JUDGE ADVOCATE. An officer of a court-martial who is to discharge some duties at the trial of offenders. His duties are to prosecute in the name of the United States; but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses, or any question to the prisoner the answer to which might

tend to criminate himself. He is, further, to swear the members of the court before they proceed upon any trial. Rules and Articles of War, art. 69; 2 Story, U. S. Laws, 1001; Holt, Dig. *passim*.

JUDGE'S CERTIFICATE. In English Practice. The written statement of the judge who tried the cause that one of the parties is entitled to costs in the action. It is very important in some cases that these certificates should be obtained at the trial. See Tidd, Pract. 879; 3 Chitty, Pract. 458, 486; 3 Camph. 316; 5 Barnew. & Ald. 796. A statement of the opinion of the court, signed by the judges, upon a question of law submitted to them by the chancellor for their decision. See 3 Sharswood, Blackst. Comm. 453; CASE STATED.

JUDGE'S NOTES. Short statements, noted by a judge on the trial of a cause, of what transpires in the course of such trial.

They usually contain a statement of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence and whether it has been received or rejected, and the like matters.

In general, judge's notes are not evidence of what transpired at a former trial, nor can they be read to prove what a deceased witness swore to on such former trial; for they are no part of the record, and he is not officially bound to make them. But in chancery, when a new trial is ordered of an issue sent out of chancery to a court of law, and it is suggested that some of the witnesses in the former trial are of an advanced age, an order may be made that, in the event of death or inability to attend, their testimony may be read from the judge's notes. 1 Greenleaf, Ev. § 166.

JUDGMENT. In Practice. The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pract. 930.

The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury.

Judgment of cassetur breve or *billa* (that the writ or bill be quashed) is a judgment rendered in favor of a party pleading in abatement to a writ or action. Stephen, Plead. 130, 131.

Judgment by confession is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.

Contradictory judgment is a judgment which has been given after the parties have been heard either in support of their claims or in their defence. 11 La. 366. It is used in Louisiana to distinguish such judgments from those rendered by default.

Judgment by default is a judgment rendered in consequence of the non-appearance of the defendant.

Judgment in error is a judgment rendered by a court of error on a record sent up from an inferior court.

Final judgment is one which puts an end to a suit.

Interlocutory judgment is one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. 3 Blackstone, Comm. 396.

Judgment of nil capiat per breve or *per billam* is a judgment in favor of the defendant upon an issue raised upon a declaration or peremptory plea.

Judgment by nil dicit is one rendered against a defendant for want of a plea.

Judgment of nolle prosequi is a judgment entered against the plaintiff where after appearance and before judgment he says "he will not further prosecute his suit." Stephen, Plead. 130.

Judgment of non-obstante veredicto is a judgment rendered in favor of the plaintiff *without regard to the verdict* obtained by the defendant.

Judgment of non pros. (*non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time.

Judgment by non sum informatus is one which is rendered when, instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Stephen, Plead. 130.

Judgment of non suit, a judgment rendered against the plaintiff when he, on trial by jury, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make an appearance.

Judgment pro retorno habendo is a judgment that the party have a return of the goods.

Judgment quod computet is a judgment in an action of account-render that the defendant do account.

Judgment quod partitio fiat is the interlocutory judgment in a writ of partition that partition be made.

Judgment quod partes replacitant is a judgment for repleader. See REPLEADER.

Judgment quod recuperet is a judgment in favor of the plaintiff (that he do recover) rendered when he has prevailed upon an issue in fact or an issue in law other than one arising on a dilatory plea. Stephen, Plead. 126.

Judgment of respondeat ouster is a judgment given against the defendant after he has failed to establish a dilatory plea upon which an issue in law has been raised.

Judgment of retraxit is one given against the plaintiff where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit."

2. Judgments upon facts found are the following. Judgment of *nul tiel record* occurs when some pleading denies the existence of a record, and issue is joined thereon; the record being produced is compared by the court with the statement in the pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains

judgment of *nul tiel record*. Judgment upon *verdict* is the most usual of the judgments upon facts found, and is for the party obtaining the verdict. *Judgment non-obstante veredicto* is a judgment rendered in favor of the plaintiff *notwithstanding the verdict* for the defendant: this judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has admitted himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case. Smith, Actions, 161. This is called a judgment upon confession, because it occurs after a pleading by defendant in confession and avoidance and issue joined thereon, and verdict found for defendant, and then it appears that the pleading was bad in law and might have been demurred to on that ground. The plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. Sometimes it may be expedient for the plaintiff to move for judgment *non-obstante veredicto* even though the verdict be in his favor; for, in a case like that described above, if he takes judgment *as upon the verdict* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*. 1 Wils. 63; Croke Eliz. 778; 2 Rolle, Abr. 99; 1 Bingh. N. C. 767. See, also, Croke Eliz. 214; 6 Mod. 10; Str. 394; 1 Ld. Raym. 641; 8 Taunt. 413; Rastell, Ent. 622; 1 Wend. N. Y. 307; 2 *id.* 624; 4 *id.* 468; 5 *id.* 513; 6 Cow. N. Y. 225. A judgment of *repleader* is given when issue is joined on an immaterial point, or one on which the court cannot give a judgment which will determine the right. On the award of a repleader, the parties must recommence their pleadings at the point where the immaterial issue originated. See REPLEADER. This judgment is interlocutory, *quod partes replacitent*. See Bacon, Abr. *Pleas*, 4 (M); 3 Hayw. No. C. 159.

3. Judgments upon facts admitted by the parties are as follows. Judgment upon a *demurrer* against the party demurring concludes him, because by demurring a party admits the facts alleged in the pleadings of his adversary, and relies on their insufficiency in law. It sometimes happens that though the adverse parties are agreed as to the facts, and only differ as to the law arising out of them, still these facts do not so clearly appear on the pleadings as to enable them to obtain the opinion of the court by way of *demurrer;* for on demurrer the court can look at nothing whatever except the pleadings. In such circumstances the statute 3 & 4 Will. IV. c. 42, § 25, which has been imitated in most of the states, allows them after issue joined, and on obtaining the consent of a single judge, to state the facts in a *special case* for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by *confession* or *nolle prosequi* immediately after the decision of the case; and judgment is entered accordingly. Sometimes *at the trial* the parties find that they agree on the facts, and the only question is one of law. In such case a verdict *pro forma* is taken, which is a species of admission by the parties, and is *general*, where the jury find for the plaintiff generally but subject to the opinion of the court on a *special case*, or *special*, where they state the facts as they find them, concluding that the opinion of the court shall decide in whose favor the verdict shall be, and that they assess the damages accordingly. The judgments in these cases are called, respectively, judgment on a *case stated*, judgment *on a general verdict subject to a special case*, and judgment *on a special verdict*.

4. Besides these, a judgment may be based upon the admissions or confessions of one only of the parties. Such judgments when for defendant upon the admissions of the plaintiff are: Judgment of *nolle prosequi*, where, after appearance and before judgment, the plaintiff says he "will not further prosecute his suit." Judgment of *retraxit* is one where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit," whereupon judgment is rendered against him. The difference between these is that a *retraxit* is a bar to any future action for the same cause; while a *nolle prosequi* is not, unless made after judgment. Bowden *vs.* Home, 7 Bingh. 716; 1 Wms. Saund. 207, n. A plaintiff sometimes, when he finds he has misconceived his action, obtains leave from the court to *discontinue*, on which there is a judgment against him and he has to pay costs; but he may commence a new action for the same cause. A *stet processus* is entered where it is agreed by leave of the court that all further proceedings shall be stayed: though in form a judgment for the defendant, it is generally, like discontinuance, in point of fact for the benefit of the plaintiff, and entered on his application, as, for instance, when the defendant has become insolvent, it does not carry costs. Smith, Actions, 162, 163.

5. Judgments for the plaintiff upon facts admitted by the defendant are judgment by *cognovit actionem*, *cognovit* or confession, where, instead of entering a plea, the defendant chooses to acknowledge the rightfulness of the plaintiff's action; or by confession *relicta verificatione*, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws, or abandons, his plea or other allegations. Upon this, judgment is entered against him without proceeding to trial.

Analogous to this is the judgment confessed by warrant of attorney: this is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment either by *cognovit actionem*, *nil dicit*, or *non sum informatus*. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given, 3 Dowl. 278, per *Parke*, B., but not before the execution of a warrant of attorney. Judgments by *nil dicit* and *non sum informatus*, though they are in fact founded upon a tacit acknowledgment on the part of the defendant that he has no defence to the plaintiff's action, yet as they are commonly reckoned among the judgments by defaults, they will be explained under that head.

6. A judgment is rendered on the default of a party, on two grounds: it is considered that the failure of the party to proceed is an admission that he, if plaintiff, has no just cause of action, or, if defendant, has no good defence; and it is intended as a penalty for his neglect; for which reason, when such judgment is set aside or opened at the instance of the defaulting party, the court generally require him to pay costs. Judgment *by default* is against the defendant when he has failed to appear after being served with the writ; to plead, after being ruled so to do, or, in Pennsylvania and some other states, to file an affidavit of defence within the prescribed time, or, generally, to take any step in the cause incumbent on him. Judgment by *non sum informatus* is a species of judgment by default, where, instead of entering a plea, the defendant's attorney says he is "not informed" of any answer to be given to the action. Judgment by *nil dicit* is rendered against the defendant where, after being ruled to plead, he neglects to do so within the time specified.

7. Judgment of *non pros.* (from *non prosequitur*) is one given against the plaintiff for a neglect to

take any of those steps which it is incumbent on him to take in due time. Judgment of *non suit* (from *non sequitur*, or *ne suit pas*) is where the plaintiff, after giving in his evidence, finds that it will not sustain his case, and therefore voluntarily makes default by absenting himself when he is called on to hear the verdict. The court gives judgment against him for this default; but the proceeding is really for his benefit, because after a non-suit he can institute another action for the same cause, which is not the case—except in ejectment, in some states—after a verdict and judgment against him. It follows that at common law the plaintiff cannot be nonsuited against his will; for a party cannot be compelled to make default. But in Pennsylvania, by statute, the plaintiff may be nonsuited compulsorily. This may be done in two cases: 1, under the act of 11th March, 1836, when the defendant has offered no evidence, and the plaintiff's evidence is not sufficient in law to maintain his action; 2, under the act of 14th April, 1846, confined to Philadelphia, when the cause is reached and the plaintiff or his counsel does not appear, or, if he appears, does not proceed to trial, and does not assign and prove a sufficient legal cause for continuance.

The formality of calling the plaintiff when he is to suffer a nonsuit is obsolete in most of the states.

In England, when the plaintiff neglects to carry down the record to the assizes for trial, the defendant is empowered, by stat. Geo. II. c. 17, to move for judgment *as in case of nonsuit*, which the court may either grant, or may, upon just and reasonable terms, allow the plaintiff further time to try the issue.

8. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. 3 Blackstone, Comm. 396. Such is a judgment for the plaintiff upon a plea in abatement, which merely decides that the cause must proceed and the defendant put in a better plea. But, in the ordinary sense, interlocutory judgments are those incomplete judgments whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained. This can only be the case where the plaintiff recovers; for judgment for the defendant is always complete as well as final. The interlocutory judgments of most common occurrence are where a demurrer has been determined for the plaintiff, or the defendant has made default, or has by *cognovit actionem* acknowledged the plaintiff's demand to be just. After interlocutory judgment in such case, the plaintiff must ordinarily take out a *writ of inquiry*, which is addressed to the sheriff, commanding him to summon a jury and assess the damages, and upon the return of the writ of inquiry final judgment may be entered for the amount ascertained by the jury. It is not always necessary to have a writ of inquiry upon interlocutory judgment; for it is said that "this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages," 3 Wils. 62, per *Wilmot*, C. J.; and accordingly, if the damages are matter of mere computation, as, for instance, interest upon a bill of exchange or promissory note, it is usual for the court to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 Term, 275; 1 H. Blackst. 541; 4 Price, 134. But in actions where a specific thing is sued for, as in actions of debt for a sum certain, the judgment upon demurrer, default, or confession is not interlocutory, but is absolutely complete and final in the first instance.

9. *Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon demurrer or default, because here, the *amount* being ascertained at the outset, the only question at issue is that respecting the right, and when that is determined nothing remains to be done.

When an issue in *fact*, or an issue in *law* arising on a peremptory plea, is determined for the plaintiff, the judgment is "that the plaintiff do recover, etc.," which is called a judgment *quod recuperet*. Stephen, Plead. 126; Comyn, Dig. *Abatement* (I 14, I 15); 2 Archbold, Pract. 3. When the issue in law arises on a dilatory plea and is determined for the plaintiff, the judgment is only that the defendant "do answer over," called a judgment of *respondeat ouster*. In an action of *account*, judgment for the plaintiff is that the defendant "do account," *quod computet*. Of these, the last two, *quod computet* and *quod respondeat ouster*, are interlocutory only; the first, *quod recuperet*, is either final or interlocutory according as the *quantum* of damages is or is not ascertained at the rendition of the judgment.

Judgment in error is either in affirmance of the former judgment; in recall of it for error in fact; in reversal of it for error in law; that the plaintiff be barred of his writ of error, where a plea of release of errors or of the statute of limitations is found for the defendant; or that there be a *venire facias de novo*, which is an award of a new trial. Smith, Actions, 196. A *venire facias de novo* will always be awarded when the plaintiff's declaration contains a good cause of action, and judgment in his favor is reversed by the court of error. 24 Penn. St. 470. In general, however, when judgment is *reversed*, the court of error not merely overturns the decision of the court below, but will give such a judgment as the court below ought to have given. Smith, Actions, 196.

10. Requisites of. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held, or out of his district, or if he rendered a judgment before the cause was prepared for a hearing.

The judgment must confine itself to the question raised before the court, and cannot extend beyond it. For example, where the plaintiff sued for an injury committed on his lands by animals owned and kept carelessly by defendant, the judgment may be for damages, but it cannot command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legislature. A judgment declares the rights which belong to the citizen, the law alone rules future actions. The law commands all men, it is the same for all, because it is general; judgments are particular decisions, which apply only to particular persons, and bind no others; they vary like the circumstances on which they are founded.

11. Effect of. Final judgments are com-

monly said to conclude the parties; and this is true in general, but does not apply to judgments for defendant on *non suit*, as in case of *non suit* by *nolle prosequi*, and the like, which are final judgments in one sense, because they put an end to all proceedings in the suit, but which nevertheless do not debar the plaintiff from instituting another suit for the same cause. With this qualification, the rule as to the effect of a judgment is as follows. The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court. The judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Duchess of Kingston's case, 20 Howell, St. Tr. 538; 2 Smith, Lead. Cas. 424; and see the authorities in this place. See, also, 2 Gall. C. C. 229; 4 Watts, Penn. 183. The rule above given relates to the effect of a judgment upon proceedings in another court; if the court is the same, of course the rule holds *a fortiori*. Moreover, all persons who are represented by the parties and claim under them or in privity with them are equally concluded by the proceeedings. All privies whatever in estate, in blood, or in law are, therefore, estopped from litigating that which is conclusive upon him with whom they are in privity. 1 Greenleaf, Ev. §§ 523, 536.

A further rule as to the conclusiveness of judgments is sometimes stated thus: "a judgment of a court of competent jurisdiction cannot be impeached or set aside in any *collateral* proceeding except on the ground of fraud." See, generally, 1 Greenleaf, Ev. pt. 3, ch. 5, and the authorities there cited.

This does not prevent a judgment from being attached *directly* by writ of error or other proceeding in the nature of an appeal; and its validity may be impeached in other *direct* proceedings, as by motion to open or set it aside, and in contests between creditors in regard to the validity of their respective judgments: in this latter class of cases the court will sometimes award a feigned issue to try questions of fact affecting the validity of the judgment.

And matters of defence arising since the judgment may be taken advantage of by a writ of *audita querela*, or, which is more usual, the court may afford summary relief on motion.

12. As to Form. The form of the judgment varies according to the nature of the action and the circumstances, such as default, verdict, etc., under which it is obtained. Anciently great particularity was required in the entries made upon the judgment roll; but now, even in the English practice, the drawing up the judgment roll is generally neglected, except in cases where it is absolutely necessary, as where it is desirable to give the proceedings in evidence on some future occasion. Smith, Actions, 169. In this country the roll is rarely if ever drawn up, the simple entry on the trial list and docket, "judgment for plaintiff," or "judgment for defendant," being all that is generally considered necessary; and though the formal entries are in theory still required to constitute a complete record, yet if such record should subsequently be needed for any purpose, it may be made up after any length of time from the skeleton entries upon the docket and trial list. See Wilkins *vs.* Anderson, 1 Jones, Penn. 399. When the record is thus drawn up in full, the ancient formalities must be observed, at least in a measure.

Judgments on Verdict.

In *account*, judgment for the plaintiff is interlocutory in the first instance, that the defendant *do account, quod computet*. 4 Wash. C. C. 84; 2 Watts, Penn. 95; 1 Penn. 138.

In *assumpsit*, judgment for the plaintiff is that he recover the damages assessed by the jury, and full costs of suit. 1 Chitty, Pl. 100. Judgment for the defendant is that he recover his costs. For the form, see Tidd, Pract. *Forms*, 165.

In *case, trover*, and *trespass*, the judgment is the same in substance, and differs but slightly in form from that in assumpsit. 1 Chitty, Plead. 100, 147.

In *covenant*, judgment for the plaintiff is that he recover the amount of his damages as found which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit. 1 Chitty, Plead. 116, 117. Judgment for defendant is for costs.

13. In *debt*, judgment for the plaintiff is that he recover his debt, and, in general, nominal damages for the detention thereof; and in cases under the 8th & 9th Will. III. c. 11, for successive breaches of a bond conditioned for the performance of covenant, it is also awarded that he have execution for such damages, and likewise full costs of suit. 1 Chitty, Pl. 108, 109. But in some penal and other actions the plaintiff does not always recover costs. Espinasse, Pen. Act. 154; Hull, Costs, 200; Buller, Nisi P. 333; 5 Johns. N. Y. 251. Judgment for defendant is generally for costs; but in certain penal actions neither party can recover costs. 5 Johns. N. Y. 251. See the form, Tidd, Pract. *Forms*, 176.

In *detinue*, judgment for the plaintiff is in the alternative that he recover the goods or the value thereof if he cannot have the goods themselves, with damages for the detention, and costs. 1 Chitty, Pl. 121, 122; 1 Dall. Penn. 458. See the form, Tidd, Pract. *Forms*, 187.

Executor. If judgment in any of the above

personal actions is against the defendant in the character of executor, it confines the liability of the defendant for the debt or damages to the amount of assets of the testator in his hands, but leaves him personally liable for costs. See the form, Tidd, Pract. *Forms*, 168. If the executor defendant has pleaded *plene administravit*, judgment against him confines his liability to such amount of the assets as shall hereafter come to his hands. See the form, Tidd, Pract. *Forms*, 174. A general judgment for costs against an administrator plaintiff is against the estate only.

14. In *dower*, judgment for demandant is interlocutory in the first instance with the award of a writ of *habere facias seisinam*, and inquiry of damages, on the return of which final judgment is rendered for the value of the land detained, as ascertained by the jury, from the death of the husband to the suing out of the inquisition, and costs of suit. See the form, 3 Chitty, Plead. 7th ed. 583–585.

In *ejectment*, judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession. See the form, 3 Blackstone, Comm. App. xii.; Tidd, Pract. *Forms*, 188.

In *partition*, judgment for plaintiff is also interlocutory in the first instance; *quod partitio fiat*, with award of the writ *de partitione facienda*, on the return of which final judgment is rendered,—"therefore it is considered that the partition aforesaid be held firm and effectual forever," *quod partitio facta firma et stabilis in perpetuam teneatur*. Co. Litt. 169; 2 Bl. Rep. 1159. See the form, 2 Sellon, Pract. 319, 2d ed. 222.

15. In *replevin*. If the replevin is in the *detinent*, *i.e.* where the plaintiff declares that the chattels "were detained until replevied by the sheriff," judgment for plaintiff is that he recover the damages assessed by the jury for the taking and unjust detention, or for the detention only where the taking was justifiable, and also his costs. 5 Serg. & R. Penn. 133; Hammond, Nisi P. 488. If the replevin is in the *detinet*, *i.e.* where the plaintiff declares that the chattels taken are "yet detained," the jury in giving a verdict for plaintiff find, in addition to the above, the value of the chattels each separately; for the defendant will perhaps restore some, in which case the plaintiff is to recover the value of the remainder. Hammond, Nisi P. 489; Fitzherbert, Nat. Brev. 159 *b*; 5 Serg. & R. Penn. 130.

If the replevin be *abated*, the judgment is that the writ or plaint abate, and that the defendant, having avowed, have a return of the chattels.

If the plaintiff is *nonsuited*, the judgment for defendant, at common law, is that the chattels be restored to him, and that without his first assigning the object of the taking, because by abandoning his suit the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," *pro retorno habendo*, without adding the words "to hold irreplevisable." Hammond, Nisi P. 490. For the form of judgments of *non-suit* under the statutes 21 Hen. VIII. c. 19, and 17 Car. II. c. 7, see Hammond, Nisi P. 490, 491; 2 Chitty, Plead. 161; 8 Wentworth, Pl. 116; 5 Serg. & R. Penn. 132; 1 Saund. 195, n. 3; 2 *id.* 286, n. 5. In these cases the defendant has the option of taking his judgment *pro retorno habendo* at common law. 5 Serg. & R. Penn. 132; 1 Lev. 255; 3 Term, 349.

When the avowant succeeds upon the merits, the common-law judgment is that he "have return irreplevisable;" for it is apparent that he is by law entitled to keep possession of the goods. 5 Serg. & R. Penn. 145; Hammond, Nisi P. 493; 1 Chitty, Pl. 162. For the form of judgment in such case under the statutes last mentioned, see Hammond, Nisi P. 494.

16. *After verdict*, the general form of judgment for plaintiff in actions on contracts sounding in damages, and in actions founded on *torts* unaccompanied with violence, is this. "Therefore it is considered that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges by the court, now here adjudged of increase to the said A B, with his assent; which said damages, costs, and charges in the whole amount to ——. And the said C D in mercy, etc." In *debt* for a sum certain, the general form is, "—— that the said A B do recover against the said C D his said debt, and also —— for his damages which he has sustained, as well on occasion of detaining the said debt as for his costs and charges by him about his suit in this behalf expended by the court now here adjudged to the said A B, and with his assent. And the said C D in mercy, etc." In actions founded on *torts* accompanied with violence, the form of judgment for plaintiff is, "—— that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges by the court now here adjudged of increase to the said A B, and with his consent; which said damages, costs, and charges in the whole amount to ——. And let the said C D be taken, etc."

Final judgment for the defendant is in these words: "Therefore it is considered that the said A B take nothing by his writ, but that he be in mercy, etc. (*or* that he and his pledges to prosecute be in mercy, etc.), and that the said C D do go thereof without day, etc. And it is further considered ——." Then follows the award of costs and of execution therefor. See Tidd, Pract. *Forms*, 189.

This is the general form of judgment for defendant, whether it arise upon interlocutory proceedings or upon verdict, and whatever be the form of action. This is sometimes called judgment of *nil capiat per breve* or *per billam*. Stephen, Pl. 128.

17. The words "and the said —— in mercy, etc.," or, as expressed in Latin, *quod sit in misericordia pro falso clamore suo*, were formerly an operative part of the judgment, it being an invariable rule of the common law that the party who lost his cause was punished by amercement for having unjustly asserted or resisted the claim. And on this account pledges of prosecution were required of the plaintiff before the return of the original, who were real and responsible persons and liable for these amercements. But afterwards the amercements ceased to be exacted, —perhaps because the payment of costs took their place,—and, this portion of the judgment becoming mere matter of form, the pledges returned were the fictitious names John Doe and Richard Roe. Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273, 274.

The words "and let the said —— be taken," in Latin, *capiatur pro fine*, which occur above in the form of judgment in actions founded on torts accompanied with violence, were operative at common law, because formerly a defendant adjudged to have committed a civil injury with actual violence was obliged to pay a fine to the king for the breach of the peace implied in the act, and was liable to be arrested and imprisoned till the fine was paid. This was abolished by stat. 5 W. & M. c. 12; but the form was still retained in entering judgment against defendant in such actions. See Gould, Plead. §§ 38, 82; Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273, 274; Style, 346.

These are called, respectively, judgments of *misericordia* and of *capiatur*.

18. *Judgments in other cases.* On a *plea in abatement*, either party may demur to the pleading of his adversary, or they may join issue. On demurrer, judgment for the plaintiff is that the defendant have another day to plead in chief, or, as it is commonly expressed, that he answer over: *quod respondeat ouster;* and judgment for defendant is that the writ be quashed: *quod cassetur billa* or *breve*. But if issue be joined, judgment for plaintiff is *quod recuperet*, that he recover his debt or damages, and not *quod respondeat;* judgment for defendant is the same as in the case of demurrer, that the writ be quashed. But the plaintiff may admit the validity of the plea in abatement, and may himself pray that his bill or writ may be quashed, *quod cassetur billa* or *breve*, in order that he may afterwards sue or exhibit a better one. Steph. Pl. 128, 130, 131; Lawes, Civ. Pl. See the form, Tidd, Pract. *Forms*, 195.

Judgment on *demurrer* in other cases, when for the plaintiff is interlocutory in *assumpsit* and actions sounding in damages, and recites that the pleading to which exception was taken by defendant appears sufficient in law, and that the plaintiff ought therefore to recover; but the amount of damages being unknown, a court of inquiry is awarded to ascertain them. See the form, Tidd, Pract. *Forms*, 181. In *debt* it is final in the first instance. See the form, *id.* pp. 181, 182. Judgment on demurrer when for the defendant is always final in the first instance, and is for costs only. See the form, *id.* 195, 196.

19. *Judgment by default*, whether by *nil dicit* or *non sum informatus*, is in these words, in assumpsit or other actions for damages, after stating the default: "wherefore the said A B ought to recover against the said C D his damages on occasion of the premises; but because it is unknown to the court, etc. now here what damages the said A B hath sustained by means of the premises, the sheriff is commanded, etc." Then follows the award of the writ of inquiry, on the return of which final judgment is signed. See the forms, Tidd, Pract. *Forms*, 165–169. In debt for a sum certain, as on a bond for the payment of a sum of money, the judgment on default is final in the first instance, no writ of inquiry being necessary. See the form, *id.* 169, 170.

Judgment by *cognovit actionem* is for the amount admitted to be due, with costs, as on a verdict. See the form, *id.* 176.

Judgment of *non pros.* or *non suit* is final, and is for defendant's costs only, which is also the case with judgment on a *discontinuance* or *nolle prosequi*. See *id.* 189–195.

20. Of Matters of Practice. *Of docketing the judgment.* By the stat. 4 & 5 W. & M. c. 20, all final judgments are required to be regularly docketed: that is, an abstract of the judgment is to be entered in a book called the judgment-docket. 3 Blackstone, Comm. 398. And in these states the same regulation prevails. Besides this, an index is required to be kept in England of judgments confessed upon warrant of attorney, and of certain other sorts of judgments. *Id.* 396, Shars. ed. n. (9). In most of the states this index is required to include all judgments. The effect of docketing the judgment is to notify all interested persons, including purchasers or incumbrancers of land upon which the judgment is a lien, and subsequent judgment creditors, of the existence and amount of the judgment. In Pennsylvania, the judgment index is for this purpose conclusive evidence of the amount of a judgment in favor of a purchaser of the land bound thereby, but not against him: if the amount indexed is less than the actual amount, the purchaser is not bound to go beyond the index; but if the amount indexed is too large, he may resort to the judgment-docket to correct the mistake. 1 Penn. St. 408.

And now, in England, judgments, in order to affect purchasers, mortgagees, and creditors, must be registered in the common pleas, and renewed every five years. See 2 & 3 Vict. c. 11, s. 5.

Of the time of entering the judgment. After verdict a brief interval is allowed to elapse before signing judgment, in order to give the defeated party an opportunity to apply for a new trial, or to move in arrest of judgment, if he is so disposed. This interval, in England, is four days. Smith, Actions, 150. In this country it is generally short; but, being

regulated either by statute or by rules of court, it of course may vary in the different states, and even in different courts of the same state.

See ARREST OF JUDGMENT; ASSUMPSIT; ATTACHMENT; CONFLICT OF LAWS; COVENANT; DEBT; DETINUE; EJECTMENT; FOREIGN JUDGMENT; LIEN; REPLEVIN; TRESPASS; TROVER.

JUDGMENT NISI. A judgment entered on the return of the nisi prius record with the postea indorsed, which will become absolute according to the terms of the "postea" unless the court out of which the nisi prius record proceeded shall, within the first four days of the following term, otherwise order.

Under the compulsory arbitration law of Pennsylvania, on filing the award of the arbitrators, judgment nisi is to be entered, which judgment is to be valid as if it had been rendered on a verdict of a jury, unless an appeal is entered within the time required by law.

JUDGMENT NOTE. A promissory note given in the usual form, and containing, in addition, a power of attorney to appear and confess judgment for the sum therein named.

It usually contains a great number of stipulations as to the time of confessing the judgment, 11 Ill. 623, against appeal and other remedies for setting the judgment aside, see 9 Johns. N. Y. 80; 20 *id.* 296; 2 Cow. N. Y. 465; 2 Penn. St. 501; 15 Ill. 356; and other conditions.

JUDGMENT PAPER. In English Practice. An *incipitur* of the pleadings, written on plain paper, upon which the master will sign judgment. 1 Archbold, Pract. 229, 306, 343.

JUDGMENT RECORD. In English Practice. A parchment roll, on which are transcribed the whole proceedings in the cause, deposited and filed of record in the treasury of the court, after signing of judgment. 3 Stephen, Comm. 632. See JUDGMENT ROLL. In American practice, the record is signed, filed, and docketed by the clerk, all of which is necessary to suing out execution. Graham, Pract. 341.

JUDGMENT ROLL. In English Law. A record made of the issue roll (which see), which, after final judgment has been given in the cause, assumes this name. Stephen, Plead. 133; 3 Chitty, Stat. 514.

JUDICATURE. The state of those employed in the administration of justice; and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction: as, the judicature is upon writs of error, etc. Comyn, Dig. *Parliament* (L 1). And see Comyn, Dig. *Courts* (A).

JUDICES PEDANEOS (Lat.). **In Roman Law.** Judges chosen by the parties.

Among the Romans, the prætors and other great magistrates did not themselves decide the actions which arose between private individuals: these were submitted to judges chosen by the parties, and these judges were called *judices pedaneos*. In choosing them, the plaintiff had the right to nominate, and the defendant to accept or reject those nominated. Heineccius, Antiq. lib. 4, tit. b. n. 40; 7 Toullier, n. 353.

JUDICIAL ADMISSIONS. Admissions of the party which appear of record as the admissions of the party.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. In English Law. A tribunal, composed of members of the privy council, which exercises the entire appellate jurisdiction of the queen in council, and also advises her majesty upon any matters which she may refer to it.

Its jurisdiction extends to cases in civil, ecclesiastical, and maritime law, in equity, and to many of the colonial cases, including cases arising under the Hindoo and Mohammedan law. It consists of eminent lawyers chiefly of judicial station. When questions arise which belong to any peculiar jurisdiction, as the ecclesiastical or civil, the attendance and aid of judges in that branch are required; and in case of questions under the Hindoo or other peculiar systems of law, assistance is, in like manner, derived from those skilled in such proceedings.

Allegations and proofs are made before this committee, which thereupon reports to the queen in council, by whom judgment is finally rendered. Blackstone, Comm. Warren Abr. 220.

JUDICIAL CONFESSIONS. In Criminal Law. Those voluntarily made before a magistrate, or in a court, in the due course of legal proceedings. A preliminary examination, taken in writing, by a magistrate lawfully authorized, pursuant to a statute, or the plea of guilty made in open court to an indictment, are sufficient to found a conviction upon them.

JUDICIAL CONVENTIONS. Agreements entered into in consequence of an order of court: as, for example, entering into a bond on taking out a writ of sequestration. 6 Mart. La. N. S. 494.

JUDICIAL DECISIONS. The opinions or determinations of the judges in causes before them. Hale, Hist. Crim. Law, 68; Willes, 666; 3 Barnew. & Ald. 122; 1 H. Blackst. 63; 5 Maule & S. 185. See DICTUM.

JUDICIAL MORTGAGE. In Louisiana. The lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them. La. Civ. Code, art. 3289.

JUDICIAL POWER. The authority vested in the judges.

The constitution of the United States declares that "the judicial power of the United

States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." Art. 3, s. 1.

By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively. *See the articles on the several states.* There is nothing in the constitution of the United States to forbid or prevent the legislature of a state from exercising judicial functions, 2 Pet. 413; and judicial acts have occasionally been performed by the legislatures. 2 Root, Conn. 350; 3 Me. 334; 4 *id.* 140; 3 Dall. Penn. 386; 2 Pet. 660; 16 Mass. 328; 1 Miss. 258; 1 N. H. 199; 10 Yerg. Tenn. 59; 2 N. Chipm. Vt. 77. But a state legislature cannot annul the judgments nor determine the jurisdiction of the courts of the United States, 5 Cranch, 115; 2 Dall. Penn. 410; nor authoritatively declare what the law is or has been, but what it shall be. 2 Cranch, 272; 4 Pick. Mass. 23; 3 Mart. La. 248; 4 *id.* 451; 6 *id.* 668; 9 *id.* 325; 10 *id.* 1; 3 Mart. La. N. s. 551; 5 *id.* 519.

JUDICIAL PROCEEDINGS. Proceedings relating to, practised in, or proceeding from, a court of justice.

2. Conclusive presumptions are made in favor of judicial proceedings. Thus, it is an undoubted rule of pleading that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged. 1 Saund. 74; 10 Q. B. 411, 455–459. So, also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form. 6 Coke, 54 *a;* 10 Q. B. 411, 455–459.

3. The rule is well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule, viz.: that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry. Heard, Lib. & S. §§ 101, 102. The rule that no action will lie for words spoken or written in the course of any judicial proceeding, has been acted upon from the earliest times. In 4 Coke, 14 *b*, it was adjudged that if one exhibits articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they have pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been very recently decided that though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it. 18 C. B. 126; 4 Hurlst. & N. Exch. 568.

4. The general rule is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceedings, in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved. Heard, Lib. & S. § 104.

JUDICIAL SALE. A sale, by authority of some competent tribunal, by an officer authorized by law for the purpose.

The officer who makes the sale conveys all the rights of the defendant, or other person against whom the process has been issued, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold. 9 Wheat. 616. When real estate is sold by the sheriff or marshal, the sale is subject to the confirmation of the court, or it may be set aside. See 4 Wash. C. C. 45, 322. See TAX SALE.

JUDICIAL WRITS. In English Practice. The capias and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable.

Being grounded on what had passed in that court in consequence of the sheriff's return, they are called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs. 3 Blackstone, Comm. 282.

JUDICIARY. That which is done while administering justice; the judges taken collectively: as, the liberties of the people are secured by a wise and independent judiciary. See COURTS; 3 Story, Const. b. 3, c. 38.

JUDICIUM DEI (Lat. the judgment or decision of God).

In Old English Law. A term applied to trials by ordeal; for, in all trials of this sort, God was thought to interfere in favor of the innocent, and so decide the cause. These trials are now all abolished.

JUICIO DE APEO. In Spanish Law.

The decree of a competent tribunal directing the determining and marking the boundaries of lands or estates.

JUICIO DE CONCURSO DE ACREEDORES. In Spanish Law. The decree obtained by a debtor against his creditors, or by the creditors against their debtor, for the payment of the amounts due, according to the respective rank of each creditor, when the property of the debtor is insufficient to pay the whole of his liabilities.

JUNIOR. Younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. 10 Paige, Ch. N. Y. 170; 7 Johns. N. Y. 549; 2 Caines, N. Y. 164; 1 Pick. Mass. 388; 15 *id.* 7; 17 *id.* 200; 3 Metc. Mass. 330.

Any matter that distinguishes persons renders the addition of *junior* or *senior* unnecessary. 1 Mod. Ent. 35; Salk. 7. But if father and son have both the same name, the father shall be *primâ facie* intended, if *junior* be not added, or some other matter of distinction. Salk. 7; 6 Coke, 20; 11 *id.* 39; Hob. 330. If father and son have the same name and addition, and the former sue the latter, the writ is abatable unless the son have the further addition of junior, or the younger. But if the father be the defendant and the son the plaintiff, there is no need of the further addition of *senior*, or the elder, to the name of the father. 2 Hawkins, Pl. Cr. 187; Laws of Women, 380.

JUNIPERUS SABINA (Lat.). **In Medical Jurisprudence.** This plant is commonly called savin.

It is used for lawful purposes in medicine, but too frequently for the criminal purpose of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes, for a grown person, is from two to four drops. Parr, Med. Dict. *Sabina.* Foderé mentions a case where a large dose of powdered savin had been administered to an ignorant girl in the seventh month of her pregnancy, which had no effect on the fœtus. It was, however, near taking the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, four or six grains, in the form of powder, kills a dog in a few hours; and even its insertion into a wound has the same effect. 3 Orfila, Traité des Poisons, 42. For a form of indictment for administering savin to a woman quick with child, see 3 Chitty, Crim. Law, 798. See 1 Beck, Med. Jur. 316.

JURA FISCALIA (Lat.). Rights of the exchequer. 3 Sharswood, Blackst. Comm. 45.

JURA PERSONARUM (Lat.). **In Civil Law.** Rights which belong to men in their different characters or relations, as father, apprentice, citizen, etc. 1 Sharswood, Blackst. Comm. 122, n.

JURA IN RE (Lat.). **In Civil Law.** Rights in a thing, as opposed to rights to a thing (*jura ad rem*). Rights in a thing which are not gone upon loss of possession, and which give a right to an action *in rem* against whoever has the possession. These rights are of four kinds: *dominium, hereditas, servitus, pignus.* Heineccius, Elem. Jur. Civ. § 333. See JUS IN RE.

JURA REGALIA (Lat.). Royal rights. 1 Sharswood, Blackst. Comm. 117, 119, 240; 3 *id.* 45. See 21 & 22 Vict. c. 45.

JURAMENTÆ CORPORALES (Lat.). Corporal oaths. These oaths are so called because the party making oath must touch the Bible, or other thing, by which he swears.

JURAMENTUM CALUMNIÆ (Lat. oath of calumny). **In Civil and Canon Law.** An oath required of plaintiff and defendant, whether the parties themselves insist on it or not, that they are not influenced in seeking their right by malice, but believe their cause to be just. It was also required of the attorneys and procurators of the parties. Called, also, *jusjurandum* or *sacramentum calumniæ.* Calvinus, Lex.; Vicat, Voc. Jur. Utr.; Clerke, Prax. Cur. Adm. tit. 42.

JURAMENTUM JUDICIALE (Lat.). **In Civil Law.** An oath which the judge, of his own accord, defers to either of the parties.

It is of two kinds: *first*, that which the judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium; second*, that which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem.* Pothier, Obl. p. 4, c. 3, s. 3, art. 3.

JURAT. In Practice. That part of an affidavit where the officer certifies that the same was "sworn" before him.

The jurat is usually in the following form, viz.: "Sworn and subscribed before me, on the —— day of ——, 1842. J. P., justice of the peace."

In some cases it has been holden that it was essential that the officer should sign the jurat, and that it should contain his addition and official description. 3 Caines, N. Y. 128. But see 2 Wend. N. Y. 283; 6 *id.* 543; 12 *id.* 223; 2 Cow. N. Y. 552; 2 Johns. N. Y. 479.

An officer in some English corporations, whose duties are similar to those of aldermen in others. Stat. 1 Edw. IV.; 2 & 3 Edw. VI. c. 30; 13 Edw. I. c. 26.

JURATA (Lat.). **In Old English Law.** A jury of twelve men sworn. Especially, a jury of the common law, as distinguished from *the assiza*, or jury established or re-established by stat. Hen. II.

The *jurata*, or common-law jury, was a jury called in to try the cause, upon the prayer of the parties themselves, in cases where a jury was not given by statute Hen. II., and as the jury was not given under the statute of Henry II., the *writ of attaint* provided in that statute would not be against a *jurata* for false verdict. It was common for the parties to a cause to request that the cause might be decided by the *assiza*, sitting as a *jurata*, in order to save trouble of summoning a new jury, in which case "*cadit assiza et vertitur in juratam,*" and the

cause is said to be decided *non in modum assizæ*, but *in modum juratæ*. 1 Reeve, Hist. Eng. Law, 335, 336; Glanville, lib. 13, c. 20; Bracton, lib. 3, c. 30. But this distinction has been long obsolete.

Juratæ were divided into: *first, jurata dilatoria*, which inquires out offences against the law, and presents their names, together with their offences, to the judge, and which is of two kinds, *major* and *minor*, according to the extent of its jurisdiction; *second, jurata judicaria*, which gives verdict as to the matter of fact in issue, and is of two kinds, *civilis*, in civil causes, and *criminalis*, in criminal causes. DuCange.

A clause in nisi prius record called the *jury clause*, so named from the word *jurata*, with which its Latin form begins. This entry, *juratur ponitur in respectu*, is abolished. Com. Law Proc. Act, 1852, § 104; Wharton, Law Lex. 2d Lond. ed.; 9 Coke, 32; 59 Geo. III. c. 46; 4 Sharswood, Blackst. Comm. 342. Such trials were usually held in churches, in presence of bishops, priests, and secular judges, after three days' fasting, confession, communion, etc. DuCange.

A certificate placed at the bottom of an affidavit, declaring that the witness has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is, "Sworn (or affirmed) before me, the —— day of ——, 18—." The jurat.

JURATORY CAUTION. A security sometimes taken in Scotch proceedings, when no better can be had, viz.: an inventory of effects given up upon oath, and assigned in security of the sums which may be found due. Bell, Dict.

JURE PROPINQUITATIS (Lat.). By right of relationship. Coke, Litt. 10 *b*.

JURE REPRESENTATIONIS (Lat.). By right of representation. See PER STIRPES. 2 Sharswood, Blackst. Comm. 219, n. 14, 224.

JURE UXORIS (Lat.). By right of a wife.

JURIDICAL. Relating to administration of justice, or office of a judge. Webster, Dict.

2. Regular; done in conformity to the laws of the country and the practice which is there observed.

JURIS ET DE JURE (Lat.). Of right and by law. A presumption is said to be *juris et de jure* when it is conclusive, *i.e.* when no evidence will be admitted to rebut it, in contradistinction to a presumption, which is simply *juris*, *i.e.* rebuttable by evidence. 1 Greenleaf, Ev. § 15, note; Wills, Circ. Ev. 29; Best, Presump. 20, § 17; Best, Ev. 43, § 48.

JURIS ET SEISINÆ CONJUNCTIO (Lat.). The union of seisin, or possession, and the right of possession, forming a complete title. 2 Sharswood, Blackst. Comm. 199, 311.

JURISCONSULTUS (Lat. skilled in the law). **In Civil Law.** A person who has such knowledge of the laws and customs which prevail in a state as to be able to advise, act, and to secure a person in his dealings. Cicero.

The early jurisconsults gave their opinions gratuitously, and were also employed in drawing up written documents. From Augustus to Adrian, only those allowed by the emperor could be jurisconsults: before and after those emperors, any could be jurisconsults who chose. If their opinion was unanimous, it had the force of law; if not, the praetor could follow which opinion he chose. Vicat, Voc. Jur. Utr.

There were two sects of jurisconsults at Rome, the Proculeians and Labinians. The former were founded by Labeo, and were in favor of innovation; the latter by Capito, and held to the received doctrines. Cushing, Int. Rom. Law, §§ 5, 6.

JURISDICTION (Lat. *jus*, law, *dicere*, to say). The authority by which judicial officers take cognizance of and decide causes. Power to hear and determine a cause. 3 Ohio, 494; 6 Pet. 591. It includes power to enforce the execution of what is decreed. 9 Johns. N. Y. 239; 3 Metc. Mass. 460; Thach. Crim. Cas. 202.

Appellate jurisdiction is that given by appeal from the judgment of another court.

Assistant jurisdiction is that afforded by a court of chancery in aid of a court of law: as, for example, by a bill of discovery, or for the perpetuation of testimony, and the like.

Jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists.

Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature.

Criminal jurisdiction is that which exists for the punishment of crimes.

Concurrent jurisdiction is that which is possessed over the same cause at the same time by two or more separate tribunals.

Exclusive jurisdiction is that which gives to one tribunal sole power to try the cause.

General jurisdiction is that which extends to a great variety of matters.

Limited jurisdiction (called, also, *special* and *inferior*) is that which extends only to certain specified causes.

Original jurisdiction is that bestowed upon a tribunal in the first instance.

Jurisdiction of the person is that obtained by the appearance of the defendant before the tribunal. 9 Mass. 462.

Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised. 9 Mass. 462.

2. Jurisdiction is given by the law, 11 Barb. N. Y. 309; 22 *id.* 323; 3 Tex. 157, and cannot be conferred by consent of the parties. 5 Mich. 331; 2 Greene, Iowa, 374; 3 Iowa, 470; 23 Conn. 112; 2 Ohio St. 223; 11 Ga. 453; 23 Ala. N. s. 155; 34 Me. 223; 4 Cush. Mass. 27; 4 Gilm. Va. 131; 6 Ired. No. C. 139; 4 Yerg. Tenn. 579; 3 M'Cord, So. C. 280; 12 Miss. 549; see 17 Mo. 258; but a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter. 4 Ga. 47; 11 *id.* 453; 14 *id.* 589; 6 Tex. 379; 13 Ill. 432; 1 Iowa, 94; 1 Barb. N. Y. 449; 7 Humphr. Tenn. 209; 4 Mass. 593; 4 M'Cord. So. C. 79; 3 McLean, C. C. 587; 4 Wash. C. C. 84; 5 Cranch, 288; 8 Wheat. 699.

3. Jurisdiction given by the law of the sovereignty of the tribunal is held sufficient everywhere, at least as to all property within the sovereignty, 2 Blatchf. C. C. 427; 10

Rich. Eq. So. C. 19; 27 Mo. 594; 1 R. I. 285, and as to persons of whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction. 6 Tex. 275; 4 N. Y. 375; 8 Ga. 83. See 11 Barb. 309. But the appearance of a person on whom no personal service of process has been made, merely to object to the jurisdiction, is not such an admission. 37 N. H. 9; 9 Mass. 462; Hard. Ky. 96. And see 2 Sandf. N. Y. 717. Jurisdiction must be either *of the cause*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or *of the person*, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to the law of the sovereignty, Dav. Dist. Ct. 407; of the latter, as a simple question of fact. See CONFLICT OF LAWS; FOREIGN JUDGMENTS.

4. A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown. 10 Ga. 371; 10 Barb. N. Y. 97; 3 Ill. 269; 13 *id.* 432; 15 Vt. 46; 2 Dev. No. C. 431; 4 *id.* 305. A court of limited jurisdiction, or a court acting under special powers, has only the jurisdiction expressly delegated, 27 Ala. N. S. 291; 32 *id.* 227; 26 Mo. 65; 1 Dougl. Mich. 384; 7 Hill, So. C. 39; and it must appear from the record that its acts are within its jurisdiction, 5 Harr. Del. 387; 2 Harr. N. J. 25; 3 Green, N. J. 57; 1 Dutch. N. J. 554; 2 Zabr. N. J. 356, 396; 2 Ill. 554; 20 *id.* 286; 27 Mo. 101; 1 Hempst. Ark. 423; 22 Barb. N. Y. 323; 28 Miss. 737; 26 Ala. N. S. 568; 5 Ind. 157; 1 Greene, Iowa, 78; 21 Me. 340; 16 Vt. 246; 2 How. 319, unless the legislature, by general or special law, remove this necessity. 24 Ga. 245; 7 Mo. 373; 1 Pet. C. C. 36. See 1 Salk. 414; Bacon, Abr. *Courts* (C, D).

Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause. 1 Grant, Cas. Penn. 212; 8 Ohio St. 599; 16 Ohio, 373; 27 Vt. 518; 28 *id.* 470; 25 Barb. N. Y. 513; 8 Md. 254; 2 Md. Ch. Dec. 42; 4 Tex. 242; 19 Ala. N. S. 438; 1 Fla. 198; 2 Murph. No. C. 195; 6 McLean, C. C. 355.

5. Any act of a tribunal beyond its jurisdiction is null and void, and of no effect whatever, 33 Me. 414; 13 Ill. 432; 21 Barb. N. Y. 9; 26 N. H. 232, whether without its territorial jurisdiction, 21 How. 506; 1 Grant, Cas. Penn. 218; 15 Ga. 457, or beyond its powers. 22 Barb. N. Y. 271; 13 Ill. 432; 1 Strobh. So. C. 1; 1 Dougl. Mich. 390; 5 T. B. Monr. Ky. 261; 16 Vt. 246. Want of jurisdiction may be taken advantage of by plea in abatement, 18 Ill. 292; 3 Johns. N. Y. 105; 20 How. 541; see 6 Fla. 724, and must be taken advantage of before making any plea to the merits, if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person. 7 Cal. 584; 19 Ark. 241; 17 *id.* 340; 28 Mo. 319; 22 Barb. N. Y. 323; 6 Cush. Mass. 560; 13 Ga. 318; 20 How. 541. See 2 R. I. 450; 30 Ala. N. S. 62. But where the cause of action is not within the jurisdiction granted by law to the tribunal, it will dismiss the suit at any time when the fact is brought to its notice. 22 Barb. N. Y. 271; 23 Conn. 172; 2 Ohio St. 26; 5 T. B. Monr. Ky. 261; 13 Vt. 175; 4 Ill. 133.

Courts of dernier resort are conclusive judges of their own jurisdiction. 1 Park. Crim. N. Y. 360; 1 Bail. So. C. 294.

JURISDICTION CLAUSE. In Equity Practice. That part of a bill which is intended to give jurisdiction of the suit to the court, by a general averment that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the *jurisdiction clause*. Mitford, Eq. Plead. Jeremy ed. 43.

This clause is unnecessary; for if the court appear from the bill to have jurisdiction, the bill will be sustained without this clause; and if the court have not jurisdiction, the bill will be dismissed though the clause may be inserted. Story, Eq. Plead. § 34.

JURISPRUDENCE. The science of the law. The practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise.

By science, in the first definition, is understood that connection of truths which is founded on principles either evident in themselves or capable of demonstration,—a collection of truths of the same kind, arranged in methodical order. In the latter sense, it is the habit of judging the same questions in the same manner, and by this course of judgments forming precedents. 1 Ayliffe, Pand. 3; Toullier, Droit. Civ. Fr. tit. prél. s. 1, n. 1, 12, 99; Merlin, Répert.; 19 Am. Jur. 3.

JURIST. One versed in the science of the law. One skilled in the civil law. One skilled in the law of nations.

JURO. In Spanish Law. A certain pension granted by the king on the public revenues, and more especially on the salt-works, by favor, either in consideration of meritorious services or in return for money loaned the government or obtained by it through forced loans. It is a portion of the yearly revenue of the state, assigned as a rightful indemnity, either in perpetuity or as an annuity.

JUROR (Lat. *juro*, to swear). A man who is sworn or affirmed to serve on a jury.

JURY (Lat. *jurata*, sworn). **In Practice.** A body of men who are sworn to declare the facts of a case as they are delivered from the evidence placed before them.

The origin of this venerable institution of the common law is lost in the obscurity of the middle ages. Antiquarians trace it back to an early period of English history; but, if known to the Saxons, it must have existed in a very crude form, and may have been derived to them from the mode of administering justice by the peers of litigant parties, under the feudal institutions of France, Germany, and the other northern nations of Europe. The ancient ordeals of red-hot iron and boiling water,

practised by the Anglo-Saxons to test the innocence of a party accused of crime, gradually gave way to the wager of battle, in the days of the Normans; while this latter mode of trial disappeared in civil cases in the thirteenth century, when Henry II. introduced into the assizes a trial by jury. It is referred to in Magna Charta as an institution existing in England at that time; and its subsequent history is well known. See GRAND ASSIZE; 3 Blackstone, Comm. 349; 1 Reeve, Hist. Eng. Law, 23, 84; Glanville, c. 9; Bracton, 155.

Trial by jury is guaranteed by the constitution of the United States in all criminal cases except upon impeachments, and in all suits at common law where the subject-matter of the controversy exceeds twenty dollars in value. The right to such a trial is also asserted in many of our state constitutions.

A common jury is one drawn in the usual and regular manner.

A grand jury is a body organized for certain preliminary purposes.

A jury de medietate linguæ is one composed half of aliens and half of denizens.

Such juries might formerly be claimed, both in civil and criminal cases, where the party claiming the privilege was an alien born, by virtue of 28 Edw. III. c. 13. And see 8 Hen. VI. c. 29; 3 Geo. III. c. 25, by which latter statute the right is thought to be taken away in civil cases. See 3 Sharswood, Blackst. Comm. 360; 4 *id.* 352. A provision of a similar nature, providing for a jury one-half of the nationality of the party claiming the privilege where he is a foreigner, exists in some of the states of the United States.

A petit jury is a jury who try the question in issue and pass finally upon the truth of the facts in dispute. The term jury is ordinarily applied to this body distinctively.

A special jury is one selected by the assistance of the parties.

This is granted in some cases upon motion and cause shown, under various local provisions. See 33 Eng. L. & Eq. 406. The method at common law was for the officer to return the names of forty-eight principal freeholders to the prothonotary or proper officer. The attorneys of the respective parties, being present, strike off each twelve names, and from the remaining twenty-four the jury is selected. A similar course is pursued in those states where such juries are allowed. See 3 Sharswood, Blackst. Comm. 357.

A struck jury is a special jury. See 4 Zabr. N. J. 843.

2. *The number* of jurors must be twelve; and it is held that the term jury in a constitution imports, *ex vi termini*, twelve men. 6 Metc. Mass. 231; 4 Ohio St. 177; 2 Wisc. 22; 3 *id.* 219; 12 N. Y. 190; 13 *id.* 427.

Qualifications of jurors. Jurors must possess the qualifications which may be prescribed by statute, must be free from any bias caused by relationship to the parties or interest in the matter in dispute, and in criminal cases must not have formed any opinion as to the guilt or innocence of the accused. See CHALLENGE.

The selection of jurors is to be made impartially; and elaborate provisions are made to secure this impartiality. In general, a sufficient number are selected, from among the qualified citizens of the county or district, by the sheriff, or similar executive officer of the court, and, in case of his disqualification, by the coroner, or, in some cases, by still other designated persons. See ELISUS. From among these the requisite number is selected at the time of trial, to whom objection may be made by the parties. See CHALLENGE.

3. *The province* of the jury is to determine the truth of the facts in dispute in civil cases, and the guilt or innocence of the person accused in criminal cases. See CHARGE. If they go beyond their province, their verdict may be set aside. 4 Maule & S. 192; 3 Barnew. & C. 357; 2 Price, Exch. 282; 4 Bingh. 195; 2 Cow. N. Y. 479; 10 Mass. 39.

Duties and privileges of. Qualified persons may be compelled to serve as jurors under penalties prescribed by law. They are exempt from arrest in certain cases. See PRIVILEGE. They are liable to punishment for misconduct in some cases.

Consult Edwards, Forsyth, Ingersoll, on Juries; 1 Kent, Comm. 10th ed. 623, 640.

JURY BOX. A place set apart for the jury to sit in during the trial of a cause.

JURY LIST. A paper containing the names of jurors impanelled to try a cause, or it contains the names of all the jurors summoned to attend court.

JURYMAN. A juror; one who is impanelled on a jury. Webster, Dict.

JURY PROCESS. **In Practice.** The writs for summoning a jury, viz.: in England, *venire juratores facias*, and *distringas juratores*, or *habeas corpora juratorum*. These writs are now abolished, and jurors are summoned by precept. 1 Chitty, Archb. Prac. by Prent. 344; Com. Law Proc. Act, 1852, §§ 104, 105; 3 Chitty, Stat. 519.

JURY WOMEN. A jury of women is given in two cases: viz.: on writ *de ventre inspiciendo*, in which case the jury is made up of men and women, but the search is made by the latter, 1 Mad. Ch. 11; 2 P. Will. 591; and where pregnancy is pleaded by condemned criminal in delay of execution, in which case a jury of twelve discreet women is formed, and on their returning a verdict of "enseinte" the execution is delayed till birth, and sometimes the punishment commuted to perpetual exile. But if the criminal be *priviment enseinte*, and not *quick*, there is no respite. 2 Hale, Pl. Cr. 412. As to time of quickening, see 1 Beck, Med. Jur. 229.

JUS (Lat.). Law; right; equity. Story, Eq. Jur. § 1.

JUS ABUTENDI (Lat.). The right to abuse. By this phrase is understood the right to abuse property, or having full dominion over property. 3 Toullier, n. 86.

JUS ACCRESCENDI (Lat.). The right of survivorship.

At common law, when one of several joint tenants died, the entire tenancy or estate went to the survivors, and so on to the last survivor, who took an estate of inheritance. This right, except in estates held in trust, has been abolished by statute in Alabama, Delaware, Georgia, Illinois, Indiana, Kentucky,

Michigan, Missouri, Mississippi, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia, Griffin, Reg.; 1 Hill, Abr. 439, 440; in Connecticut, 1 Root, Conn. 48; 1 Swift, Dig. 102. In Louisiana, this right was never recognized. See 11 Serg. & R. Penn. 192; 2 Caines, Cas. N. Y. 326; 3 Vt. 543; 6 T. B. Monr. Ky. 15; ESTATE IN COMMON; ESTATE IN JOINT TENANCY.

JUS AQUÆDUCTUS (Lat.). **In Civil Law.** The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through, the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below. 2 Rolle, Abr. 140, l. 25; Lois des Bât. part 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it. Dig. 8. 3. 1. 10; 3 Burge, Confl. of Laws, 417. See RIVER; WATER-COURSE; Washburn, Easements.

JUS CIVILE (Lat.). **In Roman Law.** The private law, in contradistinction to the public law, or *jus gentium*. 1 Savigny, Dr. Rom. c. 1, § 1.

JUS CIVITATIS (Lat.). **In Roman Law.** The collection of laws which are to be observed among all the members of a nation. It is opposed to *jus gentium*, which is the law which regulates the affairs of nations among themselves. 2 Lepage, El. du Dr. c. 5, page 1.

JUS CLOACÆ (Lat.). **In Civil Law.** The name of a servitude which requires the party who is subject to it to permit his neighbor to conduct the waters which fall on his grounds over those of the servient estate.

JUS DARE (Lat.). To give or to make the law. *Jus dare* belongs to the legislature; *jus dicere*, to the judge.

JUS DELIBERANDI (Lat.). The right of deliberating given to the heir, in those countries where the heir may have *benefit of inventory*, (*q. v.*), in which to consider whether he will accept or renounce the succession.

In Louisiana, he is allowed ten days before he is required to make his election. La. Civ. Code, art. 1028.

JUS DICERE (Lat.). To declare the law. It is the province of the court *jus dicere* (to declare what the law is).

JUS DISPONENDI (Lat.). The right to dispose of a thing.

JUS DUPLICATUM (Lat. double right). When a man has the possession as well as the property of any thing, he is said to have a double right, *jus duplicatum*. Bracton, l. 4, tr. 4, c. 4; 2 Blackstone, Comm. 199.

JUS FECIALE (Lat.). **In Roman Law.** That species of international law which had its foundation in the religious belief of different nations: such as the international law which now exists among the Christian people of Europe. Savigny, Dr. Rom. c. 2, § 11.

JUS FIDUCIARUM (Lat.) **In Civil Law.** A right to something held in trust: for this there was a remedy in conscience. 2 Blackstone, Comm. 328.

JUS GENTIUM (Lat.). The law of nations. Although the Romans used these words in the sense we attach to *law of nations*, yet among them the sense was much more extended. Falck, Encyc. Jur. 102, n. 42.

Modern writers have made a distinction between the laws of nations which have for their object the conflict between the laws of different nations, which is called *jus gentium privatum*, or private international law, and those laws of nations which regulate those matters which nations, as such, have with each other, which is denominated *jus gentium publicum*, or public international law. Fœlix, Droit Intern. Privé, n. 14. See INTERNATIONAL LAW.

JUS GLADII (Lat. the right of the sword). Supreme jurisdiction. The right to absolve from or condemn a man to death.

JUS HABENDI (Lat.). The right to have a thing.

JUS INCOGNITUM (Lat.). An unknown law. This term is applied by the civilians to obsolete laws, which, as Bacon truly observes, are unjust; for the law to be just must give warning before it strikes. Bacon, Aph. 8, s. 1; Bowyer, Mod. Civ. Law, 33. But until it has become obsolete no custom can prevail against it. See OBSOLETE.

JUS LEGITIMUM (Lat.). **In Civil Law.** A legal right which might have been enforced by due course of law. 2 Blackstone, Comm. 328.

JUS MARITI (Lat.). **In Scotch Law.** The right of the husband to administer, during the marriage, his wife's goods and the rents of her heritage.

In the common law, by *jus mariti* is understood the rights of the husband, as *jus mariti* cannot attach upon a bequest to the wife, although given during coverture, until the executor has assented to the legacy. 1 Bail. Eq. So. C. 214.

JUS MERUM (Lat.). A simple or bare right; a right to property in land, without possession or the right of possession.

JUS PATRONATUS (Lat.). **In Ecclesiastical Law.** A commission from the bishop, directed usually to his chancellor and others of competent learning, who are required to summon a jury, composed of six clergymen and six laymen, to inquire into and examine who is the rightful patron. 3 Blackstone, Comm. 246.

JUS PERSONARUM (Lat.). The right of persons. See JURA PERSONARUM.

JUS PRECARIUM (Lat.). **In Civil Law.** A right to a thing held for another,

for which there was no remedy. 2 Blackstone, Comm. 328.

JUS POSTLIMINII (Lat.). The right to claim property after recapture. See POSTLIMINY; Marshall, Ins. 573; 1 Kent, Comm. 108; Dane, Abr. Index.

JUS PROJICIENDI (Lat.). **In Civil Law.** The name of a servitude by which the owner of a building has a right of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50. 16. 242; 8. 2. 25; 8. 5. 8. 5.

JUS PROTEGENDI (Lat.). **In Civil Law.** The name of a servitude: it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50. 16. 242. 1; 8. 2. 25; 8. 5. 8. 5.

JUS QUÆSITUM (Lat.). A right to ask or recover: for example, in an obligation there is a binding of the obligor, and a *jus quæsitum* in the obligee. 1 Bell, Comm. 5th ed. 323.

JUS IN RE (Lat.). A right which belongs to a person, immediately and absolutely, in a thing, and which is the same against the whole world,—*idem erga omnes*.

JUS RELICTÆ (Lat.). **In Scotch Law.** The right of a wife, after her husband's death, to a third of movables if there be children, and to one-half if there be none.

JUS AD REM (Lat.). A right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

The *jus in re*, by the effect of its very nature, is independent and absolute, and is exercised *per se ipsum*, by applying it to its object; but the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound to me *ad aliquid dandum, vel faciendum, vel præstandum*. Thus, if I have the ownership of a horse, the usufruct of a flock of sheep, the right of habitation of a house, a right of way over your land, etc., my right in the horse, in the flock of sheep, in the house, or the land, belongs to me directly, and without any intermediary; it belongs to me absolutely, and independently of any particular relation with another person; I am in direct and immediate relation with the thing itself which forms the object of my right, without reference to any other relation. This constitutes a *jus in re*. If, on the other hand, the horse is lent to me by you, or if I have a claim against you for a thousand dollars, my right to the horse or to the sum of money exists only relatively, and can only be exercised through you; my relation to the object of the right is mediate, and is the result of the immediate relation of debtor and creditor existing between you and me. This is a *jus ad rem*. Every *jus in re*, or real right, may be vindicated by the *actio in rem* against him who is in possession of the thing, or against any one who contests the right. It has been said that the words *jus in re* of the civil law convey the same idea as thing in possession at common law. This is an error, arising from a confusion of ideas as to the distinctive characters of the two classes of rights. Nearly all the common-law writers seem to take it for granted that by the *jus in re* is understood the title or property in a thing in the possession of the owner; and that by the *jus ad rem* is meant the title or property in a thing not in the possession of the owner. But it is obvious that *possession* is not one of the elements constituting the *jus in re*: although possession is generally, but not always, one of the incidents of this right, yet the loss of possession does not exercise the slightest influence on the character of the right itself, unless it should continue for a sufficient length of time to destroy the right altogether by prescription. In many instances the *jus in re* is not accompanied by possession at all: the usuary is not entitled to the possession of the thing subject to his use; still, he has a *jus in re*. So with regard to the right of way, etc. See DOMINIUM.

A mortgage is considered by most writers as a *jus in re;* but it is clear that it is a *jus ad rem:* it is granted for the sole purpose of securing the payment of a debt or the fulfillment of some other personal obligation. In other words, it is an accessory to a principal obligation and corresponding right: it can have no separate and independent existence. The immovable on which I have a mortgage is not the object of the right, as in the case of the horse of which I am the owner, or the house of which I have the right of habitation, etc.: the true object of my right is the sum of money due to me, the payment of which I may enforce by obtaining a decree for the sale of the property mortgaged. 2 Marcadé, 350 *et seq.*

JUS RERUM (Lat.). The right of things. Its principal object is to ascertain how far a person can have a permanent dominion over things, and how that dominion is acquired. See Blackstone, Comm.

JUS STRICTUM (Lat.). A Latin phrase, which signifies law interpreted without any modification, and in its utmost rigor.

JUS UTENDI (Lat.). The right to use property without destroying its substance. It is employed in contradistinction to the *jus abutendi*. 3 Toullier, n. 86.

JUSTICE. The constant and perpetual disposition to render every man his due. Justinian, Inst. b. 1, tit. 1; Coke, 2d Inst. 56. The conformity of our actions and our will to the law. Toullier, Droit Civ. Fr. tit. prél. n. 5.

Commutative justice is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss.

Distributive justice is that virtue whose object it is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. Tr. of Eq. 3; and Toullier's learned note, Droit Civ. Fr. tit. prél. n. 7, note.

In the most extensive sense of the word, it differs little from virtue; for it includes within itself the whole circle of virtues. Yet the common distinction between them is, that that which considered positively and in itself is called virtue, when considered relatively and with respect to others has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridg-

ments of the ancient doctors, and prefers the division of *internal* and *external* justice,—the first being a conformity of our *will*, and the latter a conformity of our *actions*, to the law, their union making perfect justice. Exterior justice is the object of jurisprudence; interior justice is the object of morality. Droit Civ. Fr. tit. prél. n. 6 et 7.

According to the Frederician Code, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws. And, as this definition includes all the other rules of right, there is properly but one single general rule of right, namely: *Give every one his own.*

In Norman French. Amenable to justice. Kelham, Dict.

In Feudal Law. Feudal jurisdiction, divided into high (*alta justitia*), and low, (*simplex, inferior justitia*), the former being a jurisdiction over matters of life and limb, the latter over smaller causes. Leg. Edw. Conf. c. 26; DuCange. Sometimes high, low, and middle justice or jurisdiction were distinguished.

An assessment, DuCange; also, a judicial fine. DuCange.

At Common Law. A title given in England and America to judges of common-law courts, being a translation of *justitia*, which was anciently applied to common-law judges, while *judex* was applied to ecclesiastical judges and others; *e.g. judex fiscalis.* Leges Hen. I. §§ 24, 63; Anc. Laws & Inst. of Eng. Index; Coke, Litt. 71 *b.*

The judges of king's bench and common pleas, and the judges of almost all the supreme courts in the United States, are properly styled "justices."

The term justice is also applied to the lowest judicial officers: *e.g.* a trial justice; a justice of the peace.

JUSTICE AYRES. In Scotch Law. The circuits through the kingdom made for the distribution of justice. Erskine, Inst. 1. 3. 25.

JUSTICE OF THE PEACE. A public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the law.

2. These officers, under the constitution of the United States and some of the states, are appointed by the executive; in others, they are elected by the people and commissioned by the executive. In some states they hold their office during good behavior; in others, for a limited period.

3. At common law, justices of the peace have a double power in relation to the arrest of wrong-doers: when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so, and, in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers when the affray has been committed in their presence. If a magistrate be not present when a crime is committed, before he can take a step to arrest the offender an oath or affirmation must be made, by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender or there is probable cause to believe that he has committed the offence.

4. The constitution of the United States directs that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

5. In some, perhaps all, the United States, justices of the peace have jurisdiction in civil cases given to them by local regulations. In Pennsylvania, their jurisdiction in cases of contracts, express or implied, extends to one hundred dollars.

See, generally, Burn, Just.; Graydon, Just.; Bache, Man. of a Just. of the Peace; Comyn, Dig.; 15 Viner, Abr. 3; Bacon, Abr.; 2 Sellon, Pract. 70; 2 Phillipps, Ev. 239; Chitty, Pract.; Davis, Just.; the articles on the various states.

JUSTICES COURTS. In American Law. Inferior tribunals, with limited jurisdiction, both civil and criminal. There are courts so called in the states of Massachusetts and New Hampshire, and probably other states.

JUSTICES IN EYRE. Certain judges established, if not first appointed, A.D. 1176, 22 Hen. II.

England was divided into certain circuits, and three justices in eyre—or justices itinerant, as they were sometimes called—were appointed to each district, and made the circuit of the kingdom once in seven years, for the purpose of trying causes. They were afterwards directed, by Magna Charta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes mere justices of assize or dower, or of general gaol delivery, and the like. 3 Blackstone, Comm. 58; Crabb, Eng. Law, 103–104.

JUSTICES OF THE PAVILION (*justiciarii pavilionis*). Certain judges of a pye-pouder court, of a most transcendent jurisdiction, authorized by the bishop of Winchester, at a fair held at St. Giles Hills near that city, by virtue of letters-patent granted by Edw. IV. Prynne's Animadv. on Coke's 4th Inst. fol. 191.

JUSTICES OF TRAIL BASTION. A sort of justice in eyre, with large and summary powers, appointed by Edw. I. during his absence in war. Old. Nat. Brev. fol. 52; 12 Coke, 25. For derivation, see Cowel.

JUSTICIAR, JUSTICIER. In Old English Law. A judge or justice. Baker, fol. 118; Cron. Angl. One of several persons learned in the law, who sat in the *aula regis*, and formed a kind of court of appeal in cases of difficulty.

The chief justiciar (*capitalis justiciarius totius Angliæ*) was a special magistrate, who presided over the whole *aula regis*, who was the principal minister of state, the second

man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. 3 Sharswood, Blackst. Comm. 37; Spelman, Gloss. 331, 332, 330; 2 Hawkins, Pl. Cr. 6. The last who bore this title was Philip Basset, in the time of Hen. III.

JUSTICIARII ITINERANTES (Lat.). **In English Law.** Justices who formerly went from county to county to administer justice. They were usually called justices in eyre, to distinguish them from justices residing at Westminster, who were called *justicii residentes*. Coke, Litt. 293.

JUSTICIARII RESIDENTES (Lat.). **In English Law.** Justices or judges who usually resided in Westminster: they were so called to distinguish them from justices in eyre. Coke, Litt. 293.

JUSTICIARY. Another name for a judge. In Latin, he was called *justiciarius*, and in French, *justicier*. Not used. Bacon, Abr. *Courts* (A).

JUSTICIES (from verb *justiciare*, 2d pers. pres. subj. do you justice).

In English Law. A special writ, in the nature of a commission, empowering a sheriff to hold plea in his county court of a cause which he could not take jurisdiction of without this writ: *e.g.* trespass *vi et armis* for any sum, and all personal actions above forty shillings. 1 Burn, Just. 449. So called from the Latin word *justicies*, used in the writ, which runs, "*præcipimus tibi quod justicies A B*," etc.; we command you to do A B right, etc. Bracton, lib. 4, tr. 6, c. 13; Kitch. 74; Fitzherbert, Nat. Brev. 117; 3 Sharswood, Blackst. Comm. 3, 6.

JUSTIFIABLE HOMICIDE. That which is committed with the intention to kill, or to do a grievous bodily injury, under circumstances which the law holds sufficient to exculpate the person who commits it. A judge who, in pursuance of his duty, pronounces sentence of death, is not guilty of homicide; for it is evident that, as the law prescribes the punishment of death for certain offences, it must protect those who are intrusted with its execution. A judge, therefore, who pronounces sentence of death, in a legal manner, on a legal indictment, legally brought before him, for a capital offence committed within his jurisdiction, after a lawful trial and conviction of the defendant, is guilty of no offence. 1 Hale, Pl. Cr. 496–502.

Magistrates, or other officers intrusted with the preservation of the public peace, are justified in committing homicide, or giving orders which lead to it, if the excesses of a riotous assembly cannot be otherwise repressed. 4 Blackstone, Comm. 178, 179.

An officer intrusted with a legal warrant, criminal or civil, and lawfully commanded by a competent tribunal to execute it, will be justified in committing homicide, if in the course of advancing to discharge his duty he be brought into such perils that without doing so he cannot either save his life or discharge the duty which he is commanded by the warrant to perform. And when the warrant commands him to put a criminal to death, he is justified in obeying it.

A soldier on duty is justified in committing homicide, in obedience to the command of his officer, unless the command was something plainly unlawful.

A private individual will, in many cases, be justified in committing homicide while acting in self-defence. See DEFENCE.

See, generally, ARREST; HOMICIDE; 4 Blackstone, Comm. 178 *et seq.*; 1 Hale, Pl. Cr. 496 *et seq.*; 1 East, Pl. Cr. 219; 1 Russell, Crimes, 538; 2 Bishop, Crim. Law, §§ 538 *et seq.*; 2 Wash. C. C. 515; 4 Mass. 391; 1 Hawks. No. C. 210; 1 Coxe, N. J. 424; 5 Yerg. Tenn. 459; 9 Carr. & P. 22.

JUSTIFICATION. In Pleading. The allegation of matter of fact by the defendant, establishing his legal right to do the act complained of by the plaintiff.

Justification admits the doing of the act charged as a wrong, but alleges a right to do it on the part of the defendant, thus denying that it is a wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done. See AVOWRY.

2. *Trespasses.* A *warrant*, regular on its face, and issued by a court of competent jurisdiction, is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or not. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done is one which is beyond the power conferred by the warrant, it is no justification. See ARREST; TRESPASS. So, too, many acts, and even homicide committed in *self-defence*, or defence of wife, children, or servants, are justifiable, see SELF-DEFENCE; or in *preserving the public peace*, see ARREST; TRESPASS; or under a *license*, express or implied, 3 Caines, N. Y. 261; 2 Bail. So. C. 4; 3 McLean, C. C. 571; see 13 Me. 115; including entry on land to demand a debt, to remove chattels, 2 Watts & S. Penn. 225; 12 Vt. 273; see 2 Humphr. Tenn. 425; to ask lodgings at an inn, the entry in such cases being peaceful; to exercise an incorporeal right, 21 Pick. Mass. 272; or for *public service* in case of exigency, as pulling down houses to stop a fire, Year B. 13 Hen. VIII. 16 *b*; destroying the suburbs of a city in time of war, Year B. 8 Edw. IV. 35 *b*; entry on land to make fortifications; or in *preservation* of the owner's rights of property, 14 Conn. 255; 4 Dev. & B. No. C. 110; 7 Dan. Ky. 220; Wright, Ohio, 333; 25 Me. 453; 6 Penn. St. 318; 12 Metc. Mass. 53, are justifiable.

3. *Libel and slander* may be justified in a civil action, in some cases, by proving the truth of the matter alleged, and generally by showing that the defendant had a right upon the particular occasion either to write and publish the writing or to utter the words: as, when slanderous words are found in a report of a committee of congress, or in an indictment, or words of a slanderous nature

are uttered in the course of debate in the legislature by a member, or at the bar by counsel when properly instructed by his client on the subject. Comyns, Dig. *Pleader* (2 L 3–2 L 7). See DEBATE; SLANDER.

Matter in justification must be specially pleaded, and cannot be given in evidence under the general issue. See LICENSE. A plea of justification to an action for slander, oral or written, should state the charge with the same degree of certainty and precision as are required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It must be direct and explicit. It must in every respect correspond with, and be as extensive as the charge in, the declaration.

4. The justification, however, will be complete if it covers the essence of the libel. But it must extend to every part which could by itself form a substantive ground of action. Where the slander consists in an imputation of crime, the plea of justification must contain the same degree of precision as is requisite in an indictment for the crime, and must be supported by the same proof that is required on the trial of such an indictment. It is a perfectly well-established rule that where the charge is general in its nature, yet the plea of justification must state specific instances of the misconduct imputed to the plaintiff. And, even for the purpose of avoiding prolixity, a plea of justification cannot make a general charge of criminality or misconduct, but must set out the specific facts in which the imputed offence consists, and with such certainty as to afford the plaintiff an opportunity of joining issue precisely upon their existence. Heard, Libel & Slander, §§ 240–244. See SLANDER.

When established by evidence, it furnishes a complete bar to the action.

In Practice. The proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance.

5. It must take place before an authorized magistrate, 5 Binn. Penn. 461; 6 Johns. N. Y. 124; 13 *id.* 422; and notice must, in general, be given by the party proposing the bail, to the opposite party, of the names of the bail and the intention to justify. 3 Harringt. N. J. 503. See 3 Halst. 369.

It is a common provision that bail must justify in double the amount of the recognizance if exceptions are taken, 2 Hill, N. Y. 379; otherwise, a justification in the amount of the recognizance is, in general, sufficient.

It must be made within a specified time, or the persons named cease to be bail. 1 Cow. N. Y. 54; 2 *id.* 514. See 1 Baldw. C. C. 148.

JUSTIFICATORS. A kind of compurgators, or those who, by oath, justified the innocence or oaths of others, as in the case of wagers of law.

JUSTIFYING BAIL. In Practice. The production of bail in court, who there justify themselves against the exception of the plaintiff. See BAIL.

JUZGADO. In Spanish Law. The collective number of judges that concur in a decree, and more particularly the tribunal having a single judge.

K.

KAIN. In Scotch Law. A payment of fowls, etc. reserved in a lease. It is derived from *canum*, a word used in ancient grants to signify fowls or animals deliverable by the vassal to his superior as part of the *reddendum*. Erskine, Inst. 11. 10. 32; 2 Ross, Lect. 236, 405.

KEELAGE. The right of demanding money for the bottom of ships resting in a port or harbor. The money so paid is also called *keelage*.

KEELS. This word is applied, in England, to vessels employed in the carriage of coals. Jacob, Law Dict.

KEEPER OF THE FOREST (called, also, the chief warden of the forest). An officer who had the principal government over all officers within the forest, and warned them to appear at the court of justice-seat on a summons from the lord chief-justice in eyre. Manwood, For. Law, part 1, p. 156; Jacob, Law Dict.

KEEPER OF THE GREAT SEAL (lord keeper of the great seal). A judicial officer who is by virtue of his office a lord, and a member of the privy council. Through his hands pass all charters, commissions, and grants of the crown, to be sealed with the *great seal*, which is under his keeping. The office was consolidated with that of lord chancellor by 5 Eliz. c. 18; and the lord chancellor is appointed by delivery of the great seal, and taking oath. Coke, 4th Inst. 87; 1 Hale, Pl. Cr. 171, 174; 3 Sharswood, Blackst. Comm. 47.

KEEPER OF THE PRIVY SEAL. The officer through whose hands go all charters, pardons, etc. signed by the king before going to the great seal, and some which do not go there at all. He is of the privy council *virtute officii*. He was first called clerk of the privy seal, then guardian, then lord privy seal, which is his present designation. 12 Ric. II. c. 12; Rot. Parl. 11 Hen.

IV.; Stat. 34 Hen. VIII. c. 4; 4 Inst. 55; 2 Sharswood, Blackst. Comm. 347.

KENNING TO A TERCE. In Scotch Law. The ascertainment by a sheriff of the just proportion of the husband's lands which belongs to the widow in virtue of her *terce* or third. An assignment of dower by sheriff. Erskine, Inst. 11. 9. 50; Bell, Dict.

KENTUCKY. (An Indian word signifying "the dark and bloody ground.") The name of one of the new states of the United States of America.

2. The territory of which this state is composed was formerly a part of the territory of Virginia. See VIRGINIA. This latter state, by an act of the legislature passed December 18, 1789, "consented that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state." This state was admitted into the Union under an act of congress passed the 4th of February, 1791, the enacting clause of which is as follows: "*Be it enacted*, that Congress doth consent that the said district of Kentucky, within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries on the 18th day of December, 1789, shall, upon the 1st day of June, 1792, be formed into a new state, separate from and independent of the said commonwealth of Virginia. Upon the aforesaid 1st of June, 1792, the said new state, by name and style of the State of Kentucky, shall be received and admitted into the Union as a new and entire member of the United States." See 1 U. S. Stat. at Large, 189. This state claims that the Ohio river to low-water-mark from the mouth of the Big Sandy river, the northerly boundary of the state, to the Mississippi, is part of her domain, by virtue of the construction given by the supreme court of the United States to the Virginia acts of cession of 1781 and 1783. See 5 Wheat. 374.

3. There have been three constitutions adopted by the state: the first at Danville, on the 19th of April, 1792; the second at Frankfort, on the 17th of August, 1799; and the third at Frankfort, on the 11th of June, 1850. Under the latter constitution all civil officers except the secretary of state are elected by the people. Duelling is prohibited; and any one who, directly or indirectly, gives, accepts, or knowingly carries a challenge to any person or persons to fight in single combat with a citizen of the state, either in or out of the state, is deprived of the right to hold any office of honor or profit in the state, but may be pardoned by the governor after five years, and loses, in addition, the right of suffrage for seven years. Const. 1851, sec. 20.

A voter must be a free white male citizen of the United States, twenty-one years of age, and must have resided in the state two years, or in the county, town, or city in which he proposes to vote, one year, next preceding the election, and in the precinct in which he proposes to vote sixty days at least next before the election. The counties are divided into precincts; and no one can vote but in the precinct where he resides. Under this constitution, in all elections by the people, and also by the senate and house of representatives, jointly or separately, the vote shall be personally and publicly given *viva voce;* but dumb persons can vote by ballot.

The Legislative Power.

4. This is exercised by a general assembly, composed of a senate and house of representatives.

The *Senate* is composed of thirty-eight members, elected quadrennially by the people of each senatorial district for a term of four years. A senator must be a citizen of the United States, thirty years old at least, and for six years a resident in the state.

The *House of Representatives* is composed of one hundred members, elected biennially by the people for the term of two years. A representative must be a citizen of the United States, twenty-four years of age, and for two years a citizen of the state. The house is to impeach, and the senate try impeachments.

The Executive Power.

5. The *Governor* is elected quadrennially by the people for the term of four years, and is ineligible for the succeeding term. He is commander-in-chief of the army and navy of the state, except when called into the service of the United States, when he is to command only upon recommendation of the general assembly. He nominates, and, with the consent of the senate, appoints, all officers except those whose appointment is otherwise provided for. He is invested with the pardoning power, except in certain cases, as impeachment and treason.

A *Lieutenant-Governor* is chosen at every election of governor, in the same manner and to continue in office for the same time as the governor. He is *ex officio* speaker of the senate, and acts as governor when the latter is impeached or removed from office, is dead, or refuses to qualify, resigns, or is absent from the state.

The Judicial Power.

6. The *Court of Appeals* is composed of four judges, elected, one in each of the districts into which the state is divided for the purpose, by the people, for the term of eight years, and subject to removal by address of two-thirds of each house of the general assembly to the governor, stating the cause or causes for which such removal is required. Special judges may be appointed by the governor when a majority cannot sit in any case. This court has jurisdiction by appeal or writ of error in matter of law from the final order, judgment, or decree of inferior court, except in case of an office, franchise, or freehold, or divorce refused, where the matter in dispute does not exceed one hundred dollars, certain cases of criminal jurisdiction, and cases of small amount, where an appeal is to be taken to the district and county courts. See Pract. Code of 1854.

7. The *Circuit Court* is composed, under the constitution, of twelve judges, elected by the people, for the term of six years, in each of the twelve judicial districts into which the state is divided. Each district is composed of several counties, and a court is held twice a year in each county. It is provided that a new district may be erected every four years,—not, however, to exceed in all sixteen,—until the population exceeds one million five hundred thousand. In case of the absence of the judge, the attorneys present may elect a special judge to hold the court. This is the court of general original jurisdiction in all matters of law and equity, except where exclusive jurisdiction has been granted by law to some other court. The qualifications for a judge, both of this court and the court of appeals, are that a man should be thirty years of age at least, and have been a practising lawyer for eight years, or have served for eight years as judge in some court of record.

8. A *County Court* also exists in each county, composed of a president judge, and, when sitting for fiscal purposes only, a majority of the justices in commission for the county. The president judge must be at least twenty-one years old, and have been for one year a resident of the state. This court has concurrent jurisdiction with the circuit court in law and in equity where the matter in dispute does not exceed one hundred dollars, but not of cases involving the title to land. It has the general control of the fiscal matters of the county, including the support of the poor.

Two justices of the peace and one constable are elected for four years by the people in each of the justice districts into which the counties are by law divided. *Sheriffs*, *coroners*, and *jailers* are elected by the voters of the county for four years. Sheriffs are ineligible for two successive terms.

Under the code of practice adopted March 22, 1851, the forms of actions at common law and of suits in chancery were abandoned, and a petition and answer substituted therefor.

KEY. An instrument made for shutting and opening a lock.

2. The keys of a house are considered as real estate, and descend to the heir with the inheritance. 11 Coke, 50 *b*; 30 Eng. L. & Eq. 598. See 5 Blackf. Ind. 417; 5 Taunt. 518.

3. When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same. Dig. 41. 1. 9. 6; 18. 1. 74.

4. Keys are implements of housebreaking within statute 14 & 15 Vict. c. 19, § 1; for, though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking; and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, with the intention of using them as implements of housebreaking. 2 Den. Cr. Cas. 472; 3 Carr. & K. 250.

KEYAGE. A toll paid for loading and unloading merchandise at a key or wharf.

KIDNAPPING. The forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another. 4 Blackstone, Comm. 219.

It has been held, however, that the carrying away is not essential. 8 N. H. 550. The crime includes a false imprisonment. 2 Bishop, Crim. Law, § 671. See ABDUCTION; 1 Russell, Crimes, Greaves ed. 716; 2 Harr. Del. 538; 3 Tex. 282; 12 Metc. Mass. 56; 2 Park. Crim. N. Y. 590; Comb. 10.

KILDERKIN. A measure of capacity, equal to eighteen gallons.

KINDRED. Relations by blood.

Nature has divided the kindred of every one into three principal classes. 1. His children, and their descendants. 2. His father, mother, and other ascendants. 3. His collateral relations; which include, in the first place, his brothers and sisters, and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred. 14 Ves. Ch. 372. See Wood. Inst. 50; Ayliffe, Parerg. 325; Dane, Abr.; Toullier, Ex. 382, 383; 2 Sharswood, Blackst. Comm. 516, n.; Pothier, Des Successions, c. 1, art. 3.

KING. The chief magistrate of a kingdom, vested usually with the executive power.

The following table of the reigns of English and British kings and queens, commencing with the Reports, is added, to assist the student in many points of chronology:—

	Accession.
Henry III.	1216
Edward I.	1272
Edward II.	1307
Edward III.	1327
Richard II.	1377
Henry IV.	1399
Henry V.	1413
Henry VI.	1422
Edward IV.	1461
Edward V.	1483
Richard III.	1483
Henry VII.	1485
Henry VIII.	1509
Edward VI.	1547
Mary	1553
Elizabeth	1558
James I.	1603
Charles I.	1625
Charles II.	1660
James II.	1685
William III.	1689
Anne	1702
George I.	1714
George II.	1727
George III.	1760
George IV.	1820
William IV.	1830
Victoria	1837

See REPORTS.

KING'S BENCH. See COURT OF KING'S BENCH.

KING'S COUNSEL. Barristers or serjeants who have been called within the bar and selected to be the king's counsel. They answer in some measure to the *advocati fisci*, or advocates of the revenue, among the Romans. They must not be employed against the crown without special leave, which is, however, always granted, at a cost of about nine pounds. 3 Sharswood, Blackst. Comm. 27, note.

KING'S EVIDENCE. An accomplice in a felony, who, on an implied promise of pardon if he fully and fairly discloses the truth, is admitted as evidence for crown against his accomplices. 1 Phillipps, Ev. 31. A jury may, if they please, convict on the unsupported testimony of an accomplice. 4 Stephen, Comm. 398. On giving a full and fair confession of truth, the accomplice has an equitable title to a recommendation to mercy. He cannot be admitted to testify as king's evidence after judgment against him. 2 Russell, Crimes, 956–958.

KING'S SILVER. A fine or payment due to the king for leave to agree in order to levying a fine (*finalis concordia*). 2 Sharswood, Blackst. Comm. 350; Dy. 320, pl. 19; 1 Leon. 249, 250; 2 *id.* 56, 179, 233, 234; 5 Coke, 39.

KINGDOM. A country where an officer called a king exercises the powers of government, whether the same be absolute or limited. Wolff. Inst. Nat. § 994. In some kingdoms the executive officer may be a woman, who is called a queen.

KINSBOTE (from *kin*, and *bote*, a composition). **In Saxon Law.** A composition for killing a kinsman. Anc. Laws & Inst. of Eng. Index, *Bote*.

KINTLIDGE. A term used by merchants and seafaring men to signify a ship's ballast. Merc. Dict.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the English exchequer: so called from being the inquest of John de Kirby, treasurer to Edward I.

KISSING THE BOOK. A ceremony used in taking the corporal oath, the object being, as the canonists say, to denote the assent of the witness to the oath in the form it is imposed. The witness kisses either the whole Bible, or some portion of it; or a cross, in some countries. See the ceremony explained in Oughton's Ordo. tit. lxxx.; Consitt. on Courts, part 3, sect. 1, § 3; Junkin, Oath, 173, 180; 2 Pothier, Obl. Evans ed. 234.

KNAVE. A false, dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning, which was merely servant or attendant.

2. To call a man a knave has been held to be actionable. 1 Rolle, Abr. 52; 1 Freem. Ch. 277; 5 Pick. Mass. 244.

KNIGHT. In English Law. The next personal dignity after the nobility. Of knights there are several orders and degrees. The first in rank are knights of the garter, instituted by Edward III. in 1344; next follows, a knight banneret; then come knights of the Bath, instituted by Henry IV., and revived by George I.; and they were so called from a custom of bathing the night before their creation. The last order are knights bachelors, who, though the lowest, are yet the most ancient, order of knighthood; for we find that king Alfred conferred this order upon his son Athelstan. 1 Blackstone, Comm. 403. These are sometimes called knights of the chamber, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. Coke, 2d Inst. 666. Knights were called *equites*, because they always served on horseback; *aurati*, from the gilt spurs they wore; and *milites*, because they formed the royal army, in virtue of their feudal tenures.

KNIGHT'S FEE was anciently so much of an inheritance in land as was sufficient to maintain a knight; and every man possessed of such an estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*. In the time of Henry II. the estate was estimated at twenty pounds a year; but Lord Coke in his time states it to be an estate of six hundred and eighty acres. Coke, Litt. 69 *a*.

KNIGHT'S SERVICE. Upon the Norman conquest, all the lands in England were divided into knight's fees, in number above sixty thousand; and for every knight's fee a knight was bound to attend the king in his wars forty days in a year, in which space of time, before war was reduced to a science, a campaign was generally finished. If a man only held half a knight's fee, he was only bound to attend twenty days; and so in proportion. But this personal service, in process of time, grew into pecuniary commutations, or aids; until at last, with the military part of the feudal system, it was abolished at the restoration, by the statute of 12 Car. II. c. 24. 1 Blackstone, Comm. 410; 2 *id.* 62.

KNIGHTS HOSPITALLERS. An order of knights that had their name from a hospital erected at Jerusalem for the use of pilgrims coming to the Holy Land, and dedicated to St. John Baptist. They were afterwards called Knights of St. John of Jerusalem, and their first business was to provide for and protect such pilgrims as came to that hospital. Afterwards, being driven out of the Holy Land, they settled at Rhodes, and then at Malta, and were then called Knights of Malta. Many of them came to England in the year 1100, where, in process of time, they became of so much wealth and dignity that their superior was the first lay baron and had a seat among the lords in parliament.

KNIGHTS TEMPLARS. An order of knights so called from having their first residence in some apartments adjoining the temple at Jerusalem; and their employment was to guard the roads for the security of pilgrims in the Holy Land. They came into England in the reign of Stephen, where they increased so much in wealth and power that they were considered dangerous to the state, and the order was suppressed in 1312.

KNOWINGLY. In Pleading. The word "knowingly," or "well knowing," will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. See Comyns, Dig. *Indictment* (G 6); 2 Cush. Mass. 577; 2 Strange, 904; 2 East, 452; 1 Chitty, Plead. 367.

KNOWLEDGE. Information as to a fact.

Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them: for example, a man may pass a counterfeit note, and be guiltless, if he did not know it was so; he may receive stolen goods, if he were not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime.

Such guilty knowledge is made by the statute a constituent part of the offence; and therefore it must be averred and proved as such. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which by the common law or by statute is unlawful, and in pursuing his criminal purpose does that which constitutes another and different offence, he shall be held responsible for all the legal

consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. It is true that in the commission of all crimes a guilty purpose, a criminal will and motive, are implied. But, in general, such bad motive or criminal will and purpose, that disposition of mind and heart which is designated by the generic and significant term "malice," is implied from the criminal act itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution. *Per Shaw*, C. J., in 2 Metc. Mass. 192. Thus, it is not necessary, in an indictment against an unmarried man for adultery with a married woman, to aver that he knew, at the time when the offence was committed, that she was a married woman; nor is it necessary to prove such knowledge at the trial. 2 Metc. Mass. 190. See, as to the proof of guilty knowledge, 1 Bennett & H. Lead. Crim. Cas. 185–191.

END OF VOLUME I.