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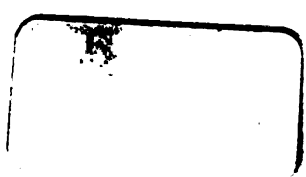

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REVISED AND ENLARGED EDITION.

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.

FOURTEENTH EDITION, REVISED AND GREATLY ENLARGED.

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LAW DICTIONARY

LABEL. A narrow slip of paper or parchment affixed to a deed or writing, hanging at or out of the same. This name is also given to an appending seal.

LABOR. Continued operation; work.

The labor and skill of one man is frequently used in a partnership, and valued as equal to the capital of another.

When business has been done for another, and suit is brought to recover a just reward, there is generally contained in the declaration a count for work and labor.

Where penitentiaries exist, persons who have committed crimes are condemned to be imprisoned therein at labor.

LABOR A JURY. To tamper with a jury; to persuade jurymen not to appear. It seems to come from the meaning of labor, to prosecute with energy, to urge: as, *to labor a point*. Dy. 48; Hob. 294; Coke, Litt. 157 *b*; 14 & 20 Hen. VII. 30, 11. The first lawyer that came from England to practise in Boston was sent back for laboring a jury. Washburn, Jud. Hist.

LACHES (Fr. *lacher*). Negligence.

2. In general, when a party has been guilty of laches in enforcing his right by great delay and lapse of time, this circumstance will, at common law, prejudice and sometimes operate in bar of a remedy which it is discretionary and not compulsory in the court to afford. In courts of equity, also, delay will generally prejudice. 1 Chitty, Pract. 786, and the cases there cited; 8 Comyns, Dig. 684; 6 Johns. Ch. N. Y. 360.

3. But laches may be excused from ignorance of the party's rights, 2 Mer. Ch. 362; 2 Ball & B. Ch. Ir. 104; from the obscurity of the transaction, 2 Schoales & L. Ch. Ir. 487; by the pendency of a suit, 1 Schoales & L. Ch. Ir. 413; and where the party labors under a legal disability: as, insanity, coverture, infancy, and the like. And no laches can be imputed to the public. 4 Mass. 522; 3 Serg. & R. Penn. 291; 4 Hen. & M. Va. 57; 1 Penn. 476. See 1 Belt, Supp. to Ves. Ch. 436; 2 *id.* 170; Dane, Abr. Index; 4 Bouvier, Inst. n. 3911.

LADY'S FRIEND. The name of a functionary in the British house of commons. When the husband sues for a divorce, or asks the passage of an act to divorce him from his wife, he is required to make a provision for her before the passage of the act: it is the duty of the lady's friend to see that such a provision is made. Maxquand, Husb. & W. 213.

LÆSA MAJESTAS (Lat.). Læse-majesty, or injured majesty; high treason. It is a phrase taken from the civil law, and anciently meant any offence against the king's person or dignity, defined by 25 Edw. III. c. 6. See Glanville, lib. 5, c. 2; 4 Sharswood, Blackst. Comm. 75; Bracton, 118; CRIMEN LÆSÆ MAJESTATIS.

LAGA. The law.

LAGAN (Sax. *liggan, cubare*). Goods found at such a distance from shore that it was uncertain what coast they would be carried to, and therefore belonging to the finder. Bracton, 120. See LIGAN.

LAHLSLIT (Sax.). A breach of law. Cowel. A mulct for an offence, viz.: twelve "ores." 1 Anc. Inst. & Laws of Eng. 169.

LAIRESITH. The name of a fine imposed upon those who committed adultery or fornication. Tech. Dict.

LAITY. Those persons who do not make a part of the clergy. In the United States the division of the people into clergy and laity is not authorized by law, but is merely conventional.

LAMB. A ram, sheep, or ewe under the age of one year. 4 Carr. & P. 216.

LAMBETH DEGREE. A degree given by archbishop of Canterbury. 1 Sharswood, Blackst. Comm. 381, n. Although he can confer all degrees given by the two universities, the graduates have many privileges not shared by the recipients of his degrees.

LAND, LANDS. A term comprehending any ground, soil, or earth whatsoever: as, meadows, pastures, woods, waters, marshes, furzes, and heath. Arable land.

An estate of frank tenement at the least. Sheppard, Touchst. 92.

Land has an indefinite extent upward as well as downwards: therefore, land legally includes all houses or other buildings standing or built on it, and whatever is in a direct line between the surface and the centre of the earth. 3 Kent, Comm. 378, n. See Coke, Litt. 4 *a;* Wood, Inst. 120; 2 Sharswood, Blackst. Comm. 18; 1 Cruise, Dig. 58. It is not so broad a term as tenements, or hereditaments, but has been defined in some states as including these. 1 Washburn, Real Prop. 9.

In the technical sense, freeholds are not included within the word lands. 3 Madd. Ch. 535. The term *terra* in Latin was used to denote land, from *terendo, quia vomere teritur* (because it is broken by the plough), and, accordingly, in fines and recoveries, land, *i.e. terra,* has been held to mean arable land. Salk. 256; Cowp. 346; Coke, Litt. 4 *a;* 11 Coke, 55 *a.* But see Croke Eliz. 476; 4 Bingh. 90; Burton, Real Prop. 196. See, also, 2 P. Will. Ch. 458, n.; 5 Ves. Ch. 476; 20 Viner, Abr. 203.

2. Land includes, in general, all the buildings erected upon it, 9 Day, Conn. 374; but to this general rule there are some exceptions. It is true that if a stranger voluntarily erect buildings on another's land, they will belong to the owner of the land, and will become a part of it, 16 Mass. 449; yet cases are not wanting where it has been held that such an erection, under peculiar circumstances, would be considered as personal property. 4 Mass. 514; 5 Pick. Mass. 487; 8 *id.* 203, 402; 6 N. H. 555; 10 Me. 371; 1 Dan. Ky. 591; 1 Burr. 144. It includes mines, except mines of gold and silver; and in the United States a grant of public lands will include these also. 3 Kent, Comm. 378, n.; 1 N. Y. 572. See MINES.

3. If one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them), in fee-simple, or for life, by this grant shall pass no more but the lands he hath in fee-simple. Sheppard, Touchst. 92. But if a man have no freehold estate, "lands," in a will, will pass his leasehold; and now, by statute, leasehold will pass if no contrary intent is shown, and the description is applicable even if he have freehold. 1 Vict. c. 26; 2 Bos. & P. 303; Croke Car. 292; 1 P. Will. Ch. 286; 11 Beav. Rolls, 237, 250.

Generally, in wills, "land" is used in its broadest sense. 1 Jarman, Wills, Perkins ed. 604, n.; Powell, Dev. Jarman ed. 186. But as the word has two senses, one general and one restricted, if it occurs accompanied with other words which either in whole or in part supply the difference between the two senses, that is a reason for taking it in its less general sense: *e.g.* in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Burton, Real Prop. 183; Croke Eliz. 476, 659; 2 And. 123.

4. Incorporeal hereditaments will not pass under "lands," if there is any other real estate to satisfy the devise; but if there is no other such real estate they will pass, by statute. Moore, 359, pl. 49; 3 & 4 Will. IV. cc. 74, 105, 106

LAND CEAP, LAND CHEAP (land, and Sax. *ceapan,* to buy). A fine payable in money or cattle, upon the alienation of land, within certain manors and liberties. Cowel, Gloss.

LAND COURT. In American Law. The name of a court in the city of St. Louis, state of Missouri, having sole jurisdiction in St. Louis county in suits respecting lands, and in actions of ejectment, dower, partition. See MISSOURI.

LAND-MARK. A monument set up in order to ascertain the boundaries between two contiguous estates. For removing a land-mark an action lies. 1 Thomas, Coke, Litt. 787. See MONUMENTS.

LAND TAX. A tax on beneficial proprietor of land: so far as a tenant is beneficial proprietor, and no farther, does it rest on him. It has superseded all other methods of taxation in Great Britain. Sugden, Vend. 268. It was first imposed in 1693, a new valuation of the lands in the kingdom having been made in 1692, which has not since been changed. In 1798 it was made perpetual, at a rate of four shillings in a pound of valued rent. See Encyc. Brit. *Taxation;* Wharton, Lex. 2d Lond. ed.

LAND TENANT (commonly called *tene tenant*). He who actually possesses the land.

LANDLORD. The lord or proprietor of land, who, under the feudal system, retained the dominion or ultimate property of the feud, or fee of the land; while his grantee, who had only the possession and use of the land, was styled the feudatory, or vassal, which was only another name for the tenant or holder of it. In the popular meaning of the word, however, it is applied to a person who owns lands or tenements which he rents out to others.

LANDLORD AND TENANT. A term used to denote the relation which subsists by virtue of a contract, express or implied, between two or more persons, for the possession or occupation of lands or tenements either for a definite period, for life, or at will.

2. When this relation is created by an express contract, the instrument made use of for the purpose is called a lease. See LEASE. But it may also arise by necessary implication from the circumstances of the case and the relative position of the parties to each other; for the law will imply its existence whenever there is an ownership of land on the one hand and an occupation of it by permission on the other; and in all such cases it will be presumed that the occupant intends to compensate the owner for the use of the premises. 4 Conn. 473; 4 Pet. 84; 3 Wend. N. Y. 219; 7 La. 83; 6 Ad. & E. 854; Taylor, Landl. & Ten. § 19.

3. The *intention to create.* This relation may be inferred from a variety of circumstances; but the most obvious acknowledgment of its existence is the payment of rent;

and this principle applies even after the expiration of an express term of years; for if a tenant continues to hold over, after his term has run out, the landlord may, if he chooses, consider him a tenant, and he is, in fact, understood to do so, unless he proceeds to eject him at once. If the landlord suffers him to remain, and receives rent from him, or by any other act acknowledges him as tenant, a new tenancy springs up, of so definite a character that it cannot be terminated by either party, except by a reasonable notice to quit. 15 Johns. N. Y. 505; 1 Den. N. Y. 113; 4 M'Cord, So. C. 59; 2 Esp. 528; 4 Campb. 275; 2 Carr. & P. 348.

The payment of money, however, is only a *primâ facie* acknowledgment of the existence of a tenancy; for if it does not appear to have been paid as rent, but stands upon some other consideration, it will not be evidence of a subsisting tenancy. 3 Barnew. & C. 413; 10 East, 261; 11 Ad. & E. 307; 4 Bingh. 91. Neither does a mere participation in the profits of land, where the owner is not excluded from possession, nor the letting of land *upon shares*, unless the occupant expressly agrees to pay a certain part of the crop as rent, in either case amount to a tenancy. 16 Mass. 443; 1 Speers, So. C. 408; 3 M'Cord, So. C. 211; 1 Gill & J. Md. 266; 3 Zabr. N. J. 390; 2 Rawle, Penn. 11; 3 Hill, N. Y. 90; 15 Wend. N. Y. 379.

4. But the relation of landlord and tenant will not be inferred from the mere occupation of land, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause: as, for instance, between a vendor and vendee of land, where the purchaser remains in possession after the agreement to purchase falls through. For the possession in that case was evidently taken with the understanding of both parties that the occupant should be owner, and not tenant; and the other party cannot without his consent convert him into a tenant, so as to charge him with rent. 6 Johns. N. Y. 46; 16 Pet. 25; 21 Me. 525; 8 Mees. & W. Exch. 118; 10 Cush. Mass. 259. The same principle applies to a mortgagor and mortgagee, as well as to that of a mortgagor and an assignee of the mortgagee; for no privity of estate exists in either case; and, as a general rule, a tenancy by implication can never arise under a party who has not the legal estate of the premises in question. 2 Mann. & R. 303; 6 Ad. & E. 268; Taylor, Landl. & Ten. § 25.

5. Generally, the rights and obligations of the parties will be considered as having commenced from the date of the lease, if there be one, and no other time for its commencement has been agreed upon; or, if there be no date, then from the delivery of the papers. If, however, there be no writings, it will take effect from the day the tenant entered into possession, and not with reference to any particular quarter-day. 4 Johns. N. Y. 230; 15 Wend. N. Y. 656; Coke, Litt. 46 *a*. And these rights and duties attach to each of the parties, not only in respect to each other, but also with reference to other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with its possession, while the tenant assumes obligations with respect to it which continue so long as he is invested with that character.

6. After the making of a lease, the *right of possession*, in legal contemplation, remains in the landlord until the contract is consummated by the entry of the lessee. When the tenant enters, this right of possession changes, and he draws to himself all the rights incident to possession after this. The landlord's rights in the premises are suspended, or confined to the protection of his reversionary interest; that is, to the maintenance of actions for such injuries as would, in the ordinary course of things, continue to affect his interest after the determination of the lease. Of such are actions for breaking the windows of a house, cutting timber, or damming up a rivulet, whereby the timber on the estate becomes rotten. 11 Mass. 519; 1 Maule & S. 234; 9 Bingh. 3; 4 Barnew. & Ald. 72; 3 Me. 6; 5 Den. N. Y. 494. The injury must be of such a character as permanently affects the inheritance; but it may be so if any one interferes with his tenants, and disturbs their enjoyment so far as to cause him loss of rent, or other damage. 14 East, 489; 4 Barnew. & Ald. 72; 1 Hall, N. Y. 214.

7. The landlord may, however, go upon the premises peaceably, for the purpose of ascertaining whether any waste or injury has been committed by the tenant or other person, first giving notice of his intention. He may also use all ways appurtenant thereto, demand rent, make such repairs as are necessary to prevent waste, or remove an obstruction. But if the rent is payable in hay or other produce, to be delivered to him from the farm, he is not entitled to go upon the land and take it, until it is delivered to him by the tenant, or until after it has been severed and set apart for his use. 3 Johns. N. Y. 408; 1 Vern. Ch. 575; 7 Pick. Mass. 76; 1 Barnew. & C. 8; 7 Mees. & W. Exch. 601. But see 5 Dowl. & R. 442; 3 Barnew. & C. 533.

8. The *landlord's responsibilities* in respect to possession, also, are suspended as soon as the tenant commences his occupation. If, therefore, a stranger is injured by the ruinous state of the premises, or the tenant creates a nuisance upon them, or if the fences are suffered to fall into decay, whereby the cattle of a stranger stray and are injured or lost, the landlord is in neither case answerable. But it would be otherwise if he had undertaken to keep the premises in repair, and the injury was occasioned by his neglect to keep up the repairs, or if he should renew the lease with a nuisance upon it. 4 Term, 318; 2 H. Blackst. 350; 4 Taunt. 949; 1 Ad. & E. 827.

9. The *principal obligation on the part of the landlord*, which is, in fact, always to be

implied as a necessary condition to his receiving any rent, is that the tenant shall enjoy the quiet possession of the premises,—which means, substantially, that he shall not be turned out of possession of the whole or any material part of the premises by one having a title paramount to that of landlord, or that the landlord shall not himself disturb or render his occupation uncomfortable by the erection of a nuisance on or near the premises, or otherwise oblige him to quit possession. 3 East, 491; 6 Dowl. & R. 349; 8 Cow. N. Y. 727; 7 Wend. N. Y. 281; 13 N. Y. 151; 2 Dev. 388; 4 Mass. 349; 5 Day, Conn. 282. But if he be ousted by a stranger, that is, by one having no title, or after the rent has fallen due, or if the molestation proceeds from the acts of a third person, the landlord is in neither case responsible for it. 1 Term, 671; 3 Johns. N. Y. 471; 7 Wend. N. Y. 281; 4 Dev. No. C. 46; 5 Hill, N. Y. 599; 6 Mass. 246; 13 East, 72; 12 Wend. N. Y. 529; 25 Barb. N. Y. 594.

10. Another *obligation* which the law imposes *upon the landlord* in the absence of any express stipulation in the lease, is the payment of all taxes and assessments chargeable upon the property, or any ground-rent, or interest upon mortgages to which it may be subject. Every landlord is bound to protect his immediate tenant against all paramount claims; and if a tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payment which ought, as between himself and his landlord, to have been made by the latter, he may call upon the landlord to reimburse him, or he may deduct such payment from the rent due or to become due. 6 Taunt. 524; 12 East, 469; 5 Bingh. 409; 3 Barnew. & Ald. 647; 7 Barnew. & C. 285; 3 Ad. & E. 331; 3 Mees. & W. Exch. 607; 5 Barnew. & Ald. 521.

11. But the landlord is under *no obligation to make any repairs*, or to rebuild in case the premises should be burned; nor does he guarantee that they are reasonably fit for the purposes for which they were taken. And it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so; for the tenant takes the premises for *better or for worse*, and cannot involve the landlord in expense for repairs without his consent. 6 Cow. N. Y. 475; 3 Du. N. Y. 464; 1 Saund. 320; 7 East, 116; 1 Ry. & M. 357; 7 Mann. & G. 576. Even if the premises have become uninhabitable by fire, and the landlord having insured them has recovered the insurance-money, the tenant cannot compel him to expend the money so recovered in rebuilding, unless he has expressly engaged to do so; nor can he, in such an event, protect himself from the payment of rent during the unexpired balance of the term. 8 Paige, Ch. N. Y. 437; 1 Sim. Ch. 146; 1 Term, 314. A different rule is said to prevail in Louisiana. See 3 Rob. La. 52.

12. On the *part of the tenant*, we may observe that on taking possession he is at once invested with all *the rights incident to possession*, is entitled to the use of all the privileges and easements appurtenant to the tenement, and to take such reasonable estovers and emblements as are attached to the estate. He may maintain an action against any person who disturbs his possession or trespasses upon the premises, though it be the landlord himself. 1 Den. N. Y. 21; Croke Car. 325; 3 Wils. 461; 2 H. Blackst. 924; 2 Barnew. & Ad. 97; 3 Crompt. & R. Exch. 557. As occupant, he is also answerable for any neglect to repair highways, fences, or party-walls; it being generally sufficient, except where a statute has otherwise provided, to charge a man for such repairs by the name of occupant. He is also liable for all injuries produced by the mismanagement of his servants, or by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them, or the like; for, as a general rule, where a man is in possession of property, he must so manage it that other persons shall not be injured thereby. 3 Term, 766; 3 Q. B. 449; 1 Scott, N. R. 392; 4 Taunt. 649; 5 Barnew. & C. 552; 6 Mees. & W. Exch. 499.

13. One of the *principal obligations* which the law imposes upon every tenant, independent of any agreement, is to treat the premises in such a manner that no substantial injury shall be done to them, and so that they may revert to the landlord, at the end of the term, unimpaired by any wilful or negligent conduct on his part. In the language of the books, he must keep the buildings wind-and-water-tight, and is bound to make fair and tenantable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation. If it is a furnished house, he must preserve the furniture, and leave it, with the linen, etc., clean and in good order. 5 Carr. & P. 239; 7 *id.* 327; 4 Term, 318; 18 Ves. Ch. 331; 2 Esp. 590; 4 Mann. & G. 95; 12 Mees. & W. Exch. 827.

But he is *not bound to rebuild* premises which have accidentally become ruinous during his occupation; nor is he answerable for ordinary wear and tear, nor for an accidental fire, nor to put a new roof on the building, nor to make what are usually called general or substantial repairs. Neither is he bound to do painting, white-washing, or papering, except so far as they may be necessary to preserve exposed timber from decay. 6 Term, 650; 6 Carr. & P. 8; 12 Ad. & E. 476; 1 Marsh. 567; 10 Barnew. & C. 312.

14. With respect to *farming leases*, a tenant is under a similar obligation to repair; but it differs from the general obligation in this, that it is confined to the dwelling-house which he occupies,—the burden of supporting the out-buildings and other erections on the farm being sustained either by the landlord, or the tenant, in the absence of any express provision in the lease, by the particu-

lar custom of the country in which the farm is situated. He is always bound, however, to cultivate the farm in a good and husband-like manner, to keep the fences in repair, and to preserve the timber and ornamental trees in good condition; and for any violation of any of these duties he is liable to be proceeded against by the landlord *for waste*, whether the act of waste be committed by the tenant or by a stranger. Coke, Litt. 53; 6 Taunt. 300; 5 Johns. N. Y. 373; 13 East, 18; 3 Mood. 536; 2 Dougl. 745; 1 Taunt. 198; 1 Den. N. Y. 104. As to what constitutes waste, see WASTE.

15. The tenant's general obligation to repair also renders him *responsible for any injury* a stranger may sustain by his neglect to keep the premises in a safe condition: as, by not keeping the covers of his vaults sufficiently closed, so that a person walking in the street falls through, or is injured thereby. If he repairs or improves the building, he must guard against accident to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of the danger. 4 Term, 318; 28 Barb. N. Y. 194; 6 N. Y. 48; 4 *id.* 222. For any unreasonable obstruction which he places in the highway adjoining his premises, he may be indicted for causing a public nuisance, as well as rendered liable to an action for damages, at the suit of any individual injured. The law will tolerate only such a partial and temporary obstruction of the street as may be necessary for business purposes: as in receiving and delivering goods from a warehouse, or coals, or fuel on the sidewalk, or the like; provided, always, that the public convenience does not suffer from it. 1 Serg. & R. Penn. 217; 6 East, 427; 6 Carr. & P. 636; 1 Den. N. Y. 524; Taylor, Landl. & Ten. § 192.

16. The tenant's *chief duty*, however, is *the payment of rent*, the amount of which is either fixed by the terms of the lease, or, in the absence of an express agreement, is such a reasonable compensation for the occupation of the premises as they are fairly worth. If there has been no particular agreement between the parties, the tenant pays rent only for the time he has had the beneficial enjoyment of the premises; but if he has entered into an express agreement to pay rent *during the term*, no casualty or injury to the premises by fire or otherwise, nothing, in fact, short of an eviction, will excuse him from such payment. 4 Paige, Ch. N. Y. 355; 18 Ves. Ch. 415; 1 Harr. & J. Md. 42; 16 Mass. 240; 3 Den. N. Y. 464; 3 Bos. & P. 420; 6 Term, 650; 24 Wend. N. Y. 454; Al. 26; 4 Harr. & J. Md. 564; 1 Bay, So. C. 499. But if he has been deprived of the possession of the premises, or any part thereof, by a third person under a title superior to that of the landlord, or if the latter annoys his tenant, erect or causes the erection of such a nuisance upon or near the premises as renders his occupation so uncomfortable as to justify his removal, he is in either case discharged from the payment of rent. 2 Wend. N. Y. 561; 12 *id.* 529; 4 Cow. N. Y. 58; 8 *id.* 727; 4 N. Y. 217; 2 Ired. No. C. 350; 3 Ohio, 364; 4 Rawle, Penn. 329; Coke, Litt. 148 *b*; 2 East, 576; 1 Cowp. 242; 6 Term, 458.

17. The obligation to pay rent may *be apportioned;* for, as rent is incident to the reversion, it will become payable to the assignees of the respective portions thereof whenever that reversion is severed by an act of the parties or of the law. But the tenant's consent is necessary for an apportionment when made by the landlord, unless the proportion of rent chargeable upon each portion of the land has been settled by the intervention of a jury. 22 Wend. N. Y. 121; 2 Barb. N. Y. 643; 3 Den. N. Y. 454; 1 Dowl. & R. 291; 5 Barnew. & Ald. 876. A tenant, however, cannot get rid of or apportion his rent by transferring the whole or a part of his lease; for if he assigns it, or underlets a portion of it, he still remains liable to his landlord for the whole. Croke Eliz. 633; 24 Barb. N. Y. 333. Instances of an apportionment by act of law occur where there is a descent of the reversion among a number of heirs, or upon a judicial sale of a portion of the premises; for in such cases the tenant will be bound to pay rent to each of the parties for the portion of the premises belonging to them respectively. So, if a man dies, leaving a widow, she will have a right to receive one-third of the rent, while the remaining two-thirds will be payable to his heirs. Croke Eliz. 742; 15 Wend. N. Y. 464; Croke Jac. 160; Coke, Litt. 148; 1 Mees. & W. Exch. 747.

18. These rights and liabilities are not confined to the immediate parties to the contract, but will be found to *attach to all persons* to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This principle follows as a necessary consequence of that privity of estate which is incident to the relation of landlord and tenant. A landlord may not violate his tenant's rights by a sale of the property; neither can a tenant avoid his responsibilities by substituting another tenant in his stead without the landlord's consent. The purchaser of the property becomes in one case the landlord, and is entitled to all the rights and remedies against the tenant or his assignee which the seller had, while in the other case the assignee of the lessee assumes all the liabilities of the latter, and is entitled to the same protection which he might claim from the assignee of the reversion; but the original lessee is not thereby discharged from his obligations. 17 Johns. N. Y. 239; 3 Harr. & M'H. Md. 387; 24 Barb. N. Y. 365; 13 Wend. N. Y. 136; 19 N. Y. 68; 8 Ves. Ch. 95; 1 Ves. & B. Ch. Ir. 11; 4 Term, 99.

19. The relation of landlord and tenant *may be terminated* in several ways. If it is a *tenancy for life*, it will of course terminate upon the decease of him upon whose life the lease depends; but if it be for life, or for a

certain number of years depending upon some particular event, the happening of that event will determine the tenancy. So if it be for a certain number of years, independent of any contingency, it will expire at the last moment of the anniversary of the day from which the tenant was to hold in the last year of the tenancy. And in all these cases depending upon the express conditions of the lease, no notice to quit will be necessary in order to dissolve the relation of the parties to each other. Coke, Litt. 216; Sheppard, Touchst. 187; 9 Ad. & E. 879; 5 Johns. N. Y. 128; 1 Pick. Mass. 43; 2 Serg. & R. Penn. 49; 18 Me. 264; Taylor, Landl. & Ten. § 465.

20. But a *tenancy from year to year*, or *at will*, can only be terminated by a *notice to quit*. This notice must be in writing; it must be explicit, and require the tenant to remove from the premises; it must be served upon the tenant, and not upon an undertenant; it must run in the name of the person to whom possession is to be given, and not of his agent; and if given by one of several tenants in common, it is valid only to the extent of his share, but if made by one of several joint tenants, it will enure for the benefit of all. Burr. 1603; 5 Esp. 196; Dougl. 175; 5 Ad. & E. 350; 6 Barnew. & C. 41; 10 Johns. N. Y. 270; 8 Taunt. 241; 2 Mann. & R. 433; 7 Mees. & W. Exch. 139; 3 Bingh. N. C. 677. At common law, this notice was required to be one of six calendar months, ending with the period of the year at which the tenancy commenced, W. Blackst. 596; 3 Term, 13; and this rule prevails in New York, Kentucky, Tennessee, North Carolina, Vermont, and New Jersey, as to tenancies from year to year. 1 Vern. Ch. 311; 1 Johns. N. Y. 322; 1 Dan. Ky. 30; 5 Yerg. Tenn. 431; 22 Vt. 88; 4 Ired. No. C. 291; 3 Green, N. J. 181. See 17 Mass. 287. In Pennsylvania, South Carolina, New Hampshire, and Michigan, three months' notice is required, 24 N. H. 219; 8 Serg. & R. Penn. 458; 2 Rich. So. C. 346; while the New-York statutes provide for its termination by giving one month's notice wherever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise.

21. This relation will also be dissolved when the tenant incurs a forfeiture of his lease by the breach of some covenant or condition therein contained. At common law, a forfeiture was incurred if the tenant did any act which was inconsistent with his first relation to his landlord: as, if he impugned the title of his lessor by affirming by matter of record the fee to be in a stranger, claimed a greater estate than he was entitled to, or undertook to alienate the estate in fee. Coke, Litt. 251 *b*; Croke Eliz. 321. But these causes of forfeiture, founded upon strict feudal principles, have been generally abolished in the United States, and a forfeiture of a term of years now only occurs in consequence of a breach of some express stipulation contained in the contract: as, for the commission of waste, non-payment of rent, or the like. 2 Wend. N. Y. 357; 2 Hill, N. Y. 554; 10 N. Y. 9; 7 Paige, Ch. N. Y. 350. A forfeiture may be waived by an acceptance of, or distraining for, rent which became due after a breach committed by the tenant, or by giving a notice to quit, or by any other act which acknowledges the continuance of the tenancy, 8 Watts, Penn. 55; 2 N. H. 160; 18 Johns. N. Y. 174; 3 Hen. & M. Va. 436; 1 Binn. Penn. 333; 1 Mees. & W. Exch. 408; 1 Taunt. 78, and will be relieved against by the courts in all cases where it happened accidentally and the injury is capable of compensation, or where the damages are a mere matter of computation. 10 Ves. Ch. 6; 12 *id.* 475; 16 *id.* 405; 2 Price, Exch. 206; 1 Dall. Penn. 210; 9 Mod. 22.

22. Another means of dissolving a tenancy is by an operation of law, termed a *merger*,—which happens where a tenant purchases the fee of the reversion, or the fee descends to him as heir at law, the lease becoming thereby merged in the inheritance, the lesser estate being absorbed in the greater. To produce this result, however, it is necessary that the two estates should meet in the same person and in the same right; for if he who has the reversion in fee marries the tenant for years, or if a tenant makes the landlord his executor, the term of years is in neither case merged, because in either case he holds the fee for his own benefit, while the term of years is taken in one case for his wife's use, and in the other for the benefit of the estate he represents as executor. 10 Johns. N. Y. 482; 15 Barb. N. Y. 7; 12 N. Y. 526; Coke, Litt. 388 *b*; Burton, Real Prop. § 898; 1 Washburn, Real Prop. 354.

23. In addition to the several methods of putting an end to a tenancy already mentioned, we may add that it is, of course, competent for a tenant *to surrender* his lease to the landlord; or if the subject-matter of the lease *wholly* perishes, or is required to be taken for public uses, or if the premises are converted into a house of ill fame, or the tenant disclaims to hold under his landlord and therefore refuses to pay his rent, asserts the title to be in himself or unlawfully attorney to another, the tenancy is at an *end*, and the landlord may forthwith resume the possession. 7 Wend. N. Y. 210; 24 *id.* 454; 3 Maule & S. 270; 5 Ohio, 303; 11 Metc. Mass. 448; 1 Esp. 13; 13 Pet. 1; 3 A. K. Marsh, Ky. 247; 10 Ill. 41; 20 Penn. St. 398; 6 Yerg. Tenn. 280.

24. *After the tenancy has ended*, the right of possession reverts to the landlord, who may re-enter upon the premises if he can do so without violence. But if the tenant holds over and the landlord takes possession forcibly, so as to endanger a breach of the peace, he runs the risk of being punished criminally for a forcible entry (see FORCIBLE ENTRY and DETAINER) as well as of suffering the consequences of an action of trespass. The landlord should, therefore, in all such cases, call in the law to his assistance, and receive possession at the hands of the sheriff.

The tenant, on his part, is bound quietly to yield up the possession of the entire premises, although he still retains a reasonable right of egress and regress for the purpose of removing his goods and chattels. And for a refusal to perform this duty he will be subjected to all the statutory penalties of *holding over*. 1 Add. Penn. 14, 43; 10 Mass. 409; 8 Term, 357; 1 Dev. & B. No. C. 324; 5 Carr. & P. 201; 1 Mann. & G. 644; 1 Watts & S. Penn. 90; 13 Johns. N. Y. 235; 9 Vt. 352; 1 Strobh. So. C. 313. He may, also, in certain cases, take the *emblements* or annual profits of the land after his tenancy is ended (see EMBLEMENTS), and, unless restricted by some stipulation to the contrary, may remove such *fixtures* as he has erected during his occupation for his comfort, convenience, or profit. See FIXTURES.

25. The ordinary common-law remedy by which a landlord proceeds to recover the possession of his premises is by an action of ejectment, which is strictly a possessory action; and the party claiming possession must recover upon his right of entry, whether his title to the estate be in fee for life or for years. 7 Johns. N. Y. 227; 2 Yeates, Penn. 309; 3 Bingh. 203. The tenant is never permitted, for reasons of sound public policy, to controvert his landlord's title, or to set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise. 10 East, 158; 3 Barnew. & C. 413; 7 Term, 488; 5 Wend. N. Y. 246; 5 Den. N. Y. 431; 3 Ad. & E. 188; 1 Harp. So. C. 70; 6 Harr. & J. Md. 533; 2 Binn. Penn. 472; 4 Serg. & R. Penn. 467.

26. But the slow and measured progress of this ancient proceeding in most cases affords a very inadequate remedy to the landlord; and in order, therefore, to obviate the evils arising from its delays, the statutes of the different states provide a summary proceeding, by which a landlord may be speedily reinstated, upon notice of a day or two, in cases where a tenant abandons the premises before the end of the term without surrendering the lease, leaving rent in arrear, continues to hold over after the expiration of his term, or has become unable or unwilling to pay for the use of the premises. 22 Wend. N. Y. 611; 4 Barnew. & C. 259; 10 N. Y. 35; 2 Ov. Tenn. 233; 2 Chitty, Bail. 179; 7 Term, 431.

See, further, on the subject of this article, Woodfall, Smith, Taylor, Archbold, Comyns, Cootes, on the Law of Landlord and Tenant; Chambers, Platt, on Leases; Washburn on Real Property.

LANGUAGE. The medium for the communication of perceptions and ideas.

Spoken language is that wherein articulate sounds are used.

Written language is that wherein written characters are used, and especially the system of characters called letters and figures.

2. By conventional usage, certain sounds and characters have a definite meaning in one country or in certain countries, and this is called the language of such country or countries: as, the Greek, the Latin, the French, or the English language. The law, too, has a peculiar language. See Eunom. Dial. 2.

3. On the subjugation of England by William the Conqueror, the French-Norman language was substituted in all law-proceedings for the ancient Saxon. This, according to Blackstone, 3 Comm. 317, was the language of the records, writs, and pleadings until the time of Edward III. Mr. Stephen thinks Blackstone has fallen into an error, and says the record was, from the earliest period to which that document can be traced, in the Latin language. Plead. Appx. note 14. By the statute 36 Edw. III. st. 1, c. 15, it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue, but be entered and enrolled in Latin. The Norman or law French, however, being more familiar as applied to the law than any other language, the lawyers continued to employ it in making their notes of the trial of cases, which they afterwards published in that barbarous dialect under the name of Reports.

4. After the enactment of this statute, on the introduction of paper pleadings, they followed in the language as well as in other respects the style of the records, which were drawn up in Latin. This technical language continued in use till the time of Cromwell, when by a statute the records were directed to be in English; but this act was repealed at the restoration by Charles II., the lawyers finding it difficult to express themselves as well and as concisely in the vernacular as in the Latin tongue; and the language of the law continued as before till about the year 1730, when the statute of 4 Geo. II. c. 26, was passed. It provided that both the pleadings and the records should thenceforward be framed in English. The ancient terms and expressions which had been so long known in French and Latin were now literally translated into English. The translations of such terms and phrases were found to be exceedingly ridiculous. Such terms as nisi prius, habeas corpus, fieri facias, mandamus, and the like, are not capable of an English dress with any degree of seriousness. They are equally absurd in the manner they are employed in Latin; but use and the fact that they are in a foreign language have made the absurdity less apparent.

5. By statute of 6 Geo. II. c. 14, passed two years after the last-mentioned statute, the use of technical words was allowed to continue in the usual language,—which defeated almost every beneficial purpose of the former statute. In changing from one language to another, many words and technical expressions were retained in the new which belonged to the more ancient language; and not seldom they partook of both. This, to the unlearned student, has given an air of confusion and disfigured the language of the law. It has rendered essential, also, the study of the Latin and French languages. This, perhaps, is not to be regretted, as they are the keys which open to the ardent student vast stores of knowledge. In the United States, the records, pleadings, and all law proceedings are in the English language, except certain technical terms which retain their ancient French and Latin dress.

6. Agreements, contracts, wills, and other instruments may be made in any language, and will be enforced. Bacon, Abr. *Wills* (D 1). And a slander spoken in a foreign language, if understood by those present, or a libel published in such language, will be punished as if spoken or written in the English language. Bacon, Abr. *Slander*, (D 3); 1

Rolle, Abr. 74; 6 Term, 163. For the construction of language, see articles CONSTRUCTION; INTERPRETATION; Jacob, Intr. to the Com. Law Max. 46.

7. Among diplomatists, the French language is the one commonly used. At an early period, the Latin was the diplomatic language in use in Europe. Towards the end of the fifteenth century that of Spain gained the ascendency, in consequence of the great influence which that country then exercised in Europe. The French, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world; though some states use their national language in treaties and diplomatic correspondence. It is usual in these cases to annex to the papers transmitted a translation in the language of the opposite party, wherever it is understood this comity will be reciprocated. This is the usage of the Germanic Confederation, of Spain, and of the Italian courts. When nations using a common language, as the United States and Great Britain, treat with each other, such language is used in their diplomatic intercourse.

See, generally, 3 Blackstone, Comm. 323; 1 Chitty, Crim. Law, 415; 2 Rey, Inst. jud. de l'Angleterre, 211, 212.

LANGUIDUS (Lat.). **In Practice.** The name of a return made by the sheriff when a defendant, whom he has taken by virtue of process, is so dangerously sick that to remove him would endanger his life or health.

In such a case, the officer may and ought unquestionably to abstain from removing him, and may permit him to remain even in his own house in the custody of a follower, though not named in the warrant, he keeping the key of the house in his possession. The officer ought to remove him as soon as sufficiently recovered. If there be a doubt as to the state of health of the defendant, the officer should require the attendance and advice of some respectable medical man, and require him, at the peril of the consequences of misrepresentation, to certify in writing whether it be fit to remove the party or take him to prison within the county. 3 Chitty, Pract. 358. For a form of the return of *languidus*, see 3 Chitty, Pract. 249; T. Chitty, Forms, 53.

LANZAS. In Spanish Law. A certain contribution in money paid by the grandees and other high officers in lieu of the soldiers they ought to furnish government in time of war.

LAPSE. In Ecclesiastical Law. The transfer, by forfeiture, of a right to present or collate to a vacant benefice from a person vested with such right to another, in consequence of some act of negligence by the former. Ayliffe, Parerg. 331.

Upon six months' neglect of the patron, the right lapses to the bishop; upon six months' neglect of bishop, to archbishop; upon his six months' neglect, to king. The day on which the vacancy occurs is not counted, and the six months are calculated as a half-year. 2 Burn, Eccl. Law, 355.

To glide; to pass slowly, silently, or by degrees. To slip; to deviate from the proper path. Webster, Dict. See LAPSED DEVISE; LAPSED LEGACY.

LAPSE PATENT. A patent issued to petitioner for land. A patent for which land to another party has lapsed through neglect of patentee. The lapse patent relates to date of original patent, and makes void all mesne conveyances. 1 Wash. Va. 39, 40.

LAPSED DEVISE. A devise which has lapsed, or does not take effect because of the death of devisee before testator.

The subject-matter of the lapsed devise will, if no contrary intention appears, be included in the residuary clause (if any) contained in the will. But, if the devise be to children or other issue of devisor, and issue of devisee be alive, the devise shall not lapse, if no such intention appear in the will. See 1 Vict. c. 26, §§ 25, 26, 32, 33. A devise always lapses at common law if the devisee dies before testator: in some of the states there are statutes on the subject. See 1 Jarman, Wills, Perkins ed. 301, n.; 4 Kent, Comm. 541.

LAPSED LEGACY. A legacy which, on account of the death of the legatee before the period arrives for the payment of the legacy, lapses or deviates from the course prescribed by the testator, and falls into the residuum. 1 Williams, Ex. 1036.

A distinction exists between a lapsed devise and a lapsed legacy. A legacy which lapses does not fall into the residue unless so provided by the will, but descends to the heir at law; on the contrary, personal property passes by the residuary clause where it is not otherwise disposed of. 2 Bouvier, Inst. 2154–2156. See LAPSED DEVISE.

LARCENY. In Criminal Law. The wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to his the taker's use, and make them his property without the consent of the owner. 2 East, Pl. Cr. 553; 4 Wash. C. C. 700.

In a recent English case, Mr. Baron Parke said that this definition, which was the most complete of any, was defective, in not stating what is the meaning of the word "felonious," which, he said, "may be explained to mean that there is no color of right or excuse for the act; and the 'intent' must be to deprive the owner, not temporarily, but permanently, of his property." Regina *vs.* Holloway, 2 Carr. & K. 942; 1 Den. Cr. Cas. 370; Templ. & M. Cr. Cas. 40. It is safer to be guided by the cases than by the definitions given by text-writers. *Per Coltman*, J. Several definitions are collected by Mr. Bishop, 2 Crim. Law, § 675, n., to which reference is made.

Larceny was formerly in England, and still is, perhaps, in some states, divided into *grand* and *petit* or *petty* larceny, according as the value of the property taken was great or small. 2 East, Pl. Cr. 736; 3 M'Cord, So. C. 187; 3 Hill, N. Y. 395; 6 *id.* 144; 1 Hawks, No. C. 463; 8 Blackf. Ind. 498. Yet

in England this distinction is now abolished, by 7 & 8 Geo. IV. c. 29, § 2; and the same is true of many of the United States, although in some a difference is made, similar in theory, between cases where the amount stolen is more and where it is less than one hundred dollars or some fixed sum.

Compound larceny is larceny under circumstances which, in view of the law, aggravate the crime. The law in relation to this branch of larceny is to a great extent statutory.

2. The property of the owner may be either general, 1 Carr. & K. 518; 2 Den. Cr. Cas. 449, or special. 10 Wend. N. Y. 165; 14 Mass. 217; 13 Ala. N. S. 153; 21 Me. 14; 8 Tex. 115; 4 Harr. Del. 570; 6 Hill, N. Y. 144; 9 Carr. & P. 44.

There must be a taking against the consent of the owner, 8 Carr. & P. 291; 9 *id.* 365; 1 Den. Cr. Cas. 381; 2 Ov. Tenn. 68; 9 Yerg. Tenn. 198; 6 *id.* 154; 20 Ala. N. S. 428; 1 Rich. So. C. 30; 2 Nott & M'C. So. C. 174; Coxe, N. J. 439; and the taking will not be larceny if consent be given, though obtained by fraud. 15 Serg. & R. Penn. 93; 9 Carr. & P. 741; 4 Taunt. 258; 7 Cox, Cr. Cas. 289. When the *possession* of an article is intrusted to a person, who carries it away and appropriates it, this is no larceny, 24 Eng. L. & Eq. 562; 4 Carr. & P. 545; 5 *id.* 533; 1 Pick. Mass. 375; 20 Ala. N. S. 428; 17 N. Y. 114; see 2 M'Mull. So. C. 382; 2 Carr. & K. 983; 4 Mo. 461; 33 Me. 127; 11 Cush. Mass. 483; 13 Gratt. Va. 803; 11 Tex. 769; but when the *custody* merely is parted with, such misappropriation is a larceny. 6 T. B. Monr. Ky. 130; 1 Den. N. Y. 120; 11 Q. B. 929; 1 Den. Cr. Cas. 584.

3. The taking must be in the county where the criminal is to be tried. 9 Carr. & P. 29; Ry. & M. 349. But when the taking has been in the county or state, and the thief is caught with the stolen property in another county than that where the theft was committed, he may be tried in the county where arrested with the goods; as, by construction of law, there is a fresh taking in every county in which the thief carries the stolen property. 7 Metc. Mass. 175. Whether an indictment for larceny can be supported where the goods are proved to have been originally stolen in another state, and brought thence into the state where the indictment is found, is a point on which the decisions are contradictory. Property stolen in one of the British Provinces and brought by the thief into Massachusetts is not larceny there. 3 Gray Mass. 434. See, *contra*, 11 Vt. 650.

4. There must be an actual removal of the article, 1 Leach, Cr. Cas. 4th ed. 236, n., 320; 3 Greenleaf, Ev. § 154; 7 Carr. & P. 552; 8 *id.* 291; 8 Ala. N. S. 328; 12 Ired. No. C. 157; 9 Yerg. Tenn. 198; but a very slight removal, if it amount to an actual taking into possession, is sufficient. 2 East, Pl. Cr. 556, 617; 1 Carr. & K. 245; Dearsl. Cr. Cas. 421.

The property must be personal; and there can be no larceny of things affixed to the soil, 1 Hale, Pl. Cr. 510; 11 Ired. No. C. 477; 8 Carr. & P. 293; but if once severed by the owner, a third person, or the thief himself, as a separate transaction, it becomes a subject of larceny. 11 Ired. No. C. 70; 3 Hill, N. Y. 395; 1 Mod. 89; 2 Rolle, 89; 7 Taunt. 188. It must be of some value, though but slight. 4 Rich. So. C. 356; 3 Harr. Del. 563; 7 Metc. Mass. 475. See 8 Penn. St. 260; 6 Johns. N. Y. 103; 9 Carr. & P. 347.

See Hale, Hawkins, Pleas of the Crown; Bishop, Gabbett, Russell, Criminal Law; Roscoe, Criminal Evidence.

LAS PARTIDAS. The name of a code of Spanish law. It is sometimes called *las siete partidas*, or the seven parts, from the number of its principal divisions. It is a compilation from the civil law, the customary law of Spain, and the canon law. It was compiled by four Spanish jurisconsults, under the eye of Alphonso X., A.D. 1250, and published in Castille in 1263, but first promulgated as law by Alphonso XI., A.D. 1348. The maritime law contained in it is given in vol. 6 of Pardess. Col. of Mar. Law. He follows the edition of 1807, at Paris. It has been translated into English. Such of its provisions as are applicable are in force in Florida, Louisiana, and Texas. 1 Sharswood, Blackst. Comm. 66; 1 White, New Recop. 354.

LASCIVIOUS CARRIAGE. In Connecticut. A term including those wanton acts between persons of different sexes, who are not married to each other, that flow from the exercise of lustful passions, and which are not otherwise punished as crimes against chastity and public decency. 2 Swift, Dig. 343; 2 Swift, Syst. 331.

Lascivious carriage may consist not only in mutual acts of wanton and indecent familiarity between persons of different sexes, but in wanton and indecent actions against the will and without the consent of one of them: as, if a man should forcibly attempt to pull up the clothes of a woman. 5 Day, Conn. 81.

LAST HEIR. He to whom the lands come if they escheat for want of lawful heirs: viz., sometimes the lord of whom the lands are held, sometimes the king. Bracton, lib. 5, c. 17.

LAST SICKNESS. That of which a person dies.

The expenses of this sickness are generally entitled to a preference in payment of debts of an insolvent estate. La. Civ. Code, art. 3166.

To prevent impositions, the statute of frauds requires that nuncupative wills shall be made during the testator's last sickness. Roberts, Frauds, 556; 20 Johns. N. Y. 502.

LAST WILL (Lat. *ultima voluntas*). A disposition of real estate to take effect after death.

It is strictly distinguishable from testament, which is applied to personal estate, 1 Williams, Exec. 6, n. *b*, Amer. notes; but the words are generally used together, "last will and tes-

tament," in a will, whether real or personal estate is to be disposed of. See WILL.

LATENT AMBIGUITY. One which does not appear on the face of the instrument. See AMBIGUITY; MAXIMS, *Ambiguities.*

LATHE, LATH (L. Lat. *laestrum* or *leda.* Law Fr. and Eng. Dict.). A division of certain counties in England, intermediate between a county or shire and a hundred, sometimes containing three or four hundreds, as in Kent and Sussex. Cowel. But in Sussex the word used for this division is *rape.* 1 Sharswood, Blackst. Comm. 116. There was formerly a lathe-reeve or bailiff in each *lathe. Id.* This division into *lathes* continues to the present day. See 12 East, 244. In Ireland, the *lathe* was intermediate between the tything and the hundred. Spencer, Ireland. See Termes de la Ley.

LATIDEMEO. In Spanish Law. The tax paid by the possessor of land held by quit-rent or emphyteusis to the owner of the estate, when the tenant alienates his right in the property.

LATIFUNDIUM (Lat.). **In Civil Law.** Great or large possessions; a great or large field; a common. Ainsworth. A great estate made up of smaller ones (*fundus*), which began to be common in the latter times of the empire. Schmidt, Civ. Law, Introd. p. 17.

LATIFUNDUS (Lat. *latè possidens*). A possessor of a large estate made up of smaller ones. DuCange.

LATITAT (Lat. he lies hid). **In English Law.** The name of a writ calling a defendant to answer to a personal action in the king's bench. It derives its name from a supposition that the defendant lurks and lies hid, and cannot be found in the county of Middlesex (in which the said court is holden) to be taken there, but is gone into some other county, and therefore requiring the sheriff to apprehend him in such other county. Fitzherbert, Nat. Brev. 78.

LAUDIMIUM, LAUDATIOREM (Lat. *a laudando domino*). A fiftieth part of the purchase-money or (if no sale) of the value of the estate paid to the landlord (*dominus*) by a new *emphyteuta* on his succession to the estate, not as heir, but as singular successor. Voetius, Comm. ad Pand. lib. 6, tit. 3, §§ 26–35; Mackeldey, Civ. Law, 297.

In Old English Law. The tenant paid a *laudemium* or acknowledgment-money to new landlord on the death of the old. See Blount, *Acknowledgment-Money.*

LAUNCH. The movement by which a ship or boat descends from the shore into the water when she is first built, or afterwards.

A large, long, low, flat-bottomed boat. Mar. Dict. The long-boat of a ship. R. H. Dana. A small vessel employed to carry the cargo of a large one to and from the shore.

The goods on board of a launch are at the risk of the insurers till landed. 5 Mart. La. N. S. 387. The duties and rights of the master of a launch are the same as those of the master of a lighter.

When the master of a vessel agreed to take cotton on board his vessel from the cotton-press, and employed a steam-lighter for that purpose, and the cotton was lost by an explosion of the steam-boiler of the lighter, it was held that his vessel was liable *in rem* for the loss. 23 Bost. Law Rep. 277.

LAW. That which is laid down; that which is established. A rule or method of action, or order of sequences.

The rules and methods by which society compels or restrains the action of its members.

The aggregate of those rules and principles of conduct which the governing power in a community recognizes as the rules and principles which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members.

A rule of civil conduct prescribed by the supreme power in a state. 1 Stephen, Comm. 25.

A rule or enactment promulgated by the legislative authority of a state; a long-established local custom which has the force of such an enactment. 10 Pet. 18.

The doctrines and procedure of the common law of England and America, as distinguished from those of equity.

An oath. So used in the old English practice, by which wager of law was allowed. See WAGER OF LAW.

2. Perhaps few terms whose use requires equal precision serve in so many diverse meanings as the term law. In its root it signifies that which is laid down, that which is established. "In the largest sense," says Montesquieu (Esprit des Lois, b. 1, ch. 1), "laws are the necessary relations which arise from the nature of things; and, in this sense, all beings have their laws, God has his laws, the material universe has its laws, intelligences superior to man have their laws, animals have their laws, man has his laws. In this sense, the idea of a command proceeding from a superior to an inferior is not necessarily involved in the term law. It is frequently thus used to denote simply a statement of a constant relation of phenomena. The laws of science, thus, are but generalized statements of observed facts. "It is a perversion of language," says Paley, "to assign any law as the efficient operative cause of any thing. A law presupposes an agent: this is only the mode according to which an agent proceeds."

In its relation to human affairs there is a broad use of the term, in which it denotes any of those rules and methods by which a society compels or restrains the action of its members. Here the idea of a command is more generally obvious, and has usually been thought an essential element in the notion of human law.

A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. That which is usually intended by the term "laws" is not coextensive with that which is intended by the term "law." In the broadest sense which it bears when used in the abstract, law is a science. It treats of the theory of government, the relation of states to each other and to individuals, and the rights and obligations of states, of individuals, and of artificial persons and

local communities among themselves and to each other.

3. An analysis of the science of law presents a view, *first*, of the rights of persons, distinguishing them as natural persons and artificial persons, or bodies politic or corporations. These rights are deemed either absolute, as relating to the enjoyment of personal security, liberty, and of private property, or, on the other hand, as relative,—that is, arising out of the relation in which several persons stand. These relations are either, *first*, public or political, viz.: the relation of magistrates and people; or, *second*, are private, as the relations of master and servant, husband and wife, parent and child, guardian and ward, to which might be added relations arising out of private contracts, such as partnership, principal and agent, and the like. Under the head of the rights of persons as arising out of public relations may be discussed the constitution and polity of the state, the distribution of powers among the various departments of the government, the political status of individuals, as aliens, citizens, and the like.

In the *second* place, the analysis presents the rights of property, which is divided into personal property or chattels, viz., that which is movable, and real property, or that which is immovable, viz., lands, including nearly all degrees of interest therein, as well as such chattels as by a peculiar connection with land may be deemed to have lost their character as legally movable: these rights of property are viewed in respect to the origin of title, the transmission of title, and the protection of the enjoyment thereof.

In the *third* place, the analysis presents a view of private wrongs, or those injuries to persons for which the law provides a redress for the aggrieved party; and under this head may be considered the tribunals through which the protection of rights or the redress of wrongs may be obtained, and the various modes of procedure to those ends.

4. Lastly, the analysis presents a view of public wrongs, or crimes and misdemeanors, in which may be considered the theory of crime and punishment, the persons capable of committing crimes, the several degrees of guilt of principals and accessories, the various crimes of which the law takes cognizance,—as, those against religion, those against the state and its government, and those against persons and property,—with the punishment which the law affixes to each, and also the tribunals and procedure by which crimes threatened may be prevented and crimes committed may be punished. Blackstone, Comm.

5. In a stricter sense, but still in the abstract, law denotes the aggregate of those rules and principles of conduct which the governing power in a community recognizes as the rules and principles which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of members of the community.

It is the *aggregate* of legal rules and principles, as distinguished from any particular rule or principle. No one statute, nor all statutes, constitute the law of the state; for the maxims of the courts and the regulations of municipal bodies, as well as, to some extent, the universal principles of ethics, go to make up the body of the law. It includes *principles*, which rest in the common sense of justice and right, as well as positive rules or regulations, which rest in ordinance. It is the aggregate of the rules or principles only which the *governing power* in the community recognizes, because that power, whether it be deemed as residing in a monarch, an aristocracy, or in the common people at large, is the source of the authority and the sanction of those rules and principles. It is the aggregate of those rules and principles which are *recognized* as the law by that power, rather than those which are actually enforced in all cases; for a statute is none the less a law because the community forbear to enforce it, so long as it is officially recognised by them as that which, in theory at least, should be enforced; nor does a departure from the law by the governing power in itself abrogate the law. It comprises not only those rules and principles which are to be enforced, but also those which are simply permissive; for a very large part even of modern statute-law—which is commonly defined as a rule commanding or prohibiting—in reality neither commands nor prohibits, except in the most distant and indirect sense, but simply authorizes, permits, or sanctions; and this is much more generally true of those principles of the law which rest in custom and the adjudications of the courts. It is only those which relate to the *members of the community* in question; for laws, as such, have no extra-territorial operation.

6. The idea of law has commonly been analyzed as composed of three elements: *First*, a command of the lawgiver, which command must prescribe not a single act merely, but a series or class of acts; *second*, an obligation imposed thereby on the citizen; *third*, a sanction threatened in the event of disobedience. Thus, municipal law is defined as "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong." 1 Blackstone, Comm. 44. The latter clause of this definition has been much criticized. Mr. Chitty modifies it to "commanding what shall be done or what shall not be done" (*id. note*); and Mr. Stephen omits it, defining law as "a rule of civil conduct prescribed by the supreme power in a state." 1 Stephen, Comm. 25. It is also defined as a rule of conduct contained in the command of a sovereign addressed to the subject. (Encyc. Brit.) These definitions, though more apt in reference to statutes and edicts than to the law in general, seem, even in reference to the former sort of law, to look rather at the usual form than the invariable essence of the thing. The principle of law, that a promise without a consideration is void, neither commands men to provide a consideration for every promise nor forbids them to promise without consideration, for this is lawful; nor does it forbid them to fulfil such promises. It simply amounts to this, that if men choose to break such promises, society will interfere to enforce them. And even many statutes have no form of a command or prohibition; and, moreover, some that are such in form are not in reality. An enactment that no action shall be brought on a simple contract after the lapse of six years from the time the cause of action accrued cannot aptly be said to command men to bring actions within six years, nor even, in fact, to forbid them to bring such actions after that time; for it is still lawful to sue on an outlawed demand, and, if the defendant do not object, the plaintiff may succeed. It may be deemed a command in so far as it is a direction to the courts to dismiss such actions; but as a rule of civil conduct it amounts simply to this, that when an obligation has become stale to a certain degree, society will sanction the debtor in repudiating it.

7. When used in the concrete, the term usually has reference to statutes or expressions of the legislative will. "The *laws* of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 16 Pet. 18. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "the solemn expression of the legislative will."

But, as has already been said, "law" in the ab-

struct involves much more. Thus, a reference in a statute to "the cases provided by law" includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law. 18 N. Y. 115.

The law of the land, an expression used in Magna Charta and adopted in most of the earlier constitutions of the original states, means, however, something more than the legislative will: it requires the due and orderly proceeding of justice according to the established methods. See DUE PROCESS OF LAW; Jones *vs.* Robbins, 8 Gray, Mass. 329.

When the term law is used to denote enactments of the legislative power, it is frequently confined, especially by English writers, to permanent rules of civil conduct, as distinguished from other acts, such as a divorce act, an appropriation bill, an estates act. Report of Eng. Stat. L. Com. Mar., 1856.

In the United States, the organic law of a state is termed the constitution, and the term "laws" generally designates statutes or legislative enactments, in contradistinction to the constitution. See STATUTES.

8. Law, as distinguished from equity, denotes the doctrines and procedure of the common law of England and America, from which equity is a departure.

The distinction between law and equity has been abolished in New York, Ohio, Indiana, Missouri, Wisconsin, Kentucky, Alabama, California, Oregon, and Minnesota, at least so far as the methods of procedure and the organization of tribunals is concerned; but the distinction between legal and equitable relief still maintains its place in the doctrines of remedies.

Law is also used in contradistinction to fact. Questions of law are, in general, for the decision of the court; while it is for the jury to pass upon questions of fact.

In respect to the ground of the authority of law, it is divided as natural law, or the law of nature or of God, and positive law.

9. *Arbitrary law.* A law or provision of law so far removed from considerations of abstract justice that it is necessarily founded on the mere will of the law-making power, so that it is rather a rule established than a principle declared. The principle that an infant shall not be bound by his contract is not arbitrary; but the rule that the limit of infancy shall be twenty-one years, not twenty nor twenty-two, is arbitrary.

The term is also sometimes used to signify an unreasonable law,—one that is in violation of justice.

Irrevocable laws. All laws which have not in their nature or in their language some limit or termination provided are, in theory, perpetual; but the perpetuity is liable to be defeated by subsequent abrogation. It has sometimes been attempted to secure an absolute perpetuity by an express provision forbidding any abrogation. But it may well be questioned whether one generation has power to bind their posterity by an irrevocable law. See this subject discussed by Bentham, Works, vol. 2, pp. 402–407; and see Dwarris, Stat. 479.

Municipal law is a system of law proper to any single state, nation, or community. See MUNICIPAL LAW.

A *penal law* is one which inflicts a penalty for its violation.

Positive law is the system naturally established by a community, in distinction from natural law. See POSITIVE LAW.

A *private law* is one which relates to private matters which do not concern the public at large.

A *prospective law* or statute is one which applies only to cases arising after its enactment, and does not affect that which is already past.

10. A *public law* is one which affects the public, either generally or in some classes.

A *retrospective law* or statute is one that turns backward to alter that which is past or to affect men in relation to their conduct before its enactment. These are also called *retroactive laws.* In general, whenever a retroactive statute would take away vested rights or impair the obligation of contracts, it is in so far void. 3 Dall. Penn. 391. But laws which only vary the remedies, or merely cure a defect in proceedings otherwise fair, are valid. 10 Serg. & R. Penn. 102, 103; 15 *id.* 72; 2 Pet. 380, 627; 8 *id.* 88; 11 *id.* 420. See EX POST FACTO.

For matters peculiar to the following classes of laws, see their several titles:

AGRARIAN LAWS; BREHON LAW; BRETTS AND SCOTTS LAW; CANON LAW; CIVIL LAW; CODES; COLONIAL LAW; COMMERCIAL LAW; CONSTITUTIONAL LAW; CONSUETUDINARY LAW; CORN LAWS; CRIMINAL LAWS; CROWN LAW; ECCLESIASTICAL LAW; EDICTAL LAW; EX POST FACTO LAWS; FECIAL LAW; FEUDAL LAW; FOREIGN LAW; GAME LAWS; GENTOO LAW; GREEN CLOTH LAW; HINDU LAW; INSOLVENCY; LAWS OF OLERON; MAHOMMEDAN LAW; MARTIAL LAW; MILITARY LAW; RHODIAN LAW; STATUTES OF WISBUY.

LAW BORGH. **In Old Scotch Law.** A pledge or surety for appearance.

LAW-BURROWS. **In Scotch Law.** Security for the peaceful behavior of a party; security to keep the peace. This process was much resorted to by the government of Charles II. for political purposes.

LAW COURT OF APPEALS. **In American Law.** An appellate tribunal, in the state of South Carolina, for hearing appeals from the courts of law.

LAW DAY. The day fixed in a mortgage or defeasible deed for the payment of the debt secured. 24 Ala. N. S. 149; 10 Conn. 280; 21 N. Y. 345.

In Old English Law. Law day or lage day denoted a day of open court; especially the more solemn courts of a county or hundred. The court-leet, or view of frankpledge.

LAW FRENCH. From the time of William the Norman down to that of Edward III., all public proceedings and documents in England, including the records of the courts, the arguments of counsel, and the decisions of the judges, were in the language of the Norman French. After Latin and English were substituted in the records and proceedings, however, the cases and decisions

continued until the close of the seventeenth century to be reported in French; the first reports published in English being those of Style, in 1658. The statutes of the reign of Henry III. and some of the subsequent reigns are partly or wholly in this language; but English was substituted in the reign of Henry VII. Of the law-treatises in French, the Mirrour and Britton, and the works of Littleton, may be mentioned.

LAW OF THE LAND. Due process of law. 2 Yerg. Tenn. 50; 6 Penn. St. 86; 4 Hill, N. Y. 140. See DUE PROCESS OF LAW.

LAW LATIN. Edward III. substituted the Latin language for the Norman-French in the records, and the English in other proceedings. The Latin was used by virtue of its being the language of scholars of all European nations; but, in order to adapt it to the purposes of the profession, the English terms of legal art in most frequent use were Latinized by the simple addition of a Latin termination, and the diverse vocabulary thus collected was arranged in English idioms. But this barbarous dialect commended itself by a semblance of scholarly sound, and more by the precision which attaches to technical terms that are never used in popular language. During the time of Cromwell, English was used; but with the restoration Latin was reinstated, and held its place till 4 Geo. II. ch. 26, when it was enacted that, since the common people ought to know what was done for and against them, proceedings should be in English. It was found, however, that certain technical terms had become so fixed that by a subsequent act such words were allowed to continue in use. 6 Geo. II. ch. 14. Hence a large class of Latin terms are still in use, of which *nisi prius*, *habeas corpus*, *lis pendens*, are examples. Consult 3 Blackstone, Comm. 318–323, and as to particular words and phrases, Termes de la Ley; Taylor's Law Glossary; the Law-French and Law-Latin Dictionary; Kelham's Norman-French Dictionary; DuCange.

LAW MERCHANT. The general body of commercial usages in matters relative to commerce. Blackstone calls it the *custom of merchants*, and ranks it under the head of the particular customs of England, which go to make up the great body of the common law. 1 Blackstone, Comm. 75. Since, however, its character is not local, nor its obligation confined to a particular district, it cannot with propriety be considered as a *custom* in the technical sense. 1 Stephen, Comm. 54. It is a system of law which does not rest exclusively on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. 3 Kent, Comm. 2.

These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*, Winch, 24; and this application is not confined to merchants, but extends to all persons concerned in any mercantile transaction. See Beawes, Lex Mercatoria Rediviva; Caines, Lex Mercatoria Americana; Comyns, Dig. *Merchant* (D); Chitty, Com. Law; Pardessus, Droit Commercial; Collection des Lois maritimes antérieure au dix-huitième Siècle, par Dupin; Capmany, Costumbres Maritimas; Il Consolato del Mare; Us et Coutumes de la Mer; Piantandia, Della Giurisprudenze Maritima Commerciale, Antica e Moderna; Valin, Commentaire sur l'Ordonnance de la Marine, du Mois d'Août, 1681; Boulay-Paty, Droit Comm.; Boucher, Institutions au Droit Maritime; Parsons, Marit. Law.

LAW OF NATIONS. See INTERNATIONAL LAW.

LAW OF NATURE. That law which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties which we owe either to the Supreme Being, to ourselves, or to our neighbours: as, reverence to God, self-defence, temperance, honour to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like. Erskine, Pract. Scotch Law, 1. 1. 1. See Ayliffe, Pand. tit. 2, p. 2; Cicero, de Leg. lib. 1.

2. The primitive laws of nature may be reduced to six, namely: comparative sagacity, or reason; self-love; the attraction of the sexes to each other; the tenderness of parents towards their children; the religious sentiment; sociability.

When man is properly organized, he is able to discover moral good from moral evil; and the study of man proves that man is not only an intelligent but a free being, and he is therefore responsible for his actions. The judgment we form of our good actions produces happiness; on the contrary, the judgment we form of our bad actions produces unhappiness.

3. Every animated being is impelled by nature to his own preservation, to defend his life and body from injuries, to shun what may be hurtful, and to provide all things requisite to his existence. Hence the duty to watch over his own preservation. Suicide and duelling are, therefore, contrary to this law; and a man cannot mutilate himself, nor renounce his liberty.

The attraction of the sexes has been provided for the preservation of the human race; and this law condemns celibacy. The

end of marriage proves that polygamy and polyandry are contrary to the law of nature. Hence it follows that the husband and wife have a mutual and exclusive right over each other.

4. Man from his birth is wholly unable to provide for the least of his necessities; but the love of his parents supplies for this weakness. This is one of the most powerful laws of nature. The principal duties it imposes on the parents are to bestow on the child all the care its weakness requires, to provide for its necessary food and clothing, to instruct it, to provide for its wants, and to use coercive means for its good, when requisite.

5. The religious sentiment which leads us naturally towards the Supreme Being is one of the attributes which belong to humanity alone; and its importance gives it the rank of the moral law of nature. From this sentiment arise all the sects and different forms of worship among men.

The need which man feels to live in society is one of the primitive laws of nature whence flow our duties and rights; and the existence of society depends upon the condition that the rights of all shall be respected. On this law are based the assistance, succors, and good offices which men owe to each other, they being unable to provide each every thing for himself.

LAW OF THE STAPLE. See LAW MERCHANT.

LAWFUL. Legal. That which is not contrary to law. That which is sanctioned or permitted by law. That which is in accordance with law. The terms "lawful," "unlawful," and "illegal" are used with reference to that which is in its *substance* sanctioned or prohibited by the law. The term "legal" is occasionally used with reference to matters of *form* alone: thus, an oral agreement to convey land, though void by law, is not properly to be said to be unlawful, because there is no violation of law in making or in performing such an agreement; but it is said to be not legal, or not in lawful form, because the law will not enforce it, for want of that written evidence required in such cases.

LAWFUL MONEY. Money which is a legal tender in payment of debts: *e.g.* gold and silver coined at the mint. 2 Salk. 446; 5 Mod. 7; 3 Ind. 358; 2 How. 244; 3 *id.* 717; 16 Ark. 83. See 1 Hempst. C. C. 236.

LAWING OF DOGS. Mutilating the fore-feet of mastiffs, to prevent them from running after deer. 3 Blackstone, Comm. 71.

LAWLESS COURT. An ancient local English court, said to have been held in Essex once a year, at cock-crowing, without a light or pen and ink, and conducted in a whisper.

LAWLESS MAN. An outlaw.

LAWSUIT. An action at law, or litigation.

LAWYER. One skilled in the law.

LAY. In English Law. That which relates to persons or things not ecclesiastical. In the United States, the people are not by law divided, as in England, into ecclesiastical and lay. The law makes no distinction between them.

In Pleading. To state or to allege. The place from whence a jury are to be summoned is called the venue, and the allegation in the declaration of the place where the jury is to be summoned is, in technical language, said to *lay the venue*. 3 Stephen, Comm. 574; 3 Bouvier, Inst. n. 2826.

LAY CORPORATION. A corporation composed of lay persons or for lay purposes. Angell & A. Corp. 28–30; 1 Sharswood, Blackst. Comm. 470.

TO LAY DAMAGES. To state at the conclusion of the declaration the amount of damages which the plaintiff claims.

LAY DAYS. In Maritime Law. The time allowed to the master of a vessel for loading and unloading the same. In the absence of any custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge. 10 Mees. & W. Exch. 331. See 3 Esp. 121. They differ from DEMURRAGE, which see.

LAY FEE. A fee held by ordinary feudal tenure, as distinguished from the ecclesiastical tenure of *frankalmoign*, by which an ecclesiastical corporation held of donor. The tenure of *frankalmoign* is reserved by stat. 12 Car. II., which abolished military tenures. 1 Sharswood, Blackst. Comm. 101.

LAY IMPROPRIATOR. Lay rector, to whom the greater tithes are reserved, the lesser going to the vicar. 1 Burn, Eccl. Law, 75, 76.

LAY PEOPLE. Jurymen. Finch, Law, 381.

LAYMAN. In Ecclesiastical Law. One who is not an ecclesiastic nor a clergyman.

LAZARET, LAZARETTO. A place, selected by public authority, where vessels coming from infected or unhealthy countries are required to perform quarantine. See HEALTH.

LE ROI S'AVISERA. The king will consider of it. This phrase is used by the English monarch when he gives his dissent to an act passed by the lords and commons. The same formula was used by the late king of the French for the same purpose. 1 Toullier, n. 52. See VETO.

LE ROI LE VEUT. The king assents. This is the formula used in England, and formerly in France, when the king approved of a bill passed by the legislature. 1 Toullier, n. 52.

LE ROI VEUT EN DELIBERER. The king will deliberate on it. This is the formula which the late French king used when he intended to veto an act of the legislative assembly. 1 Toullier, n. 42.

LEADING A USE. A term applied to deeds declaring the use of a fine: *i.e.* specifying to whose use the fine shall enure before the fine is levied. 2 Sharswood, Blackst. Comm. 363. See DEED.

LEADING CASE. A case decided by a court of last resort, which decides some particular point in question, and to which reference is constantly or frequently made, for the purpose of determining the law in similar questions.

Many elements go to the constitution of a case as a leading case: among which are, the priority of the case, the character of the court, the amount of consideration given to the question, the freedom from collateral matters or questions. The term is applied to cases as leading either in a particular state or at common law. A very convenient means of digesting the law upon any subject is found to be the selection of a leading case upon the subject, and an arrangement of authorities illustrating the questions decided. See Bennett & H. Lead. Crim. Cas.; Smith, Lead. Cas.; Hare & W. Sel. Dec.; Tudor, Lead. Cas.; and a variety of others.

LEADING COUNSEL. That one of two or more counsel employed on the same side in a cause who has the principal management of the cause. So called as distinguished from the other, who is called the *junior counsel*.

LEADING QUESTION. **In Practice.** A question which puts into the witness's mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. 7 Serg. & R. Penn. 171; 4 Wend. N. Y. 247. In that case the examiner is said to *lead* him to the answer. It is not always easy to determine what is or is not a leading question.

These questions cannot, in general, be put to a witness in his examination in chief. 3 Binn. Penn. 130; 6 *id.* 483; 1 Phillipps, Ev. 221; 1 Starkie, Ev. 123. But, in an examination in chief, questions may be put to lead the mind of the witness to the subject of inquiry; and they are allowed when it appears the witness wishes to conceal the truth or to favor the opposite party, or where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of such subject. 1 Campb. 43; 1 Stark. 100.

In cross-examinations, the examiner has generally the right to put leading questions. 1 Starkie, Ev. 132; 3 Chitty, Pract. 892; Roscoe, Civ. Ev. 94; 3 Bouvier, Inst. n. 3203, 3204.

LEAGUE. A measure of length, which consists of three geographical miles. The jurisdiction of the United States extends into the sea a marine league. See Acts of Congress of June 5, 1794, 1 Story, U. S. Laws, 352; and April 20, 1818, 3 Story, U. S. Laws, 1694; 1 Wait, State Papers, 195. See CANNON SHOT.

In Criminal Law. A conspiracy to do an unlawful act. The term is but little used.

In Contracts. An agreement between states. Leagues between states are of several kinds: *First*, leagues offensive and defensive, by which two or more nations agree not only to defend each other, but to carry on war against their common enemies. *Second*, defensive, but not offensive, obliging each to defend the other against any foreign invasion. *Third*, leagues of simple amity, by which one contracts not to invade, injure, or offend the other: this usually includes the liberty of mutual commerce and trade, and the safeguard of merchants and traders in each other's domain. Bacon, Abr. *Prerogative* (D 4). See CONFEDERACY; CONSPIRACY; PEACE; TRUCE; WAR.

LEAKAGE. The waste which has taken place in liquids, by their escaping out of the casks or vessels in which they were kept.

By the act of March 2, 1799, s. 59, 1 Story, U. S. Laws, 625, it is provided that there be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon, and ten per cent. on all beer, ale, and porter in bottles, and five per cent. on all other liquors in bottles, to be deducted from the invoice quantity, in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity, to be ascertained by tale, at the option of the importer, to be made at the time of entry.

LEAL. Loyal; that which belongs to the law.

LEAP YEAR. See BISSEXTILE.

LEASE. A species of contract for the possession and profits of lands and tenements either for life or for a certain term of years, or during the pleasure of the parties.

2. One of its essential properties is, that its duration must be for a shorter period than the duration of the interest of the lessor in the land; for if he disposes of his entire interest it becomes an *assignment*, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves to himself a reversion in the leased premises.

And a distinction is to be noted between a lease and a mere agreement for a lease. The whole question, however, resolves itself into one of construction, and an instrument is to be considered either a lease or an agreement for a lease, according to what appears to be the intention of the parties; though, generally, if there are apt words of demise followed by possession, the instrument will be held a lease, 2 Johns. N. Y. 47; 5 *id.* 74; 9 N. Y. 44; 5 Barnew. & Ad. 1042; 3 Carr. & P. 441; 4 Mees. & W. Exch. 719; 8 Bingh. 178; 1 Q. B. 517; otherwise, if a fuller lease is to be prepared and executed before the demise is to take effect and possession to be given. 21 Vt. 172; 24 Wend. N. Y. 201; 3 Stor. C. C. 325; 4 Conn. 238; 9 Ad. & E. 644; 1 Pen. & D. 444.

3. The party who leases is called *the lessor*, he to whom the lease is made *the lessee*, and the compensation or consideration of the lease is *the rent*. The words *lease* and *demise* are frequently used to signify the estate or interest conveyed; but they properly apply to the instrument of conveyance

When a lessee parts with the estate granted to him, reserving any portion thereof, however small, he makes an *underlease*. Taylor, Landl. & Ten. § 14; 15 Wend. N. Y. 667; 2 Ohio, 221; 8 Pick. Mass. 339; 1 W. Blackst. 482; 13 Mees. & W. Exch. 209.

The estate created by a lease, when for years, is called *a term* (*terminus*), because its duration is limited and determined,—its commencement as well as its termination being ascertained by an express agreement of the parties. And this phrase signifies not only the limitation of time or period granted for the occupation of the premises, but includes also the estate or interest in the land that pass during such period. A term, however, is perfected only by the entry of the lessee; for previous to this the estate remains in the lessor, the lessee having a mere right to enter, which right is called an *inter esse termini*. 1 Washburn, Real Prop. 292–297; 5 Barnew. & C. 111; 5 Coke, 23 *b*; Croke Jac. 60; 1 Barnew. & Ald. 606; 1 Brod. & B. 238.

4. Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease; and therefore not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common-law rule. Sheppard, Touchst. 268; 23 Penn. St. 106; 3 N. Y. 151; 1 Root, Conn. 318. See 1 Washburn, Real Prop. 310. Goods, chattels, or live stock may also be demised; and, although rent cannot technically be said to issue out of these, the contract for its payment is good, and an action for rent in arrear may be maintained upon such leases. Coke, Litt. 57 *a*; 3 Hen. & M. Va. 470; 31 Penn. St. 20.

5. Leases are made either by *parol* or by *deed*. The former mode embraces all cases where the parties agree either orally or by a writing not under seal. The technical words generally made use of in the written instrument are, "*demise, grant, and to farm, let;*" but no particular form of expression is required in any case to create an immediate demise. 8 Bingh. 182; 9 Ad. & E. 650; 5 Term, 168; 2 Wend. N. Y. 438; 1 Den. N. Y. 602; 8 Penn. St. 272; 12 Me. 135; Williams, Real Prop. 327. Any permissive holding is, in fact, sufficient for the purpose, and it may be contained in any written memorandum by which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises for any given period, and of the other to assume the possession for the same period. Taylor, Landl. & Ten. § 26; 1 Washburn, Real Prop. 300. The English statute of frauds, of 29 Charles II., first required all leases exceeding three years to be in writing; and this statute has been generally adopted in the United States. But New York, Connecticut, Michigan, Indiana, and Illinois have reduced the period of an oral lease to one year. 1 Washburn, Real Prop. 299, 391; 5 Ad. & E. 856; Browne, Stat. of Frauds, 501–532.

6. A written agreement is generally sufficient to create a term of years, 3 Greene, N. J. 116; 21 Wend. N. Y. 635; but at common law every conveyance of a freehold interest was required to be by deed. This rule is in force in New York and South Carolina, and, consequently, applies to leases for life in those states. Virginia and Kentucky require all estates exceeding a term of five years to be by deed; while Vermont and Rhode Island apply the rule to a term that exceeds one year. In Louisiana, it must, in addition, be registered in the office of a notary. In England, by a recent statute, all leases that are required to be in writing must also be under seal. 4 Kent, Comm. 443; Taylor, Landl. & Ten. § 34. See Browne, Stat. of Frauds, Appx. 503–531.

7. All persons seised of lands or tenements may grant leases of them, unless they happen to be under some legal disability: as, of unsound mind, immature age, or the like, 2 Exch. 487; 4 *id.* 17; 9 *id.* 309; 8 Carr. & P. 679; 10 Pet. 65; 5 Pick. Mass. 431; 11 *id.* 304; 17 Wend. N. Y. 133; 4 Dev. & B. No. C. 289; 1 N. H. 75; and in case of many of these disabilities the leases are voidable merely, and not void. See, as to infants, 10 Pet. 65; 5 Ohio, 251; 15 *id.* 192; 11 Humphr. Tenn. 468; 11 Johns. N. Y. 539; 14 *id.* 124; intoxicated persons, 13 Mees. & W. Exch. 623; married women, Smith, Landl. & Ten. 48; 1 Platt, Leases, 48; 19 N. H. 483. See PARTIES; CONTRACTS. But it is essential to the validity of a lease that the lessor has, at the time he undertakes to make the grant, possession of the premises; otherwise, whatever he does will amount to nothing more than the assignment of a *chose in action*. Croke Car. 109; Sheppard, Touchst. 269. For this reason, it was held in Pennsylvania that a purchaser at a sheriff's sale who had not received his deed could not make a valid lease. 1 Penn. St. 402.

8. But, unless there is an *adverse holding*, possession will be deemed to follow the ownership. And although a lease may not be sufficient to authorize a lessee to demand possession for the want of a possessory title in his lessor, it will still operate by way *of estoppel*, and enure to his benefit if the lessor afterwards comes into possession of the land before the expiration of the lease. Bacon, Abr. *Leases* (I 4); Croke Eliz. 109; 28 Barb. N. Y. 240; 2 Hill, N. Y. 554; 16 Johns. N. Y. 110, 201; 5 Ark. 693; 7 Mann. & G. 701.

9. The power to lease will, of course, depend upon the extent of the lessor's estate in the premises; and if he has but an estate for life, his lease can only be coextensive therewith; when for a term of years, its commencement as well as its termination must be ascertained, for certainty in these respects is of the essence of a term of years. But although this term may not at first appear to be certain, it may be rendered so by reference to some fact or event: as, if a lease be made to a man for so many years as he has in the manor of Dale, and he happens to have a term of two years in that manor, the lease will be good for that period. Coke, Litt. 45 *b*; 3 Term, 463; 4 East, 29; 1 Mees. & W. Exch. 533.

10. Lord Coke states that, originally, ex-

press terms could not endure beyond an ordinary generation of forty years, lest men might be disinherited; but the doctrine had become antiquated even in his day, and at the present time there is no limitation to a term of years except in the state of New York, where land cannot be leased for agricultural purposes for a longer period than twelve years. See Coke, Litt. 45 *b*, 46 *a;* 9 Mod. 101; 13 Ohio, 334; 1 Platt, Leas. 3; 1 Washburn, Real Prop. 310.

In all cases of uncertain duration, or if no time has been agreed upon for the continuation of the term, or if after the expiration of a term the tenant continues to hold over, without any effort on the part of the landlord to remove him, the tenancy is at the will of either party. And it remains at will until after the payment and receipt of rent on account of a new tenancy, or until the parties concur in some other act which recognizes the existence of a tenancy, from which event it becomes a tenancy from year to year. After this, neither party has a right to terminate it before the expiration of the current year upon which they have entered, nor then without having first given reasonable notice to the other party of his intention to do so. The length of this notice is regulated by the statutes of the different states. 11 Wend. N. Y. 616; 13 Johns. N. Y. 109; 8 Term, 3; 4 Ired. No. C. 294; 3 Zabr. N. J. 111.

11. The *formal parts* of a lease by deed are: *first, the date,* which will fix the time for its commencement, unless some other period is specified in the instrument itself for that purpose; but if there is no date, or an impossible one, the time will be considered as having commenced from the delivery of the deed. 2 Johns. N. Y. 231; 15 Wend. N. Y. 656; 4 Barnew. & C. 272. *Second, the names* of the parties, with respect to which the law knows but one Christian name; and therefore the middle letter of the name of either party is immaterial, and a person may always show he is as well known by one name as another. 14 Pet. 322. *Third,* some *consideration* must appear, although it need not be what is technically called *rent,* or a periodical render of compensation for the use of the premises; but it may be a sum in gross, or the natural affection which one party has for the other. It may also consist in grain, animals, or the personal services of the lessee. 3 Hill, N. Y. 345; 1 Speers, So. C. 408. *Fourth,* the *description* of the premises need not specify all the particulars of the subject-matter of the demise, for the accessories will follow the principal thing named: thus, the garden is parcel of a *dwelling-house,* and the general description of *a farm* includes all the houses and lands appertaining to the farm. 9 Conn. 374; 4 Rawle, Penn. 330; 9 Cow. N. Y. 747. But whether certain premises are parcel of the demise or not is always matter of evidence. 14 Barb. N. Y. 434; 3 Barnew. & C. 870. *Fifth,* the rights and liabilities of the respective parties are regulated by law in the absence of any particular agreement in respect thereto; but express covenants are usually inserted in a lease, for the purpose of limiting or otherwise defining their rights and duties in relation to repairs, taxes, insurance renewals, residence on the premises, modes of cultivation, fixtures, and the like.

12. In every well-drawn lease, provision is made for a *forfeiture* of the term in case the tenant refuses to pay rent, commits waste, or is guilty of a breach of the covenant to repair, insure, reside upon the premises, or the like. This clause enables the lessor or his assigns *to re-enter* in any such event upon the demised premises and eject the tenant, leaving both parties in the same condition as if the lease were a nullity; but in the absence of a proviso for re-entry the lessor would possess no such power, the mere breach of a covenant enabling him to sue for damages only. 3 Wils. 127; 2 Cow. N. Y. 591; 2 Ov. Tenn. 233. The forfeiture will generally be enforced by the courts, except where the landlord's damages are a mere matter of computation and can be readily compensated by money. 7 Johns. N. Y. 235; 4 Munf. Va. 332; 2 Price, Exch. 200. But in case of a forfeiture for the non-payment of rent, the proviso is allowed to operate simply as a security for rent, and the tenant will be relieved from its effects at any time by paying the landlord or bringing into court the amount of all arrears of rent, with interest and costs.

13. A lease may also be *terminated* before the prescribed period if the premises are required to be taken for public uses or improvements, or the subject-matter of demise wholly perishes or is turned into a house of ill fame. 24 Wend. N. Y. 454; 29 Barb. N. Y. 116; 5 Ohio, 303. The same result will follow when the tenant purchases the fee, or the fee descends to him as heir at law; for in either case the lease is *merged* in the inheritance: since there would be a manifest inconsistency in allowing the same person to hold two distinct estates immediately expectant on each other, while one of them includes the time of both, thus uniting the two opposite characters of landlord and tenant. 10 Johns. N. Y. 482; 2 Carr. & P. 347; Taylor, Landl. & Ten. § 502. See LANDLORD AND TENANT.

LEASE AND RELEASE. A species of conveyance much used in England, consisting theoretically of two instruments, but which are practically united in the same instrument.

It was invented by Sergeant Moore, soon after the enactment of the statute of uses. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the *possession.* Being thus in pos-

session, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is granted to him.

The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. 2 Blackstone, Comm. 339; 4 Kent, Comm. 482; Coke, Litt. 207; Cruise, Dig. tit. 32, *c.* 11.

LEASEHOLD. The estate held by virtue of a lease.

LEASING-MAKING. In Scotch Law. Verbal sedition, viz.; slanderous and untrue speeches to the disdain, reproach, and contempt of his majesty, his council and proceedings, etc. Bell, Dict.; Erskine, Inst. 4. 4. 29.

LEAVE OF COURT. Permission granted by the court to do something which, without such permission, would not be allowable.

2. The statute of 4 Ann. c. 16, s. 4, provides that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with *leave of the court*, to plead as many several matters thereto as he shall think necessary for his defence. The principles of this statute have been adopted by most of the states of the Union.

3. When the defendant, in pursuance of this statute, pleads more than one plea in bar to one and the same demand or thing, all of the pleas except the first should purport to be pleaded with *leave of the court*. But the omission is not error nor cause of demurrer. Lawes, Plead. 132; 2 Chitty, Plead. 421; Story, Plead. 72, 76; Gould, Plead. c. 8, § 21; Andr. 109; 3 N. H. 523.

4. Asking leave of court to do any act is an implied admission of jurisdiction of the court, and in those cases in which the objection to the jurisdiction must be taken, if at all, by plea to the jurisdiction, and it can be taken in no other way, the court, by such asking leave, becomes fully vested with the jurisdiction. Bacon, Abr. *Abatement* (A); Bacon, Abr. *Pleas, etc.* (E 2); Lawes, Plead. 91; 6 Pick. Mass. 391. But such admission cannot aid the jurisdiction except in such cases.

LECTOR DE LETRA ANTIQUA. In Spanish Law. The person duly authorized by the government to read and decipher ancient documents and titles, in order to entitle them to legal effect in courts of justice.

The importance of the functions of this officer caused the queen of Spain to issue an ordinance on the 2d of July, 1838, ordering that no person should be permitted to exercise it unless he justified, *first*, that he was a man of good character; *second*, that he was twenty-five years of age, and submitted to a strict examination, justifying that he was acquainted with the Latin language, and especially with the idioms of it used in writings and documents of the middle ages, also with the Romance or ancient Castilian, the Limousin, used in the ancient provinces of Arragon, paleology, Spanish history and chronology; and, *third*, that he could decipher the ancient manuscripts preserved in the archives of Spain, the ancient modes of writing, and the changes introduced in it by time. This examination to be conducted under the superintendence of the *Chefe Politico*, and the process-verbal forwarded to the queen, together with the observations of the board of examiners. Escriche, Dict.

LEDGER. In Commercial Law. A book in which are inscribed the names of all persons dealing with the person who keeps it, and in which there is a separate account, composed generally of one or more pages for each. There are two parallel columns, on one of which the party named is the debtor, and on the other the creditor, and presents a ready means of ascertaining the state of the account. As this book is a transcript from the day-book or journal, it is not evidence *per se*.

LEDGER-BOOK. In Ecclesiastical Law. The name of a book kept in the prerogative courts in England. It is considered as a roll of the court, but, it seems, it cannot be read in evidence. Bacon, Abr.

LEGACY. A gift by last will. The term is more commonly applied to money or personal property, although sometimes used with reference to a charge upon real estate. 2 Williams, Exec. 947; 5 Term, 716; 1 Burr. 268; 7 Ves. Ch. 391, 522.

An *absolute legacy* is one given without condition, to vest immediately. 1 Vern. Ch. 254; 2 *id.* 181; 5 Ves. Ch. 461; 19 *id.* 86; Comyns, Dig. *Chancery* (I 4).

An *additional legacy* is one given to a legatee to whom a legacy has already been given. It may be either by an increase in a codicil of a prior legacy given in the will, or by another legacy added to that already given by the will. 6 Mod. 31; 2 Ves. Ch. 449; 3 Mer. Ch. 154.

An *alternative legacy* is one by which the testator gives one of two or more things without designating which.

A *conditional legacy* is a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated. 1 Roper, Leg. 3d ed. 645.

A *demonstrative legacy* is a bequest of a certain sum of money with reference to a particular fund for payment. Williams, Exec. 995.

A *general legacy* is one so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. 1 Roper, Leg. 3d ed. 170.

An *indefinite legacy* is a bequest of things which are not enumerated or ascertained as to numbers or quantities: as, a bequest by a testator of all his goods, all his stocks in the

funds. Lowndes, Leg. 84; Swinburne, Wills, 485; Ambl. Ch. 641; 1 P. Will. Ch. 697.

A *lapsed legacy* is one which, in consequence of the death of the legatee before the testator or before the period for vesting, has never vested.

A *legacy for life* is one in which the legatee is to enjoy the use of the legacy for life.

A *modal legacy* is a bequest accompanied with directions as to the mode in which it should be applied for the legatee's benefit: for example, a legacy to Titius to put him an apprentice. 2 Vern. Ch. 431; Lowndes, Leg. 151.

A *pecuniary legacy* is one of money. Pecuniary legacies are most usually general legacies, but there may be a specific pecuniary legacy: for example, of the money in a certain bag. 1 Roper, Leg. 150, n.

A *residuary legacy* is a bequest of all the testator's personal estate not otherwise effectually disposed of by his will. Lowndes, Leg. 10; Bacon, Abr. *Legacies* (I).

A *specific legacy* is a bequest of a specified part of the testator's personal estate, distinguished from all others of the same kind. 3 Beav. Rolls, 349.

2. Most persons are capable of becoming legatees, unless prohibited by statute or alien enemies. Legacies to the subscribing witnesses to a will are by statute often declared void. See 2 Williams, Exec. 4th Am. ed. 906 *et seq.*; 19 Ves. Ch. 208; 10 Sim. Ch. 487; 3 Russ. Ch. 437; 1 Sharswood, Blackst. Comm. 442. Bequests to superstitious uses are prohibited by many of the English statutes. No doubt a bequest to further and carry into effect any illegal purpose, which the law regards as subversive of sound policy or good morals, would be held void, and the executor not justified in paying it. 2 Beav. Rolls, 151; 2 Mylne & K. Ch. 697; 5 Mylne & C. Ch. 11; 1 Salk. 162; 2 Vern. Ch. 266. But bequests to charitable uses are favored both in England and the United States. The cases are extensively collated in 2 Williams, Exec. 951, n. 1; 4 Kent, Comm. 508; 2 How. U. S. R. 127; 4 Wheat. 1; 7 Johns. Ch. N. Y. 292; 20 Ohio, 483; 10 Penn. St. 23; 11 Vt. 296; 5 Cush. Mass. 336; 12 Conn. 113; Saxt. Ch. N. J. 577; 3 Leigh, Va. 450; 2 Ired. Eq. No. C. 9, 210; 5 Humphr. Tenn. 170; 11 Beav. Rolls, 481; 14 *id.* 357; 10 Hare, Ch. 446. It is questionable whether the English cases in regard to bequests to secure the offices of the Roman Church, being void, would or should be followed in this country. In those states where the principles of the statute of Elizabeth in regard to charitable uses are recognized in the equity courts, the decisions have been liberal in upholding bequests for the most diverse objects and expressed in the most general terms. 17 Serg. & R. Penn. 88; 2 Ired. Eq. No. C. 210; 1 Gilm. Va. 336; 7 Vt. 241; 2 Sandf. Ch. N. Y. 46; 7 B. Monr. Ky. 617, 618–622; 2 How. 127; 9 Penn. St. 433; 7 Johns. Ch. N. Y. 292.

3. *Construction of legacies.* *First*, the technical import of words is not to prevail over the obvious intent of the testator. 3 Term, 86; 11 East, 246; 16 *id.* 221; 6 Ad. & E. 167; 7 Mees. & W. Exch. 1, 481; 1 Mylne & K. 571; 2 *id.* 759; 2 Russ. & M. Ch. 546; 2 Mass. 56; 11 Pick. Mass. 257, 375; 13 *id.* 41, 44; 2 Metc. Mass. 191, 194; 1 Root, Conn. 332; 1 Nott & M'C. So. C. 69; 12 Johns. N. Y. 389. *Second*, where technical words are used by the testator, or words of art, they are to have their technical import, unless it is apparent they were not intended to be used in that sense. 6 Term, 352; 3 Brown, Ch. 68; 4 Russ. Ch. 386, 387; 2 Sim. Ch. 274; 1 Younge & J. Ch. 512; 4 Ves. Ch. 329; 8 *id.* 306; Dougl. 341; 5 Mass. 500; 8 *id.* 3; 2 M'Cord, So. C. 66; 5 Den. N. Y. 646. *Third*, the intent of the testator is to be determined from the whole will. 1 Swanst. Ch. 28; 1 Coll. Ch. 681; 8 Term, 122; 3 Pet. 377; 4 Rand. Va. 213; 8 Blackf. Ind. 387. *Fourth*, every word shall have effect, if it can be done without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode. 6 Ves. 102; 2 Barnew. & Ald. 448; 2 Blackstone, Comm. 381; 3 Pick. Mass. 360; 7 Ired. Eq. No. C. 267; 10 Humphr. Tenn. 368; 2 Md. 82; 6 Pet. 68; 1 Jarman, Wills, 404–412. *Fifth*, a will of personalty made abroad, the *lex domicilii* must prevail, unless it appear the testator had a different intent. Story, Confl. of Laws, §§ 479 *a*, 479 *m*, 490, 491.

4. *Whether cumulated or repeated.* Where there is *internal evidence* of the intention of the testator, that intention is to be carried out, 2 Beav. Rolls, 215; 7 *id.* 107; 3 Hare, Ch. 620; 2 Drur. & Warr. Ch. 133; 3 Ves. Ch. 462; 5 *id.* 369; 17 *id.* 462; 2 Sim. & S. Ch. 145; 4 Hare, Ch. 219; and evidence will be received in support of the apparent intention, but not against it. 2 Brown, Ch. 528; 4 Hare, Ch. 216; 1 Drur. & Warr. Ch. 94, 113. Where there is no such internal evidence, the following positions of law appear established. *First*, if the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, in that case he can claim the benefit of only one legacy. Toller, Exec. 335; 2 Hare, Ch. 432. *Second*, where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only. 1 Brown, Ch. 30; 4 Ves. Ch. 75; 3 Mylne & K. Ch. 29; 10 Johns. N. Y. 156. See 4 Gill, Md. 280; 1 Zabr. N. J. 573; 16 Penn. St. 127; 5 De Gex & S. Ch. 698; 16 Sim. Ch. 423. *Third*, where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee entitled to both. Finch, 267; 2 Brown, Ch. 225; 3 Hare, Ch. 620. *Fourth*, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case also the latter shall be cumulative, whether its amount be equal,

1 Cox, Ch. 392; 17 Ves. Ch. 34; 1 Coll. Ch. 495; 4 Hare, Ch. 216, or unequal to the former. 1 Chanc. Cas. 301; 1 P. Will. Ch. 423; 5 Sim. Ch. 431; 7 *id.* 29; 1 Mylne & K. Ch. 589. And see 1 Cox, Ch. 392; 1 Brown, Ch. 272; 2 Beav. Rolls, 215; 2 Drur. & Warr. 133; 1 Bligh, N. S. 491; 1 Phill. Ch. 294.

5. *Description of legatee.—Children.* This may have reference to the time of the testator's death, or that of making the will. The former is the presumed intention, unless from the connection or circumstances the latter is the apparent intent, in which case it must prevail. 4 Brown, Ch. 55; Ambl. Ch. 397; 2 Cox, Ch. 191, 192; 11 Sim. Ch. 42; 2 Williams, Exec. 4th Am. ed. 934.

This term will include a child *in ventre sa mère.* 2 H. Blackst. 399; 1 Sim. & S. Ch. 181; 2 Cox, Ch. 425; 1 Meigs, Tenn. 149. But it will sometimes have a more restricted application, and thus be confined to children born before the death of the testator. And it will make no difference that the bequest is to children begotten, or to be begotten, or which "may be born." 2 Mylne & K. 46; 14 Beavan, 453; 1 Williams, Exec. 982, and note.

Heirs may be construed children, 3 Rich, Eq. So. C. 543; 4 Pick. Mass. 198; 2 Hayw. No. C. 356; and children, when used to designate one's heirs, may include grandchildren. 12 B. Monr. Ky. 115, 121; 5 Barb. N. Y. 190. But if the word children is used, and there are persons to answer it, then grandchildren cannot be comprehended under it. 5 Ired. Eq. No. C. 421. See 4 Watts, Penn. 82; 3 Pert. Ala. 452; 5 Harr. & J. Md. 135. The general rule is, that a devise to a man and his children, he having children living at the time the will takes effect, creates a joint estate in the father and children; but if he have no children, he takes an estate tail. 1 Turn. & R. Ch. 310; 12 Clark & F. Hou. L. 161. And a similar legacy of personal estate gives the father a life estate, if he have no children at the time the will takes effect, 12 Sim. Ch. 88; but if there are children living, they take jointly with the father. 5 Sim. Ch. 458.

6. The term children will not include illegitimate children, if there are legitimate to answer the term, 1 Younge, Ch. 354; 2 Russ. & M. Ch. 336; see 1 Williams, Exec. 992, and note (2); otherwise, it may or may not, according to circumstances. See 5 Harr. & J. Md. 10; 2 Paige, Ch. N. Y. 11; 1 Ves. & B. Ch. Ir. 422; 1 Bail. Eq. So. C. 261; 6 Ired. Eq. No. C. 130; 1 Roper, Leg. 80. A bequest to "my beloved wife," not mentioning her by name, applies exclusively to the wife at the date of the will, and is not to be extended to an after-taken wife. 2 P. Will. 992; 1 Russ. & M. Ch. 629; 8 Hare, Ch. 131. One not lawfully married may, nevertheless, take a legacy by the name or description of the wife of the one to whom she is reputed to be married, 1 Keen, Ch. 685; 9 Sim. Ch. 615; but not if the reputed relation is the motive for the bequest. 4 Ves. Ch. 802; 4 Brown, Ch. 90; 5 Mylne & C. Ch. 145. But see 1 Keen, Reg. Cas. 685.

Nephews and *nieces* are terms which, in the description of a legatee, will receive their strict import, unless there is something in the will to indicate a contrary intention. 14 Sim. Ch. 214; 1 Jac. Ch. 207; 4 Mylne & C. Ch. 60; 8 Beav. Rolls, 247; 2 Yeates, Penn. 196; 3 Barb. Ch. N. Y. 466; 3 Halst. Ch. N. J. 462. See 10 Hare, Ch. 63; 17 Beav. Rolls, 21.

The term *cousins* will be restricted to its primary signification, where it is before used in the same will in that sense. 9 Sim. Ch. 457. See 2 Brown, Ch. 125; 1 Sim. & S. Ch. 301; 3 De Gex, M. & G. 649; 4 Mylne & C. Ch. 56; 9 Sim. Ch. 356.

Terms which give an estate tail in lands will be construed to give the absolute title to personalty, 1 Madd. Ch. 475; 19 Ves. Ch. 545; but slight circumstances will often induce a different construction. 2 Brown, Ch. 570; 5 De Gex, M. & G. 188.

A legacy to one and his heirs, although generally conveying a fee-simple in real estate and the entire property in personalty, may, by the manner of its expression and connection, be held to be a designation of such persons as are the legal heirs of the person named, and thus they take as purchasers by name. 1 Jac. & W. Ch. 388.

7. Mistakes in the name or description of legatees may be corrected whenever it can be clearly shown by the will itself what was intended. 1 Phill. Ch. 279, 288; 2 Younge & C. Ch. 72; 10 Hare, Ch. 345; 12 Sim. Ch. 521; 8 Md. 496; 9 Eng. L. & Eq. 269; 15 N. H. 317; 32 *id.* 268; 4 Johns. Ch. N. Y. 607; 23 Vt. 336; 7 Ired. Eq. No. C. 201.

The only instance in which parol evidence is admissible to show the intention of the testator as to a legatee imperfectly described, is that of a strict equivocation: that is, where it appears from extraneous evidence that two or more persons answer the description in the will. 8 Bingh. 244; 5 Mees. & W. Exch. 363; 2 Younge & C. Exch. 72; 12 Ad. & E. 451; Wigram, Wills, 2d ed. 78.

8. *Interest of legatee.* Property given specifically to one for life, and remainder over, must be enjoyed specifically during the life of the first donee, although that may exhaust it. 4 My. & Cr. 299; 2 My. & Keen, 703. But where the bequest is not specific, as where personal property is limited to one for life, remainder over, it is presumed that the testator intended the same property to go over, and if any portion of it be perishable, as long annuities, it shall be sold and converted into permanent property, for the benefit of all concerned. 2 My. & Keen, 699, 701, 702; 7 Ves. 137; 4 My. & Cr. 298.

In personal property there cannot be a remainder in the strict sense of the word, and therefore every future bequest of personal property, whether it be preceded or not by any particular bequest, or limited on a certain or uncertain event, is an executory bequest, and falls under the rules by which

that mode of limitation is regulated. See Fearne, Cont. Rem. 401, n. An executory bequest cannot be prevented or destroyed by any alteration whatsoever in the estate, out of which or after which it is limited. 8 Coke, 96 *a*; 10 *id.* 476. And this privilege of executory bequests, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the event on which an interest of this sort is permitted to take effect is such as must happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the period of gestation, afterwards. Fearne, Cont. Rem. 431.

9. Legacies may be made conditional. In such case, the condition may be either precedent or subsequent: in the former case, no interest vests in the legatee until the performance of the condition, and in the latter, it is liable to be defeated by the failure or non-performance of the condition. 2 Williams, Exec. 1131 *et seq.*

No particular form of words is requisite to constitute one a residuary legatee. It must appear to be the intention of the testator that he shall take the residue of the estate, after paying debts and meeting all other appointments of the will. 2 Williams, Exec. 1310 *et seq.* The right of the executor to the residue of the estate when there is no residuary legatee is well established, both at law and in equity, in England, except so far as it is controlled by statute, 2 P. Will. 340; 3 Atk. Ch. 228; 7 Ves. Ch. 228: but the rule has been controlled in equity by aid of slight presumptions in favor of the next of kin. 1 Brown, Ch. 201; 14 Sim. Ch. 8, 12; 2 Small & G. 241; 14 Ves. Ch. 197. The rule never obtained in this country, it is believed, to any great extent. 3 Binn. Penn. 557; 9 Serg. & R. Penn. 424; 6 Mass. 153; 2 Hayw. No. C. 298; 4 Leigh, Va. 163; 13 Ill. 117.

10. The assent of the executor to a specific legacy is requisite to vest the title in the legatee. 1 Wash. Va. 308; 1 Bail. So. C. 504; 1 Harr. & J. Md. 138; 2 Ired. Eq. No. C. 34; 12 Ala. N. s. 532; 4 Fla. 144; 11 Humphr. Tenn. 559; 2 Md. Ch. Dec. 162. This will often be presumed where the legatee was in possession of the thing at the decease of the testator, and the executor acquiesces in his right. See 4 Dev. No. C. 267; 3 Leigh, Va, 682; 6 Pick. Mass. 126; 6 Call. Va. 55.

Abatement. The general pecuniary legacies are subject to abatement whenever the assets are insufficient to answer the debts and specific legacies. The abatement must be upon all *pro rata*, 4 Brown, Ch. 349, 350; 13 Sim. Ch. 440; but a general pecuniary legatee is not bound to abate in favor of the residuary legatee. 1 Story, Eq. Jur. §§ 555–575; Brightly, Eq. Jur. 387, 388, 389. Specific legatees must abate, *pro rata*, when all the assets are exhausted except specific devises, and prove insufficient to pay debts. 2 Vern. Ch. 756. In New York, they must contribute to make up the share of a child born after the execution of the will, and not provided for in it. 5 Paige, Ch. N. Y. 588.

11. *Ademption of legacies.* A specific legacy is revoked by the sale or change of form of the thing bequeathed: as, by converting a gold chain into a cup, or wool into cloth, or cloth into garments, 2 Brown, Ch. 108, 112; but the change of the form of a security is not an ademption. 23 N. H. 212. A demonstrative legacy is not adeemed by the sale or change of the fund. 5 Barb. N. Y. 312; 10 Beav. Rolls, 547; 15 Jur. 982; 16 *id.* 1130. A legacy to a child is regarded in courts of equity as a portion for such child: hence, when the testator, after giving such a legacy, settles the child and gives a portion, it is regarded as an ademption of the legacy. And it will make no difference that the portion given in settlement is less than the legacy: it will still adeem the legacy *pro tanto*. 2 Vern. Ch. 257; 15 Beav. Rolls, 565; 1 P. Will. 681; 5 Mylne & C. 29; 2 Story, Eq. Jur. §§ 1111–1113.

Payment. A legacy given generally, if no time of payment be named, is due at the death of the testator, although not payable until the executor has time to settle the estate in due course of law. See DEVISE, **6.** Legacies are not due by the civil law or the common law until one year after the decease of the testator. The same term is generally allowed the executor in the American states to dispose of the estate and pay debts, and sometimes, by special order of the probate court, this is extended, from time to time, according to circumstances. 5 Binn. Penn. 475; 5 Paige, Ch. N. Y. 573; 1 Des. So. C. 112; 16 Beav. Rolls, 298.

12. An annuity given by will shall commence at the death of the testator, and the first payment fall due one year thereafter. 3 Madd. Ch. 167. A distinction is taken between an annuity and a legacy to enjoy the interest during life. In the latter case, no interest begins to accumulate until the end of one year from the death of the testator. 7 Ves. Ch. 96; 2 Roper, Leg. 1253. But this point is left in some doubt in the American cases. The following hold that a child's portion, payable at a certain age, draws interest from the death of the testator, *Tilghman*, C. J., 5 Binney, 477, 479; 4 Rawle, Penn. 113, 119; but this rule does not apply when any other provision is made for the child. 6 Paige, Ch. N. Y. 299.

13. Where legatees are under disabilities, as infancy or coverture, the executor cannot discharge himself by payment, except to some party having a legal right to receive the same on the part of the legatee, which in the case of an infant is the legally-appointed guardian, and in the case of a married woman the husband; but in the latter case the executor may decline to pay the legacy until the husband make a suitable provision out of it for the wife, according to the order of the court of chancery. See, on the above points, 1 P. Will. 285; 1 Johns. Ch. N. Y. 3; 9 Vt. 41; 1 Drewr. 71. The proper course

in such cases is for the executor to deposit the money on interest, subject to the order of the court of chancery. 2 Williams, Exec. 4th Am. ed. 1206–1220. The executor is liable for interest upon legacies, whenever he has realized it, and in general he is liable for interest after the legacy is due. 2 Williams, Exec. 1283 *et seq.* But he may excuse himself by paying the money into the court of chancery. 2 P. Will. 67. So, too, if the testator is compelled to pay the money out of his own funds on account of the *devastavit* of a co-executor, and the matter has lain along for many years on account of the infancy of the legatees, no interest was allowed under the special circumstances until the filing of the bill. 9 Vt. 41.

The proper remedy for the recovery of a legacy is in equity. 5 Term, 690.

13. *Satisfaction of debt by legacy.* In courts of equity, if a legacy equal or exceed the debt, it is presumed to have been intended to go in satisfaction, Prec. in Chanc. 240; 3 P. Will. 353; 4 Madd. 325; but if the legacy be less than the debt, it shall not be deemed satisfaction *pro tanto*. 2 Salk. 508; 1 Ves. Sen. Ch. 263; 2 Hou. L. Cas. 153. But courts allow very slight circumstances to rebut this presumption of payment: as, where the debt was not contracted until after the making of the will, 2 P. Will. Ch. 343; where the debt is unliquidated, and the amount due not known, 1 P. Will. 299; where the debt was due upon a bill or note negotiable, 3 Ves. Ch. 561; where the legacy is made payable after the debt falls due, 3 Atk. Ch. 96; where the legacy appears from the will to have been given *diverso intuitu*, 2 Ves. Sen. Ch. 635; where there is express direction in the will for the payment of all debts and legacies, or the legacy is expressed to be for some other reason, 1 P. Will. 410; see, also, 3 Atk. Ch. 65, 68; 2 Story, Eq. Jur. §§ 1110–1113; Brightly, Eq. Jur. §§ 382, 391; 2 Dev. & B. Eq. No. C. 66; 3 Wash. C. C. 48; 6 Penn. St. 18. The American cases do not favor the rule that a legacy is *primâ facie* payment, 12 Wend. N. Y. 67; 2 Hill, N. Y. 576; 2 Gill & J. Md. 185; and its soundness was early questioned in England. 1 P. Will. 410.

Release of debt by a legacy. If one leave a legacy to his debtor, it is not to be regarded as a release of the debt unless that appears to have been the intention of the testator. 4 Brown, Ch. 227; 15 Sim. Ch. 554.

Where one appoints his debtor his executor, it is at law regarded as a release of the debt, Coke, Litt. 264; 8 Coke, 136 *a*; but this is now controlled by statute in England and in many of the United States. But in equity it is considered that the executor is still liable to account for the amount of his own debt. 11 Ves. Ch. 90, nn. 1, 2, 3; 13 *id.* 262, 264.

Where one appoints his creditor executor, and he has assets, it operates to discharge the debt, but not otherwise. 2 Williams, Exec. 4th Am. ed. 1118–1123. See, generally, Toller, Williams, on Executors, Roper on Legacies, Jarman on Wills.

LEGAL. That which is according to law. It is used in opposition to equitable: as, the legal estate is in the trustee, the equitable estate in the *cestui que trust*. But see Powell, Mortg. Index.

LEGAL ASSETS. Such property of a testator in the hands of his executor as is liable to debts in temporal courts and to legacies in the spiritual by course of law; equitable assets are such as are liable only by help of a court of equity. 2 Williams, Exec. 1408–1431, Amer. notes. No such distinction exists in Pennsylvania. 1 Ashm. Penn. 347. See Story, Eq. Jur. § 551; 2 Jarman, Wills, 543.

LEGAL ESTATE. One the right to which may be enforced in a court of law.

It is distinguished from an equitable estate, the right to which can be established only in a court of equity. 2 Bouvier, Inst. n. 1688.

The party who has the legal title has alone the right to seek a remedy for a wrong to his estate, in a court of law, though he may have no beneficial interest in it. The equitable owner is he who has not the legal estate, but is entitled to the beneficial interest.

The person who holds the legal estate for the benefit of another is called a trustee; he who has the beneficiary interest and does not hold the legal title is called the beneficiary, or, more technically, the *cestui que trust*.

When the trustee has a claim, he must enforce his right in a court of equity, for he cannot sue any one at law in his own name, 1 East, 497; 8 Term, 332; 1 Saund. 158, n. 1; 2 Bingh. 20; still less can he in such court sue his own trustee. 1 East, 497.

LEGALIZATION. The act of making lawful.

By legalization is also understood the act by which a judge or competent officer authenticates a record, or other matter, in order that the same may be lawfully read in evidence.

LEGAL TENDER. That currency which has been made suitable by law for the purposes of a tender in the payment of debts.

The following descriptions of currency are legal tender in the United States:—

All the gold coins of the United States, according to their nominal value, for all sums whatever. *The silver dollar* of the United States is a legal tender for all sums whatever. *The silver coins* below the denomination of the dollar, coined prior to 1854, are a legal tender in payment of any sum whatever. *The silver coins below the dollar*, of the date of 1854 and of subsequent years, are a legal tender in sums not exceeding five dollars. *The three-cent silver coins* of the date of 1851, 1852, and 1853 are a tender in sums not exceeding thirty cents. Those of subsequent dates are a tender in sums not exceeding five dollars.

The cent is not a legal tender.

The laws at one time in force making certain foreign coins a legal tender was repealed by the act of Feb. 21, 1857, § 3 (Stat. at Large, vol. 11, p. 163). No foreign coins are now a legal tender.

By recent legislation, treasury notes have

been issued, which are a legal tender for all debts, public and private, except duties on imports and interest on the public debt. (Act of Congress of May 23, 1862.)

A postage currency has also been authorized, which is receivable in payment of all dues to the United States less than five dollars. They are not, however, a legal tender in payment of private debts. (Act of Congress, approved July 17, 1862.)

LEGALIS HOMO (Lat.). A person who stands *rectus in curia*, who possesses all his civil rights. A lawful man. One who stands *rectus in curia*, not outlawed nor infamous. In this sense are the words *probi et legales homines*.

LEGANTINE CONSTITUTIONS. The name of a code of ecclesiastical laws, enacted in national synods, held under legates from Popes Gregory IX. and Clement IV., in the reign of Hen. III., about the years 1220 and 1268. 1 Sharswood, Blackst. Comm. 83. Burn says, 1237 and 1268. 2 Burn, Eccl. Law, 30 *d*.

LEGATARY. One to whom any thing is bequeathed; a legatee. This word is sometimes, though seldom, used to designate a legate or nuncio.

LEGATEE. The person to whom a legacy is given. See LEGACY.

LEGATES. Legates are extraordinary ambassadors sent by the pope to catholic countries to represent him and to exercise his jurisdiction. They are distinguished from the ambassadors of the pope who are sent to other powers.

Legates à latere hold the first rank among those who are honored by a legation; they are always chosen from the college of cardinals, and are called *à latere*, in imitation of the magistrates of ancient Rome, who were taken from the court, or *side* of the emperor.

Legati missi are simple envoys.

Legati nati are those who are entitled to be legates by birth. See A LATERE.

LEGATION. An embassy; a mission. All persons attached to a foreign legation, lawfully acknowledged by the government of this country, whether they are ambassadors, envoys, ministers, or attachés, are protected by the act of April 30, 1790, 1 Story, U. S. Laws, 83, from violence, arrest, or molestation. 1 Dall. Penn. 117; 1 Wash. C. C. 232; 2 *id.* 435; 4 *id.* 531; 11 Wheat. 467; 1 Miles, Penn. 366; 1 Nott & M'C. So. C. 217; 1 Baldw. 240; Wheaton, Int. Law, 167. See AMBASSADOR; ARREST; PRIVILEGE.

LEGATORY. The third part of a freeman's personal estate, which by the custom of London, in case he had a wife and children, the freeman might always have disposed of by will. Bacon, Abr. *Customs of London* (D 4).

LEGES (Lat.). **In Civil Law.** Laws proposed by a magistrate of the senate and adopted by the whole people in *comitia centuriata*. See POPULISCITUM; LEX.

In English Law. Laws. *Scriptæ.*

Leges scriptæ, written or statute laws.

Leges non scriptæ, unwritten or customary laws; the common law, including general customs, or the common law properly so called; and also particular customs of certain parts of the kingdom, and those particular laws that are, by custom, observed only in certain courts and jurisdictions. 1 Sharswood, Blackst. Comm. 67. "These parts of law are therefore styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage." 1 Stephen, Comm. 40, 66. It is not to be understood, however, that they are merely oral; for they have come down to us in reports and treatises.

LEGISLATIVE POWER. The authority, under the constitution, to make laws, and to alter or repeal them.

LEGISLATOR. One who makes laws.

In order to make good laws, it is necessary to understand those which are in force; the legislator ought, therefore, to be thoroughly imbued with a knowledge of the laws of his country, their advantages and defects; to legislate without this previous knowledge is to attempt to make a beautiful piece of machinery with one's eye shut. There is unfortunately too strong a propensity to multiply our laws and to change them. Laws must be yearly made, for the legislatures meet yearly, but whether they are always for the better may be well questioned. A mutable legislation is always attended with evil. It renders the law uncertain, weakens its effects, hurts credit, lessens the value of property, and, as they are made frequently, in consequence of some extraordinary case, laws sometimes operate very unequally. See 1 Kent, Comm. 227; and Le Magasin Universel, tome ii. p. 227, for a good article against excessive legislation.

LEGISLATURE. That body of men in the state which has the power of making laws.

By the constitution of the United States, art. 1, § 1, all legislative powers granted by it are vested in a congress of the United States, which shall consist of a senate and house of representatives.

It requires the consent of a majority of each branch of the legislature in order to enact a law, and then it must be approved by the president of the United States, or, in case of his refusal, by two-thirds of each house. U. S. Const. art. 1, § 7, 2.

Most of the constitutions of the several states contain provisions nearly similar to this. In general, the legislature will not, and, by the constitutions of some of the states, cannot, exercise judicial functions: yet the use of such power upon particular occasions is not without example.

LEGITIM (called, otherwise, Bairn's Part of Gear). **In Scotch Law.** The legal share of father's free movable property, due on his death to his children: if widow and children are left, it is one-third; if children alone, one-half. Erskine, Inst. 3. 9. 20; 4 Bell, Hou. L. Cas. 286.

LEGITIMACY. The state of being born in wedlock; that is, in a lawful manner.

2. Marriage is considered by all civilized nations as the only source of legitimacy; the qualities of husband and wife must be possessed by the parents in order to make the offspring legitimate; and, furthermore, the marriage must be lawful, for if it is void *ab initio*, the children who may be the offspring of such marriage are not legitimate. 1 Phillipps, Ev.; La. Civ. Code, art. 203 to 216.

In Virginia, it is provided, by statute of 1787, "that the issue of marriages deemed null in law shall nevertheless be legitimate." 3 Hen. & M. Va. 228, n.

3. A strong presumption of legitimacy arises from marriage and cohabitation; and proof of the mother's irregularities will not destroy this presumption: *pater est quem nuptiæ demonstrant.* To rebut this presumption, circumstances must be shown which render it impossible that the husband should be the father, as impotency and the like. 3 Bouvier, Inst. n. 3062. See BASTARD.

LEGITIMATE. That which is according to law: as, legitimate children are lawful children, born in wedlock, in contradistinction to bastards; legitimate authority, or lawful power, in opposition to usurpation

LEGITIMATION. The act of giving the character of legitimate children to those who were not so born.

2. In Louisiana, the Civil Code, art. 217, enacts that "children born out of marriage, except those who are born of an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage, or by the contract of marriage itself."

3. In most of the other states, the character of legitimate children is given to those who are not so, by special acts of assembly. In Georgia, real estate may descend from a mother to her illegitimate children and their representatives, and from such child, for want of descendants, to brothers and sisters, born of the same mother, and their representatives. Prince's Dig. 202. In Alabama, Kentucky, Mississippi, Vermont, and Virginia, subsequent marriages of parents, and recognition by the father, legitimatize an illegitimate child; and the law is the same in Massachusetts, for all purposes except inheriting from their kindred. Mass. Rev. Stat. 414.

4. The subsequent marriage of parents legitimatizes the child in Illinois; but he must be afterwards acknowledged. The same rule seems to have been adopted in Indiana and Missouri. An acknowledgment of illegitimate children, of itself, legitimatizes in Ohio; and in Michigan and Mississippi, marriage alone between the reputed parents has the same effect. In Maine, a bastard inherits to one who is legally adjudged, or in writing owns himself to be, the father. A bastard may be legitimated in North Carolina, on application of the putative father to court, either where he has married the mother, or she is dead, or married another, or lives out of the state. In a number of the states, namely, in Alabama, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and Virginia, a bastard takes by descent from his mother, with modifications regulated by the laws of these states. 2 Hill, Abr. §§ 24–35, and authorities cited. See DESCENT.

LEGITIME. In Civil Law. That portion of a parent's estate of which he cannot disinherit his children without a legal cause.

2. The civil code of Louisiana declares that 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. Under the name of children are included descendants of whatever degree they may be: it must be understood that they are only counted for the child they represent. La. Civ. Code. art. 1480.

In Holland, Germany, and Spain, the principles of the Falcidian law, more or less limited, have been generally adopted. Coop. Just. 516.

3. In the United States, other than Louisiana, and in England, there is no restriction on the right of bequeathing. But this power of bequeathing did not originally extend to *all* a man's personal estate: on the contrary, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. Glanville, l. 2, c. 5; Bracton, l. 2, c. 26. The shares of the wife and children were called their reasonable part. 2 Blackstone, Comm. 491. See DEATH'S PART; FALCIDIAN LAW.

LENDER. He from whom a thing is borrowed. The bailor of an article loaned. See BAILMENT; LOAN.

LESION. In Civil Law. A term used to signify the injury suffered, in consequence of inequality of situation, by one who does not receive a full equivalent for what he gives in a commutative contract.

The remedy given for this injury is founded on its being the effect of implied error or imposition; for in every commutative contract equivalents are supposed to be given and received. La. Code, 1854. Persons of full age, however, are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive. Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 4. But minors are admitted to restitution, not only against any excessive inequality, but against any inequality whatever. Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 5; La. Code, art. 1858. See FRAUD; GUARDIAN; SALE.

LESSEE. He to whom a lease is made. He who holds an estate by virtue of a lease. See LEASE.

LESSOR. He who grants a lease. See LEASE; LANDLORD AND TENANT.

LESTAGE, LASTAGE (Sax. *last*, burden). A custom for carrying things in fairs and markets. Fleta, l. 1, c. 47; Termes de la Ley.

LET. Hindrance; obstacle; obstruction. To lease; to grant the use and possession of a thing for compensation. It is the correlative of hire. See HIRE.

LETTER. He who, being the owner of a thing, lets it out to another for hire or compensation. Story, Bailm. § 369. See HIRING.

LETTER. An epistle; a despatch; a written message, usually on paper, folded up and sealed, and sent by one person to another. 1 Caines, N. Y. 582.

2. The business of transporting and delivering letters between different towns, states, and countries, and from one part of a city to another, is undertaken by the government, and private persons are forbidden to enter into competition.

In the United States the various acts relating to the post-office were reduced to one act in 1825, 3 Story, U. S. Laws, 1991, Brightly, Dig. 759, by which severe penalties are inflicted upon all persons who interfere with the rapid transportation of the mails, upon all officers who tamper with the mails, as by opening letters, secreting the contents, etc., and competition of private individuals prevented.

3. Contracts may be made by letter; and when a proposition is made by letter, the mailing a letter containing an acceptance of the proposition completes the contract. 1 Barnew. & Ald. 681; 6 Hare, 1; 1 Hou. L. Cas. 381; 7 Mees. & W. Exch. 515; 21 N. H. 41; 4 Paige, Ch. N. Y. 17; 11 N. Y. 441; 4 Ga. 1; 12 Conn. 431; 7 Dan. Ky. 281; 9 Port. Ala. 605; 5 Penn. St. 339; 9 How. 390; 4 Wheat. 228. See 1 Pick. Mass. 281; Parsons, Mar. Law, 22, n.

Payments may be made by letter at the risk of the creditor, when the debtor is authorized, expressly or impliedly, from the usual course of business, and not otherwise. Peake, 67; 1 Exch. 477; Ry. & M. 149; 3 Mass. 249.

LETTER OF ADVICE. In Common Law. A letter containing information of any circumstances unknown to the person to whom it is written; generally informing him of some act done by the writer of the letter.

It is usual and perfectly proper for the drawer of a bill of exchange to write a letter of advice to the drawee, as well to prevent fraud or alteration of the bill, as to let the drawee know what provision has been made for the payment of the bill. Chitty, Bills, 185.

LETTER OF ADVOCATION. In Scotch Law. The decree or warrant of the supreme court or court of sessions, discharging the inferior tribunal from all further proceedings in the matter, and advocating the action to itself. This proceeding is similar to a *certiorari* issuing out of a superior court for the removal of a cause from an inferior.

LETTER OF ATTORNEY. In Practice. A written instrument, by which one or more persons, called the constituents, authorize one or more other persons, called the attorneys, to do some lawful act by the latter for or instead, and in the place, of the former. 1 Mood. Cr. Cas. 52, 70. It may be parol or under seal. See POWER OF ATTORNEY.

LETTER BOOK. In Common Law. A book containing the copies of letters written by a merchant or trader to his correspondents.

After notice to the plaintiff to produce a letter which he admitted to have received from the defendant, it was held that an entry by a deceased clerk, in a letter book professing to be a copy of a letter from the defendant to the plaintiff of the same date, was admissible evidence of the contents, proof having been given that, according to the course of business, letters of business written by the plaintiff were copied by this clerk and then sent off by the post. 3 Campb. 305. See 1 Starkie, Ev. 356; Bouvier, Inst. n. 3139.

LETTER CARRIER. A person employed to carry letters from the post-office to the persons to whom they are addressed. Provisions are made by the act of March 3, 1851, 11 U. S. Stat. at Large, 591, for the appointment of letter carriers in cities and towns, and by c. 21, § 2 of the same act, for letter carriers in Oregon and California.

LETTER OF CREDENCE. In International Law. A written instrument addressed by the sovereign or chief magistrate of a state to the sovereign or state to whom a public minister is sent, certifying his appointment as such, and the general object of his mission, and requesting that full faith and credit may be given to what he shall do and say on the part of his court.

When it is given to an ambassador, envoy, or minister accredited to a sovereign, it is addressed to the sovereign or state to whom the minister is delegated; in the case of a *chargé d'affaires*, it is addressed by the secretary or minister of state charged with the department of foreign affairs to the minister of foreign affairs of the other government. Wheaton, Int. Law, pt. 3, c. 1, § 7; Wicquefort, de l'Ambassadeur, l. 1, § 15.

LETTER OF CREDIT. An open or sealed letter, from a merchant in one place, directed to another, in another place or country, requiring him that if a person therein named, or the bearer of the letter, shall have occasion to buy commodities, or to want money to any particular or unlimited amount, either to procure the same, or to pass his promise, bill, or other engagement for it, the writer of the letter undertaking to provide him the money for the goods, or to repay him by exchange, or to give him such satisfaction as he shall require, either for himself or the bearer of the letter. 3 Chitty, Com. Law,

336. And see 4 *id.* 259, for a form of such letter.

2. These letters are either general or special: the former is directed to the writer's friends or correspondents generally, where the bearer of the letter may happen to go; the latter is directed to some particular person. When the letter is presented to the person to whom it is addressed, he either agrees to comply with the request, in which case he immediately becomes bound to fulfil all the engagements therein mentioned; or he refuses, in which case the bearer should return it to the giver without any other proceeding, unless, indeed, the merchant to whom the letter is directed is a debtor of the merchant who gave the letter, in which case he should procure the letter to be protested. 3 Chitty, Com. Law, 337; Malyn, 76; 1 Beaw. Lex Mer. 607; Hall, Adm. Pract. 14; 4 Ohio, 197.

3. The debt which arises on such letter, in its simplest form, when complied with, is between the mandatory and the mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. *First*, when the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who granted it, or in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter, against him to whom the money is paid. *Second*, when not so purchased, but truly an accommodation, and meant to raise a debt on the person accommodated, the engagement generally is, to see paid any advances made to him, or to guaranty any draft accepted or bill discounted; and the compliance with the mandate, in such case, raises a debt both against the writer of the letter and against the person accredited. 1 Bell, Comm. 371, 5th ed. The bearer of the letter of credit is not considered bound to receive the money; he may use the letter as he pleases, and he contracts an obligation only by receiving the money. Pothier, Contr. *de Change*, 237.

LETTER OF LICENSE. An instrument or writing made by creditors to their insolvent debtor, by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts, and that they will not arrest or molest him in his person or property till after the expiration of such additional time.

LETTER OF MARQUE AND REPRISAL. A commission granted by the government to a private individual, to take the property of a foreign state, or of the citizens or subjects of such state, as a reparation for an injury committed by such state, its citizens or subjects. A vessel loaded with merchandise, on a voyage to a friendly port, but armed for its own defence in case of attack by an enemy, is also called a *letter of marque*. 1 Boulay Paty, tit. 3, § 2, p. 300.

By the constitution, art. 1, § 8, cl. 11, congress have power to grant letters of marque and reprisal. See Chitty, Law of Nat. 73; 1 Blackstone, Comm. 251; Viner, Abr. *Prerogative* (B 4); Comyns, Dig. *Prerogative* (B 4); Molloy, b. 1, c. 2, § 10; 2 Wooddeson, 440; 2 C. Rob. Adm. 224; 5 *id.* 9, 260. And see REPRISAL.

LETTER MISSIVE. In English Law. A request addressed to a peer, peeress, or lord of parliament, against whom a bill has been filed, desiring the defendant to appear and answer to the bill. It is issued by the lord chancellor, on petition, after the filing of the bill; and a neglect to attend to this places the defendant, in relation to such suit, on the same ground as other defendants who are not peers, and a subpœna may then issue. Newland, Pr. 9; 2 Maddock, Chanc. Pract. 196; Cooper, Eq. Plead. 16.

LETTER OF RECALL. A written document addressed by the executive of one government to the executive of another, informing the latter that a minister sent by the former to him has been recalled.

LETTER OF RECOMMENDATION. In Commercial Law. An instrument given by one person to another, addressed to a third, in which the bearer is represented as worthy of credit. 1 Bell, Comm. 5th ed. 371; 3 Term, 51; 7 Cranch, 69; Fell, Guar. c. 8; 6 Johns. N. Y. 181; 13 *id.* 224; 1 Day, Conn. 22. See RECOMMENDATION.

LETTER OF RECREDENTIALS. A document delivered to a minister by the secretary of state of the government to which he was accredited. It is addressed to the executive of the minister's country. This is in reply to the *letter of recall*.

LETTERS OF ADMINISTRATION. An instrument in writing, granted by the judge or officer having jurisdiction and power of granting such letters, thereby giving (the administrator, naming him) "full power to administer the goods, chattels, rights, and credits, which were of the said deceased, in the county or district in which the said judge or officer has jurisdiction; as also to ask, collect, levy, recover, and receive the credits whatsoever of the said deceased, which at the time of his death were owing, or did in any way belong, to him, and to pay the debts in which the said deceased stood obliged, so far forth as the said goods and chattels, rights and credits, will extend, according to the rate and order of law." See LETTERS TESTAMENTARY.

LETTERS CLOSE. In English Law. Close letters are grants of the king, and, being of private concern, they are thus distinguished from letters patent.

LETTERS AD COLLIGENDUM BONA DEFUNCTI. In Practice. In default of the representatives and creditors to administer to the estate of an intestate, the officer entitled to grant letters of administration may grant, to such person as he approves, *letters to collect the goods of the deceased*, which neither make him executor nor administrator; his only business being to collect the goods and keep them in his safe-custody. 2 Blackstone, Comm. 505.

LETTERS PATENT. The name of an instrument granted by the government to convey a right to the patentee: as, a patent for a tract of land; or to secure to him a right which he already possesses, as, a patent for a new invention or discovery. Letters patent are matter of record. They are so called because they are not sealed up, but are granted open. See PATENT.

LETTERS OF REQUEST. In English Ecclesiastical Law. An instrument by which a judge of an inferior court waives or remits his own jurisdiction in favor of a court of appeal immediately superior to it.

Letters of request, in general, lie only where an appeal would lie, and lie only to the next immediate court of appeal, waiving merely the primary jurisdiction to the proper appellate court, except letters of request from the most inferior ecclesiastical court, which may be direct to the court of arches, although one or two courts of appeal may by this be ousted of their jurisdiction as courts of appeal. 2 Add. Eccl. 406. The effect of letters of request is to give jurisdiction to the appellate court in the first instance. See a form of letters of request in 2 Chitty, Pract. 498, note *h*.

LETTERS ROGATORY. An instrument sent in the name and by the authority of a judge or court to another, requesting the latter to cause to be examined, upon interrogatories filed in a cause depending before the former, a witness who is within the jurisdiction of the judge or court to whom such letters are addressed.

2. They are sometimes denominated *sub mutuæ vicissitudinis*, from a clause which they generally contain. Where the government of a foreign country, in which witnesses proposed to be examined reside, refuse to allow commissioners to administer oaths to such witnesses, or to allow the commission to be executed unless it is done by some magistrate or judicial officer there, according to the laws of that country, *letters rogatory* must issue. Commissioners are forbidden to administer oaths in the island of St. Croix, 6 Wend. N. Y. 476; in Cuba, 1 Pet. C. C. 236; 8 Paige, Ch. N. Y. 446; and in Sweden. 2 Ves. Sen. Ch. 236.

3. These letters are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit in court, and state that there are material witnesses residing there, without whose testimony justice cannot be done between the parties, and then *request* the said judge or tribunal to cause the witnesses to come before them and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory. In letters rogatory there is always an offer, on the part of the court whence they issued, to render a mutual service to the court to which they may be directed, whenever required. The practice of such letters is derived from the civil law, by which these letters are sometimes called letters requisitory. A special application must be made to court to obtain an order for letters rogatory.

4. Though formerly used in England in the courts of common law, 1 Rolle, Abr. 530, pl. 13, they have been superseded by commissions of *dedimus potestatem*, which are considered to be but a feeble substitute. Dunlap, Adm. Pract. 223, n.; Hall, Adm. Pract. 37. The courts of admiralty use these letters; and they are recognized by the law of nations. See Fœlix, Droit Intern. liv. 2, t. 4, p. 300; Denisart; Dunlap, Adm. Pract. 221; Benedict, Adm. § 533; 1 Hoffman, Ch. N. Y. 482.

In Nelson *vs.* United States, *supra*, will be found a copy of letters rogatory, issued to the courts of Havana, according to the form and practice of the civil law, on an occasion when the authorities there had prevented the execution of a commission, regarding any attempts to take testimony under it as an interference with the rights of the judicial tribunals of that place.

LETTERS TESTAMENTARY. An instrument in writing granted by the judge or officer having jurisdiction of the probate of wills, under his hand and official seal, making known that at a certain date the last will and testament of A B (naming the testator) was duly proved before him; that the probate and grant of administration was within his jurisdiction, and he accordingly certifies "that the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, was granted" to C D, "the executor named in the said will," "he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory, etc., and to exhibit the same, etc., and also to render a just and true account thereof."

2. In England, the original will is deposited in the registry of the ordinary or metropolitan, and a copy thereof made out under his seal; which copy and the letters testamentary are usually styled the probate. This practice has been followed in some of the United States; but where the will needs to be proved in more than one state, the impounding of it leads to much inconvenience. In other states, the original will is returned to the executor, with a certificate that it has been duly proved and recorded, and the letters testamentary are a *separate* instrument. The letters are usually general; but

the court may grant a limited probate, where the testator has limited the executor, and then the administration *cæterorum* may be granted.

3. Letters testamentary are granted in case the decedent was testate; letters of administration, in case he was intestate, or failed to provide an executor; see ADMINISTRATION; EXECUTOR; but in regard to all matters coming properly under the heads of letters of administration or letters testamentary, there is little or no difference in the law relating to the two instruments. Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible. 16 Mass. 433; 1 Lev. 236. But if the nature of his plea raise the issue, the defendant may show that the *seal* of the supposed probate *has been forged*, or that the letters have been revoked, or that the testator is alive. 15 Serg. & R. Penn. 42; 3 Term, 130; Williams, Exec. 450.

4. They can be revoked only by the court whence they issued, or on appeal. At common law, the executor or administrator has no power over real estate; nor is the probate even admissible as evidence that the instrument is a will, or as an execution of a power to charge land. Williams, Exec. 460; 1 Mann. & G. 331. By statute, the probate may be made *primâ facie* or conclusive evidence as to realty. 2 Binn. Penn. 511; 3 *id.* 498; 6 *id.* 409; Gilbert, Ev. 66; Bacon, Abr. *Evidence.* Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as obligated by a trust for the party injured. Williams, Exec. 452.

Letters may be revoked by the court which made the grant, or an appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly. Williams, Exec. 480.

5. *Of their effect in a state other than that in which legal proceedings were instituted.*

In view of the rule of the civil law, that *personalia sequitur personam*, certain effect has been given by the comity of nations to a foreign probate granted at the place of the domicil of the deceased, in respect to the personal assets in other states. At common law, the *lex loci rei sitæ* governs as to real estate, and the foreign probate has no validity; but as to personalty the law of the domicil governs both as to testacy and intestacy. It is customary, therefore, on a due exemplification of the probate granted at the place of domicil, to admit the will to probate, and issue letters testamentary, without requiring original or further proof.

A foreign probate at the place of domicil has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

6. *Alabama.* Administrators may sue upon letters of administration granted in another state, where the intestate had no known place of residence in Alabama at the time of his death, and no representative has been appointed in the state; but before rendition of the judgment he must produce to the court his letters of administration, authenticated according to the laws of the United States, and the certificate of the clerk of some county court in this state, that the letters have been recorded in his office. Before he is entitled to the money on the judgment, he must also give bond, payable to the judge of the court where the judgment is rendered, for the faithful administration of the money received. Aiken, Dig. 183; Toulmin, Dig. 342.

Arkansas. When the deceased had no residence in Arkansas, and he devised lands by will, or where the intestate died possessed of lands, letters testamentary or of administration shall be granted in the county where the lands lie, or of one of them, if they lie in several counties; and if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died, or where the greater part of his estate may be. Rev. Stat. c. 4, § 2.

7. *California.* When the estate of the deceased is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate. Wood, Cal. Dig. art. 2223.

Connecticut. Letters testamentary issued in another state are not available in this, 3 Day, Conn. 303; nor are letters of administration. 3 Day, Conn. 74. And see 2 Root, Conn. 462.

8. *Delaware.* By the act of 1721, 1 State Laws, 82, it is declared, in substance, that when any person shall die leaving *bona notabilia* in several counties in the state and in Pennsylvania or elsewhere, and any person not residing in the state obtains letters of administration out of the state, the deceased being indebted to any of the inhabitants of the state for a debt contracted within the same, to the value of twenty pounds, then, and in such case, such administrator, before he can obtain any judgment in any court of record within the state against any inhabitant thereof, by virtue of such letters of administration, is obliged to file them with some of the registers in this state, and must enter into bonds with sufficient sureties, who have visible estates here, with condition to pay and satisfy all such debts as were owing by the intestate at the time of his death to any person residing in this state, so far as the effects of the deceased in this state will extend. By the act of June 16, 1769, 1 State Laws, 448, it is enacted, in substance, that any will in writing made by a person residing out of the state, whereby any lands within the state are devised, which shall be proved in the chancery in England, Scotland, Ireland, or any colony, plantation, or island in America, belonging to the king of Great Britain, or in the hustings, or mayor's court, in London, or in some manor court, or before such persons as have power or authority at the

time of proving such wills, in the places aforesaid, to take probates of wills, shall be good and available in law for granting the lands devised, as well as of the goods and chattels bequeathed by such will. The *copies* of such will, and of the bill, answer, depositions, and decree, where proved in any court of chancery, or copies of such wills and the probate thereof, where proved in any other court, or in any office as aforesaid, being transmitted to this state, and produced under the public or common seal of the court or office where the probate is taken, or under the great seal of the kingdom, colony, plantation, or island, within which such will is proved (except copies of such wills and probates as shall appear to be revoked), are declared to be matter of record, and to be good evidence in any court of law or equity in this state, to prove the gift or devise made in such will; and such probates are declared to be sufficient to enable executors to bring their actions within any court within this state, as if the same probates or letters testamentary were granted here, and produced under the seal of any of the registers' offices within this state. By the third section of the act, it is declared that the copies of such wills and probates so produced and given in evidence shall not be returned by the court to the persons producing them, but shall be recorded in the office of the recorder of the county where the same are given in evidence, at the expense of the party producing the same.

9. *Florida.* Copies of all wills, and letters testamentary and of administration, heretofore recorded in any public office of record in the state, when duly certified by the keeper of said records, shall be received in evidence in all courts of record in this state; and the probate of wills granted in any of the United States or of the territories thereof, in any foreign country or state, duly authenticated and certified according to the laws of the state or territory, or of the foreign country or state, where such probate may have been granted, shall likewise be received in evidence in all courts of record in this state.

Georgia. To enable executors and administrators to sue, in Georgia, the former must take out letters testamentary in the county where the property or debt is; and administrators, letters of administration. Prince, Dig. 238; Act of 1805, 2 Laws of Ga. 268.

10. *Illinois.* Letters testamentary must be taken out in this state, and when the will is to be proved the original must be produced; administrators of other states must take out letters in Illinois, before they can maintain an action in the courts of the state. 3 Griffin, Law Reg. 419.

Indiana. Executors and administrators appointed in another state may maintain actions and suits, and do all other acts coming within their powers, as such, within this state, upon producing authenticated copies of such letters and filing them with the clerk of the court in which such suits are to be brought. Rev. Code, c. 24, Feb. 17, 1838, sec. 44.

Iowa. If administration of the estate of a deceased non-resident has been granted in accordance with the laws of the state or country where he resided at the time of his death, the person to whom it has been committed may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed an executor to administer upon the property of the deceased in this state, unless another executor has previously been appointed in this state.

The original letters testamentary or of administration, or other authority, conferring his power upon such executor, or an attested copy thereof, together with a copy of the will, if there be one, attested as hereinbefore directed, must be filed in the office of the judge of the proper county court before such appointment can be made. Iowa Rev. Laws, 1860, §§ 2341, 2342.

11. *Kansas.* Letters must be taken out in the state; and the balance, after payment of debts due citizens of the state, may be transmitted to the foreign executor or administrator. Comp. Stat. c. 91, §§ 214–218.

Kentucky. Executors and administrators appointed in other states may sue in Kentucky, "upon filing with the clerk of the court, where the suit is brought, an authenticated copy of the certificate of probate, or orders granting letters of administration of said estate, given in such non-resident's state." 1 Dig. Stat. 536; 2 Litt. Ky. 194; 3 *id.* 182.

Louisiana. Executors or administrators of other states must take out *letters of curatorship* in this state. Exemplifications of wills and testaments are evidence. 4 Griffith, Law Reg. 683; 8 Mart. La. N. S. 586.

12. *Maine.* Letters of administration must be taken from some court of probate in this state. Copies of wills which have been proved in a court of probate in any of the United States, or in a court of probate of any other state or kingdom, with a copy of the probate thereof, under the seal of the court where such wills have been proved, may be filed and recorded in any probate court in this state, which recording shall be of the same force as the recording and proving the original will. Rev. Stat. t. 9, c. 107, § 20; 3 Mass. 514; 9 *id.* 337; 11 *id.* 256; 1 Pick. Mass. 80; 3 *id.* 128.

Maryland. Letters testamentary or of administration granted out of Maryland have no effect in this state, except only such letters issued in the District of Columbia; and letters granted there authorize executors or administrators to claim and sue in this state. Act of April, 1813, chap. 165. By the act of 1839, chap. 41, when non-resident owners of any public or state of Maryland stocks, or stocks of the city of Baltimore, or any other corporation in this state, die, their executors or administrators constituted under the authority of the state, district, territory, or country where the deceased resided at his death, have the same power as to such stocks as if they were appointed by authority of the state of Maryland. But before they can transfer the stocks they must, during three months, give notice in two newspapers, published in Baltimore, of the death of the testator or intestate, and of the "amount and description of the stock designed to be transferred." Administration must be granted in this state, in order to recover a debt due here to a decedent, or any of his property, with the exceptions above noticed.

13. *Massachusetts.* When any person shall die intestate in any other state or country, leaving estate to be administered within this state, administration thereof shall be granted by the judge of probate of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted shall extend to all the estate of the deceased within the state, and shall exclude the jurisdiction of the probate court in every other county. Rev. Stat. c. 64, § 5. See 3 Mass. 514; 5 *id.* 67; 11 *id.* 256, 314; 1 Pick. Mass. 81.

Michigan. Letters testamentary or letters of administration granted out of the state are not of any validity in it. In order to collect the debts or to obtain the property of a deceased person who was not a resident of the state, it is requisite to take out letters testamentary or letters of administration from a probate court of this state, within whose jurisdiction the property lies, which letters operate over all the state, and then sue in the name of the executor or administrator so appointed. Rev. Stat. 280. When the deceased leaves a will executed according to the laws of this state, and the

same is admitted to proof and record where he dies, a certified transcript of the will and probate thereof may be proved and recorded in any county in this state where the deceased has property real or personal, and letters testamentary may issue thereon. Rev. Stat. 272, 273.

14. *Mississippi.* Executors or administrators in another state or territory cannot, as such, sue nor be sued in this state. In order to recover a debt due to a deceased person or his property, there must be taken out in the state letters of administration, or letters with the will annexed, as the case may be. These may be taken out from the probate court of the county where the property is situated, by a foreign as well as a local creditor, or any person interested in the estate of the deceased, if properly qualified in other respects. 1 Miss. 211.

Missouri. Letters testamentary or of administration granted in another state have no validity in this; to maintain a suit, the executors or administrators must be appointed under the laws of this state. Rev. Code, § 2, p. 41.

New Hampshire. One who has obtained letters of administration, Adams, Rep. 193, or letters testamentary under the authority of another state, cannot maintain an action in New Hampshire by virtue of such letters. 3 Griffith, Law Reg. 41.

15. *New Jersey.* Executors having letters testamentary, and administrators letters of administration, granted in another state, cannot sue thereon in New Jersey, but must obtain such letters in that state as the law prescribes. By the act of March 6, 1828, Harr. Comp. 195, when a will has been admitted to probate in any state or territory of the United States, or foreign nation, the surrogate of any county of this state is authorized, on application of the executor or any person interested, on filing a duly exemplified copy of the will, to appoint a time not less than thirty days and not more than six months distant, of which notice is to be given as he shall direct, and if, at such time, no sufficient reason be shown to the contrary, to admit such will to probate, and grant letters testamentary or of administration *cum testamento annexo*, which shall have the same effect as though the original will had been produced and proved under form. If the person to whom such letters testamentary or of administration be granted is not a resident of this state, he is required to give security for the faithful administration of the estate. By the statute passed February 28, 1838, Elmer, Dig. 602, no instrument of writing can be admitted to probate under the preceding act unless it be *signed* and published by the testator as his will. See Saxt. Ch. N. J. 332.

New York. An executor or administrator appointed in another state has no authority to sue in New York. 1 Johns. Ch. N. Y. 153; 6 *id.* 353; 7 *id.* 45. Whenever an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in several counties, or assets shall after his death come in several counties, the surrogate of any county in which assets shall be shall have power to grant letters of administration on the estate of such intestate; but the surrogate who shall first grant letters of administration on such estate shall be deemed thereby to have acquired sole and exclusive jurisdiction over such estate, and shall be vested with the powers incidental thereto. Rev. Stat. p. 2, c. 6, tit. 2, art. 2, § 24; 1 R. L. 455, § 3.

16. *North Carolina.* It was decided by the court of conference, then the highest tribunal in North Carolina, that letters granted in Georgia were insufficient. Conf. Rep. 68. But the supreme court have since held that letters testamentary granted in South Carolina were sufficient to enable an executor to sue in North Carolina. 1 Car. Law Rep. 471. See 1 Hayw. No. C. 354.

By the revised statutes, c. 46, § 6, it is provided that "when a testator or testatrix shall appoint any person, residing out of this state, executor or executrix of his or her last will and testament, it shall be the duty of the court of pleas and quarter sessions, before which the said will shall be offered for probate, to cause the executor or executrix named therein to enter into bond with good and sufficient security for his or her faithful administration of the estate of the said testator or testatrix, and for the distribution thereof in the manner prescribed by law; the penalty of said bond shall be double the supposed amount of the personal estate of the said testator or testatrix; and until the said executor or executrix shall enter into such bond, he or she shall have no power nor authority to intermeddle with the estate of the said testator or testatrix, and the court of the county, in which the testator or testatrix had his or her last usual place of residence, shall proceed to grant letters of administration with the will annexed, which shall continue in force until the said executor or executrix shall enter into bond as aforesaid. *Provided, nevertheless*, and it is hereby declared, that the said executor or executrix shall enter into bond, as by this act directed, within the space of one year after the death of the said testator or testatrix, and not afterwards."

17. *Ohio.* Executors and administrators appointed under the authority of another state may, by virtue of such appointment, sue in this. Ohio Stat. vol. 38, p. 146; Act of March 23, 1840, which went into effect the first day of November following; Swan's Coll. 184.

Oregon. Letters testamentary, or of administration, shall not be granted to a non-resident; and when an executor or administrator shall become non-resident, the probate court having jurisdiction of the estate of the testator or intestate of such executor or administrator shall revoke his letters. Oreg. Stat. 1855, 352.

18. *Pennsylvania.* Letters testamentary or of administration, or otherwise purporting to authorize any person to intermeddle with the estate of a decedent, granted out of the commonwealth, do not in general confer on any such person any of the powers and authorities possessed by an executor or administrator under letters granted within the state. Act of March 15, 1832, s. 6. But by the act of April 14, 1835, s. 3, this rule is declared not to apply to any public debt or loan of this commonwealth; but such public debt or loan shall pass and be transferable, and the dividends thereon accrued and to accrue be receivable, in like manner and in all respects and under the same and no other regulations, powers, and authorities as were used and practised before the passage of the above-mentioned act. And the act of June 16, 1836, s. 3, declares that the above act of March 15, 1832, s. 6, shall not apply to shares of stock in any bank or other incorporated company within this commonwealth, but such shares of stock shall pass and be transferable, and the dividends thereon accrued and to accrue be receivable, in like manner in all respects, and under the same regulations, powers, and authorities, as were used and practised with the loans or public debts of the United States, and were used and practised with the loans or public debt of this commonwealth, before the passage of the said act of March 15, 1832, s. 6, unless the by-laws, rules, and regulations of any such bank or corporation shall otherwise provide and declare. Executors and administrators who had been lawfully appointed in some other of the United States might, by virtue of their letters duly authenticated by the proper officer, have sued in this state. 4 Dall. Penn. 492; 1 Binn. Penn. 63. But letters of administration granted by the archbishop of York, in England, give no authority to the administrator in Pennsylvania. 1 Dall. Penn. 456.

19. *Rhode Island.* It does not appear to be settled whether executors and administrators appointed in another state may, by virtue of such appointment, sue in this. 3 Griffith, Law Reg. 107, 108.

South Carolina. Executors and administrators of other states cannot, as such, sue in South Carolina; they must take out letters in the state. 3 Griffith, Law Reg. 848.

Tennessee. Where any person or persons may obtain administration on the estate of any intestate, in any one of the United States, or territory thereof, such person or persons shall be enabled to prosecute suits in any court in this state, in the same manner as if administration had been granted to such person or persons by any court in the state of Tennessee. Provided, that such person or persons shall produce a copy of the letters of administration, authenticated in the manner which has been prescribed by the congress of the United States for authenticating the records or judicial acts of any one state in order to give them validity in any other state; and that such letters of administration had been granted in pursuance of and agreeable to the laws of the state or territory in which such letters of administration were granted.

When any executor or executors may prove the last will and testament of any deceased person, and take on him or themselves the execution of said will in any state in the United States, or in any territory thereof, such person or persons shall be enabled to prosecute suits in any court in this state, in the same manner as if letters testamentary had been granted to him or them by any court within the state of Tennessee. Provided, that such executor or executors shall produce a certified copy of the letters testamentary under the hand and seal of the clerk of the court where the same were obtained, and a certificate by the chief justice, presiding judge, or chairman of such court that the clerk's certificate is in due form, and that such letters testamentary had been granted in pursuance of and agreeable to the laws of the state or territory in which such letters testamentary were granted. Act of 1839, Carr. & Nich. Comp. 78.

20. *Texas.* When a will has been admitted to probate in any of the United States or the territories thereof or of any country out of the limits of the United States, and the executor or executors named in such will have qualified, and a copy of such will and of the probate thereof has been filed and recorded in any court of this state, under the provisions of the fifth section of this act, and letters of administration with such will annexed have been granted to any other person or persons than the executors therein named, upon the application of such executor or executors, or any one of them, such letters shall be revoked, and letters testamentary shall be issued to such applicant. Oldham & W. Dig. Texas Laws, art. 712.

Vermont. If the deceased person shall, at the time of his death, reside in any other state or country, leaving estate to be administered in this state, administration thereof shall be granted by the probate court of the district in which there shall be estate to administer; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other district. Rev. Stat. tit. 12, c. 47, s. 2.

21. *Virginia.* Authenticated copies of wills, proved according to the laws of any of the United States, or of any foreign country, relative to any estate in Virginia, may be offered for probate in the general court; or, if the estate lie altogether in any one county or corporation, in the circuit, county, or corporation court of such county or corporation. 3 Griffith, Law Reg. 345. It is understood to be the settled law of Virginia, though there is no statutory provision on the subject, that no probate of a will or grant of administration in another state of the Union, or in a foreign country, and no qualification of an executor or administrator elsewhere than in Virginia, give any such executor or administrator any right to demand the effects or debts of the decedent which may happen to be within the jurisdiction of the state. There must be a regular probate or grant of administration and qualification of the executor or administrator in Virginia, according to her laws. And the doctrine prevails in the federal courts held in Virginia, as well as in the state courts. 3 Griffith, Law Reg. 348.

Wisconsin. When an executor or administrator shall be appointed in any other state, or in any foreign country, on the estate of any person dying out of this state, and no executor or administrator shall be appointed in this state, the foreign executor may file an authenticated copy of his appointment in the county court of any county in which there may be real estate of the deceased.

Upon filing such authenticated copy of his appointment, such foreign executor or administrator may be licensed, by the same county court, to mortgage, lease, or sell real estate for the payment of debts or legacies and charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, excepting in the particulars in which a different provision is made. Wisc. Rev. Stat. c. 94, §§ 43, 44.

LETTING OUT. In American Law. The act of awarding a contract.

This term is much used in the United States, and most frequently in relation to contracts to construct railroads, canals, or other mechanical works. When such an undertaking has reached the point of actual construction, a notice is generally given that *proposals* will be received until a certain period, and thereupon a *letting out*, or award of portions of the work to be performed according to the proposals, is made. See 35 Ala. N. S. 55.

LEVANDÆ NAVIS CAUSA (Lat.). **In Civil Law.** For the sake of lightening the ship. See *Leg. Rhod. de jactu.* Goods thrown overboard with this purpose of lightening the ship are subjects of a general average.

LEVARI FACIAS (Lat. that you cause to be levied). **In Practice.** A writ of execution directing the sheriff to cause to be made of the lands and chattels of the judgment debtor the sum recovered by the judgment.

Under this writ the sheriff was to sell the goods and collect the rents, issues, and profits of the land in question. It has been generally superseded by the remedy by *elegit*, which was given by statute Westm. 2d (13 Edw. I.), c. 18. In case, however, the judgment debtor is a clerk, upon the sheriff's return that he has no lay fee, a writ in the nature of a *levari facias* goes to the bishop of the diocese, who thereupon sends a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect and pay them to the plaintiff till the full sum be raised. Yet the same course is pursued upon a *fi. fa.* 2 Burn, Eccl. Law, 329. See 2 Tidd, Pract. 1042; Comyns, Dig. *Execution* (c. 4); Finch, Law, 471; 3 Sharswood, Blackst. Comm. 471.

In American Law. A writ used to sell lands mortgaged, after a judgment has been obtained by the mortgagee, or his assignee, against the mortgagor, under a peculiar pro-

ceeding authorized by statute. 3 Bouvier, Inst. n. 3396.

LEVATO VELO (Lat.). An expression used in the Roman law, *Code*, 11. 4. 5, and applied to the trial of wreck and salvage. Commentators disagree about the origin of the expression; but all agree that its general meaning is that these causes shall be heard summarily. The most probable solution is that it refers to the place where causes were heard. A sail was spread before the door and officers employed to keep strangers from the tribunal. When these causes were heard, this sail was raised, and suitors came directly to the court, and their causes were heard immediately. As applied to maritime courts, its meaning is that causes should be heard without delay. These causes require despatch, and a delay amounts practically to a denial of justice. Emerigon, Des Assurances, c. 26, sect. 3.

LEVIR. A husband's brother. Vicat, Voc. Jur.

LEVITICAL DEGREES. Those degrees of kindred, set forth in the eighteenth chapter of Leviticus, within which persons are prohibited to marry.

LEVY. To raise. Webster, Dict. To levy a nuisance, *i.e.* to raise or do a nuisance, 9 Coke, 55; to levy a fine, *i.e.* to raise or acknowledge a *fine*, 2 Sharswood, Blackst. Comm. 357; 1 Stephen, Comm. 236; to levy a tax, *i.e.* to raise or collect a tax; to levy war, *i.e.* to raise or begin war, to take arms for attack, 4 Sharswood, Blackst. Comm. 81; to levy an execution, *i.e.* to raise or levy so much money on execution. Reg. Orig. 298.

In Practice. A seizure; the raising of the money for which an execution has been issued.

In order to make a valid levy on personal property, the sheriff must have it within his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time by his taking possession in such manner as to apprize everybody of the fact of its having been taken into execution. 3 Rawle, Penn. 405, 406; 1 Whart. Penn. 377; 2 Serg. & R. Penn. 142; 1 Wash. C. C. 29. The usual mode of making levy upon real estate is to describe the land which has been seized under the execution, by metes and bounds, as in a deed of conveyance. 3 Bouvier, Inst. n. 3391.

It is a general rule that when a sufficient levy has been made the officer cannot make a second. 12 Johns. N. Y. 208; 8 Cow. N. Y. 192.

LEVYING WAR. In Criminal Law. The assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution. 4 Cranch, 473, 474; Const. art. 3, s. 3. See TREASON; Fries, Trial, Pamphl. This is a technical term, borrowed from the English law, and its meaning is the same as it is when used in stat. 25 Ed. III. 4 Cranch, 471; U. S. *vs.* Fries, Pamphl. 167; Hall, Am. Law Jour. 351; Burr's Trial; 1 East, Pl. Cr. 62–77; Alison, Crim. Law of Scotl. 606; 9 Carr. & P. 129.

LEX (Lat.). The law. A law for the government of mankind in society. Among the ancient Romans this word was frequently used as synonymous with right, *jus*. When put absolutely, it means the Law of the Twelve Tables.

LEX FALCIDIA. See FALCIDIAN LAW.

LEX FORI (Lat. the law of the forum). The law of the country, to the tribunal of which appeal is made. 5 Clark & F. Hou. L. 1.

2. The forms of remedies, modes of proceeding, and execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted. 8 Clark & F. Hou. L. 121; 11 Mees. & W. Exch. 877; 10 Barnew. & C. 903; 5 La. 295; 2 Rand. Va. 303; 6 Humphr. Tenn. 45; 2 Ga. 158; 13 N. H. 321; 24 Barb. N. Y. 68; 4 Zabr. N. J. 333; 9 Gill, Md. 1; 17 Penn. St. 91; 18 Ala. N. s. 248; 4 McLean, C. C. 540; 5 How. 83; 11 Ind. 385; 33 Miss. 423.

The *lex fori* is to decide who are proper parties to a suit. 11 Ind. 485; 33 Miss. 423; Merlin, Rep. Etrang. § II.; Westlake, Priv. Int. Law, 121. Generally, all foreigners who sue in their own name, including sovereigns, unless specially disabled, may sue. 2 Bligh, N. s. 51; 2 Sim. Ch. 94; 4 Russ. Ch. 225; 1 Dowl. & C. 169. Foreign corporations may sue, 8 Barnew. & C. 427; 9 Ves. Ch. 347; 4 Johns. Ch. N. Y. 370; 13 Pet. 519, and be sued, when they have property within the jurisdiction. 9 N. H. 394; 3 Metc. Mass. 420; 16 Beav. Rolls, 287.

3. The assignee of a debt or chose in action other than a negotiable instrument may not sue in his own name, 6 Maule & S. 99; 6 Binn. Penn. 374; 7 Serg. & R. Penn. 483; 9 Mass. 357; 13 *id.* 146; 2 Johns. N. Y. 342; 5 Johns. Ch. N. Y. 60; 4 Conn. 312; 9 Am. Jur. 42; 11 *id.* 101, whether a voluntary or an involuntary assignee, 6 Maule & S. 126; 4 Johns. Ch. N. Y. 450; 33 Miss. 423; 1 Curt. C. C. 168; but see 6 N. Y. 320; 4 Zabr. N. J. 270; CONFLICT OF LAWS; nor a foreign executor or administrator, by virtue of his appointment by a foreign power. 24 Ga. 356; 15 Tex. 463; 1 Humphr. Tenn. 54; 10 Cush. Mass. 172; 2 Jones, Eq. No. C. 276; 10 Rich. So. C. 393; 3 Sneed, Tenn. 55; 7 Ind. 211. But see 16 Ark. 28; 4 McLean, C. C. 4.

The authority of a guardian to sue is local, and restricted to the jurisdiction where granted. 9 Rich. Eq. So. C. 311. See 30 Ala. N. s. 613; LETTERS TESTAMENTARY.

4. The *lex fori* governs as to the nature, extent, and character of the remedy, 17 Conn. 500; 37 N. H. 86; 2 Pat. & H. Va. 144, as

in case of instruments considered sealed where made, but not in the country where sued upon. 4 Cow. N. Y. 508; 5 Johns. N. Y. 239; 2 Caines, N. Y. 362; 1 Bos. & P. 360; 8 Pet. 361; 3 Gill & J. Md. 234; 3 Conn. 523; 4 *id.* 47, 49; 8 How. 451; 9 Mo. 56, 157.

Arrest and imprisonment may be allowed by the *lex fori*, though they are not by the *lex loci contractus*. 2 East, 453; 2 Burr. 1089; 5 Clark & F. Hou. L. 1; 1 Barnew. & Ad. 284; 14 Johns. N. Y. 346; 3 Mas. C. C. 88; 5 *id.* 378; 1 Pet. 317; 1 Wash. C. C. 376; 10 Wheat. 1.

For the law of interest as effected by the *lex fori*, see CONFLICT OF LAWS. For the law in relation to damages, see DAMAGES.

The forms of judgment and execution are to be determined by the *lex fori*. 3 Mas. C. C. 88; 5 *id.* 378; 4 Conn. 47; 14 Pet. 67.

The *lex fori* decides as to deprivation of remedy.

5. Where a debt is discharged by the law of the place creating it, such discharge will amount to a discharge everywhere. 5 East, 124; 12 Wheat. 360; 1 W. Blackst. 258; 13 Mass. 1; 16 Mart. La. 297; 6 Rob. La. 15; 7 Cush. Mass. 15; 1 Buck, 57, 61; 1 Woodb. & M. C. C. 115; 23 Wend. N. Y. 87; 5 Binn. Penn. 332; 16 Johns. N. Y. 233; 7 Johns. Ch. N. Y. 297; 16 Me. 206. It must be a discharge from the debt, and not an exemption from the effect of particular means of enforcing the remedy. 5 Binn. Penn. 381; 14 Johns. N. Y. 346; 10 *id.* 300; 8 Barnew. & C. 479; 1 Atk. Ch. 255; 2 H. Blackst. 553; 7 Me. 337; 11 Mart. La. 730; 15 Mass. 419; 5 Mas. C. C. 378.

Under the constitution of the United States, the insolvent laws of the various states which purport to discharge the debt are, at most, allowed that effect only as against their own citizens; as between their own citizens and strangers, where the claims of the latter have not been proved, they only work a destruction in the remedy, 5 Mas. C. C. 375; 4 Conn. 47; 14 Pet. 67; 12 Wheat. 213, 358, 369; 8 Pick. Mass. 194; 3 Iowa, 299; at least, if there be no provision requiring performance in the state where the discharge is obtained. 9 Conn. 314; 13 Mass. 18, 20; 7 Johns. Ch. 297; 1 Breese, Ill. 16; 1 South. N. J. 192; 4 Gill & J. Md. 509; 2 Blackf. Ind. 366. If claims are proved, they may work a discharge. 3 Johns. Ch. N. Y. 435; 26 Wend. N. Y. 43; 3 Pet. 411; 2 How. 202; 5 *id.* 295, 299; 8 Metc. Mass. 129; 7 Cush. Mass. 45. See INSOLVENCY.

6. Statutes of limitation affect the remedy only; and hence the *lex fori* will be the governing law. 6 Dow, Parl. Cas. 116; 5 Clark & F. Hou. L. 1–16; 8 *id.* 121, 140; 11 Pick. Mass. 36; 7 Ind. 91; 2 Paine, C. C. 437; 36 Me. 362. See 9 B. Monr. Ky. 518; 16 Ohio, 145. But these statutes restrict the remedy for citizens and strangers alike. 10 Barnew. & C. 903; 2 Bingh. N. C. 202, 216; 5 Clark & F. Hou. L. 1; 3 Johns. Ch. N. Y. 190; 6 Wend. N. Y. 475; 9 Mart. La. 526. For the effect of a discharge by statutes of limitation, where they are so drawn as to effect a discharge, in a foreign state, see Story, Confl. Laws, § 582; 11 Wheat. 361; 2 Bingh. N. C. 202; 6 Rob. La. 15. The restriction applies to a suit on a foreign judgment. 5 Clark & F. Hou. L. 1–21; 13 Pet. 312; 2 Barnew. & Ad. 413; 4 Cow. N. Y. 528, n. 10; 1 Gall. C. C. 371; 9 How. 407.

7. The right of set-off is to be determined by the *lex fori*. 2 N. H. 296; 3 Johns. N. Y. 263. Liens, implied hypothecations, and priorities of claim generally, are matters of remedy. 12 La. Ann. 289; Story, Confl. Laws, § 575. A prescriptive title to personal property acquired in a former domicil will be respected by the *lex fori*. 17 Ves. Ch. 88; 3 Hen. & M. Va. 57; 5 Cranch, 358; 11 Wheat. 361. But see Ambl. 113.

Questions of the admissibility and effect of evidence are to be determined by the *lex fori*. 12 La. Ann. 410; 2 Bradf. Surr. N. Y. 339. See EVIDENCE.

The *lex loci* is presumed to be that of the forum till the contrary is shown, 4 Iowa, 464; 40 Me. 247; 6 N. Y. 447; 13 Md. 392; 12 La. Ann. 673; 9 Gill, Md. 1; 3 Bosw. N. Y. 333; and also the *lex rei sitæ*. 1 Harr. & J. Md. 687. See FOREIGN LAWS; AUTHENTICATION.

LEX LOCI (Lat.). The law of the place. This may be either *lex loci contractus aut actus* (the law of the place of making the contract or of the thing done); *lex loci rei sitæ* (the law of the place where the thing is situated); *lex loci domicilii* (the law of the place of domicil).

In general, however, *lex loci* is only used for *lex loci contractus aut actus*.

1. CONTRACTS. It is a general principle applying to contracts made, rights acquired, or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it in all matters touching the modes of execution and authentication of the form or instrument of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it, and the legal rights and immunities acquired under it. 1 Bingh. N. C. 151, 159; 8 Clark & F. Hou. L. 121; 1 Pet. 317; 13 *id.* 378, 379; 2 N. H. 42; 5 *id.* 401; 13 *id.* 321; 6 Vt. 102; 2 Mass. 88, 89; 7 Cush. Mass. 30; 3 Conn. 253, 472; 14 *id.* 583; 22 Barb. N. Y. 118; 17 Penn. St. 91; 2 Harr. & J. Md. 193; 3 Gill & J. Md. 234; 9 Gill, Md. 1; 3 Dev. No. C. 161; 8 Mart. La. 95; 4 Ohio St. 241; 14 B. Monr. Ky. 556; 19 Mo. 84; 22 *id.* 550; 4 Fla. 404; 23 Miss. 42; 12 La. Ann. 607; 3 Stor. C. C. 465; Ware, Dist. Ct. 402; Story, Confl. Laws, § 242 *et seq.*; Bayley, Bills, 5th ed. 78; Parsons, Notes and Bills; 2 Kent, Comm. Lect. 39.

2. This principle, though general, does not, however, apply where the parties at the time

of entering into the contract had the law of another kingdom in view, or where the *lex loci* is in itself unjust, *contra bonos mores* (against good morals), or contrary to the public law of the state, as regarding the interests of religion or morality, or the general well-being of society. Ferguson, Marr. & D. 385; 2 Burr. 1077; 9 N. H. 271; 6 Pet. 172; 1 How. 169; 5 *id.* 295; 8 Paige, Ch. N. Y. 261; 17 Johns. N. Y. 511; 13 Mass. 23; 5 Clark & F. Hou. L. 11, 13; 8 *id.* 121; 6 Whart. 331; 2 Metc. Mass. 8; 1 B. Monr. Ky. 32; 5 Ired. No. C. 590; 2 Kent, Comm. 458; Story, Confl. Laws, § 280. And where the place of performance is different from the *locus contractus*, it is presumed the parties had the law of the former in mind. See § **10.**

3. The validity or invalidity of a contract as affected by the *lex loci* may depend upon the capacity of the parties or the legality of the act to be done.

The capacity of the parties as affected by questions of minority or majority, incapacities incident to coverture, guardianship, emancipation, and other personal qualities or disabilities, is to be decided by the law of the place of making the contract. Story, Confl. Laws, § 103; 1 Grant, Cas. Penn. 51.

The question of disability to make a contract on account of infancy is to be decided by the *lex loci*. 3 Esp. 163, 597; 17 Mart. La. 597; 8 Johns. N. Y. 189; 1 Grant, Cas. Penn. 51; 2 Kent, Comm. 233.

So, also, as to contracts made by married women. Al. 72; 8 Johns. N. Y. 189; 13 La. 177; 5 East, 31; 2 Parsons, Contr. 84, 111.

4. Personal disqualifications not arising from the law of nature, but from positive law, and especially such as are penal, are strictly territorial, and are not to be enforced in any country other than that where they originate. Story, Confl. Laws, §§ 91, 92, 104, 620–625; 2 Kent, Comm. 459.

Slavery works no incapacity in those countries or states where its existence is not recognized by positive law, and the *lex loci contractus* is to determine capacity in this respect. 20 Howell, St. Trials, 1–15; Dowl. & R. 679; Coke, Litt. 79 *b;* 17 Mart. La. 598; 9 Am. Jur. 490; 4 Wash. C. C. 390; 7 Serg. & R. Penn. 378; Story, Confl. Laws, § 96 *a.*

Natural disabilities, such as insanity, imbecility, etc., are everywhere recognized, so that the question whether they are controlled by the *lex loci* or *lex domicilii* seems to be theoretic rather than practical. On principle, there seems to be no good reason why they should come under a different rule from the positive disabilities.

5. The legality or illegality of the contract will be determined by the *lex loci*, unless it affects injuriously the public morals or rights, contravenes the policy or violates a public law of the country where it is sought to be enforced. 2 Kent, Comm. 458.

A contract illegal by the law of the place of its making and performance will generally be held so everywhere. 1 Gall. C. C. 375; 2 Mass. 88, 89; 2 N. H. 42; 5 *id.* 401; 2 Mas. C. C. 459; 13 Pet. 65, 78; 2 Johns. Cas. N. Y. 355; 1 Nott & M'C. So. C. 173; 2 Harr. & J. Md. 193, 221, 225; 17 Ill. 328; 16 Tex. 344; 2 Burr. 1077; 7 Term, 237; 2 Kent, Comm. 458; Henry, Foreign Law, 37, 50; Story, Confl. Laws, § 243.

An exception is said to exist in case of contracts made in violation of the revenue laws. Cas. *temp.* Hardw. 85; 2 C. Rob. Adm. 6; 1 Dougl. 251; 1 Cowp. 341; 2 Crompt. M. & R. Exch. 311; 2 Kent, Comm. 458.

6. A contract legal by the *lex loci* will be so everywhere, 13 La. Ann. 117; unless—

It is injurious to public rights or morals, 3 Burr. 1568; Cowp. 37; 2 Carr. & P. 347; 4 Barnew. & Ald. 650; 1 Bos. & P. 340; 6 Mass. 379; 2 Harr. & J. Md. 193; *or contravenes the policy.* 2 Bingh. 314; 2 Sim. Ch. 194; 1 Turn. & R. 299; 1 Dowl. & C. 342; 16 Johns. N. Y. 438; 5 Harr. Del. 31; 1 Green, Ch. N. J. 326; 17 Ga. 253. In this connection, it is held generally that the claims of citizens are to be preferred to those of foreigners in case of a conflict of rights. Assignments, under the insolvent laws of a foreign state, are usually held inoperative as against claims in the state in regard to personal property in the jurisdiction of the *lex fori.* 1 Green, Ch. N. J. 326; 5 Harr. Del. 31; 32 Miss. 246; 13 La. Ann. 280; 21 Barb. N. Y. 198; but see 12 Md. 54; 13 *id.* 392. *Or violates a positive law* of the *lex fori.* The application of the *lex loci* is a matter of comity; and that law must, in all cases, yield to the positive law of the place of seeking the remedy. 13 Mass. 6; 18 Pick. Mass. 193; 1 Green, Ch. N. J. 326; 12 Barb. N. Y. 631; 17 Miss. 247. See 10 N. Y. 53.

7. The interpretation of contracts is to be governed by the law of the country where the contract was made. Dougl. 201, 207; 2 Barnew. & Ad. 746; 6 Term, 224; 1 Bingh. N. C. 151–159; 1 Barnew. & Ad. 284; 10 Barnew. & C. 903; 2 Hagg. Cons. 60, 61; 8 Pet. 361; 13 *id.* 378; 30 Ala. N. S. 253; 4 McLean, C. C. 540; 2 Sharswood, Blackst. Comm. 141; Story, Confl. Laws, § 270; Chitty, Bills, 474.

The *lex loci* governs as to the formalities and authentication requisite to the valid execution of contracts. Story, Confl. Laws, §§ 123, 260; 11 La. 14; 2 Hill, N. Y. 227; 37 N. H. 86; 30 Vt. 42. But in proving the existence of, and seeking remedies for, the breach, as well as in all questions relating to the competency of witnesses, course of procedure, etc., the *lex fori* must govern. 11 Ind. 385; 9 Gill, Md. 1; 17 Penn. St. 91; 18 Ala. N. S. 248; 4 McLean, C. C. 540; 3 *id.* 545; 5 How. 83; 6 Humphr. Tenn. 75; 17 Conn. 500; 9 Mo. 56, 157; 4 Gilm. Va. 521; 26 Barb. N. Y. 177; Story, Confl. Laws, §§ 567, 634.

8. The *lex loci* governs as to the obligation and construction of contracts, 11 Pick. Mass. 32; 8 Vt. 325; 12 N. H. 520; 12 Wheat. 213; 2 Keen, 293; 1 Bos. & P. 138; 12 Wend. N. Y. 439; 22 Barb. N. Y. 118; 13 Mart. La. 202; 14 B. Monr. Ky. 556; 15

Miss. 798, unless, from their tenor, it must be presumed they were entered into with a view to the laws of some other state. 13 Mass. 1. This presumption arises where the place of performance is different from the place of making. 31 Eng. L. & Eq. 433; 17 Johns. N. Y. 511; 13 Pet. 65; 9 La. Ann. 185; 13 Mass. 23; 1 How. 169.

An obligation may be incurred under the *lex loci* which there is no means of enforcing in that country and which may be enforced in another country. 1 Barnew. & Ad. 284; 2 Cow. N. Y. 626; 2 Johns. N. Y. 345; 1 Pet. 317; 1 Wash. C. C. 376; 10 Wheat. 1; Henry, Foreign Law, 81–86; Story, Confl. Laws, § 571.

A lien or privilege created by the *lex loci* will generally be enforced wherever the property may be found, 8 Mart. 95; 5 La. 295; Story, Confl. Laws, §§ 322, 402; but not necessarily in preference to claims arising under the *lex fori*. 5 Cranch, 289, 298; 12 Wheat. 361.

9. A discharge from the performance of a contract under the *lex loci* is a discharge everywhere. 5 Mass. 509; 13 *id.* 1, 7; 7 Cush. Mass. 15; 4 Wheat. 122, 209; 12 *id.* 213; 2 Mas. C. C. 161; 2 Blackf. Ind. 394; 3 Caines, N. Y 154; 24 Wend. N. Y. 43; 2 Kent, Comm. 394. A distinction is to be taken between discharging a contract and taking away the remedy for a breach. 3 Mas. C. C. 88; 5 *id.* 378; 4 Conn. 47; 14 Pet. 67; 12 Wheat. 347; 8 Pick. Mass. 194; 9 Conn. 314; 2 Blackf. Ind. 394; 9 N. H. 478.

A series of conflicting decisions has arisen in the United States courts, and the courts of the various states, upon the insolvent laws of the various states. The principle deducible from the majority of the cases would seem to be, that the insolvent laws of most states must be considered only as affecting the remedy in the courts of the state where obtained, as between citizens and foreigners, but both as a discharge and deprivation of remedy, as between citizens. 5 How. 295; 12 Metc. Mass. 470; 26 Me. 110; 1 Woodb. & M. C. C. 115; 2 Kent, Comm. 393. See 3 Gray, Mass. 551.

Statutes of limitations apply to the remedy, but do not discharge the debt. 11 Wheat. 361; 9 How. 407; 20 Pick. Mass. 310; 11 *id.* 36; 17 Mass. 55; 2 Paine, C. C. 437; 2 Mas. C. C. 751; 6 N. H. 557; 6 Vt. 127; 8 Port. (Ala.) 84. But see 5 Clark & F. Hou. L. 1–17; 9 B. Monr. Ky. 513; 2 Tex. 414. See LIMITATIONS, STATUTE OF.

10. A question of some difficulty often arises as to where the *locus contractus* is, in the case of contracts made partly in one country or state and partly in another, or made in one state or country to be performed in another, or where the contract in question is accessory to a principal contract.

Where a contract is made partly in one country and partly in another, it is a contract of the place where the assent of the parties first concurs and becomes complete. 2 Parsons, Contr. 94; 27 N. H. 217, 244; 11 Ired. No. C. 303; 3 Strobh. So. C. 27; 1 Gray, Mass. 336.

As between the place of making and the place of performance, where a place of performance is specified, the law of the place of performance governs as to obligation, interpretation, etc. 5 East, 124; 3 Caines, N. Y. 154; 1 Gall. C. C. 371; 12 Vt. 648; 12 Pet. 456; 13 *id.* 65; 1 How. 182; 8 Paige, Ch. N. Y. 261; 8 Johns. N. Y. 189; 17 *id.* 511; 5 McLean, C. C. 448; 27 Vt. 8; 14 Ark. 189; 7 B. Monr. Ky. 575; 8 *id.* 306; 9 Mo. 56, 157; 4 Gilm. Va. 521; 21 Ga. 135; 30 Miss. 59; 7 Ohio, 134; 4 Mich. 450; 2 Kent, Comm. 459; Story, Confl. Laws, § 233. But see 11 Tex. 54.

Where the contract is to be performed generally, the law of the place of making governs. 2 Barnew. & Ald. 301; 5 Clark & F. Hou. L. 1, 12; 1 Barnew. & C. 16; 1 Metc. Mass. 82; 6 Cranch, 221; 6 Ired. No. C. 107; 17 Miss. 220.

If the contract is to be performed partly in one state and partly in another, it will be affected by the law of both states. 14 B. Monr. Ky. 556.

In cases of indorsement of negotiable paper, every indorsement is a new contract, and the place of each indorsement is its *locus contractus*. 2 Kent, Comm. 460; Prec. in Chanc. 128; 17 Johns. N. Y. 511; 9 Barnew. & C. 208; 13 Mass. 1; 25 Ala. N. s. 139; 19 N. Y. 436; 17 Tex. 102.

The place of payment is the *locus contractus*, however, as between indorsee and drawer. See 19 N. Y. 436.

The place of acceptance of a draft is regarded as the *locus contractus*. 3 Gill, Md. 430; 1 Q. B. 43; 1 Cow. N. Y. 103; 4 Pet. 111; 12 Wend. N. Y. 439; 6 Du. N. Y. 34; 8 Metc. Mass. 107; 4 Dev. No. C. 124; 6 McLean, C. C. 622; 9 Cush. Mass. 46; 13 N. Y. 290; 18 Conn. 138; 17 Miss. 220. See PROMISSORY NOTES; BILLS OF EXCHANGE.

11. The *lex loci* is presumed to be the same as that of the *forum*, unless shown to be otherwise. 46 Me. 247; 13 La. Ann. 673; 13 Md. 392; 9 Gill, Md. 1; 4 Iowa, 464. But see 1 Iowa, 388.

TORTS. Damages for the commission of a tortious act are to be measured by the law of the place where the act is done. 1 P. Will. 395; 1 Pet. C. C. 225; Story, Confl. Laws, § 307.

Marriage, if valid where contracted, is valid everywhere, unless where it works some manifest injustice, is *contra bonos mores*, or repugnant to the settled principles and policy of the laws of the country where it is sought to be enforced.

This is understood to be the doctrine in England, Buller, Nisi P. 114; 2 Hagg. Cons. 444, and note; 1 Ves. Ch. 159; 3 Stark. 178; 9 Bligh, Hou. L. 129; 29 Am. Law Jour. 97; 23 Bost. Law Rep. 741; even though the parties may have left their domicil for the purpose of evading the statute.

The exceptions to the validity of a foreign marriage are understood to be, in the United

States, such as are regarded by all Christian nations as *contra bonos mores*, as *naturally* incestuous, polygamous, and the like, 16 Mass. 157; 1 Pick. Mass. 596; 8 *id.* 433; 10 Metc. 451; 1 Yerg. Tenn. 110; 2 Ired. No. C. 346; 5 Humphr. Tenn. 13; 8 Ala. N. S. 48; 3 A. K. Marsh. Ky. 368; 10 Watts, Penn. 168; 2 Blatchf. C. C. 51; 2 Gilm. Va. 322; 5 J. J. Marsh. Ky. 460; 4 Johns. Ch. 343, 2 Parsons, Contr. 107; while marriages valid by the *lex loci* are sustained, even though incestuous in the *lex fori*, by statute provisions. 10 Metc. Mass. 451.

In New Hampshire, the exceptions are admitted as fully as in England. 21 N. H. 55.

The prevalent American doctrine is that a marriage valid in the state where contracted is good everywhere, even if prohibited by the *lex fori* or *domicilii*. But this is otherwise by statute in some states, and decisions in others. Mass. Gen. Stat. 529.

12. As laid down in a recent decision, the English law is that the *lex loci*, without regard to any question of fraudulent evasion, governs only as to formalities, but if in its essentials the marriage violates the *lex domicilii*, it is void. 23 Bost. Law Rep. 741. In this decision, the distinction taken in the Massachusetts cases is denied. See, also, Vaugh. 302; 11 Q. B. 205; 4 Johns. Ch. N. Y. 343; 21 N. H. 55. This decision puts marriages on the same footing with other contracts, except in the matter of avoiding formalities by Scotch marriages. This law is certainly open to the objection of respecting the form more highly than the substance of marriage.

The formalities to be observed are those of the *lex loci*, if any mode available by the parties is provided by that law. 1 Ves. 157; 10 East, 282; 6 How. 550; Bishop, Marr. & D. § 138.

13. If no mode is provided, the formalities of the *lex domicilii* of both parties may be observed. Bishop, Marr. & D. § 134; 1 Sim. Ch. 361; Rogers, Eccl. Law, 652; Waddilove, Dig. 238; 11 Clark & F. Hou. L. 85, 152.

But the *lex domicilii* governs as to the rights, duties, and obligations arising under a marriage. 5 Barnew. & C. 438.

A marriage invalid where contracted is not necessarily so elsewhere. 2 Hagg. Cons. 389, 390, 423.

Obtaining divorces is governed by the law of the domicil. See DOMICIL.

The law of all acts relating to real property is governed by the *lex rei sitæ*. Taking a mortgage as security does not, however, divest the *lex loci* of its force. See LEX REI SITÆ.

For *lex domicilii*, see DOMICIL.

LEX LONGOBARDORUM (Lat.). The name of an ancient code in force among the Lombards. It contains many evident traces of feudal policy. It survived the destruction of the ancient government of Lombardy by Charlemagne, and is said to be still partially in force in some districts of Italy.

LEX MERCATORIA (Lat.). That system of laws which is adopted by all commercial nations, and which, therefore, constitutes a part of the law of the land. See LAW MERCHANT.

LEX REI SITÆ (Lat.). The law of the place of situation of the thing.

2. It is the universal rule of the common law that any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place where the same is situate, 1 Pick. Mass. 81; 6 *id.* 286; 1 Paige, Ch. N. Y. 220; 2 Ohio, 124; 1 H. Blackst. 665; 2 Rose, Bank. 29; 2 Ves. & B. Ch. Ir. 130; 5 Barnew. & C. 438; 6 Madd. Ch. 16; 1 Younge & C. Exch. 114; 7 Cranch, 115; 10 Wheat. 192, 465; 6 *id.* 597; 4 Cow. N. Y. 510, 527; 4 Johns. Ch. N. Y. 460; 1 Gill, Md. 280; 6 Binn. Penn. 559; Story, Confl. Laws, §§ 365, 428; and the law is the same in this respect in regard to all methods whatever of transfer, and every restraint upon alienation. 12 Eng. L. & Eq. 206.

3. The *lex rei sitæ* governs as to the capacity of the parties to any transfer, whether testamentary or *inter vivos*, as affected by questions of minority or majority, 17 Mart. 569; of rights arising from the relation of husband and wife, Story, Confl. Laws, § 454; 9 Bligh, Hou. L. 127; 8 Paige, Ch. N. Y. 261; 2 Md. 297; 1 Miss. 281; 4 Iowa, 381, 3 Strobh. So. C. 562; 9 Rich. Eq. So. C. 475; parent and child, or guardian and ward, 2 Ves. & B. Ch. Ir. 127; 1 Johns. Ch. N. Y. 153; 4 Gill & J. Md. 332; 4 Cow. N. Y. 529, n.; 9 Rich. Eq. So. C. 311; 14 B. Monr. Ky. 544; 11 Ala. N. S. 343; 18 Miss. 529; but see 7 Paige, Ch. N. Y. 236; and of the rights and powers of executors and administrators, whether the property be real or personal, 2 Hamm. 124; 8 Clark & F. Hou. L. 112; 4 Mees. & W. Exch. 71, 192; 3 Q. B. 498, 507; 2 Sim. & S. Ch. 284; 3 Cranch, 319; 5 Pet. 518; 15 *id.* 1; 12 Wheat. 169; 2 N. H. 291; 4 Rand. Va. 158; 2 Gill & J. Md. 493; 5 Me. 261; 11 Mass. 256, 313; 5 Pick. Mass. 65; 10 Cush. Mass. 172; 7 Cow. N. Y. 4; 20 Johns. N. Y. 229; 3 Day, Conn. 74; 1 Humphr. Tenn. 54; 7 Ind. 211; 3 Sneed, Tenn. 55; 8 Md. 517; 10 Rich. So. C. 393; see EXECUTORS; of heirs, 5 Barnew. & C. 451, 452; 6 Bligh, 479, n.; 1 Rob. 627; 9 Cranch, 151; 9 Wheat. 566, 570; 10 *id.* 192; and of devisee or devisor. Story, Confl. Laws, § 474; 14 Ves. Ch. 337; 9 Cranch, 151; 10 Wheat. 192; 37 N. H. 114.

4. So as to the forms and solemnities of the transfer the *lex rei sitæ* must be complied with, whether it be a transfer by devise, 2 Dowl. & C. 349; 2 P. Will. 291, 293; 14 Ves. Ch. 537; 7 Cranch, 115; 10 Wheat. 192; 4 Johns. Ch. N. Y. 260; 2 Ohio, 124; 37 N. H. 114; 5 R. I. 112, 413; 2 Jones, No. C. 368; see 4 McLean, C. C. 75, or by conveyance *inter vivos*, 9 Bligh, Hou. L. 127, 128; 2 Dowl. & C. 349; 1 Pick. Mass. 81; 1 Paige, Ch. N. Y. 220; 11 Wheat. 465; 11 Tex. 755; 18 Penn. St. 170; 12 Eng. L. & Eq. 206; 13 *id.* 465. So as to the amount of property or extent of interest which may be acquired,

held, or transferred, 3 Russ. Ch. 328; 2 Dow. & C. 393, and the question of what is real property. 1 W. Blackst. 234; 2 Burr. 1079; 2 Dowl. 230, 250; 6 Paige, Ch. N. Y. 630; 3 Deac. & C. Bank. 704; 2 Salk. 666. And, generally, the *lex rei sitæ* governs as to the validity of any such transfer. 4 Sandf. N. Y. 252; 23 Miss. 42; 22 *id.* 130; 11 Mo. 314; 4 Den. N. Y. 305; 2 Bradf. Surr. N. Y. 339. As to the disposition of the proceeds, see 12 Eng. L. & Eq. 206. As to the interpretation and construction of wills, see DOMICIL.

5. The rules here given do not apply to personal contracts indirectly affecting real estate. 1 Halst. Ch. N. J. 631; Story, Confl. Laws, § 351, d.

A contract for the conveyance of lands valid by the *lex fori* will be enforced in equity by a decree *in personam* for a conveyance valid under the *lex rei sitæ*. 1 Ves. Ch. 144; 2 Paige, Ch. N. Y. 606; Wythe, Va. 135; 1 Hopk. Ch. N. Y. 213; 6 Cranch, 148.

An executory foreign contract for the conveyance of lands not repugnant to the *lex rei sitæ* will be enforced in the courts of the latter country by personal process. 8 Paige, Ch. N. Y. 201; 23 Eng. L. & Eq. 288; 4 Bosw. N. Y. 266.

LEX TALIONIS (Lat.). The law of retaliation: an example of which is given in the law of Moses, an eye for an eye, a tooth for a tooth, &c.

Amicable retaliation includes those acts of retaliation which correspond to the acts of the other nation under similar circumstances.

Jurists and writers on international law are divided as to the right of one nation punishing with death, by way of retaliation, the citizens or subjects of another nation. In the United States no example of such barbarity has ever been witnessed; but prisoners have been kept in close confinement in retaliation for the same conduct towards American prisoners. See Rutherforth, Inst. b. 2, c. 9; Marten, Law of Nat. b. 8, c. 1, s. 3, note; 1 Kent, Comm. 93; Wheaton, Int. Law, pt. 4, c. 1, § 1.

Vindictive retaliation includes those acts which amount to a war.

LEX TERRÆ (Lat.). The law of the land. See DUE PROCESS OF LAW.

LEY (Old French; a corruption of *loi*). Law. For example, Termes de la Ley, Terms of the Law. In another, and an old technical, sense, ley signifies an oath, or the oath with compurgators: as, il tend sa *ley* aiu pleyntiffe. Britton, c. 27.

LEY GAGER. Wager of law. An offer to make an oath denying the cause of action of the plaintiff, confirmed by *compurgators* (*q. v.*), which oath used to be allowed in certain cases. When it was accomplished, it was called the "doing of the law," "*fesans de ley.*" Termes de la Leye, *Ley;* 2 Barnew. & C. 538; 3 Bos. & P. 297; 3 & 4 Will. IV. c. 42, § 16.

LEYES DE ESTILLO. In Spanish Law. Laws of the age. A book of explanations of the *Fuero Real*, to the number of two hundred and fifty-two, formed under the authority of Alonzo X. and his son Sancho, and of Fernando el Emplazado, and published at the end of the thirteenth century or beginning of the fourteenth, and some of them are inserted in the New Recopilacion. See 1 White, New Recop. p. 354.

LIABILITY. Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed.

LIBEL. In Practice. The plaintiff's petition or allegation, made and exhibited in a judicial process, with some solemnity of law.

A written statement by a plaintiff of his cause of action, and of the relief he seeks to obtain in a suit. Law, Eccl. Law, 17; Ayliffe, Par. 346; Shelford, Marr. & D. 506; Dunlap, Adm. Pract. 111. It performs substantially the same office in the ecclesiastical courts, and those courts which follow the practice of the ecclesiastical courts, as the bill in chancery and the declaration in common-law practice.

2. The libel should be a narrative, specific, clear, direct, certain, not general nor alternative. 3 Law, Eccl. Law, 147. It should contain, substantially, the following requisites: the name, description, and addition of the plaintiff, who makes his demand by bringing his action; the name, description, and addition of the defendant; the name of the judge, with a respectful designation of his office and court; the thing or relief, general or special, which is demanded in the suit; the grounds upon which the suit is founded.

3. The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration, when the cause of action can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations or articles. 2 Law, Eccl. Law, 148; Hall, Adm. Pract. 123; 7 Cranch, 349. The material facts should be stated in distinct articles in the libel, with as much exactness and attention to times and circumstances as in a declaration at common law. 4 Mas. C. C. 541.

4. Although there is no fixed formula for libels, and the courts will receive such an instrument from the party in such form as his own skill or that of his counsel may enable him to give it, yet long usage has sanctioned forms, which it may be most prudent to adopt. The parts and arrangement of libels commonly employed are:

First, the address to the court: as, To the Honorable John K. Kane, Judge of the district court of the United States within and for the eastern district of Pennsylvania.

5. *Second*, the names and descriptions of

the parties. Persons competent to sue at common law may be parties libellants; and similar regulations obtain in the admiralty courts and the common-law courts respecting those disqualified from suing in their own right or name. Married women prosecute by their husbands, or by *prochein ami*, when the husband has an adverse interest to hers; minors, by guardians, tutors, or *prochein ami;* lunatics and persons *non compos mentis*, by tutor, guardian *ad litem*, or committee; the rights of deceased persons are prosecuted by executors or administrators; and corporations are represented and proceeded against as at common law.

Third, the averments or allegations setting forth the cause of action. These should be conformable to the truth, and so framed as to correspond with the evidence. Every fact requisite to establish the libellant's right should be clearly stated, so that it may be directly met by the opposing party by admission, denial, or avoidance: this is the more necessary, because no proof can be given, or decree rendered, not covered by and conformable to the allegations. 1 Law, Eccl. Law, 150; Hall, Pract. 126; Dunlap, Adm. Pract. 113; 7 Cranch, 394; 21 How. Pract. 343.

6. *Fourth*, the conclusion, or prayer for relief and process: the prayer should be for the specific relief desired; for general relief, as is usual in bills in chancery; the conclusion should also pray for general or particular process. Law, Eccl. Law, 149. And see 3 Mas. C. C. 503.

Interrogatories are sometimes annexed to the libel: when this is the case, there is usually a special prayer, that the defendant may be required to answer the libel, and the interrogatories annexed and propounded. This, however, is a dangerous practice, because it renders the answers of the defendant evidence, which must be disproved by two witnesses, or by one witness corroborated by very strong circumstances.

7. The libel is the first proceeding in a suit in admiralty in the courts of the United States. 3 Mas. C. C. 504.

No *mesne* process can issue in the United States admiralty courts until a libel is filed, 1 Adm. 7, Rules of the U. S. Supreme Court. The twenty-second and twenty-third rules require certain statements to be contained in the libel; and to those, and the forms in 2 Conkling, Adm. Pract., the reader is referred. And see Parsons, Marit. Law; Dunlap, Adm. Pract.; Hall, Adm. Pract.

In Torts. That which is written or printed, and published, calculated to injure the character of another by bringing him into ridicule, hatred, or contempt. *Parke*, J., 15 Mees. & W. Exch. 344.

Every thing, written or printed, which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been. 15 Mees. & W. Exch. 437.

A malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. 1 Hawkins, Pl. Cr. b. 1, c. 73, § 1; 4 Mass. 168; 2 Pick. Mass. 115; 9 Johns. N. Y. 214; 1 Den. N. Y. 347; 24 Wend. N. Y. 434; 9 Barnew. & C. 172; 4 Mann. & R. 127; 2 Kent, Comm. 13.

It has been defined, perhaps with more precision, to be a censorious or ridiculous writing, picture, or sign made with a malicious or mischievous intent towards government, magistrates, or individuals. 3 Johns. Cas. N. Y. 354; 9 Johns. N. Y. 215; 5 Binn. Penn. 340.

8. There is a great and well-settled distinction between verbal and written slander; and this not only in reference to the consequences, as subjecting the party to an indictment, but also as to the character of the accusations or imputations essential to sustain a civil action to recover damages. To write and publish maliciously any thing of another which either makes him ridiculous or holds him out as a dishonest man, is held to be actionable, or punishable criminally, when the speaking of the same words would not be so. 1 Saund. 6th ed. 247 *a;* 4 Taunt. 355; 5 Binn. Penn. 219; Heard, Libel & S. § 74; 6 Cush. Mass. 75.

9. The reduction of the slanderous matter to writing or printing is the most usual mode of conveying it. The exhibition of a picture intimating that which in print would be libellous is equally criminal. 2 Campb. 512; 5 Coke, 125; 2 Serg. & R. Penn. 91. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel. Hawkins, Pl. Cr. b. 1, c. 73, s. 2; 11 East, 227.

There is, perhaps, no branch of the law which is so difficult to reduce to exact principles, or to compress within a small compass, as the requisites of a libel.

In the following cases the publications have been held to be *actionable*. It is a libel to write of a person soliciting relief from a charitable society, that she prefers unworthy claims, which it is hoped the members will reject forever, and that she has squandered away money, already obtained by her from the benevolent, in printing circulars abusive of the secretary of the society. 12 Q. B. 624. It is libellous to publish of the plaintiff that, although he was aware of the death of a person occasioned by his improperly driving a carriage, he had attended a public ball in the evening of the same day. 1 Chitt. Bail, 480. It is a libel to publish of a Protestant archbishop that he endeavors to convert Roman Catholic priests by promises of money and preferment. 5 Bingh. 17. It is a libel to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the same story of himself. 6 Bingh. 409.

A declaration which alleges that the be-

fendant charged the plaintiff, an attorney, with being guilty of "sharp practice," which is averred to mean disreputable practice, charges a libellous imputation. 4 Mees. & W. Exch. 446.

10. Any publication which has a tendency to disturb the public peace, or good order of society, is *indictable* as a libel. "This crime is committed," says Professor Greenleaf, "by the publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule; or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of the law and government of the country; to degrade the administration of government, or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations, expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law, or by virtue of particular statutes." 3 Greenleaf, Ev. § 164. See 4 Mass. 163; 9 Johns. N.Y. 214; 4 M'Cord, So. C. 317; 9 N. H. 34.

Libels against the memory of the dead, which have a tendency to create a breach of the peace, by inciting the friends and relatives of the deceased to avenge the insult of the family, render their authors liable to indictment. The malicious intention of the defendant to injure the family and posterity of the deceased must be expressly averred and clearly proved. 5 Coke, 125; 4 Term, 126, 129, note; 3 Binn. Penn. 281; Heard, Libel & S. §§ 72, 348.

If the matter is understood as scandalous, and is calculated to excite ridicule or abhorrence against the party intended, it is libellous, however it may be expressed. 5 East, 463; 1 Price, Exch. 11, 17; Hob. 215; Chitty, Crim. Law, 868; 2 Campb. 512.

11. The malicious reading of a libel to one or more persons, it being on the shelves in a bookstore, as other books, for sale; and where the defendant directed the libel to be printed, took away some and left others: these several acts have been held to be publications. The sale of each copy, where several copies have been sold, is a distinct publication and a fresh offence. The publication must be malicious: evidence of the malice may be either express or implied. Express proof is not necessary; for where a man publishes a writing which on the face of it is libellous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary, on the part of the prosecution, to prove any circumstance from which malice may be inferred. But no allegation, however false and malicious, contained in answers to interrogatories in affidavits duly made, or any other proceedings in courts of justice or petitions to the legislature, are indictable. 4 Coke, 14; 2 Burr. 807; Hawkins, Pl. Cr. b. 1, c. 73, s. 8; 1 Saund. 131, n. 1; 1 Lev. 240; 2 Chitty, Crim. Law, 869; 2 Serg. & R. Penn. 23. It is no defence that the matter published is part of a document printed by order of the house of commons. 9 Ad. & E. 1. See JUDICIAL PROCEEDINGS.

The publisher of a libel is liable to be punished criminally by indictment, 2 Chitty, Crim. Law, 875; or is subject to an action on the case by the party grieved. Both remedies may be pursued at the same time. See, generally, 2 Bishop, Crim. Law; Heard, Libel & S.

LIBEL OF ACCUSATION. In Scotch Law. The instrument which contains the charge against a person accused of a crime. Libels are of two kinds, namely, indictments and criminal letters.

Every libel assumes the form of what is termed, in logic, a syllogism. It is first stated that some particular kind of act is criminal: as, that "theft is a crime of a heinous nature, and severely punishable." This proposition is termed the *major*. It is next stated that the person accused is guilty of the crime so named, "actor, or art and part." This, with the narrative of the manner in which, and the time when, the offence was committed, is called the *minor* proposition of the libel. The *conclusion* is that, all or part of the facts being proved, or admitted by confession, the panel "ought to be punished with the pains of the law, to deter others from committing the like crime in all time coming." Burton, Man. Pub. L. 300, 301.

LIBELLANT. The party who files a libel in an ecclesiastical or admiralty case, corresponding to the plaintiff in actions in the common-law courts.

LIBELLEE. A party against whom a libel has been filed in proceedings in an ecclesiastical or in admiralty, corresponding to the defendant in a common-law suit.

LIBELLUS (Lat.). In Civil Law. A little book. *Libellus supplex*, a petition, especially to emperor; all petitions to whom must be in writing. L. 15, D. *in jus voc. Libellum rescribere*, to mark on such petition the answer to it. L. 2, § 2, Dig. *de jur. fisc. Libellum agere*, to assist or counsel the emperor in regard to such petitions, L. 12, D. *de distr. pign.*; and one whose duty it is to do so is called *magister libellorum*. There were also *promagistri*. L. 1, D. *de offic. præf. pract. Libellus accusatorius*, an information and accusation of a crime. L. 17, § 1, & L. 29, § 8, *D. ad leg. Jul. de adult. Libellus divortii*, a writing of divorcement. L. 7, D. *de divort. et repud. Libellus rerum*, an inventory. Calv. Lex. *Libellus* or *oratio consultoria*, a message by which emperors laid matters before senate. Calvinus, Lex.; Suet. Cæs. 56.

A writing in which is contained the names of the plaintiff (actor) and defendant (reus), the thing sought, the right relied upon, and name of the tribunal before which the action is brought. Calvinus, Lex.

Libellus appellatorius, an appeal. Calvinus, Lex.; L. 1, § ult., D. ff. *de appellat.*

In English Law (sometimes called *libellus conventionalis*). A bill. Bracton, fol. 112.

LIBELLUS FAMOSUS (Lat.). A libel; a defamatory writing. L. 15, D. *de pœn.*; Vocab. Jur. Utr. sub "*famosus.*" It may be without writing: as, by signs, pictures, etc. 5 Rep. *de famosis libellis.*

LIBER (Lat.). **In Civil Law.** A book, whatever the material of which it is made; a principal subdivision of a literary work: thus, the Pandects, or Digest of the Civil Law, is divided into fifty books. L. 52, D. *de legat.*

In Civil and Old English Law. Free: *e.g.* a free (*liber*) bull. Jacobs. Exempt from service or jurisdiction of another, Law Fr. & Lat. Dict.: *e.g.* a free (*liber*) man. L. 3, D. *de statu hominum.*

LIBER ASSISARUM (Lat.). The book of assigns or pleas of the crown; being the fifth part of the Year-Books.

LIBER FEUDORUM (Lat.). A code of the feudal law, which was compiled by direction of the emperor Frederick Barbarossa, and published in Milan, in 1170. It was called the *Liber Feudorum*, and was divided into five books, of which the first, second, and some fragments of the others still exist, and are printed at the end of all the modern editions of the Corpus Juris Civilis. Giannone, b. 13, c. 3; Cruise, Dig. prel. diss. c. 1, § 31.

LIBER HOMO (Lat.). A free man; a freeman lawfully competent to act as juror. Ld. Raym. 417; Kebl. 563.

In London, a man can be a *liber homo* either—1, by service, as having served his apprenticeship; or, 2, by birthright, being a son of a *liber homo;* or, 3, by redemption, *i.e.* allowance of mayor and aldermen. 8 Rep., Case of City of London. There was no intermediate state between *villein* and *liber homo.* Fleta, lib. 4, c. 11, § 22. But a *liber homo* could be vassal of another. Bract. fol. 25.

In Old European Law. An allodial proprietor, as opposed to a feudatory. Calvinus, Lex, *Alode.*

LIBER JUDICIARUM (Lat.). The book of judgment, or doom-book. The Saxon Domboc. Conjectured to be a book of statutes of ancient Saxon kings. See Jacob, *Domboc;* 1 Sharswood, Blackst. Comm. 64.

LIBER ET LEGALIS HOMO (Lat.). A free and lawful man. One worthy of being a juryman: he must neither be infamous nor a bondman. 3 Sharswood, Blackst. Comm. 340, 362; Bracton, fol. 14 *b;* Fleta, l. 6, c. 25, § 4; l. 4, c. 5, § 4.

LIBERATE (Lat.). **In English Practice.** A writ which issues on lands, tenements, and chattels, being returned under an extent on a statute staple, commanding the sheriff to deliver them to the plaintiff, by the extent and appraisement mentioned in the writ of extent and in the sheriff's return thereto. See Comyns, Dig. *Statute Staple* (D 6).

LIBERATION. In Civil Law. The extinguishment of a contract, by which he who was bound becomes free or liberated. Wolff, Dr. de la Nat. § 749. Synonymous with payment. Dig. 50. 16. 47.

LIBERTI, LIBERTINI. In Roman Law. The condition of those who, having been slaves, had been made free. 1 Brown, Civ. Law, 99.

There is some distinction between these words. By *libertus* was understood the freedman when considered in relation to his patron, who had bestowed liberty upon him; and he was called *libertinus* when considered in relation to the state he occupied in society subsequent to his manumission. Leç. El. Dr. Rom. § 93.

LIBERTY (Lat. *liber*, free; *libertas*, freedom, liberty). Freedom from restraint. The faculty of willing, and the power of doing what has been willed, without influence from without.

A privilege held by grant or prescription, by which some men enjoy greater privileges than ordinary subjects.

A territory with some extraordinary privilege.

A part of a town or city: as, the Northern Liberties of Philadelphia. See FAUBOURG.

Civil liberty is the greatest amount of absolute liberty which can in the nature of things be equally possessed by every citizen in a state.

The term is frequently used to denote the amount of absolute liberty which is actually enjoyed by the various citizens under the government and laws of the state as administered. 1 Blackstone, Comm. 125.

The fullest political liberty furnishes the best possible guarantee for civil liberty.

Lieber defines civil liberty as guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men, or by all the members of a state, together with an effectual share in the making and administration of the laws, as the best apparatus to secure that protection, including Blackstone's divisions of civil and political under this head.

Natural liberty is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature and so as not to interfere with an equal exercise of the same rights by other men. Burlam. c. 3, § 15; 1 Blackstone, Comm. 125. It is called by Lieber *social* liberty, and is defined as the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of.

Personal liberty consists in the power of locomotion, of changing situation, or remov-

ing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law. 1 Blackstone, Comm. 134.

Political liberty is an effectual share in the making and administration of the laws. Lieber, Civ. Lib.

2. Liberty, in its widest sense, means the faculty of willing, and the power of doing what has been willed without influence from without. It means self-determination, unrestrainedness of action. Thus defined, one being only can be absolutely free,—namely, God. So soon as we apply the word liberty to spheres of human action, the term receives a relative meaning, because the power of man is limited; he is subject to constant influences from without. If the idea of unrestrainedness of action is applied to the social state of man, it receives a limitation still greater, since the equal claims of unrestrained action of all necessarily involves the idea of protection against interference by others. We thus come to the definition, that liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as man or citizen, or of his humanity, manifested as a social being. (See RIGHT.) The word liberty, applied to man in their political state, may be viewed with reference to the state as a whole, and in this case means the independence of the state, of other states (see AUTONOMY); or it may have reference to the relation of the citizen to the government, in which case it is called political or civil liberty; or it may have reference to the status of a man as a political being, contradistinguished from him who is not considered master over his body, will, or labor,—the slave. This is called personal liberty, which, as a matter of course, includes freedom from prison.

3. Lieber, in his work on Civil Liberty, calls that system which was evolved in England, and forms the basis of liberty in the countries settled by English people, Anglican liberty. The principal guarantees, according to him, are:—

I. National independence. There must be no foreign interference. The country must have the right and power of establishing the government it thinks best.

II. Individual liberty, and, as belonging to it, personal liberty, or the great habeas-corpus principle, and the prohibition of general warrants of arrest. The right of bail belongs also to this head.

III. A well-secured penal trial, of which the most important is trial for high treason.

IV. The freedom of communion, locomotion, and emigration.

V. Liberty of conscience. The United States constitution and the constitutions of all the states have provisions prohibiting any interference with the church.

4. VI. Protection of individual property, which requires unrestrained action in producing and exchanging, the prohibition of unfair monopolies, commercial freedom, and the guarantee that no property shall be taken except in the course of law, the principle that taxation shall only be with the consent of the tax-payer, and for short periods only, and the exclusion of confiscation.

VII. Supremacy of the law. The law must not, however, violate any superior law or civil principle, nor must it be an *ex post facto* law. The executive must not possess the power of declaring martial law, which is merely a suspension of all law. In extreme cases, parliament in England and congress in the United States pass an act suspending the habeas corpus act.

VIII. Every officer must be responsible to the affected person for the legality of his act; and no act must be done for which some one is not responsible.

IX. It has been deemed necessary in the Bill of Rights and the American constitution specially to refer to the quartering of soldiers as a dangerous weapon in the hands of the executive.

5. X. The forces must be strictly submitted to the law, and the citizen should have the right to bear arms.

XI. The right of petitioning, and the right of meeting and considering public matters, and of organising into associations for any lawful purposes, are important guarantees of civil liberty.

The following guarantees relate more especially to the government of a free country and the character of its polity:

XII. Publicity of public business in all its branches, whether legislative, judicial, written, or oral.

XIII. The supremacy of the law, or the protection against the absolutism of one, of several, or of the majority, requires other guarantees. It is necessary that the public funds be under close and efficient popular control; they should therefore be chiefly in the hands of the popular branch of the legislature, never of the executive. Appropriations should also be for distinct purposes and short times.

6. XIV. It is further necessary that the power of making war reside with the people, and not with the executive. A declaration of war in the United States is an act of congress.

XV. The supremacy of the law requires, also, not only the protection of the minority, but the protection of the majority against the rule of a factious minority or cabal.

XVI. The majority and, through it, the people are protected by the principle that the administration is founded on party principles.

XVII. A very important guarantee of liberty is the division of government into three distinct functions,—legislative, administrative, and judicial. The union of these is absolutism or despotism on the one hand, and slavery on the other.

XVIII. As a general rule, the principle prevails in Anglican liberty that the executive may do what is positively allowed by fundamental or other law, and not all that which is not prohibited.

7. XIX. The supremacy of the law requires that, where enacted constitutions form the fundamental law, there be some authority which can pronounce whether the legislature itself has or has not transgressed it. This power must be vested in courts of law.

XX. There is no guarantee of liberty more important and more peculiarly Anglican than the representative government. See Lieber, Civ. Lib. p. 168.

In connection with this, a very important question is, whether there should be direct elections by the people, or whether there should be double elections. The Anglican principle favors simple elections; and double elections have often been resorted to as the very means of avoiding the object of a representative government.

The management of the elections should also be in the hands of the voters, and government especially should not be allowed to interfere.

Representative bodies must be free. They must be freely chosen, and, when chosen, act under no threat or violence of the executive or any portion of the people. They must be protected as representative bodies; and a wise parliamentary law and usage should secure the rights of each member and the elaboration of the law.

A peculiar protection is afforded to members of the legislature in England and the United States,

by their freedom from arrest, except for certain specified crimes.

8. Every member must possess the right to propose any measure or resolution.

Not only must the legislature be the judge of the right each member has to his seat, but the whole internal management belongs to itself. It is indispensable that it possess the power and privileges to protect its own dignity.

The principle of two houses, or the bicameral system, is an equally efficient guarantee of liberty, by excluding impassioned legislation and embodying in the law the collective mind of the legislature.

XXI. The independence of the law, of which the independence of the judiciary forms a part, is one of the main stays of civil liberty. It requires "a living common law, a clear division of the judiciary from other powers, the public accusatorial process, the independence of the judge, the trial by jury, and an independent position of the advocate." See Lieber, Civil Liberty and Self-Government, pp. 208–250.

9. XXII. Another constituent of our liberty is local and institutional self-government. It arises out of a willingness of the people to attend to their own affairs, and an unwillingness to permit of the interference of the executive and administration with them beyond what it necessarily must do, or which cannot or ought not to be done by self-action. A pervading self-government, in the Anglican sense, is organic: it consists in organs of combined self-action, in institutions, and in a systematic connection of these institutions. It is, therefore, equally opposed to a disintegration of society and to despotism.

American liberty belongs to the great division of Anglican liberty, and is founded upon the checks, guarantees, and self-government of the Anglican race. The following features are, however, peculiar to American liberty: republican federalism, strict separation of the state from the church, greater equality and acknowledgment of abstract rights in the citizen, and a more popular or democratic cast of the whole polity. With reference to the last two may be added these further characteristics:

10. We have everywhere established voting by ballot. The executive has never possessed the power of dissolving or proroguing the legislature. The list of states has not been closed. We admit foreigners to the rights of citizenship, and we do not believe in inalienable allegiance. There is no attainder of blood. We allow no *ex post facto* laws. American liberty possesses, also, as a characteristic, the enacted constitution,—distinguishing it from the English polity, with its accumulative constitution. Our legislatures are, therefore, not omnipotent, as the British Parliament theoretically is; but the laws enacted by them may be declared by the supreme courts to conflict with the constitution,—as unconstitutional.

The liberty sought for by the French, as a peculiar system, is founded chiefly, in theory, on the idea of equality and the abstract rights of man. (Rousseau's Social Contract.) Lieber calls this system—if indeed that which has never yet come to be established as an enduring reality, with true vitality, can be called a system—Gallican liberty, to contradistinguish it from Anglican liberty.

11. Very few works have been written that treat exclusively of civil liberty; but liberty has been more or less comprehensively treated in many works in which the great topics of government or the rights of individuals or nations have been discussed. Aristotle's Politics; W. Fortescue, De Laudibus Legum Angliæ; Hooker, The Laws of Ecclesiastical Polity; Locke on Government; Algernon Sidney, Discourses on Government (the great book which, together with Montesquieu's Spirit of Laws, may be said to have furnished the chief food on which the minds of our most distinguished revolutionary framers and legislators were reared). As to Montesquieu's Esprit des Lois, the student ought to combine with it the Critical Commentary, by Count Destutt de Tracy, first published in Philadelphia in 1811, and, if we are rightly informed, adopted by Mr. Jefferson as a political text-book for the University of Virginia. There is a German translation of Destutt de Tracy, with additional notes and criticisms, by C. F. Morstadt, Heidelberg, 1820; Locke, Two Treatises on Government; the best English edition of De Lolme on the British Constitution; the Works of Jeremy Bentham; Hallam, Constitutional History of England; Creasy, Rise and Progress of the English Constitution; Rousseau, Contrat Social (in connection with it, Lorimer's Political Progress not necessarily Democratic); Guizot, especially his Democracy; Jonathan Elliot; the Debates in the several State Conventions on the Adoption of the Federal Constitution, together with the Journal of the Federal Convention, as reported by James Madison; John Adams' Defence of the Constitution of the United States; The Federalist, by Hamilton and Madison; George T. Curtis, History of the Origin, Formation, and Adoption of the Constitution of the United States; Story's Commentaries; Sismondi, Histoire de la Renaissance de la Liberté en Italie, and his History of the Italian Republics in the Middle Ages; Lieber's Political Ethics; Whewell's Elements of Morality, including Polity; all those portions of the great writers on the Law of Nations where human rights are discussed. For criticism of political literature and a comprehensive enumeration of political writers, we must refer the student to Robert von Mohl, History and Literature of Political Sciences, 3 vols. Erlangen, 1858.

LIBERTY OF THE PRESS. The right to print and publish the truth, from good motives and for justifiable ends. 3 Johns. Cas. N. Y. 394.

This right is secured by the constitution of the United States. Amendments, art. 1. The abuse of the right is punished criminally by indictment, civilly by action. See Judge Cooper, Libel; LIBEL.

LIBERTY OF SPEECH. The right to public support in speaking facts or opinions.

2. It is provided by the constitution of the United States that members of congress shall not be called to account for any thing said in debate; and similar provisions are contained in the constitutions of the several states in relation to the members of their respective legislatures. This right, however, does not extend beyond the mere speaking; for if a member of congress were to reduce his speech to writing and cause it to be printed, it would no longer bear a privileged character, and he might be held responsible for a libel, as any other individual. See Bacon, Abr. *Libel* (B); DEBATE.

3. The greatest latitude is allowed by the common law to counsel: in the discharge of his professional duty, he may use strong epithets, however derogatory to other persons they may be, if *pertinent* to the cause, and stated in his instructions, whether the thing were true or false. But if he were maliciously to travel out of his case for the purpose of slandering another, he would be liable

to an action, and amenable to a just, and often more efficacious, punishment, inflicted by public opinion. 3 Chitty, Pract. 887. No respectable counsel will indulge himself with unjust severity; and it is doubtless the duty of the court to prevent any such abuse.

LIBERUM MARITAGIUM (Lat.). **In Old English Law.** Frank-marriage (*q.v.*). 2 Sharswood, Blackst. Comm. 115; Littleton, § 17; Bracton, fol. 21.

LIBERUM SERVITIUM. Free service. Service of a warlike sort by a feudatory tenant; sometimes called *servitium liberum armorum*. Somner, Gavelk. p. 56; Jacob, Law Dict.; 4 Coke, 9.

Service not unbecoming character of freemen and soldier to perform: as, to serve under the lord in his wars, to pay a sum of money, and the like. 2 Sharswood, Blackst. Comm. 60. The tenure of free service does not make a villein a free man, unless homage or manumission precede, any more than a tenure by villein services makes a freeman a villein. Bracton, fol. 24.

LIBERUM TENEMENTUM. In Real Law. Freehold. Frank-tenement. 2 Bouvier, Inst. n. 1690; 1 Washburn, Real Prop. 46.

In Pleading. A plea in justification by the defendant in an action of trespass, by which he claims that he is the owner of the close described in the declaration, or that it is the freehold of some third person by whose command he entered. 2 Salk. 453; 7 Term, 355; 1 Wms. Saund. 299 *b*, note.

It has the effect of compelling the plaintiff to a new assignment, setting out the abuttals where he has the *locus in quo* only generally in his declaration, 11 East, 51, 72; 16 *id.* 343; 1 Barnew. & C. 489; or to set forth tenancy in case he claims as tenant of the defendant, or the person ordering the trespass. 1 Saund. 299 *b*. It admits possession by the plaintiff, and the fact of the commission of a trespass as charged. 2 M'Cord, So. C. 226.

LICENCIADO. In Spanish Law. Lawyer or Advocate. By a decree of the Spanish government of 6th November, 1843, it was declared that all persons who have obtained diplomas of "Licentiates in Jurisprudence" from any of the literary universities of Spain are entitled to practise in all the courts of Spain without first obtaining permission by the tribunals of justice.

Their title is furnished them by the minister of the interior, to whom the universities forward a list of those whom they think qualified.

This law does not apply to those already licensed, who may, however, obtain the benefit of it, upon surrendering their license and complying with certain other formalities prescribed by the law.

LICENSE (Lat. *licere*, to permit).

In Contracts. A permission. A right given by some competent authority to do an act which without such authority would be illegal.

An authority to do a particular act or series of acts on another's land without possessing any estate therein. 11 Mass. 533; 4 Sandf. Ch. N. Y. 72; 1 Washburn, Real Prop. 148.

The written evidence of the grant of such right.

An *executed license* exists when the licensed act has been done.

An *executory license* exists where the licensed act has not been performed.

An *express license* is one which is granted in direct terms.

An *implied license* is one which is presumed to have been given from the acts of the party authorized to give it.

It is distinguished from an *easement*, which implies an interest in the land to be affected, and a *lease*, or right to take the profits of land. It may be, however, and often is, coupled with a grant of some interest in the land itself, or right to take the profits. 1 Washburn, Real Prop. 148.

A license may be by specialty, 2 Parsons, Contr. 22; by parol, 13 Mees. & W. Exch. 838; 4 Maule & S. 562; 7 Barb. N. Y. 4; 1 Washburn, Real Prop. 148; or by implication from circumstances, as opening a door in response to a knock. Hob. 62; 2 Greenleaf, Ev. § 427.

2. It may be granted by the owner, or, in many cases, by a servant. Croke Eliz. 246; 2 Greenleaf, Ev. § 427.

An executory license may be revoked at the pleasure of the grantor. 1 Washburn, Real Prop. 148. In general, a mere license may be revoked at the grantor's pleasure, 11 Mass. 433; 15 Wend. N. Y. 380; although the licensee has incurred expense. 10 Conn. 378; 23 *id.* 223; 3 Du. N. Y. 355; 11 Metc. Mass. 251; 2 Gray, Mass. 302; 24 N. H. 364; 13 *id.* 264; 4 Johns. N. Y. 418; 3 Wisc. 117; 1 Dev. & B. No. C. 492; 13 Mees. & W. Exch. 838; 37 Eng. L. & Eq. 489; 5 Barnew. & Ad. 1. But see 14 Serg. & R. Penn. 267. Not so a license closely coupled with a transfer of title to personal property. 8 Metc. Mass. 34; 11 Conn. 525; 13 Mees. & W. Exch. 856; 11 Ad. & E. 34.

3. An executed license which destroys an easement enjoyed by the licenser in the licensee's land, cannot be revoked. 9 Metc. Mass. 395; 2 Gray, Mass. 302; 2 Gill, Md. 221; 3 Wisc. 124; 3 Du. N. Y. 255; 7 Bingh. 682; 3 Barnew. & C. 332; 5 *id.* 221.

The effect of an executed license, though revoked, is to relieve or excuse the licensee from liability for acts done properly in pursuance thereof, and their consequences. 6 Du. N. Y. 363; 22 Barb. N. Y. 336; 18 Pick. Mass. 569; 2 Gray, Mass. 302; 10 Conn. 378; 13 N. H. 264; 7 *id.* 237; 7 Taunt. 374; 5 Barnew. & C. 221.

The licensee's improvements on lands without compensation, in equity. 3 Wisc. 117; Story, Eq. Jur. § 1237; Angell, Wat. Cour. § 318.

In International Law. Permission granted by a belligerent state to its own subjects, or to the subjects of the enemy, to

carry on a trade interdicted by war. Wheaton, Int. Law, 475.

4. Licenses operate as a dispensation of the rules of war, so far as its provisions extend. They are *stricti juris*, but are not to be construed with pedantic accuracy. Wheaton, Int. Law, 476; 1 Kent, Comm. 5th ed. 163 n.; 4 C. Rob. Adm. 8. They can be granted only by the sovereign authority, or by those delegated for the purpose by special commission. 1 Dods. Adm. 226; Stew. Adm. 367. They constitute a ground of capture and confiscation *per se* by the adverse belligerent party. Wheaton, Int. Law, 475.

In Patent Law. See PATENTS.

In Pleading. A plea of justification to an action of trespass, that the defendant was authorized by the owner of the freehold to commit the trespass complained of.

A license must be specially pleaded to an action of trespass, 2 Term, 166, but may be given in evidence in an action on the case. 2 Mod. 6; 8 East, 308.

LICENTIA CONCORDANDI (Lat. leave to agree). One of the formal steps in the levying a fine. When an action is brought for the purpose of levying a fine, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them, but, having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up: this, which is readily granted, is called the *licentia concordandi*. 5 Coke, 39; Cruise, Dig. tit. 35, c. 2, 22.

LICENTIA LOQUENDI. Imparlance.

LICENTIA SURGENDI. In Old English Law. Liberty of rising. A liberty or space of time given by the court to a tenant, who is essoined, *de malo lecti*, in a real action, to *arise* out of his bed. Also, the writ thereupon. If the demandant can show that the tenant was seen abroad before leave of court, and before being viewed by the knights appointed by the court for that purpose, such tenant shall be taken to be deceitfully essoined, and to have made default. Bracton, lib. 5; Fleta, lib. 6, c. 10.

LICENTIA TRANSFRETANDI. A writ or warrant directed to keeper of port of Dover, or other seaport, commanding him to let the person who has this license of the king pass over sea. Reg. Orig. 93.

LICENTIOUSNESS. The doing what one pleases, without regard to the rights of others. It differs from liberty in this, that the latter is restrained by natural or positive law, and consists in doing whatever we please not inconsistent with the rights of others, whereas the former does not respect those rights. Wolff. Inst. § 84.

LICET (Lat.). It is lawful; not forbidden by law.

Id omne licitum est, quod non est legibus prohibitum, quamobrem, quod, lege permittente, fit, pœnam non meretur. Licere dicimus quod legibus, moribus, institutisque conceditur. Cic. Philip. 13; L. 42, D. ff. *de ritu nupt. Est aliquid quod non oporteat; tametsi licet; quicquod vero non licet certe non oportet.* L. *verbum oportere*, ff. *de verb. et rer. sign.*

Although. Calvinus, Lex. An averment that "although such a thing is done or not done," is not implicative of the doing or not doing, but a direct averment of it. Plowd. 127.

LICET SÆPIUS REQUISITUS (although often requested). **In Pleading.** A formal allegation in a declaration that the defendant has been often requested to perform the acts the non-performance of which is complained of.

It is usually alleged in the declaration that the defendant, *licet sæpius requisitus*, etc., he did not perform the contract the violation of which is the foundation of the action. This allegation is generally sufficient when a request is not parcel of the contract. Indeed, in such cases it is unnecessary even to lay a general request; for the bringing of the suit is itself a sufficient request. 1 Saund. 33, n. 2; 2 *id.* 118, note 3; Plowd. 128; 1 Wils. 33; 2 H. Blackst. 131; 1 Johns. N. Y. Cas. 99, 319; 7 Johns. N. Y. 462; 18 *id.* 485; 3 Maule & S. 150. See DEMAND.

LICITACION. In Spanish Law. The sale made at public auction by co-proprietors, or co-heirs, of their joint property which is not susceptible of being advantageously divided in kind.

LIDFORD LAW. See LYNCH LAW.

LIEGE (from *liga*, a bond, or *litis*, a man wholly at command of his lord. Blount). **In Feudal Law.** Bound by a feudal tenure; bound in allegiance to the lord paramount, who owned no superior.

The term was applied to the lord, or liege lord, to whom allegiance was due, since he was *bound* to protection and a just government, and also to the feudatory, liegeman, or subject bound to allegiance, for he was *bound* to tribute and due subjection. 34 & 35 Hen. VIII. So *lieges* are the king's subjects. Stat. 8 Hen. VI. c. 10; 14 Hen. VIII. c. 2. So in Scotland. Bell, Dict. But in ancient times private persons, as lords of manors, had their *lieges*. Jacob, Law Dict.; 1 Sharswood, Blackst. Comm. 367.

Liege, or *ligius*, was used in old records for full, pure, or perfect: *e.g. ligia potestas*, full and free power of disposal. Paroch. Antiq. 280. (Probably in this sense derived from legitima.) So in Scotland. See LIEGE POUSTIE.

LIEGE POUSTIE (*Legitima Potestas*). **In Scotch Law.** That state of health which gives a person full power to dispose of, mortis causâ or otherwise, his heritable property. Bell, Dict.

2. A deed executed at time of such state of health, as opposed to a death-bed conveyance. *Id.* A person is said to be in such state of health (in liege poustie, or in *legitima potestati*) when he is in his ordinary health and capacity, and not a minor, nor cognosced as an idiot or madman, nor under interdiction. 1 Bell, Comm. 85, 5th ed.; 6 Clark & F. Hou. L. 540.

LIEN. A hold or claim which one person has upon the property of another as a security for some debt or charge.

In every case in which property, either real or personal, is charged with the payment of a debt or duty, every such charge may be denominated a lien on the property. Whit. Liens. It differs from an estate in or title to the property, as it may be discharged at any time by payment of the sum for which the lien attaches. It differs from a mortgage in the fact that a mortgage is made and the property delivered, or otherwise, for the express purpose of security; while the lien attaches as incidental to the main purpose of the bailment, or, as in case of a judgment, by mere act of the law, without any act of the party. In this general sense the word is commonly used by English and American law writers to include those preferred or privileged claims given by statute or by admiralty law, and which seem to have been adopted from the civil law, as well as the security existing at common law, to which the term more exactly applies. In its more limited as well as commoner sense, the word lien indicates a mere right to hold the property of another as security; or it is *the right* which one person possesses, in certain cases, of detaining property placed in his possession belonging to another, until some demand which the former has be satisfied. 2 East, 235. A qualified right which, in certain cases, may be exercised over the property of another. 6 East, 25, n. A lien is a right to hold. 2 Campb. 579. A lien in regard to personal property is a right to detain the property till some claim or charge is satisfied. Metc. Yelv. 67, n. c. The right of retaining or continuing possession till the price is paid. 1 Parsons, Mar. Law, 144.

Common Law Lien....2-11
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The Common Law Lien. As distinguished from the other classes, it consists in a mere right to retain possession until the debt or charge is paid.

In the case of a factor an apparent exception exists, as he is allowed a lien on the proceeds of goods sold, as well as on the goods themselves. But this seems to result from the relation of the parties and the purposes of the bailment; to effectuate which, and at the same time give a security to the factor, the law considers the possession, or right to possession, of the proceeds, the same thing as the possession of the goods themselves.

A particular lien is a right to retain the property of another on account of labor employed or money expended on that specific property. Whitaker, Liens, 9.

A general lien is a right to retain the property of another on account of a general balance due from the owner. 3 Bos. & P. 494.

2. Of course, where a general lien exists, a particular lien is included.

Particular liens constitute the oldest class of liens, and the one most favored by the common law. 4 Burr. 2221; Dougl. 97; 3 Bos. & P. 126. But courts ceased to originate liens at an early period, 9 East, 426; while general liens have been looked upon with jealousy, being considered encroachments upon the common law and founded solely in the usage of and for the benefit of trade. 3 Bos. & P. 42, 26, 494. Liens either exist by law, arise from usage, or are created by express agreement.

Liens which exist by the common law, generally arise in cases of bailment. Thus, a particular lien exists whenever goods are delivered to a tradesman for the execution of the purposes of his trade upon them. 1 Atk. Ch. 228; 2 Rolle, Abr. 92; 3 Maule & S. 167; 14 Pick. Mass. 332; 7 Barb. N. Y. 113. And so, where a person is, from the nature of his occupation, under a legal obligation to receive and be at trouble or expense about the personal property of another, in every such case he is entitled to a particular lien on it. 1 Esp. 109; Ld. Raym. 867; 6 Term, 17; 3 Bos. & P. 42.

3. And sometimes a lien arises where there is strictly no bailment. Thus, where a ship or goods at sea come into possession of a party by finding, and he has been at some trouble or expense about them, he is entitled to retain the same until reimbursed his expenses. This applies only to the salvors of a ship and cargo preserved from peril at sea, 1 Ld. Raym. 393; 5 Burr. 2732; 8 East, 57; 16 Penn. St. 393, and, in the case of property on shore, where a specific reward is offered for the restoration, 8 Gill, Md. 218; 3 Metc. Mass. 352, and does not apply, generally, it is said, to the preservation of things found upon land. 2 H. Blackst. 254; 2 W. Blackst. 1117.

Liens which arise by usage are usually general liens, and the usage is said by Whitaker to be either the general usage of trade, or the particular usage of the parties. Whitaker, Liens, 31.

4. The usage must be so general that the party delivering the goods may be presumed to have known it, and to have made the right of lien a part of the contract. 3 Bos. & P. 50. And it is said the lien must be for a general balance arising from transactions of a similar character between the parties, and that the debt must have accrued in the business of the party claiming the lien, Whitaker, Liens, 33; and see 1 Atk. Ch. 223; 1 W. Blackst. 651; and it seems that more decisive proof of general usage is required in those occupations in which the workmen are required to receive their employment when offered them, such as carriers. 6 Term, 14; 6 East, 519; 7 *id.* 224. But where a general lien has been once established, the courts

will not allow it to be disturbed. 1 Esp. 109; 3 *id.* 31.

In regard to a general lien arising from particular usage between the parties, proof of their having before dealt upon the basis of such a lien will be presumptive evidence that they continue to deal upon the same terms. 1 Atk. Ch. 235; 6 Term, 19. If a debtor, who has already pledged property to secure a loan, borrow a further sum, it will be understood that the creditor's lien is for the whole debt. 2 Vern. Ch. 691.

5. *Liens which arise from express agreement.* A general or particular lien may be acquired in any case by the express agreement of the parties. Croke Car. 271; 6 Term, 14. This generally happens when goods are placed in the hands of a person for the execution of some particular purpose upon them, with an express contract that they shall be considered as a pledge for the labor or expense which the execution of that purpose may occasion. Or it exists where property is merely pawned or delivered for bare custody to another, for the sole purpose of being a security for a loan made to the owner on the credit of it. Whitaker, Liens, 27. And if a number of tradesmen, not obliged by law to receive the goods of any one who offers, for the purposes of their trade, agree not to receive goods unless they may be held subject to a general lien for the balance due them, and the bailor knows this, and leaves the goods, the lien attaches. 6 Term, 14; 3 Bos. & P. 42. And the same is true, of course, of an individual under similar circumstances.

6. But where the tradesman is obliged to receive employment from any one who offers, a mere notice will not be enough to give this lien with implied assent, but *express* assent must be shown. 6 Term, 14. Among the different classes who have liens by the common law, in the absence of any special agreement, are—

Innkeepers. They may detain a horse for his keeping, 2 Ld. Raym. 366; 8 Mod. 173; 6 Term, 141, if he belong to a guest, 11 Barb. N. Y. 41; but not sell him, F. Moore, 876; Bacon, Abr. *Inns* (D); 8 Mod. 173; except by custom of London and Exeter, F. Moore, 876; and cannot retake the horse after giving him up. 8 Mod. 173; Hob. 42; Metc. Yelv. 67. They may detain the goods of a traveller, but not of a boarder. 8 Rich. So. C. 423. Their lien is a particular lien. 9 East, 433; Croke Car. 271; 2 E. D. Smith, N. Y. 195.

Warehousemen have a particular lien. 18 Ill. 286; 34 Eng. L. & Eq. 116; 31 Miss. 261; 13 Ark. 437.

Tailors have a particular lien. Croke Car. 271; 9 East, 433.

Common carriers, for transportation of goods, 1 Ld. Raym. 752; 6 East, 519; 7 *id.* 224; 1 Dougl. Mich. 1; Wright, Ohio, 216; 24 Me. 339; but not if the goods are taken tortiously from the owner's possession, where the carrier is innocent, 1 Dougl. Mich. 1; 2 Hall, N. Y. 561; 5 Cush. Mass. 137; *contra*, 6 East, 519; 6 Whart. Penn. 418; and on a passenger for his passage-money. 2 Campb. 631. Part of the goods may be detained for the whole freight of goods belonging to the same person. 6 East, 622.

7. *Bailees for hire*, generally, for work done by them. 6 Term, 14; 3 Selwyn, Nisi P. 1163; 4 Term, 260; 26 Miss. 182; 4 Wend. N. Y. 292. *A wharfinger.* Ware, Dist. Ct. 354.

An agister of cattle has no lien, Croke Car. 271; nor a livery-stable keeper, 2 Ld. Raym. 866; 6 East, 509; 35 Me. 153; otherwise in Pennsylvania. 23 Penn. St. 193.

Attorneys and *solicitors* have a lien upon papers of their clients, 12 Wend. N. Y. 261; 2 Aik. Vt. 162; 14 Vt. 485; 11 N. H. 163; 11 Miss. 225; and also upon judgments obtained by them, 20 Pick. Mass. 259; 2 Metc. Mass. 458; 10 Barb. N. Y. 67; 4 Sandf. N. Y. 661; Wright, Ohio, 485; 30 Me. 152; 15 Vt. 544; not in Pennsylvania. 7 Penn. St. 376. This lien is subject to some restrictions. Metc. Yelv. 67 *f*; 34 Me. 20; 21 N. H. 339; 22 Pick. Mass. 210.

Clerks of courts have a lien on papers for their fees. 3 Atk. Ch. 727; 2 P. Will. 460; 2 Ves. Ch. 111.

Bankers have a lien on all securities left with them by their employers. 5 Term, 488; 1 Esp. 66; 3 Gilm. Va. 233; 1 How. 234.

8. *Factors* and *brokers* have a lien on goods and papers, 3 Term, 119; 1 Johns. Cas. N. Y. 437, n.; 8 Wheat. 268; 28 Vt. 118; 34 Me. 582; on part of the goods for the whole claim, 6 East, 622; 34 Me. 582; but only for such goods as come to them as factors. 11 Eng. L. & Eq. 528.

The *vendor of goods*, for the price, so long as he retains possession. 7 East, 574; 1 H. Blackst. 363; Hob. 41; 2 Blackstone, Comm. 448; 2 Swan, Tenn. 661; 6 McLean, C. C. 472.

Pawnees, from the very nature of their contract, 15 Mass. 408; 2 Vt. 309; 9 Wend. N. Y. 345; 3 Mo. 219; but only where the pawner has authority to make such pledge. 3 Atk. Ch. 44; 2 Campb. 336, n. A pledge, even where the pawnee is innocent, does not bind the owner, unless the pawner has authority to make the pledge. Paley, Ag. 151; 1 Vern. Ch. 407; 2 Stark. 21; 1 Mas. C. C. 440; 2 Mass. 398; 4 Johns. N. Y. 103; 1 Maule & S. 180. The pawnee does not have a general lien. 15 Mass. 490.

9. Requisites as to Creation. In all these cases, to give rise to the lien, there must have been a delivery of the property; it must have come into the possession of the party claiming the lien, or his agent. 3 Term, 119; 6 East, 25, n.

A question may arise by whom the delivery is to be made. Where a person, in pursuance of the authority and directions of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman will not have a general lien against the owner for a balance due from the person delivering it, if he knew

that the one delivering was not the real owner. 1 East, 335; 2 *id.* 523; 2 Campb. 218; Parke, Cas. 176; 2 Atk. Ch. 114. Thus, a carrier, who, by the usage of trade, is to be paid by the consignor, has no lien for a general balance against the consignee. 5 Bos. & P. 64. Nor can a claim against the consignee destroy the consignor's right of stoppage in transitu. 3 Bos. & P. 42. But a particular lien may undoubtedly be derived through the acts of agents acting within the scope of their employment. 9 East, 233; 3 Bos. & P. 119; 3 Esp. 182; 2 East, 237. And the same would be true of a general lien against the owner for a balance due from him. Whitaker, Liens, 39.

10. No lien exists where the party claiming it acquires possession by wrong, 2 Term, 485, or by misrepresentation; 1 Campb. 12, or by his unauthorized and voluntary act, 1 Strange, 651; 8 Term, 310, 610; 2 H. Blackst. 254; 3 W. Blackst. 1117. But see 4 Burr. 2218.

No lien exists where the act of the servant or agent delivering the property is totally unauthorized, and the pledge of it is tortious against the owner, whether delivered as a pledge or for the execution of the purposes of a trade thereupon. 5 Ves. Ch. 111; 6 East, 17; 4 Esp. 174; 5 Term, 604. A pledge, even when the pawner is innocent, does not bind the owner unless the pawner had authority. Paley, Ag. 151; 1 Vern. Ch. 407; 2 Stark. 21; 1 Mas. C. C. 440; 2 Mass. 398; 4 Johns. N. Y. 103; 1 Maule & S. 140.

A delivery by a debtor for the purpose of preferring a creditor will not be allowed to operate as a delivery sufficient for a lien to attach. 4 Burr. 2239; 3 Ves. Ch. 85; 2 Campb. 579; 11 East, 256.

11. Waiver of Liens. Possession is a necessary element of common-law liens; and if the creditor once knowingly parts with that possession after the lien attaches, the lien is gone. Strange, 556; 1 Atk. Ch. 254; Ambl. 252; Dougl. 97; 5 Ohio, 88; 6 East, 25, n.; 7 *id.* 5; 3 Term, 119; 2 Ed. Ch. 181; 5 Binn. Penn. 398; 3 Am. Law Jour. 128; 4 N. Y. 497; 4 Den. N. Y. 498; 42 Me. 50; 11 Cush. Mass. 231; 2 Swan, Tenn. 561; 23 Vt. 217. But there may be a special agreement extending the lien, though not to affect third persons. 36 Wend. N. Y. 467. The delivery may be constructive, Ambl. 252; and so may possession. 5 Ga. 153. A lien cannot be transferred, 8 Pick. Mass. 73; but property subject to a lien may be delivered to a third person, as to the creditor's servant, with notice of the lien, so as to preserve the lien of the original creditor. 2 East, 529; 7 *id.* 5. But it must not be delivered to the owner or his agent. Whitaker, Liens, 71, n.; 2 East, 529; 4 Johns. N. Y. 103. But if the property be of a perishable nature, possession may be given to the owner under proper agreements. 1 Atk. Ch. 235; 8 Term, 199.

Neglect to insist upon a lien in giving reasons for a refusal to deliver property on demand, has been held a waiver. 1 Campb. 410, n.; 7 Ind. 21; 13 Ark. 437; 2 Blackf. Ind. 465.

12. Where there is a special agreement made, or act done, inconsistent with the existence of the lien, such as an agreement to give credit, or where a distinct security is taken, or the possession of the property is acquired for another distinct purpose, and for that only, or where the property is attached by the creditor, no lien arises. 16 Ves. Ch. 275; 4 Campb. 146; 2 Marsh. 339; 3 Anstr. 881; 5 Maule & S. 180; Metc. Yelv. 67 *c;* 8 N. H. 441; 17 Pick. Mass. 140; 15 Mass. 389; 4 Vt. 549. But such agreement must be clearly inconsistent with the lien. 1 Dutch. N. J. 443; 32 Me. 319.

The only remedy or use of the lien at common law is to allow the creditor to retain possession of the goods. 33 Me. 438; 1 Mas. C. C. 319. And he may do this against assignees of the debtor. 1 Burr. 489.

13. The Civil Law Lien. The civil law embraces, under the head of mortgage and privilege, the peculiar securities which, in the common and maritime law, and equity, are termed liens.

In regard to privilege, Domat says, "We do not reckon in the number of privileges the preference which the creditor has on the movables that have been given him in a pawn, and which are in his custody. The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time, and who have mortgages." Domat, part 1, lib. iii. tit. i. sect. v.

These privileges were of two kinds: one gave a preference on all the goods, without any particular assignment on any one thing; the other secures to the creditors their security on certain things, and not on the other goods.

14. Among creditors who are privileged, there is no priority of time, but each one takes in the order of his privilege, and all creditors who have a privilege of the same kind take proportionately although their debts be of different dates. And all privileges have equally a preference over those of an inferior class, and over debts which do not have this favored character, whether subsequent or antecedent in point of time.

The vendor of immovable property, for which payment has not been made, is preferred before creditors of the purchaser, and all other persons, as to the thing sold. By the Roman law, this principle applies equally to movables and immovables; and the seller may seize upon the property in the hands of his vendee, or wherever he can find it.

So, too, a person who has lent money to repair a thing, or to make improvements, has this privilege. And this, though he lends to workmen or architects, etc., if it be done with the knowledge of the owner.

Carriers have a privilege not only for the price of carriage, but for money paid on account of the goods.

Landlords have a privilege for the rents due from their tenants even on the furniture of the under-tenants, if there be a sub-lease. But not if payment has been made to the tenant by an immediate lessor; although a payment made by the sub-tenant to the landlord would be good as against the tenant.

15. The privilege was lost by an ovation, or by any thing in the original contract which showed that the vendor had taken some other security inconsistent with the privilege. See Domat, part i. lib. iii. tit. i. sect. v.

Mortgages in the civil law are of two kinds, conventional and legal. A conventional mortgage results from the direct act or covenant of the parties. A legal mortgage arises by mere act of law.

A mortgage may be acquired in three ways.

First, with the consent of the debtor, by his agreement.

Second, without the owner's consent, by the quality and bare effect of the engagement, the nature of which is such that the law has annexed to it the security of a mortgage.

Third, where a mortgage is acquired by the authority of justice: as where a creditor who had no mortgage obtains a decree of condemnation in his favor.

16. When the creditor is put into possession of the thing, movable or immovable, he has a right to keep it until he is paid what is owing him; and the debtor cannot turn the creditor out of possession, nor make use of his own thing without the consent of the creditor.

Effect of a Mortgage. First, the creditor has a right to sell the thing pledged, whether the creditor has it in his possession or not. Under the French law, it was a right to have it sold. Cushing's Domat, p. 647.

Second, a right on the part of the creditor to follow the property, into whosoever hands it has come, whether movable or immovable.

Third, a preference of the first creditor to whom the property is mortgaged, and a right on his part to follow the property into the hands of the other creditors.

Fourth, the mortgage is a security for all the consequences of the original debt, as damages, interest, expenses in preserving, etc.

See, generally, Domat, part i. lib. iii. tit. i.; Guyot, Rep. Univ. tit. *Privilegium*; Cushing's Domat; Massi, Droit Commerciel.

17. Equitable Liens are such as exist in equity, and of which courts of equity alone take cognizance.

A lien is neither a *jus in re* nor a *jus ad rem*; it is not property in the thing, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. In regard to these liens, it may be generally stated that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached as an incumbrance; and they can be enforced only in courts of equity. Story, Eq. Jur. § 1217.

An equitable lien on a sale of realty is very different from a lien at law; for it operates after the possession has been changed, and is available by way of charge instead of detainer. Adams, Eq. Jur. 127.

18. The vendor of land has a lien for the unpaid purchase-money. The principle is stated, "where a conveyance is made prematurely before payment of the price, the money is a charge on the estate in the hands of the vendee," 4 Kent, Comm. 151; Story, Eq. Jur. § 1217; 1 W. Blackst. 950; 15 Ves. Ch. 329; 1 Johns. Ch. N. Y. 308; 1 Schoales & L. 132; 6 Johns. N. Y. 402; 7 Wheat. 46; 17 Ves. Ch. 433; 10 Pet. 625; and in the hands of heirs or subsequent purchasers with notice, 15 Ves. Ch. 337; 3 Russ. 488; 1 Schoales & L. 135; against assignees in bankruptcy, under a general assignment, 1 Brown, Ch. 420; 9 Ves. Ch. 100; 2 Ves. & B. Ch. 306; 1 Vern. Ch. 267; 1 Madd. Ch. 356; and whether the estate is actually conveyed or only contracted to be conveyed. Sugden, Vend. c. 12, p. 541; 2 Dick. Ch. 730; 12 Ad. & E. 632.

So, too, where money has been paid prematurely before conveyance made, the purchaser and his representatives have a lien. 3 Younge & J. Exch. 264; 11 Price, Exch. 58; 1 P. Will. 278.

So where the purchase-money has been deposited in the hands of a third person, to cover incumbrances. 1 Turn. & R. 469; 1 Ves. Ch. 478. Yet a lien will not be created for a third party, who was to receive an annuity under a covenant as a part of the consideration for the conveyance. 3 Sim. Ch. 499; 1 Mylne & K. Ch. 297; 2 Keen, 81.

19. The deposit of the title-deeds of an estate gives an equitable lien on the estate. This lien is not favored, and is confined strictly to an actual, immediate, and *bonâ fide* deposit of the title-deeds with the creditor, as a security, in order to create the lien. 12 Ves. Ch. 197; Story, Eq. Jur. § 1020; 4 Kent, Comm. 150.

In regard to the effect of a conveyance to different alienees, subject to a lien, a difference exists between the rules in England and in the United States. In England, the alienees must divide the incumbrance. 1 Younge & C. 401; 2 Atk. Ch. 448; 8 Ves. Ch. 391; 1 Lloyd & G. 252.

One joint tenant has, in many cases, a lien on the common estate for repairs put on by himself above his share of the liability. 1 Ball & B. 199; Story, Eq. Jur. § 1236; Sugden, Vend. 611.

And equity applies this principle even to cases where tenant for life makes permanent improvements in good faith. 1 Sim. & S. 552. So where a party has made improvements under a defective title. 6 Madd. Ch. 2; 9 Mod. 11.

So, too, there is a lien where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts, or to other charges in favor of third persons. Story, Eq. Jur. § 1244. A distinction must be kept in

mind between a devise in trust to pay certain sums, and a devise subject to charges.

A covenant to convey and settle lands does not give the covenantee a lien; but was held to do so in case of a covenant to settle lands in lieu of dower. 3 Brown, Ch. 489; 1 Ves. Ch. 451; 1 Maddox, Chanc. Pract. 471.

20. *Waiver.* The lien may be waived by agreement; but postponement of the day of payment is not a waiver, not being inconsistent with the nature of the lien; nor taking personal security. Adams, Eq. Jur. 128; 1 Johns. Ch. N. Y. 308; 2 Rand. Va. 428; 2 Humphr. Tenn. 248; 1 Mas. C. C. 192; 2 Ohio, 383; 1 Blackf. Ind. 246; 1 Paige, Ch. N. Y. 502; 6 B. Monr. Ky. 174; 6 Yerg. Tenn. 50; 3 Ga. 333; Story, Eq. Jur. § 1226; 1 Ball & B. Ch. Ir. 514; 15 Ves. Ch. 348. A bill or note payable at a future day is generally held merely a means of payment, and not a security destroying the lien. 1 Schoales & L. Ch. 135; 2 Ves. & B. Ch. Ir. 306; 1 Madd. Ch. 349; 2 Rose, 79; 2 Ball & B. Ch. Ir. 514. But if it be the note of a third party, or an independent security on real estate, it would generally be a waiver. Story, Eq. Jur. § 1226, n.; 4 Kent, Comm. 151; 4 Wheat. 290; 1 Paige, Ch. N. Y. 20; 9 Cow. N. Y. 316; 1 Mas. C. C. 212. And, generally, the question of relinquishment will turn upon the facts of each case. 6 Ves. Ch. 752; 15 *id.* 329; 3 Russ. Ch. 488; 3 Sugden, Vend. c. 18; 8 J. J. Marsh. Ky. 553.

21. Maritime Liens. Maritime liens do not include or require possession. The word lien is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. 22 Eng. L. & Eq. 62. See 15 Bost. Law Rep. 555; 16 *id.* 1, 264; 17 *id.* 93, 421. A distinction is made in the United States between qualified maritime liens, which depend upon possession, and absolute maritime liens, which do not require nor depend upon possession. 7 How. 729.

22. *The shipper of goods* has a lien upon the ship, for the value of the goods sent, which can be enforced in admiralty, 1 Blatchf. & H. Adm. 300; Olcott, Adm. 43; 1 Blatchf. C. C. 173; Ware, Dist. Ct. 188; 1 Sumn. C. C. 551; 12 How. 272; and, generally, every act of the master binds the vessel, if it be done within the scope of his authority. 17 Me. 147; 1 W. Rob. Adm. 392; 2 Eng. L. & Eq. 536; 18 How. 182; 19 *id.* 22, where the possession of the master is not tortious, but under a color of right. 6 McLean, C. C. 484. This does not apply to contracts of material men with the master of a domestic ship, 1 Conkling, Adm.; and the act must have been within the scope of the master's employment. 18 How. 182. See Crabb, 23; 1 C. Rob. Adm. 391–406. This lien follows the ship even in the hands of a purchaser, without notice before the creditor has had a reasonable opportunity to enforce his lien. Ware, Dist. Ct. 188. If the master borrow money for the ship's necessity, the lender has a lien on the ship for the amount. 3 Yeates, Penn. 131; 4 Dall. Penn. 225; 8 Me. 298.

23. *The owner of a ship* has a lien on the cargo carried for the freight earned, whether reserved by a bill of lading or not. 12 Mod. 447; 6 East, 622; 4 Campb. 298; 7 Taunt. 14; 4 Barnew. & Ald. 630; 2 Brod. & B. 410; 4 Mass. 91; 6 Pick. Mass. 248; 18 Johns. N. Y. 157; 5 Wend. N. Y. 315; 5 Sandf. N. Y. 97; 5 Ohio, 88; 4 Wash. C. C. 110; 8 Wheat. 605; Ware, Dist. Ct. 149; 1 Sumn. C. C. 551; 2 *id.* 589; 2 Woodb. & M. C. C. 151.

This lien is, at most, only a qualified maritime lien. See 1 Parsons, Mar. Law, 143, n. The lien exists in case of a chartered ship, 4 Cow. N. Y. 470; 1 Paine, C. C. 358; 4 Barnew. & Ald. 630; 20 Bost. Law Rep. 669; 8 Wheat. 605, to the extent of the freight due under the bill of lading. 2 Atk. Ch. 621; 1 Barnew. & Ald. 712; 4 *id.* 630; 1 Sumn. C. C. 551. But if the charterer takes possession and management of the ship, he has the lien. 1 Cowp. 143; 8 Cranch, 39; 6 Pick. Mass. 248; 4 Cow. N. Y. 470; Ware, Dist. Ct. 149; 4 Mann. & G. 502; 26 Eng. L. & Eq. 136. No lien for freight attaches before the ship has broken ground. 1 Bos. & P. 634; 5 Binn. Penn. 392; 3 Gray, Mass. 92. But see, as to the damages for removing goods from the ship before she sails, 28 Eng. L. & Eq. 210; 1 C. B. 328; 2 Carr. & P. 334; 19 Bost. Law Rep. 579; 2 Gray, Mass. 92.

24. No lien exists for dead freight. 15 East, 547; 3 Maule & S. 205. The lien attaches only for freight earned. 3 Maule & S. 205; Ware, Dist. Ct. 149; 2 Brev. No. C. 233. The lien is lost by a delivery of the goods, 6 Hill, N. Y. 43; but not if the delivery be involuntary or procured by fraud. 6 Hill, N. Y. 43. So it is by stipulations inconsistent with its exercise, 17 How. 53; 10 Conn. 104; 6 Pick. Mass. 248; 4 Barnew. & Ald. 50; 4 Mann. & G. 502; 4 Bingh. 729; 3 Barnew. & Ald. 497; 32 Eng. L. & Eq. 210: as, by an agreement to receive the freight at a day subsequent to the entire delivery of the goods,—a distinction being, however, taken between the unloading or arrival of the ship, and the delivery of the goods. 1 Sumn. C. C. 551; 18 Johns. N. Y. 157; 14 Mees. & W. Exch. 794; 2 Sumn. C. C. 589; 5 Maule & S. 180; 10 Mass. 510.

A third person cannot take advantage of the existence of such lien. 3 East, 85. A vendor, before exercising right of stoppage in transitu, must discharge this lien by payment of freight. 1 Parsons, Mar. L. 350; 15 Me. 314; 3 Bos. & P. 42.

25. *Master's Lien.* In England, the master has no lien, at common law, on the ship for wages, nor disbursements. 9 East, 426; 33 Eng. L. & Eq. 600; 1 Barnew. & Ald. 575; 5 Dowl. & R. 552; 6 How. 112.

But now, by the one-hundred-and-ninety-

first section of the English Merchant Shipping Act of 1854, it is provided that "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the amount of his wages, which, by this act, or any law or custom, any seaman, not being a master, has for the money of his wages." And it has been properly held by Judge Sprague, of the United States district court, that this lien of the master on an English vessel may be reinforced in the admiralty courts of the United States. 22 Bost. Law Rep. 150.

26. In the United States, he has no lien for his wages. 2 Paine, C. C. 201; 8 Serg. & R. Penn. 18; 1 Pet. Adm. 223; 11 *id.* 175; 3 Mas. C. C. 91; 14 Penn. St. 34; 18 Pick. Mass. 530. This does not apply to one not master in fact. Bee, Adm. 198. As to lien for disbursements, see 2 Curt. C. C. 427; 14 Penn. St. 34; 11 Pet. 175. He may be substituted if he discharge a lien. 1 Pet. Adm. 223; Bee, Adm. 116; 3 Mas. C. C. 255. But he has a lien on the freight for disbursements, 4 Mass. 91; 11 *id.* 72; 5 Wend. N. Y. 315; 18 Pick. N. Y. 530; for wages in a peculiar case, Ware, 149; and on the cargo, where it belongs to the ship-owners. 14 Me. 180. He may, therefore, detain goods against the shipper or consignee, even after payment to owner, if the master give reasonable notice. 11 Mass. 72; 5 Wend. N. Y. 315; 4 Esp. 22. But see 5 Dowl. & R. 552. The master may retain goods till a contribution bond is signed. 11 Johns. N. Y. 23; 2 Sandf. N. Y. 55; 11 Me. 150; 13 *id.* 357.

27. *The seamen's* lien for wages attaches to the ship and freight, and the proceeds of both, and follows them into whosoever hands they come, 2 Sumn. C. C. 443; 2 Parsons, Mar. L. 579; and lies against a part, or the whole, of the fund, 3 Sumn. C. C. 50, 286; but not the cargo. 5 Pet. 675. It applies to proceeds of a vessel sold under attachment of a state court. 2 Wall. C. C. 592, overruling 1 Newb. Adm. 215.

This lien of a seaman is of the nature of the *privilegium* of the civil law, does not depend upon possession, and takes precedence of a bottomry bond or hypothecation. 2 Parson, Mar. Law, 581, and cases cited; 15 Bost. Law Rep. 555; 16 *id.* 264; Ware, Dist. Ct. 134. Taking the master's order does not destroy the lien. Ware, Dist. Ct. 185. And see 2 Hagg. Adm. 136. Fishermen on shares have it, by statute. Generally, all persons serving in a way directly and materially useful to the navigation of the vessel. Gilp. Adm. 505; 2 Ventr. 181; 3 Hagg. Adm. 376; 2 Pet. Adm. 268; Ware, Dist. Ct. 83; 1 Blatchf. & H. Adm. 423; 1 Sumn. C. C. 384; 1 Ld. Raym. 397; 2 Strange, 858. A woman has it if she performs seaman's service. 1 Hagg. Adm. 187; 18 Bost. Law Rep. 672; 1 Newb. Adm. 5. It lies against ships owned by private persons, but not against government ships employed in the public service. 9 Wheat. 409; 3 Sumn. C. C. 308.

28. *A ship broker*, who obtains a crew, has been held to have a lien for his services and advances for their wages. 1 Blatchf. & H. Adm. 189.

Stevedores have no lien. Olcott, Adm. 120; 1 Wall. Jr. 370.

Material men have a lien by admiralty law. They are those whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provisions necessary in any kind. 3 Hagg. Adm. 129. In regard to foreign ships, it has been lately held that material men have a lien on the ship only when the supplies were necessary and could be obtained only on the credit of the ship. 19 How. 359. The lien for repairs continues only as long as they retain possession, on domestic ships, Wright, Ohio, 660; 4 Wheat. 438; 1 Stor. C. C. 68; and is gone if possession is left. 14 Conn. 404; 4 Wheat. 438; 4 Wash. C. C. 453; 1 Parsons, Mar. Law, 492, n. And see § **11.**

The several states of the United States are foreign to each other in this respect.

29. As to the order of precedence of these liens, see Dav. Dist. Ct. 199; Ware, Dist. Ct. 2d ed. 565; 2 Curt. C. C. 421. Admiralty formerly took jurisdiction of such liens, though not strictly maritime liens, 7 Pet. 324; 1 Wall. Jr. 358; 12 Bost. Law Rep. 183; but this jurisdiction is now questioned, 20 How. 393, if not denied. 21 *id.* 4, 248.

Giving credit will not be a waiver of a lien on a foreign ship, unless so given as to be inconsistent with the exercise of the lien. 7 Pet. 324; 1 Sumn. C. C. 73; 5 Sandf. N. Y. 342.

Builders' lien may be placed on the common-law ground that a workman employing skill and labor on an article has a lien upon it, 2 Rose, 91; 4 Barnew. & Ald. 341; 1 W. Rob. Adm. 1; Wright, Ohio, 660; 4 Wheat. 438; 1 Stor. C. C. 68; and a lien for the purpose of finishing the ship, where payments are made by instalments. 1 Parsons, Mar. Law. 75; 5 Barnew. & Ald. 942.

30. *Collision.* In case of collision the injured vessel has a lien upon the one in fault for the damage done, 1 Notes of Cases, 508; 22 Eng. L. & Eq. 62; Crabb, 580; 10 Law Rep. 264; and the lien lasts a reasonable time. 18 Bost. Law Rep. 91.

A part-owner, merely as such, has no lien whatever, but acquires such a lien when any of the elements of partnership or agency, with bailment upon which his lien may rest, enter into his relation with the other part-owners. 1 Parsons, Mar. Law, 103.

A part-owner who has advanced more than his share towards building a vessel has no lien on her for such surplus, 6 Pick. Mass. 46, and none, it is said, for advances on account of a voyage. 4 Pick. Mass. 456; 7 Bingh. 709.

That the relation of partners must exist to give the lien. 20 Johns. N. Y. 61; 4 B. Monr. Ky. 458; 8 Barnew. & C. 612; Gilp. Dist. Ct. 467; 4 Johns. Ch. N. Y. 522; 6 Pick. Mass. 120; 5 Mann. & R. 25.

And part-owners of a ship may become

partners for a particular venture. 1 Ves. Sen. Ch. 497; 3 Woodb. & M. C. C. 193; 10 Mo. 701; 9 Pick. Mass. 334. But see 14 Penn. St. 34.

31. *The ship's husband*, if a partner, has a partner's lien; if not, he may have a lien in the proceeds of the voyage, 8 Barnew. & C. 612; 16 Conn. 12, 23; 3 Woodb. & M. C. C. 193; or of the ship herself, if sold, or on her documents, if any of these have come into his actual possession. And the lien applies to all disbursements and liabilities for the ship. But it is doubtful if his mere office gives him a lien. 1 Parsons, Mar. Law, 100; 2 Curt. C. C. 427; 2 Ves. & B. Ch. Ir. 242; Cowp. 469.

32. *Deposit of a bill of lading* gives a lien for the amount advanced on the strength of the security. 5 Taunt. 558; 2 Wash. C. C. 283.

These liens of part-owners and by deposit of a bill of lading are not maritime liens, however, and could not be enforced in admiralty. See COLLISION; SEAMEN'S WAGES; MARSHALLING OF ASSETS; MASTER; CAPTAIN; PRIVILEGE.

33. Statutory Lien. Under this head it is convenient to consider some of those liens which subsist at common law, but have been extensively modified by statutory regulations, as well as those which subsist entirely by force of statutory regulations.

The principal liens of this class are judgment liens, and liens of material men and builders.

Judgment Lien. At common law, a judgment is a lien upon real property from the time of its rendition. Metcalf's Yelv. 67 *i*; Sugden, Vend. 306, 446.

In Alabama, Georgia and Indiana, a judgment is a lien; in the latter state, for ten years. 28 Ala. N. S. 328; 9 Ind. 92; 4 McLean, C. C. 555; 19 Ga. 452.

34. In *Arkansas*, the lien commences on delivery of execution to the officer, 12 Ark. 421; 18 *id.* 414; and the lien extends to after-acquired lands. 13 Ark. 74.

In *California*, an appeal suspends the claim. 6 Cal. 130.

In *Florida*, the lien attaches from the rendition of the judgment. 6 Fla. 711.

In *Kentucky*, the lien commences by delivery of execution to the sheriff. 4 Pet. 336; 1 Dan. Ky. 360.

In *Mississippi*, the law is the same as in Kentucky. 27 Miss. 480. Liens attach in the order of enrolment of the judgments, 30 Miss. 580, and apply to property liable to execution and sale only. 23 Miss. 298.

35. In *Maryland*, a judgment rendered by a single magistrate does not give a lien, 11 Md. 332; 8 *id.* 405; nor if rendered in a different county, until transferred to the county where the land is situated. 3 Md. 357.

In *Missouri*, all judgments rendered at the same term and in the same court must divide *pro rata* the amount made on execution, in case it prove insufficient to satisfy all. 21 Mo. 144.

In the *New England States*, there is, strictly speaking, no judgment lien, but lands are attached on mesne process, and a lien thus instituted. 2 Hill, Abr. c. 46; 28 Vt. 546; 24 *id.* 228. This lien covers debt and costs. 33 Me. 214. And the lien is lost unless execution is taken out within a reasonable time, 29 Vt. 198, prescribed by statute in most of the states.

36. In *New Jersey*, judgments are marshalled in the order in which executions issue. 2 Dutch. N. J. 570.

In *New York*, a judgment lien continues ten years, and binds after-acquired lands, 14 N. Y. 16, and dates from the time it is given to the officer. 5 Du. N. Y. 242. But see 2 Paine, C. C. 251.

In *North Carolina*, it exists, probably, if an elegit has been sued out. 2 Murph. No. C. 43.

In *Ohio*, the lien relates to the first day of the term, 3 McLean, C. C. 140; is restricted to the county; lasts only one year; does not bind after-acquired lands; and covers land and incidents. 20 Ohio, 401.

37. In *Pennsylvania*, it continues five years from the rendition of judgment, but does not *per se* bind after-acquired lands. 23 Penn. St. 205; 27 *id.* 52; 28 *id.* 47.

A sale under decree of court releases this lien; but no other transfer of the property affects it. 22 Penn. St. 406; Sergeant, Mech. Lien.

In South Carolina and Tennessee, a judgment is a lien. 1 Sneed, Tenn. 297; 11 How. 348; 6 Rich. So. C. 513.

In *Virginia*, 9 Gratt. Va. 131, judgments obtained at the same time divide the proceeds *pro rata*, if there is not enough to satisfy all, 2 Patt. & H. 11; otherwise, they are to be satisfied in the order of their date. 12 Gratt. Va. 401.

A judgment is sometimes, but more rarely, a lien upon personal property.

38. In *Georgia*, it re-attaches if the property has been removed from the state and then brought back. 7 Ga. 356.

In *Maryland*, issuing a fi. fa. gives the creditor a lien from the time of putting the execution into the officer's hands. 3 Md. 99.

In *North Carolina*, 8 Ired. No. C. 63.

In *South Carolina*, 5 Strobh. So. C. 149.

In *Tennessee*, on property held between the teste and the execution. 2 Swan, Tenn. 292.

In *New York;* but not if the execution lie dormant. 7 Barb. N. Y. 341.

And see 2 Hill, Abr. c. 46.

39. Mechanics and Material Men have, in many of the states, a lien upon the buildings which they have repaired or constructed, which, being in the nature, generally, of the civil law privilegium, do not require possession, commence with the commencement of the work, and continue a limited time. They exist

In *Arkansas;* and are subordinate to a judgment lien. 8 Ark. 231.

In *California;* for builders and material men. 2 Cal. 60, 489.

In *Connecticut*, the contract must have been made with the owner, and only the contracting party can take advantage of the lien. 23 Conn. 544.

In *Illinois*, for the benefit of the builder and material men who furnish labor or goods under a contract with the land-owners, 12 Ill. 300; 15 *id.* 189, 556; 17 *id.* 423; the lien is subordinate to a mortgage title. 17 Ill. 423.

In *Indiana*, in favor of builders and material men; and a wife may join with her husband in the contract, and so subject her land to the lien. 7 Ind. 125. The builder must file notice of his intention. 8 Blackf. Ind. 252.

In *Iowa*. 2 Greene, Iowa, 435, 513.

40. In *Kentucky*, for work and labor. 13 B. Monr. Ky. 411; 16 *id.* 605.

In *Maine*, 34 Me. 198, if the contract is made with the land-owner. 35 Me. 291. As to precedence, 28 Me. 511.

In *Maryland*, a copy of the claim must have been filed. 6 Gill, Md. 17.

The materials must have been furnished under a contract with the land-owner. 5 Md. 419; 3 *id.* 234.

In *Massachusetts*, the contract must have been with the land-owner. 1 Gray, Mass. 576; 3 *id.* 233. Suit must be brought within six months. 4 Cush. Mass. 532. Wife cannot join in the contract and bind her land. 13 Metc. Mass. 149.

41. In *Mississippi*, the lien commences at the commencement of the work. 26 Miss. 650. The contract must have been with the land-owner. 26 Miss. 125; 27 *id.* 40. No lien for mere repairs. 16 Miss. 754.

In *Michigan*, affects only the rights of those for whom the work was done. 2 Dougl. Mich. 54.

In *Missouri*, the lien is preferred to previous or subsequent incumbrances. 21 Mo. 213.

In *New Jersey*, 2 Zabr. N. J. 387; 1 Halst. Ch. N. J. 485, specifications must be filed to exempt the building from the lien. 1 Dutch. N. J. 474.

In *New York*, contract must have been made with the land-owner, 13 N. Y. 70; and see 21 Barb. N. Y. 520; or notice must have been given. 2 E. D. Smith, N. Y. 689.

In *Ohio*, the contract need not have been with the owner of the fee. 2 Ohio, 114. Material may have been used elsewhere, if furnished in good faith. 6 Ohio, 247.

42. In *Pennsylvania*, the work must have been done under contract, and the claim filed within six months from the completion of the work. 19 Penn. St. 341; 20 *id.* 319, 519.

In *Tennessee*, must be taken advantage of in reasonable time. 6 Humphr. Tenn. 268. Citizens of other states may have the lien. 2 Swan, Tenn. 130, 313.

In *Texas*, work must have been done under express contract. 11 Tex. 20.

Remedy is by *scire facias*, in some states, 14 Ark. 370; 1 Dutch. N. J. 317; 14 Tex. 37; 22 Mo. 140; 3 Md. Ch. Dec. 186; 14 How. 434; 12 Penn. St. 45; by petition, in others. 11 Cush. Mass. 308; 4 Wisc. 451; 14 Ala. N. S. 33; 11 Ill. 519; 1 Iowa, 75. Judgment, when obtained, has the effect of a common-law judgment. 3 Wisc. 9.

Many of the states have made full provisions, by statute, for the liens of repairers of domestic ships and builders of ships and steamboats. These liens are generally held to be distinct from maritime liens, though in some respects partaking of the nature of such. For a full discussion of this subject, and a classification of the laws of the different states, see 1 Parsons, Marit. Law, 106, and note.

LIEUTENANT. This word has now a narrower meaning than it formerly had: its true meaning is a deputy, a substitute, from the French *lieu* (place or post) and *tenant* (holder). Among civil officers we have *lieutenant-governors*, who in certain cases perform the duties of governors (see the names of the several states), *lieutenants of police*, etc. Among military men, *lieutenant-general* was formerly the title of a commanding general, but now it signifies the degree above major-general. *Lieutenant-colonel* is the officer between the colonel and the major. *Lieutenant*, simply, signifies the officer next below a captain. In the navy, a *lieutenant* is the second officer next in command to the captain of a ship.

LIFE. "The sum of the forces by which death is resisted." Bichat.

A state in which energy of function is ever resisting decay and dissolution.

2. It commences, for many legal purposes, at the period of quickening, when the first motion of the fœtus in utero is perceived by the mother. 1 Blackstone, Comm. 129; Coke, 3d Inst. 50. It ceases at death. See DEATH.

But physiology pronounces life as existing from the period of conception, because fœtuses in utero do die prior to quickening, and then all the signs of death are found to be perfect. Dean, Med. Jur. 129, 130.

3. For many important purposes, however, the law concedes to physiology the fact that life commences at conception, *in ventre sa mère*. See FŒTUS. Thus, it may receive a legacy, have a guardian assigned to it, and an estate limited to its use. 1 Blackstone, Comm. 130. It is thus considered as alive for all beneficial purposes. 1 P. Will. 329.

But for the transfer of civil rights the child must be born alive. The ascertainment of this, as a fact, depends upon certain signs which are always attendant upon life: the most important of these is crying. As to conditions of live birth, see BIRTH; INFANTICIDE.

Life is presumed to continue for one hundred years. 9 Mart. La. 257.

The law considers life of the utmost importance, and its most anxious care is to guard and protect it. 1 Bouvier, Inst. n. 202.

LIFE-ANNUITY. An annual income to be paid during the continuance of a particular life. See ANNUITY.

LIFE-ASSURANCE. An insurance of a life upon the payment of a premium: this may be for the whole life, or for a limited time. On the death of the person whose life has been insured during the time for which it is insured, the insurer is bound to pay to the insured the money agreed upon. See 1 Bouvier, Inst. n. 1231; ASSURANCE; POLICY; Loss.

LIFE-RENT. In Scotch Law. A right to use and enjoy a thing during life, the substance of it being preserved.

A life-rent cannot, therefore, be constituted upon things which perish in the use; and though it may upon subjects which gradually wear out by time, as household furniture, etc., yet it is generally applied to heritable subjects. Life-rents are divided into conventional and legal.

The conventional are either simple or by reservation. A simple life-rent, or by a separate constitution, is that which is granted by the proprietor in favor of another. A life-rent by reservation is that which a proprietor reserves to himself in the same writing by which he conveys the fee to another. Life-rents by law are the terce and the courtesy. See TERCE; COURTESY.

LIFE-RENTER. In Scotch Law. A tenant for life without waste. Bell, Dict.

LIGAN, LAGAN. Goods cast into the sea tied to a buoy, so that they may be found again by the owners, are so denominated. When goods are cast into the sea in storms or shipwrecks, and remain there, without coming to land, they are distinguished by the barbarous names of jetsam, flotsam, and ligan. 5 Coke, 108; Hargrave, St. Tr. 48; 1 Blackstone, Comm. 292.

LIGEANCE. The true and faithful obedience of a subject to his sovereign, of a citizen to his government. It signifies, also, the territory of a sovereign. See ALLEGIANCE.

LIGHTERMAN. The owner or manager of a lighter. A lighterman is considered as a common carrier. See LIGHTERS.

LIGHTERS. Small vessels employed in loading and unloading larger vessels.

The owners of lighters are liable like other common carriers for hire. It is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employments for which he offers and holds it forth to the public; it is the immediate foundation and substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier, without actual proof; and every principle of sound policy and public convenience requires it should be so. 5 East, 428; Abbott, Shipp. 225; 1 Marshall, Ins. 254; Park, Ins. 23; Weskett, Ins. 328; Parsons, Marit. Law.

LIGHTS. Those openings in a wall which are made rather for the admission of light than to look out of. 6 J. B. Moore, 47; 9 Bingh. 305. See ANCIENT LIGHTS.

Lamps carried on board vessels, under statutory regulations or otherwise, for the purpose of preventing collisions at night. See NAVIGATION RULES.

Lamps or lights placed in lighthouses, or other conspicuous positions, as aids to navigation at night. See NAVIGATION RULES.

LIMITATIONS.—Of Civil Remedies. In general, by the theory and early practice of the common law, a party who had any legal ground of complaint against another might call the latter to answer in court at such time as suited his convenience. This privilege, however, it was soon found, might be productive of great inconvenience, and not unfrequently of great injustice. Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defence might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress,—hence called statutes of limitation. The doctrine of *fines*, of very great antiquity in the history of the common law, the purpose of which was to put an end to controversies, grew out of the efforts to obviate these evils, and frequent attempts, prior to the accession of James I., by statutes of restricted application, were made to the same end. But till the reign of that prince no general enactment applicable alike to personal and real actions had been passed.

2. In the year 1623, however, by stat. 21 Jac. I. c. 16, entitled "An Act for Limitation of Actions, and for avoiding of Suits at Law," known and celebrated ever since as the *Statute of Limitations*, the law upon this subject was comprehensively declared substantially as it exists at the present day in England, whence our ancestors brought it with them to this country; and it has passed, with some modifications, into the statute-books of every state in the Union except Louisiana, whose laws of limitation are essentially the Prescriptions of the civil law, drawn from the *Partidas*, or Spanish Code.

3. The similarity between the statutes of the several states and those of England is such that the decisions of the British courts and those of this country are for the most part illustrative of all, and will be cited indiscriminately in this brief summary of the law as it now stands. 5 Barnew. & Ald. 204; 4 Johns. N. Y. 317. One preliminary question, however, has arisen in this country, growing out of the provision of the national constitution prohibiting states from passing laws impairing the obligation of contracts, for which there is no English precedent. Upon this point the settled doctrine is that unless the law bars a right of action already accrued without giving a reasonable time within which to bring an action, it pertains to the remedy merely, and is valid. 4 Wheat.

122; 12 *id.* 349; 6 How. 550; 14 N. Y. 16; 5 Metc. Mass. 168; 2 All. Mass. 436. Subject to this qualification, a law may extend or reduce the time already limited. But a cause of action already barred by pre-existing statutes will not be revived by a statute extending the time, 5 Metc. Mass. 400; 7 Penn. St. 292; 25 Vt. 41; 8 Blackf. Ind. 506; though if it be not already barred a statute extending the time will apply. 1 T. L. Smith, Ind. 8.

4. Courts of equity, though not within the terms of the statute, have nevertheless been uniformly regarded as within its spirit, and have, as a general rule, been governed by its provisions, unless special circumstances, where there has been no laches, in the interests of justice, require that they should be disregarded. 2 Schoales & L. Ir. Ch. 329, 630; 12 Pet. 56; 7 Johns. Ch. N. Y. 90; 2 Den. N. Y. 577; 9 Pick. Mass. 1; 3 All. Mass. 42. And in some cases when claims are not barred by the statute of limitations, a court of equity will refuse to interfere, on grounds of public policy, and the difficulty of doing entire justice between the parties when the original transaction may have become obscure by the lapse of time and the evidence lost, 1 Dav. Dist. Ct. 252; 1 Jones, No. C. Eq. 18; though a lapse of time short of that of the statute of limitations will not be held a bar without strong reasons. 1 Woodb. & M. C. C. 90.

5. But in a proper case, as where there is fraud undiscovered till the statute has become a bar, or it is the fault and wrong of the defendant that the plaintiff did not enforce his legal rights within the limited time, courts of equity will not hesitate to interfere in the interest of justice, and entertain suits long since barred at law. 5 Johns. Ch. N. Y. 522; 4 How. 503; 2 Schoales & L. Ir. Ch. 630; 8 Ves. Ch. 73; 2 Sim. Ch. 340. But here, again, courts of equity will proceed with great caution, 7 How. 819; and hold the complainant to allegation and proof of his ignorance of the fraud and when and how it was discovered. 1 Curt. C. C. 390. Subject to these conditions, a claim forty years old for services was sustained against a defendant who had obtained them by falsely representing to the person who rendered them that he was a slave. 12 Penn. St. 49.

6. And courts of admiralty are governed by substantially the same rules as courts of equity. 3 Mas. C. C. 95; 2 Sumn. C. C. 212. And although the statute does not apply in terms to probate courts, there seems to be no reason why the statute of limitations should not be applied according to the principles of equity. 1 Bradf. Surr. N. Y. 1.

AS TO PERSONAL ACTIONS.

It is generally provided that personal actions shall be brought within a certain specified time—usually six years or less—from the time when the cause of action accrues, and not after; and hereupon, whether the limitation be one or twenty years (the latter being the limit applicable to personal actions not otherwise specially limited), the question at once arises when the cause of action in each particular case accrues.

7. *Cause of action accrues when.* The rule that the cause of action accrues when and so soon as there is a right to apply to the court for relief by no means solves the difficulty. When does the right itself so to apply accrue? Upon this point the decisions are so numerous and so conflicting, or perhaps, more accurately speaking, so controlled by particular circumstances, that no inflexible rule can be extracted therefrom. In general, it may be said that in actions of contract the cause of action accrues when there is a breach of the contract. 3 Barnew. & Ald. 288; 3 Johns. N. Y. 137.

8. *When a note* (except bank-notes, 2 Sneed, Tenn. 482) is payable on demand, the statute begins to run from its date, 2 Mees. & W. Exch. 467; 9 Pick. Mass. 488; and if there is no date, then from the delivery, 1 Harr. & G. Md. 439; and the rule is the same if the note is payable "at any time within six years," 39 Me. 492; or borrowed money is to be paid "when called on." 1 Harr. & G. Md. 439. If the note be payable in certain days after demand, sight, or notice, the statute begins to run from the demand, sight, or notice, 13 Wend. N. Y. 267; 2 Taunt. 323; 4 Mas. C. C. 336; but the demand itself should be made within the time limited for bringing the action on the note; else a note limited to six years might be kept open indefinitely by a failure to make a demand. 10 Pick. Mass. 120. And when the note is on interest, this does not become barred by the statutes till the principal, or some distinct portion of it, becomes barred. 2 Cush. Mass. 92; 1 Hall, N. Y. 314. If the note be entitled to grace, the statute runs from the last day of grace. 11 Me. 412.

9. *Where money is paid by mistake,* the statute begins to run from the time of payment, 9 Cow. N. Y. 674; also in case of usury, 6 Ga. 228, or where paid for another as surety. 6 Cow. N. Y. 225. If money is payable by instalments, the statute runs against each instalment as it becomes due. 20 Me. 400, unless it is agreed that upon default the whole shall become due. 3 Gale & D. Exch. 402.

Where a contract takes effect upon some condition or contingency, or the happening of some event, the statute runs from the performance of the condition, 5 Pick. Mass. 384, or the happening of the contingency or event, 3 Penn. St. 149, and not from the date of the contract. On an agreement to devise, the statute runs from the death of the promissor. 9 Penn. St. 260. When money is paid, and there is afterwards a failure of consideration, the statute runs from the failure. 14 Mass. 425.

10. *Where continuous services are rendered,* as by an attorney in the conduct of a suit, 1 Barnew. & Ad. 15, or by a mechanic in doing a job, 16 Ill. 341, the statute begins to run

from the completion of the service. On a promise of indemnity, when the promissee pays money or is damnified, the statute begins to run. 12 Metc. Mass. 130. In cases of *negligence, carelessness, unskilfulness*, and the like, the statute runs from the time when these happen respectively, and not from the time when damages accrue therefrom, 4 Pet. 172; and so, generally, in cases of tort when the wrong is done or the right is invaded. 8 East, 4; 10 Wend. N. Y. 260; 24 Penn. St. 186. Thus, where an attorney negligently invests money in a poor security, the statute runs from the investment, 2 Brod. & B. 73; so, where a party neglected to remove goods from a warehouse, whereby the *plaintiff* was obliged to pay damages, the statute runs from the neglect, and not from the payment of damages, 3 Johns. N. Y. 137; so, where the defendant agreed to go into another state and collect some money, and on his return to pay off a certain judgment, the statute was held to run from the return. 3 Ired. No. C. 481.

11. The breach of the contract is the gist of the action, and not the damages resulting therefrom. 5 Barnew. & C. 259; 1 Sandf. N. Y. 98; 6 Ohio, 276. Thus, where the defendant had contracted to sell the plaintiff a quantity of salt, but was unable, by reason of the destruction of the salt, to deliver on demand, and prolonged negotiations for settlement till the statutory limitation had expired, and then refused, the statute was held to run from the demand, the non-delivery being a breach of the contract. 1 Eng. L. & Eq. 44. So, where *a notary public* neglects to give seasonable notice of non-payment of a note, and the bank employing him was held responsible for the failure, upon suit brought by the bank against the notary to recover the damages it had been obliged to pay, the action was held to be barred, it not being within six years of the notary's default, though within six years of the time when the bank was required to pay damages. 6 Cow. N. Y. 278.

12. So, where *an attorney* makes a mistake in a writ, whereupon, after prolonged litigation, nonsuit follows, but not till an action against the indorser on the note originally sued has become barred, the mistake was held to set the statute in motion. 4 Pet. 172; 4 Ala. 495. *A captain* who barratrously loses his vessel is freed from his liability to the underwriter in six years after the last act in the barratrous proceeding. 1 Campb. 539. *Directors of a bank* liable by statute for mismanagement are discharged in six years after the insolvency of the bank is made known. 16 Mass. 68.

13. If a *sheriff* make an insufficient return, and there is in consequence a reversal of judgment, the statute runs from the return, and not from the reversal of judgment. 16 Mass. 456. So where a sheriff collects money and makes due return but fails to pay over, the statute runs from the return, 11 Ala. 679, or from the demand by the creditor. 10 Metc. Mass. 244. If he suffers an escape, it runs from the escape, 2 Mod. 222; if he takes insufficient bail, from the return of *non est inventus* upon execution against the principal debtor, 17 Mass. 60; 20 Me. 93; if he receive money in *scire facias*, from its reception, 9 Ga. 413; if he neglects to attach sufficient property, on the return of the writ, and not from the time when the insufficiency of the property is ascertained. 27 Me. 443.

14. *In cases of nuisance*, the statute begins to run from the injury to the right, without reference to the question of the amount of the damage, the law holding the violation of a right as some damage. 8 East, 4. And so when a party having a right to use land for a specific purpose puts it to other uses, or wrongfully disposes of property rightfully in possession, the statute begins to run from the perversion. 24 Penn. St. 186; 15 Mass. 82. *In trover*, the statute runs from the conversion, 7 Mod. 99; 4 Harr. & J. Md. 393; *in replevin*, from the unlawful taking or detention. The limitation in the statute of James of *actions for slander* to two years next after the words spoken, applies only to cases where the words are actionable in themselves. 1 Salk. 206.

15. *Adverse possession of personal property* gives title in six years after the possession becomes adverse. 16 Vt. 124; 1 Brev. So. C. 111; 16 Ala. N. s. 696; 9 Tex. 123. But different adverse possessions cannot be linked together to give title. 3 Strobh. So. C. 31; 1 Swann, Tenn. 501. The statute acts upon the title, and, when the bar is perfect, transfers the property to the adverse possessor; while in contracts for the payment there is no such thing as adverse possession, but the statute simply affects the remedy, and not the debt. 18 Ala. N. s. 248.

16. *Computation of time.* In computing the time limited, much discussion has been had in the courts whether the day when the statute begins to run is to be included or excluded, but without any satisfactory result. It is most generally held that when the computation is from an act done, or the happening of an event, the day upon which the act is done, or event happens, is to be included, and when it is from the date, the day of the date is excluded. 9 Cranch, 120; 9 N. H. 304. This rule, however, of including the day upon which an act is done, is subject to so many exceptions and qualifications that it can hardly be said to be a rule, and the cases are wholly irreconcilable with it. It has been well said that whether the day upon which an act is done or an event happens is to be included or excluded, depends upon the circumstances and reason of the thing, so that the intention of the parties may be effected; and such a construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided. 1 Tex. 107. Fractions of a day are not regarded, unless it becomes necessary in a question of priority, 8 Ves. Ch. 83; 9 Eng. L. & Eq. 457; 3 Den. N. Y. 12; 6 Gray, Mass. 316; and then only

in questions concerning private acts and transactions. 20 Vt. 653.

17. *Exceptions to general rule.* If, when the right of action would otherwise accrue and the statute begin to run, *there is no person who can exercise the right*, the statute does not begin to run till there is such a person. Thus, if a note matures after the decease of the promissee, and prior to the issue of letters of administration, the statute runs from the date of the letters of administration, unless otherwise specified in the statute, 5 Barnew. & Ald. 204; 13 Wend. N. Y. 216; 9 Leigh, Va. 79; 11 Metc. Mass. 445; 15 Conn. 145; in Missouri, from the date of notice that letters of administration have issued, 9 Mo. 262. But if the statute begins to run before the death of the testator or intestate, it is not interrupted by his death, 4 Mees. & W. Exch. 42; 3 Mylne & C. Ch. 455; 4 Edw. Ch. N. Y. 733; 18 Miss. 100; nor by the death of the administrator, 17 Ala. N. S. 291; nor by his removal from the state. 15 Ala. N. S. 545.

18. And the courts will not recognize exemptions, where the statute has once begun to run, because they are within the equity and reason of the statute, if they are not within its letter. Thus, an insolvent's discharge as effectually removes him from pursuit by his creditor as absence from the state; but it is not an exception within the statute, and cannot avail. 1 Whart. Penn. 106; 1 Cow. N. Y. 356; 6 Gray, Mass. 517. A creditor's absence makes it inconvenient for him to return and sue; but he may so do, and he must, or be barred. 17 Ves. Ch. 38; 1 Wils. Ch. 134; 1 Johns. N. Y. 165. And it has ever been held that a *statutory impediment* to the assertion of title will not help the party so impeded, 2 Wheat. 25; nor even a state of war, which closes the courts. 2 Salk. 420.

19. There are many authorities, however, to show that if, by the interposition of courts, or the provisions of a statute, a person cannot be sued for a limited time, the currency of the statute is suspended during that period. In other words, if the law interposes to prevent suit, it will see to it that he who has a right of action shall not be prejudiced thereby. 10 Gill & J. Md. 246; 4 Md. Ch. Dec. 368; 5 Ga. 66; 3 McLean, C. C. 568; 12 Wheat. 129; 2 Den. N. Y. 577; 20 How. 128. Thus, *an injunction* suspends the statute. 1 Md. Ch. Dec. 182; 12 Gratt. Va. 579; 2 Stockt. N. J. 347; 10 Humphr. Tenn. And so does an *assignment of an insolvent's effects*, as between the estate and the creditors, 7 Metc. Mass. 435; 1 Cush. Mass. 461; 12 La. Ann. 216; though not, as has just been said, as between the debtor and his creditor. 6 Gray, Mass. 517.

20. But *when the statute does not in terms exclude and limit* a particular case, the court will not extend it, although the case comes within the reason of the statute. Thus, in Illinois, where the action of debt will lie wherever *indebitatus assumpsit* will, and justices of the peace have jurisdiction of both actions, the summons being the same in both forms of action, if the statute of limitations is pleaded the law will presume that to be the particular form which is best calculated to advance the plaintiff's remedy. 9 Ill. 193. So the Alabama act, which permits an action to be commenced within a year after the reversal of a previous judgment, was held, in favor of the plaintiff, to apply to a case when, by the action of an inferior court, the cause was discontinued as to two of the defendants, and thus caused a reversal of the judgment as to the other defendant, although not within the letter of the statute. 11 Ala. N. S. 356.

21. By the special provisions of the statute, *infants*, *married women*, *persons* non compos mentis, *those imprisoned*, and *those beyond seas*, *out of the state*, *out of the realm*, or *out of the country*, are regarded as affected by the incapacity to sue, or, in other words, as being under disability, and have, therefore, the right of action secured to them until the expiration of the time limited, after the removal of the disability. These personal exceptions have been strictly construed, and the party alleging the disability has been very uniformly held to bring himself exactly within the express words of the statute to entitle himself to the benefit of the exception. To bring himself within the spirit or supposed reason of the exception is not enough. 1 Cow. N. Y. 356; 3 Green, N. J. 171; 2 Curt. C. C. 480; 17 Ves. Ch. 87. And this privilege is accorded although the person laboring under the statute disability might in fact bring suit. Thus, an infant may sue before he arrives at his majority, but he is not obliged to, and his right is saved if he does not. 2 Saund. 117. The disability must, however, be continuous and identical. One disability cannot be superadded to another so as to prolong the time, and if the statute once begins to run, whether before a disability exists or after it has been removed, no intervention of another and subsequent disability can stop it. 1 Wils. Ch. 134; 2 M'Cord, So. C. 269; 1 Johns. N. Y. 165. When, however, there are two or more coexisting disabilities at the time the right of action accrues, suit need not be brought till all are removed. 1 Atk. Ch. 610; 12 Me. 397; 3 Johns. Ch. N. Y. 129.

22. Beyond seas means without the jurisdiction of the state or government in which the question arises. 1 Show. 91; 3 Cranch, 174; 3 Wheat. 341; 1 Harr. & M'H. Md.; 14 Pet. 41; 2 M'Cord, So. C. 331; 13 N. H. 79. In Pennsylvania and Missouri, however, and perhaps other states, contrary to the very uniform current of authorities, beyond seas is held to mean out of the limits of the United States. 2 Dall. Penn. 217; 13 Mo. 216. And the United States courts adopt and follow the decisions of the respective states upon the interpretation of their respective laws. 2 How. 76; 12 Pet. 32. What constitutes absence out of the state within the meaning of the statute, is wholly undeterminable by any rule to be drawn from the decisions. It seems to be agreed that temporary absence is not enough; but what is a temporary absence is by no means agreed.

23. The word return, as applied to an absent debtor, applies as well to foreigners, or residents out of the state coming to the state, as to citizens of the state who have gone abroad and have returned. 3 Johns. N. Y. 267; 11 Pick. Mass. 36. And in order to set the statute in motion the return must be open, public, and such and under such circumstances as will give a party, who exercises ordinary diligence, an opportunity to bring his action. 10 Johns. N. Y. 264; 1 Pick. Mass. 263; 3 Gill & J. Md. 158. Such a return, though temporary, will be sufficient. 8 Cranch, U. S. 179. But if the return is such and under such circumstances as to show that the party does not intend that his creditor shall take advantage of his presence, or such, in fact, that he cannot without extraordinary vigilance avail himself of it,—if it is secret, concealed, or clandestine,—it is insufficient. The absence of one of several joint-plaintiffs does not prevent the running of the statute, 4 Term, 516; but the absence of one of several joint-defendants does. 29 Eng. L. & Eq. 271. This at least seems to be the settled law of England; but the cases in the several states of the Union are conflicting upon these points.

24. *Commencement of process.* The question sometimes arises as to what constitutes the bringing an action or the commencement of process, and this is very uniformly held to be the delivery or transmission by mail in due course of the writ or process to the sheriff in good faith, for service. 18 Johns. N. Y. 14; 14 Wend. N. Y. 649; 1 Paige, Ch. N. Y. 564. In Connecticut, the actual service of the writ is held to be the commencement of the action, 17 Conn. 213; in Arkansas, the issuance of the writ, 5 Eng. Ark. 479; in Vermont, the taking out of the writ, if it be served in time for the next court to which it is returnable. 1 N. Chipm. Vt. 94. The date of the writ is *primâ facie* evidence of the time of its issuance. 17 Pick. Mass. 407; 7 Me. 370.

25. If the writ or process seasonably issued *fail of a sufficient service* or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or is abated, or the action is otherwise avoided by the death of any party thereto, or for any matter of form, or judgment for plaintiff be arrested or reversed, the plaintiff may commence a new action within a reasonable time; and that reasonable time is usually fixed by the statute at one year, and by the courts in the absence of statutory provision, at the same period. 10 Wend. N. Y. 276. *Irregularity of the mail* is an inevitable accident within the meaning of the statute. 8 Me. 497. And so is a *failure of service* by reason of the removal of the defendant, without the knowledge of the plaintiff, from the county in which he had resided and to which the writ was seasonably sent. 12 Metc. Mass. 15. But a mistake of the attorney as to time of the sitting of the court, and consequent failure to enter, is not. 29 Me. 458. *An abatement by the marriage* of the female plaintiff is no abatement within the statute; it is rather a voluntary abandonment. 8 Cranch, 84. And so, generally, of any act of the party or his attorney whereby the suit is abated or the action fails. 3 M'Cord, So. C. 452; 29 Me. 458; 1 Mich. 252; 6 Cush. Mass. 417.

26. A *nonsuit* is in some states held to be within the equity of the statute, 13 Ired. No. C. 123; 4 Ohio St. 172; 12 La. Ann. 672; but generally otherwise. 1 Serg. & R. Penn. 236; 3 M'Cord, So. C. 452; 3 Harr. N. J. 269. *If there are two defendants*, and by reason of a failure of service upon one an alias writ is taken out, this is no continuance, but a new action, and the statute is a bar. 6 Watts, Penn. 528. So of amending bill introducing new parties. 6 Pet. 61. A dismissal of the action because of the *clerk's omission to seasonably enter* it on the docket is for matter of form, 7 Gray, Mass. 165; and so is a dismissal for want of jurisdiction, where the action is brought in the wrong county. 1 Gray, Mass. 580. In Maine, however, a wrong venue is not matter of form. 38 Me. 217. The statute is a bar to an action at law after a dismissal from chancery for want of jurisdiction. 16 Wend. N. Y. 572; 1 Atk. Ch. 1; 2 Munf. Va. 181; 18 Ala. N. S. 307.

27. *Lex fori governs.* Questions under the statute are to be decided by the law of the place where the action is brought, and not by the law of the place where the contract is made or the wrong done. If the statute has run against a claim in one state, the remedy is gone, but the right is not extinguished; and therefore the right may be enforced in another state where the remedy is still open, the time limited by the statute not having expired. 15 East, 439; 2 Mas. C. C. 159; 9 How. 407; 11 Pick. Mass. 36. So if the statute of the place of the contract is still unexpired, yet an action brought in another place is governed by the *lex fori*, and may be barred. 1 Caines, N. Y. 402. But statutes giving title by adverse possession are to be distinguished from statutes of limitation. Adverse possession gives title; lapse of time bars the remedy only. And a right acquired by adverse possession in the place where the adverse possession is had is good elsewhere. 11 Wheat. 361; 9 How. 407; 5 Ala. N. S. 108; 16 Ark. 384.

28. *Public rights not affected.* Statutes of limitation do not run against the state or the United States, unless it is expressly so provided in the statute itself. No laches is to be imputed to the government. 18 Johns. N. Y. 228; 4 Mass. 526. But this principle has no application when a party seeks his private rights in the name of the state. Counties, towns, and municipal bodies not possessed of the attributes of sovereignty have no exemption. 4 Dev. No. C. 568; 22 Me. 445; 12 Ill. 38. If, however, the sovereign becomes a party in a private enterprise, as, for instance, a stockholder in a bank, he subjects himself to the operation of the statute. 3 Pet. 30.

29. *Particular classes of actions.* Actions of *trespass*, *trespass* quare clausum, *detinue*,

account, *trover*, *replevin*, and *upon the case* (except actions for slander), and action of *debt for arrearages of rent*, and of *debt* grounded upon any lending or contract *without specialty*, or simple contract debt, are usually limited to six years. Actions for *slander*, *libel*, *assault*, and the like, are usually limited to a less time, generally two years. Judgment of courts not of record, as courts of justices of the peace, and county commissioners' courts, are in some states, either by statute or the decisions of the highest courts, included in the category of debts founded on contract without specialty. 13 Metc. Mass. 251; 2 Bail. So. C. 58; 37 Me. 29. In others, however, they are excluded upon the ground that the statute applies only to debts founded on contracts in fact, and not to debts founded on contracts implied by law. 14 Johns. N. Y. 480.

30. Action of *assumpsit*, though not specifically named in the original statute of James I. as included within the limitation of six years, were held in England, after much discussion, to be fairly embraced in actions of "trespass." 4 Ad. & E. 912. The same rule has been adopted in this country, 5 Ohio, 444; 3 Pet. 270; 1 Morr. Iowa, 59; and, in fact, assumpsit is expressly included in most of the statutes. And it has also been held in this country that statutes of limitation apply as well to motions made under a statute as to actions. 11 Humphr. Tenn. 423. Such statutes are in aid of the common law, and furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statutes; as where compensation is sought for land taken for a railroad. 23 Penn. St. 371.

31. A *set-off* cannot usually be pleaded in bar, 5 East, 16; 3 Johns. N. Y. 261; though when there are cross-demands accruing at nearly the same time, and the plaintiff has saved the statute by suing out process, the defendant will be allowed to set off his demand, 2 Esp. 569; and, generally, when there is any equitable matter of defence in the nature of set-off, or which might be the subject of a cross-action, growing out of the subject-matter for which the action is brought, courts will permit it to be set up although a cross-action or an action on the claim in set-off might be barred by the statute. 8 Rich. So. C. 113; 9 Ga. 398; 11 Eng. L. & Eq. 10; 2 Green, N. J. 545; 8 B. Monr. Ky. 580. A *lien* is not lost though an action to recover on the debt or obligation secured by the pledge may be barred. 3 Esp. 81; 2 Barnew. & Ad. 413; 19 Pick. Mass. 535.

32. *Debts by specialty*, as contracts under seal, judgments of courts of record (except foreign judgments, and judgments of courts out of the state, upon which the decisions are very discordant), liabilities imposed by statute, awards under seal, or where the submission is under seal, indentures reserving rent, and actions for legacies, are affected only by the general limitation of twenty years. A mortgage, though under seal, does not take the note, not witnessed, secured thereby, with it, out of the limitation of simple contracts. 7 Wend. N. Y. 94. And though liabilities imposed by statute are specialties, a liability under a by-law made by virtue of a charter is not, 6 Eng. L. & Eq. 309; on the ground that by becoming a member of the company enacting the by-laws the party consents and agrees to assume the liabilities imposed thereby.

33. An action *brought by the payee of a witnessed promissory note*, his executor or administrator, is in some states excepted from the limitation of simple contracts, and is only barred by the lapse of twenty years. But the indorsee of such a note must sue within six years from the time of the transfer to him, 4 Pick. Mass. 384; though he may sue after that time in the name of the payee, with his consent. 4 Cush. Mass. 176. If there are two promissees to the note, and the signature of only one is witnessed, the note as to the other is not a witnessed note. 4 Metc. Mass. 406; 18 Shep. Me. 49. And the attestation of the witness must be with the knowledge and consent of the maker of the note. 8 Pick. Mass. 246; 1 Mas. Vt. 26. An attested indorsement signed by the promissee, acknowledging the note to be due, is not a witnessed note, 23 Pick. Mass. 282; but the same acknowledgment for value received, with a promise to pay the note, is. 1 Metc. Mass. 21. If the note be payable to the maker's own order, witnessed and indorsed by the maker in blank, the indorsement being without attestation, an action by the first indorsee is barred in six years. 4 Metc. Mass. 219. And even if the indorsement be attested, a second indorsee or holder by delivery, not being the original payee, is barred. 13 Metc. Mass. 128.

34. *Statute bar avoided, when.* Trusts in general are not within the operation of the statute, where they are direct and exclusively within the jurisdiction of a court of equity, and the question arises between the trustees and the *cestui que trust*. 7 Johns. Ch. N. Y. 90; 1 Watts, Penn. 275. And of this character are the trusts of executors, administrators, guardians, assignees of insolvents, and the like. The claim or title of such trustees is that of the *cestui que trust*. 2 Schoales & L. Ir. Ch. 607. Special limitations to actions at law are made in some states in favor of executors and administrators, modifying or abrogating the rule in equity; and as these laws are made in the interest of the trust funds, it is the duty of the executor or administrator to plead the special statute which applies to him as such and protects the estate he represents, though he is not bound to plead the general statute. 13 Mass. 203; 3 N. H. 491; 15 *id.* 58.

35. If, however, the trustee deny the right of his *cestui que trust*, and claim adversely to him, and these facts come to the knowledge of the *cestui que trust*, the statute will begin to run from the time when the

facts become known. 3 Sumn. C. C. 466. But trusts cognizable at law are subject to the operation of the statute, including implied trusts generally. 6 Johns. Ch. N. Y. 110; 9 Pick. Mass. 242; 17 Ves. Ch. 95; 1 Watts & S. Penn. 112; 7 Blackf. Ind. 86; 7 B. Monr. Ky. 556; 7 S. & M. Miss. 219; 4 Ired. No. C. 1; 3 Gratt. Va. 373.

36. *Principal and agent.* The relation of an agent to his principal is a fiduciary one, and the statute does not begin to run so long as there is no breach of the trust or duty. When, however, there is such a breach, and the principal has knowledge of it, the statute will begin to run. 2 Gill & J. Md. 389; 10 Johns. N. Y. 285; 6 Cow. N. Y. 376. In many cases, a lawful demand upon the agent to perform his duty, and neglect or refusal to comply, are necessary to constitute a breach. As when money is placed in the hands of an agent with which to purchase property, and the agent neglects to make the purchase, there must be a demand for the money before the statute will begin to run, 5 Ired. No. C. 507; so where property is placed in the hands of an agent to be sold, and he neglects to sell. 2 Gill & J. Md. 389. If, however, the agent's conduct is such as to amount to a declaration on his part that he will not perform his duty, or if he has disabled himself from performing it, it is tantamount to a repudiation of the trust, or an adverse claim against the *cestui que trust*, and the same consequences follow. No demand is necessary: the right of action accrues at once upon the declaration, and the statute then begins to run. 10 Gill & J. Md. 422; 1 Rand. Va. 284.

37. But where a demand is necessary, it should itself be made within the limited time; otherwise an agent might be subject all his lifetime to demands, however stale, 15 Wend. N. Y. 302; 17 Mass. 145; unless the agent, by his own act, prevents a demand. 6 Cush. Mass. 501. The rendering an untrue account by a collection or other agent would seem to be such a breach of duty as to warrant an action without demand, and would therefore set the statute in motion. 17 Mass. 145. If the custom of trade or the law makes it the clear duty of an agent to pay over money collected without a demand, then if the principal has notice the statute begins to run from the time of collection; and when there is no such custom or law, if the agent having funds collected gives notice to his principal, the statute will begin to run after the lapse of a reasonable time within which to make the demand, though no demand be made. 4 Sandf. N. Y. 355.

38. In equity, *fraud practised* upon the plaintiff so that the fact of his right to sue does not come to his knowledge till after the expiration of the statute of limitations, is held to open the case so that he may bring his action within the time limited, dating from the discovery of the fraud. But herein the courts proceed with great caution, and require not only a clear case of fraudulent concealment, but the absence of negligence on the part of the party seeking to obviate the statute limitation by the replication of fraud. 7 How. 819; 12 Penn. St. 49; 1 Curt. C. C. 390; 5 Johns. Ch. N. Y. 522. In some states, fraudulent concealment of the cause of action is made by statute a cause of exemption from its effect. And the courts construe the saving clause with great strictness, and hold that means of knowledge of the concealment are equivalent to knowledge in fact. 8 All. Mass. 130; 39 Me. 404. In the absence of statutory provision, the admissibility of the replication of fraud has been the subject of contradictory decisions in the different states, the weight of authority, perhaps, being in favor of its admissibility. 5 Mas. C. C. 143.

39. *Running accounts.* Such accounts as concern the trade of merchandise between merchant and merchant were by the original statute of James I. exempted from its operation; and among these mutual and open accounts current were early held to be included, Peake, Cas. 164; 6 Term, 189, if they contained upon either side any item upon which the right of action accrued within six years, whether the accounts were between merchant and merchant or other persons. And this construction of the law, based, as is said in some cases, upon the ground that such accounts come within the equity of the exception in respect to merchants' accounts, and in others upon the ground that every new item and credit in an account given by one party to another is an admission of there being some unsettled account between them, and, as an acknowledgment, sufficient to take the case out of the statute, has taken the form of legislative enactment in many states in this country, and, in the absence of such enactment, has been generally followed by the courts. 20 Johns. N. Y. 576; 8 Pick. Mass. 187; 6 Me. 108; 6 Conn. 248; 2 Rawle, Penn. 287; 4 Rand. Va. 488; 12 Pet. U. S. 300; 1 Hayw. No. C. 216; 11 Gill & J. Md. 212; 4 M'Cord, So. C. 215; 3 Blackf. Ind. 300; 3 Harr. N. J. 266; 3 Miss. 786.

40. But there must be a reciprocity of dealing between the respective parties, and the accounts must be such that there may be a fair implication that it is understood that the items of one account are to be a set-off so far as they go against the items of the other account. 2 Sumn. C. C. 410. Where the items of account are all on one side, as between a shopkeeper and his customer, or where goods are charged and payments credited, there is no mutuality, and the statute bars the account. 4 M'Cord, So. C. 214; 2 Sandf. N. Y. 318; 17 Serg. & R. Penn. 347. And where, in the case of mutual account, after a statement, the balance has been struck and agreed upon, the statute at once applies to such balance as a distinct demand, 2 Saund. 125; 6 Me. 337; unless it is made the first item of a new mutual account. 3 Pick. Mass. 96; 1 Mod. 270.

41. A closed account is not a stated account. In order to constitute the latter, an account must have been rendered by one

party, and expressly or impliedly assented to by the other. 8 Pick. Mass. 187; 6 Me. 308; 12 Pet. 300. Accounts between merchant and merchant are exempted from the operation of the statute, if current and mutual, although no item appears on either side within six years. 8 Bligh, 352; 6 Pick. Mass. 364; 5 Cranch, 15; 13 Penn. St. 300; 1 T. L. Smith, Ind. 217. A single transaction between two merchants is not within the exception, 17 Penn. St. 238; nor is an account between partners, 3 R. I. 87; nor an account between two joint-owners of a vessel, 10 B. Monr. Ky. 112; nor an account for freight under a charter-party, although both parties are merchants, 6 Pet. 151; nor any account between merchants, unless concerning the trade of merchandise, or, in other words, originating in articles of merchandise. 7 Miss. 328.

42. *New promise to pay debt barred.* There is another important class of exceptions, not made by the statute, but by the courts, wherein, although the statutory limitation may have expired, parties bringing themselves within the exception have always been allowed to recover. In actions of assumpsit, an acknowledgment of existing indebtedness made under such circumstances as to be equivalent to a new promise express or implied, and within six years before the time of action brought, will take the case out of the operation of the statute, although the original cause of action accrued more than six years before that time. And this proceeds upon the ground that as the statutory limitation merely bars the remedy and does not discharge the debt, there is something more than a merely moral obligation to support the promise,—to wit, a pre-existent debt, which is a sufficient consideration for the new promise. 2 Mas. C. C. 151. The new promise upon this sufficient consideration constitutes, in fact, a new course of action. 4 East, 399; 1 Pet. 351.

43. This was undoubtedly a liberal construction of the statute; but it was early adopted, and has maintained itself, in the face of much adverse criticism, to the present time. While, however, at an early period there was an inclination of the courts to accept the slightest and most ambiguous expressions as evidence of a new promise, the spirit and tendency of modern decisions is towards greater strictness, and seem to be fairly expressed in the learned judgment of the late Mr. Justice Story, in the case of Bell *v.* Morrison, 1 Pet. 351. "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had [not] received such support as would have made it, what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt by a court or jury, that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt, that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and let in evidence, *aliundè*, to establish any debt, however large and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defeated, and the statute virtually repealed." . . . "If the bar is sought to be removed by the proof of a new promise, that proving, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed."

44. And to the same general purport are the following cases, although it is undeniable that in the application of the rule there seems in some cases to be a looseness and liberality which hardly comport with the rule. 11 How. 493; 32 Me. 260; 14 N. H. 422; 22 Vt. 179; 3 Cush. Mass. 155; 7 Hill, N. Y. 45; 16 Penn. St. 210; 12 Ill. 146; 4 Fla. 481; 19 Miss. 419; 22 *id.* 52; 5 Ga. 486; 9 B. Monr. Ky. 614; 10 Ark. 134; 11 Ired. No. C. 447; 8 Gratt. Va. 110; 20 Ala. N. S. 687.

45. *A new provision to pay the principal* only, does not except the interest from the operation of the statute. 29 Penn. St. 189. Nor does an agreement to refer take the claim out of the statute, 1 Sneed, Tenn. 464; nor the insertion, by an insolvent debtor, of an outlawed claim in a schedule of his creditors required by law, 2 Miles, Penn. 424; 10 Penn. St. 129; 7 Gray, Mass. 274; 12 Metc. Mass. 470; nor an agreement not to take advantage of the statute. 29 Me. 47; 17 Penn. St. 232; 8 Md. 374; 9 Leigh, Va. 381. If such an agreement were valid, it might be made part of the contract, and thus the object of the law would be defeated. 32 Me. 169. Nor will a devise of property to pay debts exempt debts upon which the statute has run prior to the testator's death.

4 Edw. N. Y. 527; 13 Ala. N. s. 611; 4 Whart. Penn. 445; 4 Penn. St. 56; 13 Gratt. Va. 329.

46. Nor, in general, will any statement of a debt, made officially, in pursuance of special legal requirement, or with another purpose than to recognize it as an existing debt. 5 Me. 140; 12 Eng. L. & Eq. 191; 9 Cush. Mass. 390; 30 Me. 425. Nor will a deed of assignment made by the debtor for the payment of certain debts, and of his debts generally, and a partial payment by the assignor to a creditor, 1 R. I. 81; 6 Eng. L. & Eq. 520; nor the entry of a debt in an unsigned schedule of the debtor's liabilities, made for his own use, 30 Me. 425; nor an undelivered mortgage to secure an outlawed debt, though duly executed, acknowledged, and recorded. 6 Cush. Mass. 151. But if the mortgage be delivered, it will be a sufficient acknowledgment to exempt the debt secured thereby from the operation of the statute. 4 Cush. Mass. 559; 18 Conn. 257; 14 Tex. 672. And so will the answer to a bill in chancery which expressly sets forth the existence of the debt. 28 Vt. 569; 3 Gill, Md. 166.

47. If there is any thing said to repel the inference of a promise, or inconsistent therewith, the statute will not be avoided. 3 Bingh. 329; 6 Watts, Penn. 44; 2 Wash. C. C. 514. "The account is due, and I supposed it had been paid, but did not know of its being ever paid," is no new promise. 8 Cranch, 72. If the debtor admits that the debt is due, but intimates his purpose to avail himself of the bar of the statute, the acknowledgment is insufficient. 9 Serg. & R. Penn. 128; 2 Dev. & B. No. C. 82; 2 Browne, Penn. 35. So if he says he will pay if he owes, but denies that he owes, 3 Me. 97; 2 Pick. Mass. 368, or if he is liable, but denies his liability. 2 Bail. So. C. 278. So if he states his inability to pay. 22 Pick. Mass. 291. So if he admits the claim to have been once due, but claims that it is paid by an account against the claimant, 3 Fairf. Me. 72; 5 Conn. 480; 4 M'Cord, So. C. 215; or otherwise. 11 Ill. 146. "I am too unwell to settle now; when I am better, I will settle your account:" held insufficient. 9 Leigh, Va. 45; 1 Yerg. Tenn. 270. So of an offer to pay a part in order to get the claim out of the hands of the creditor, 2 Bail. So. C. 283; and of an admission that the account is right. 4 Dan. Ky. 505.

48. If the new promise is subject to conditions or qualifications, is indefinite as to time or amount, or as to the debt referred to, or in any other way limited or contingent, the plaintiff will be held to bring himself strictly within the terms of the promise, and to show that the condition has been performed, or the contingency happened, and that he is not excluded by any limitation, qualification, or uncertainty. 11 Wheat. 309; 15 Johns. N. Y. 511; 1 Pet. 351; 3 Bingh. 638; 3 Hare, Ch. 299. If the promise be to pay when able, the ability must be proved by the plaintiff. 3 Barnew. & C. 603; 4 Esp. 36; 13 N. H. 486; 10 N. Y. 88; 7 Hill, N. Y. 45; 15 Ga. 395. So if it be to pay as soon as convenient, the convenience must be proved, 2 Crompt. & M. Exch. 459; or, "if E will say that I have had the timber," the condition must be complied with. 1 Pick. Mass. 370.

49. And if there be a promise to pay in specific articles, the plaintiff must show that he offered to accept them. 8 Johns. N. Y. 318; 8 Metc. Mass. 432. The vote of a town to appoint a committee to "settle the dispute" was held to be a conditional promise, requiring, to give it force as against the statute, proof that the committee reported something due. 11 Mass. 451. If the original promise be conditional, and the new promise absolute, the latter will not alter the former. 3 Wash. C. C. 404. But where the promise was to pay if the debtor could not prove that B had paid it, it was held that the onus was upon A to prove that B had paid it. 11 Ired. No. C. 445. The offer must be accepted altogether or rejected altogether. 4 Leigh, Va. 603.

50. It must appear clearly that the promise is made with reference to the particular demand in suit, 6 Pet. 86; 15 Johns. N. Y. 511; though a general admission would seem to be sufficient, unless the defendant show that there were other demands between the parties. 21 Pick. Mass. 323. If there be uncertainty as to the amount admitted to be due, the plaintiff, on proving that something is due, may recover nominal damages, 4 Nev. & M. 337; 4 Younge & C. 238; 12 Carr. & P. 104; 6 N. H. 367; and whether evidence *aliunde* may be admitted to prove the actual amount is a point upon which the most respectable authorities differ. That it may, is held in Massachusetts, 22 Pick. Mass. 291, and perhaps in Maine. 27 Me. 433. *Contra*, 1 Pet. 351; 9 Leigh, Va. 381; 2 Dev. & B. No. C. 390; 10 Watts, Penn. 172; 23 Penn. St. 416; 24 Me. 145; 6 Mo. 27.

51. *Part payment* of a debt is evidence of a new promise to pay the remainder. 2 Dougl. 652. It is, however, but *primâ facie* evidence, and may be rebutted by other evidence. 28 Vt. 642; 27 Me. 370; 4 Mich. 580; 10 Ark. 638. Payment of the interest has the same effect as payment of part of the principal. 8 Bingh. 309; 14 Pick. Mass. 387. And the giving a note for part of a debt, 2 Metc. Mass. 168, or for accrued interest, is payment. 13 Wend. N. Y. 267; 6 Metc. Mass. 553; 24 Eng. L. & Eq. 92. And so is the credit of interest in an account stated, 6 Johns. N. Y. 267, and the delivery of goods on account. 4 Ad. & E. 71. But the payment of a dividend by the assignee of an insolvent debtor is no new promise to pay the remainder, 7 Gray, Mass. 387; 6 Eng. L. & Eq. 520; and it has recently been held by respectable authorities that new part payment is no new promise, but, in order to take the case out of the statute, the payment must be made on account of a sum admitted to be due, accompanied with a promise to pay the remainder. 1 Exch. 188; 6 Mees. & W.

Exch. 824; 6 Eng. L. & Eq. 520; 20 Miss. 663.

52. Part payment by a surety in the presence of his principal, and without dissent, is payment by the principal, 22 N. H. 219; but part payment by the surety after the statute has barred the debt, is not a new promise to pay the other part. 18 B. Monr. Ky. 643. A general payment on account of a debt for which several notes were given, without direction as to the application of the payment, may be applied by the creditor to either of the notes, so as to take the note to which the payment is applied out of the statute; but the payment cannot be apportioned to the several notes with the same effect. 19 Vt. 26; 31 Eng. L. & Eq. 55; 1 Gray, Mass. 630.

53. The payment may be made to an agent, or even a stranger not authorized to receive it, but erroneously supposed to be authorized. It is as much an admission of the debt as if made to the principal himself. 1 Bingh. 480; 10 Barnew. & C. 122. And so with reference to acknowledgments or new promises. 4 Pick. Mass. 110; 9 *id.* 488; 9 Wend. N. Y. 293; 11 Me. 152. And the weight of authority is in favor of the rule that part payment of a witnessed note or bond will avoid the statute. 30 Me. 164; 9 B. Monr. Ky. 438; 12 Mo. 94; 18 Ark. 521: *contra*, 1 Ala. N. s. 482. Whether the new promise or payment, if made after the debt is barred by the statute, will remove the bar, is also a mooted point, the weight of authority perhaps being in favor of the negative. 14 Pick. Mass. 387; 10 Ala. N. s. 959; 13 Miss. 564; 2 N. Y. 523; 12 *id.* 635; 14 Ark. 199. In Ohio it is so, by statute. 17 Ohio, 9. For the affirmative, see 18 Vt. 440; 20 Me. 176; 5 Ired. No. C. 341; 2 Tex. 501; 8 Humphr. Tenn. 656.

54. It was long held that an acknowledgment or part payment by one of several joint-contractors would take the claim out of the statute as to the other joint-contractors, 2 Dougl. 652; 2 H. Blackst. 340; but this cannot now be considered to be the law either in England or this country. 6 Eng. L. & Eq. 520; 10 Barb. N. Y. 566; 2 N. Y. 523; 11 *id.* 176; 22 N. H. 219; 10 Ark. 108; 7 Gill, Md. 857; 19 Miss. 275; 1 N. J. 677; 6 Cush. Mass. 360; 9 Ga. 467; 8 Penn. St. 337; 24 Ala. N. s. 474; 9 Rich. So. C. 44. *A fortiori* the admission or part payment by an executor or administrator of one joint-debtor will not revive the claim as against the other.

55. Of course an acknowledgment or part payment made by an agent acting within the scope of his authority is, upon the familiar maxim, *qui facit per alium facit per se*, an acknowledgment or part payment by the principal; and hence if a partner has been appointed specially to settle the affairs of a dissolved partnership, his acknowledgment or part payment by virtue of his authority as such agent will take the claim out of the statute. 6 Johns. N. Y. 267; 1 Pet. 351; 20 Me. 347. And the wife may be such agent as to a claim for goods sold to her during the absence of her husband, 1 Campb. 394; but a wife during coverture, not made specially or by implication of law an agent, cannot make a new promise effectual to take a claim to which she was a party *dum sola* out of the statute. 1 Barnew. & C. 248; 24 Vt. 89; 12 Eng. L. & Eq. 398. Not even though the coverture be removed before the expiration of six years after the alleged promise. 2 Penn. St. 490.

56. Nor is the husband an agent for the wife for such a purpose, 15 Vt. 471; but he is an agent for the wife, payee of a note given to her *dum sola*, to whom a new promise or part payment may be made. 6 Q. B. 937. So a new promise to an executor or administrator is sufficient, 8 Mass. 134; and the weight of authority seems to be in favor of the binding force of a promise or part payment made by an executor or administrator, 12 Cush. Mass. 324; 12 B. Monr. Ky. 408; 9 Ala. N. s. 502; 17 Ga. 96; 9 Eng. L. & Eq. 80; particularly if the promise be express. 15 Johns. N. Y. 3; 15 Me. 360. But there are highly respectable authorities to the contrary. 1 Whart. Penn. 66; 23 Miss. 389; 7 Md. 442; 9 *id.* 317; 14 Tex. 312.

57. But to put an end to such litigation, it was enacted by stat. 9 Geo. IV. c. 14, commonly known as Lord Tenterden's Act, that the new promise or acknowledgment by words only, in order to be effectual to take a case out of the statute of limitations, should be in writing, signed by the party chargeable thereby; and this statute has been substantially adopted by most, if not all, of the states in this country. This statute affects merely the mode of proof. The same effect is to be given to the words reduced to writing as would before the passage of the statute have been given to them when proved by oral testimony. 7 Bingh. 163. If part payment is alleged, "words only," admitting the fact of payment, though not in writing, are admissible to strengthen the proof of the fact of payment. 2 Gale & D. 59.

58. The *return, under citation, by an administrator* of the maker of a note, showing the note as one of his intestate's debts, is, in writing, within the meaning of this statute. 12 Sim. 17; and so is the entry by an insolvent debtor of the debt in his schedule of liabilities. 12 Metc. Mass. 470. It was held in the last case that the mere entry was not in itself a sufficient acknowledgment, but being in writing, within the meaning of the statute, it might be used with other written evidence to prove a new promise. But the making one note and tendering it in payment of another is not a new promise in writing, 3 Cush. Mass. 355; not even if the note be delivered, if it be re-delivered to the maker for the purpose of restoring matters between the parties to the state they were in before the note was given. 1 Metc. Mass. 1.

59. A and B had an unsettled account. In 1845, A signed the following: "It is agreed that B, in his general account, shall give credit to A for £10, for books delivered in 1834." Held, no acknowledgment in

writing, so as to give B a right to an account against A's estate more than six years before A's death. 35 Eng. L. & Eq. 195. The writing must be signed by the party himself. The signature of the husband's name by the wife, though at his request, is not a signing by the party to be charged. 2 Bingh. N. C. 776. Nor is the signature by a clerk sufficient. 17 C. B. 147. Nor is a promise in the handwriting of the defendant sufficient; it must be signed by him. 12 Ad. & E. 492. And a request by the defendant to the plaintiff to get certain moneys due the defendant from third parties, does not charge the party making the request, because it is not apparent that the defendant intended to render himself personally liable. 8 Ad. & E. 221; 5 Carr. & P. 209. Since this statute, mutual accounts will not be taken out of the operation of the statute by any item on either side, unless the item be the subject of a new promise in writing. 2 Crompt. M. & R. Exch. 45. The effect of part payment is left by the statute as before. 10 Barnew. & C. 122. And the fact of part payment, it is now held, contrary to some earlier cases, may be proved by unsigned written evidence, 4 Eng. L. & Eq. 514; or by oral testimony. 9 Metc. Mass. 485; 30 Me. 353.

60. *A new promise by an infant* for necessaries revives the debt. 28 Eng. L. & Eq. 276. And where an infant had jointly with an adult made a note, and a part payment thereon, an oral promise, after arriving at his majority, to pay the balance, was held valid against him, but not against the adult. 5 Metc. Mass. 162. But this doctrine as to the effect of a new promise is chiefly applicable to cases of indebtedness, and has no application whatever in cases of contracts to do or not to do an act, nor in cases of tort, 2 Campb. 157; 11 Wheat. 309; 16 Ga. 144; 1 Barnew. & Ald. 92; nor to an action on a judgment. 11 Ired. No. C. 427.

AS TO REAL PROPERTY AND RIGHTS.

61. The general if not universal limitation of the right to bring action or to make entry, is to twenty years after the right to enter or to bring the action accrues, *i.e.* to twenty years after the cause of action accrues. As the rights and interests of different parties in real property are various, and attach at different periods, and successively, it follows that there may be a right of entry in a particular person, accruing many years after the expiration of the twenty years, and after the expiration of antecedent rights.

62. Thus, if an estate be limited to one in tail, and the tenant in tail be barred of his remedy by the statute, yet, as the statute only affects the remedy, and the right or estate still exists, the right of entry in the remainder-man does not accrue until the failure of the issue of the tenant in tail, which may not happen for many years. The estate still existing in the tenant in tail or his issues supports and keeps alive the remainder-man's right of action till the expiration of twenty years after his right of entry accrues. 1 Burr. 60.

The laches of the owner of a prior right in an estate cannot prejudice the owner of a subsequently accruing right in the same estate. 8 East, 551; 4 Johns. N. Y. 390; 15 Mass. 471. And where there exist two distinct rights of entry in the same person, he may claim under either. He is not obliged to enter under his earlier right. 1 Pick. Mass. 318; 9 Mass. 508; 5 Carr. & P. 563.

63. When an *actual entry is necessary* prior to the bringing an action, it must be upon the land in question, 13 East, 489; 3 Me. 316; unless prevented by force or fraud, when a *bona fide* attempt is equivalent. 4 Johns. N. Y. 389. If the land lie in two counties, there must be an entry in each county; though if all the land be in one county an entry upon part, with a declaration of claim to the whole, is sufficient. 3 Johns. Cas. N. Y. 115. The intention to claim the land is essential to the sufficiency of the entry. 3 Me. 316; 9 Watts, Penn. 28. An entry may be made by the guardian for his ward, by the remainder-man or reversioner for the tenant, and the tenant for the reversioner or remainder-man, being parties having privity of estate. 9 Coke, 106. So a *cestui que trust* may enter for his trustee, 1 T. Raym. 716; and an agent for his principal, 11 Penn. St. 212, even without original authority, if the act be adopted and ratified. 9 Penn. St. 40. And the entry of one joint-tenant, coparcener, or tenant in common will inure to the benefit of the other. 10 Watts, Penn. 296.

64. *Adverse possession* for twenty years gives title against the true owner; but it must be open, uninterrupted, and with intent to claim against the true owner. The possession must be an actual occupation, so open that the true owner ought to know it and must be presumed to know it, and in such manner and under such circumstances as amount to an invasion of his rights, thereby giving him cause of action. 11 Gill & J. Md. 371; 5 Cow. N. Y. 219.

65. It must be *open*, so that the owner may know it or might know of it. Many acts of occupation would be unequivocal, such as fencing the land or erecting a house on it, 7 Wheat. 59: actual improvement and cultivation of the soil, 1 Johns. N. Y. 156; digging stones and cutting timber from time to time, 14 East, 332; driving piles into the soil covered by a mill-pond, and thereon erecting a building, 6 Mass. 229; cutting roads into a swamp, and cutting trees and making shingles therefrom, 1 Ired. No. C. 56; and setting fish-traps in a non-navigable stream, building dams across it, and using it every year during the entire fishing-season for the purpose of catching fish. 1 Ired. No. C. 535. But entering upon unenclosed flats, when covered by the tide, and sailing over them with a boat or vessel for the ordinary purposes of navigation, is not an adverse possession, 1 Cush. Mass. 395; though the filling up the flats, and building a wharf there,

and using the same, would be if the use were exclusive. 1 Cush. Mass. 313. Nor is the entering upon a lot and marking its boundaries by splitting the trees, 14 N. H. 101; nor the getting rails and other timber for a few weeks each year from timber-land, 4 Jones, No. C. 295; nor cattle ranging, 1 Hayw. No. C. 311; nor the overflowing of land by the stoppage of a stream, 4 Dev. No. C. 158; nor the survey, allotment, and conveyance of a piece of land, and the recording of the deed; unless there is open occupation. 22 Me. 29.

66. It must be *continuous* for the whole period. If one trespasser enters and leaves, and then another trespasser, a stranger to the former and without purchase from or respect to him, enters, the possession is not continuous. 2 Serg. & R. Penn. 240; 9 B. Monr. Ky. 253. But a slight connection of the latter with the former trespasser, as by a purchase by parol contract, will be sufficient to give the possession continuity. 31 Me. 583; 6 Penn. St. 355. And so will a purchase at a sale or execution. 5 Penn. St. 126. To give continuity to the possession by successive occupants, there must be privity of estate, 5 Metc. Mass. 15; and such a privity that each possession may be referred to one and the same entry: as that of a tenant to his landlord, or of the heir of a disseisor to his ancestor. 1 Rice, So. C. 10.

67. So an administrator's possession may be connected with that of his intestate, 11 Humphr. Tenn. 457; and that of a tenant holding under the ancestor, with that of the heir. Cheeves, So. C. 200. In some states, however, it is held that whether the possession be held uniformly under one title, or at different times under different titles, can make no difference, provided the claim of title is always adverse: as in Connecticut, 3 Day, Conn. 269, and in Kentucky. 1 A. K. Marsh, Ky. 4.

68. The possession must be *adverse*. If it be permissive, 2 Jac. & W. Ch. 1, or by mistake, 3 Watts, Penn. 280, or unintentional, 11 Mass. 296, or confessedly in subordination to another's right, 5 Barnew. & Ald. 223, it does not avail to bar the statute. If the occupation is such and by such a person that it may be for the true owner, it will be presumed to be for him, unless it be shown that the adverse claimant gave notice that he held adversely and not in subordination. 1 Batt. Ch. Ir. 373; 1 Speers, So. C. 225. And this notice must be clear and unequivocal. If the act of the tenant or adverse claimant may be a trespass as well as a disseisin, the true owner may elect which he will consider it, regardless of the wishes of the trespasser, who cannot be allowed to qualify his own wrong. 4 Mas. C. C. 329.

69. So that if the adverse claimant sets up his trespasses as amounting to an adverse possession, the true owner may reply they are no disseisin, but trespasses only; while, on the other hand, the true owner may elect, if he please, for the sake of his remedy, to treat them as a disseisin. 19 Me. 383; 8 N. H. 67. This is called a disseisin by election, in distinction from a disseisin in fact,—a distinction which was taken for the benefit of the owner of the land. Whenever the act done of itself necessarily works an actual disseisin, it is a disseisin in fact: as, when a tenant for years or at will conveys in fee. On the other hand, those acts which are susceptible of being made a disseisin by election are no disseisin till the election of the owner makes them so: as, when a tenant at will, instead of conveying in fee, makes a lease for years. 1 Johns. Cas. N. Y. 36.

70. The claim by adverse possession must have some definite boundaries. 1 Metc. Mass. 528; 10 Johns. N. Y. 447. There ought to be something to indicate to what extent the adverse possessor claims. A sufficient inclosure will establish the limits. 7 Serg. & R. Penn. 129. But it must be an actual, visible, and substantial inclosure. 4 Bibb, Ky. 544; 2 Aik. Vt. 364; 7 Mo. 166. An inclosure on three sides, by a trespasser as against the real owner, is not enough, 8 Me. 239; 5 Md. 256; nor is an unsubstantial brush fence, 10 N. H. 397; nor one formed by the lapping of fallen trees. 3 Metc. Mass. 125; 2 Johns. N. Y. 230. And where the claim is by possession only, without any color or pretence of title, it cannot extend beyond the actual limits of the inclosure. 3 Harr. & M'H. Md. 621; 5 Conn. 305; 28 Vt. 142; 6 Ind. 273. And this must be fixed, not roving from part to part. 11 Pet. 53.

71. *Extension of the inclosure* within the time limited will not give title to the part included in the extension. 2 Harr. & J. Md. 391; 8 Ill. 238. Where, however, the claim rests upon color of title as well as possession, the possession will be regarded as coextensive with the powers described in the title-deed, 11 Pet. 41; 4 Mas. C. C. 330; 3 Ired. No. C. 578; 2 Ill. 181; 13 Johns. N. Y. 406; 5 Dan. Ky. 232; 4 Mass. 416, unless the acts or declarations of the occupant restrict it. 22 Vt. 357. But the constructive possession of land arising from color of title cannot be extended to that part of it whereof there is an actual adverse possession, whether with or without a proper title, 28 Penn. St. 124; 16 B. Monr. Ky. 72; 1 Ired. No. C. 56; 4 Sneed, Tenn. 584; 18 Vt. 294; nor will a subsequent conflicting possession, whether under color of title or not, be extended by construction beyond the limits of the actual adverse possession for the purpose of defeating a prior constructive possession. 6 Cow. N. Y. 677; 11 Vt. 521.

72. Nor can there be any constructive adverse possession against the owner when there has been no actual possession which he could treat as a trespass and bring suit for. 3 Rich. So. C. 101. A trespasser who afterwards obtains color of title can claim constructively only for the time when the title was obtained. 16 Johns. N. Y. 293. This doctrine of constructive possession, however, applies only to land taken possession of for

the ordinary purposes of cultivation and use, and not to a case where a few acres are taken possession of in an uncultivated township for the mere purpose of thereby gaining title to the entire township. 22 Vt. 388; 1 Cow. N. Y. 286; 6 B. Monr. Ky. 463.

73. In fine, with a little relaxation of strictness in favor of the owner of wild, remote, and uncultivated lands, 4 Mass. 416, to gain title by possession it must be adverse, open, or public and notorious, and not clandestine and secret, exclusive, uninterrupted, definite as to boundaries, and fixed as to its locality. *Color of title* is any thing in writing, however defective, connected with the title, which serves to define the extent of the claim, 19 Ga. 8; 18 Johns. N. Y. 40; 8 Cow. N. Y. 589; and it may exist even without writing, if the facts and circumstances show clearly the character and extent of the claim. 17 Ill. 498; 6 Ind. 273.

74. A fraudulent deed, if accepted in good faith, gives color of title, 8 Pet. 244; so does a defective deed, 4 Harr. & M'H. Md. 222, unless defective in defining the limits of the land, 1 Cow. N. Y. 276; so does an improperly executed deed, if the grantor believe he has title thereby, 6 Metc. Mass. 337; so does a sheriff's deed, 7 B. Monr. Ky. 236; 22 Ga. 56; 7 Hill, N. Y. 476; and a sheriff's return on a *fieri facias*, 1 Dev. & B. No. C. 586; and a deed from a collector of taxes, 4 Ired. No. C. 164; and a deed from an attorney who has no authority to convey, 2 Murph. No. C. 14; and a deed founded on a voidable decree in chancery, 1 Meigs, Tenn. 207; and a deed, by one tenant in common, of the whole estate, to a third person, 4 Dev. & B. No. C. 54; and a deed by an infant, 4 Dev. & B. No. C. 289; and a bond for a deed. 5 Ga. 6.

75. So possession, in good faith, under a void grant from the state, gives color of title. 4 Ga. 115. And if A purchases under an execution against B, takes a deed, and on the same day conveys to B, though the purchase and conveyance be at the request of B, and no money is paid, B has a colorable title. A will gives color of title; but if it has but one subscribing witness, and has never been proved, it does not. 5 Ired. No. C. 711. Nor does the sale by an administrator of the land of his solvent intestate, under a license of the probate court, unless accompanied by a deed from the administrator. 34 N. H. 544. Nor does the sale of property by an intestate to his son, of which the possession is held by the wife, who is administratrix, while the son lives in the family, as against the intestate's creditors. 30 Miss. 472.

76. If there is no written title, then the possession must be under a *bonâ fide* claim to a title existing in another. 3 Watts, Penn. 72. Thus, if under an agreement for the sale of land the consideration be paid and the purchaser enter, he has color of title, 5 Metc. Mass. 173; though if the consideration be not paid, or be paid only in part, he has not, 2 Bail. So. C. 59; 11 Ohio, 455; 20 Ga. 311; because the fair inference in such case is that the purchaser is by consent of the grantor, and holds subordinately to him until the payment of the full consideration. There is, in fact, a mutual understanding, and a mutual confidence, amounting to an implied trust. 9 Wheat. 241; 12 Mass. 325.

77. In New York, a parol gift of land is said not to give color of title, 1 Johns. Cas. N. Y. 36; but it is at least doubtful if that is the law of New York, 6 Cow. N. Y. 677; and in Massachusetts and other states, a parol gift is held to give color of title if accompanied by actual entry and possession. It manifests, equally with a sale, the intent of the donee to enter, and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken. 6 Metc. Mass. 337; 13 Conn. 227; 2 B. Monr. Ky. 282. The element of good faith, and the actual belief on the part of the claimant that he has title, give the claimant by color of title his advantage over the mere trespasser, who, as we have seen, is restricted carefully to his actual occupation; and it may be said, generally, that whenever the facts and circumstances show that one in possession, in good faith and in the belief that he has title, holds for himself and to the exclusion of all others, his possession must be adverse, and according to his assumed title, whatever may be his relations in point of interest or priority, to others. 4 Hayw. Tenn. 182; 5 Pet. 440. When a man enters under such a claim of title, his entry on a part is an entry on the whole; but if he claims no such title he has no seisin by his entry but by the ouster of him who was seised, which can only be by the actual and exclusive occupation of the land. 4 Mass. 416.

78. In cases of mixed possession, or a possession at the same time by two or more persons, each under a separate colorable title, the seisin is in him who has the prior title, 4 Wheat. 213; 20 How. 235; for, though there may be a concurrent possession, there cannot be a concurrent seisin; and, one only being seised, the possession must be adjudged to be in him, because he has the better right. 3 Mass. 219; 3 Me. 216. Of course, in such a case, if one has color of title, and the other is a mere trespasser or intruder, the possession is in him who has color of title. 2 Harr. & J. Md. 112; 4 Serg. & R. Penn. 465; 5 Du. N. Y. 272; 2 Bail. So. C. 101.

79. But, with all the liberality shown by the courts in giving color of title, it has been denied that a grant from a foreign government confers it, on the ground that the possession under such a title was rather a question between governments than individuals. Thus, the courts of New York have refused to recognize claims under a grant of the French government in Canada, made prior to the treaty between Great Britain and France in 1763. 4 Johns. N. Y. 163; 12 *id.* 365. But the soundness of the exception has since been questioned in the same court, 8 Cow. N. Y. 589; and the grant of a foreign government has been expressly held to give color

of title in Pennsylvania, even as against one claiming under her own grant. 2 Watts, Penn. 37. And, for political reasons, it has been held that a grant from the Indians gives no color of title. 8 Wheat. 571.

80. *One joint-tenant, tenant in common,* or *coparcener* cannot dismiss another but by actual ouster, as the seisin and possession of one are the seisin and possession of all, and inure to the benefit of all. 2 Salk. 422; 7 Wheat. 59; 12 Metc. Mass. 357; 11 Gratt. Va. 505. Actual ouster implies exclusion or expulsion. No force is necessary; but there must be a denial of the right of the co-tenant, Cowp. 217; 1 Mass. 323; 1 Me. 89; 12 Wend. N. Y. 404; and, like a grant, after long lapse of time it may be presumed, 1 East, 568; 3 Metc. Mass. 100; 10 Serg. & R. Penn. 182, and inferred from acts of an unequivocal character importing a denial. 3 Watts, Penn. 77; 1 Me. 89. But the possession of the grantee of one tenant in common is adverse to all. 13 B. Monr. Ky. 436; 3 Metc. Mass. 101; 4 Paige, Ch. N. Y. 178. The possession of the tenant is likewise the possession of his landlord, and cannot be adverse unless he distinctly renounce his landlord's title. 2 Campb. 11; 2 Binn. Penn. 468; 10 N. Y. 9.

81. Mere non-payment of rent during the time limited, there having been no demand, does not prejudice the landlord's right to enter and demand it, even though the lease contains a clause giving the right of re-entry in case of non-payment of rent, 7 East, 299; 3 Hill, N. Y. 344; and payment of rent is conclusive evidence that the occupation of the party paying was permissive and not adverse. 3 Barnew. & C. 135. The defendant in execution after a sale is a quasi tenant at will to the purchaser. 1 Johns. Cas. N. Y. 153; 3 Mass. 128. And a mere holding over after the expiration of a lease does not change the character of the possession. 2 Gill & J. Md. 173. Nor does the assignment of the lease, or a sub-letting. The assignee and sub-lessees are still tenants, so far as the title by adverse possession is concerned. 4 Serg. & R. Penn. 467; 6 Cow. N. Y. 751.

82. If the tenant convey the premises, as we have before seen, the landlord may treat him as a disseisor by election; but the tenant cannot set up the act as the basis of a title by adverse possession, 5 Cow. N. Y. 123, unless in the case where the relation of landlord and tenant subsists by operation of law; as where one makes a grant and by the omission of the word "heirs" an estate for life only passes. In such case, after the death of the tenant for life an adverse possession may commence. 7 Cow. N. Y. 323. So in case the tenant has attorned to a third person and the landlord has assented to the attornment. 6 Cow. N. Y. 133. But a mere parol disclaimer, by the lessor, of the existence of the relationship, and of all right in the premises, is not equivalent to an attornment. To admit such disclaimer would lead to fraud and perjury, and is in direct violation of the principles of the Statute of Frauds. 7 Johns. N. Y. 186; 16 *id.* 305; 5 Cow. N. Y. 74.

83. The *possession of the mortgagor* is not adverse to the mortgagee, the relation being in many respects analogous to that of landlord and tenant, 11 Mass. 125; 30 Miss. 49; 27 Penn. St. 504; 1 Dougl. 275; not even if the possession be under an absolute deed, if intended as a mortgage. 19 How. 289. The tenancy is sometimes like a tenancy for years, Croke Jac. 659; sometimes like a tenancy at will, 1 Dougl. 22; and sometimes like a tenancy at sufferance, 1 Salk. 245; but, whatever it may be like, it is always presumed to be by permission of the mortgagor until the contrary be shown. The assignee of the mortgagor, with notice, is in the same predicament with the mortgagor; but if he purchase without notice, his possession will be adverse. 2 Rand. Va. 93; 2 No. C. Law Rep. 93.

84. But, although the possession of the mortgagor be not adverse so as to give title under the statute against the mortgagee, the courts have nevertheless practically abrogated this rule, by holding that where the mortgagor has held during the statutory limit, and has meantime paid no interest nor otherwise recognized the rights of the mortgagee, this raises a presumption that the debt has been paid, and is a good defence in an action to foreclose. 12 Johns. N. Y. 242; 9 Wheat. 497; 8 Metc. Mass. 87; 19 Vt. 526; 3 Ga. 850; 6 B. Monr. Ky. 479. And the reasons for so holding seem to be equally cogent with those upon which rests the well-settled rule that, with certain exceptions, the mortgagee's possession for the time limited bars the mortgagor's right to redeem. 2 Jac. & W. Ch. 434; 1 Johns. Ch. N. Y. 385; 9 Wheat. 489; 3 Harr. & M'H. Md. 328; 2 Sumn. C. C. 401; 13 Ala. N. s. 246; 20 Me. 269.

85. The exceptions are—*first,* where an account has been settled within the limited time, 2 Vern. Ch. 377; 5 Brown, Parl. Cas. 187; *second,* where within that time the mortgagee, by words spoken or written, or by deed, has clearly and unequivocally recognized the fact that he held as mortgagee, 2 Brown, Ch. 397; 1 Johns. Ch. N. Y. 594; 10 Wheat. 152; 3 Sumn. C. C. 160, by which recognition a subsequent purchaser, with actual or constructive notice of the mortgage, is barred, 7 Paige, Ch. N. Y. 465; *third,* where no time is fixed for payment, as in the case of a mortgage where the mortgagee is by agreement to enter and hold till he is paid out of the rents and profits, 1 Vt. 418; *fourth,* where the mortgagor continues in possession of the whole or any part of the premises, 1 Sel. Ca. in Ch. 55; 1 Johns. Ch. N. Y. 594; and, *fifth,* where there is fraud on the part of the mortgagee, or at the time of the inception of the mortgage he has taken advantage of the necessities of the mortgagor. 1 Johns. Cas. N. Y. 402, 595.

86. *The trustee of real estate,* under a direct trust, as well as of personal, as we have seen, holds for his *cestui que trust,* and the latter is not barred of his right unless it be

denied and repudiated by the trustee; in which case the statute will begin to run from the denial or repudiation. 5 How. 233; 3 Gray, Mass. 1. In cases of implied construction and resulting trusts, the rule is also the same as with reference to personal property. The statute is a bar even in cases where the conduct of the trustee was originally fraudulent. 5 Johns. Ch. N. Y. 184.

87. *Disabilities existing* at the time the right descends or the cause of action accrues, prevent the running of the statute, till their removal; but only such as exist at that time. When the statute once begins to run, no subsequent disability can stop it. 1 How. 37; 4 Mass. 182. And there is no distinction in this respect between voluntary and involuntary disabilities. 4 Term, 301; 3 Brev. So. C. 286. The disability of one joint-tenant, tenant in common, or coparcener does not inure to the benefit of the other tenants. 8 Johns. N. Y. 262; 4 Day, Conn. 265; 2 Taunt. 441; 10 Ohio, 11; 10 Ga. 218; 5 Humphr. Tenn. 117; 4 Strobh. Eq. So. C. 167; 13 Serg. & R. Penn. 350.

88. It would be wholly impracticable here to give a compend, or even an analysis, of the different statutes of the several states. Nor, indeed, would such an analysis be of much service, as, from frequent revision, changes, and modifications, what is the law to-day might not be the law to-morrow, and it could not be referred to, therefore, as a reliable index of the actual state of the law in any particular state. As, however, the statutes of the several states are substantially and in principle the same, differing only in immaterial details, and as all are derived directly or indirectly from the same source, it will doubtless prove both convenient and useful to be able to refer to the text of the original statutes which have been the occasion of so much comment. These are, accordingly, appended, except stat. 3 & 4 Will. IV. c. 27, of which there is room only for a synopsis.

Statute 21 *James I. c.* 16

89. For quieting of men's estates, and avoiding of suits, be it enacted by the king's most excellent majesty, the lords spiritual and temporal, and commons, in this present parliament assembled, that all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued or taken within twenty years next after the end of this present session of parliament: and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments; (2) and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding.

II. Provided, nevertheless, That if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be, at the time of the said right or title first descended, accrued, come or fallen within the age of one-and-twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action or make his entry as he might have done before this act: (2) so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action, *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say,) (2) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and

not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said action upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

IV. And, nevertheless, be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

V. And be it further enacted, That in all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; (2) and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same.

VI. And be it further enacted by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, after the end of this present session of parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any farther increase of the same, any law, statute, custom, or usage to the contrary in any wise notwithstanding.

VII. Provided, nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or shall be, at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should be done.

90. *Statute* 9 *Geo. IV. c.* 14, *known as Lord Tenterden's Act. Sect.* 1. Whereas by an act passed in England in the twenty-first year of the reign of King James the First, it was among other things enacted that all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after; and whereas a similar enactment is contained in an act passed in Ireland in the tenth year of the reign of King Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions, and to make a provision for giving effect to the said enactments and to the intention thereof: Be it therefore enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint-contractors, or executors or administrators of any contractor, no such joint-contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided, always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person

whatsoever: Provided also, that in actions to be commenced against two or more such joint-contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint-contractors or executors or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Sect. 2. If any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued and issue be joined on such plea; and it shall appear at the trial that the action could not by reason of the said recited acts, or of this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Sect. 3. No indorsement or memorandum of any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Sect. 4. That the said recited act, and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

91. *Statute* 3 *&* 4 *Will. IV. c.* 27. Section 1. The time within which actions to recover reality, etc. must be brought, is regulated by the statute 3 & 4 Will. IV. c. 27. By the first section of the act the meaning of the words in the act is defined; it enacts, *inter alia*, that the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a *spiritual or eleemosynary corporation sole*), and also to any share or interest in them, whether the same be a freehold or chattel interest, and whether they be of freehold, copyhold, or any other tenure; and that the word "rent" shall extend to all heriots, services, and suits for which a distress may be made, and to annuities charged upon land (except modusses or compositions belonging to a *spiritual or eleemosynary corporation sole*), and that the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as to an individual; and that the singular number shall embrace the plural, and the masculine gender the feminine.

Section 2 enacts that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover *any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued.*

Sections 3, 4, 5, 6, 7, 8, and 9, define the period from which the statute begins to run (where a party is not under disability), which may be thus briefly stated: viz., where the claimant was, in respect of the estate or interest claimed, himself once in possession or claims through a party who was once in possession of the property or in receipt of the rents or profits, the statute runs from the time when he was dispossessed, or discontinued such possession or receipts.

Where the claimant claims on the death of one who died in possession of the land or receipt of the rents or profits thereof, the statute runs from the time of the death, and this even in the case of an administrator, by section 6, which see, *post.*

Where the claimant derives his right under any instrument (other than a will), the statute runs from the time when under the instrument he was entitled to the possession.

In the case of remainders or reversions, the statute runs from the time when the remainder or reversion becomes an estate in possession.

Where the claimant claims by reason of a forfeiture or breach of condition, the statute runs from the time of the forfeiture incurred or breach of condition broken.

But section 4 provides *that when any right to make any entry or distress, or to bring any action to recover any land or rent, by reason of any forfeiture or breach of condition*, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, *the right to make an entry or distress, or bring an action* to recover such land or rent, *shall be deemed to have first accrued* in respect of such estate or interest *at the time when the same shall have become an estate or interest in possession*, as if no such forfeiture or breach of condition had happened.

And by section 8 it is provided that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Section 6 enacts that, *for the purpose of*

this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, *shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of letters of administration.*

In case of a tenancy from year to year (without lease in writing), the statute runs from the end of the first year *or* the last payment of rent (which shall *last* happen).

In case of a lease in writing reserving more than 20*s.* rent, if the rent be received by a party wrongfully claiming the land, subject to the lease, and no payment of the rent be afterwards made to the party rightfully entitled, the statute runs from the time when the rent was first so received by the party wrongfully claiming; and the party rightfully entitled has no further right on the determination of the lease.

In the case of a tenancy at will, the statute runs from the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, *at which time the tenancy at will shall be deemed to have determined.* But the clause provides that no mortgagor or *cestui que trust* shall be deemed a tenant at will, within the meaning of the act, to his mortgagee or trustee.

Section 10 enacts that no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

Section 11 enacts that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.

Section 12 enacts that when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

Section 13 enacts that when a younger brother, or other relation, of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Section 14 provides and enacts that when *any acknowledgment* of the title of the person entitled to any land or rent shall have been given *to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in respect of such rent, then such possession or receipt* of or by the person by whom such acknowledgment shall have been given, *shall be deemed*, according to the meaning of this act, *to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right* of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, *shall be deemed to have first accrued* at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

Section 15 gives a party claiming land or rent, of which he had been out of possession more than twenty years, five years from the time of passing the act within which to enforce his claim, where the possession was not adverse to his right or title at the time of passing the act.

By section 16, persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, are to be allowed ten years from the termination of their disability or death to enforce their rights.

But by section 17, even though a person be under disability when his claim first accrues, he must enforce it within forty years, even though the disability continue during the whole of the forty years.

And by section 18 no further time is to be allowed for a succession of disabilities.

By section 19, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any adjacent island (being part of the dominions of his majesty), are to be deemed beyond seas.

By section 20, when the right of any person to recover any land or rent to which he may have been entitled, or an estate or interest in possession, shall have been barred by time, any right in reversion, or otherwise, which such person may during that time have had to the same land or rent, shall also be barred, unless in the mean time the land or rent shall have been recovered by some person entitled to an estate which shall have taken effect after or in defeasance of such estate or interest in possession.

Section 21 enacts that when the right of a tenant in tail of any land or rent shall have been barred, the right of any person claiming any estate or interest which such tenant in tail might have barred, shall also be barred.

Section 22 enacts that when any tenant in tail shall have died before the bar as against him is complete, no person claiming an estate or interest, etc., which such tenant in tail might have barred, shall enforce his claim but within the period within which the tenant in tail, had he lived, might have recovered.

Section 23 makes possession under an assurance by a tenant in tail, which shall not operate to bar the remainder, a bar to such remainders at the end of twenty years from the time when such assurance, if then exe

cuted, would, without the consent of any other person, have barred them.

Section 24 enacts that no suit in equity shall be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Section 25 enacts that in cases of *express trust* the right of the *cestui que trust*, or any person claiming through him, shall be deemed to have first accrued at the time when the land or rent may have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only against such purchaser, or any person claiming through him.

Section 26 enacts that in case of fraud the right shall be deemed to have first accrued at the time when such fraud shall be, or with reasonable diligence might have been, discovered, but that nothing in that clause shall affect a *bonâ fide* purchaser for value, not assisting in, and, at the time he purchased, not knowing, and having no reason to believe, such fraud had been committed.

Section 27 provides that the act shall not prevent the courts of equity refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by the act.

Section 28 enacts that a mortgagor shall be barred by twenty years' possession of the mortgagee, unless there be an acknowledgment in writing.

Section 29 enacts that no land or rent shall be recovered by an ecclesiastical or eleemosynary corporation sole, but within the period during which two persons in succession shall have held the benefice, etc. in respect whereof such land or rent is claimed, and six years after a third person shall have been appointed thereto, if such two incumbencies and six years taken together shall amount to the full period of sixty years, but if they do not amount to sixty years, then during such further time in addition to the two incumbencies and six years as will make up the sixty years.

Section 30 enacts that no advowson or right of presentation shall be recovered but within the period during which three clerks in succession shall have held the same (all of whom shall have obtained possession thereof adversely to the right of the party claiming), if the three incumbencies shall together amount to sixty years, but if they do not amount to sixty years, then after such further time as with the incumbencies will together make up sixty years.

Section 31 provides that when on an avoidance after a clerk shall have obtained possession of a benefice adversely to the right of the patron, a clerk shall be presented or collated by reason of a lapse, such last-mentioned presentation shall be deemed adverse to the patron, but if such presentation be after promotion to a bishopric, it shall not be adverse to the patron.

Section 32 enacts that every person claiming a right in an advowson, which the tenant in tail thereof might have barred, shall be deemed a person claiming through such tenant in tail.

Section 33 enacts that an advowson shall not be recovered after one hundred years from the time at which a clerk shall have obtained possession thereof adversely to the right of the claimant, unless a clerk has subsequently had possession of the benefice on the presentation of some person having the same right.

Section 34 enacts that at the determination of the period limited by this act to any person for making any entry or distress, or bringing any writ of *quare impedit*, or other action or writ, *the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.*

Section 35 enacts that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

By section 36, all real and mixed actions are abolished after the 31st of December, 1834, except dower, right of dower, *quare impedit*, and ejectment.

But section 37 enables any person not having a right of entry on the 31st of December, 1834, to bring any real or mixed action, to which he was then entitled, at any time before the 1st of June, 1835.

And section 38 further provides that when on the 1st day of June, 1835, any person whose right of entry shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any real action, he may maintain the same after the 1st day of June, 1835, *but only within the period during which he might under the act have made an entry, if his right of entry had not been so taken away*

And by section 39, no descent cast, discontinuance, or warranty shall, after the 31st of December, 1833, toll or defeat any right of entry or action for the recovery of land.

Section 40 enacts that *money secured by mortgage, judgment, or lien, or otherwise, charged upon or payable out of any land or rent at law or in equity, or any legacy*, shall not be recovered but within twenty years next after a present right shall have accrued to some person capable of giving a discharge for or releasing the same, unless there have been part payment in the mean time of principal or interest, or an acknowledgment in writing have been given, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, in which case the time runs from such payment or acknowledgment, or the last of them, if more than one.

Section 41 enacts that no arrears of dower, or any damages on account of such arrears

shall be recovered but within six years before commencement of action or suit.

Section 42 enacts that no arrears of rent, or of interest in respect of any money charged upon any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered but within six years next after the same became due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent, *except* where any prior mortgagee or incumbrancer shall have been in possession of the land mortgaged, or profits thereof, within one year next before any action or suit by a subsequent mortgagee or incumbrancer of the same land; in which case such subsequent mortgagee or incumbrancer may in such action or suit recover all arrears of interest which shall have become due during the time that the prior mortgagee or incumbrancer was in possession of the land or profits thereof.

Section 43 extends the act to the spiritual courts.

Section 44 enacts that the act shall not extend to Scotland, and that it shall not, so far as it relates to advowsons, extend to Ireland.

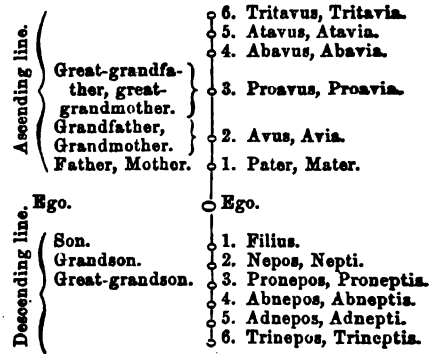
Of Criminal Proceedings. The time within which indictments may be found, or other proceedings commenced, for crimes and offences, varies considerably in the different jurisdictions. In general, in all jurisdictions, the length of time is extended in some proportion to the gravity of the offence. Indictments for murder, in most, if not all, of the states, may be found at any time during the life of the criminal after the death of the victim. Proceedings for less offences are to be commenced within periods varying from ten years to sixty days.

Of Estates. A circumscription of the quantity of time comprised in any estate. 1 Preston, Est. 25.

The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take. The term is used by different writers in different senses. Thus, it is used by Lord Coke to denote the express definition of an estate by the words of its creation, so that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. Coke, Litt. 23 *b*. In the work of Mr. Sanders on Uses, the term is used, however, in a broader and more general sense, as given in the second definition above. 1 Sanders, Uses, 4th ed. 121 *et seq.* And, indeed, the same writers do not always confine themselves to one use of the term; though the better usage is undoubtedly given by Mr. Stephen in his note above cited. And see Fearne, Cont. Rem. Butler's note *n*, 9th ed. 10; 1 Stephen, Comm. 5th ed. 304, note. For the distinctions between limitations and remainders, see CONDITIONAL LIMITATION; CONTINGENT REMAINDER.

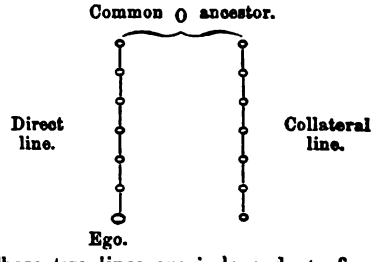
Consult, generally, Angell, Ballantine, Price, on Limitations; Flintoff, Washburn, on Real Property; Barbour, Bishop, on Criminal Law.

LINE. In Descents. The series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. See CONSANGUINITY; DEGREE.



2. The line is either direct or collateral. The direct line is composed of all the persons who are descended from each other. If, in the direct line, any one person is assumed as the *propositus*, in order to count from him upwards and downwards, the line will be divided into two parts, the ascending and descending lines. The ascending line is that which, counting from the *propositus*, ascends to his ancestors, to his father, grandfather, great-grandfather, etc. The descending line is that which, counting from the same person, descends to his children, grandchildren, great-grandchildren, etc. The preceding table is an example.

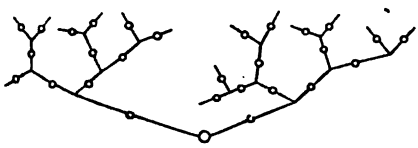
3. The collateral line, considered by itself and in relation to the common ancestor, is a direct line; it becomes collateral when placed alongside of another line below the common ancestor, in whom both lines unite. For example:



These two lines are independent of each other: they have no connection except by their union in the person of the common ancestor. This reunion is what forms the relation among the persons composing the two lines.

4. A line is also *paternal* or *maternal*. In the examination of a person's ascending line, the line ascends first to his father, next to his paternal grandfather, his paternal great-grandfather, etc., so on from father to father;

this is called the paternal line. Another line will be found to ascend from the same person to his mother, his maternal grandmother, and so from mother to mother: this is the maternal line. These lines, however, do not take in all the ascendants: there are many others who must be imagined. The number of ascendants is double at each degree, as is shown by the following diagram:



See 2 Blackstone, Comm. 200, b. 2, c. 14; Pothier, Des Successions, c. 1, art. 3, § 2; ASCENDANTS.

Estates. The division between two estates. Limit: border; boundary.

5. When a line is mentioned in a deed as ending at a particular monument (*q. v.*), it is to be extended in the direction called for, without regard to distance, until it reach the boundary. 1 Tayl. No. C. 110, 303; 2 *id.* 1; 2 Hawks, No. C. 219; 3 *id.* 21. And a marked line is to be adhered to although it depart from the course. 7 Wheat. 7; 2 Ov. Tenn. 304; 3 Call. Va. 239; 4 T. B. Monr. Ky. 29; 7 *id.* 333; 2 Bibb, Ky. 261; 4 *id.* 503. See, further, 2 Dan. Ky. 2; 6 Wend. N. Y. 467; 1 Bibb, Ky. 466; 3 Murph. No. C. 82; 13 Pick. Mass. 145; 13 Wend. N. Y. 300; 5 J. J. Marsh. Ky. 587.

6. Where a number of persons settle simultaneously or at short intervals in the same neighborhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called *consentible lines*. These lines, when fairly agreed upon, have been sanctioned by the courts; and such agreements are conclusive upon all persons claiming under the parties to them, with notice, but not upon *bonâ fide* purchasers for a valuable consideration, without notice, actual or constructive. 3 Serg. & R. Penn. 323; 5 *id.* 273; 17 *id.* 57; 9 Watts & S. Penn. 66.

7. Lines fixed by compact between nations are binding on their citizens and subjects. 11 Pet. 209; 1 Ov. Tenn. 269; 1 Ves. Sen. Ch. 450; 1 Atk. Ch. 2; 2 *id.* 592; 1 Chanc. Cas. 85; 1 P. Will. 723–727; 1 Vern. Ch. 48; 1 Ves. Ch. 19; 2 *id.* 284; 3 Serg. & R. Penn. 331.

Measures. A line is a lineal measure, containing the one-twelfth part of an inch.

LINEA RECTA (Lat.). The perpendicular line; the direct line. The line of ascent, through father, grandfather, etc., and of descent, through son, grandson, etc. Coke, Litt. 10, 158; Bracton, fol. 67; Fleta, lib. 6, c. 1, § 11. This is represented in a diagram by a vertical line.

Where a person springs from another immediately, or mediately through a third person, they are said to be in the direct line (*linea recta*), and are called ascendants and descendants. Mackeldey, Civ. Law, § 129.

LINEA TRANSVERSALIS (Lat.). A line crossing the perpendicular lines. Where two persons are descended from a third, they are called collaterals, and are said to be related in the collateral line (*linea transversa* or *obliqua*).

LINEAL. In a direct line.

LINEAL WARRANTY. A warranty by ancestor from whom the title did or might have come to heir. 2 Sharswood, Blackst. Comm. 301; Rawle, Cov. 30; 2 Hilliard, Real Prop. 360. Thus, a warrant by an elder son during lifetime of father was lineal to a younger son, but a warranty by younger son was collateral to elder; for, though the younger might take the paternal estate through the elder, the elder could not take it through the younger. Litt. § 703. Abolished. 3 & 4 Will. IV. c. 74, § 14.

LINES AND CORNERS. *In deeds and surveys.* Boundary-lines and their angles with each other. 17 Miss. 459; 21 Ala. 66; 9 Fost. & H. N. H. 471; 10 Gratt. Va. 445; 16 Ga. 141.

LIQUIDATE. To pay; to settle. Webster, Dict.; 8 Wheat. 322. Liquidated damages are damages ascertained or agreed upon. Sedgwick, Meas. of Dam. 427 *et seq.*

LIQUIDATED DAMAGES. In Practice. Damages whose amount has been determined by anticipatory agreement between the parties.

Where there is an agreement between parties for the doing or not doing particular acts, the parties may, if they please, estimate beforehand the damages to result from a breach of the agreement, and prescribe in the agreement itself the sum to be paid by either by way of damages for such breach. See 1 H. Blackst. 232; 2 Bos. & P. 335, 350; 2 Brown, Parl. Cas. 431; 4 Burr. 2225; 2 Term. 32. The civil law appears to recognize such stipulations. Inst. 3. 16. 7; Toullier, l. 3, no. 809; La. Civ. Code, art. 1928, n. 5; Code Civile, 1152, 1153. Such a stipulation on the subject of damages differs from a penalty in this, that the parties are holden by it; whereas a penalty is regarded as a forfeiture, from which the defaulting party can be relieved.

2. The sum named in an agreement as damages to be paid in case of a breach will, in general, be considered as liquidated damages, or as a penalty, according to the intent of the parties; and the mere use of the words "penalty" or "liquidated damages" will not be decisive of the question, if on the whole the instrument discloses a different intent. Story, Eq. Jur. 1318; 6 Barnew. & C. 224; 6 Bingh. 141; 6 Ired. No. C. 186; 15 Me. 273; 2 Ala. N. S. 425; 8 Mo. 467.

Such a stipulation in an agreement will be considered as a penalty merely, and not as liquidated damages, in the following cases:

3. Where the parties in the agreement have expressly declared it or described it as a "penalty," and no other intent is clearly to be deduced from the instrument. 2 Bos.

& P. 340, 350, 630; 1 H. Blackst. 227; 1 Campb. 78; 7 Wheat. 14; 1 McMull. So. C. 106; 2 Ala. N. s. 425; 5 Metc. Mass. 61; 1 Pick. Mass. 451; 4 *id.* 179; 3 Johns. Cas. N. Y. 297; 17 Barb. N. Y. 260; 24 Vt. 97.

Where it is doubtful on the language of the instrument whether the stipulation was intended as a penalty or as liquidated damages. 3 Carr. & P. 240; 6 Humphr. Tenn. 186; 5 Sandf. N. Y. 192; 24 Vt. 97; 16 Ill. 475.

4. Where the agreement was evidently made for the attainment of another object or purpose, to which the stipulation is wholly collateral. 11 Mass. 488; 15 *id.* 488; 1 Brown, Ch. 418.

Where the agreement imposes several distinct duties, or obligations of different degrees of importance, and yet the same sum is named as damages for a breach of either indifferently. 6 Bingh. 141; 5 Bingh. N. C. 390; 7 Scott, 364; 5 Sandf. N. Y. 192. But see 7 Johns. N. Y. 72; 15 *id.* 200; 9 N. Y. 551.

Where the agreement is not under seal, and the damages are capable of being certainly known and estimated. 2 Barnew. & Ald. 704; 6 Barnew. & C. 216; 1 Mood. & M. 41; 4 Dall. Penn. 150; 5 Cow. N. Y. 144.

5. Where the instrument provides that a larger sum shall be paid upon default to pay a lesser sum in the manner prescribed. 5 Sandf. N. Y. 192, 640; 16 Ill. 400; 14 Ark. 329.

The stipulation will be sustained as liquidated damages in the following cases:

Where the agreement is of such a nature that the damages are uncertain, and are not capable of being ascertained by any satisfactory and known rule. 2 Term, 32; 1 Alc. & N. Ir. 389; 2 Burr. 2225; 10 Ves. Ch. 429; 3 Mees. & W. Exch. 535; 3 Carr. & P. 240; 8 Mass. 223; 7 Cow. N. Y. 307; 4 Wend. N. Y. 468; 5 Sandf. N. Y. 192; 12 Barb. N. Y. 137, 366; 18 *id.* 336; 14 Ark. 315; 2 Ohio St. 519.

Where, from the tenor of the agreement or from the nature of the case, it appears that the parties have ascertained the amount of damages by fair calculation and adjustment. 2 Story, Eq. Jur. § 1318; 2 Greenleaf, Ev. 259; 1 Bingh. 302; 7 Conn. 291; 11 N. H. 234; 6 Blackf. Ind. 206; 13 Wend. N. Y. 507; 17 *id.* 447; 22 *id.* 201; 26 *id.* 630; 10 Mass. 459; 7 Metc. Mass. 583; 2 Ala. N. s. 425; 14 Me. 250.

See 2 W. Blackst. 1190; Cooper, Just. 606; 1 Chitty, Pract. 872; 2 Atk. 194; Finch. 117; Chanc. Prec. 102; 2 Brown, Parl. Cas. 436; Fonblanque, 151, 152, note; Chitty, Contr. 336; 11 N. H. 234; 11 Tex. 273; 14 Ark. 315; 37 Eng. L. & Eq. 122; 2 Abb. Pract. 449; Sedgwick, Dam. 3d ed. 417, 442, and cases cited.

LIQUIDATION. A fixed and determinate valuation of things which before were uncertain.

LIRA. The name of a foreign coin.

In all computations at the custom-house, the lira of Sardinia shall be estimated at eighteen cents and six mills, Act of March 22, 1846; the lira of the Lombardo-Venetian kingdom, and the lira of Tuscany, at sixteen cents. Act of March 22, 1846.

LIS MOTA (Lat.). A controversy begun, *i.e.* on the point at issue, and prior to commencement of judicial proceedings. Such controversy is taken to arise on the advent of the state of facts on which the claim rests; and after such controversy has arisen (*post litem motam*) no declarations of deceased members of family as to matters of pedigree are admissible. 6 Carr. & P. 560; 4 Camph. 417; 2 Russ. & M. Ch. 161; Greenleaf, Ev. §§ 131, 132; 4 Maule & S. 497; 1 Pet. 337; 26 Barb. N. Y. 177.

LIS PENDENS (Lat.). A pending suit. Suing out a writ and making attachment (on mesne process) constitutes a lis pendens at common law. 21 N. H. 570.

2. Filing the bill and serving a subpœna creates a *lis pendens* in equity, 1 Vern. Ch. 318; 7 Beav. Rolls, 444; 27 Mo. 560; 4 Sneed, Tenn. 672; 26 Miss. 397; 9 Paige, Ch. N. Y. 512; 22 Ala. N. s. 743; 7 Blackf. Ind. 242; Cross, Liens, 140, which the final decree terminates. 1 Vern. Ch. 318. In the civil law, an action is not said to be pending till it reaches the stage of *contestatio litis*. The phrase is sometimes used as a substitute for *autre action pendant*. See 1 La. Ann. 46; 21 N. H. 570; U. S. Dig. *Lis Pendens*; AUTRE ACTION PENDANT.

The proceedings must relate directly to the specific property in question, 1 Strobh. Eq. So. C. 180; 7 Blackf. Ind. 242; 7 Md. 537; Story, Eq. Plead. § 351; 1 Hilliard, Vend. 411; and the rule applies to no other suits. 1 M'Cord, Ch. So. C. 252.

3. Filing a judgment creditor's bill constitutes a *lis pendens*. 4 Edw. Ch. N. Y. 29. A petition by heirs to sell real estate is not a *lis pendens*. 14 B. Monr. Ky. 164. The court must have jurisdiction over the thing. 1 McLean, C. C. 167.

Only unreasonable and unusual negligence in the prosecution of a suit will take away its character as a *lis pendens*, 18 B. Monr. Ky. 230; 11 *id.* 297; that there must be an active prosecution to keep it alive. 1 Vern. Ch. 286; 1 Russ. & M. 617.

Lis pendens is general notice of an equity to all the world. Ambl. 676; 2 P. Will. 282; 3 Atk. Ch. 343; 1 Vern. Ch. 286; 3 Hayw. No. C. 147; 1 Johns. Ch. N. Y. 556.

4. A voluntary assignment during the pendency of a suit does not affect the rights of other parties, if not disclosed, except so far as the alien action may disable the party from performing the decree of the court, Story, Eq. Plead. § 351; 15 Tex. 495; 22 Barb. N. Y. 666: as in case of mortgage by tenant in common of his undivided interest, and subsequent partition. 2 Sandf. Ch. N. Y. 98.

An involuntary assignment, as under the bankrupt or insolvent laws, renders the suit so defective that it cannot be prosecuted if

the defendant objects. 7 Paige, Ch. N. Y. 287; 1 Atk. Ch. 88; 4 Ves. Ch. 387; 9 Wend. N. Y. 649; 1 Hare, 621; Story, Eq. Plead. § 349. Not if made under the bankrupt law of 1841. 27 Barb. N. Y. 252.

The same may be said of a voluntary assignment of all his interest by a sole complainant. 5 Hare, 223; Story, Eq. Plead. § 349.

5. An alienee, during the pendency of a suit, is bound by the proceedings therein subsequent to the alienation, though before he became a party. 4 Beav. Rolls, 40; 5 Mich. 456; 22 Barb. N. Y. 166; 27 Penn. St. 418; 5 Du. N. Y. 631; 7 Blackf. Ind. 242.

Purchasers during the pendency of a suit are bound by the decree in the suit without being made parties. 1 Swanst. 55; 4 Russ. 372; 1 Daniell, Ch. Pract. 375; Story, Eq. Plead. § 351 *a*; 32 Ala. N. s. 451; 11 Mo. 519; 30 Miss. 27; 12 La. Ann. 776; 6 Barb. N. Y. 133; 22 *id.* 166; 27 Penn. St. 418; 7 Eng. 421; 16 Ill. 225; 5 B. Monr. Ky. 323; 4 Dan. Ky. 99; 9 B. Monr. Ky. 220; 12 *id.* 600; 11 Ind. 443; 2 Hilliard, Vend. 311.

6. So also is a purchaser during a suit to avoid a conveyance as fraudulent. 5 T. B. Monr. Ky. 373; 6 B. Monr. Ky. 18.

Lis pendens by a mortgagor under a prior unrecorded mortgage is notice to a second mortgagee. 9 Ala. N. s. 921. But see 2 Rand. Va. 93.

The rule does not apply where a title imperfect before suit brought is perfected during its pendency. 4 Cow. N. Y. 667; 14 Ohio, 323.

A debtor need not pay to either party *pendente lite*. 1 Paige, Ch. N. Y. 490.

The doctrine of *lis pendens* is an equitable doctrine.

7. In law, the same effect is produced by the rule that each purchaser takes the title of his vendor only. 11 Md. 519; 27 Penn. St. 418; 6 Barb. N. Y. 133; 30 Miss. 27; 5 Mich. 456; 1 Hilliard, Vend. 411. The doctrine of *lis pendens* is modified in many of the states of the United States, and by statutes requiring records of the attachment to preliminary proceedings to be made, and constituting such records notice. See stat. 2 Vict. c. 11, § 7; and Rev. Statutes of the various states.

LIST. A table of cases arranged for trial or argument: as, the trial list, the argument list. See 3 Bouvier, Inst. n. 3031.

LISTERS. This word is used in some of the states to designate the persons appointed to make lists of taxables. See Vt. Rev. Stat. 538.

LITERÆ PROCURATORIÆ (Lat.). **In Civil Law.** Letters procuratory. A written authority, or power of attorney (*litera attornati*), given to a procurator. Vicat, Voc. Jur. Utr.; Bracton, fol. 40–43.

LITERAL CONTRACT. In Civil Law. A contract the whole of the evidence of which is reduced to writing. This contract is perfected by the writing, and binds the party who subscribed it, although he has received no consideration. Leç. Elém. § 887.

LITERARY PROPERTY. The general term which describes the interest of an author in his works, or of those who claim under him, whether before or after publication, or before or after a copyright has been secured. See COPYRIGHT; MANUSCRIPT; Curtis on Copyright; 2 Blackstone, Comm. 405, 406; 4 Viner, Abr. 278; Bacon, Abr. *Prorogation* (F 5); 2 Kent, Comm. 306–315; 1 Belt, Suppl. Ves. Jr. 360, 376; 2 *id.* 469; Nicklin, Lit. Prop.; Dane, Abr. Index; 1 Chitty, Pract. 98; 2 Am. Jur. 248; 10 *id.* 62; 1 Phil. Law Int. 66; 1 Bell, Comm. b. 1, part 2, c. 4, s. 2, p. 115; 1 Bouvier, Inst. nn. 508 *et seq.*

LITIGANT. One engaged in a suit; one fond of litigation.

LITIGATION. A contest, authorized by law, in a court of justice, for the purpose of enforcing a right.

In order to prevent injustice, courts of equity will retain a party from further litigation, by a writ of injunction: for example, after two verdicts on trials at bar, in favor of the plaintiff, a perpetual injunction was decreed. Strange, 404. And not only between two individuals will a court of equity grant this relief, as in the above case of several ejectments, but also, when one general legal right, as a right of fishery, is claimed against several distinct persons, in which case there would be no end of bringing actions, since each action would only bind the particular right in question between the plaintiff and defendant in such action, without deciding the general right claimed. 2 Atk. Ch. 484; 2 Ves. Ch. 587. See CIRCUITY OF ACTIONS.

LITIGIOSITY. In Scotch Law. The pendency of a suit: it is an implied prohibition of alienation, to the disappointment of an action, or of diligence, the direct object of which is to obtain possession, or to acquire the property of a particular subject. The effect of it is analogous to that of inhibition. 2 Bell, Comm. 5th ed. 152.

LITIGIOUS. That which is the subject of a suit or action; that which is contested in a court of justice. In another sense, litigious signifies a disposition to sue; a fondness for litigation.

LITIGIOUS RIGHTS. In French Law. Those which are or may be contested either in whole or in part, whether an action has been commenced, or when there is reason to apprehend one. Pothier, Vente, n. 584; 9 Mart. La. 183; Troplong, De la Vente, n. 984 à 1003; Eva. Civ. Code, art. 2623; *id.* 3522, n. 22. See CONTENTIOUS JURISDICTION.

LITISPENDENCIA. In Spanish Law. The condition of a suit pending in a court of justice.

In order to render this condition valid, it is necessary that the judge be competent to take cognizance of the cause; that the defendant has been duly cited to appear, and fully informed, in due time and form, of the

nature of the demand, or that, if he has not, it has been through his own fault or fraud.

The litispendencia produces two effects: the legal impossibility of alienating the property in dispute during the pendency of the suit; the accumulation of all the proceedings in the cause, in the tribunal where the suit is pending, whether the same be had before the same judge or other judges or notaries. This cumulation may be required in any stage of the cause, and forms a valid exception to the further proceeding, until the cumulation is effected. Escriche, Dict.

LITRE. A French measure of capacity. It is of the size of a décimètre, or one-tenth part of a cubic mètre. It is equal to 61.028 cubic inches. See MEASURE.

LITTORAL (*littus*). Belonging to shore: as, of sea and great lakes. Webst. Corresponding to riparian proprietors on a stream or small pond are littoral proprietors on a sea or lake. But riparian is also used coextensively with littoral. 7 Cush. Mass. 94. See 17 How. 426.

LITUS MARIS (Lat.). **In Civil Law.** Shore; beach. *Quâ fluctus eluderet.* Cic. Top. c. 7. *Quâ fluctus adludit.* Quinct. lib. 5, c. ult. *Quousque maximus fluctus a mari pervenit.* Celsus; said to have been first so defined by Cicero, in an award as arbitrator. L. 92, D, *de verb. signif. Quâ maximus fluctus exæstuat.* L. 112, D, *eod. tit. Quatenus hibernus fluctus maximus excurrit.* Inst. lib. 2, *de rer. divis. et qual.* § 3. That is to say, as far as the largest winter wave runs up. Vocab. Jur. Utr.

At Common Law. The shore between common high-water mark and low-water mark. Hale, de Jure Maris, cc. 4, 5, 6; 3 Kent, Comm. 427; 2 Hilliard, Real Prop. 90.

Shore is also used of a river. 5 Wheat. 385; 20 Wend. N. Y. 149. See 13 How. 381; 28 Me. 180; 14 Penn. St. 171.

LIVERY. In English Law. The delivery of possession of lands to those tenants who hold of the king *in capita* or by knight's service.

The name of a writ which lay for the heir of age to obtain possession of the seisin of his lands at the king's hands. Fitzherbert, Nat. Brev. 155; 2 Sharswood, Blackst. Comm. 68.

The distinguishing dress worn by the servants of a gentleman or nobleman, or by the members of a particular guild. "Livery or clothing." Say. 274. By stat. 1 Rich. II. c. 7, and 16 Rich. II. c. 4, none but the servants of a lord, and continually dwelling in his house, or those above rank of yeomen, should wear the lord's livery.

Privilege of a particular company or guild. Wharton, Lex. 2d Lond. ed.

LIVERY OF SEISIN. In Estates. A delivery of possession of lands, tenements, and hereditaments unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and livery was in *deed*, which was performed by the feoffor and the feoffee going upon the land and the latter receiving it from the former; or in *law*, where the same was not made on the land, but in sight of it. 2 Blackstone, Comm. 315, 316.

In most of the states, livery of seisin is unnecessary, it having been dispensed with either by express law or by usage. The recording of the deed has the same effect. Washburn, Real Prop. 14, 35. In Maryland, however, it seems that a deed cannot operate as a feoffment without livery of seisin. 5 Harr. & J. Md. 158. See 4 Kent, Comm. 381; 1 Mo. 553; 1 Pet. 508; 1 Bay, So. C. 107; 5 Harr. & J. 158; 11 Me. 318; Dane, Abr.; SEISIN.

LIVRE TOURNOIS. In Common Law. A coin used in France before the revolution. It is to be computed, in the *ad valorem* duty on goods, etc., at eighteen and a half cents. Act of March 2, 1798, § 61, 1 Story, U. S. Laws, 629. See FOREIGN COINS.

LOADMANAGE. The pay to loadsmen; that is, persons who sail or row before ships, in barks or small vessels, with instruments for towing the ship and directing her course, in order that she may escape the dangers in her way. Pothier, Des Avaries, n. 137; Guidon de la Mer, c. 14; Bacon, Abr. *Merchant and Merchandise* (F). It is not in use in the United States.

LOAN. A bailment without reward. A bailment of an article for use or consumption without reward. The thing so bailed.

A loan, in general, implies that a thing is lent without reward; but, in some cases, a loan may be for a reward: as, the loan of money. 7 Pet. 109.

It would be an inquiry too purely speculative, whether this use of the term loan originated in the times when taking interest was considered usury and improper, the bailment of money which was to be returned in kind. The supposition would furnish a reasonable explanation of the exception to the general rule that loan includes properly only those bailments where no reward is given or received by the bailee.

In order to make a contract usurious, there must be a loan, Cowp. 112, 770; 1 Ves. Ch. 527; 2 Blackstone, 859; 3 Wils. 390; and the borrower must be bound to return the money at all events. 2 Schoales & L. Ch. Ir. 470. The purchase of a bond or note is not a loan, 3 Schoales & L. Ch. Ir. 469; 9 Pet. 103; but if such a purchase be merely colorable, it will be considered as a loan. 2 Johns. Cas. N. Y. 60, 66; 12 Serg. & R. Penn. 46; 15 Johns. N. Y. 44.

LOAN FOR CONSUMPTION. A contract by which the owner of a personal chattel, called the lender, delivers it to the bailee, called the borrower, to be returned in kind.

For example, if a person borrows a bushel of wheat, and at the end of a month returns to the lender a bushel of equal value. This class of loans is commonly considered under the head of bailments; but it lacks the one essential element of bailment, that of a *return* of the property: it is more strictly a barter or an exchange: the property passes to the borrower. 4 N. Y. 76; 8 *id.* 433; 1 Ohio St. 98: 3 Mas. C. C. 478; 1 Blackf. Ind. 353; Story, Bailm. § 439. Those cases sometimes called *centuum* (the corresponding civil law term),

such as where corn is delivered to a miller to be ground into wheat, are either cases of *hiring* of labor and service, as where the miller grinds and returns the identical wheat ground into flour, retaining a portion for his services, or constitute a mere exchange, as where he mixes the wheat with his own, undertaking to furnish an equivalent in corn. It amounts to a contract of sale, payment being stipulated for in a specified article instead of money.

LOAN FOR USE (called, also, *commodatum*). A bailment of an article to be used by the borrower without paying for the use. 2 Kent, Comm. 4th ed. 573.

Loan for use (called *commodatum* in the civil law) differs from a loan for consumption (called *mutuum* in the civil law) in this, that the *commodatum* must be specifically returned, the *mutuum* is to be returned in kind. In the case of a *commodatum*, the property in the thing remains in the lender; in a *mutuum*, the property passes to the borrower.

2. The loan, like other bailments, must be of some thing of a personal nature, Story, Bailm. § 223; it must be gratuitous, 2 Ld. Raym. 913, for the use of the borrower, and this as the principal object of the bailment, Story, Bailm. § 225; 13 Vt. 161; and must be lent to be specifically returned at the determination of the bailment. Story, Bailm. § 228.

The general law of contracts governs as to the capacity of the parties and the character of the use. Story, Bailm. §§ 50, 162, 302, 380. He who has a special property may loan the thing, and this even to the general owner, and the possession of the general owner still be that of a borrower. 1 Atk. Ch. 235; 8 Term, 199; 2 Taunt. 268.

3. *The borrower* may use the thing himself, but may not, in general, allow others to use it, 1 Mod. 210; 4 Sandf. N. Y. 8, during the time and for the purposes and to the extent contemplated by the parties. 5 Mass. 104; 1 Const. So. C. 121; 3 Bingh. N. C. 468; Bracton, 99, 100. He is bound to use extraordinary diligence, 3 Bingh. N. C. 468; 14 Ill. 84; 4 Sandf. N. Y. 8; is responsible for accidents, though inevitable, which injure the property during any excess of use, 5 Mass. 104; 16 Ga. 25; must bear the ordinary expenses of the thing, Jones, Bailm. 67, and restore it at the time and place and in the manner contemplated by the contract, 16 Ga. 25; 12 Tex. 373; Story, Bailm. § 99; including, also, all accessories. 16 Ga. 25; 2 Kent, Comm. 4th ed. 566. As to the place of delivery, see 9 Barb. N. Y. 189; 1 Me. 120; 1 N. H. 295; 1 Conn. 255; 5 *id.* 76; 16 Mass. 453; Chipman, Contr. 25. He must, as a general rule, return it to the lender. 7 Cow. N. Y. 278; 1 Barnew. & Ad. 450; 11 Mass. 211.

4. *The lender* may terminate the loan at his pleasure, 9 East, 49; 1 Term, 480; 9 Cow. N. Y. 687; 8 Johns. N. Y. 432; 16 Ga. 25; is perhaps liable for expenses adding a permanent benefit. Story, Bailm. § 274. The lender still retains his property as against third persons, and, for some purposes, his possession, 11 Johns. N. Y. 285; 6 *id.* 195; 13 *id.* 141, 561; 7 Cow. N. Y. 753; 9 *id.* 687; 1 Pick. Mass. 389; 5 Mass. 303; 1 Term, 480; 2 Campb. 464; 2 Bingh. 172; 1 Barnew. & Ald. 59; 2 Crompt. M. & R. Exch. 659. As to whether the property is transferred by a recovery of judgment for its value, see 26 Eng. L. & Eq. 328; 2 Strange, 1078; Metc. Yelv. 67, n.; 5 Me. 147; 1 Pick. Mass. 62. See, generally, Edwards, Jones, Story, on Bailments; Kent, Comm. Lect. 46; Chipman, Contr.

LOAN SOCIETIES. In English Law. A kind of club formed for the purpose of advancing money on loan to the industrial classes. They are of comparatively recent origin in England, and are authorized and regulated by 3 & 4 Vict. ch. 110, & 21 Vict. ch. 19.

LOCAL ACTION. In Practice. An action the cause of which could have arisen in some particular county only.

All local actions must be brought in the county where the cause of action arose.

In general, all actions are local which seek the recovery of real property, 2 W. Blackst. 1070; 4 Term, 504; 7 *id.* 589; whether founded upon contract or not; or damages for injury to such property as waste, under the statute of Gloucester, trespass *quare clausum fregit*, trespass or case for injuries affecting things real, as for nuisances to houses or lands, disturbance of rights of way or of common, obstruction or diversion of ancient water-courses, 1 Chitty, Plead. 271; Gould, Plead. ch. 3, §§ 105, 106, 107; but not if there were a contract between the parties on which to ground an action. 15 Mass. 284; 1 Day, Conn. 263.

Many actions arising out of injuries to local rights are local: as, *quare impedit*. 1 Chitty, Plead. 241. The action of replevin is also local. 1 Wms. Saund. 247, n. 1; Gould, Plead. c. 3, § 111. See Gould and Chitty, *Pleading;* Comyns, Dig. *Action;* TRANSITORY ACTION.

LOCAL ALLEGIANCE. The allegiance due to a government from an alien while within its limits. Sharswood, Blackst. Comm. 370; 2 Kent, Comm. 63, 64.

LOCAL STATUTES. Statutes whose operation is intended to be restricted within certain limits. Dwarris on Stat. p. 384. It may be either public or private. 1 Sharswood, Blackst. Comm. 85, 86, n. *Local statutes* is used by Lord Mansfield as opposed to *personal statutes*, which relate to personal transitory contracts; whereas local statutes refer to things in a certain jurisdiction alone: *e. g.* the Statute of Frauds relates only to things in England. 1 W. Blackst. 246.

LOCALITY. In Scotch Law. This name is given to a life rent created in marriage contracts in favor of the wife, instead of leaving her to her legal life rent of terce. 1 Bell, Comm. 55. See JOINTURE.

LOCATIO (Lat.). **In Civil Law.** Letting for hire. Calv. Lex.; Voc. Jur. Utr. The term is also used by text-writers upon the law of

bailment at common law. 1 Parsons, Contr. 602. In Scotch law it is translated location. Bell, Dict.

LOCATIO MERCIUM VEHENDARUM (Lat.). **In Civil Law.** The carriage of goods for hire.

In respect to contracts of this sort entered into by private persons not exercising the business of common carriers, there does not seem to be any material distinction varying the rights, obligations, and duties of the parties from those of other bailees for hire. Every such private person is bound to ordinary diligence and a reasonable exercise of skill; and of course he is not responsible for any losses not occasioned by ordinary negligence, unless he has expressly, by the terms of his contract, taken upon himself such risk. 2 Ld. Raym. 909, 917, 918; 4 Taunt. 787; 6 *id.* 577; 2 Marsh. 293; Jones, Bailm. 103, 106, 121; 2 Bos. & P. 417; 1 Bouvier, Inst. n. 1020. See COMMON CARRIER.

LOCATIO OPERIS (Lat.). **In Civil Law.** The hiring of labor and services.

It is a contract by which one of the parties gives a certain work to be performed by the other, who binds himself to do it for the price agreed between them, which he who gives the work to be done promises to pay to the other for doing it. Pothier, Louage, n. 392. This is divided into two branches: first, *locatio operis faciendi;* and, secondly, *locatio mercium vehendarum.* See these words.

LOCATIO OPERIS FACIENDI (Lat.). **In Civil Law.** Hire of services to be performed.

There are two kinds: first, the *locatio operis faciendi* strictly so called, or the hire of labor and services; such as the hire of tailors to make clothes, and of jewellers to set gems, and of watchmakers to repair watches. Jones, Bailm. 90, 96, 97. Secondly, *locatio custodiæ,* or the receiving of goods on deposit for a reward, which is properly the hire of care and attention about the goods. Story, Bailm. §§ 422, 442; 1 Bouvier, Inst. n. 994.

In contracts for work, it is of the essence of the contract, first, that there should be work to be done; secondly, for a price or reward; and, thirdly, a lawful contract between parties capable and intending to contract. Pothier, Louage, nn. 395–403.

LOCATIO REI (Lat.). **In Civil Law.** The hiring of a thing. It is a contract by which one of the parties obligates himself to give to the other the use and enjoyment of a certain thing for a period of time agreed upon between them, and in consideration of a price which the latter binds himself to pay in return. Poth. Contr. de Louage, n. 1. See BAILMENT; HIRE; HIRER; LETTER.

LOCATION. **In Scotch Law.** A contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire. 1 Bell, Comm. b. 2, pt. 3, c. 2, s. 4, art. 2, § 1, page 255. See BAILMENT; HIRE.

At Common Law. The act of selecting and designating lands which the person making the location is authorized by law to select.

It is applied among surveyors who are authorized by public authority to lay out lands by a particular warrant. The act of selecting the land designated in the warrant and surveying it is called its location. In Pennsylvania, it is an application made by any person for land, in the office of the secretary of the late land office of Pennsylvania, and entered in the books of said office, numbered and sent to the surveyor-general's office. Act June 25, 1781, § 2. It is often applied to denote the act of selecting and marking out the line upon which a railroad, canal, or highway is to be constructed.

LOCATIVE CALLS. Calls describing certain means by which the land to be located can be identified.

Reference to physical objects in entries and deeds, by which the land to be located is exactly described. 2 Bibb, Ky. 145; 3 *id.* 414.

Special, as distinguished from general, calls or descriptions. 3 Bibb, Ky. 414; 2 Wheat. 211; 10 *id.* 463; 7 Pet. 171; 18 Wend. N. Y. 157; 16 Johns. N. Y. 257; 17 *id.* 29; 10 Gratt. Va. 445; Jones, Law, No. C. 469; 16 Ga. 141; 5 Ind. 302; 15 Mo. 80; 2 Bibb, Ky. 118.

LOCATOR. **In Civil Law.** He who leases or lets a thing to hire to another. His duties are, *first,* to deliver to the hirer the thing hired, that he may use it; *second,* to guarantee to the hirer the free enjoyment of it; *third,* to keep the thing hired in good order in such manner that the hirer may enjoy it; *fourth,* to warrant that the thing hired has not such defects as to destroy its use. Pothier, Contr. de Louage, n. 53.

LOCK-UP HOUSE. A place used temporarily as a prison.

LOCO PARENTIS. See IN LOCO PARENTIS.

LOCUS CONTRACTUS. See LEX LOCI.

LOCUS DELICTI. The place where the tort, offence, or injury has been committed.

LOCUS PŒNITENTIÆ (Lat. a place of repentance). The opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed. 2 Brown, Ch. 569. See ATTEMPT.

LOCUS IN QUO (Lat. the place in which). **In Pleading.** The place where any thing is alleged to have been done. 1 Salk. 94.

LOCUS REI SITÆ. See LEX REI SITÆ.

LOCUS SIGILLI (Lat.). The place of the seal.

In many of the states, instead of sealing deeds, writs, and other papers or documents requiring it, a scroll is made, in which the

letters L. S. are printed or written, which is an abbreviation of *Locus sigilli*. This, in some of the states, has all the efficacy of a seal, but in others it has no such effect. See SCROLL; SEAL.

LODGER. One who inhabits a portion of a house of which another has the general possession and custody.

It is difficult, in the present state of the law, to state exactly the distinctions between a lodger, a guest, and a boarder. A person may be a guest at an inn without being a lodger. 1 Salk. 388; 9 Pick. Mass. 280; 25 Wend. N. Y. 653; 5 Sandf. N. Y. 242; 16 Ala. N. S. 666; 8 Blackf. Ind. 535; 14 Barb. N. Y. 193; 6 C. B. 132. And boarder includes one who regularly takes his meals with, and forms in some degree a part of, the householder's family. See BOARDER; GUEST; 25 Eng. L. & Eq. 76. A lodger does not take meals in the house as lodger: but the duration of the inhabitancy is of no importance as determining his character. The difficulty in this respect is in deciding whether a person is an under-tenant, entitled to notice to quit, or merely a lodger, and not entitled to such notice. See Woodfall, Landl. & T. 177; 7 Mann. & G. 87.

LODS ET RENTES. A fine payable to the seigneur upon every sale of lands within his seigniory. 1 Low. C. 59.

Any transfer of lands for a consideration gives rise to the claim, 1 Low. C. 79: as, the creation of a *rente viagire* (life-rent), 1 Low. C. 84; a transfer under *bail emphyteotique*, 1 Low. C. 295; a promise to sell, accompanied by transfer of possession. 9 Low. C. 272. It does not arise on a transfer by a father to his son subject to a payment by the son of a life-rent to the father, and of the father's debts, 8 Low. C. 5, 34, 324; nor where property is required for public uses. 1 Low. C. 91.

LOG-BOOK. A ship's journal. It contains a minute account of the ship's course, with a short history of every occurrence during the voyage. 1 Marshall, Ins. 408.

When a log-book is required by law to be kept, it is an official register so far as regards the transactions required by law to be entered in it, but no further. Abbott, Shipp. 468, n. 1; 1 Sumn. C. C. 373; 2 *id.* 19, 78; 4 Mas. C. C. 544; 1 Esp. 427; 1 Dods. Adm. 9; 2 Hagg. Eccl. 159; Gilp. Dist. Ct. 147.

In suits for seamen's wages, the log-book is to be produced if required, or otherwise the complainant may state its contents. The neglect of a seaman to render himself on board, and his absence without leave, are also to be entered on the log-book in certain cases, or the sailor's fault will not forfeit his wages. Act 20 July, 1790, sects. 2, 5, & 6.

It is the duty of the mate to keep the log-book. Dana's Seamen's Friend, 145, 200. See Brightly's Dig. U. S. Laws, *Log-Book*.

LOQUELA (Lat.). **In Practice.** An imparlance, *loquela sine die*, a respite in law to an indefinite time. Formerly by *loquela* was meant the allegations of fact mutually made on either side, now denominated the pleadings. Stephen, Plead. 29.

LORD'S DAY. Sunday. Coke, Litt. 135. See MAXIMS, *Dies Dominicus*.

LORD MAYOR'S COURT. In English Law. One of the chief courts of special and local jurisdiction in London. It is a court of the queen, held before the lord mayor and aldermen. Its practice and procedure are amended and its powers enlarged by 20 & 21 Vict. c. 157. In this court, the recorder, or, in his absence, the common serjeant, presides as judge; and from its judgments error may be brought in the exchequer chamber. 3 Stephen, Comm. 449, note *l*.

LOSS. In Insurance. The destruction of or damage to the insured subject by the perils insured against, according to the express provisions and construction of the contract.

These accidents, or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. And no loss, however great or unforeseen, can be a loss within the policy unless it be the direct and immediate consequence of one or more of these perils. Marshall, Ins. 1, c. 12.

Loss under a life policy is simply the death of the subject by a cause the risk of which is not expressly excepted in the policy, and where the loss is not fraudulent, as where one assured, who assures the life of another for his own benefit, procures the death.

Loss in insurance against fire must, under the usual form of policy, be by the partial or total destruction or damage of the thing insured by fire.

In maritime insurance, in which loss by fire is one of the risks usually included, the loss insured against may be absolutely or constructively total, or a partial or general average loss, or a particular average.

A partial loss is any loss or damage short of, or not amounting to, a total loss; for if it be not the latter it must be the former. See 4 Mass. 374; 6 *id.* 102, 122, 317; 12 *id.* 170, 288; 8 Johns. N. Y. 237; 10 *id.* 487; 5 Binn. Penn. 595; 2 Serg. & R. Penn. 553.

A total loss is such destruction of, or damage to, the thing insured that it is of little or no value to the owner.

Partial losses are sometimes denominated *average* losses, because they are often in the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages. See AVERAGE.

Total losses, in maritime insurance, are absolutely such when the entire thing perishes or becomes of no value. Constructively, a loss may become total where the value remaining is of such a small amount that the whole may be surrendered. See ABANDONMENT.

Consult Phillips, Arnold, Insurance; Parsons, Marit. Law; TOTAL LOSS.

LOST PAPERS. Papers which have been so mislaid that they cannot be found after diligent search.

2. When deeds, wills, agreements, and the like, have been lost, and it is desired to prove their contents, the party must prove that he has made diligent search, and in good faith exhausted all sources of information accessible to him. For this purpose his own affidavit is sufficient. 1 Atk. Ch. 446; 1 Greenleaf, Ev. § 349. On being satisfied of this, the court will allow secondary evidence to be given of its contents. See EVIDENCE.

3. Even a will proved to be lost may be admitted to probate upon secondary evidence. 1 Greenleaf, Ev. 2d ed. §§ 84, 509, 575; 2 *id.* § 668 *a*. But the fact of the loss must be proved by the clearest evidence; because it may have been destroyed by the testator *animo revocandi*. 8 Metc. Mass. 487; 2 Add. Eccl. 223; 6 Wend. N. Y. 173; 1 Hagg. Eccl. 115; 3 Pick. Mass. 67; 5 B. Monr. Ky. 58; 2 Curt. Eccl. 913.

4. When a bond or other deed was lost, formerly the obligee or plaintiff was compelled to go into equity to seek relief, because there was no remedy at law, the plaintiff being required to make profert in his declaration. 1 Chanc. Cas. 77. But in process of time courts of law dispensed with profert in such cases, and thereby obtained concurrent jurisdiction with the courts of chancery: so that now the loss of any paper, other than a negotiable note, will not prevent the plaintiff from recovering at law, as well as in equity. 3 Atk. 214; 1 Ves. Ch. 341; 5 *id.* 235; 6 *id.* 812; 7 *id.* 19; 3 Ves. & B. Ch. Ir. 54.

5. When a negotiable note has been lost, equity alone will, in the absence of statutory provisions, grant relief. In such case the claimant must tender an indemnity to the debtor, and file a bill in chancery to compel payment. 7 Barnew. & C. 90; Ry. & M. 90; 4 Taunt. 602; 2 Ves. Sen. Ch. 317; 16 Ves. Ch. 430.

LOST, OR NOT LOST. A phrase in policies of insurance, signifying the contract to be retrospective and applicable to any loss within the specified risk, provided the same is not already known to either of the parties, and that neither has any knowledge or information not equally obvious or known to the other. The clause has been adopted only in maritime insurance; though a fire or life policy is not unfrequently retrospect, or, under a different phraseology, by a provision that the risk is to commence at some time prior to its date. 1 Phillips, Ins. § 925.

LOT. That which fortuitously determines what we are to acquire.

When it can be certainly known what are our rights, we ought never to resort to a decision by lot; but when it is impossible to tell what actually belong to us, as if an estate is divided into three parts and one part given to each of three persons, the proper way to ascertain each one's part is to draw lots. Wolff, Dr. etc. de la Nat. § 669.

LOT OF GROUND. A small piece of land in a town or city, usually employed for building, a yard, a garden, or such other urban use. Lots are *in-lots*, or those within the boundary of the city or town, and *out-lots*, those which are out of such boundary and which are used by some of the inhabitants of such town or city.

LOTTERY. A scheme for the distribution of prizes by chance. The American Art Union is a lottery, 8 N. Y. 228, 240; and so is a gift-sale of books. 33 N. H. 329.

2. In most, if not all, of the United States, lotteries not specially authorized by the legislatures of the respective states are prohibited, and the persons concerned in establishing them are subjected to a heavy penalty. This is the case in Alabama, Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, Mississippi, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and Virginia. In Louisiana, a license is granted to sell tickets in a lottery not authorized by the legislature of that state, on the payment of five thousand dollars, and the license extends only to one lottery. In many of the states, the lotteries authorized by other states are absolutely prohibited. Encyc. Amer.

LOUISIANA. The name of one of the new states of the United States of America.

2. It covers a part of the territory ceded by France to the United States by the treaty of the 13th April, 1803. It was admitted into the Union by an act of congress approved on the 8th April, 1812, with the following limits: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of said river to lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence, bounded by said gulf, to the place of beginning, including all islands within three leagues of the coast. These limits were enlarged by virtue of an act of congress, with the consent of the legislature of the state, approved on the 14th April, 1812, by adding all that tract of country comprehended within the following bounds, to wit: beginning with the junction of the Iberville with the river Mississippi, thence along the middle of the Iberville, the river Amite, and the lakes Maurepas and Pontchartrain, to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the place of beginning. The territory thus added to the limits of the state had, up to that time, been subject to the dominion of Spain, and the parishes into which it has been divided are, for this reason, still called, in popular language, "the Florida parishes."

3. The first constitution of the state was adopted on the 22d January, 1812, and was substantially copied from the constitution of Kentucky. This constitution was superseded by that of 1845, which was in its turn replaced by that adopted on the 31st July, 1852, now in force.

Every free white male citizen of the United States, who is twenty-one years old or more, who has been a resident of the state for twelve months and of the district in which he offers to vote six months, is a voter, and is privileged from arrest, except for treason, felony, or breach of the peace, while going to or returning from the place of election.

The Legislative Power.

This is lodged in a Senate and House of Representatives, together constituting the General Assembly.

The Senate is composed of thirty-two members, elected one from each of the districts into which the state is divided, by the people of the district, for the term of two years. A senator must be an elector, and a member of the district for which he is chosen.

The House of Representatives is to be composed

of not more than one hundred nor less than seventy members chosen by the people for the term of two years, with provision that they shall be apportioned according to population, and that a new apportionment shall be made in 1863.

The Executive Power.

4. *The Governor* is elected by the people, for four years. If two persons have an equal and the highest number of votes, the selection is to be made between these by a joint vote of the general assembly. He must be twenty-eight years old at least, and a citizen and resident within the state for four years next before the election. He is ineligible for the succeeding term. He is commander-in-chief of the army and navy and militia of the state, except when called into the service of the United States; is to take care that the laws be faithfully executed; must give to the general assembly information respecting the situation of the state, and recommend such measures as he may deem expedient; has power to grant reprieves for all offences against the state; with the consent of the senate, has power to grant pardons, and remit fines and forfeitures, after conviction, except in cases of impeachment; in cases of treason, may grant reprieves until the end of the next session of the general assembly, in which the pardoning power is vested; is to nominate, and, by and with the advice and consent of the senate, appoint, all officers established by the constitution, whose mode of appointment is not otherwise prescribed by the constitution, nor by the legislature; has power to fill vacancies during the recess of the senate, provided he appoint no one whom the senate has rejected for the same office; may, on extraordinary occasions, convene the general assembly at the seat of government, or at a different place, if that should have become dangerous from an enemy or from an epidemic, and in case of disagreement between the two houses as to the time of adjournment, may adjourn them to such time as he may think proper, not exceeding four months. He has the veto power, but must return the bill vetoed with his objections, and it may still become a law by vote of two-thirds of the members of each house. Const. tit. iii.

5. *The Lieutenant-Governor* is elected by the people at the same time, 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 has the casting vote. In case of the incapacity of the governor, his death, removal from office, resignation, or absence from the state, refusal or inability to qualify, he is to act as governor.

The Secretary of State is elected by the people for the term of four years.

The Treasurer is elected by the people for the term of two years.

The Judicial Power.

The Supreme Court consists of a chief-justice, elected by the people of the state at large for the term of ten years, and four associate justices, elected, one in each of the four districts into which the state is divided, for the term of eight years. The associate justices are so classified that one goes out of office every two years. It has appellate jurisdiction of all civil cases where the amount in dispute is more than three hundred dollars, or where the constitutionality of any duty, tax, or impost, or any fine, penalty, or forfeiture imposed by a municipal court, is brought in question; and in criminal cases where the punishment is death, imprisonment at hard labor, or a fine exceeding three hundred dollars. Its civil remedial jurisdiction extends both to law and fact, and it may reverse the verdict of a jury, and render a final decree in opposition to the finding of the jury. In criminal cases it corrects errors of law only. It has only an appellate jurisdiction, but may issue the writ of *habeas corpus*. It holds one term annually in each district.

6. *The District Court* is composed of one judge elected in each of the eighteen districts (except the first) into which the state is divided for the purpose, by the people of the district, for the term of four years. The city and parish of New Orleans constitutes the first district, but has six district judges. It has jurisdiction of all civil cases whatever in which the amount involved is over fifty dollars, in all criminal cases, and in all matters of successions. Jury and probate terms are held separately. The districts are never to be less than twelve nor more than twenty in number, and subject to reorganization every sixth year.

Justices of the Peace are elected one or more from each police-jury ward, into which the several parishes of the state are divided, for the term of two years. They have civil jurisdiction where the amount in dispute does not exceed one hundred dollars, and where the defendent resides within their section. They may perform marriages; take cognizance of infractions of the levee laws, where the penalty is not over one hundred dollars; may disperse runaway slaves, search for stolen goods, and arrest slaves suspected of any crime whatever; take cognizance of proceedings under the landlord and tenant process.

Jurisprudence.

This state is the only one of the United States in which the civil law, in contradistinction to the common law of England, prevails. The code of Louisiana is founded on the Code Napoléon, with some modifications introduced from Spanish law, and, through these, upon the Roman law. See CODE.

LOW-WATER MARK. That part of the shore of the sea to which the waters recede when the tide is lowest. See HIGH-WATER MARK; RIVER; SEA-SHORE; Dane, Abr.; 1 Halst. Ch. N. J. 1.

LOYAL. Legal, or according to law: as, loyal matrimony, a lawful marriage.

"*Uncore n'est loyal a homme de faire un tort*" (it is never lawful for a man to do a wrong). Dyer, fol. 36, § 38. "*Et per curiam n'est loyal*" (and it was held by the court that it was not lawful). T. Jones, 24. Also spelled *loayl*. Dy. 36, § 38; Law Fr. & Lat. Dict. The Norman spelling is "*loyse*." Kelh. Norm. Dict.

Faithful to a prince or superior; true to plighted faith or duty. Webster, Dict.

LOYALTY. Adherence to law. Faithfulness to the existing government.

LUCID INTERVALS. In Medical Jurisprudence. Periods in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein.

2. Correct notions respecting the lucid interval are no less necessary than correct notions respecting the disease itself. By the earlier writers on insanity, lucid intervals were regarded as a far more common event than they have been found to be in recent times. They were also supposed to be characterized by a degree of mental clearness and vigor not often witnessed now. These views of medical writers were shared by distinguished legal authorities, by whom the lucid interval was described as a complete, though temporary, restoration. D'Aguesseau, in his pleading in the case of the Abbé d'Orléans, says, "It must not be a superficial tranquillity, a shadow of repose, but, on the contrary, a profound tranquillity, a real repose;

it must not be a mere ray of reason, which makes its absence more apparent when it is gone,—not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal,—not a glimmering which joins the night to the day,—but a perfect light, a lively and continued lustre, a full and entire day interposed between the two separate nights of the fury which precedes and follows it; and, to use another image, it is not a deceitful and faithless stillness which follows or forebodes a storm, but a sure and steadfast tranquillity for a time, a real calm, a perfect serenity. In fine, without looking for so many metaphors to represent our idea, it must not be a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration of health." Pothier, Obl. Evans ed. 579. So Lord Thurlow says, by a perfect interval, "I do not mean a cooler moment, an abatement of pain or violence or of a higher state of torture,—a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit." 3 Brown, Ch. 234. That there sometimes occurs an intermission in which the person appears to be perfectly rational, restored, in fact, to his proper self, is an unquestionable fact. It is equally true that they are of rare occurrence, that they continue but for a very brief period, and that with the apparent clearness there is a real loss of mental force and acuteness. In most cases of insanity there may be observed, from time to time, a remission of the symptoms, in which excitement and violence are replaced by quiet and calm, and, within a certain range, the patient converses correctly and properly. A superficial observer might be able to detect no trace of disease; but a little further examination would show a confusion of ideas and singularity of behavior, indicative of serious, though latent, disease. In this condition the patient may hold some correct notions, even on a matter of business, and yet be quite incompetent to embrace all the relations connected with a contract or a will, even though no delusion were present to warp his judgment. The revelations of patients after recovery furnish indubitable proof that during this remission of the symptoms the mind is in a state of confusion utterly unreliable for any business purpose. Georget, Des Mal. Men. 46; Reid, Essays on Hypochondriacal Affections, 21 Essay; Combe, Men. Derang. 241; Ray, Med. Jur. 376.

3. Of late years—whatever may have been the earlier practice—courts have not required that proof of a lucid interval which consists of complete restoration of reason, as described above. They have been satisfied with such proof as was furnished by the transaction in question. They cared less to consider the general state of mind than its special manifestations on a particular occasion. In 1 Phill. Lect. 90, the court said, "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself;" if that "is a rational act, rationally done, the whole case is proved;" "if she could converse rationally, that is a lucid interval.' Proctor, 2 Carr. & P. 415. This is a mere begging of the question, which is whether the act so rational and so rationally done—and not for that reason necessarily incompatible with insanity—was or was not done in a lucid interval. Persons very insane, violent, and full of delusions frequently do and say things evincing no mark of disease, while no one supposes that there is any lucid interval in the case. Correcter views prevailed in 2 Hagg. 433, where the court pronounced against two wills which showed no trace of folly, because the testator had been confessedly so insane as to require an attendant from an asylum, until within a few months of the date of the last will, and had manifested delusions during the period that intervened between the two wills in question. "It is clear," said the court, "that persons essentially insane may be calm, may do acts, hold conversations, and even pass in general society, as perfectly sane. It often requires close examination by persons skilled in the disorder, to discover and ascertain whether or not the mental derangement is removed and the mind become again perfectly sound. Where there is calmness, where there is rationality on ordinary subjects, those who see the party usually conclude that his recovery is perfect. . . . When there is not actual recovery, and a return to the management of himself and his concerns by the unfortunate individual, the proof of a lucid interval is extremely difficult."

4. In criminal cases, the proof of a lucid interval must be still more difficult, in the very nature of the case. For although the mental manifestations may be perfectly right, it cannot be supposed that the brain has resumed its normal condition. In its outward expression, insanity, like many other nervous diseases, is characterized by a certain periodicity, whereby the prominent symptoms disappear for a time, only to return again within a very limited period. An epileptic, in the intervals between his fits, may evince to the closest observer not a single trace of mental or bodily disease; and yet, for all that, nobody supposes that he has recovered from his malady. No more does a lucid interval in a case of insanity imply that the disease has disappeared because its outward manifestations have ceased. There unquestionably remains an abnormal condition of the brain, by whatever name it may be called, whereby the power of the mind to sustain provocations, to resist temptations, or withstand any other causes of excitement, is greatly weakened.

Lucid intervals, properly so called, should not be confounded with those periods of apparent recovery which occur between two successive attacks of mental disease, nor with those transitions from one phasis of insanity to another, in which the individual seems to be in his natural condition. They may not be essentially different, but the suddenness and brevity of the former would be likely to impart to an act a moral complexion very different from that which it would bear if performed in the larger and more indefinite intermissions of the latter. Still, great forbearance should be exercised towards persons committing criminal acts while in any of these equivocal conditions. Those who have suffered repeated attacks of mental disease habitually labor under a degree of nervous irritability, which renders them peculiarly susceptible to many of those incidents and influences which lead to crime. The law may make no distinction, but executive and judicial tribunals are generally intrusted with discretionary powers, whereby they are enabled to apportion the punishment according to the moral guilt of the party. Ray, Med. Jur. chap. *Luc. Int.*

It is the duty of the party who contends for a lucid interval, to prove it; for a person once insane is presumed so, until it is shown that he had a lucid interval, or has recovered, Swinb. 77; Coke, Litt. 185, n.; 3 Brown, Ch. 443; 1 Const. So. C. 225; 1 Pet. 163; 1 Litt. Ky. 102; and yet, on the trial of Hadfield, whose insanity, both before and after the act, was admitted, the court, Lord Kenyon, said that "were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed." See INSANITY.

LUCRATIVE SUCCESSION. In Scotch Law. The passive title of *præceptio hæreditatis*, by which, if an heir apparent receive gratuitously a part, however small, of the heritage which would come to him as heir,

he is liable for all grantor's precontracted debts. Erskine, Inst. 3. 8. 87–89; Stair, Inst. 3. 7.

LUCRI CAUSA (Lat. for the sake of gain). **In Criminal Law.** A term descriptive of the intent with which property is taken in cases of larceny.

According to the tenor of the latest authorities, *lucri causâ* would appear to be immaterial; though, in recent cases, judges have sometimes thought it advisable not to deny, but rather to confess and avoid it, however sophistically. The prisoner, a servant of A, applied for, and received, at the post-office, all A's letters, and delivered them to A, with the exception of one, which the prisoner destroyed in the hope of suppressing inquiries respecting her character. This was held to be a larceny; "for, supposing that it was a necessary ingredient in that crime that it should be done *lucri causâ* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character." 1 Den. Cr. Cas. 180. In a case where some servants in husbandry had the care of their master's team, they entered his granary by means of a false key, and took out of it two bushels of beans, which they gave to his horses. Of eleven judges, three were of opinion that there was no felony. Of the eight judges who were for a conviction, some (it is not stated how many) alleged that by the better feeding of the horses the men's labor was lessened, so that they took the beans to give themselves ease,—which was, constructively, at least, *lucri causâ*. Russ. & R. 307. When a similar case afterwards came to be decided by the judges, it was said to be no longer *res integra*. 1 Den. Cr. Cas. 193. The rule with regard to the *lucri causâ* is stated by the English criminal law commissioners in the following terms: "The ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it is to benefit himself or another, or to injure any one by the taking, is immaterial." Coke, 17. In this country, these cases have not been considered as authority. 18 Ala. 461. See 16 Miss. 401; 10 Ala. N. s. 814; 3 Strobh. So. C. 508; 1 Carr. & K. 532; Carr. & M. 547; Inst. lib. 4, t. 1, § 1.

LUCRUM CESSANS. In Scotch Law. A cessation of gain. Opposed to *damnum emergens*, an actual loss.

LUGGAGE. Such articles of personal comfort and convenience as travellers usually find it desirable to carry with them. This term is synonymous with baggage: the latter being in more common use in this country, while the former seems to be almost exclusively used in England. See BAGGAGE.

LUNACY. See INSANITY.

LUNAR. Belonging to or measured by the moon.

LUNATIC. One who is insane. See INSANITY.

LYEF-GELD. In Saxon Law. Leave-money. A small sum paid by customary tenant for leave to plough, etc. Cowel; Somn. on Gavelk. p. 27.

LYING IN GRANT. Incorporeal rights and things which cannot be transferred by livery of possession, but which exist only in idea, in contemplation of law, are said to lie in grant, and pass by the mere delivery of the deed. See GRANT; LIVERY OF SEISIN; SEISIN.

LYING IN WAIT. Being in ambush for the purpose of murdering another.

Lying in wait is evidence of deliberation and intention. Where murder is divided into degrees, as in Pennsylvania, lying in wait is such evidence of malice that it makes the killing, when it takes place, murder in the first degree. See Dane, Abr. Index.

LYNCH-LAW. A common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offence. In England this is called *Lidford Law*.

M.

M. The thirteenth letter of the alphabet.

Persons convicted of manslaughter, in England, were formerly marked with this letter on the brawn of the thumb.

This letter is sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per centum, and not one per centum interest. 13 Pet. 176.

MACE-BEARER. In English Law. An officer attending the court of session.

MACEDONIAN DECREE. In Roman Law. A decree of the Roman senate, which derived its name from that of a certain usurer, who was the cause of its being made, in consequence of his exactions.

It was intended to protect sons who lived under the paternal jurisdiction from the unconscionable contracts which they sometimes made on the expectations after their fathers' deaths; another, and perhaps the principal, object, was to cast odium on the rapacious

creditors. It declared such contracts void. Dig. 14. 6. 1; Domat, Lois Civ. liv. 1, tit. 6, § 4; Fonblanque, Eq. b. 1, c. 2, § 12, note. See CATCHING BARGAIN; POST OBIT.

MACHINATION. The act by which some plot or conspiracy is set on foot.

MACHINE. In Patent Law. Any contrivance which is used to regulate or modify the relations between force, motion, and weight.

In its broadest signification, this term is applied to any contrivance which is used to regulate or modify the relations between force, motion, and weight. "The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." 15 How. 267.

What are sometimes called the simple machines are six in number: the lever, the pulley, the wheel and axle, the wedge, the screw, and the inclined plane. These are sometimes known as the mechanical powers, though neither these nor any other machinery can ever constitute or create power. They can only economize, control, direct, and render it useful.

Machines, as generally seen and understood, are compounded of these simple machines in some of their shapes and modifications. Such a combination as, when in operation, will produce some specific final result, is regarded as an entire machine. It is so treated in the patent law; for, although a new machine, or a new improvement of a machine, is an invention, and although only one invention can be included in a single patent, still, several different contrivances each of which is in one sense a machine may all be separately claimed in a single patent, provided they all contribute to improve or to constitute one machine and are intended to produce a single ultimate result; and a new combination of machines is patentable whether the machines themselves be new or old. 3 Wash. C. C. 69; 1 Stor. C. C. 273, 568; 2 *id.* 609; 1 Mas. C. C. 474; 1 Sumn. C. C. 482; 3 Wheat. 454.

MADE KNOWN. Words used as a return to a *scire facias* when it has been served on the defendant.

MAGISTER (Lat.). A master; a ruler; one whose learning and position make him superior to others: thus, one who has attained to a high degree or eminence in science and literature is called a *master:* as, master of arts.

MAGISTER AD FACULTATES (Lat.). **In English Ecclesiastical Law.** The title of an officer who grants dispensations: as, to marry, to eat flesh on days prohibited, and the like. Bacon, Abr. *Eccles. Courts* (A 5).

MAGISTER NAVIS (Lat.). **In Civil Law.** Master of a ship; he to whom the whole care of a ship is given up, whether appointed by the owner, or charterer, or master. L. 1, ff. *de exercit.*; Idem, § 3; Calvinus, Lex.; Story, Ag. § 36.

MAGISTER SOCIETATIS (Lat.). **In Civil Law.** Managing partner. Vicat, Voc. Jur.; Calvinus, Lex. Especially used of an officer employed in the business of collecting revenues, who had power to call together the tything-men (*decumands*), as it were a senate, and lay matters before them, and keep account of all receipts, etc. He had, generally, an agent in the province, who was also sometimes called *magister societatis. Id.;* Story, Partn. § 95.

MAGISTRACY. In its most enlarged signification, this term includes all officers, legislative, executive, and judicial. For example, in most of the state constitutions will be found this provision: "the powers of the government are divided into three distinct departments, and each of these is confided to a separate *magistracy*, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another." In a more confined sense, it signifies the body of officers whose duty it is to put the laws in force: as, judges, justices of the peace, and the like. In a still narrower sense, it is employed to designate the body of justices of the peace. It is also used for the office of a magistrate.

MAGISTRALIA BREVIA (Lat.). Writs adapted to special cases, and so called because drawn by the *masters* in chancery. 1 Spence, Eq. Jur. 239. For the difference between these and *judicial writs*, see Bracton, 413 *b*.

MAGISTRATE. A public civil officer, invested with some part of the legislative, executive, or judicial power given by the constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the peace.

The president of the United States is the chief magistrate of this nation; the governors are the chief magistrates of their respective states.

It is the duty of all magistrates to exercise the power, vested in them for the good of the people, according to law, and with zeal and fidelity. A neglect on the part of a magistrate to exercise the functions of his office, when required by law, is a misdemeanor. See 15 Viner, Abr. 144; Ayliffe, Pand. tit. 22; Dig. 30. 16. 57; Merlin, Rep.; 13 Pick. Mass. 523.

MAGISTRATE'S COURT. In American Law. Courts in the state of South Carolina, having exclusive jurisdiction in matters of contract of and under twenty dollars.

MAGNA CHARTA. The Great Charter of English liberties, so called (but which was really a compact between the king and his barons, and almost exclusively for the benefit of the latter, though confirming the ancient liberties of Englishmen in some few particulars), was wrung from king John by his barons assembled in arms, on the 19th of June, 1215, and was given by the king's hand, as a confirmation of his own act, on the little

island in the Thames, within the county of Buckinghamshire, which is still called "Magna Charta Island."

The preliminary interview was held in the meadow of Running Mede, or Runny Mede (fr. Sax. -mæ, council), that is, council meadow, which had been used constantly for national assemblies, and which was situated on the southwest side of the Thames, between Staines and Windsor. Though such formalities were observed, the provisions of the charter were disregarded by John and succeeding kings, each of whom, when wishing to do a popular thing, confirmed this charter. There were thirty-two confirmations between 1215 and 1416, the most celebrated of which were those by Hen. III. (1225) and Edw. I., which last confirmation was sealed with the great seal of England at Ghent, on the 5th Nov. 1297. The Magna Charta printed in all the books as of 9 Hen. III. is really a transcript of the roll of parliament of 25 Edw. I. There were many originals of Magna Charta made, two of which are preserved in the British Museum.

2. Magna Charta consists of thirty-seven chapters, the subject-matter of which is very various. C. 1 provides that the Anglican church shall be free and possess its rights unimpaired, probably referring chiefly to immunity from papal jurisdiction. C. 2 fixes relief which shall be paid by king's tenant of full age. C. 3 relates to heirs and their being in ward. C. 4; guardians of wards within age are by this chapter restrained from *waste* of ward's estate, "*vasto hominum et rerum*," waste of men and of things, which shows that serfs were regarded as slaves even by this much-boasted charter; and as serfs and freemen were at this time the divisions of society, and as freemen included, almost without exception, the nobility alone, we can see somewhat how much this charter deserves its name. C. 5 relates to the land and other property of heirs, and the delivering them up when the heirs are of age. C. 6, the marriage of heirs. C. 7 provides that widow shall have quarantine of forty days in her husband's chief house, and shall have her dower set out to her at once, without paying any thing for it, and in mean while to have reasonable estovers; the dower to be one-third of lands of husband, unless wife was endowed of less at the church-door; widow not to be compelled to marry, but to find surety that she will not marry without consent of the lord of whom she holds.

3. Marriage settlements have now in England taken the place, in great measure, of dower.

C. 8, the goods and chattels of crown-debtor to be exhausted before his rents and lands are distrained; the surety not to be called upon if the principal can pay; if sureties pay the debt, they to have the rents and lands of debtor till the debt is satisfied. C. 9 secures to London and other cities and boroughs and town barons of the five ports, and all other ports, to have their ancient liberties. C. 10 prohibits excessive distress for more services or rent than was due. C. 11 provides that court of common pleas should not follow the court of the king, but should be held in a certain place. They have been, accordingly, located at Westminster. C. 12 declares the manner of taking assizes of *novel disseisin* and *mort d'ancestor*. These were actions to recover lost seisin (*q. v.*), now abolished. C. 13 relates to assizes *darein presentment* brought by ecclesiastics to try right to present to ecclesiastical benefice. Abolished. C. 14 provides that amercement of a freeman for a fault shall be proportionate to his crime, and not excessive, and that the villein of any other than the king shall be amerced in same manner, his farm, utensils, etc. being preserved to him (*salvo wanagio suo*). For otherwise he could not cultivate lord's land. C. 15 and c. 16 relate to making of bridges and keeping in repair of sewers and sea-walls. This is now regulated by local parochial law.

4. C. 17 forbids sheriffs and coroners to hold pleas of the crown. Pleas of the crown are criminal cases which it is desirable should not be tried by an inferior and perhaps ignorant magistrate. C. 18 provides that if any one holding a lay fee from crown die, the king's bailiff, on showing letters patent of summons for debt from the king, may attach all his goods and chattels, so that nothing be moved away till the debt to crown be paid off clearly, the residue to go to executors to perform the testament of the dead; and if there be no debt owing to crown, all the chattels of the deceased to go to executors, reserving, however, to the wife and children their reasonable parts. Debts to the government have precedence in United States as well as in England. A man can now in England will away his whole personal property from wife and children, but not in some of the United States. See Gen. Stat. Mass. 1560. C. 19 relates to purveyance of king's house; c. 20, to the castle-guard; c. 21, to taking horses, carts, and wood for use of royal castles. The three last chapters are now obsolete. C. 22 provides that the lands of felons shall go to king for a year and a day, afterwards to the lord of the fee. So in France. The day is added to prevent dispute as to whether the year is exclusive or inclusive of its last day. C. 23 provides that the *wears* shall be pulled down in the Thames and Medway, and throughout England, except on the sea-coast. These *wears* destroyed fish, and interrupted the floating of wood and the like down stream. C. 24 relates to the writ of *præcipe in capite* for lords against their tenants offering wrong, etc. Now abolished. C. 25 provides a uniform measure. See 5 & 6 Will. IV. c. 63. C. 26 relates to inquisitions of life and member, which are to be granted freely. Now abolished. C. 27 relates to knight-service and other ancient tenures, now abolished.

5. C. 28 relates to accusations, which must be under oath. C. 29 provides that "no freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by

legal judgment of his peers or the law of the land. We will sell or deny justice to none, nor put off right or justice." This clause is very much celebrated, as confirming the right to trial by jury. By common law, the twelve jurors must be unanimous. Lord Campbell, in England, recently introduced a bill changing this and, in certain cases, allowing the majority to decide. C. 30 relates to merchant-strangers, who are to be civilly treated, and, unless previously prohibited, are to have free passage through, and exit from, and dwelling in, England, without any manner of extortions, except in time of war. If they are of a country at war with England, and found in England at the beginning of the war, they are to be kept safely until it is found out how English merchants are treated in their country, and then are to be treated accordingly. C. 31 relates to escheats; c. 32, to the power of alienation in a freeman, which is limited. C. 33 relates to patrons of abbeys, etc. C. 34 provides that no appeal shall be brought by a woman except for death of her husband. This was because the defendant could not defend himself against a woman in single combat. The crime of murder or homicide is now inquired into by indictment. C. 35 relates to rights of holding county courts, etc. Obsolete. C. 36 provides that a gift of lands in *mortmain* shall be void, and lands so given go to lord of fee. C. 37 relates to escuage and subsidy. C. 38 confirms every article of the charter.

Magna Charta is said by some to have been so called because larger than the Charta de Foresta, which was given about the same time. Spelman, Gloss. But see Cowel. Magna Charta is mentioned casually by Bracton, Fleta, and Britton. Glanville is supposed to have written before Magna Charta. The Mirror of Justices, c. 315 *et seq.*, has a chapter on its defects. See Coke, 2d Inst.; Barrington, Stat.; 4 Sharswood, Blackst. Comm. 423. See a copy of Magna Charta in 1 Laws of South Carolina, edited by Judge Cooper, p. 78. In the Penny Magazine for the year 1833, p. 229, there is a copy of the original seal of King John affixed to this instrument; a specimen of a fac-simile of the writing of Magna Charta, beginning at the passage, *Nullus liber homo capietur vel imprisonetur*, etc. A copy of both may be found in the Magasin Pittoresque for the year 1834, pp. 52, 53. See 8 Encyc. Brit. 722; 6 *id.* 332; Wharton, Lex. 2d Lond. ed.

MÄHL BRIEF. A term confined to the German law of shipping. It is a contract for building a ship, specifying her description, quality of materials, the denomination, and size, with reservation generally that contractor or his agent (who is in most cases the master of a vessel) may reject such material as he deems uncontract-worthy, and oblige builder to supply other materials. Jacobsen, Sea Laws, 2, 3.

MAIDEN. An instrument formerly used in Scotland for beheading criminals.

MAIDEN RENTS. In Old English Law. A fine paid to lords of some manors, on the marriage of tenants, originally given in consideration of the lord's relinquishing his customary right of lying the first night with the bride of a tenant. Cowel.

MAIHEM. See MAYHEM; MAIM.

MAIL (Fr. *malle*, a trunk). The bag, valise, or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail.

The laws of the United States have provided for the punishment of robberies or wilful injuries to the mail; the act of March 3, 1825, 3 Story, U. S. Laws, 1985.

MAILE. In Old English Law. A small piece of money. A rent.

MAILS AND DUTIES. In Scotch Law. Rents of an estate. Stair, Inst. 2. 12. 32; 2 Ross, Lect. 235, 381, 431–439.

MAIM. In Criminal Law. To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been.

In Pleading. The words "feloniously did maim" must of necessity be inserted, because no other word nor any circumlocution will answer the same purpose. 1 Chitty, Crim. Law, 244.

MAINE. The name of one of the new states of the United States of America, formed out of that part of the territory of Massachusetts called the district of Maine.

2. The territory embraced in the new state was not contiguous to that remaining in the state from which it was taken, and was more than four times as large. The legislature of Massachusetts, by an act passed June 19, 1819, gave its consent for the people of the district to become a separate and independent state. They met in convention, by delegates elected for the purpose, and formed a separate state, by the style of the *State of Maine*, and adopted a constitution for the government thereof, October 19, 1819, and applied to congress, at its next session, for admission into the Union.

The petition was presented in the house of representatives of the United States, Dec. 8, 1819, and the state was admitted into the Union by the act of congress of March 3, 1820, from and after the fifteenth day of March, 1820.

3. Every male citizen of the United States, twenty-one years of age, excepting paupers, persons under guardianship, and Indians not taxed, who has resided in the state three months next before any election, has a right to vote, except United States troops in service at stations of the United States, who do not by such stay gain any residence.

The Legislative Power.

This is vested in two distinct branches: a house of representatives and a senate, each having a negative upon the other, and both together being styled the *Legislature of Maine*. Art. 4, part 1, § 1.

The *House of Representatives* is to consist of one hundred and fifty-one members. Amend. art. 4.

They are to be apportioned among the counties according to law; to be elected annually by the qualified electors for one year from the day preceding the meeting of the legislature. Art. 4, part

1, § 2. The legislature is to convene on the first Wednesday of January annually. Art. 4, part 3, § 1. A representative must be twenty-one years old at least, for five years a citizen of the United States, for one year a resident of the state, and for three months immediately preceding his election a resident of the town or district which he represents. He must continue a resident during his term of office.

4. The *Senate* is to consist of not less than twenty nor more than thirty-one members, elected, one from each district, at the same time, and for the same term, as the representatives, by the qualified electors of the districts into which the state shall from time to time be divided. Art. 4, part 2, § 1. A senator must be at least twenty-five years old, and otherwise possess the same qualifications as representatives.

Every bill or resolution having the force of law, to which the concurrence of both branches is necessary, except on a question of adjournment, must be approved by the governor, unless upon its return to the house in which it originated, with his objections, it shall there be passed over his veto by receiving in each house the votes of two-thirds thereof; or unless he shall retain it for more than five days. Art. 4, part 3, § 1.

The senate has power to try all impeachments. Art. 4, part 2, § 7.

The Executive Power.

The *Governor* is elected by the qualified electors, and holds his office for one year from the first Wednesday of January in each year. Art. 1, part 1, §§ 1 and 2.

He must, at the commencement of his term, be not less than thirty years of age, a natural-born citizen of the United States, five years a resident of the state, and at the time of his election, and during his term, be a resident of the state. Art. 5, part 1, § 4.

5. A *Council* consisting of seven persons, citizens of the United States, and resident within the state, to advise the governor in the executive part of government, is to be chosen annually by joint ballot of the senators and representatives in convention. Art. 5, part 2, §§ 1 and 2.

The governor, with the advice and consent of the council, is to nominate and appoint all judicial officers, the attorney-general, sheriffs, coroners, registers of probate, and notaries public; is to inform the legislature of the condition of the state, and recommend measures; may, after conviction, with the advice and consent of council, remit forfeitures, and grant reprieves and pardons, and in cases of impeachment; may convene the legislature at unusual times or places, if necessary, and adjourn them, in case of disagreement as to the time of adjournment.

The Judicial Power.

The *Supreme Judicial Court* is composed of one chief and seven assistant judges, appointed by the governor and council for the term of seven years. It is the highest court, and also the court of general original jurisdiction,—having the jurisdiction of the former district court. It has exclusive civil jurisdiction in law and equity, except over cases involving small amounts, of which jurisdiction is given to the justices of the peace. Five judges are necessary to constitute a quorum for the decision of questions of law. Annual law terms are held in each of the three districts into which the state is divided for the purpose. For purposes of jury trials, including civil and criminal cases, the court is held by a single judge. Two or more terms are held annually in each county in the state, as provided by statute from time to time. The justices receive a stated salary, and are to give their opinions upon important questions of law upon solemn occasions when required by the governor, senate, or house of representatives.

6. *Probate Courts* are held in each county by judges elected for three years by the people. They are to appoint guardians; take probate of wills; grant letters of administration; attend to the settlement of estates of persons in state prison, under sentence of death or imprisonment for life; and to have jurisdiction generally for these and similar purposes. The supreme court is the supreme court of probate, and an appeal lies to it from the decision of the judge of probate.

Justices of the Peace are appointed by the governor and council for the term of seven years. They have jurisdiction over all civil cases (except those involving the title to land) where the amount involved does not exceed twenty dollars. They have a limited criminal jurisdiction.

Police Courts are created by special enactment in the larger towns, with a jurisdiction substantially that of the justices, and exclusive thereof, except in specified cases.

County Commissioners are chosen by the people, three in each county, to attend to the internal police of the county. They have the care of roads, bridges, etc., the public buildings of the county, and the control of the county money. One is elected annually for the term of three years.

MAINOUR. **In Criminal Law.** The thing stolen found in the hands of the thief who has stolen it.

Hence, when a man is found with property which he has stolen, he is said to be taken with the mainour, that is, it is found in his *hands*.

Formerly there was a distinction made between a larceny, when the thing stolen was found in the hands of the criminal, and when the proof depended upon other circumstances not quite so irrefragable; the former properly was termed *pris ove maynovere*, or *ove mainer*, or *mainour*, as it is generally written. Barrington, Stat. 315, 316, note.

MAINPERNABLE. Capable of being bailed; one for whom bail may be taken; bailable.

MAINPERNORS. **In English Law.** Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

Mainpernors differ from bail: a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 6 Mod. 231; 7 *id.* 77, 85, 98; 3 Blackstone, Comm. 128. See Dane, Abr.

MAINPRISE. **In English Law.** The taking a man into friendly custody, who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. Wood, Inst. b. 4, c. 4.

MAINSWORN. Forsworn, by making false oath with *hand* (*main*) on book. Used in the North of England. Brownl. 4; Hob. 125.

MAINTAINED. **In Pleading.** A technical word indispensable in an indictment for maintenance. 1 Wils. 325.

MAINTAINORS. **In Criminal Law.** Those who maintain or support a cause de-

pending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift, Dig. 328; 4 Blackstone, Comm. 124; Bacon, Abr. *Barrator*.

MAINTENANCE. Aid, support, assistance; the support which one person, who is bound by law to do so, gives to another for his living: for example, a father is bound to find maintenance for his children; and a child is required by law to maintain his father or mother, when they cannot support themselves, and he has ability to maintain them. 1 Bouvier, Inst. nn. 284–286.

In Criminal Law. A malicious, or, at least, officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russell, Crimes, 176.

The intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation. 2 Parsons, Contr. 266. See 4 Term, 340; 6 Bingh. 299; 4 Q. B. 883.

But there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, *first*, because the party has an interest in the thing in variance; as when he has a bare contingency in the lands in question, which possibly may never come in esse, Bacon, Abr. *Maintenance;* and see 11 Mees. & W. Exch. 675; 9 Metc. Mass. 489; 13 *id.* 262; 1 Me. 292; 6 *id.* 361; 11 *id.* 111; *second*, because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife, 3 Cow. N. Y. 623; *third*, because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him; *fourth*, because the money is given out of charity, 1 Bail. So. C. 401; *fifth*, because the person assisting the party to the suit is an attorney or counsellor; the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man. 1 Russell, Crimes, 179; Bacon, Abr. *Maintenance;* Broke, Abr. *Maintenance*. This offence is punishable criminally by fine and imprisonment. 4 Blackstone, Comm. 124; 2 Swift, Dig. 328. Contracts growing out of maintenance are void. 11 Mass. 549; 5 Humphr. Tenn. 379; 20 Ala. N. S. 521; 53 B. Monr. Ky. 413; 5 Johns. Ch. N. Y. 44; 4 Q. B. 883. See 3 Hawks, No. C. 86; 1 Me. 292; 6 Mass. 421; 11 *id.* 553; 5 Pick. Mass. 359; 5 T. B. Monr. Ky. 413; 3 Cow. N. Y. 647; 6 *id.* 431; 4 Wend. N. Y. 306; 14 Johns. N. Y. 124; 3 Johns. Ch. N. Y. 508; 7 Dowl. & R. 846; 5 Barnew. & C. 188.

MAISON DE DIEU (Fr. house of God; a hospital). A hospital; an almshouse; a monastery. Stat. 39 Eliz. c. 5.

MAJESTY. A term used of kings and emperors as a title of honor. It sometimes means power: as when we say, the majesty of the people. See Wolff. § 998.

MAJOR. One who has attained his full age and has acquired all his civil rights; one who is no longer a minor; an adult.

In Military Law. The officer next in rank above a captain.

MAJOR-GENERAL. **In Military Law.** An officer next in rank above a brigadier-general. He commands a division consisting of several brigades, or even an army.

MAJORES (Lat.). The male ascendants beyond the sixth degree. The term was used among the Romans; and the term is still retained in making genealogical tables.

MAJORITY. The state or condition of a person who has arrived at full age. He is then said to be a major, in opposition to minor, which is his condition during infancy.

The greater number. More than all the opponents.

Some question exists as to whether a majority of any body is *more than one-half the whole number* or *more than the number acting in opposition*. Thus, in a body of one hundred voters, in which twenty did not vote on any particular question, on the former supposition fifty-one would be a majority, on the latter forty-one. The intended signification is generally denoted by the context, and where it is not the second sense is generally intended; a majority on a given question being more than one-half the number of those voting.

In every well-regulated society, the majority has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws; and the minority are bound whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject. 1 Tucker, Blackstone, Comm. Appx. 168, 172; 9 Dane, Abr. 37–43; 1 Story, Const. § 330.

As to the rights of the majority of part-owners of vessels, see 3 Kent, Comm. 114 *et seq.;* Parsons, Marit. Law; PART-OWNERS. As to the majority of a church, see 16 Mass. 488.

In the absence of all stipulations, the general rule in partnerships is that each partner has an equal voice, and a majority acting *bonâ fide* have the right to manage the partnership concerns and dispose of the partnership property notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified. 2 Bouvier, Inst. n. 1954. See PARTNER.

As to the majorities of companies or corporations, see Angell, Corp. 48 *et seq.;* 3 Mart. La. 495. See, generally, Rutherford, Inst. 249; 9 Serg. & R. Penn. 99; Brooke, Abr. Corp. pl. 63; 15 Viner, Abr. 183, 184.

MAKE. To perform or execute: as, to *make his law*, is to perform that which a man had bound himself to do; that is, to clear himself of an action commenced against him, by his oath and the oath of his neighbors. Old Nat. Brev. 161. To make default, is to fail to appear in proper trial. To make oath, is to swear according to the form prescribed by law. It is also used intransitively of persons and things, to have effect; to tend: *e.g.*

"That case makes for me." Hardr. 133; Webster, Dict.

MAKER. A term applied to one who makes a promissory note and promises to pay it when due.

He who makes a bill of exchange is called the drawer; and frequently in common parlance and in books of reports we find the word drawer inaccurately applied to the maker of a promissory note. See PROMISSORY NOTE.

MAKING HIS LAW. A phrase used to denote the act of a person who wages his law. Bacon, Abr. *Wager of Law.*

MALA FIDES (Lat.). Bad faith. It is opposed to *bonâ fides*, good faith.

MALA PRAXIS (Lat.). Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured.

Wilful mal-practice takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care: as in the case of criminal abortion. Elwell, Mal-Pract. 243 *et seq.*; 2 Barb. N. Y. 216.

Negligent mal-practice comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires: as if a physician should administer medicines, while in a state of intoxication, from which injury would arise to his patient.

Ignorant mal-practice is the administration of medicines calculated to do injury, which do harm, and which a well-educated and scientific medical man would know were not proper in the case. Elwell, Mal-Pract. 198 *et seq.*; 7 Barnew. & C. 493, 497; 6 Bingh. 440; 6 Mass. 134; 5 Carr. & P. 333; 1 Mood. & R. 405; 5 Cox, Cr. Cas. 587.

2. This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect), because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. 1 Ld. Raym. 213. See 3 Chitty, Crim. Law, 863; 4 Wentworth, Plead. 360; 2 Russell, *Crimes*, Greaves ed. 277; 1 Chitty, Pract. 43; 6 Mass. 134; 8 Mo. 561; 3 Carr. & P. 629; 4 *id.* 423.

Besides the public remedy for mal-practice, in many cases the party injured may bring a civil action. 5 Day, Conn. 260; 9 Conn. 209; 3 Watts, Penn. 355; 7 N. Y. 397.

3. Civil cases of mal-practice are of very frequent occurrence on those occasions where surgical operations are rendered necessary, or supposed to be so, by disease or injury, and are so performed as either to shorten a limb or render it stiff, or otherwise prevent the free, natural use of it, by which the party ever after suffers damages. This may embrace almost every kind of surgical operation; but nine-tenths of all such cases arise from amputations, fractures, or dislocations. Elwell, Mal-Pract. 55.

4. To the performance of all surgical operations the surgeon is bound to bring at least ordinary skill and knowledge. He must apply without mistake what is settled in his profession. He must possess and practically exercise that degree and amount of knowledge and science which the leading authorities have pronounced as the result of their researches and experience up to the time, or within a reasonable time before the issue or question to be determined is made. Elwell, Mal-Pract. 55. Many cases, both English and American, have occurred, illustrating the nature and extent of this liability. 8 East, 347; 2 Wils. 259; 1 H. Blackst. 61; Wright, Ohio, 466; 22 Penn. St. 261; 27 N. H. 460; 13 B. Monr. Ky. 219.

MALA PROHIBITA (Lat.). Those things which are prohibited by law, and therefore unlawful.

A distinction was formerly made, in respect of contracts, between *mala prohibita* and *mala in se*; but that distinction has been exploded, and it is now established that when the provisions of an act of the legislature have for their object the protection of the public, it makes no difference with respect to contracts whether the thing be prohibited absolutely or under a penalty. 5 Barnew. & Ald. 335, 340; 10 Barnew. & C. 98; 3 Stark. 61; 13 Pick. Mass. 518; 2 Bingh. N. C. 636, 646. The distinction is, however, important in criminal law in some cases with reference to the question of intent. See INTENT; 1 Bishop, Crim. Law, § 2157.

MALE. Of the masculine sex; of the sex that begets young; the sex opposed to the female.

MALEDICTION (Lat.). **In Ecclesiastical Law.** A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights.

MALEFACTOR (Lat.). He who has been guilty of some crime; in another sense, one who has been convicted of having committed a crime.

MALEFICIUM (Lat.). **In Civil Law.** Waste; damage; torts; injury. Dig. 5. 18. 1.

MALFEASANCE. The unjust performance of some act which the party had no right, or which he had contracted not, to do. It differs from misfeasance and nonfeasance, which titles see. See 1 Chitty, Pract. 9; 1 Chitty, Plead. 134.

MALICE. In Criminal Law. The doing a wrongful act intentionally without just cause or excuse. 4 Barnew. & C. 255; 9 Metc. Mass. 104.

A conscious violation of the law, to the prejudice of another. 9 Clark & F. Hou. L. 321.

Malice is never understood to denote general malevolence or unkindness of heart, or enmity toward a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. 15 Pick. Mass. 337; 9 Metc. 410; 4 Ga. 14; 33 Me. 331; 7 Ala. N. S. 728; 2 Dev. No. C. 425; 2 Rich. So. C. 179; 1 Dall. Penn. 335; 4 Mas. C. C. 115; 1 Den. Cr. Cas. 63; Russ. & R. 26, 465; 1 Mood. Cr. Cas. 93. It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion

against some one at the time of committing the crime: as, if A intending to poison B, conceals a quantity of poison in an apple and puts it in the way of B, and C, against whom he has no ill will, and who, on the contrary, is his friend, happens to eat it and dies, A will be guilty of murdering C with malice aforethought. Bacon, Max. Reg. 15; 2 Chitty, Crim. Law, 727; 3 *id.* 1104.

Express malice exists when the party evinces an intention to commit the crime. 3 Bulstr. 171.

Implied malice is that inferred by law from the facts proved. 11 Humphr. Tenn. 172; 6 Blackf. Ind. 299; 1 East, Pl. Cr. 371.

It is *implied* in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity or informality are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule that it applies only to cases where the killing is proved and *nothing further is shown;* for if the circumstances disclosed tend to extenuate the act, the prisoner has the full benefit of such facts. 9 Metc. Mass. 93; 5 Cush. Mass. 295; 3 Gray, Mass. 463.

3. It is a general rule that when a man commits an act, unaccompanied by any circumstances justifying its commission, the law presumes he has acted advisedly and with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon. 9 Metc. Mass. 103; 5 Cush. Mass. 305. See 3 Maule & S. 15; 1 Russ. & R. Cr. Cas. 207; 1 Wood. Cr. Cas. 263; 1 East, Pl. Cr. 223, 232, 340; 15 Viner, Abr. 506.

In Torts. The doing any act injurious to another without a just cause.

4. This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 Serg. & R. Penn. 39, 40. Indeed, in some cases it seems not to require any intention in order to make an act malicious. When a slander has been published, therefore, the proper question for the jury is, not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. 10 Barnew. & C. 472. Again, take the common case of an offensive trade, the melting of tallow, for instance: such trade is not itself unlawful, but if carried on to the annoyance of the neighboring dwellings, it becomes unlawful with respect to them, and their inhabitants may maintain an action, and may charge the act of the defendant to be malicious. 3 Barnew. & C. 584.

MALICE AFORETHOUGHT. Wicked purpose. These words in the description of murder do not imply deliberation, or the lapse of considerable time between the malicious intent to take and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance. 5 Cush. Mass. 306. And see 8 Carr. & P. 616; 2 Mas. C. C. 60; 1 Dev. & B. No. C. 121, 163; 6 Blackf. Ind. 299; 3 Ala. N. s. 497.

These words distinguish an indictment for murder from one for manslaughter, Yelv. 205; 1 Chitty, Crim. Law, 242, and must be used in charging the crime where malice aforethought is necessary to its commission. 1 East, Pl. Cr. 402; 2 Mas. C. C. 91.

MALICIOUS ABANDONMENT. The forsaking without a just cause a husband by the wife, or a wife by her husband. See ABANDONMENT; DIVORCE.

MALICIOUS ARREST. A wanton arrest made without probable cause by a regular process and proceeding. See MALICIOUS PROSECUTION.

MALICIOUS INJURY. An injury committed wilfully and wantonly, or without cause. 1 Chitty, Gen. Pr. 136. See Wharton, Crim. Law, 226 *et seq.*, as to malice. See 4 Sharswood, Blackst. Comm. 143, 198, 199, 200, 206; 2 Russell, Crimes, 544, 547.

MALICIOUS MISCHIEF. An expression applied to the wanton or reckless destruction of property, and the wilful perpetration of injury to the person.

The word malicious is not sufficiently defined as the wilfully doing of any act prohibited by law, and for which the defendant has no lawful excuse. In order to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. Jacob, Law Dict. *Mischief, Malicious;* Alison, Scotch Law, 448; 3 Cush. Mass. 558; 2 Metc. Mass. 21; 3 Dev. & B. No. C. 130; 5 Ired. No. C. 364; 8 Leigh, Va. 719; 3 Me. 177.

MALICIOUS PROSECUTION. A wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result.

2. Where the defendant commenced a *criminal prosecution* wantonly, and in other respects against law, he will be responsible. Addis. Penn. 270; 12 Conn. 219. The prosecution of a *civil suit*, when malicious, is a good cause of action, even when there has been no arrest. 1 Pet. C. C. 210; 11 Conn. 582; 1 Wend. N. Y. 345. See 1 Penn. 235.

3. The action lies against the prosecutor, and even against a mere informer, when the proceedings are malicious. 9 Ala. 367. But grand jurors are not liable to an action for a malicious prosecution for information given by them to their fellow-jurors, on which a prosecution is founded. Hard. Ky. 556. Such action lies against a plaintiff in a civil action

who maliciously sues out the writ and prosecutes it, 16 Pick. Mass. 453; but an action does not lie against an attorney at law for bringing the action, when regularly employed. 16 Pick. Mass. 478. See 6 Pick. Mass. 193.

4. There must be malice and want of probable cause. 1 Wend. N. Y. 140, 345; 7 Cow. N. Y. 281; 2 P. A. Browne, Penn. Appx. xlii.; Cooke, Tenn. 90; 4 Litt. Ky. 334; 3 Gill & J. Md. 377; 1 Nott & M'C. So. C. 36; 2 *id.* 54, 143; 12 Conn. 219; 3 Call. Va. 446; 3 Mas. C. C. 112. See MALICE.

The proceedings under which the original prosecution or action was held must have been *regular*, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge and to punish the supposed offender, the now plaintiff. 3 Pick. Mass. 379, 383. When the proceedings are irregular, the prosecutor is a trespasser. 3 Blackf. Ind. 210.

5. The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action. 1 Root, Conn. 553; 1 Nott & M'C. So. C. 36; 2 *id.* 54, 143; 7 Cow. N. Y. 715; 2 Dev. & B. No. C. 492.

The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained. 5 Stew. & P. Ala. 367; 2 Conn. 700; 11 Mass. 500; 6 Me. 421; 3 Gill & J. Md. 377. See CASE.

See, generally, Buller, Nisi P. 11; 1 Saund. 228; 12 Mod. 208; 1 Tenn. 493–551; Bacon, Abr. *Actions on the Case* (H.); Bouvier, Inst. Index.

MALUM IN SE (Lat.). Evil in itself.

An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se*. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden: as playing at games which, being innocent before, have become unlawful in consequence of being forbidden. See Bacon, Abr. *Assumpsit* (*a*); MALA PROHIBITA.

MALVHILLES. Ill will. In some ancient records this word signifies malicious practices, or crimes and misdemeanors.

MALVERSATION. In French Law. This word is applied to all punishable faults committed in the exercise of an office, such as corruptions, exactions, extortions, and larceny. Merlin, Répert.

MAN. A human being. A person of the male sex. A male of the human species above the age of puberty.

In its most extended sense the term includes not only the adult male sex of the human species, but women and children: examples: "of offences against *man*, some are more immediately against the king, others more immediately against the *subject*." Hawkins, Pl. Cr. b. 1, c. 2, s. 1. "Offences against the life of *man* come under the general name of homicide, which in our law signifies the killing of a *man* by a *man*." *Id.* book 1, c. 8, s. 2.

It was considered in the civil or Roman law that although *man* and *person* are synonymous in grammar, they had a different acceptation in law: all persons were men, but all men—for example, slaves—were not persons, but things. See Barrington, Stat. 216, note.

MANAGER. A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs. 1 Bouvier, Inst. n. 190.

One of the persons appointed on the part of the house of representatives to prosecute impeachments before the senate.

2. In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company is vested in a board of directors. In other private corporations, such as railroad companies, canal and coal companies, and the like, these officers are called managers. Being agents, when their authority is limited, they have no power to bind their principal beyond such authority. 17 Mass. 29; 1 Me. 81.

3. In England and Canada the chief executive officer of a branch bank is called a manager. His duties are those of our presidents and cashiers combined. His signature is necessary to every contract binding on the bank, except entries in the pass-books of customers. He indorses bills, signs bills of exchange and drafts, and conducts the correspondence of the bank. He is under the control of the board of directors of the bank, and there is usually a local or branch board of directors, at which he acts as presiding officer. Sewell, Bank.

MANBOTE. A compensation paid the relations of a murdered man by the murderer or his friends.

MANCIPIUM. The power acquired over a freeman by the *mancipatio*.

To form a clear conception of the true import of the word in the Roman jurisprudence, it is necessary to advert to the four distinct powers which were exercised by the *pater familias*, viz.: the *manus*, or martial power; the *mancipium*, resulting from the *mancipatio*, or *alienatio per æs et libram*, of a freeman; the *dominica potestas*, the power of the master over his slaves, and the *patria potestas*, the paternal power. When the *pater familias* sold his son, *venum dare*, *mancipare*, the paternal power was succeeded by the *mancipium*, or the power acquired by the purchaser over the person whom he held *in mancipio*, and whose condition was assimilated to that of a slave. What is most remarkable is, that on the emancipation from the *mancipium* he fell back into the paternal power, which was not entirely exhausted until he had been sold three times by the *pater familias*. *Si pater filium ter venum duit, filius a patre liber esto.* Gaius speaks of the *mancipatio* as *imaginaria quædam venditio*, because in his times it was only resorted to for the purpose of adoption or emancipation. See ADOPTION; PATER FAMILIAS; 1 Ortolan, 112 *et seq.*

MANDAMUS. In Practice. This is a high prerogative writ, usually issuing out of the highest court of general jurisdiction in a state, in the name of the sovereignty, directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to

their office or duty. 3 Blackstone, Comm. 110; 4 Bacon, Abr. 495; Opinion of *Marshall*, Ch. J., in Marbury *vs.* Madison; 1 Cranch, 137, 168.

2. Its use is well defined by Lord *Mansfield*, Ch. J., in Rex *vs.* Barker, 3 Burr. 1265: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions when the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a *right*, and no other specific *remedy*, this should not be denied." The same principles are declared by Lord *Ellenborough*, Ch. J., in Rex *vs.* Archbishop of Canterbury, 8 East, 219. See 6 Ad. & E. 321. The writ of *mandamus* is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Petersdorff, Abr. 438 (309). It is the absence of a specific legal remedy which gives the court jurisdiction, 2 Selwyn, Nisi P. *Mandamus;* 29 Penn. St. 131; 32 *id.* 219; 34 *id.* 496; 41 Me. 15; 2 Pat. & H. Va. 385; but the party must have a perfect legal right. 27 Mo. 225; 11 Ind. 205; 20 Ill. 525; 25 Barb. N. Y. 73; 2 Dutch. N. J. 135; 3 Cal. 167.

3. The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons in some cases. But more generally the English court of king's bench, from which our practice on the subject is derived, declines to interfere by *mandamus* to require a specific performance of a contract when no public right is concerned. Angell & A. Corp. 761; 2 Term, 260; 6 East, 356; Bacon, Abr. *Mandamus;* 28 Vt. 587, 592.

It is a proper remedy to compel the performance of a specific act where the act is ministerial in its character, 12 Pet. 524; 34 Penn. St. 293; 26 Ga. 665; 7 Iowa, 186, 390; but where the act is of a discretionary, 6 How. 92; 11 *id.* 272; 17 *id.* 284; 12 Cush. Mass. 403; 20 Tex. 60; 10 Cal. 376; 5 Harr. Del. 108; 12 Md. 329; 4 Mich. 187; 5 Ohio St. 528, or judicial nature, 14 La. Ann. 60; 7 Cal. 130; 18 B. Monr. Ky. 423; 7 Ell. & B. 366, it will lie only to compel action generally, 11 Cal. 42; 30 Ala. N. S. 49; 28 Mo. 259; and where the necessity of acting is a matter of discretion, it will not lie even to compel action. 6 How. 92; 5 Iowa, 380.

4. This remedy will be applied to compel a corporation or public officer, 14 La. Ann. 265; 41 Me. 15; 3 Ind. 452; see 7 Gray, Mass. 280, to pay money awarded against them in pursuance of a statute duty, where no other specific remedy is provided, 6 Ad. & E. 335; 8 *id.* 438, 910; 34 Penn. St. 496; but if debt will lie, and the party is entitled to execution, *mandamus* will not be allowed. Redfield, Railw. § 196, and cases cited in notes. But *mandamus* will not be granted to enforce a matter of contract or right upon which an action lies in the common-law courts, as to enforce the duty of common carriers, 7 Dowl. Parl. Cas. 566, or where the proper remedy is in equity. 3 Term, 646; 16 Mees. & W. Exch. 451. But where compensation is claimed for damages done under a statute, *mandamus* is the proper remedy. 2 Railw. Cas. 1; Redfield, Railw. § 196, pt. 3, 4, and notes and cases cited.

5. *Mandamus* is the appropriate remedy to compel corporations to produce and allow an inspection of their books and records, at the suit of a corporator, where a controversy exists in which such inspection is material to his interest. 2 Strange, 1223; 3 Term, 141; 4 Maule & S. 162.

It lies to compel the performance by a corporation of a variety of specific acts within the scope of its duties. 34 Penn. St. 496; 26 Ga. 665; 2 Metc. Ky. 56.

It is the common remedy for restoring persons to corporate offices, of which they are unjustly deprived: the title to the office having been before determined by proceeding by *quo warranto*. 1 Burr. 402; 1 Ld. Raym. 426; 1 Salk. 314; 2 Head, Tenn. 650. And see the cases fully reviewed in Redfield, Railw. § 197, pl. 5, nn. 9–14.

6. This remedy must be sought at the earliest convenient time in those cases where important interests will be affected by the delay. 12 Q. B. 448. But it is often necessary to delay in order to determine definitely the rights and injuries of the several parties concerned. Parke's *ex parte*, 9 Dowl. Parl. Cas. 614; 4 Q. B. 877.

It is no sufficient answer to the application that the party is also liable to indictment for the act complained of. 2 Railw. Cas. 599; 3 Q. B. 528. And where a railway company attempted to take up their rails, they were required by mandamus to restore them, notwithstanding they were also liable to indictment, that being regarded a less efficacious remedy. *Abbott*, Ch. J., 2 Barnew. & Ald. 646. But mandamus will always be denied when there is other adequate remedy. 11 Ad. & E. 69; 1 Q. B. 288; Redfield, Railw. § 199, and cases cited in notes.

It is not a proper proceeding for the correction of errors of an inferior court. 13 Pet. 279, 404; 18 Wend. N. Y. 79; 13 La. Ann. 481; 7 Dowl. & R. 334. Indeed, by statute 6 & 7 Vict. ch. 67, § 2, the decisions of the English courts upon proceedings in mandamus may be revised on writ of error, and upon principle a writ of error will lie when the decision is made to turn upon a question of law, and not upon discretion merely. Redfield, Railw. § 200, and notes.

7. The writ is not demandable, as matter of right, but is to be awarded in the discretion of the court. 1 Term, 331, 396, 404, 425; 2 *id.* 336; Redfield, Railw. 441, § 190, and cases cited in notes.

The power of granting this writ in England seems originally to have been exercised by the court of chancery, as to all the inferior courts, but not as to the king's bench. 1 Vern. Ch. 175; Angell & A. Corp. § 697. But see 2 Barnew. & Ald. 646; 2 Maule & S.

80; 3 Ald. & E. 416. But for a great number of years the granting of the prerogative writ of mandamus has been confined in England to the court of king's bench.

8. In the United States the writ is generally issued by the highest court of judicature having jurisdiction at law. 34 Penn. St. 496; 20 Ill. 525.

The thirteenth section of the act of congress of Sept. 24, 1789, gives the supreme court power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. The issuing of a mandamus to courts is the exercise of an appellate jurisdiction, and, therefore, constitutionally vested in the supreme court; but a mandamus directed to a public officer belongs to original jurisdiction, and, by the constitution, the exercise of original jurisdiction by the supreme court is restricted to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section, authorizing this writ to be issued by the supreme court, to persons holding office under the authority of the United States, is, therefore, not warranted by the constitution, and void. 1 Cranch, 175. See 5 Pet. 190; 13 *id.* 279, 404; 5 How. 103.

The circuit courts of the United States may also issue writs of mandamus; but their power in this particular is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. 7 Cranch, 504; 8 Wheat. 598; 1 Paine, C. C. 453.

9. The mode of proceeding in obtaining the writ is: first, to demand of the party to perform the act. And it would seem that the party should be made aware of the purpose of the demand. 3 Ad. & E. 217, 477. The refusal must be of the thing demanded, and not of the right merely. 5 Barnew. & Ad. 978. The refusal should be absolute and unqualified; but it may be by silence only. But the party should understand that he is required to perform the duty upon pain of the legal redress being resorted to without further delay. 4 Railw. Cas. 112. But any exception to the demand should be taken as a preliminary question. 10 Ad. & E. 531; Redfield, Railw. § 190, and notes.

The application for a mandamus may be by motion in court, and the production of *ex parte* affidavits, in support of the facts alleged; in which case an alternative writ issues, as matter of course, generally, and the case is heard upon the excuse alleged in the return to the alternative writ. See 2 Metc. Ky. 56. Or the party may apply for the writ by formal petition, setting forth the grounds in detail, in which case the merits of the question are determined upon the traverse of the petition, instead of the traverse of the return to the alternative writ. 9 Ohio St. 599. And in either form, if the application prevails, a peremptory mandamus issues; the only proper or admissible return to which is a certificate of compliance with its requisitions, without further excuse or delay. Hodges on Railw. 640-644; 1 Q. B. 616; 1 Iowa, 179.

10. The English practice is, that if the first writ is denied, even on the ground of defects in the affidavits, not to permit a second application to be made. 8 Ald. & E. 413. So, also, if it fail for other defects of form. But a more liberal practice obtains in the American courts. Redfield, Railw. § 190, notes.

Costs rest in the discretion of the court. In the English courts they are allowed when the application fails, but not always when it prevails. Redfield, Railw. § 190, n. 8. The more just rule in such cases is to allow costs to the prevailing party, unless there is some special reason for denying them; and this rule now generally prevails. 8 Ad. & E. 901, 905; 5 *id.* 804; 1 Q. B. 636, 751; 6 Eng. L. & Eq. 267.

11. By the recent Common-Law Procedure Act, 17 & 18 Vict. c. 125, any party requiring any order in the nature of specific performance may commence his action in any of the superior courts of common law, in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served that he will claim a writ of mandamus, and may renew the claim in his declaration, and if the writ is awarded in the final judgment in the case, it will issue peremptorily in the first instance. The form of this statutory mandamus is very brief, and its execution is enforced by attachment. The prerogative writ of mandamus is still retained in the English practice: but it is obvious that the foregoing statute must have very essentially abridged its use, as well as that of decrees in chancery, for specific performance. See 8 Ell. & B. 512; Redfield, Railw. § 190, pl. 8.

Controverted questions of fact, arising in the trial of applications for mandamus in the English practice, are referred to the determination of a jury. 1 Railw. Cas. 377; 2 *id.* 711; 8 Ell. & B. 512; 1 East, 114. By the American practice, questions of fact, in applications for mandamus, are more commonly tried by the court. 2 Metc. Ky. 56.

MANDANT. The bailor in a contract of mandate.

MANDATARY, MANDATARIUS. One who undertakes to perform a mandate. Jones, Bailm. 53.

MANDATE. A judicial command or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence, or decree. Jones, Bailm. 52.

A bailment of property in regard to which the bailee engages to do some act without reward. Story, Bailm. § 137.

The contract of mandate in the civil law is not limited to personal property, nor does it require a delivery of personal property when it relates to that. Pothier, de Mand. n. 1; La. Civ. Code, 2954-2964. It is, however, restricted to things of a personal nature at common law, and of these there must be a delivery, actual or constructive. Story, Bailm. § 142; 3 Strobh. So. C. 343.

Mandates and deposits closely resemble each other: the distinction being that in mandates the care and service are the principal, and the custody

the accessory; while in deposits the custody is the principal thing, and the care and service are merely accessory. Story, Bailm. § 140.

2. For the creation of a mandate it is necessary, — first, that there should exist something, which should be the matter of the contract; secondly, that it should be done gratuitously; and, thirdly, that the parties should voluntarily intend to enter into the contract. Pothier, Pand. l. 17, t. 1, p. 1, § 1; Pothier, de Mandat, c. 1, § 2.

There is no particular form or manner of entering into the contract of mandate prescribed either by the common law or by the civil law, in order to give it validity. It may be verbal or in writing; it may be express or implied; it may be in solemn form or in any other manner. Story, Bailm. § 160. The contract may be varied at the pleasure of the parties. It may be absolute or conditional, general or special, temporary or permanent. Wood, Civ. Law, 242; 1 Domat, b. 1, t. 15, §§ 1, 6, 7, 8; Pothier, de Mandat, c. 1, § 3, nn. 34–36.

3. The mandatary, upon undertaking his trust and receiving his article, is bound to perform it as agreed upon, 2 Ld. Raym. 919; 1 Taunt. 523; 5 Barnew. & Ald. 117; 1 Sneed, Tenn. 248; 6 Binn. Penn. 308; 5 Fla. 38, and is responsible only for gross negligence, 2 Kent, Comm. 4th ed. 571–573; 1 H. Blackst. 158; 4 Barnew. & C. 345; 2 Ad. & E. 256; 16 How. 475; 3 Mas. C. C. 132; 14 Serg. & R. Penn. 275; 17 Mass. 459; 2 Hawks, No. C. 146; 8 Metc. Mass. 91; but in considering the question of negligence, regard is to be had to any implied undertaking to furnish superior skill arising from the known ability of the mandatary. Story, Bailm. §§ 177, 182; Jones, Bailm. 14–16; 20 Mart. La. 68. Whether a bank is liable for neglect of its agents in collecting notes, see 22 Wend. N. Y. 215; 3 Hill, N. Y. 560; 8 N. Y. 459; 3 Hill, So. C. 77; 4 Rawle, Penn. 384; 2 Gall. C. C. 565; 10 Cush. Mass. 583; 12 Conn. 303; 6 Harr. & J. Md. 146; 4 Whart. 105; 1 Pet. 25. He must render an account of his proceedings, and show a compliance with the conditions of the bailment. Story, Bailm. §§ 191 *et seq.*

4. The *dissolution* of the contract may be by *renunciation* by the mandatary before commencing the execution of the undertaking, 2 Mees. & W. Exch. 145; 1 Mood. & R. 38; 2 Ld. Raym. 909; 22 Eng. L. & Eq. 501; 8 B. Monr. Ky. 415; 3 Fla. 38; by *revocation* of authority by the mandator, 6 Pick. Mass. 198; 5 Binn. Penn. 316; 5 Term, 213; see 4 Taunt. 541; 16 East, 382; by the *death* of the mandator, 6 East, 356; 5 Esp. 118; 2 Ves. & B. Ch. Ir. 51; 2 Mas. C. C. 244; 8 Wheat. 174; by *death* of the mandatary, 2 Kent, Comm. 504; 8 Taunt. 403; and by a *change of state* of the parties, Story, Ag. § 481; and in some cases by operation of law. Story, Ag. § 500.

The question of gross negligence is one for the jury, 2 Ad. & E. 256; 3 Bingh. N. C. 468; 11 Wend. N. Y. 25, and the plaintiff must show it. 3 East, 192; 4 Esp. 165; 2 Ad. & E. 80; 10 Watts, Penn. 335. See 3 Johns. N. Y. 170; 2 Wheat. 100; 7 B. Monr. Ky. 661; 8 Humphr. Tenn. 430.

In Civil Law. The instructions which the emperor addressed to a public functionary, and which were to serve as rules for his conduct. These mandates resembled those of the proconsuls, the *mandata jurisdictio*, and were ordinarily binding on the legates or lieutenants of the emperor of the imperial provinces, and there they had the authority of the principal edicts. Savigny, Dr. Rom. c. 3, § 24, n. 4.

MANDATOR. The person employing another to perform a mandate. Story, Bailm. § 138; 1 Brown, Civ. Law, 382; Halif. Anal. Civ. Law, 70.

MANDAVI BALLIVO. In English Practice. The return made by a sheriff when he has committed the execution of a writ to a bailiff of a liberty, who has the right to execute the writ.

MANHOOD. In Feudal Law. A term denoting the ceremony of doing homage by the vassal to his lord. The formula used was *devenio vester homo*, I become your man. 2 Blackstone, Comm. 54. See HOMAGE.

MANIA. In Medical Jurisprudence. This is the most common of all the forms of recent insanity, and consists of one or both of the following conditions, viz.: intellectual aberration, and morbid or affective obliquity.

In other words, the maniac either misapprehends the true relations between persons and things, in consequence of which he adopts notions manifestly absurd, and believes in occurrences that never did and never could take place, or his sentiments, affections, and emotions are so perverted that whatever excites their activity is viewed through a distorting medium, or, which is the most common fact, both these conditions may exist together, in which case their relative share in the disease may differ in such a degree that one or the other may scarcely be perceived at all. According as the intellectual or moral element prevails, the disease is called *intellectual* or *moral* mania. Whether the former is ever entirely wanting has been stoutly questioned, less from any dearth of facts than from some fancied metaphysical incongruity. The logical consequence of the doubt is that in the absence of intellectual disturbance there is really no insanity,—the moral disorders proceeding rather from unbridled passions than any pathological condition. Against all such reasoning it will be sufficient here to oppose the very common fact that in every collection of the insane may be found many who exhibit no intellectual aberration, but in whom moral disorders of the most flagrant kind present a marked contrast to the previous character and habits of life.

Both forms of mania may be either general or partial. In the latter, the patient has adopted some notion having a very limited influence upon his mental movements, while outside of that no appearance of impairment or irregularity can be discerned. Pure monomania, as this form of insanity has been often called,—that is, a mania confined to a certain point, the understanding being perfectly sound in every other respect,—is, no doubt, a veritable fact, but one of very rare occurrence. The peculiar notions of the insane, constituting insane belief, are of two kinds: *delu-*

sions and *hallucinations*. By the former is meant a firm belief in something impossible, either in the nature of things or in the circumstances of the case, or, if possible, highly improbable, and associated in the mind of the patient with consequences that have to it only a fanciful relation. By hallucination is meant an impression supposed by the patient, contrary to all proof or possibility, to have been received through one of the senses. For instance, the belief that one is Jesus Christ or the Pope of Rome is a delusion; the belief that one hears voices speaking from the walls of the room, or sees armies contending in the clouds, is a hallucination. The latter implies some morbid activity of the perceptive powers; the former is a mistake of the intellect exclusively.

2. The legal consequences of partial intellectual mania in criminal cases are not yet very definitely settled. In the trial of Hadfield, Mr. Erskine, his counsel, declared that delusion was the true test of the kind of mental disease which annuls criminal responsibility; and the correctness of the principle was unhesitatingly recognized by the court. In subsequent trials, however, it has been seldom mentioned, being discarded for other more favorite tests. In the authoritative statement of the law made by the English judges, in 1843, in reply to queries propounded by the house of lords, it is recognized as a sufficient plea in defence of crime, under certain qualifications. The effect of the delusion on the quality of the act will be precisely the same as if the facts in connection with it were real. "For example," they say, "if under the influence of delusion the person supposes another man to be in the act of attempting to take away life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." 10 Clark & F. Hou. L. 200. "If a man had the delusion that his head was made of glass, that would be no excuse for his killing a man: he would know very well that, although his head was made of glass, that was no reason why he should kill another man, and that it was a wrong act; and he would be properly subjected to punishment for that act." Baron Alderson, in Reg. *vs.* Pate, Times, July 12, 1850. In Com. *vs.* Rogers, 7 Metc. Mass. 500, this view was adopted, and has become authority in this country. At first sight this doctrine seems to be very reasonable; but herein consists its fallacy, in expecting sound logical reasoning from the insane. To suppose that one may kill another for some little affront or injury is no less an indication of insanity than to suppose that one's head is made of glass, and he is no more responsible for one than for the other. It is a characteristic trait of the insane that they do not gauge the measure of their retaliation for the fancied injuries which they suffer by the standards of sane men. The doctrine of the courts, therefore, is in direct conflict with the facts of science. It also indicates the unwillingness common among all classes of minds to regard any person as irresponsible who, notwithstanding some delusions, conducts with shrewdness and discretion in most of the relations of life.

3. In civil cases the prevailing doctrine is that partial intellectual mania invalidates, as it certainly should, any act performed under its influence. The principle was enforced with remarkable clearness and ability by Sir John Nicholl, in the celebrated case of Dew *vs.* Clark, 3 Add. Eccl. 79. See Johnson *vs.* Moore's heirs, 1 Litt. Ky. 371. This is noticeable as being opposed to the principle of what was then the leading case on the subject, Greenwood *vs.* Greenwood, 13 Ves. Ch. 88, *sed contra*, 3 Curt. Eccl. 337, where a will was established which was made under the direct influence of a delusion. Recently, however, Lord Brougham has declared that, in regard to legal consequences, partial is not to be distinguished from general insanity, because it is impossible to assign limits to the action of the former in any given case. If the mind were an aggregate of various faculties, then it might be possible, perhaps, to indicate those which are diseased and trace the operation of the disease; but, the fact being that the mind is one and indivisible, insanity on one point renders it unreliable on any other, and, consequently, must invalidate any civil act, whether sensible and judicious or manifestly prompted by the delusion. If, for instance, a person believing himself to be Emperor of Germany should make his will, and that, while so doing, something should occur to lead him to utter his delusion, then certainly that will cannot be established, however correct and rational its dispositions may be. In this view of the matter, his lordship said he had the concurrence of Lord Langdale, Dr. Lushington, and Mr. T. Pemberton Leigh. Waring *vs.* Waring, 6 Thornt. It is not probable, however, that the common practice, founded as it is on our maturest knowledge of insanity, will be readily abandoned on the strength of a showy speculation. It may now be considered as the settled doctrine of English and American courts that partial insanity may or may not invalidate a will.

4. In general intellectual mania, excepting that form of it called *raving*, it is not to be understood that the mind is irrational on every topic, but rather that it is the sport of vague and shifting delusions, or, where these are not manifest, has lost all nicety of intellectual discernment, and the ability to perform any continuous process of thought with its customary steadiness and correctness. It is usually accompanied by feelings of estrangement or indifference towards those who at other times were objects of affection and interest. A common feature of the disease is either more or less nervous exaltation, manifested by loquacity, turbulence, and great muscular activity, or depression, indicated by silence, gloom, painful apprehensions, and thoughts of self-destruction.

The legal consequences of general intellectual mania depend somewhat on the vio-

lence of the disease, the instructions of the court, the opinions of experts, and the intelligence of the jury. In its higher grades, where all reason has disappeared, and the person knows nothing correctly, responsibility is unquestionably annulled. 1 Hale, Pl. Cr. 30. In cases where reason has not completely gone,—where the person converses rationally on some topics, and conducts with propriety in some relations of life,—the law does not regard him as necessarily irresponsible. It lays down certain criteria, or tests, and the manner in which he stands these decides the question of guilt or innocence. On these points the practice varied to such a degree that it was impossible to say with any confidence what the law actually was. Ray, Med. Jur. 42. In this dilemma, the house of lords propounded to the judges of England certain queries, for the purpose of obtaining an authoritative exposition of the law. 10 Clark & F. Hou. L. 200. These queries had reference chiefly to the effect of delusions; and the reply of the judges has been just considered. In regard to the effect of insanity generally, they reply that "to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." In regard to this criterion, it is enough to say that had it been always used it would have produced the conviction of most of those who are universally regarded as having been properly acquitted. Hadfield, for instance, knew that in attempting the life of the king he was doing wrong, and that the act, if successful, would be murder; but he thought it would lead to the accomplishment of great ends, and he was ready to meet the punishment he deserved. So, too, in regard to the common case of a person killing his children to prevent their coming to want: he is perfectly aware of the nature and quality of the act, but considers himself justified by the end proposed. And yet such persons have been generally acquitted. The truth is, these criteria have no foundation in nature, and do not truly indicate the extent to which the disease has affected the operations of the mind. Insanity once admitted, in any degree, it is only sheer presumption, not wisdom, to say that it could not have perverted the action of the mind in regard to any particular criminal act. Ray, Med. Jur. Ins. 60, 64, 273–284.

5. In moral or affective mania, the disorder is manifested chiefly, if not entirely, in the sentiments or propensities, which are essential parts of our mental constitution, and, of course, as liable to disease as the intellectual faculties. It may be partial or general. In the former, a single propensity is excited to such a degree of activity as to impel the person to its gratification by an irresistible force, while perfectly conscious of the nature of the act and deploring the necessity that controls him. Our limits allow us to do but little more than to indicate the principal of these morbid impulses:—propensity to kill, *homicidal monomania;* propensity to steal, *kleptomania;* sexual propensity, *aidoiomania;* propensity to burn, *pyromania;* propensity to drink, *dipsomania.* In the first, the patient is impelled by an inward necessity to take life, without provocation, without motive. The victim is often the patient's child, or some one to whom he has been tenderly attached. In most cases there has been some derangement of health, or some deviation from the ordinary physiological condition, such as delivery, suppressed menstruation; but occasionally no incident of this kind can be detected; the patient has been, apparently, in his ordinary condition, both bodily and mental. Kleptomania occurs in persons of a previously irreproachable life, who may be in easy circumstances, and, by education and habit, above all petty dishonesty. The objects stolen are usually, not always, of trifling value, and put away out of sight as soon as obtained. It generally occurs in connection with some pathological or other abnormal conditions,—as a sequel of fever or blows on the head, of pregnancy and disordered menstruation, and the precursor of mania and organic disease of the brain. Pyromania always occurs in young subjects, and is supposed to be connected with disordered menstruation, or that physiological evolution which attends the transition from youth to manhood. Doubts have been inconsiderately expressed as to the maniacal character of these singular impulses, which are attributed to depravity of character rather than disease. Nothing, however, is better established by an abundance of cases related by distinguished observers. In spite of all metaphysical cavils, there are the cases on record; and there they will remain, to be increased in number with every year's observation.

6. Nothing can be more contrary to the spirit of the common law than to show any favor to the plea of this kind of insanity in defence of crime. Occasionally, however, this defence has prevailed in minor offences, owing more to favorable accessory circumstances than to its intrinsic merits. Juries have been loath to convict of theft a man who towards the close of an exemplary life has been detected in stealing things of insignificant value, or a lady who when pregnant, and only then, forgets entirely the distinctions of *meum* and *tuum*, though at all other times a model of moral propriety. In cases of homicide, the defence of moral mania has been too seldom made, either in this country or England, to settle the law on the subject. But there is no reason to suppose that the old criteria would be dispensed with unless some peculiar features of the case conveyed unquestionable evidence of insanity. In 1846, C. J. Gibson, of Pennsylvania, admitted that "there is a moral or homicidal insanity, consisting of an irresistible inclina-

tion to kill or to commit some other particular offence," which would be a competent defence. Wharton, Ment. Unsound. 43. Just previously, C. J. Shaw, in Com. *vs.* Rogers, 7 Metc. Mass. 500, had mentioned an "uncontrollable impulse" as among the conditions which would annul criminal responsibility. In practice, the objection would always be urged that such impulses as those under consideration are not uncontrollable.

7. In general moral mania, it is not to be supposed that the sentiments and propensities are all and equally disordered. On the contrary, the propensities may not be excessively active, though occasionally one may crave unusual indulgence. The essential feature of general moral mania is that the moral relations, whereby the conduct is governed, more than by the deductions of reason, are viewed through a distorting medium. This condition is usually accompanied by a perversion of some of the sentiments that inspire hope, fear, courage, self-reliance, self-respect, modesty, veracity, domestic affection. The patient is eager and sanguine in the pursuit of whatever strikes his fancy, ready with the most plausible reasons for the success of the wildest projects, viewing every prospect through a rose-colored medium, and regardless of the little proprieties and amenities of life. Love for others is replaced by aversion or indifference; the least contradiction or check is met by anger or impatience; he is restless, insensible to fatigue, and sleeps comparatively little. In some cases, and often at different periods in the same case, the very opposite moral condition occurs. Without cause, true or delusive, the person is completely wretched. The past affords him no pleasure, the future reveals not a single gleam of hope, and the ordinary sources of comfort and joy only serve to darken the cloud of doubt, apprehension, and despair in which he is enveloped.

8. There is no good reason why general moral mania should not be followed by the same legal consequences as those of intellectual mania. True, the intellect is supposed to be sound; but that is only one element of responsibility, which requires, besides a knowledge of the right and true, the power, supplied only by the moral faculties, to obey their dictates. If the latter are diseased, then is responsibility annulled just as effectually as if the knowing faculties were disordered by delusion. The conduct of most men is determined in a great degree as much by the state of their feelings as by the conclusions of their understandings; and when the former are affected by disease, nothing can be more unphilosophical, more contradictory to facts, than to ignore its existence altogether in settling the question of responsibility. Theoretically, this form of insanity is not recognized by courts. In Reg. *vs.* Barton, it was pronounced by Baron Parke to be "a dangerous innovation coming in with the present century." 3 Cox, Cr. Cas. 275. "A man might say he picked a pocket from some uncontrollable impulse; and in that case the law would have an uncontrollable impulse to punish him for it." Baron Alderson, in Reg. *vs.* Pate, Lond. Times, July 12, 1850. See, also, Chitty, Med. Jur. 352; 3 Carr. & Kir. 185. In Frere *vs.* Peacock, 1 Rob. 448, the court, Sir Herbert Jenner Fust, said "he was not aware of any case decided in a court of law, where moral perversion of the feelings, unaccompanied with delusion, has been held a sufficient ground to invalidate and nullify the acts of one so affected." In this country, C. J. Hornblower, in State *vs.* Spencer, 1 Zabr. 196, declared himself strongly against the doctrine of moral insanity. On the other hand, C. J. Lewis, of Pennsylvania, in a case he was trying, declared emphatically that, "where its existence is fully established, this species of insanity relieves from accountability to human laws." Wharton, Ment. Unsound. 44. In cases not capital, the verdict would probably be determined rather by the circumstances of the case than by any arbitrary rule of law. See INSANITY.

MANIA A POTU. See DELIRIUM TREMENS.

MANIFEST. **In Commercial Law.** A written instrument containing a true account of the cargo of a ship or a commercial vessel.

As to the requirements of the United States laws in respect to manifests, see 1 Story, U. S. Laws, 593, 594.

The want of a manifest, where one is required, and also the making a false manifest, are grave offences.

In Evidence. That which is clear and requires no proof; that which is notorious. See NOTORIETY.

MANIFESTO. A solemn declaration, by the constituted authorities of a nation, which contains the reasons for its public acts towards another.

On the declaration of war, a manifesto is usually issued, in which the nation declaring the war states the reasons for so doing. Vattel, l. 3, c. 4, § 64; Wolffius, § 1187.

MANKIND. Persons of the male sex; the human species. The statute of 25 Hen. VIII., c. 6, makes it felony to commit sodomy with mankind or beast. Females as well as males are included under the term mankind. Fortescue, 91; Bacon, Abr. *Sodomy*. See GENDER.

MANNER AND FORM. **In Pleading.** After traversing any allegation in pleading, it is usual to say, "in manner and form as he has in his declaration in that behalf alleged," which is as much as to include in the traverse not only the mere fact opposed to it, but that in the *manner and form* in which it is stated by the other party. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and neces-

sary to be proved as laid. 3 Bouvier, Inst. 297. See MODO ET FORMA.

MANNOPUS (Lat.). An ancient word, which signifies goods taken in the hands of an apprehended thief.

MANOR.

This word is derived from the French *manoir*, and signifies a house, residence, or habitation. At present its meaning is more enlarged, and includes not only a dwelling-house, but also lands. See Coke, Litt. 58, 108; 2 Rolle, Abr. 121; Merlin, Répert, *Manoir*. See Sergeant, Land Laws of Penn. 195.

In English Law. A tract of land originally granted by the king to a person of rank, part of which (*terræ tenementales*) were given by the grantee or lord of the manor to his followers, the rest he retained, under the name of his demesnes (*terræ dominicales*). That which remained uncultivated was called the lord's waste, and served for public roads, and commons of pasture for the lord and his tenants. The whole fee was called a lordship, or barony, and the court appendant to the manor the court-baron. The tenants, in respect to their relation to this court and to each other, were called *pares curiæ;* in relation to the tenure of their lands, copyholders (*q.v.*), as holding by a copy of the record in the lord's court.

The franchise of a manor; *i.e.* the right to jurisdiction and rents and services of copyholders. Cowel. No new manors were created in England after the prohibition of subinfeudation by stat. *Quia Emptores*, in 1290. 1 Washburn, Real Prop. 30.

In American Law. A manor is a tract held of a proprietor by a fee-farm rent in money or in kind, and descending to oldest son of proprietor, who in New York is called a patroon.

Manor is derived originally either from Lat. *manendo*, remaining, or from Brit. *maer*, stones, being the place marked out or inclosed by stones. Webst.

MANSE. Habitation; farm and land. Spelman, Gloss. Parsonage or vicarage house. Paroch. Antiq. 431; Jacob, Law Dict. So in Scotland. Bell, Dict.

MANSION-HOUSE. Any house of dwelling, in the law of burglary, etc. Coke, 3d Inst. 64.

The term "mansion-house," in its common sense, not only includes the dwelling-house, but also all the buildings within the curtilage, as the dairy-house, the cow-house, the stable, etc.; though not under the same roof nor contiguous. Burn, Inst. *Burglary;* 1 Thomas, Co. Litt. 215, 216; 1 Hale, Pl. Cr. 558; 4 Sharswood, Blackst. Comm. 225. See 3 Serg. & R. Penn. 199; 4 Strobh. So. C. 372; 13 Bost. Law Rep. 157; 4 Call. Va. 109; 14 Mees. & W. Exch. 181; 4 C. B. 105.

MANSLAUGHTER. In Criminal Law. The unlawful killing of another without malice either express or implied. 4 Blackstone, Comm. 190; 1 Hale, Pl. Cr. 466.

The distinction between manslaughter and murder consists in the following. In the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter. 1 East, Pl. Cr. 218; Foster, 290; 5 Cush. Mass. 304.

It also differs from murder in this, that there can be no accessaries before the fact, there having been no time for premeditation. 1 Hale, Pl. Cr. 437; 1 Russell, Crimes, 485.

Involuntary manslaughter is such as happens without the intention to inflict the injury.

Voluntary manslaughter is such as happens voluntarily or with an intention to produce the injury.

2. Homicide may become manslaughter in consequence of provocation; mutual combat; in case of resistance to public officers, etc.; killing in the prosecution of an unlawful or wanton act; or killing in the prosecution of a lawful act improperly performed, or performed without lawful authority.

3. The provocation which reduces the killing from murder to manslaughter is an answer to the presumption of malice, which the law raises in every case of homicide: it is, therefore, no answer when express malice is proved. 1 Russell, Crimes, 440; Foster, 132; 1 East, Pl. Cr. 239. And to be available the provocation must have been reasonable and recent; for no words or slight provocation will be sufficient, and if the party has had time to cool, malice will be inferred. 3 Wash. C. C. 515; 4 Penn. St. 264; 2 N. Y. 193; 25 Miss. 383; 3 Gratt. Va. 594; 6 Blackf. Ind. 299; 8 Ired. No. C. 344; 18 Ala. N. s. 720; 15 Ga. 223; 10 Humphr. Tenn. 141; 1 Carr. & K. 556; 5 Carr. & P. 324; 6 How. St. Tr. 769; 17 *id.* 57; 1 Leach, Cr. Cas. 4th ed. 151.

4. In cases of mutual combat, it is generally manslaughter only, when one of the parties is killed. J. Kel. 58, 119; 4 Dev. & B. No. C. 191; 1 Jones, No. C. 280; 2 Carr. & K. 814. When death ensues from duelling, the rule is different; and such killing is murder.

The killing of an officer by resistance to him while acting under lawful authority is murder; but if the officer be acting under a void or illegal authority, or out of his jurisdiction, the killing is manslaughter, or excusable homicide, according to the circumstances of the case. 1 Mood. Cr. Cas. 80, 132; 1 Hale, Pl. Cr. 458; 1 East, Pl. Cr. 314; 2 Stark. Nisi P. Cas. 205.

5. Killing a person while doing an act of mere wantonness is manslaughter: as, if a person throws down stones in a coal-pit, by which a man is killed, although the offender was only a trespasser. Lew. Cr. Cas. 179.

When death ensues from the performance of a lawful act, it may, in consequence of the negligence of the offender, amount to manslaughter. For instance, if the death has been occasioned by negligent driving. 1 East, Pl. Cr. 263; 1 Carr. & P. 320; 6 *id.* 129. Again, when death ensues from the gross

negligence of a medical or surgical practitioner, it is manslaughter. It is no crime for any to administer medicine; but it is a crime to administer it so rashly and carelessly, or with such criminal inattention, as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack. 1 Fost. & F. 519, 521; 3 Carr. & K. 202; 4 Carr. & P. 440; 1 Bennett & H. Lead. Crim. Cas. 46–48. And see 6 Mass. 134; 1 Hale, Pl. Cr. 429; 3 Carr. & P. 632.

MANSTEALING. A word sometimes used synonymously with kidnapping. The latter is more technical. 4 Blackstone, Comm. 219.

MANU FORTI (Lat. with strong hand). A term used in pleading in cases of forcible entry. No other words are of equal import. 8 Term, 362; 4 Cush. Mass. 141; Dane, Abr. c. 132, a. 6, c. 203, a. 12.

MANU OPERA. See MANNOPUS.

MANUAL. That which is employed or used by the hand, of which a present profit may be made. Things in the manual occupation of the owner cannot be distrained for rent. See TOOLS.

MANUCAPTIO (Lat.). **In Old English Practice.** A writ which lay for a man taken on suspicion of felony, and the like, who could not be admitted to bail by the sheriff, or others having power to let to mainprise. Fitzherbert, Nat. Brev. 249.

MANUCAPTORS. The same as mainpernors.

MANUFACTURE. In Patent Law. A term which is used to denote whatever is made directly by the hand of man, or indirectly through the instrumentality of any machinery which is controlled by human power. It is also applied to the process by which those results are produced. A commodity may be regarded as being in itself a manufacture, or as being produced by manufacture.

2. The term is used in its widest sense in the patent law of Great Britain. The statute of that kingdom prohibits the granting of letters patent except for the making, using, or selling of some new manufacture. The term, therefore, must embrace every thing which can there be the subject-matter of a patent. See 2 Barnew. & Ald. 349; 8 Term, 99; 2 H. Blackst. 492; 1 Webst. Pat. Cas. 512.

By our law, a patent can not only be granted for a new manufacture, but also for a new and useful art, machine, or composition of matter. There are, consequently, with us four classes of patentable inventions; and we therefore give the word "manufacture," when used as the subject-matter of a patent, a meaning so narrow that it shall cover none of the ground occupied by either of the other classes. Now, all these classes together only include what is embraced by the word "manufacture" in the English law, inasmuch as nothing is the subject-matter of a patent with us which is not so also in England. It follows that the term "manufacture" has a very different signification in the patent laws of the two countries.

3. With us, it has been defined to be "any new combination of old materials constituting a new result or production in the form of a vendible article, not being machinery." The contriver of a substantially new commodity, which is not properly a machine or a composition of matter, can obtain a patent therefor as for a new manufacture. And although it might properly be regarded as a machine or a composition of matter, yet if the claim to novelty rests on neither of those grounds, and if it really constitutes an essentially new merchantable commodity, it may be patented as a new manufacture. See PATENTS.

The vendible substance is the thing produced; and that which operates preserves no permanent form. In the first class the machine, and in the second the substance produced, is the subject of the patent. 2 H. Blackst. 492. See 8 Term, 99; 2 Barnew. & Ald. 349; Dav. Pat. Cas. 278; Webster, Pat. 8; Phillips, Pat. 77; Perpigny, Manuel des Inv. c. 2, s. 1; Renouard, c. 5, s. 1; Westm. Rev. No. 44, April, 1835, p. 247; 1 Bell, Comm. l. 1, part 2, c. 4, s. 1, p. 110, 5th ed.

MANUMISSION. The act of releasing from the power of another. The act of giving liberty to a slave.

The modern acceptation of the word is the act of giving liberty to slaves. But in the Roman law it was a generic expression, equally applicable to the enfranchisement from the *manus*, the *mancipium*, the *dominica potestas*, and the *patria potestas*. *Manumittere* signifies to escape from a power,—*manus*. Originally, the master could only validly manumit his slave when he had the *dominium jure Quiritium* over him: if he held him merely *in bonis*, the manumission was null, according to the civil law; but by the *jus honorarium* the slave was permitted to enjoy his liberty *de facto*, but whatever he acquired belonged to his master. By the law *Junia Norbana*, passed under Tiberius in the year of Rome 772, the position of this class of quasi slaves was fixed, by conceding to them the same rights which were formerly enjoyed by the people of the colonies established by *Latium*; and they were called *Latini Juniani*,—*Latini* because they enjoyed the *jus latii*,—*jus latinitatis*,—*Juniani* because they owed this *status* to the law *Junia*. They did not possess the rights of Roman citizens: they could neither vote nor perform any public functions; they were without the capacity of being instituted heirs or legatees, except indirectly by a *fideicommissum*; they could make no valid will or act as tutors; but they had the *commercium*, or right of buying and selling, and might witness a will made *per æs et libram*. But at their death their masters were entitled to all their property, as if they had never ceased to be slaves. In the language of the law, with their last breath they lost both their life and their liberty: *in ipso ultimo spiritu simul animam atque libertatem amittebant*. Inst. 3. 7. 4; Gaius, 3, § 56 *et seq.* At first there were only three modes of manumission, viz.: 1, *vindicta*; 2, *census*; and, 3, *testamentum*. The *vindicta* consisted in a fictitious suit, in which the *assertor libertatis*, as plaintiff, alleged that the slave was free; the master not denying the claim, the prætor rendered a decision declaring the slave free. In this proceeding figured

a rod,—*festuca, vindicta,*—a sort of lance (the symbol of property), with which the *assertor libertatis* touched the slave when he claimed him as free: hence the expression *vindicta manumissio. Census,* the second mode, was when the slave was inscribed at the instance of his master, by the censor, in the census as a Roman citizen. *Testamento* was when the testator declared in express terms that the slave should be free,—*servus meus Cratinus liber esto,*—or by a *fideicommissum,*—*heres meus rogo te ut Sanum vicini mei servum, manumittas; fideicommitto heredis mei ut iste eum servum manumittat.*

3. Afterwards, manumission might take place in various other ways: *in sacrosanctis ecclesiis,* of which we have a form: *Ex beneficiis S. ✠ per Joannem episcopum et per Albertum S. ✠ Casatum, factus est liber Lemtbertus, teste hac sancta ecclesia. Per epistolam.* Justinian required the letter containing the manumission to be signed by five witnesses. *Inter amicas,* a declaration made by the master before his friends that he gave liberty to his slave: five witnesses were required, and an act was drawn up in which it was stated that they had heard the declaration. *Per codicillum,* by a codicil, which required to be signed by five witnesses. There were many other modes of manumission, which were enumerated in a Constitution of Justinian. C. 76, 3–12; 1 Ortolan, 35 *et seq.*; 1 Etienne, 78 *et seq.*; Lagrange, 101 *et seq.*

Direct manumission may be either by deed or will, or any other act of notoriety done with the intention to manumit. A variety of these modes are described as used by ancient nations.

Indirect manumission may be either by operation of law, as the removal of a slave to a non-slaveholding state *animo morandi,* or by implication of law, as where the master by his acts recognizes the freedom of his slave.

In the absence of statutory regulations, it is held in this country, in accordance with the principles of the common law, that no formal mode or prescribed words were necessary to effect the manumission; it may be by parol; and any words are sufficient which evince a renunciation of dominion on the part of the master. 8 Humphr. Tenn. 189; 3 Halst. N. J. 275. But mere declarations of intention are insufficient unless subsequently carried into effect. Coxe, N. J. 259; 8 Mart. La. 149; 14 Johns. N. Y. 324; 19 *id.* 53. Manumission may be made to take effect in future. Coxe, N. J. 4; 2 Root, Conn. 364. In the mean time the slaves are called *statu liberi.* See Cobb, Law of Slavery, *passim;* SERVUS; FREEDOM; BONDAGE.

MANURE. Dung. When collected in a heap it is considered as personal property, but when spread it becomes a part of the land and acquires the character of real estate. Al. 31; 2 Ired. No. C. 326; Washburn, Real Prop.

MANUS (Lat. hand), anciently, signified the person taking an oath as a compurgator. The use of this word probably came from the party laying his *hand* on the New Testament. Manus signifies, among the civilians, power, and is frequently used as synonymous with *potestas.* Leç. El. Dr. Rom. § 94.

MANUSCRIPT. An unpublished writing, or one that has been published without the consent of the person entitled to control it.

In every writing the author has a property at common law, which descends to his representative, but is not liable to seizure by creditors so that they can publish it. 1 Bell, Dict. 68. And an unauthorized publication will be restrained in equity. 4 Burr. 2320, 2408; 2 Brown, Parl. Cas. 138; 2 Atk. Ch. 342; 2 Ed. Ch. 329; 2 Mer. Ch. 434; Ambl. 694, 739; 1 Ball & B. Ch. Ir. 207; 2 Stor. C. C. 100; 5 McLean, C. C. 32. Letters are embraced within this principle; for, although the receiver has a qualified property in them, the right to object to their publication remains with the writer. It is held, however, that the receiver may publish them for the purposes of justice publicly administered, or to vindicate his character from an accusation publicly made. 2 Ves. & B. Ch. Ir. 19; 2 Swanst. Ch. 418; 2 Mer. Ch. 435; 2 Stor. C. C. 100; 1 Mart. La. 297; 2 Story, Eq. Jur. § 947; 4 Du. N. Y. 379. In the United States, the Copyright Act recognizes the right of property in "any manuscript whatever," which includes private letters, 5 McLean, C. C. 32, and gives a remedy for the unauthorized publication. These rights will be considered as abandoned if the author publishes his manuscripts without securing the copyright under the acts of congress. See Bouvier, Inst. Index; COPYRIGHT; Curtis, Copyright.

MARAUDER. One who, while employed in the army as a soldier, commits a larceny or robbery in the neighborhood of the camp, or while wandering away from the army. Merlin, Répert. See Halleck, Int. Laws; Lieber, Guerrilla Parties.

MARC-BANCO. The name of a coin. The marc-banco of Hamburg, as money of account, at the custom-house, is deemed and taken to be of the value of thirty-five cents. Act of March 3, 1843.

MARCH. In Scotch Law. A boundary-line. Bell, Dict.; Erskine, Inst. 2. 6. 4.

MARCHERS. In Old English Law. Nobles who lived on the Marches, and had their own laws, and power over life and death, as if they were petty princes. Camden; Jacob, Law Dict. Abolished by stat. 27 Hen. VIII. c. 26, 1 Edw. VI. c. 10, & 1 and 2 P. & M. c. 15. They were also called Lords Marchers.

MARCHES. Limits; confines; borders. Especially used of the limits between England and Wales and between England and Scotland.

MARESCALLUS (fr. Germ. *march,* horse, and *schalch,* master. DuCange). A groom of the stables, who also took care of the diseases of the horses. DuCange.

An officer of the imperial stable: *magister equorum.* DuCange.

A military officer, whose duty it was to keep watch on the enemy, to choose place of encampment, to arrange or *marshal* the army in order of battle, and, as master of the horse, to commence the battle. This office was second

to that of *comes stabuli*, or constable. DuCange.

An officer of the court of exchequer. 51 Hen. III. 5.

An officer of a manor, who oversaw the hospitalities (*mansionarius*). DuCange; Fleta, lib. 2, c. 74.

Marescallus aulæ. An officer of the royal household, who had charge of the person of the monarch and peace of the palace. DuCange.

MARETUM (Lat.). Marshy ground overflowed by the sea or great rivers. Coke, Litt. 5.

MARINARIUS (L. Lat.). An ancient word which signified a mariner or seaman. In England, *marinarius capitaneus* was the admiral or warden of the ports.

MARINE. Belonging to the sea; relating to the sea; naval. A soldier employed, or liable to be employed, on vessels of war, under the command of an officer of marines, who acts under the direction of the commander of the ship. See MARINE CORPS. It is also used as a general term to denote the whole naval power of a state or country.

MARINE CONTRACT. One which relates to business done or transacted upon the sea and in sea-ports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law. See MARITIME CONTRACT; Parsons, Marit. Law; 2 Gall. C. C. 398.

MARINE CORPS. A body of officers and soldiers under an organization separate and distinct from that of the army, and intended for service, in detached portions, on board of ships of war.

MARINE COURT IN THE CITY OF NEW YORK. See NEW YORK.

MARINE INSURANCE. A contract of indemnity by which one party, for a stipulated premium, undertakes to indemnify the other, to the extent of the amount insured, against all perils of the sea, or certain enumerated perils, to which his ship, cargo, and freight, or some of them, may be exposed during a certain voyage or a fixed period of time.

The party who takes the risk is called the insurer or underwriter; and the party to be protected is called the insured or assured. The sum paid as a consideration for the insurance is called the premium; and the instrument containing the contract is called the policy. See Phillips, Arnould, Duer, Marshall, Insurance; Parsons, Marit. Law; Emerigon on Insurance, by Meredith; and title Insurance in the Index of Kent's Commentaries and Bouvier's Institutes, and in this work.

MARINE INTEREST. A compensation paid for the use of money loaned on bottomry or respondentia. Provided the money be loaned and put at risk, there is no fixed limit to the rate which may be lawfully charged by the lender; but courts of admiralty, in enforcing the contract, will mitigate the rate when it is extortionate and unconscionable. See BOTTOMRY; MARITIME LOAN; RESPONDENTIA.

MARINE LEAGUE. A measure equal to the twentieth part of a degree of latitude. Boucher, Inst. n. 1845. It is generally conceded that a nation has exclusive territorial jurisdiction upon the high seas for a marine league from its own shores. 1 Kent, Comm. 29.

MARINER. One whose occupation it is to navigate vessels upon the sea. See SEAMEN; SHIPPING ARTICLES. Surgeons, engineers, clerks, stewards, cooks, porters, and chambermaids, on passenger-steamers, when necessary for the service of the ship or crew, are also deemed mariners, and permitted as such to sue in the admiralty for their wages. 1 Conkling, Adm. 107. See SEAMEN; LIEN.

MARITAGIUM (Lat.). A portion given with a daughter in marriage.

During the existence of the feudal law, it was the right which the lord of the fee had, under certain tenures, to dispose of the daughters of his vassal in marriage. Beames, Glanv. 138, n.; Bracton, 21 *a*; Spelman, Gloss.; 2 Blackstone, Comm. 69; Coke, Litt. 21 *b*, 76 *a*.

MARITAL. That which belongs to marriage: as, marital rights, marital duties.

Contracts made by a feme sole with a view to deprive her intended husband of his marital rights with respect to her property are a fraud upon him, and may be set aside in equity. By the marriage the husband assumes the duty of paying her debts contracted previous to the coverture, and of supporting her during its existence; and he cannot, therefore, be fraudulently deprived, by the intended wife, of those rights which enable him to perform the duties which attach to him. Newland, Contr. 424; 1 Vern. Ch. 408; 2 *id.* 17; 2 P. Will. Ch. 357, 674; 2 Brown, Ch. 345; 1 Ves. Ch. 22; 2 Cox, Ch. 28; 2 Beav. Rolls, 528; White, Lead. Cas. in Eq. *277; 1 Hill, Ch. 1, 4; 13 Me. 124; 1 M'Mull. Eq. So. C. 237; 3 Ired. Eq. No. C. 487; 4 Wash. C. C. 224.

MARITAL PORTION. In Louisiana. The name given to that part of a deceased husband's estate to which the widow is entitled. La. Civ. Code, 334, art. 55; 3 Mart. La. N. S. 1.

MARITIME CAUSE. A cause arising from a maritime contract, whether made at sea or on land.

2. The term includes such causes as relate to the business, commerce, or navigation of the sea: as charter-parties, bills of lading, and other contracts of affreightment; bottomry and respondentia contracts; and contracts for maritime services in repairing, supplying, and navigating ships and vessels; contracts and *quasi* contracts respecting averages, contributions, and jettisons, when the party prosecuting has a maritime lien; and also those arising from torts and injuries committed on the high seas, or on other navigable waters within the admiralty jurisdiction.

3. Suits for the recovery of damages for

the collision of ships and vessels constitute an important class of the causes founded upon marine torts; and in these cases the admiralty courts adopt a rule of decision entirely different from that acted upon in common-law courts. In the latter a plaintiff whose negligence has contributed to the injury of which he complains cannot recover damages, although the defendant has been equally, or even more, culpable; but in cases of collision the admiralty courts, when it is established that both vessels were in fault, or that the collision must be attributed to the fault of one or both of the vessels, and it cannot be determined which, if either alone, was in fault, aggregate the damage to both, and then divide it between them, decreeing that the owners of each shall bear half the whole loss. 2 Dods. Adm. 85; 3 W. Rob. Adm. 38; 17 How. 172; 1 Conkling, Adm. 374–380.

4. Cases of salvage are also within the jurisdiction of the admiralty courts; and they likewise exercise jurisdiction in favor of a part-owner who dissents from the determination of a majority of the owners to employ the ship in a particular manner, and seeks to obtain security for the safe return of the vessel. They also exercise a jurisdiction (founded upon a rule of national comity) for the purpose of enforcing the decrees of foreign courts of admiralty, when the ends of justice require it. 1 Conkling, Adm. 2d ed. 26; 2 Gall. C. C. 191, 197.

The admiralty courts of the United States also have jurisdiction of controversies between part-owners and others in relation to the title or possession of ships and vessels, Ware, Dist. Ct. 232; 2 Curt. C. C. 426; 18 How. 267; also of all seizures under laws of import, navigation, or trade of the United States, where such seizures are made on the high seas or on waters which are navigable from the sea by vessels of ten or more tons burden. See Judiciary Act, sec. 9, 1 U. S. Stat. at Large, 77.

5. In all cases of contract the jurisdiction of the admiralty courts depends upon the nature or subject-matter of the contract; but in cases of maritime tort and salvage their jurisdiction depends upon the place in which the cause of action accrued. 1 Conkling, Adm. 19, 32. In general, the courts of common law have a concurrent jurisdiction with courts of admiralty in those cases which, in legal parlance, are said to be prosecuted or promoted on the instance side of the court. But the admiralty also has jurisdiction of prize cases, or cases arising upon captures *jure belli;* and that jurisdiction is exclusive.

6. In the United States, the jurisdiction of the admiralty courts is not limited to the cases of contracts relating to the navigation of the high seas or other waters within the ebb and flow of the tide, and to causes of action for torts committed on tide-waters, as was generally supposed prior to 1845, 10 Wheat. 428; 7 Pet. 324, 343; but it is now held to extend to the great lakes and to the other navigable waters of the United States, in respect to commerce with foreign nations and among the states. . 12 How. 443, 468; 5 McLean, C. C. 269, 359; 20 How. 296.

The admiralty jurisdiction has been held not to extend to preliminary contracts, merely leading to the execution of maritime contracts, 3 Mas. C. C. 6; 4 *id.* 380; 3 Sumn. C. C. 144; nor to matters of account between part-owners, 11 Pet. 175; nor to trusts, although they may relate to maritime affairs, Dav. Dist. Ct. 71; nor to enforce a specific performance of a contract relating to maritime affairs; nor to a contract not maritime in its character, although the consideration for it may be maritime services, 4 Mas. C. C. 380; nor to questions of possession and property between owner and mortgagee, 17 How. 399; nor to contracts of affreightment from one port of the great lakes to another port in the same state, 21 How. 244; nor to contracts for supplies furnished a vessel engaged in such trade only; and, of course, such causes cannot be considered maritime causes. 21 How. 248.

MARITIME CONTRACT. One which relates to the business of navigation upon the sea, or to business appertaining to commerce or navigation to be transacted or done upon the sea, or in sea-ports, and over which courts of admiralty have jurisdiction concurrent with the courts of common law.

2. Such contracts, according to civilians and jurists, include, among others, charter-parties, bills of lading, and other contracts of affreightment, marine hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships or vessels, contracts and quasi contracts respecting averages, contributions, and jettisons. See 2 Gall. C. C. 398, etc., in which Judge Story gave a very elaborate and learned opinion on the subject. Parsons, Marit. Law.

It is, however, very doubtful whether his views in respect to the admiralty jurisdiction in cases of marine insurance would now be concurred in by the supreme court of the United States; and that learned tribunal, in the late case of The People's Ferry Co. *vs.* Beers, 20 How. 393, intimated that a contract for building a vessel was not a maritime contract. See, also, 7 How. 729; 19 *id.* 171.

3. The term "*maritime contract,*" in its ordinary and proper signification, does not strictly apply to contracts relating to the navigation of our great inland lakes and our great navigable rivers; and yet contracts in respect to their navigation from state to state are now within the admiralty jurisdiction of the United States to the same extent as though they were arms of the sea and subject to tidal influences. 12 How. 443, 468. Such contracts are, therefore, frequently denominated maritime contracts, and may, perhaps, be properly denominated *quasi maritime,* as being within the jurisdiction of the admiralty or maritime courts.

MARITIME LAW. That system of law which particularly relates to the affairs and

business of the sea, to ships, their crews and navigation, and to the marine conveyance of persons and property. See ADMIRALTY, and the various titles in regard to which information is sought.

MARITIME LOAN. A contract or agreement by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing upon which the loan has been made should be lost by any peril of the sea, or *vis major*, the lender shall not be repaid unless what remains shall be equal to the sum borrowed; and if the thing arrive in safety, or in case it shall not have been injured but by its own defects or the fault of the master or mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred. Emerigon, Mar. Loans, c. 1, s. 2. See BOTTOMRY; GROSS ADVENTURE; INTEREST, MARITIME; RESPONDENTIA.

MARITIME PROFIT. A term used by French writers to signify any profit derived from a maritime loan.

MARK. A sign, traced on paper or parchment, which stands in the place of a signature; usually made by persons who cannot write. It is most often the sign of the cross, made in a little space left between the Christian name and surname. 2 Sharswood, Blackst. Comm. 305; 2 Curt. 324; Mood. & M. 516; 12 Pet. 150; 7 Bingh. 457; 2 Ves. Sen. Ch. 455; 1 Ves. & B. Ch. Ir. 362; 1 Ves. Ch. 11. A mark is now held to be a good signature though the party was able to write. 8 Ad. & E. 94; 3 Nev. & P. 228; 3 Curt. 752; 5 Johns. N. Y. 144; 2 Bradf. Surr. N. Y. 385; 24 Penn. St. 502; 29 *id.* 221; 19 Mo. 609; 21 *id.* 17; 18 Ga. 396; 16 B. Monr. Ky. 102; 1 Jarman, Wills, Perkins ed. 69, 112, note; 1 Williams, Exec. 63. See Penn. Stat. 1848.

The sign, writing, or ticket put upon manufactured goods to distinguish them from others, Poph. 144; 3 Barnew. & C. 541; 2 Atk. Ch. 485; 2 Ves. & B. Ch. Ir. 218; 3 Mylne & C. Ch. 1; Eden, Inj. 314; also to indicate the price; and if one use the mark of another to do him damage, an action on the case will lie, or an injunction may be had from chancery. 2 Croke, 47. See TRADE-MARKS.

MARK (spelled, also, *Marc*). A weight used in several parts of Europe, and for several commodities, especially gold and silver. When gold and silver are sold by the mark, it is divided into twenty-four carats. A money of accounts in England, and in some other countries a coin. The English mark is two-thirds of a pound sterling, or 13*s.* 4*d.*; and the Scotch mark is of equal value in Scotch money of account. Encyc. Amer.

MARKET (Lat. *merx*, merchandise; anciently, *mercat*). A public place and appointed time for buying and selling. A public place, appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold. All fairs are markets, but not *vice versâ*. Bracton, l. 2, c. 24; Coke, Litt. 22; Coke, 2d Inst. 401; Coke, 4th Inst. 272. Markets are generally regulated by local laws.

The franchise by which a town holds a market, which can only be by royal grant or immemorial usage.

By the term market is also understood the demand there is for any particular article: as, the cotton market in Europe is dull. See 15 Viner, Abr. 42; Comyns, Dig. *Market*.

MARKET OVERT. An open or public market; that is, a place appointed by law or custom for the sale of goods and chattels at stated times in public. "An open, public, and legally constituted market." *Jervis*, C. J., 9 J. Scott, 601.

2. The market-place is the only market overt out of London; but in London every shop is a market overt. 5 Coke, 83; F. Moore, 300. In London, every day except Sunday is market-day. In the country, particular days are fixed for market-days. 2 Sharswood, Blackst. Comm. 449.

3. All contracts for any thing vendible, made in market overt, shall be binding; and sales pass the property, though stolen, if it be an open and proper place for the kind of goods, there be an actual sale for valuable consideration, no notice of wrongful possession, no collusion, parties able to contract, a contract originally and wholly in the market overt, toll be paid, if requisite, by statute, and the contract be made between sun and sun. 5 Coke, 83. But sale in market overt does not bind the king, though it does infants, etc. Coke, 2d Inst. 713; 2 Sharswood, Blackst. Comm. 449; 2 Chitty, Com. Law, 148–154; Comyns, Dig. *Market* (E); Bacon, Abr. *Fairs and Markets* (E); 5 Barnew. & Ald. 624; Dane, Abr. c. 45, a. 2; Crabb, Real Prop. § 679 *et seq.*

4. There is no law recognising the effect of a sale in market overt in Pennsylvania, 3 Yeates, Penn. 347; 5 Serg. & R. Penn. 130; in New York, 1 Johns. N. Y. 480; in Massachusetts, 8 Mass. 521; 14 *id.* 500; in Ohio, 5 Ohio, 203; nor in Vermont, 1 Tyl. Vt. 341; nor, indeed, in any of the United States. 10 Pet. 161; 2 Kent, Comm. 324.

MARLBRIDGE, STATUTE OF. An important English statute, 52 Hen. III. (1267), relating to the tenures of real property, and to procedure. It derived its name from the town in Wiltshire in which parliament sat when it was enacted, now known as Marlborough. Compare 2 Reeve, Hist. Eng. Law, 62; Crabb, Com. Law, 156; Barrington, Stat. 66.

MARQUE AND REPRISAL. See LETTERS OF MARQUE.

MARRIAGE. A contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife.

2. All persons are able to contract marriage unless they are under the legal age, or

unless there be other disability. The age of consent at common law is fourteen in males, and twelve in females. Reeve, Dom. Rel. 236; 2 Kent, Comm. 6th ed. 78; 1 N. Chipm. Vt. 254; 10 Humphr. Tenn. 61; 1 Gray, Mass. 119. See 20 Ohio, 1. When a person under this age marries, such person can, when he or she arrives at the age above specified, avoid the marriage, or such person or both may, if the other is of legal age, confirm it. If either of the parties is under seven, the marriage is void. 1 Sharswood, Blackst. Comm. 436, and note 9; 5 Ired. Eq. No. C. 487.

If either party is *non compos mentis*, or *insane*, the marriage is void. 21 N. H. 52; 22 *id.* 553; 4 Johns. Ch. N. Y. 343.

If either party has a husband or wife living, the marriage is void. 4 Johns. N. Y. 53; 22 Ala. N. s. 86; 1 Salk. 120; 1 Sharswood, Blackst. Comm. 438. See NULLITY OF MARRIAGE.

Consanguinity and affinity within the rules prescribed by law in this country render a marriage void. The statutes of particular states will be referred to hereafter. In England they render the marriage liable to be annulled by the ecclesiastical courts. 10 Metc. Mass. 451; 2 Blackstone, Comm. 434. See CONFLICT OF LAWS.

3. The parties must each be willing to marry the other.

If either party acts under compulsion, or is under duress, the marriage is voidable. 2 Hagg. Cons. 104, 246.

Where one of the parties is mistaken in the person of the other, this requisite is wanting. But a mistake in the qualities or character of the other party will not avoid the marriage. Poynter, Marr. & D. c. 9.

If the apparent willingness is produced by fraud, the marriage will be valid till set aside by a court of chancery or by a decree of divorce. 5 Paige, Ch. N. Y. 43. Fraud is sometimes said to render a marriage void; but this is incorrect, as it is competent for the party injured to waive the tort and affirm the marriage. Impotency in one of the parties is sometimes laid down as rendering the marriage void, as being a species of fraud on the other party; but it is only a ground for annulling the contract by a court, or for a divorce.

4. The parties must actually make a contract of marriage: the form and requisites of it will depend on the law of the place. See LEX LOCI.

At common law, no particular form of words or ceremony was necessary. Mutual assent to the relation of husband and wife was sufficient. Any words importing a present assent to being married to each other were sufficient evidence of the contract. If the words imported an assent to a future marriage, if followed by consummation, this established a valid marriage by the canon law, but not by the common law. 10 Clark & F. Hou. L. 534; 15 N. Y. 345; 2 Roper, Husb. & W. 445–475; 1 How. 219; 2 N. H. 268.

5. At common law, the consent might be given in the presence of a magistrate or of any other person as a witness, or it might be found by a court or jury from the subsequent acknowledgment of the parties, or from the proof of cohabitation, or of general reputation resulting from the conduct of the parties. In the original United States the common-law rule prevails, except where it has been changed by legislation. 6 Binn. Penn. 405; 4 Johns. N. Y. 52; 7 Wend. N. Y. 47. See 10 N. H. 388; 4 Burr. 2058; 1 How. 219, 234; 1 Gray, Mass. 119; 2 Me. 102.

In civil cases, a marriage can generally be proved by showing that the parties have held themselves out as husband and wife, and by general reputation founded on their conduct. There is an exception, however, in the case of such civil suits as are founded on the marriage relation, such as actions for the seduction of the wife, where general reputation and cohabitation will not be sufficient. 4 N. Y. 230; 3 Bradf. Surr. N. Y. 369, 373; 6 Conn. 446; 29 Me. 323; 14 N. H. 450.

6. In most of the states, the degrees of relationship within which marriages may not be contracted are prescribed by statute. This limit in cases of consanguinity is generally, though not always, that of first cousins. In some of the states, a violation of the rule renders, by statute, the marriage absolutely void. In others, no provision of this kind is made. Various statutes have been passed to guard against abuse of the marriage ceremony. Such of them as require license, or the publication of banns, or the consent of parents or guardians, are regarded as directory, and, unless explicitly declaring the marriage to be void, if not complied with do not render it void. Mass. Gen. Stat. (1860) 529; Conn. Comp. Stat. (1854) 323; Swan, Rev. Stat. of Ohio (1854), 569; 4 Iowa, 449; 26 Mo. 260; Reeve, Dom. Rel. 196, 200; 1 Rev. Swift's Dig. 20; 2 Watts, Penn. 9; 1 How. 219; 2 Halst. N. J. 138; 2 N. H. 268. As to rights of married women, see HUSBAND AND WIFE; WIFE.

MARRIAGE ARTICLES. Articles of agreement between parties contemplating marriage, in accordance with which the marriage settlement is afterwards to be drawn up. They are to be binding in case of marriage. They must be in writing, by Statute of Frauds. Burton, Real Prop. 484; Crabb, Real Prop. § 1809; 4 Cruise, Dig. 274, 323. See 2 Washburn, Real Prop. App.

MARRIAGE BROKAGE. The act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them. The money paid for such service is also known by this name.

It is a doctrine of the courts of equity that all marriage-brokage contracts are utterly void, as against public policy, and are, therefore, incapable of confirmation. 1 Fonblanque,

Eq. b. 1, c. 4, s. 10, note s; 2 Story, Eq. Jur. § 263; Newland, Contr. 469.

MARRIAGE PORTION. That property which is given to a woman on her marriage. See DOWRY.

MARRIAGE, PROMISE OF. A promise of marriage is a contract entered into between a man and woman that they will marry each other.

When the promise is made between persons competent to contract matrimony, an action lies for a breach of it. See PROMISE OF MARRIAGE.

MARRIAGE SETTLEMENT. An agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes inalienable. 1 Rice, Eq. So. C. 315. See 2 Hill, Ch. So. C. 3; 8 Leigh, Va. 29; 1 Dev. & B. Eq. No. C. 389; 2 *id.* 103; 1 Baldw. C. C. 344; 15 Mass. 106; 1 Yeates, Penn. 221; 7 Pet. 348; 4 Bouvier, Inst. n. 3947. See 2 Washburn, Real Prop. Appx.

MARSHAL. An officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties within the district for which he is appointed are very similar to those of a sheriff. See U. S. Stat. at Large, Index; Sergeant, Const. Law, ch. 25; 2 Dall. 402; Burr's Trial, 365; 1 Mas. C. C. 100; 2 Gall. C. C. 101; 4 Cranch, 96; 7 *id.* 276; 9 *id.* 86, 212; 6 Wheat, 194; 9 *id.* 645.

MARSHAL. To arrange; put in proper order: *e. g.* "the law will *marshall* words, *ut res magis valeat.*" *Hill*, B., Hardr. 92. So to marshal assets. See ASSETS. So to marshal coat-armour: this now belongs to heralds. Wharton, Lex. 2d Lond. ed.

MARSHALLING ASSETS. See ASSETS.

MARSHALSEA. In English Law. A prison belonging to the king's bench. It has now been consolidated with others, under the name of the queen's prison.

MARSHALSEA, COURT OF. A court originally held before the steward and marshal of the royal household.

It was instituted to administer justice between the servants of the king's household, that they might not be drawn into other courts and their services lost. It was anciently ambulatory; but Charles I. erected a court of record, by the name of *curia palatii*, to be held before the steward of the household, etc., to hold pleas of all personal actions which should arise within twelve miles of the royal palace at Whitehall, not including the city of London. This court was held weekly, to determine causes involving less than twenty pounds, together with the ancient court of Marshalsea, in the borough of Southwark. A writ of error lay thence to the king's bench. Both courts were abolished by the stat. 12 & 13 Vict. c. 101, § 13. See Jacob, Whishaw, Law Dict.

MARTIAL LAW. That military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time-being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war. Prof. *Joel Parker*, in N. A. Rev., Oct. 1861.

The application of military government to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action. *Id. ibid.*

2. It supersedes all civil proceedings which conflict with it, Benèt, Mil. Law, but does not necessarily supersede all such proceedings.

It extends, at least, to the camp, environs, and near field of military operations, 7 How. 83; 3 Mart. La. 530; 6 American Archives, 186; and see, also, 2 H. Blackst. 165; 1 Term, 549; 1 Knapp, Priv. Coun. 316; Dougl. 573; 13 How. 115; but does not extend to a neutral country. 1 Hill, N. Y. 377. And see 25 Wend. N. Y. 483, 512, n. It is founded on paramount necessity, and imposed by a military chief. 1 Kent, Comm. 377, n. For any excess or abuse of the authority, the officer ordering and the person committing the act are liable as trespassers. 13 How. 115, 154; 1 Cowp. 180.

Consult the article COURT MARTIAL; Halleck, Int. Law; 1 Hale, Pl. Cr. 347; 1 Lieber, Civ. Lib. 130; McArthur, Courts Mart. 4th Lond. ed. 34; DeHart, Mil. Law, 13–17; Tytler, Courts Mart. 11–27, 58–62, 105; Hough, Mil. Courts, 349, 350; O'Brien, Mil. Law, 26, 30; Bowyer, Const. Law, 424; 3 Webster, Works, 459; Story, Const. § 1342; 8 Atty. Gens. Opinions, 365–374; 12 Metc. Mass. 56; 3 Mart. La. 531; 1 Mart. Cond. La. 169, 170, n.; 7 How. 59–88; 15 *id.* 115; 16 *id.* 144; 10 Johns. N. Y. 328; 17 Bost. Law Rep. 125; 24 *id.* 78; 4 West. Law Monthl. 449.

MARYLAND. One of the thirteen original states of the Union.

2. The territory of Maryland was included in the grants previously made to companies formed for the settlement of Virginia. These grants were annulled, and Maryland was granted by Charles the First, on the 20th of June, 1632, to Cecilius Calvert, Baron of Baltimore. The first settlement under the authority of Lord Baltimore was made on the 27th of March, 1634, in what is now St. Mary's county. Some settlements were previously made on Kent Island, under the authority of Virginia.

During its colonial period, Maryland was governed, with slight interruptions, by the lord proprietary, under its charter.

The government of Maryland was assumed by commissioners acting under the Commonwealth of England; but in a few years Lord Baltimore was restored to his full powers, and remained undisturbed until the revolution of 1688, when the government was seized by the crown, and not restored to the proprietary till 1715. From this

period there was no interruption to the proprietary rule until the revolution.

3. The territorial limits of Maryland seem to have been plainly described in the charter; still, long disputes arose about the boundaries, in the adjustment of which this state was reduced to her present limits.

The lines dividing Maryland from Pennsylvania and Delaware were fixed under an agreement between Thomas and Richard Penn and Lord Baltimore, dated in 1760. These lines were surveyed by Mason and Dixon; and hence the line between Maryland and Pennsylvania is called Mason and Dixon's line.

By this agreement, the rights of grantees under the respective proprietaries were saved, and provision made for confirming the titles by the government in whose jurisdiction the lands granted were situated. The boundary between Maryland and Virginia has never been finally settled. Maryland claimed to the south branch of the Potomac; but Virginia has held to the north branch, and exercised jurisdiction up to that line. The rights of the citizens of the respective states to fish and navigate the waters which divide Maryland and Virginia were fixed by compact between the two states in 1785.

4. The first constitution of this state was adopted on the eighth day of November, 1776. The present constitution was adopted in 1851, and went into operation on the fourth day of July in that year. It declared that no person ought to be molested on account of his religious belief, or compelled to frequent or maintain any place of worship or any ministry. Any person who believes in a God, and that he will be punished or rewarded for his acts either in this world or the next, is competent as a witness or a juror. The jury are the judges of the law and the fact in criminal cases. In civil cases the trial by jury is preserved where the amount in controversy exceeds five dollars. Lotteries are prohibited after April 1, 1859. No divorce can be granted by the legislature. No holder of public money, while indebted to the state, no person who fights a duel or sends or accepts a challenge, no person holding any office under the United States, no minister or preacher of the gospel, is eligible to any office of trust or profit. No debt can be created for purposes of internal improvement. Imprisonment for debt is not allowed. The legislature may not pass any law abolishing the relation of master and slave as now existing. Civil officers are nearly all elected by the people. Every free male white citizen twenty-one years of age, except lunatics, who has resided a year in the state and six months in the county or city, is entitled to vote. Elections are to be held on the first Wednesday in November in every year, commencing with 1851.

The statute law of Maryland, from the earliest colonial times, has been codified in two volumes, which were adopted "in lieu of and as a substitute for all the public general laws and public local laws heretofore passed by the legislature." See Acts of 1860, ch. 1.

The Legislative Power.

5. This is lodged in "The General Assembly of Maryland," composed of two branches: a senate and a house of delegates.

The Senate is composed of members elected, one from each county (the city of Baltimore also electing one), for the term of four years. One-half of the senate is elected every two years. A senator must be twenty-five years old, a citizen of the United States, have resided three years next before election in the state, and the last year thereof in the county or city from which he is elected.

The House of Delegates consists of members elected from the various counties. They are apportioned according to population; but the smallest county is not to have less than two, the city of Baltimore is to have four more than the largest, and the whole number is never to exceed eighty. A delegate must be twenty-one years of age, and otherwise possess the same qualifications as a senator.

The general assembly meets the first Wednesday in January every even year, and the session closes the tenth of March. It can grant no act of incorporation which may not be repealed. It cannot authorize taking private property without first paying or tendering a just compensation to the owner.

The Executive Power.

6. *The Governor* is elected every fourth year from 1853, for the term of four years, commencing on the second Wednesday in January next after his election. The state is divided into three districts, from each of which the governor must be elected successively. He must be thirty years old, have been for five years a resident of the state and three years of the district from which he is elected. The governor is commander of the land and naval forces; appoints, with the consent of the senate, all military officers, and all civil officers whose appointment is not otherwise provided for; in case of the vacancy of any office during the recess of the senate, he is to appoint a person to said office, to hold until the end of the next session of the legislature; may suspend or arrest any military officer for any military offence, and may remove any civil officer appointed by the governor; may convene the legislature or the senate alone; has power to grant reprieves and pardons, but before granting a *nolle prosequi*, or pardon, must give notice of the application, and of the day on or after which his decision will be given. When required, he is to report to either branch of the legislature the reasons which influenced his decision. He may not appoint to an office a person who has been rejected by the senate. He must reside at Annapolis. If a vacancy occurs in the office of governor, the legislature, if in session, appoints a substitute; and if not in session, the president of the senate shall act as governor; and if there is no such president, the speaker of the house is to act.

A Secretary of State is appointed by the governor, with the advice of the senate.

A Treasurer is elected by the house of delegates every second year.

The Judicial Power.

7. *The Court of Appeals* consists of one chief and four associate judges, elected, one from each of the four districts into which the state is divided, by the people of the district, for ten years. It has appellate jurisdiction only.

The Circuit Court consists of seven judges, elected one in each of the seven districts into which the counties of the state are arranged. Each judge holds the court in his own circuit, and has full civil and criminal jurisdiction.

An Orphans' Court exists in each county, and in the city of Baltimore, composed of three judges, elected for the term of four years by the people of the county.

The City of Baltimore constitutes a judicial circuit, and has four courts, the judges of which are elected for ten years.

The superior court has civil jurisdiction in all equity cases, and in common-law cases involving more than five hundred dollars.

The circuit court has an equity jurisdiction concurrent with the superior court.

The court of common pleas has civil jurisdiction in all cases where the debt or amount of damages

claimed is over one hundred dollars and under five hundred dollars.

The criminal court has jurisdiction of all crimes and offences committed in the city.

Commissioners of Public Works are elected, one in each of four districts into which the state is divided for this purpose, by the voters of the district, for the term of four years. A *commissioner of the land office* is elected for six years. He is clerk and judge of the land office. The *treasurer* is elected by the house of delegates every second year. The *comptroller, sheriffs, county commissioners, justices of the peace, constables,* etc., are elected every second year.

MASSACHUSETTS. One of the original thirteen states of the United States of America.

2. In 1627, a company of Englishmen obtained from the council of the Plymouth colony a grant of "all that part of New England lying three miles south of Charles river and three miles north of Merrimac river, and extending from the Atlantic to the South sea." In 1628, Charles I. granted them a charter, under the name of "The Governor and Company of the Massachusetts Bay in New England." This charter continued till 1684, when it was adjudged forfeited. From this time till 1691, governors appointed by the king ruled the colony. In 1691, William and Mary granted a new charter, by which the colonies of Massachusetts Bay and New Plymouth, the province of Maine, and the territory called Nova Scotia, were incorporated into one government, by the name of The Province of Massachusetts Bay. 1 Story, Const. § 71. This charter continued as the form of government until the adoption of the state constitution in 1780.

3. The constitution, as originally adopted, was drafted by John Adams. 4 Adams, Life and Works, 213. It contained a provision for calling a convention for its revision or amendment in 1795, if two-thirds of the voters at an election held for this purpose should be in favor of it. Const. Mass. c. 6, art. x. But at that time a majority of the voters opposed any revision, Bradford's Hist. Mass. 294; and the constitution continued without amendment till 1820, when a convention was called for revising or amending it. Mass. Stat. 1820, c. 15. This convention proposed fourteen amendments, nine of which were accepted by the people. Since then, sixteen additional articles of amendment have been adopted at different times, making twenty-five in all. In 1853, a second convention for revising the constitution was held, which prepared an entirely new draft of a constitution. This draft, upon submission to the people, was rejected.

The constitution, as originally drafted, consists of two parts, one entitled A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, and the other The Frame of Government. Const. Mass. Preamble.

The Declaration of Rights.

4. The declaration of rights asserts that all men are born free and equal, and have certain natural and unalienable rights, among them the rights of life, liberty, and property, and, in fine, the right of seeking safety and happiness. Art. i. It declares the duty of public worship, and the right of religious liberty, art. ii.; and that all sects shall receive equal protection from the law. Amendts. xi. That the commonwealth is a sovereign state, enjoying every power not expressly delegated to the United States. Art. iv. That all power is derived from the people, and all public officers are at all times accountable to them. Art. v. That no man has any title to exclusive privileges except from his public services; and this title is not heritable or transmissible. Art. vi. That government is for the protection of the people, and they alone have a right to change it when their safety requires. Art. vii. That, to prevent those in power from becoming oppressors, the people have a right to cause their public officers to return to private life, and to fill their places by election, art. viii.; and that all elections should be free, and every qualified voter have a right to vote and to be elected to office. Art. ix. Each individual has a right to be protected by law, and must, consequently, pay his share of the expense of this protection; but his property cannot be taken or applied to public uses without his consent, or that of the representative body; and wherever the property of any person is taken for public uses, he shall receive reasonable compensation therefor. Art. x. Every one should find in the laws a certain remedy for all wrongs to person, property, or character, and should obtain justice freely, promptly, and completely. Art. xi. Every person accused of an offence shall have a right to have it formally and clearly set forth; shall not be compelled to furnish evidence against himself; shall be allowed to produce proofs in his favor, and to be heard by himself or his counsel, and shall not be punished (unless in the army or navy) without trial by jury. Art. xii. The proof of facts in the vicinity where they happen is one of the greatest securities of life, liberty, and property. Art. xiii. All warrants should be supported by an oath, and, if for the search, arrest, or seizure of persons or property, should describe such persons or property. Art. xiv. In all civil suits (unless, in causes arising on the seas, or suits relating to mariners' wages, the laws provide otherwise) the trial by jury shall be held sacred. Art. xv. The liberty of the press ought not to be restrained. Art. xvi. The people have a right to keep and bear arms for the common defence; as, in peace, armies are dangerous to liberty, they ought not to be maintained without legislative consent; the military power shall be in exact subordination to the civil authority. Art. xvii. Frequent recurrence to the fundamental principles of the constitution, constant adherence to piety, justice, moderation, temperance, industry, and frugality, are necessary to preserve liberty and to maintain a free government; the people ought especially to refer to these in choosing officers, and have a right to require of their officers an observance of them in making and executing the laws. Art. xviii. The people have a right to assemble peaceably, to consult on the common good, to instruct their representatives, and to petition the legislative body. Art. xix. The power to suspend the laws should never be exercised but by the legislature, or by legislative authority in cases provided by law. Art. xx. Freedom of debate in the legislature is so essential to the rights of the people that it cannot be the foundation of any accusation, prosecution, action, or complaint in any court or place whatsoever. Art. xxi. The legislature ought to assemble frequently. Art. xxii. No tax ought to be laid without the consent of the people or their representatives. Art. xxiii. Laws to punish acts already done, and not declared crimes by preceding laws, are unjust, and inconsistent with the principles of a free government. Art. xxiv. No subject ought, in any case, to be declared guilty of treason by the legislature. Art. xxv. No magistrate shall take excessive bail, impose excessive fines, or inflict cruel or unusual punishments. Art. xxvi. In peace, no soldier should be quartered in any house without the owner's consent; and in war, such quarters should not be made but by the civil magistrate, in a manner provided by law. Art. xxvii. No person can be subjected to martial law, unless in the army or navy, or militia in actual service, except by legislative authority. Art. xxviii. An impartial interpretation of laws and administra-

tion of justice is essential to the preservation of every right. It is the citizen's right to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is not only the best policy, but for the security of the people, that the judges of the supreme court should hold office during good behavior, but that they should have honorable salaries established by standing laws. Art. xxix. Neither the legislative, judicial, nor executive department shall ever exercise any powers of government except its own, that it may be a government of laws, and not of men. Art. xxx.

The Frame of Government.

5. The name of the state is the Commonwealth of Massachusetts.

No property qualification is required for voting or for eligibility to any office, except those of governor or lieutenant-governor. Const. Amend. iii., xiii. Every male citizen, twenty-one years or more of age, who has resided within the commonwealth twelve months, and in the town where he claims to vote six months, preceding an election, who has, unless exempt from taxation, paid a tax within two years (Amend. iii.), who can, unless physically disabled, read the constitution in the English language, and write his name (Amend. xx.), and who, if a naturalized foreigner, has resided in the United States two years subsequent to his naturalization (Amend. xxiii.), may vote at any election. The last two amendments, adopted respectively in 1857 and 1859, do not disqualify persons who had a legal right to vote at the time of their adoption.

Oaths of Office.

Every person chosen or appointed to any office is obliged to take an oath or affirmation faithfully to discharge the duties of his office (c. 6, a. 1), and to support the constitution of the commonwealth. Amend. vi. An oath to support the constitution of the United States is required by the laws of the United States of every member of a state legislature, and of all judicial and executive officers in the states. St. 1789, c. 1, § 3; 1 U. S. Stat. at Large, 22.

Amendments.

Specific amendments may be proposed by the general court, and, if adopted in both houses, by a vote of two-thirds of the members present, taken by yeas and nays, in two successive legislatures, and afterwards approved and ratified by a majority of the voters at a popular election, they become a part of the constitution. Amend. ix.

The Legislative Power.

6. The *Senate* is composed of forty members, elected from single senatorial districts, each containing as nearly as possible the same number of legal voters. A senator must be an inhabitant of the district for which he is chosen, and must have been an inhabitant of the state for five years next preceding his election, and ceases to be a senator on leaving the commonwealth. Amend. xxii. Any vacancy in the senate may be filled by vote of the people of the unrepresented district, upon the order of a majority of senators elected. Amend. xxiv.

The *House of Representatives* consists of two hundred and forty members, chosen in each of the representative districts into which the counties are divided for the purpose. The number of representatives sent by any district depends on the number of legal voters in it; but no district can send more than three representatives. A representative must have been an inhabitant of the district for which he is chosen for at least one year next preceding his election, and ceases to represent his district on leaving the commonwealth.

The two houses together constitute the "General Court of Massachusetts." The members of both houses are elected annually, at the state elections, on Tuesday after the first Monday in November. Amend. xv. If the people of any representative district fail to elect a representative on the day of the annual election, they may hold a second meeting for this purpose on the fourth Monday of November. Amend. xv. The general court meets on the first Wednesday in January, and is dissolved on the day before the session of the next general court. Amend. x. It may be prorogued by the governor at any time, at the request of both houses, or, without their request, by the advice of the council, for a period not exceeding ninety days (c. 2, § 1, art. 6); and he may call them together sooner than the time to which they were adjourned, if the interests of the commonwealth require. The legislature has power to create courts (c. 1, § 1, art. 3); to make all reasonable laws for the state; to provide for the election of officers, and to prescribe their duties; to impose taxes and duties (c. 1, § 1, a. 4); and, upon the application and with the consent of the inhabitants, to create cities, in towns of not less than twelve thousand inhabitants. Amend. v. That taxes may be equal, there shall be a new valuation of estates every ten years. C. 1, § 1, a. 4. The two houses are quite distinct, and have each the usual privileges in regard to judging of the qualifications, election, etc. of members, regulation of their conduct, etc. The members of the house are exempt from arrest on mesne process in going to, attending, or returning from the assembly. C. 1, § 3, a. 10, 11. Sixteen members of the senate and one hundred members of the house constitute a quorum for the transaction of business; but a less number may organize temporarily, adjourn from day to day, and compel the attendance of absent members. Amends. xxi., xxii.

The Executive Power.

7. The *Governor* is the supreme executive magistrate. He is styled the "Governor of the Commonwealth of Massachusetts," and his title is "His Excellency." C. 2, § 1, a. 1. He is elected annually. C. 2, § 1, a. 2. Seven years' residence in the commonwealth, and the possession of a freehold of the value of a thousand pounds, are the necessary qualifications for the office of governor or lieutenant-governor. C. 2, § 1, a. 1; § 2, a. 1. The governor has authority to call together the councillors, and shall, with them, or five of them at least, from time to time hold a council for ordering and directing the affairs of the commonwealth. C. 2, § 1, a. 4. He is commander-in-chief of the army and navy of the commonwealth, has authority to train the militia for the defence of the commonwealth, and to assemble the inhabitants for this purpose, and is intrusted with all the powers incident to the office of commander-in-chief, except that no inhabitants are obliged to march out of the state without their own consent or that of the general court. C. 2, § 1, a. 7. The pardoning power is in the governor, with the advice of the council. C. 2, § 1, a. 8. No money can issue from the treasury without his warrant. C. 2, § 1, a. 11. He has the veto power, and, with the advice and consent of the council, the appointment of all judicial officers, coroners, and notaries public. C. 2, § 1, a. 9, amend. iv.

The *Lieutenant-Governor* is elected at the same time, for the same term, and must have the same qualifications, as the governor. His title is "His Honor." He is a member of the council, and, in the absence of the governor, its president. In case of a vacancy in the office of governor, the lieutenant-governor acts as governor. C. 2, § 2, a. 2, 3.

8. The *Council* consists of eight councillors, each chosen annually from a separate councillor district.

The state is re-districted every ten years. Amend. xvi. Five councillors constitute a quorum, and their duty is to advise the governor in the executive part of the government. C. 2, § 3, a. 1. In case of vacancies in both the offices of governor and lieutenant-governor, the council, or the major part of them, shall have and exercise the powers of the governor. C. 2, § 3, a. 6. Vacancies in the council are filled by concurrent vote of the two branches of the legislature; or, if the legislature is not in session, by the governor's appointment. Amend. xxv.

The *Secretary of the Commonwealth*, the *Treasurer*, *Auditor*, and *Attorney-General*, are chosen annually at the state election (Amend. xvii.); and, that the citizens of the commonwealth may be assured from time to time that the moneys remaining in the public treasury, upon the settlement and liquidation of the public accounts, are their property, no man shall be eligible as treasurer more than five successive years. C. 2, § 4, a. 1. Every councillor, the secretary, treasurer, auditor, and attorney-general, must have been an inhabitant of the state for the five years immediately preceding his election or appointment. Amends. xvi., xvii., xxii. Sheriffs, registers of probate, clerks of courts, and district attorneys are chosen by the people of the several counties. Amend. xix.

The Judicial Power.

9. The *Supreme Judicial Court* consists of one chief and five associate justices. Four justices constitute a quorum to decide all matters requisite to be heard at law. Gen. Stat. c. 112, § 1 *et seq.* A law term of the court for the commonwealth is held at Boston on the first Wednesday of January in each year, which may be adjourned from time to time, and to such places and times as may be convenient for determining questions of law arising in the nine eastern counties, and one term a year in each of the remaining five counties for cases in those counties respectively. These are regular terms of the court; but no jury is to be summoned except in certain special cases. Jury terms of the court are also held by a single justice, at times and places prescribed, once a year, in each county, except that one term only is held for Barnstable and Dukes county, and two terms annually for Suffolk. Questions of law arising at the jury terms are reported by the presiding judge to the full bench. It is provided that the court shall have original and exclusive jurisdiction of petitions for divorce and nullity of marriage, and original and concurrent jurisdiction with the superior court of petitions for partition and writs of entry, for foreclosure of mortgages, and of civil actions in which the damages demanded or the property claimed exceed in amount or value four thousand dollars if brought in the county of Suffolk, and one thousand dollars if brought in any other county, if the plaintiff, or some one in his behalf, before service of the writ, makes oath or affirmation before some justice of the peace that he verily believes the matter sought to be recovered equals in amount or value said sums respectively, a certificate of which oath or affirmation shall be indorsed on or annexed to the writ; and, also, that it shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all cases where there is not a complete remedy at law. Trials of indictments for capital crimes, questions of law on exceptions, on appeals from the superior court, on cases stated by the parties, and on a special verdict, and all issues in law, are to be heard and determined by the full court.

10. The *Superior Court* is composed of one chief justice and nine associate justices. It is to be held at the times and places prescribed, being at least two terms annually in each county. The court has exclusive original jurisdiction of complaints for flowing land, and original jurisdiction of all civil actions except those of which the supreme judicial court, police courts, or justices of the peace have original and exclusive jurisdiction; jurisdiction of all civil actions and proceedings legally brought before it, by appeal or otherwise, from justices of the peace, police courts, or courts of insolvency, and from the decisions of commissioners on insolvent estates of deceased persons; original jurisdiction of all crimes, offences, and misdemeanors, and appellate jurisdiction of all offences tried and determined before a police court or justice of the peace; and in criminal cases legally brought before it its jurisdiction shall be final, except as otherwise provided. It has concurrent jurisdiction with the supreme court, as stated above.

All judicial officers are appointed by the governor, with the advice of the council. Every nomination for a judicial appointment must be made by the governor to the council at least seven days before the council can approve it. C. 2, § 1, a. 9. The judges hold office during good behavior, but may be removed by the governor, with the consent of the council, upon the address of both branches of the legislature. C. 3, a. 1. The governor and council, and either branch of the legislature, may require the opinion of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions. C. 3, a. 2.

11. *Judges of Probate and Insolvency* are appointed to hold office according to the tenor of their commissions, so that there may be one judge for each county. They may interchange services or perform each other's duties when necessary or convenient. The courts of these judges are courts of record, and have original jurisdiction of all proceedings under the Insolvent Act, and of the probate of wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the state, leaving estate to be administered within such county; of the appointment of guardians to minors and others, and of all matters relating to the estates of such deceased persons and wards; and of petitions for the adoption of children and the change of names. The courts are to be held at such times and places as the statutes prescribe. They are held at other places as well as at the shire towns; and sessions occur very frequently. At the time of the adoption of the constitution, original jurisdiction in probate matters was exercised by deputies or surrogates appointed by the governor in the several counties, from whom there was an appeal to the governor with the council. 21 Bost. Law Rep. 78. Under a constitutional provision, in 1784, an act was passed establishing courts of probate in the several counties, and making the supreme judicial court the supreme court of probate. Sh. 1783, c. 46; 21 Bost. Law Rep. 80.

12. *Justices of the Peace* are appointed by the governor. The commissions of justices of the peace shall continue only seven years, that the people may not suffer from the long continuance in place of any justice who shall fail of discharging the important duties of his office with ability or fidelity; but any such commission may be renewed. C. 3. They have conclusive original jurisdiction of replevin for impounded beasts, and original and concurrent jurisdiction with the superior court of all actions of contract, tort, or replevin, where the debt or damages demanded, or value of the property alleged to be detained, is more than twenty and does not exceed one hundred dollars. A certain number in each county are designated as trial justices, who have jurisdiction over petty criminal offences.

A *Police Court*, consisting of one justice and two associate justices, is established in many of the

cities and large towns, but may not be hereafter in any town of less than ten thousand inhabitants. They have the same jurisdiction in civil, and substantially the same, with some additions, in criminal, matters, as justices of the peace, and their jurisdiction, when both plaintiff and defendant reside in the district, is exclusive of that of other police courts and justices. A speedy settlement of suits is obtained in these courts.

Commissions. All commissions are to be in the name of the commonwealth, and to be signed by the governor and attested by the secretary, and under the seal of the commonwealth. C. 6, a. 4.

Writs. All writs are in the name of the commonwealth, under the seal of the court, bearing teste of the first justice, not a party to the suit, and signed by the clerk. C. 6, a. 5.

Habeas Corpus. This writ shall be enjoyed in the most free, easy, cheap, expeditious, and ample manner; shall not be suspended, except by the legislature on the most urgent and pressing occasions, and for not more than twelve months. C. 6, a. 7.

MASTER. One who has control over an apprentice.

A master stands in relation to his apprentices *in loco parentis*, and is bound to fulfil that relation, which the law generally enforces. He is also entitled to be obeyed by his apprentices as if they were his children. Bouvier, Inst. Index. See APPRENTICESHIP.

One who is employed in teaching children: known, generally, as a schoolmaster. As to his powers, see CORRECTION.

One who has in his employment one or more persons hired by contract to serve him, either as domestic or common laborers.

2. Where the hiring is for a definite term of service, the master is entitled to their labor during the whole term, and may recover damages against any one who entices away or harbors them knowing them to be in his service, 6 Term, 221; 8 East, 39; Anth. N. Y. 94; 13 Johns. N. Y. 322; 6 Wend. N. Y. 436; 4 Pick. Mass. 425; or who debauches a female servant, 4 Cow. N. Y. 412; and if before the expiration of the term the servant leaves without just cause, he forfeits his wages. 2 Carr. & P. 510; 1 Watts & S. Penn. 265; 34 Me. 102; 43 *id.* 463; 19 Pick. Mass. 529; 12 Metc. Mass. 286; 19 Mo. 60; 25 Conn. 188; 6 N. H. 481. The master may dismiss a servant so hired before the expiration of the term, either for immoral conduct, wilful disobedience, or habitual neglect, and the servant will not in such case be entitled to his wages, 4 Carr. & P. 518; 2 Stark. 256; 3 Esp. 235; but if the dismissal be without reasonable cause, the servant may recover damages from his master therefor, to such an amount as to indemnify for the loss of wages during the time necessarily spent in obtaining a fresh situation, and for the loss of the excess of any wages contracted for above the usual rate. 2 Hou. L. Cas. 607; 13 C. B. 508; 20 Eng. L. & Eq. 157.

3. A master may justify an assault in defence of his servant, and a servant in defence of his master: the master because he has an interest in his servant, not to be deprived of his service; the servant because it is a part of his duty, for which he receives his wages, to stand by and defend his master. 1 Blackstone, Comm. 429; Lofft, 215. The master is liable to be sued for the injuries occasioned by the neglect or unskilfulness or the tortious acts of his servants whilst in the course of his employment, 3 Mass. 364; 19 Wend. N. Y. 345; 40 Eng. L. & Eq. 329; 4 Du. N. Y. 473; 26 Vt. 178; 23 N. H. 157; although contrary to his express orders, if not done in wilful disregard of those orders, 14 How. 468; 7 Cush. Mass. 385; 10 Ill. 509; but he is not liable for acts committed out of the course of his employment, 20 Conn. 284; 17 Mass. 508; 8 Term, 533; 16 Eng. L. & Eq. 448; nor for the wilful trespasses of his servants. 1 East, 106; 24 Conn. 40; 1 Smith, Ind. 455; 2 Mich. 519. A master is not criminally liable for the acts of his servant unless committed by his command or with his assent. 8 Ind. 312; 2 Strange, 885.

4. Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not amenable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service, 3 Mees. & W. Exch. 1; 4 Metc. Mass. 49; 3 Cush. Mass. 270; 10 *id.* 228; 5 N. Y. 492; 3 Smith, Ind. 134, 153; 42 Me. 269; 40 Eng. L. & Eq. 376, 491; but where such injury results from the master's neglect to provide suitable means to perform the service or to use reasonable care in the selection of his servants, the master will be answerable. 20 Barb. N. Y. 449; 26 *id.* 39; 6 Du. N. Y. 225; 6 Cal. 209; 33 Eng. L. & Eq. 1; 36 *id.* 486; 37 *id.* 281. All contracts made by the servant within the scope of his authority, express or implied, bind the master. See PRINCIPAL; AGENT.

The master may give moderate corporal correction to his menial servant while under age; for then he is considered as standing *in loco parentis*. 2 Kent, Comm. 261. The master is bound to supply necessaries to an infant servant unable to provide for himself, 2 Campb. 650; 1 Leach, Cr. Cas. 137; 1 Blackstone, Comm. 427, n.; but not to provide even a menial servant with medical attendance and medicines during sickness. 4 Carr. & P. 80; 7 Vt. 76.

MASTER IN CHANCERY. An officer of a court of chancery, who acts as an assistant to the chancellor. 3 Edw. Ch. N. Y. 458; 19 Ill. 131.

The masters were originally clerks associated with the chancellor, to discharge some of the more mechanical duties of his office. They were called *preceptores*, and gradually increased in number until there were twelve of them. They obtained the title of masters in the reign of Edw. III. Their office is mainly judicial in its character, but sometimes includes ministerial offices. See 1 Spence, Eq. Jur. 360–367; 1 Harr. Ch. Mich. 436; 1 Bail. Ch. So. C. 77; 1 Des. Ch. So. C. 587. The office was abolished in England by the 15 & 16 Vict. c. 80. In the United States, officers of this name exist in many of the states, with similar powers to those exercised by the English masters,

but variously modified, restricted, and enlarged by statute, and in some of the states similar officers are called commissioners and by other titles.

The duties of the masters are, generally: *first*, to take accounts and make computations, 18 How. 295; 2 Munf. Va. 129; 14 Vt. 501; 27 *id.* 673; Walk. Ch. Miss. 532; *second*, to make inquiries and report facts, 3 Woodb. & M. C. C. 258; 3 Paige, Ch. N. Y. 305; 23 Conn. 529; 1 Stockt. Ch. N. J. 309; 2 Jones, Eq. No. C. 238; 5 Gray, Mass. 423; 5 Cal. 90; see 1 Freem. Ch. 502; 9 Paige, Ch. N. Y. 372; *third*, to perform some special ministerial acts directed by the court, such as the sale of property, 11 Humphr. Tenn. 278; 25 Barb. N. Y. 440, settlement of deeds, see 1 Cow. N. Y. 711, appointment of new trustees, and the like, 1 Barbour, Chanc. Pract. 468; *fourth*, to discharge such duties as are specially charged upon them by statute. See POOR DEBTOR; INSOLVENCY.

MASTERS AT COMMON LAW. **In English Law.** Officers of the superior courts of common law, whose duty it is to tax costs, compute damages, take affidavits, and the like. They are five in number in each court. See stat. 7 Will. IV., & 1 Vict. c. 30.

MASTER OF THE CROWN OFFICE. The queen's coroner and attorney in the criminal department of the court of queen's bench, who prosecutes at the relation of some private person or common informer, the crown being the nominal prosecutor. Stat. 6 & 7 Vict. c. 20; Wharton, Dict. 2d Lond. ed.

MASTER OF THE ROLLS. **In English Law.** An officer of chancery, who has the keeping of the rolls and grants which pass the great seal and the records of the chancery, and exercises extensive judicial functions in a court which ranks next to that of the lord chancellor.

An officer with this title existed in the time of the Conqueror. He had from most ancient times an office in chancery, with distinct clerks. In early times no judicial authority was conferred by an appointment as master of the rolls. In the reigns of Hen. VI. and Edw. IV. they are found sitting in a judicial capacity, and from 1623 have had the regulation of some branches of the business of the court. He is the chief of the masters in chancery; and his judicial functions, except those specially conferred by commission, appear to have properly belonged to him in this character. 1 Spence, Eq. Jur. 100, 357.

All orders and decrees made by him, except those appropriate to the great seal alone, are valid, unless discharged or altered by the lord chancellor, but must be signed by him before enrolment; and he is especially directed to hear motions, pleas, demurrers, and the like. Stat. 3 Geo. II. c. 30; 3 & 4 Will. IV. c. 94; 3 Blackstone, Comm. 442.

MASTER OF A SHIP. **In Maritime Law.** The commander or first officer of a merchant-ship; a captain.

The master of an American ship must be a citizen of the United States, 1 U. S. Stat. at Large, 287; and a similar requirement exists in most maritime states. In some countries their qualifications in point of skill and experience must be attested by examination by proper authorities; but in the United States the civil responsibility of the owners for their acts is esteemed sufficient. A vessel sailing without a *competent* master is deemed unseaworthy, and the owners are liable for any loss of cargo which may occur, but cannot recover on a policy of insurance in case of disaster. 21 How. 7, 23; 6 Cow. N. Y. 270; 12 Johns. N. Y. 128, 136; 21 N. Y. 378.

2. The master is selected by the owners, and, in case of his death or disability during the voyage, the mate succeeds; if he also dies in a foreign country, the consignee of the vessel, or the consul of the nation, may, in a case of necessity and in the absence of other authority, appoint a master. The master himself may, in similar circumstances of necessity and distance from the owners, appoint a substitute. 1 Parsons, Mar. Law, 387; 2 Sumn. C. C. 206; 13 Pet. 387. During a temporary absence of the master, the mate succeeds. 2 Sumn. C. C. 588.

3. He must, at the *commencement of the voyage*, see that his ship is seaworthy and fully provided with the necessary ship's papers, and with all the necessary and customary requisites for navigation, as well as with a proper supply of provisions, stores, etc., Bee, Adm. 80; 2 Paine, C. C. 291; 1 Pet Adm. 219; Ware, 454, for the voyage. 1 Pet. Adm. 407; 1 Woodb. & M. C. C. 338. He must also make a contract with the seamen, if the voyage be a foreign one from the United States. 1 U. S. Stat. at Large, 131; 2 *id.* 203. He must store safely under deck all goods shipped on board, unless by well-established custom or by express contract they are to be carried on deck; and he must stow them in the accustomed manner in order to prevent liability in case of damage. In respect to the lading or carriage of goods shipped as freight, he is required to use the greatest diligence; and his responsibility attaches from the moment of their receipt, whether on board, in his boat, or at the quay or beach. 3 Kent, Comm. 206; Abbott, Shipp. 423.

4. He must proceed on the voyage in which his vessel may be engaged by direction of the owners, must obey faithfully his instructions, and by all legal means (see 3 Cranch, 242) promote the interests of the owner of the ship and cargo. He must govern his crew and prevent improper exercise of authority by his subordinates. 2 Sumn. C. C. 1, 584; 14 Johns. N. Y. 19. He must take all possible care of the cargo during the voyage, and, in case of stranding, shipwreck, or other disaster, must do all lawful acts which the safety of the ship and the interests of the owners of the ship and cargo require. Flanders, Shipp. 190; 18 How. 150; 13 Pet. 387. It is his duty, in case of disaster or interruption of the voyage by unexpected circumstances, to file a statement of circumstances, called a protest. As to his duty with respect to damaged goods, see 1 Blatchf. C. C. 357; 1 Stor. C. C. 342.

5. In time of war, he must avoid acts which will expose his vessel and cargo to seizure and

confiscation, and must do all acts required for the safety of the vessel and cargo and the interests of their owners. He must bring home from foreign ports destitute seamen, Act of Congr. Feb. 28, 1803, § 4, Feb. 28, 1811, and must retain from the wages of his crew hospital-money. Act of Congr. July 16, 1798, March 1, 1843.

He is liable to the owners, and he and they to all others whose interests are affected by his acts, for want of reasonable skill, care, or prudence in the navigation or management of the vessel, 1 Wash. C. C. 142, including injuries done to the cargo by the crew, 1 Mas. C. C. 104; and this rule includes the improper discharge of a seaman. Ware, Dist. Ct. 65.

6. His *authority* on shipboard (Ware, Dist. Ct. 506) is very great, but is of a civil character. He has a right to control and direct the efforts of the crew, and to use such force as may be necessary to enforce obedience to his lawful demands. He may even take life, if necessary, to suppress a mutiny. He may degrade officers. 1 Blatchf. & H. Adm. 195, 366; 1 Pet. Adm. 244; 4 Wash. C. C. 338; 6 Bost. Law Rep. 304; 21 *id.* 148; 2 C. Rob. Adm. 261. He may punish acts of insolence, disobedience, and insubordination, and such other offences as may be required for the safety and discipline of the ship. Flogging is, however, prohibited, 9 U. S. Stat. at Large, 515; and for any unreasonable, arbitrary, or brutal exercise of authority towards a seaman or passenger he is liable, criminally and in a civil suit. 4 U. S. Stat. at Large, 776, 1235; 1 Conkling, Adm. 430–439; 14 Johns. N. Y. 119.

7. If the master has not funds for the necessary supplies, repairs, and uses (see 3 Wash. C. C. 484) of his ship when abroad, he may borrow money for that purpose on the credit of his owners; and if it cannot be procured on his and their personal credit, he may take up money on bottomry, or, in extreme cases, may pledge his cargo. 3 Mas. C. C. 255; Abbott, Shipp. 162; 3 Kent, Comm. Lect. 49. See BOTTOMRY; RESPONDENTIA.

In such cases, and, generally, when contracting within the ordinary scope of his powers and duties, he is personally responsible, as well as his owners, when they are personally liable. On bottomry loans, however, there is ordinarily no personal liability in this country, or in England, beyond the fund which comes to the hands of the master or owners from the subject of the pledge. Abbott, Shipp. 90; Story, Ag. §§ 116, 123, 294. In most cases, too, the ship is bound for the performance of the master's contract, Ware, Dist. Ct. 322; but all contracts of the master in chartering or freighting his vessel do not give such a lien. 19 How. 82.

8. He has a lien upon, and a consequent right to retain, the freight earned by his ship for the repayment of money advanced by him for necessary repairs and supplies, 9 Mass. 548; 4 Johns. Ch. N. Y. 218, or for seamen's wages; and payment to the owner after notice of the master's lien does not discharge the consignee, 5 Wend. N. Y. 315; but not, it would seem, upon the ship itself, 1 Parsons, Mar. Law, 389; nor has he any lien on the freight for his wages. 11 Pet. 175; 5 Wend. N. Y. 315. Consult Abbott, Flanders, on Shipping; Parsons on Maritime Law; 3 Kent, Commentaries.

MATE. In Maritime Law. The officer next in rank to the master on board a merchant ship or vessel.

In such vessels there is always one mate, and sometimes a second, third, and fourth mate, according to the vessel's size and the trade in which she may be engaged. When the word mate is used without qualification, it always denotes the first mate; and the others are designated as above. On large ships the mate is frequently styled first officer, and the second and third mates, second and third officers. Parish, Sea Off. Man. 33–140.

The mate, as well as the inferior officers and seamen, is a mariner, and entitled to sue in the admiralty for his wages; and he has a lien on the vessel for his security. Even when he acts as master in consequence of the death of the appointed master, he can sue in the admiralty for his proper wages as mate, but not for the increased compensation to which he is entitled as acting master. And he is entitled, when sick, to be cured at the expense of the ship. The mate should possess a sufficient knowledge of navigation to take command of the ship and carry on the voyage in case of the death of the master; and it may well be doubted whether a vessel be seaworthy for a long voyage at sea when only the master is competent to navigate her. Blount, Comm. Dig. 32; Dana, Seaman's Friend, 146; Curtis, Rights and Duties of Merchant Seamen, 96, note. It is the special duty of the mate to keep the log-book. The mate takes charge of the larboard watch at sea, and in port superintends the storage and breaking out of the cargo.

The mate succeeds, of course, to the station, rights, and authorities of the captain or master on the death of the latter, and he also has command, with the authority required by the exigencies of the case, during the temporary absence of the master. See MASTER OF A SHIP; Dana, Seaman's Friend; Parish, Sea-Officer's Manual; Curtis, Rights and Duties of Merchant Seamen; Parsons, Maritime Law.

MATER FAMILIAS. In Civil Law. The mother of a family; the mistress of a family.

A chaste woman, married or single. Calvinus, Lex.

MATERIAL MEN. Persons who furnish materials to be used in the construction or erection of ships, houses, or buildings.

By the general maritime law, material men have a lien on a foreign ship for supplies or materials furnished for such ship, which may be recovered in the admiralty, 9 Wheat. 409; 19 How. 359; but no such lien exists in the case of domestic ships. 4 Wheat. 438; 20 How. 393; 21 *id.* 248. See LIEN, §§

By statutory provisions, material men have a lien on ships and buildings, in some of the states. See LIEN, §§

MATERIALITY. The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial.

MATERIALS. Matter which is intended to be used in the creation of a mechanical structure. The physical part of that which has a physical existence.

The general property in materials furnished to a workman remains in the bailor where the contract is merely one for the employment of labor and services; otherwise where it is a sale. See BAILMENT; LOCATIO; MANDATE; TROVER; TRESPASS.

MATERNA MATERNIS (Lat. from the mother to the mother's).

In French Law. A term denoting the descent of property of a deceased person derived from his mother to the relations on the mother's side.

MATERNAL. That which belongs to, or comes from, the mother: as, maternal authority, maternal relation, maternal estate, maternal line. See LINE.

MATERNAL PROPERTY. That which comes from the mother of the party, and other ascendants of the maternal stock. Domat, Liv. Prél. t. 3, s. 2, n. 12.

MATERNITY. The state or condition of a mother.

It is either legitimate or natural. The former is the condition of the mother who has given birth to legitimate children; while the latter is the condition of her who has given birth to illegitimate children. Maternity is always certain; while the paternity is only presumed.

MATERTERA. A mother's sister.

MATERTERA MAGNA. A grandmother's sister.

MATERTERA MAJOR. A great-grandmother's sister.

MATERTERA MAXIMA. A great-great-grandmother's sister.

MATHEMATICAL EVIDENCE. That evidence which is established by a demonstration. It is used in contradistinction to moral evidence.

MATIMA. A godmother.

MATRICULA. In Civil Law. A register in which are inscribed the names of persons who become members of an association or society. Dig. 50. 3. 1. In the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy, and *matricula pauperum*, a list of the poor to be relieved: hence, to be entered in the university is to be matriculated.

MATRIMONIAL CAUSES. In the English ecclesiastical courts there are five kinds of causes which are classed under this head, viz.: causes for a malicious jactitation; suits for nullity of marriage, on account of fraud, incest, or other bar to the marriage, 2 Hagg. Cons. 423; suits for restitution of conjugal rights; suits for divorces on account of cruelty or adultery, or causes which have arisen since the marriage; suits for alimony.

MATRIMONIUM. In Civil Law. A legal marriage. A marriage celebrated in conformity with the rules of the civil law was called *justum matrimonium*: the husband *vir*, the wife *uxor*. It was exclusively confined to Roman citizens, and to those to whom the *connubium* had been conceded. It alone produced the paternal power over the children, and the marital power—*manus*—over the wife. The *farreum*, the *coemptio*, or the *usus*, was indispensable for the formation of this marriage. See PATERFAMILIAS.

MATRON. A woman who is a mother.

By the laws of England, when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is expected, then, upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question whether with child or not. Croke Eliz. 566. Interesting cases will be found at the last reference, and in 3 Moore, 523, and Croke Jac. 685. So when a woman was sentenced to death, and she pleaded in stay of execution that she was quick with child, a jury of matrons was impanelled to try whether she was or not with child. 4 Blackstone, Comm. 395. See PREGNANCY; QUICK.

In the state of New York, if a female convict sentenced to death be pregnant, the sheriff is to summon a jury of six physicians, who, with the sheriff, are to make an inquisition; and, if she be found quick with child, sentence is to be suspended. 2 Rev. Stat. 658, §§ 20, 21.

MATTER IN DEED. Such matter as may be proved or established by a deed or specialty. Matter of fact, in contradistinction to matter of law. Coke, Litt. 320; Stephen, Pl. 197.

MATTER OF FACT. In Pleading. Matter the existence or truth of which is determined by the senses or by reasoning based upon their evidence. The decision of such matters is referred to the jury. Hob. 127; 1 Greenleaf, Ev. § 49.

MATTER OF LAW. In Pleading. Matter the truth or falsity of which is determined by the established rules of law or by reasoning based upon them. The decision of such matters is referred to the court. Where special pleading prevails, it is a rule that matter of law must be pleaded specially. The phrase here means matter which, if established as true, goes to defeat the plaintiff's charges by the effect of some rule of law, as distinguished from that which operates a direct negative.

MATTER IN PAIS (literally, matter in the country). Matter of fact, as distinguished from matter of law or matter of record.

MATTER OF RECORD. Those facts which may be proved by the production of a record. It differs from matter in deed, which consists of facts which may be proved by specialty.

MATURITY. The time when a bill or note becomes due. In order to bind the indorsers, such note or bill must be protested, when not paid, on the last day of grace. See DAYS OF GRACE.

MAXIM. An established principle or proposition. A principle of law universally admitted, as being just and consonant with reason.

2. Maxims in law are somewhat like axioms in geometry. 1 Blackstone, Comm. 68. They are principles and authorities, and part of the general customs or common law of the land, and are of the same strength as acts of parliament, when the judges have determined what is a maxim; which belongs to the judges and not the jury. Termes de la Ley; Doct. & Stud. Dial. 1, c. 8. Maxims of the law are holden for law, and all other cases that may be applied to them shall be taken for granted. Coke, Litt. 11, 67; 4 Coke. See Plowd. 27 *b*.

3. The application of the maxim to the case before the court is generally the only difficulty. The true method of making the application is to ascertain how the maxim arose, and to consider whether the case to which it is applied is of the same character, or whether it is an exception to an apparently general rule.

4. The alterations of any of the maxims of the common law are dangerous. Coke, 2d Inst. 210.

The following are some of the more important maxims:

A communi observantiâ non est recedendum. There should be no departure from common observance (or usage). Coke, Litt. 186; Wingate, Max. 203; 2 Coke, 74.

A digniori fieri debet denominatio et resolutio. The denomination and explanation of a person or thing ought to be derived from the more worthy. Wingate, Max. 265; Fleta, lib. 4, c. 10, § 12.

A l'impossible nul n'est ténu. No one is bound to do what is impossible.

A non posse ad non esse sequitur argumentum necessariè negativè licet non affirmativè. From impossibility to non-existence the inference follows necessarily in the negative, though not in the affirmative. Hob. 336 *b*.

A piratis aut latronibus capti liberi permanent. Those captured by pirates or robbers remain free. Dig. 49. 15. 19. 2; Grotius, *de Jure Belli*, lib. 3, c. 3, s. 1.

A piratis et latronibus capta dominium non mutant. Things captured by pirates and robbers do not change ownership. 1 Kent, Comm. 108, 184; 2 Wooddeson, Lect. 258, 259.

A rescriptis valet argumentum. An argument from rescripts (*i.e.* original writs in the register) is valid.

A summo remedio ad inferiorem actionem non habetur regressus neque auxilium. From the highest remedy to an inferior action there is no return or assistance. Fleta, lib. 6, c. 1; Bracton, 104 *a*, 112 *b*; 3 Sharswood, Blackst. Comm. 193, 194.

A verbis legis non est recedendum. From the words of the law there should be no departure. Broom, Max. 3d Lond. ed. 555; Wingate, Max. 25; 5 Coke, 119.

Ab assuetis non fit injuria. No injury is done by things long acquiesced in. Jenk. Cent. Cas. Introd. viii.

Abbreviationum ille numerus et sensus accipiendus est, ut concessio non sit inanis. Such a number and sense is to be given to abbreviations that the grant may not fail. 9 Coke, 48.

Absentem accipere debemus eum qui non est eo loci in quo petitur. We must call him absent who is not in that place in which he is sought. Dig. 50. 16. 199.

Absentia ejusqui reipublicæ causa abest, neque ei neque alii damnosa esse debet. The absence of him who is employed in the service of the state, ought not to be prejudicial to him nor to others. Dig. 50. 17. 140.

Absoluta sententia expositore non indiget. An absolute, unqualified sentence (or proposition) needs no expositor. Coke, 2d Inst. 533.

Abundans cautela non nocet. Abundant caution does no harm. 11 Coke, 6; Fleta, lib. 1, c. 28, § 1.

Accessorium non ducit sed sequitur suum principale. The principal draws after it the accessory, not the accessory the principal. Coke, Litt. 152 *a*, 389 *a*; 5 Ell. & B. 772; Broom, Max. 3d Lond. ed. 433. Literally, The accessory does not draw, but follows, its principal.

Accessorius sequitur naturam sui principalis. An accessory follows the nature of his principal. Coke, 3d Inst. 139; 4 Sharswood, Blackst. Comm. 36; Broom, Max. 3d Lond. ed. 440.

Accusare nemo debet se, nisi coram Deo. No one is obliged to accuse himself, unless before God. Hardr. 139.

Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit. An accuser is not to be heard after a reasonable time, unless he excuse himself satisfactorily for the omission. F. Moore, 817.

Acta exteriora indicant interiora secreta. Outward acts indicate the inward intent. Broom, Max. 3d Lond. ed. 270; 1 Smith, Lead. Cas. 4th Am. ed. 115; 8 Coke, 291; 13 Johns. N. Y. 414; 15 *id.* 401.

Actio non datur non damnifico. An action is not given to one who is not injured. Jenk. Cent. Cas. 69.

Actio personalis moritur cum personâ. A personal action dies with the person. Noy, Max. 14. See this phrase as a title, ACTIO PERSONALIS.

Actio quælibet it suâ viâ. Jenk. Cent. Cas. 77. Every action proceeds in its own course.

Actionum genera maxime sunt servanda. Lofft, 460. The kinds of actions are especially to be preserved.

Actor qui contra regulam quid adduxit, non est audiendus. A pleader ought not to be heard who advances a proposition contrary to the rules of law.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute. Home, Law Tr. 232; Story, Confl. Laws, § 325, k; 2 Kent, Comm. 462.

Actore non probante reus absolvitur. If the plaintiff does not prove his case, the defendant is absolved. Hob. 103.

Actori incumbit onus probandi. The burden of proof lies on the plaintiff. Hob. 103.

Acts indicate the intention. 8 Coke, 291; Broom, Max. 3d Lond. ed. 270; 13 Johns. N. Y. 414.

Actus curiæ neminem gravabit. An act of the court shall prejudice no man. Jenk. Cent. Cas. 118; Broom, Max. 3d Lond. ed. 115; 1 Strange, 126; 1 Smith, Lead. Cas. 245–255; 12 C. B. 415

Actus Dei neminem facit injuriam. The act of God does wrong to no one: that is, no one is re-

sponsible in damages for inevitable accidents. 2 Blackstone, Comm. 122; 1 Coke, 97 *b*; 5 *id.* 87; Coke, Litt. 206 *a*; 4 Taunt. 309; 1 Term, 33. See ACT OF GOD.

Actus inceptus cujus perfectio pendet ex voluntate partium, revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest. An act already begun, whose completion depends upon the will of the parties, may be recalled; but if it depend on the consent of a third person, or on a contingency, it cannot be recalled. Bacon, Max. Reg. 20. See Story, Ag. § 424.

Actus judiciarius coram non judice irritus habetur; de ministeriali autem a quocunque provenit ratum esto. A judicial act before one not a judge is void; as to a ministerial act, from whomsoever it proceeds, let it be valid. Lofft, 458.

Actus legis nemini est damnosus. An act of the law shall prejudice no man. Coke, 2d Inst. 287; Broom, Max. 3d Lond. ed. 119; 11 Johns. N. Y. 380; 6 Coke, 68; 8 *id.* 290; Coke, Litt. 264 *b*; 5 Term, 381, 385; 1 Ld. Raym. 515; Hob. 216; 2 H. Blackst. 324, 334; 5 East, 147; 1 Preston, Abs. of Tit. 346; 6 Bacon, Abr. 559.

Actus legis nemini facit injuriam. The act of the law does no one wrong. 5 Coke, 116; 2 Sharswood, Blackst. Comm. 123.

Actus legitimi non recipiunt modum. Acts required by law admit of no qualification. Hob. 153; Branch, Princip.

Actus me invito factus, non est meus actus. An act done by me against my will is not my act. Bracton, 101 *b*.

Actus non reum facit nisi mens rea. The act does not make a person guilty unless the intention be guilty also. This maxim applies only in criminal cases; in civil matters it is otherwise. Broom, Max. 3d Lond. ed. 270, 275, 329; 7 Term, 514; 3 Bingh. N. C. 34, 468; 5 Mann. & G. 639; 3 C. B. 229; 5 *id.* 380; 9 Clark & F. 531; 4 N. Y. 159, 163, 195; 2 Bouvier, Inst. n. 2211.

Actus repugnum non potest in esse produci. A repugnant act cannot be brought into being, *i.e.* cannot be made effectual. Plowd. 355.

Ad ea quæ frequentim accidunt Jura adaptantur. The laws are adapted to those cases which occur more frequently. Coke, 2d Inst. 137; Wingate, Max. 216; Dig. 1. 3. 3; 19 Howell, St. Tr. 1061; 3 Barnew. & C. 178, 183; 2 Crompt. & J. Exch. 108; 7 Mees. & W. Exch. 599, 600; Vaugh. 373; 5 Coke, 38, 128; 6 *id.* 77; 11 Exch. 476; 12 How. 312; Broom, Max. 3d Lond. ed. 41.

Ad officium justiciariorum spectat, unicuique coram eis placitanti justitiam exhibere. It is the duty of justices to administer justice to every one pleading before them. Coke, 2d Inst. 451.

Ad proximum antecedens fiat relatio, nisi impediatur sententia. A relative is to be referred to the next antecedent, unless the sense would be thereby impaired. Noy, Max. 9th ed. 4; 2 Exch. 479; 17 Q. B. 833; 2 Hurlst. & N. 625; 3 Bingh. N. C. 217; 9 Coke, 13; 13 How. 142.

Ad quæstiones legis judices, et non juratores respondent. Judges, and not jurors, respond to questions of law. 7 Mass. 279.

Ad questiones facti non respondent judices; ad questiones legis non respondent juratores. The judges do not answer to questions of fact; the jury do not answer to questions of law. Coke, Litt. 295; 8 Coke, 308; Vaugh. 149; Broom, Max. 3d Lond. ed. 99.

Ad vim majorem vel ad casus fortuitos non tenetur quis, nisi sua culpa intervenerit. No one is held to answer for the effects of a superior force, or of an accident, unless his own fault has contributed. Fleta, lib. 2, c. 72, § 16.

Additio probat minoritatem. An addition proves inferiority. Coke, 4th Inst. 80; Wingate, Max. 211, max. 60; Littleton, § 293; Coke, Litt. 189 *a*.

Ædificare in tuo proprio solo non licet quod alteri noceat. It is not lawful to build upon one's own land what may be injurious to another. Coke, 3d Inst. 201; Broom, Max. 3d Lond. ed. 331.

Ædificatum solo, solo cedit. That which is built upon the land goes with the land. Coke, Litt. 4 *a*; Broom, Max. 3d Lond. ed. 349, 355; Inst. 2. 1. 29; Dig. 47. 3. 1.

Ædificia solo cedunt. Buildings pass by a grant of the land. Fleta, lib. 3, c. 2, § 12.

Æquitas agit in personam. Equity acts upon the person. 4 Bouvier, Inst. n. 3733.

Æquitas sequitur legem. Equity follows the law. 1 Story, Eq. Jur. § 64; 3 Wooddeson, Lect. 479, 482; Branch, Max. 8; 2 Sharswood, Blackst. Comm. 330; Gilb. 136; 2 Ed. 316; 10 Mod. 3; 15 How. 299.

Æquior est dispositio legis quam hominis. The disposition of the law is more impartial than that of man. 8 Coke, 152; Bracton, 3 *a*.

Æquum et bonum, est lex legum. What is just and right is the law of laws. Hob. 224.

Æstimatio præteriti delicti ex postremo facto nunquam crescit. The estimation of a crime committed never increases from a subsequent fact. Bacon, Max. Reg. 8; Dig. 50. 17. 139; Broom, Max. 3d Lond. ed. 17.

Affectio tua nomen imposit operi tuo. Your motive gives a name to your act. Bracton, 2 *b*, 101 *b*.

Affectus punitur licet non sequitur effectus. The intention is punished although the consequence do not follow. 9 Coke, 56.

Affinis mei affinis non est mihi affinis. A connection (*i.e.* by marriage) of my connection is not a connection of mine. Shelford, Marr. & D. 174.

Affirmanti, non neganti, incumbit probatio. The proof lies upon him who affirms, not on him who denies. See Phillipps, Ev. 493.

Affirmantis est probatio. He who affirms must prove. 9 Cush. Mass. 535.

Alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri, et quilibet potest renunciare juri pro se introducto. Although alienation be prohibited, yet, by the consent of all in whose favor it is prohibited, it may take place, for it is in the power of any man to renounce a right introduced for his own benefit. Coke, Litt. 98; 9 N. Y. 291.

Alienatio rei præfertur juri accrescendi. Alienation is favored by the law rather than accumulation. Coke, Litt. 185 *a*, 381 *a*, note; Broom, Max. 3d Lond. ed. 393, 409; Wright, Tenures, 154 *et seq.*; 1 Cruise, Dig. 4th ed. 77, 78.

Alienation pending a suit is void. 2 P. Will. 482; 2 Atk. Ch. 174; 3 *id.* 392; 11 Ves. Ch. 194; 1 Johns. Ch. N. Y. 566, 580.

Aliquid conceditur ne injuria remanent impunita, quod alias non concederetur. Something is conceded lest a wrong should remain unpunished which otherwise would not be conceded. Coke, Litt. 197.

Aliquis non debet esse judex in propriâ causâ, quia non potest esse judex et pars. A person ought not to be judge in his own cause, because he cannot act both as judge and party. Coke, Litt. 141 *a*; Broom, Max. 3d Lond. ed. 112; Littleton, § 212; 13 Q. B. 327; 17 *id.* 1; 15 C. B. 769; 1 C. B. N. S. 329.

Aliud est celare, aliud tacere. To conceal is one thing, to be silent another. 3 Burr. 1910. See 2 Wheat. 176; 9 *id.* 631; 3 Bingh. 77; 4 Taunt. 851; 2 Carr. & P. 341; Broom, Max. 3d Lond. ed. 701.

Aliud est distinctio, aliud separatio. Distinction is one thing, separation another. Bacon's arg. Case of Postnati of Scotland, Works, iv. 351.

Aliud est possidere, aliud esse in possessione. It is one thing to possess, it is another to be in possession. Hob. 163; Bracton, 206.

Aliud est vendere, aliud vendenti consentire. To sell is one thing, to give consent to him who sells another. Dig. 50. 17. 160.

Allegans contraria non est audiendus. One making contradictory allegations is not to be heard. Jenk. Cent. Cas. 16; Broom, Max. 3d Lond. ed. 160, 268; 4 Term, 211; 3 Exch. 446, 527, 678; 4 *id.* 187; 11 *id.* 493; 3 Ell. & B. 363; 5 *id.* 502; 5 C. B. 195, 886; 10 Mass. 163; Coke, 4th Inst. 279.

Allegans suam turpitudinem non est audiendus. One alleging his own infamy is not to be heard. Coke, 4th Inst. 299; 2 Johns. Ch. N. Y. 339, 350.

Allegari non debuit quod probatum non relevat. That ought not to be alleged which, if proved, would not be relevant. 1 Chanc. Cas. 45.

Alterius circumventio alii non præbet actionem. Dig. 50. 17. 49. A deception practised upon one person does not give a cause of action to another.

Alternativa petitio non est audienda. An alternative petition is not to be heard. 5 Coke, 40.

Ambigua responsio contra proferentem est accipienda. An ambiguous answer is to be taken against the party who offers it. 10 Coke, 58.

Ambiguis casibus semper præsumitur pro rege. In doubtful cases the presumption is always in favor of the king. Lofft, 248.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. A latent ambiguity may be supplied by evidence; for an ambiguity which arises out of a fact may be removed by proof of the fact. Bacon, Max. Reg. 23; 8 Bingh. 247. See 1 Powell, Dev. 477; 2 Kent, Comm. 557; Broom, Max. 3d Lond. ed. 541; 13 Pet. 97; 8 Johns. N. Y. 90; 3 Halst. N. J. 71.

Ambiguitas verborum patens nullâ verificatione excluditur. A patent ambiguity is never holpen by averment. Lofft, 249; Bacon, Max. 25; *Cowen*, J., 21 Wend. N. Y. 651, 659; 23 *id.* 71, 78; *Story*, J., 1 Mas. C. C. 11; *Lipscomb*, J., 1 Tex. 377, 383.

Ambiguum placitum interpretari debet contra proferentem. An ambiguous plea ought to be interpreted against the party pleading it. Coke, Litt. 303 *b*; Broom, Max. 3d Lond. ed. 535; Stephen, Plead. 5th ed. 415; Bacon, Max. Reg. 3; 2 H. Blackst. 531; 2 Mees. & W. Exch. 444.

Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum. The will of a deceased person is ambulatory until the last moment of life. Dig. 34. 4. 4; Broom, Max. 3d Lond. ed. 445; 2 Blackstone, Comm. 502; Coke, Litt. 322 *b*; 1 Vict. c. 26, s. 24; 3 Ell. & B. 572; 1 Jarman, Wills, 2d ed. 11; 1 Mylne & K. Ch. 485; 2 *id.* 73.

Angliæ jura in omni casu libertati dant favorem. The laws of England are favorable in every case to liberty. Halkers, Max. 12.

Animus ad se omne jus ducit. It is to the intention that all law applies.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument. 3 Bulstr. 67; Pitman, Princ. & Sur. 26.

Annienlus trecentesimo sexagesimo-quinto die dicitur, incipiente planè non exacto die, quia annum civiliter non ad momenta temporum sed ad dies numeramur. We call a child a year old on the three hundred and sixty-fifth day, when the day is fairly begun but not ended, because we calculate the civil year not by moments, but by days. Dig. 50. 16. 134; *id.* 132; Calvinus, Lex.

Annua nec debitum judex non separat ipse. Even the judge divides not annuities or debt. 8 Coke, 52. See Story, Eq. Jur. §§ 480, 517; 1 Salk. 36, 65.

Annus est mora motûs quo suum planeta pervolvat circulum. A year is the duration of the motion by which a planet revolves through its orbit. Dig. 40. 7. 4. 5; Calvinus, Lex.; Bracton, 359 *b*.

Apices juris non sunt jura. Legal niceties are not laws. Coke, Litt. 304; 3 Scott, 773; 10 Coke, 126; Broom, Max. 142. See Apex Juris.

Applicatio est vita regulæ. Application is the life of a rule. 2 Bulstr. 79.

Aqua cedit solo. The water yields or accompanies the soil. The grant of the soil or land carries the water. Hale, de Jur. Mar. pt. 1, c. 1.

Aqua currit et debet currere ut currere solebat. Water runs and ought to run as it has used to run. 3 Rawle, Penn. 84, 88; 26 Penn. St. 413; 3 Kent, Comm. 439; Angell, Wat. Cour. 413; Gale & W. Easem. 182.

Arbitrimentum æquum tribuit cuique suum. A just arbitration renders to every one his own. Noy, Max. 248.

Arbitrium est judicium. An award is a judgment. Jenk. Cent. Cas. 137; 3 Bulstr. 64.

Arbor dum crescit; lignum dum crescere nescit. A tree while it is growing; wood when it cannot grow. Croke Jac. 166; 12 Johns. N. Y. 239, 241.

Argumentum a divisione est fortissimum in jure. An argument arising from a division is most powerful in law. 6 Coke, 60; Coke, Litt. 213 *b*.

Argumentum a majori ad minus negative non valet; valet e converso. An argument from the greater to the less is of no force negatively; conversely it is. Jenk. Cent. Cas. 281.

Argumentum a simili valet in lege. An argument drawn from a similar case, or analogy, avails in law. Coke, Litt. 191.

Argumentum ab auctoritate est fortissimum in lege. An argument drawn from authority is the strongest in law. Coke, Litt. 254.

Argumentum ab impossibili plurimum valet in lege. An argument deduced from impossibility greatly avails in law. Coke, Litt. 92.

Argumentum ab inconvenienti est validum in lege; quia lex non permittit aliquod inconveniens. An argument drawn from what is inconvenient is good in law, because the law will not permit any inconvenience. Coke, Litt. 66 *a*, 258; 7 Taunt. 527; 3 Barnew. & C. 131; 6 Clark & F. 671.

Armorum appellatione, non solum scuta et gladii et galeæ, sed et fustes et lapides continentur. Under the name of arms are included not only shields and swords and helmets, but also clubs and stones. Coke, Litt. 162.

Assignatur utitur jure auctoris. An assigner is clothed with the rights of his principal. Halkers, Max. 14; Broom, Max. 3d Lond. ed. 415, 416, 423, 425; Wingate, Max. p. 56; 1 Exch. 32; 18 Q. B. 878; Perkins, § 100.

Auctoritates philosophorum, medicorum, et poetarum, sunt in causis allegandæ et tenendæ. The opinions of philosophers, physicians, and poets are to be alleged and received in causes. Coke, Litt. 264.

Aucupia verborum sunt judice indigna. Catching at words is unworthy of a judge. Hob. 343.

Authority to execute a deed must be given by deed. Comyn, Dig. *Attorney* (C 5); 4 Term, 313; 7 *id.* 207; 1 Holt, 141; 9 Wend. N. Y. 68, 75; 5 Mass. 11; 5 Binn. Penn. 613.

Baratriam committit qui propter pecuniam justitiam baractat. He is guilty of baratry who for money sells justice. Bell, Dict. Barratry at common law has a different signification. See Barratry.

Bello parta cedunt reipublicæ. Things acquired in war go to the state. Cited 2 Russ. & M. 56; 1 Kent, Comm. 101; 5 C. Rob. Adm. 155, 163; 1 Gall. C. C. 558.

Benedicta est expositio quando res redimitur a destructione. Blessed is the exposition when the thing is saved from destruction. 4 Coke, 26.

Benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat; et quælibet concessio fortissime contra donatorem interpretanda est. Liberal interpretations are to be made of deeds, so that more may stand than fall; and every grant is to be taken most strongly against the grantor. 4 Mass. 134; 1 Sandf. Ch. N. Y. 258, 268; compare 275, 277.

Benignè faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire. Constructions should be liberal, on account of the ignorance of the laity, or non-professional persons, so that the subject-matter may avail rather than perish; and words must be subject to the intention, not the intention to the words. Coke, Litt. 36 *a;* Broom, Max. 3d Lond. ed. 481, 504; 11 Q. B. 852, 856, 868, 870; 4 Hou. L. Cas. 556; 2 Blackst. Comm. 21st ed. 379; 1 Bulstr. 175; Hob. 304.

Benignior sententia, in verbis generalibus seu dubiis, est preferanda. The more favorable construction is to be placed on general or doubtful expressions. 4 Coke, 15; Dig. 50. 17. 192. 1; 2 Kent, Comm. 557.

Benignius leges interpretandæ sunt quo voluntas earum conservetur. Laws are to be more favorably interpreted, that their intent may be preserved. Dig. 1. 3. 16.

Bis idem exigi bona fides non patitur, et in satisfactionibus, non permittitur ampliùs fieri quam semel factum est. Good faith does not suffer the same thing to be exacted twice; and in making satisfaction, it is not permitted that more should be done after satisfaction is once made. 9 Coke, 53; Dig. 50. 17. 57.

Bona fides exigit ut quod convenit fiat. Good faith demands that what is agreed upon shall be done. Dig. 19. 20. 21; *id.* 19. 1. 50; *id.* 50. 8. 2. 13.

Bona fides non patitur, ut bis idem exigatur. Good faith does not allow us to demand twice the payment of the same thing. Dig. 50. 17. 57.

Bonæ fidei possessor in id tantum quod ad se pervenerit tenetur. A *bonâ fide* possessor is bound for that only which has come to him. Coke, 2d Inst. 285; Grotius, *de Jure Bell.* lib. 2, c. 10, § 3 *et seq.*

Boni judicis est ampliare jurisdictionem (justitiam in. 1 Burr. 304). It is the part of a good judge to enlarge his jurisdiction; that is, his remedial authority. Chanc. Prec. 329; 1 Wils. 284; 9 Mees. & W. 818; 1 C. B. N. S. 255; 4 Bingh. N. C. 233; 4 Scott, N. R. 229; 17 Mass. 310.

Boni judicis est causas litium dirimere. It is the duty of a good judge to remove causes of litigation. Coke, 2d Inst. 306.

Boni judicis est judicium sine dilatione mandare executioni. It is the duty of a good judge to cause execution to issue on a judgment without delay. Coke, Litt. 289.

Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicæ ut sint fines litium. It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation. 4 Coke, 15; 5 *id.* 31 *a.*

Bonum defendentis ex integrâ causâ, malum ex quolibet defectu. The good of a defendant arises from a perfect case, his harm from some defect. 11 Coke, 68.

Bonum necessarium extra terminos necessitatis non est bonum. A thing good from necessity is not good beyond the limits of the necessity. Hob. 144.

Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. A good judge decides according to justice and right, and prefers equity to strict law. Coke, Litt. 24; 4 Term, 344; 2 Q. B. 837; Broom, Max. 3d Lond. ed. 77.

Breve judiciale debet sequi suum originale, et accessorium suum principale. A judicial writ ought to follow its original, and an accessory its principal. Jenk. Cent. Cas. 292.

Breve judiciale non cadit pro defectu firmæ. A judicial writ fails not through defect of form. Jenk. Cent. Cas. 43.

Carcer ad homines custodiendos, non ad puniendos, dari debet. A prison ought to be given to the custody, not the punishment, of persons. Coke, Litt. 260. See Dig. 48. 19. 8. 9.

Casus fortuitus non est sperandus, et nemo tenetur divinare. A fortuitous event is not to be foreseen, and no person is held bound to divine it. 4 Coke, 66.

Casus fortuitus non est supponendus. A fortuitous event is not to be presumed. Hardr. 82, arg.

Casus omissus et oblivioni datus dispositioni communis juris relinquitur. A case omitted and forgotten is left to the disposal of the common law. 5 Coke, 37; Broom, Max. 3d Lond. ed. 45; 1 Exch. 476.

Catalla justè possessa amitti non possunt. Chattels justly possessed cannot be lost. Jenk. Cent. Cas. 28.

Catalla reputantur inter minima in lege. Chattels are considered in law among the minor things. Jenk. Cent. Cas. 52.

Causa causæ est causa causati. The cause of a cause is the cause of the effect. Freem. 329; 12 Mod. 639.

Causa ecclesiæ publicæ æquiparatur; et summa est ratio quæ pro religione facit. The cause of the church is equal to public cause; and paramount is the reason which makes for religion. Coke, Litt. 341.

Causa et origo est materia negotii. Cause and origin is the material of business. 1 Coke, 99; Wingate, Max. 41, Max. 21.

Causa proxima, non remota spectatur. The immediate and not the remote cause is to be considered. Bacon, Max. Reg. 1; Story, Bailm. 515; 3 Kent, Comm. 8th ed. 374; 2 East, 348. See Causa Proxima.

Causa vaga et incerta non est causa rationabilis. A vague and uncertain cause is not a reasonable cause. 5 Coke, 57.

Causæ dotis, vitæ, libertatis, fisci sunt inter favorabilia in lege. Causes of dower, life, liberty, revenue, are among the things favored in law. Coke, Litt. 341.

Caveat emptor. Let the purchaser beware. See Caveat Emptor.

Caveat emptor; qui ignorare non debuit quod jus alienum emit. Let a purchaser beware; who ought not to be ignorant that he is purchasing the rights of another. Hob. 99; Broom, Max. 3d Lond. ed. 690; Coke, Litt. 102 *a;* 3 Taunt. 439; 1 Bouvier, Inst. 383; Sugden, Vend. & P. 13th ed. 272 *et seq.;* 1 Story, Eq. Jur. 6th ed. ch. 6.

Caveat venditor. Let the seller beware. Lofft. 328; 18 Wend. N. Y. 449, 453; 23 *id.* 353; 2 Barb. N. Y. 323; 5 N. Y. 73, 82.

Cavendum est a fragmentis. Beware of fragments. Bacon, Aph. 26.

Certa debet esse intentio, et narratio et certum fundamentum, et certa res quæ deducitur in judicium. The intention, count, foundation, and thing, brought to judgment, ought to be certain. Coke, Litt. 303 *a.*

Certum est quod certum reddi potest. That is sufficiently certain which can be made certain. Noy, Max. 481; Coke, Litt. 45 *b*, 96 *a*, 142 *a;* 2 Sharswood, Blackst. Comm. 143; 2 Maule & S. 50; Broom, Max. 3d Lond. ed. 555–558; 3 Term, 463; 4 Cruise, Dig. 4th ed. 269; 3 Mylne & K. Ch. 353; 11 Cush. Mass. 380.

Cessante causa, cessat effectus. The cause ceasing, the effect must cease. 1 Exch. 430; Broom, Max. 3d Lond. ed. 151.

Cessante ratione legis cessat, et ipsa lex. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. 4 Coke, 38; 7 *id.* 69; Coke, Litt. 70 *b*, 122 *a;* Broom, Max. 3d Lond. ed. 151, 152; 4 Rep. 38; 13 East, 348; 4 Bingh. N. C. 388.

Cessante statu primitivo, cessat derivativus. The primary state ceasing, the derivative ceases. 8 Rep. 34; Broom, Max. 3d Lond. ed. p. 438; 4 Kent, Comm. 32.

C'est le crime qui fait la honte, et non pas l'échafaud.

faud. It is the crime which causes the shame, and not the scaffold.

Cestuy que doit inheriter al père doit inheriter al fils. He who would have been heir to the father of the deceased shall also be heir of the son. Fitzherbert, Abr. *Descent*, 2; 2 Sharswood, Blackst. Comm. 239, 250.

Chacea est ad communem legem. A chace is by common law. Reg. Brev. 806.

Charta de non ente non valet. A charter or deed of a thing not in being is not valid. Coke, Litt. 36.

Chartarum super fidem, mortuis testibus, ad patriam de necessitudine, recurrendum est. The witnesses being dead, the truth of charters must, of necessity, be referred to the country. Coke, Litt. 86.

Chirographum apud debitorem repertum presumitur solutum. An evidence of debt found in possession of the debtor is presumed to be paid. Halk. Max. 30. See 14 Mees. & W. 379.

Circuitus est evitandus. Circuity is to be avoided. Coke, Litt. 384 *a*; Smith, Lead. Cas. 4th Am. ed. 20; Wingate, Max. 179; Broom, Max. 3d Lond. ed. 309; 5 Coke, 34; 15 Mees. & W. 208; 5 Exch. 829.

Citatio est de juri naturali. A summons is by natural right. Cases in *Banco Regis* Will. III. 453.

Citationes non concedantur priusquam exprimatur super qua re fieri debet citatio. Citations should not be granted before it is stated about what matter the citation is to be made. (A maxim of ecclesiastical law.) 12 Coke, 44.

Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant. A general clause of remainder does not embrace those things which are not of the same kind with those which had been specially mentioned. Lofft, 419.

Clausula generalis non refertur ad expressa. A general clause does not refer to things expressed. 8 Coke, 154.

Clausula quæ abrogationem excludit ab initio non valet. A clause in a law which precludes its abrogation is invalid from the beginning. Bacon, Max. Reg. 19, p. 89; 2 Dwarris, Stat. 673; Broom, Max. 3d Lond. ed. 27.

Clausula vel dispositio inutilis per præsumptionem remotam vel causam, ex post facto non fulcitur. A useless clause or disposition, *i. e.* one which the law would have implied, is not supported by a remote presumption, or by a cause arising afterwards. Bacon, Max. Reg. 21; Broom, Max. 3d Lond. ed. 599.

Clausulæ inconsuetæ semper inducunt suspicionem. Unusual clauses always excite a suspicion. 3 Coke, 81; Broom, Max. 3d Lond. ed. 264.

Cogitationis pœnam nemo patitur. No one is punished for his thoughts. Broom, Max. 3d Lond. ed. 279.

Cohæredes una persona censentur, propter unitatem juris quod habent. Coheirs are deemed as one person, on account of the unity of right which they possess. Coke, Litt. 163.

Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quæstum convertendum. Commerce, by the law of nations, ought to be common, and not to be converted into a monopoly and the private gain of a few. Coke, 3d Inst. 181, in marg.

Commodum ex injuriâ suâ non habere debet. No man ought to derive any benefit of his own wrong. Jenk. Cent. Cas. 161; Finch, Law, b. 1, c. 3, n. 62.

Common opinion is good authority in law. Coke, Litt. 186 *a*; 3 Barb. Ch. N. Y. 528, 577.

Communis error facit jus. A common error makes law. What was at first illegal, being repeated many times, is presumed to have acquired the force of usage; and then it would be wrong to depart from it. Hilliard, Real Prop. 268; 1 Ld. Raym. 42; 6 Clark & F. 172; 3 Maule & S. 396; 4 N. H. 458; 2 Mass. 357. The converse of this maxim is *communis error non facit jus.* A common error does not make law. Coke, 4th Inst. 242; 3 Term, 725; 6 *id.* 564.

Compendia sunt dispendia. Abridgments are hindrances. Coke, Litt. 305.

Compromissarii sunt judices. Arbitrators are judges. Jenk. Cent. Cas. 128.

Compromissum ad similitudinem judiciorum redigitur. A compromise is brought into affinity with judgments. 9 Cush. Mass. 571.

Concessio per regem fieri debet de certitudine. A grant by the king ought to be a grant of a certainty. 9 Coke, 46.

Concessio versus concedentem latam interpretationem habere debet. A grant ought to have a liberal interpretation against the grantor. Jenk. Cent. Cas. 279.

Concordiâ parvæ res crescunt et opulentiâ lites. Small means increase by concord, and litigations by opulence. Coke, 4th Inst. 74.

Conditio beneficialis, quæ statum construit, benignè, secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, strictè, secundum verborum proprietatem, accipienda. A beneficial condition, which creates an estate, ought to be construed favorably, according to the intention of the words; but an odious condition, which destroys an estate, ought to be construed strictly, according to the letter of the words. 8 Coke, 90; Sheppard, Touchst. 134.

Conditio dicitur, cùm quid in casum incertum qui potest tendere ad esse aut non esse, confertur. It is called a condition when something is given on an uncertain event, which may or may not come into existence. Coke, Litt. 201.

Conditio illicita habetur pro non adjicta. An unlawful condition is deemed as not annexed.

Conditio præcedens adimpleri debet priusquam sequatur effectus. A condition precedent must be fulfilled before the effect can follow. Coke, Litt. 201.

Conditiones quælibet odiosæ; maximè autem contrà matrimonium et commercium. Any conditions are odious, but especially those against matrimony and commerce. Lofft, 644.

Confessio facta in judicio omni probatione major est. A confession made in court is of greater effect than any proof. Jenk. Cent. Cas. 102.

Confessus in judicio pro judicato habetur et quodammodo suâ sententiâ damnatur. A person who has confessed in court is deemed as having had judgment passed upon him, and, in a manner, is condemned by his own sentence. 11 Coke, 30. See Dig. 42. 2. 1.

Confirmare est id quod prius infirmum fuit simul firmare. To confirm is to make firm what was before infirm. Coke, Litt. 295.

Confirmare nemo potest priusquam jus ei acciderit. No one can confirm before the right accrues to him. 10 Coke, 48.

Confirmatio est nulla, ubi donum præcedens est invalidum. A confirmation is null where the preceding gift is invalid. Coke, Litt. 295; F. Moore, 764.

Confirmatio omnes supplet defectus, licet id quod actum est ab initio non valuit. Confirmation supplies all defects, though that which has been done was not valid at the beginning. Coke, Litt. 295 *b*.

Confirmat usum qui tollit abusum. He confirms a use who removes an abuse. F. Moore, 764.

Conjunctio mariti et feminæ est de jure naturæ. The union of a man and a woman is of the law of nature.

Consensus facit legem. Consent makes the law. A contract is law between the parties having received their consent. Branch, Princ.

Consensus non concubitus facit matrimonium. Con-

sent, not coition, constitutes marriage. Coke, Litt. 33 *a*; Dig. 50. 17. 30. See 10 Clark & F. 534; 1 Bouvier, Inst. 103; Broom, Max. 3d Lond. ed. 129.

Consensus tollit errorem. Consent removes or obviates a mistake. Coke, Litt. 126; Coke, 2d Inst. 123; Broom, Max. 3d Lond. ed. 129; 1 Bingh. N. c. 68; 6 Ell. & B. 338; 7 Johns. N. Y. 611.

Consensus voluntas multorum ad quos res pertinet, simul juncta. Consent is the united will of several interested in one subject-matter. Dav. 48; Branch, Princ.

Consentientes et agentes pari pœnâ plectentur. Those consenting and those perpetrating shall receive the same punishment. 5 Coke, 80.

Consentire matrimonio non possunt infra annos nubiles. Persons cannot consent to marriage before marriageable years. 5 Coke, 80; 6 *id.* 22.

Consequentiæ non est consequentia. A consequence ought not to be drawn from another consequence. Bacon, Aph. 16.

Consilia multorum requiruntur in magnis. The advice of many persons is requisite in great affairs. Coke, 4th Inst. 1.

Constitutum esse eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset. It is settled that that is to be considered the home of each one of us where he may have his habitation and account-books, and where he may have made an establishment of his business. Dig. 50. 16. 203.

Constructio legis non facit injuriam. The construction of law does not work an injury. Coke, Litt. 183; Broom, Max. 3d Lond. ed. 537.

Consuetudo contra rationem introducta, potiùs usurpatio quam consuetudo appellari debet. A custom introduced against reason ought rather to be called an usurpation than a custom. Coke, Litt. 113.

Consuetudo debet esse certa. A custom ought to be certain. Dav. 33.

Consuetudo est altera lex. Custom is another law. 4 Coke, 21.

Consuetudo est optimus interpres legum. Custom is the best expounder of the law. Coke, 2d Inst. 18; Dig. 1. 3. 37; Jenk. Cent. Cas. 273.

Consuetudo et communis assuetudo vincit legem non scriptam, si sit specialis; et interpretatur legem scriptam, si lex sit generalis. Custom and common usage overcome the unwritten law, if it be special; and interpret the written law, if the law be general. Jenk. Cent. Cas. 273.

Consuetudo ex certâ causâ rationabili usitata privat communem legem. Custom observed by reason of a certain and reasonable cause supersedes the common laws. Littleton, § 169; Coke, Litt. 33 *b*. See Judgt. 5 Bingh. 293; Broom, Max. 3d Lond. ed. p. 825.

Consuetudo, licet sit magnæ auctoritatis, nunquam tamen præjudicat manifestæ veritati. A custom, though it be of great authority, should never, however, be prejudicial to manifest truth. 4 Coke, 18.

Consuetudo loci observanda est. The custom of the place is to be observed. 4 Coke, 28 *b*; 6 *id.* 67; 10 *id.* 139; 4 C. B. 48.

Consuetudo neque injuriâ oriti, neque tolli potest. A custom can neither arise, nor be abolished, by a wrong. Lofft, 340.

Consuetudo non habitur in consequentiam. Custom is not to be drawn into a precedent. 3 Kebl. 499.

Consuetudo præscripta et legitima vincit legem. A prescriptive and legitimate custom overcomes the law. Coke, Litt. 113.

Consuetudo regni Angliæ est lex Angliæ. The custom of the kingdom of England is the law of England. Jenk. Cent. Cas. 119.

Consuetudo semel reprobata non potest amplius induci. Custom once disallowed cannot again be produced. Dav. 33; Grounds & Rud. of Law, 53.

Consuetudo vincit communem legem. Custom overrules common law. 1 Roper, Husb. & Wife, 351; Coke, Litt. 33 *b*.

Consuetudo volentes ducit, lex nolentes trahit. Custom leads the willing, law compels or draws the unwilling. Jenk. Cent. Cas. 274.

Contemporanea expositio est optima et fortissima in lege. A contemporaneous exposition is the best and most powerful in the law. Coke, 2d Inst. 11; 3 Coke, 7; Broom, Max. 3d Lond. ed. 608.

Contestatio litis eget terminos contradictarios. An issue requires terms of contradiction; that is, there can be no issue without an affirmative on one side and a negative on the other. Jenk. Cent. Cas. 117.

Contra legem facit qui id facit quod lex prohibet; in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit. He does contrary to the law who does what the law prohibits; he acts in fraud of the law who, the letter of the law being inviolate, uses the law contrary to its intention. Dig. 1. 3. 29.

Contrà negantem principia non est disputandum. There is no disputing against one who denies principles. Coke, Litt. 43; Grounds & Rud. of Law, 57.

Contrà non valentem agere nulla currit præscriptio. No prescription runs against a person unable to act. Broom, Max. 3d Lond. ed. 810; Evans, Pothier, 451.

Contrà veritatem lex nunquam aliquid permittit. The law never suffers any thing contrary to truth. Coke, 2d Inst. 252. But sometimes it allows a conclusive presumption in opposition to truth. See 3 Bouvier, Inst. n. 3061.

Contractus ex turpi causâ, vel contrà bonos mores nullus est. A contract founded on a base and unlawful consideration, or against good morals, is null. Hob. 167; Dig. 2. 14. 27. 4.

Contractus legem ex conventione accipiunt. The agreement of the parties makes the law of the contract. Dig. 16. 3. 1. 6.

Contrariorum contraria est ratio. The reason of contrary things is contrary. Hob. 344.

Contrectatio rei alienæ animo furandi, est furtum. The touching or removing of another's property, with an intention of stealing, is theft. Jenk. Cent. Cas. 132.

Conventio privatorum non potest publico juri derogare. An agreement of private persons cannot derogate from public right. Wing. 746, Max. 201; Coke, Litt. 166 *a*; Dig. 50. 17. 45. 1.

Conventio vincit legem. The agreement of the parties overcomes or prevails against the law. Story, Ag. § 368; 6 Taunt. 430. See Dig. 16. 3. 1. 6.

Copulatio verborum indicat acceptationem in eodem sensu. Coupling words together shows that they ought to be understood in the same sense. Bacon, Max. Reg. 3; Broom, Max. 3d Lond. ed. 523.

Corporalis injuria non recipit æstimationem de futuro. A personal injury does not receive satisfaction from a future course of proceeding. Bacon, Max. Reg. 6; 3 How. St. Tr. 71; Broom, Max. 3d Lond. ed. 254.

Corpus humanum non recipit æstimationem. A human body is not susceptible of appraisement. Hob. 59.

Creditorum appellatione non hi tantum accipiuntur qui pecuniam crediderunt, sed omnes quibus ex qualibet causâ debetur. Under the head of creditors are included not alone those who have lent money, but all to whom from any cause a debt is owing. Dig. 50. 16. 11.

Crescente malitiâ crescere debet et pœna. Vice increasing, punishment ought also to increase. Coke, 2d Inst. 479.

Crimen falsi dicitur, cum quis illicitur, cui non fuerit ad hæc data auctoritas, de sigillo regis rapto vel invento brevia, cartasve consignaverit. The *crimen falsi* (crime of falsifying) is when any one illicitly, to whom power has not been given for

such purposes, has signed writs or charters with the king's seal, which he has either stolen or found. Fleta, l. 1, c. 23.

Crimen læsæ majestatis omnia alia crimina excedit quoad pœnam. The crime of treason exceeds all other crimes as far as its punishment is concerned. Coke, 3d Inst. 210.

Crimen omnia ex se nata vitiat. Crime vitiates every thing which springs from it. 5 Hill, N. Y. 523, 531.

Crimen trahit personam. The crime carries the person; *i.e.* the commission of a crime gives the courts of the place where it is committed jurisdiction over the person of the offender. 3 Den. N. Y. 190, 210.

Crimina morte extinguuntur. Crimes are extinguished by death.

Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest. To whom jurisdiction is given, to him those things also are held to be granted without which the jurisdiction cannot be exercised. Dig. 2. 1. 2; 1 Wooddeson, Lect. Introd. lxxi.; 1 Kent, Comm. 339.

Cui jus est donandi, eidem et vendendi et concedendi jus est. He who has a right to give has also a right to sell and to grant. Dig. 50. 17. 163.

Cui licet quod majus non debet quod minus est non licere. He who has authority to do the more important act shall not be debarred from doing that of less importance. 4 Rep. 23; Coke, Litt. 355 *b*; 2 Inst. 307; Noy, Max. 26; Finch, Law, 22; 3 Mod. 382, 392; Broom, Max. 3d Lond. ed. 165; Dig. 50. 70. 21.

Cui pater est populus non habet ille patrem. He to whom the people is father has not a father. Coke, Litt. 123.

Cuicunque aliquis quid concedit concedere videtur et id, sine quo res ipsa esse non potuit. Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. 11 Coke, 52; Broom, Max. 3d Lond. ed. 426; Hob. 234; Vaugh. 109; 11 Exch. 775; Sheppard, Touchst. 89; Coke, Litt. 56 *a*.

Cuilibet in arte suâ perito est credendum. Credence should be given to one skilled in his peculiar art. Coke, Litt. 125; 1 Sharswood, Blackst. Comm. 75; Phillips, Ev. Cowen & H. notes, pt. 1, p. 759; 11 Clark & F. 85. See EXPERT; OPINION.

Cuique in suâ arte credendum est. Every one is to be believed in his own art. 9 Mass. 227.

Cujus est commodum ejus debet esse incommodum. He who receives the benefit should also bear the disadvantage. 1 Kaimes, Eq. 289; Broom, Max. 3d Lond. ed. 837.

Cujus est dare ejus est disponere. He who has a right to give has the right to dispose of the gift. Wingate, Max. 53; Broom, Max. 3d Lond. ed. 440; 2 Coke, 71.

Cujus est divisio alterius est electio. Whichever of two parties has the division, the other has the choice. Coke, Litt. 166.

Cujus est instituere ejus est abrogare. Whose it is to institute, his it is also to abrogate. Sydney, Gov. 15; Broom, Max. 3d Lond. ed. 785.

Cujus est solum ejus est usque ad cœlum. He who owns the soil owns it up to the sky. Broom, Max. 3d Lond. ed. 309; Sheppard, Touchst. 90; 2 Bouvier, Inst. nn. 15, 70; 2 Sharswood, Blackst. Comm. 18; 9 Coke, 54; 4 Campb. 219; 11 Exch. 822; 6 Ell. & B. 76.

Cujus juris (i.e. jurisdictionis) est principale, ejusdem juris erit accessorium. He who has jurisdiction of the principal has also of the accessory. Coke, 2d Inst. 493; Bracton, 481.

Cujus per errorem dati repetitio est, ejus consulto dati, donatio est. That which, when given through mistake, can be recovered back, when given with knowledge of the facts, is a gift. Dig. 50. 17. 53.

Cujusque rei potissima pars principium est. The principal part of every thing is the beginning. Dig. 1. 2. 1; 10 Coke, 49.

Culpâ caret, qui scit, sed prohibere non potest. He is clear of blame who knows but cannot prevent. Dig. 50. 17. 50.

Culpa est immiscere se rei ad se non pertinenti. It is a fault to meddle with what does not belong to or does not concern you. Dig. 50. 17. 36; Coke, 2d Inst. 208.

Culpa lata dolo æquiparatur. Gross neglect is equivalent to fraud. Dig. 11. 6. 1.

Culpa tenet suos auctores. A fault binds its own authors. Erskine, Inst. b. 4, tit. 1, § 14; 6 Bell, App. Cas. 539.

Culpæ pœna par esto. Let the punishment be proportioned to the crime. Branch, Princ.

Cum actio fuerit merè criminalis, instituì poterit ab initio criminaliter vel civiliter. When an action is merely criminal, it can be instituted from the beginning either criminally or civilly. Bracton, 102.

Cum adsunt testimonia rerum, quid opus est verbis? When the proofs of facts are present, what need is there of words? 2 Bulstr. 53.

Cum confitente sponte mitius est agendum. One making a voluntary confession is to be dealt with more mercifully. Coke, 4th Inst. 66; Branch, Princ.

Cum de lucro duorum quæritur melior est causa possidentis. When the question of gain lies between two, the cause of the possessor is the better. Dig. 50. 17. 126.

Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est. When two things repugnant to each other are found in a will, the last is to be confirmed. Coke, Litt. 112; Sheppard, Touchst. 451; Broom, Max. 3d Lond. ed. 518; 1 Jarman, Wills, 2d ed. 394; 16 Johns. N. Y. 146; 1 Phill. 536.

Cum in testamento ambiguè aut etiam perperam scriptum, est benigne interpretari, et secundum id quod credibile est cogitatum credendum est. When an ambiguous or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. Dig. 34. 5. 24; Broom, Max. 3d Lond. ed. 506; 3 Pothier, ad Pand. ed. 1819, 46.

Cum legitimæ nuptiæ factæ sunt, patrem liberi sequuntur. Children born under a legitimate marriage follow the condition of the father.

Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa. Where two parties are equally in fault, the claimant always is at a disadvantage, and the party in possession has the better cause. Dig. 50. 17. 154; Broom, Max. 3d Lond. ed. 644.

Curia parliamenti suis propriis legibus subsistit. The court of parliament is governed by its own peculiar laws. Coke, 4th Inst. 50; Broom, Max. 3d Lond. ed. 82; 12 C. B. 413, 414.

Curiosa et captiosa interpretatio in lege reprobatur. A curious and captious interpretation in the law is to be reproved. 1 Bulstr. 6.

Currit tempus contra desides et sui juris contemptores. Time runs against the slothful and those who neglect their rights. Bracton, 100 *b*; Fleta, lib. 4. c. 5, § 12.

Cursus curiæ est lex curiæ. The practice of the court is the law of the court. 3 Bulstr. 53; Broom, Max. 3d Lond. ed. 126; 12 C. B. 414; 17 Q. B. 86; 8 Exch. 199; 2 Maule & S. 25; 15 East, 226; 12 Mees. & W. 7; 4 Mylne & C. 635; 3 Scott, N. R. 599.

Custom is the best interpreter of the law. Coke, 4th Inst. 75; 2 Ed. Ch. 74; 5 Cranch, 32; 1 Serg. & R. Penn. 106; 2 Barb. Ch. N. Y. 232, 269; 3 *id.* 528, 577.

Custome serra prise stricte. Custom must be taken strictly. Jenk. Cent. Cas. 83.

Custos statum hæredis in custodiâ existentis melio-m non deteriorem, facere potest. A guardian can make the estate of an heir living under his guardianship better, not worse. 7 Coke, 7.

Da tua dum tua sunt, post mortem tunc tua non sunt. Give the things which are yours whilst they are yours; after death then they are not yours. 3 Bulstr. 18.

Datur digniori. It is given to the more worthy. 2 Ventr. 268.

De fide et officio judicis non recipitur quæstio, sed de scientia sive sit error juris sive facti. The bona fides and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact. Bacon, Max. Reg. 17; 5 Johns. N. Y. 291; 9 *id.* 396; 1 N. Y. 45; Broom, Max. 3d Lond. ed. 82.

De jure judices, de facto juratores, respondent. The judges answer concerning the law, the jury concerning the facts. See Coke, Litt. 295; Broom, Max. 3d Lond. ed. 99.

De majori et minori non variant jura. Concerning major and minor laws do not vary. 2 Vern. Ch. 552.

De minimis non curat lex. The law does not notice (or care for) trifling matters. Broom, Max. 3d Lond. ed. 134; Hob. 88; 5 Hill, N. Y. 170.

De molendino de novo erecto non jacet prohibitio. A prohibition lies not against a new-erected mill. Croke Jac. 429.

De morte hominis nulla est cunctatio longa. When the death of a human being may be concerned, no delay is long. Coke, Litt. 134. When the question is concerning the life or death of a man, no delay is too long to admit of inquiring into facts.

De nomine proprio non est curandum cum in substantiâ non erretur; quia nomina mutabilia sunt, res autem immobiles. As to the proper name, it is not to be regarded when one errs not in substance; because names are changeable, but things are immutable. 6 Coke, 66.

De non apparentibus et non existentibus eadem est lex. The law is the same respecting things which do not appear and those which do not exist. 6 Ired. No. C. 61; 12 How. 253; 5 Coke, 6; 6 Bingh. N. C. 453; 7 Clark & F. Hou. L. 872; 5 C. B. 53; 8 *id.* 286; 1 Term, 404; Broom, Max. 3d Lond. ed. 150.

De nullo, quod est sud naturâ indivisibile, et divisionem non patitur, nullam partem habebit vidua, sed satisfaciat ei ad valentiam. A widow shall have no part from that which in its own nature is indivisible, and is not susceptible of division; but let [the heir] satisfy her with an equivalent. Coke, Litt. 32.

De similibus ad similia eadem ratione procedendum est. From similars to similars we are to proceed by the same rule. Branch, Princ.

De similibus idem est judicium. Concerning similars the judgment is the same. 7 Coke, 18.

Debet esse finis litium. There ought to be an end of lawsuits. Jenk. Cent. Cas. 61.

Debet quis juri subjacere ubi delinquit. Every one ought to be subject to the law of the place where he offends. Coke, 3d Inst. 34; Finch, Law, 14, 36; Wingate, Max. 113, 114; 3 Coke, 231; 8 Scott, N. R. 567.

Debet sua cuique domus esse perfugium tutissimum. Every man's house should be a perfectly safe refuge. 12 Johns. N. Y. 31, 54.

Debile fundamentum, fallit opus. Where there is a weak foundation, the work falls. 2 Bouvier, Inst. n. 2063; Broom, Max. 3d Lond. ed. 169, 171.

Debita sequuntur personam debitoris. Debts follow the person of the debtor. Story, Confl. Laws, § 362; 2 Kent, Comm. 429; Halkers, Max. 13.

Debitor non præsumitur donare. A debtor is not presumed to make a gift. See 1 Kames, Eq. 212; Dig. 50. 16. 108; 1 P. Will. 239.

Debitorum pactionibus, creditorum petitio nec tolli, nec minui potest. The right to sue of creditors cannot be taken away or lessened by the contracts of their debtors. Pothier, Obl. 87, 108; Broom, Max. 3d Lond. ed. 622.

Debitum et contractus sunt nullius loci. Debt and contract are of no particular place. 7 Coke, 61; 7 Mann. & G. 1019, n.; 1 Smith, Lead. Cas. 4th Am. ed. 528, n.

Debitum in presenti, solvendum in futuro. A present debt to be discharged in the future. 2 Barb. N. Y. 457, 470; 16 *id.* 171, 176; 19 *id.* 442, 445.

Deficiente uno sanguine non potest esse hæres. One blood being wanted, he cannot be heir. 3 Coke, 41; Grounds & Rud. of Law, 77.

Delegata potestas non potest delegari. A delegated authority cannot be again delegated. Coke, 2d Inst. 597; 5 Bingh. N. C. 310; 2 Bouvier, Inst. n. 1300; Story, Ag. § 13; 11 How. 233.

Delegatus debitor est odiosus in lege. A delegated debtor is hateful in law. 3 Bulstr. 148.

Delegatus non potest delegare. A delegate or deputy cannot appoint another. 2 Bouvier, Inst. n. 1936; Story, Ag. § 13; Broom, Max. 3d Lond. ed. 756–758; 9 Coke, 77; 2 Scott, N. R. 509; 12 Mees. & W. 712; 6 Exch. 156; 8 C. B. 627.

Delinquens per iram provocatus puniri debet mitius. A delinquent provoked by anger ought to be punished more mildly. Coke, 3d Inst. 55.

Derivativa potestas non potest esse major primitiva. The power which is derived cannot be greater than that from which it is derived. Wingate, Max. 36; Finch, Law, b. 1, c. 3, p. 11.

Derogatur legi, cum pars detrahitur; abrogatur legi, cum prorsus tollitur. To derogate from a law is to take away part of it; to abrogate a law is to abolish it entirely. Dig. 50. 16. 102. See 1 Bouvier, Inst. n. 91.

Designatio unius est exclusio alterius, et expressum facit cessare tacitum. The appointment or designation of one is the exclusion of another; and that expressed makes that which is implied to cease. Coke, Litt. 210.

Deus solus hæredem facere potest, non homo. God alone, and not man, can make an heir. Coke, Litt. 7 *b;* cited 5 Barnew. & C. 440, 454; Broom, Max. 3d Lond. ed. 457.

Dies dominicus non est juridicus. Sunday is not a day in law. Coke, Litt. 135 *a;* 2 Saund. 291; Broom, Max. 3d Lond. ed. 21; Finch, Law, 7; Noy, Max. 2; Plowd. 265; 3 Dowl. & L. 328; 13 Mass. 327. See SUNDAY.

Dies inceptus pro completo habetur. A day begun is held as complete.

Dies incertus pro conditione habetur. A day uncertain is held as a condition. Bell, Dict. *Computation of Time.*

Dilationes in lege sunt odiosæ. Delays in law are odious. Branch, Princ.

Discretio est discernere per legem quid sit justum. Discretion is to discern through law what is just. 5 Coke, 99, 100; 10 *id.* 140; Broom, Max. 3d Lond. ed. p. 81; Coke, 4th Inst. 41; 1 W. Blackst. 152; 1 Burr. 570; 3 Bulstr. 128; 6 Q. B. 700.

Discretio est scire per legem quid sit justum. Discretion consists in knowing what is just in law. 4 Johns. Ch. N. Y. 352, 356.

Disparata non debent jungi. Dissimilar things ought not to be joined. Jenk. Cent. Cas. 24.

Dispensatio est vulnus, quod vulnerat jus commune. A dispensation is a wound, because it wounds a common right. Dav. 69; Branch, Princ.

Disseisinam satis facit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat. He makes disseisin enough who does not permit the possessor to enjoy, or makes his enjoyment less commodious, although he does not expel altogether. Coke, Litt. 331; Bracton, lib. 4. tr. 2.

Dissimilium dissimilis est ratio. Of dissimilars the rule is dissimilar. Coke, Litt. 191.

Dissimulatione tollitur injuria. Wrong is wiped out by reconciliation. Erskine, Inst. b. 4, tit. 4, § 108.

Distinguenda sunt tempora. The time is to be considered. 1 Coke, 16 *a*; 14 N. Y. 380, 393.

Distinguenda sunt tempora; aliud est facere, aliud perficere. Times must be distinguished; it is one thing to do a thing, another to complete it. 3 Leon. 243; Branch, Princ.

Distinguenda sunt tempora; distingue tempora, et concordabis leges. Times are to be distinguished; distinguish times, and you will attune laws. 1 Coke, 24.

Divinatio non interpretatio est, quæ omnino recedit a litera. It is a guess, not interpretation, which altogether departs from the letter. Bacon, Max. Reg. 3, p. 47.

Dolosus versatur in generalibus. A deceiver deals in generals. 2 Coke, 34; 2 Bulstr. 226; Lofft, 782; 1 Rolle, 157; Wingate, Max. 636; Broom, Max. 3d Lond. ed. 264.

Dolum ex indiciis perspicuis probari convenit. Fraud should be proved by clear tokens. Code, 2. 21. 6; 1 Story, Contr. 4th ed. p. 602.

Dolus auctoris non nocet successori. The fraud of a predecessor does not prejudice the successor.

Dolus circuitu non purgatur. Fraud is not purged by circuity. Bacon, Max. Reg. 1; Noy, Max. 9, 12; Broom, Max. 3d Lond. ed. 210; 6 Ell. & B. 948.

Dolus et fraus nemini patrocinentur (*patrocinari debent*). Deceit and fraud shall excuse or benefit no man. (They themselves need to be excused.) Year B. 14 Hen. VIII. 8; Story, Eq. Jur. § 395; 3 Coke, 78; 2 Fonblanque, Eq. b. 2, ch. 6, § 3.

Dominium non potest esse in pendenti. The right of property cannot be in abeyance. Halkers, Max. 39.

Domus sua cuique est tutissimum refugium. Every man's house is his castle. 5 Coke, 91, 92; Dig. 2. 14. 18; Broom, Max. 3d Lond. ed. 384; 1 Hale, Pl. Cr. 481; Foster, Homicide, 320; 8 Q. B. 757; 16 *id.* 546, 556; 19 How. St. Tr. 1030. See ARREST.

Domus tutissimum cuique refugium atque receptaculum. The habitation of each one is an inviolable asylum for him. Dig. 2. 4. 18.

Dona clandestina sunt semper suspiciosa. Clandestine gifts are always suspicious. 3 Coke, 81; Noy, Max. 9th ed. 152; 4 Barnew. & C. 652; 1 Maule & S. 253; Broom, Max. 3d Lond. ed. 264.

Donari videtur quod, nulli jure cogente conceditur. That is considered to be given which is granted when no law compels. Dig. 50. 17. 82.

Donatio non præsumitur. A gift is not presumed. Jenk. Cent. Cas. 109.

Donatio perficitur possessione accipientis. A gift is rendered complete by the possession of the receiver. See 1 Bouvier, Inst. n. 712; 2 Johns. N. Y. 52; 2 Leigh, Va. 337; 2 Kent, Comm. 438.

Donationum alia perfecta, alia incepta, et non perfecta; ut si donatio lecta fuit et concessa, ac traditio nondum fuerit subsecuta. Some gifts are perfect, others incipient and not perfect; as if a gift were read and agreed to, but delivery had not then followed. Coke, Litt. 56.

Donator nunquam desinit possidere antequam donatarius incipiat possidere. He that gives never ceases to possess until he that receives begins to possess. Dyer, 281; Bracton, 41 *b*.

Dormiunt aliquando leges, nunquam moriuntur. The laws sometimes sleep, but never die. Coke, 2d Inst. 161.

Dos de dote peti non debet. Dower ought not to be sought from dower. 4 Coke, 122; Coke, Litt. 31; 4 Dane, Abr. 671; 1 Washburn, Real Prop. 209.

Doti lex favet; præmium pudoris est, ideò parcatur. The law favors dower; it is the reward of chastity, therefore let it be preserved. Coke, Litt. 31; Branch, Princ.

Droit ne done pluis que soit demaunde. The law gives no more than is demanded. Coke, 2d Inst. 286.

Droit ne poet pas morier. Right cannot die. Jenk. Cent. Cas. 100.

Duas uxores eodem tempore habere non potest. It is not lawful to have two wives at one time. Inst. 1. 10. 6; 1 Sharswood, Blackst. Comm. 436.

Duo non possunt in solido unam rem possidere. Two cannot possess one thing each in entirety. Coke, Litt. 368; 1 Preston, Abstr. 318; 2 *id.* 86, 326; 2 Dods. Adm. 157; 2 Carth. 76; Broom, Max. 3d Lond. ed. 415.

Duo sunt instrumenta ad omnes res aut confirmandas aut impugnandas, ratio et auctoritas. There are two instruments for confirming or impugning every thing, reason and authority. 8 Coke, 16.

Duorum in solidum dominium vel possessio esse non potest. Ownership or possession in entirety cannot be in two of the same thing. Dig. 13. 6. 5. 15; 1 Mackeldey, Civ. Law, 245, § 236; Bracton, 28 *b*.

Duplicationem possibilitatis lex non patitur. The law does not allow a duplication of possibility. 1 Rolle, 321.

Ea est accipienda interpretatio, quæ vitio caret. That interpretation is to be received which is free from fault. Bacon, Max. Reg. 3, p. 47.

Ea quæ commendandi causâ in venditionibus dicuntur si palam appareant venditorem non obligant. Those things which, by way of commendation, are stated at sales, if they are openly apparent, do not bind the seller. Dig. 18. 43. m.

Ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur. Those things which cannot be given, or which are not in existence, are held as not expressed. Dig. 50. 17. 135.

Ea quæ raro accidunt, non temerè in agendis negotiis computantur. Those things which rarely happen are not to be taken into account in the transaction of business without sufficient reason. Dig. 50. 17. 64.

Eadem mens præsumitur regis quæ est juris et quæ esse debet, præsertim in dubiis. The mind of the sovereign is presumed to be coincident with that of the law, and with that which ought to be, especially in ambiguous matters. Hob. 154; Broom, Max. 3d Lond. ed. 53.

Ecclesia ecclesiæ decimas solvere non debet. It is not the duty of the church to pay tithes to the church. Croke Eliz. 479.

Ecclesiæ magis favendum est quam personæ. The church is more to be favored than an individual. Godb. 172.

Ecclesia non moritur. The church does not die. Coke, 2d Inst. 3.

Effectus sequitur causam. The effect follows the cause. Wingate, Max. 226.

Ei incumbit probatio qui dicit, non qui negat. The burden of the proof lies upon him who affirms, not he who denies. Dig. 22. 3. 2; Tait, Ev. 1; 1 Phillips, Ev. 194; 1 Greenleaf, Ev. § 74; 3 La. 83; 2 Daniell, Chanc. Pract. 408; 4 Bouvier, Inst. n. 4411.

Ei nihil turpe, cui nihil satis. Nothing is base to whom nothing is sufficient. Coke, 4th Inst. 53.

Ejus est non nolle qui potest velle. He may consent tacitly who may consent expressly. Dig. 50. 17. 3.

Ejus est periculum cujus est dominium aut commodum. He has the risk who has the right of property or advantage.

Ejus nulla culpa est cui parere necesse sit. No guilt attaches to him who is compelled to obey. Dig. 50. 17. 169.

Electâ unâ viâ, non datur recursus ad alteram. When there is concurrence of means, he who has chosen one cannot have recourse to another. 10 Toull. n. 170.

Electio est intima [interna], libera, et spontanea separatio unius rei ab aliâ, sine compulsione, consistens in animo et voluntate. Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. Dy. 281.

Electio semel facta, et placitum testatum, non patitur regressum. Election once made, and plea witnessed, suffers not a recall. Coke, Litt. 146.

Electiones fiant rite et libere sine interruptione aliqua. Elections should be made in due form and freely, without any interruption. Coke, 2d Inst. 169.

Emptor emit quam minimo potest; venditor vendit quam maximo potest. The buyer buys for as little as possible; the vendor sells for as much as possible. 2 Johns. Ch. N. Y. 252, 256, 486.

Ex exchange il covient que les estates soient égales. In an exchange it is necessary that the estates be equal. Coke, Litt. 50; 2 Hilliard, Real Prop. 298.

Enumeratio infirmat regulam in casibus non enumeratis. Enumeration disaffirms the rule in cases not enumerated. Bacon, Aph. 17.

Enumeratio unius est exclusio alterius. Specification of one thing is an exclusion of the rest. Matter of Washburn, 4 Johns. Ch. N. Y. 106, 113.

Eodem modo quo oritur, eodem modo dissolvitur. It is discharged in the same way in which it arises. Bacon, Abr. *Release;* Croke Eliz. 697; 2 Wms. Saund. 48, n. 1; 11 Wend. N. Y. 28, 30; 24 *id.* 294, 298.

Eodem modo quo quid constituitur, eodem modo destruitur. In the same way in which any thing is constituted, in that way is it destroyed. 6 Coke, 53.

Equality is equity. Francis, Max., Max. 3; 4 Bouvier, Inst. n. 3725; 1 Story, Eq. Jur. § 64.

Equitas sequitur legem. Equity follows the law. 1 Story, Eq. Jur. 4; 5 Barb. N. Y. 277, 282.

Equity delights to do justice, and that not by halves. 5 Barb. N. Y. 277, 280; Story, Eq. Plead. § 72.

Equity follows the law. Cas. temp. Talb. 52; 1 Story, Eq. Jur. § 64.

Equity looks upon that as done, which ought to be done. 4 Bouvier, Inst. n. 3729; 1 Fonblanque, Eq. b. 1, ch. 6, s. 9, note; 3 Wheat. 563.

Equity suffers not a right without a remedy. 4 Bouvier, Inst. n. 3726.

Error fucatus nudâ veritate in multis est probabilior; et sæpenumero rationibus vincit veritatem error. Error artfully colored is in many things more probable than naked truth; and frequently error conquers truth and argumentation. 2 Coke, 73.

Error juris nocet. Error of law is injurious. See 4 Bouvier, Inst. n. 3828; 1 Story, Eq. Jur. § 139, n.

Error nominis nunquam nocet, si de identitate rei constat. Mistake in the name never injures, if there is no doubt as to the identity of the thing. 1 Duer, Ins. 171.

Error qui non resistitur, approbatur. An error not resisted is approved. Doctor & Student, c. 70.

Error scribentis nocere non debet. An error made by a clerk ought not to injure; a clerical error may be corrected. 1 Jenk. Cent. Cas. 324.

Errores ad sua principia referre, est refellere. To refer errors to their origin is to refute them. Coke, 3d Inst. 15.

Erubescat lex filios castigare parentes. The law blushes when children correct their parents. 8 Coke, 116.

Est aliquid quod non opertet, etiam si licet; quicquid vero non licet certè non oportet. There are some things which are not proper though lawful; but certainly those things are not proper which are not lawful. Hob. 159.

Est autem jus publicum et privatum, quod ex naturalibus præceptis aut gentium, aut civilibus est collectum; et quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur. Public and private law is that which is collected from natural precepts, on the one hand of nations, on the other of citizens; and that which in the civil law is called *jus*, that in the law of England is said to be right. Coke, Litt. 558.

Est autem vis legem simulans. Violence may also put on the mask of law.

Est boni judicis ampliare jurisdictionem. It is the part of a good judge to extend the jurisdiction. Gilb. 14.

Est ipsorum legislatorum tanquam viva vox; rebus et non verbis legem imponimus. The utterance of legislators themselves is like the living voice; we impose law upon things, not upon words. 10 Coke, 101.

Estoveria sunt ardendi, arundi, construendi, et claudendi. Estovers are for burning, ploughing, building, and inclosing. 13 Coke, 68.

Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit. It is not just and proper that he who speaks ill of a bad man should be condemned on that account; for it is fitting and expedient that the crimes of bad men should be known. Dig. 47. 10. 17; 1 Blackstone, Comm. 125.

Eventus varios res nova semper habet. A new matter always produces various events. Coke, Litt. 379.

Every man is presumed to intend the natural and probable consequences of his own voluntary acts. 1 Green. Evid. § 18; 9 East, 277; 9 Barnew. & C. 643; 3 Maule & S. 11, 17.

Ex antecedentibus et consequentibus fit optima interpretatio. The best interpretation is made from antecedents and consequents. 2 Parsons, Contr. 12, n. (*r*); Broom, Max. 3d Lond. ed. 513; Coke, 2d Inst. 317; 2 Sharswood, Blackst. Comm. 379; 1 Bulstr. 101; 15 East, 541.

Ex diuturnitate temporis, omnia præsumuntur solemniter esse acta. From length of time, all things are presumed to have been done in due form. Coke, Litt. 6; 1 Greenleaf, Ev. § 20; Best, Ev. § 43.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud. Broom, Max. 349; Cowp. 343; 2 C. B. 501, 512, 515; 5 Scott, N. R. 558; 10 Mass. 276.

Ex facto jus oritur. The law arises out of the fact. Coke, 2d Inst. 479; 2 Sharswood, Blackst. Comm. 329; Broom, Max. 3d Lond. ed. 99.

Ex frequenti delicto augetur pœna. Punishment increases with increasing crime. Coke, 2d Inst. 479.

Ex maleficio non oritur contractus. A contract cannot arise out of an act radically wrong and illegal. Broom, Max. 3d Lond. ed. 660; 1 Term, 734; 3 *id.* 422; 1 H. Blackst. 324; 5 Ell. & B. 999, 1015.

Ex malis moribus bonæ leges natæ sunt. Good laws arise from evil manners. Coke, 2d Inst. 161.

Ex multitudine signorum, colligitur identitas vera. From the great number of signs true identity is ascertained. Bacon, Max. Reg. 25; Broom, Max. 3d Lond. ed. 569.

Ex nihilo nihil fit. From nothing nothing comes. 13 Wend. N. Y. 178, 221; 18 *id.* 257, 301.

Ex nudo pacto non oritur actio. No action arises on a contract without a consideration. Noy, Max. 24; 3 Burr. 1670; 2 Sharswood, Blackst. Comm. 445; Chitty, Contr. 10th Am. ed. 25; 1 Story, Contr. § 525. See NUDUM PACTUM.

Ex pacto illicito non oritur actio. From an illicit contract no action arises. Broom, Max. 3d Lond. ed. 666; 7 Clark & F. Hou. L. 729.

Ex procedentibus et consequentibus optima fit in-

terpretatio. The best interpretation is made from things preceding and following; *i.e.* the context. 1 Rolle, 375.

Ex totâ materiâ emergat resolutio. The construction or explanation should arise out of the whole subject-matter. Wingate, Max. 238.

Ex turpi causâ non oritur actio. No action arises out of an immoral consideration. Selwyn, Nisi P. 63; 2 Pet. 539.

Ex turpi contractu non oritur actio. No action arises on an immoral contract. Dig. 2. 14. 27. 4; 2 Kent Comm. 466; 1 Story, Contr. § 592; 22 N. Y. 272.

Ex uno disces omnes. From one thing you can discern all.

Exceptio ejus rei cujus petitur dissolutio nulla est. A plea of that matter the dissolution of which is the object of the action is of no effect. Jenk. Cent. Cas. 37.

Exceptio falsi omnium ultima. A false plea is the basest of all things.

Exceptio firmat regulam in casibus non exceptis. The exception affirms the rule in cases not excepted. Bacon, Aph. 17.

Exceptio firmat regulam in contrarium. The exception affirms the rule to be the other way. Bacon, Aph. 17.

Exceptio nulla est versus actionem quæ exceptionem perimit. There can be no plea against an action which entirely destroys the plea. Jenk. Cent. Cas. 106.

Exceptio probat regulam de rebus non exceptis. An exception proves the rule concerning things not excepted. 11 Coke, 41.

Exceptio quæ firmat legem, exponit legem. An exception which confirms the law, expounds the law. 2 Bulstr. 189.

Exceptio quoque regulam declarat. The exception also declares the rule. Bacon, Aph. 17.

Exceptio semper ultima ponenda est. An exception is always to be put last. 9 Coke, 53.

Excessus in jure reprobatur. Excessus in re qualibet jure reprobatur communi. Excess in law is reprehended. Excess in any thing is reprehended by common law. 1 Coke, 44.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. That excuses or extenuates a wrong in capital causes which does not have effect in civil suits. Bacon, Max. Reg. 7; Broom, Max. 3d Lond. ed. 291.

Executio est executio juris secundum judicium. An execution is the execution of the law according to the judgment. Coke, 3d Inst. 212.

Executio est finis et fructus legis. An execution is the end and the fruit of the law. Coke, Litt. 289.

Exilium est patriæ privatio, natalis soli mutatio, legum nativarum amissio. Exile is a privation of country, a change of natal soil, a loss of native laws. 7 Coke, 20.

Expedit reipublicæ ne suâ re quis male utatur. It is for the interest of the state that a man should not use his own property improperly. Inst. 1. 8. 2; Broom, Max. 3d Lond. ed. 328.

Experientia per varios actus legem facit. Magistra rerum experientia. Experience by various acts makes laws. Experience is the mistress of things. Coke, Litt. 60; Branch. Princ.

Expositio, quæ ex visceribus causæ nascitur, est aptissima et fortissima in lege. That exposition which springs from the vitals of a cause is the fittest and most powerful in law. 10 Coke, 24.

Expressa nocent, non expressa non nocent. Things expressed may be prejudicial; things not expressed are not. Calvinus, Lex.; Dig. 50. 17. 19. 5.

Expressa non prosunt quæ non expressa proderunt. Things expressed may be prejudicial which not expressed will profit. 4 Coke, 73.

Expressio eorum quæ tacitè insunt nihil operatur. The expression of those things which are tacitly implied operates nothing. 2 Parsons, Contr. 28; 4 Coke, 73; 5 *id.* 11; Hob. 170; 3 Atk. 138; 11 Mees. & W. 569; 7 Exch. 28.

Expressio unius est exclusio alterius. The expression of one thing is the exclusion of another. Coke, Litt. 210; Broom, Max. 3d Lond. ed. 596; 2 Parsons, Contr. 28; 3 Bingh. N. C. 85; 8 Scott, N. R. 1013, 1017; 5 Term, 21; 6 *id.* 320; 12 Mees. & W. 761; 15 *id.* 110; 16 *id.* 244; 2 Curt. C. C. 365; 6 Mass. 84; 11 Cush. Mass. 328.

Expressum facit cessare tacitum. That which is expressed puts an end to (renders ineffective) that which is implied. Smith, Contr. 2d ed. 390; 5 Bingh. N. C. 185; 6 Barnew. & C. 609; 2 Crompt. & M. 459; 2 Ell. & B. 856; 7 Mass. 196; 24 Me. 374; 6 N. H. 481; 1 Dougl. Mich. 330; 4 Wash. C. C. 185.

Extincto subjecto, tollitur adjunctum. When the substance is gone, the adjuncts disappear. 16 Johns. N. Y. 438, 492.

Extra legem positus est civiliter mortuus. One out of the pale of the law (an outlaw) is civilly dead. Coke, Litt. 130.

Extra territorium jus dicenti non paretur impune. One who exercises jurisdiction out of his territory cannot be obeyed with impunity. 10 Coke, 77; Dig. 2. 1. 20; Story, Confl. Laws, § 539.

Facta sunt potentiora verbis. Facts are more powerful than words.

Factum a judice quod ad ejus officium non spectat, non ratum est. An act of a judge which does not pertain to his office is of no force. 10 Coke, 76; Dig. 50. 17. 170; Broom, Max. 3d Lond. ed. 89.

Factum cuique suum, non adversario, nocere debet. A man's actions should injure himself, not his adversary. Dig. 50. 17. 155.

Factum infectum fieri nequit. What is done cannot be undone. 1 Kames, Eq. 96, 259.

Factum negantis nulla probatio. No proof is incumbent on him who denies a fact.

Factum non dicitur quod non perseverat. That is not said to be done which does not last. 5 Coke, 96; Sheppard, Touchst. Preston ed. 391.

Factum unius alteri nocere non debet. The deed of one should not hurt another. Coke, Litt. 152.

Facultas probationum non est angustanda. The right of offering proof is not to be narrowed. Coke, 4th Inst. 279.

Falsa demonstratio non nocet. A false description does not vitiate. 6 Term, 676. See 2 Story, Rep. 291; 1 Greenleaf, Ev. § 301; Broom, Max. 3d Lond. ed. 562; 2 Parsons, Contr. 62, n., 69, n., 72, n., 76, n.; 4 C. B. 328; 11 *id.* 208; 14 *id.* 122.

Falsâ demonstratione legatum non perimi. A legacy is not destroyed by an incorrect description. 3 Bradf. Surr. N. Y. 144, 149.

Falsa orthographia, sive falsa grammatica, non vitiat concessionem. False spelling or false grammar does not vitiate a grant. 9 Coke, 48; Sheppard, Touchst. 55.

Falsus in uno, falsus in omnibus. False in one thing, false in every thing. 1 Sumn. C. C. 356; 7 Wheat. 338; 3 Wisc. 645; 2 Jones, No. C. 257.

Fama, fides, et oculus non patiuntur ludum. Fame, plighted faith, and eyesight do not endure deceit. 3 Bulstr. 226.

Fatetur facinus qui judicium fugit. He who flees judgment confesses his guilt. Coke, 3d Inst. 14; 5 Coke, 109 *b.* But see Best, Pres. § 248.

Fatuus præsumitur qui in proprio nomine errat. A man is presumed to be simple who makes a mistake in his own name. Code, 6. 24. 14; 5 Johns. Ch. 148, 161.

Favorabilia in lege sunt fiscus, dos, vita, libertas. The treasury, dower, life, and liberty, are things favored in law. Jenk. Cent. Cas. 94.

Favorabiliores rei potius quam actores habentur. Defendants are rather to be favored than plaintiffs.

Dig. 50. 17. 125. See 8 Wheat. 195, 196; Broom, Max. 3d Lond. ed. 639.

Favorabiliores sunt executiones aliis processibus quibuscunque. Executions are preferred to all other processes whatever. Coke, Litt. 287.

Favores ampliandi sunt; odia restringenda. Favorable inclinations are to be enlarged; animosities restrained. Jenk. Cent. Cas. 186.

Felix qui potuit rerum cognoscere causas. Happy is he who has been able to understand the causes of things. Coke, Litt. 231.

Felonia, ex vi termini, significat quodlibet capitale crimen felleo animo perpetratum. Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind. Coke, Litt. 391.

Felonia implicatur in quolibet proditione. Felony is implied in every treason. Coke, 3d Inst. 15.

Feodum est quod quis tenet ex quâcunque causâ, sive sit tenementum sive redditus. A fee is that which any one holds from whatever cause, whether tenement or rent. Coke, Litt. 1.

Festinatio justitiæ est noverca infortunii. The hurrying of justice is the stepmother of misfortune. Hob. 97.

Fiat justitia ruat cælum. Let justice be done, though the heavens should fall. Branch, Princ. 161.

Fiat prout fieri consuerit, nil temere novandum. Let it be done as formerly, let no innovation be made rashly. Jenk. Cent. Cas. 116; Branch, Princ.

Fictio cedit veritati. Fictio juris non est, ubi veritas. Fiction yields to truth. Where truth is, fiction of law does not exist.

Fictio est contra veritatem, sed pro veritate habetur. Fiction is against the truth, but it is to be esteemed truth.

Fictio legis iniquè operatur alieni damnum vel injuriam. Fiction of law is wrongful if it works loss or injury to any one. 2 Coke, 35; 3 *id.* 36; Gill, Md. 223; Broom, Max. 3d Lond. ed. 122.

Fictio legis neminem lædit. A fiction of law injures no one. 2 Rolle, 502; 3 Sharswood, Blackst. 43; 17 Johns. N. Y. 348.

Fidelitas. De nullo tenemento, quod tenetur ad terminum fit homagii; fit tamen inde fidelitatis sacramentum. Fealty. For no tenement which is held for a term is there the oath of homage, but there is the oath of fealty. Coke, Litt. 67 *b.*

Fides servanda. Good faith must be observed. 1 Metc. Mass. 551; 3 Barb. N. Y. 323, 330; 23 *id.* 521, 524.

Fides servanda est; simplicitas juris gentium prævaleat. Good faith is to be preserved; the simplicity of the law of nations should prevail. Story, Bills, § 15.

Fieri non debet, sed factum valet. It ought not to be done, but done it is valid. 5 Coke, 39; 1 Strange, 526; 19 Johns. N. Y. 84, 92; 12 *id.* 11, 376.

Filiatio non potest probari. Filiation cannot be proved. Coke, Litt. 126 *a.* But see 7 & 8 Vict. c. 101.

Filius est nomen naturæ, sed hæres nomen juris. Son is a name of nature, but heir a name of law. 1 Sid. 193; 1 Powell, Dev. 311.

Filius in utero matris est pars viscerum matris. A son in the mother's womb is part of the mother's vitals. 7 Coke, 8.

Finis finem litibus imponit. A fine puts an end to litigation. Coke, 3d Inst. 78.

Finis rei attendendus est. The end of a thing is to be attended to. Coke, 3d Inst. 51.

Finis unius diei est principium alterius. The end of one day is the beginning of another. 2 Bulstr. 305.

Firmior et potentior est operatio legis quam dispositio hominis. The operation of law is firmer and more powerful than the will of man. Coke, Litt. 102.

Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est. Rivers and ports are public; therefore the right of fishing there is common to all. Dav. 55; Branch, Princ.

Fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt. Women are excluded from all civil and public charges or offices. Dig. 50. 17. 2; 1 Exch. 645; 6 Mees. & W. Exch. 216.

Fœminæ non sunt capaces de publicis officiis. Women are not admissible to public offices. Jenk. Cent. Cas. 237. But a woman may be elected to the office of sexton, Olive *v.* Ingram, 7 Mod. 263; Str. 1114, s. c., or governor of a work-house, and act by deputy, Anon., 2 Ld. Raym. 1014, or an overseer. 2 Term, 395. See WOMEN.

Forma dat esse. Form gives being. Lord Henley, Ch. 2; Ed. Ch. 99.

Forma legalis forma essentialis. Legal form is essential form. 10 Coke, 100; 9 C. B. 493; 2 Hopk. 319.

Forma non observata, infertur adnullatio actus. When form is not observed, a nullity of the act is inferred. 12 Coke, 7.

Forestellarius est pauperum depressor, et totius communitatis et patriæ publicus inimicus. A forestaller is an oppressor of the poor, and a public enemy to the whole community and the country. Coke, 3d Inst. 196.

Fortior est custodia legis quam hominis. The custody of the law is stronger than that of man. 2 Rolle, 325.

Fortior et potentior est dispositio legis quam hominis. The disposition of the law is stronger and more powerful than that of man. Coke, Litt. 234; Broom, Max. 3d Lond. ed. 622; 10 Q. B. 944; 18 *id.* 87; 10 C. B. 561; 3 Hou. L. Cas. 507; 13 Mees. & W. Exch. 285, 306; 8 Johns. N. Y. 401.

Fractionem diei non recipit lex. The law does not regard a fraction of a day. Lofft, 572. But see DAY.

Frater fratri uterino non succedet in hæreditate paternâ. A brother shall not succeed an uterine brother in the paternal inheritance. Fort. de Laud. Leg. Ang. by Amos, p. 15; 2 Sharswood, Blackst. Comm. This maxim is now superseded in England by 3 & 4 Wm. IV. c. 106, s. 9. Broom, Max. 3d Lond. ed. 471; 2 Sharswood, Blackst. Comm. 232.

Fraus est celare fraudem. It is a fraud to conceal a fraud. 1 Vern. 270.

Fraus est odiosa et non præsumenda. Fraud is odious and not to be presumed. Croke Car. 550.

Fraus et dolus nemini patrocinari debent. Fraud and deceit should excuse no man. 3 Coke, 78.

Fraus et jus nunquam cohabitant. Fraud and justice never dwell together. Wingate, Max. 680.

Fraus latet in generalibus. Fraud lies hid in general expressions.

Fraus meretur fraudem. Fraud deserves fraud. Plowd. 100; Branch, Princ. This is very poor law.

Freight is the mother of wages. 2 Show. 283; 3 Kent, Comm. 196; 1 Hagg. 227; Smith, Merc. Law, 548; Cauders, Mar. Law, 339–343, 391, 398; Hilt. N. Y. 1, 17; 5 Johns. N. Y. 154; 11 *id.* 279; 12 *id.* 324.

Frequentia actûs multum operatur. The frequency of an act effects much. 4 Coke, 78; Wingate, Max. 192.

Fructus augeat hæreditatem. Fruits enhance an inheritance.

Fructus pendentes pars fundi videntur. Hanging fruits make part of the land. Dig. 6. 1. 44; 2 Bouvier, Inst. n. 1578. See LARCENY.

Fructus perceptos villæ non esse constat. Gathered fruits do not make a part of the farm. Dig. 19. 1. 17. 1; 2 Bouvier, Inst. n. 1578.

Frumenta quæ sata sunt solo cedere intelliguntur. Grain which is sown is understood to form a part of the soil. Inst. 2. 1. 32.

Frustrà agit qui judicium prosequi nequit cum effectu He in vain sues, who cannot prosecute his judgment with effect. Fleta, lib. 6, c. 37, § 9.

Frustrà est potentia quæ nunquam venit in actum. The power which never comes to be exercised is vain. 2 Coke, 51.

Frustrà expectatur eventus cujus effectus nullus sequitur. An event is vainly expected from which no effect follows.

Frustrà feruntur leges nisi subditis et obedientibus. Laws are made to no purpose unless for those who are subject and obedient. 7 Coke, 13..

Frustrà fit per plura, quod fieri potest per pauciora. That is done vainly by many things, which might be accomplished by fewer. Jenk. Cent. Cas. 68; Wingate, Max. 177.

Frustrà legis auxilium quærit qui in legem committit. Vainly does he who offends against the law seek the help of the law. 2 Hale, Pl. Cr. 386; Broom, Max. 3d Lond. ed. 255.

Frustrà petis quod statim alteri reddere cogeris. Vainly you ask that which you will immediately be compelled to restore to another. Jenk. Cent. Cas. 256; Broom, Max. 3d Lond. ed. 310.

Frustrà probatur quod probatum non relevat. It is vain to prove that which if proved would not aid the matter in question. Broom, Max. 3d Lond. ed. 255.

Furiosi nulla voluntas est. A madman has no will. Dig. 50. 17. 5; *id.* 1. 18. 13. 1; Broom, Max. 3d Lond. ed. 282.

Furiosus absentis loco est. A madman is considered as absent. Dig. 50. 17. 24. 1.

Furiosus nullum negotium contrahere (gerere) potest (quia non intelligit quod agit). A lunatic cannot make a contract. Dig. 50. 17. 5; 1 Story, Contr. 4th ed. p. 76.

Furiosus solo furore punitur. A madman is punished by his madness alone. Coke, Litt. 247; Broom, Max. 3d Lond. ed. 14; 4 Sharswood, Blackst. Comm. 24, 25.

Furiosus stipulari non potest nec aliquod negotium agere, qui non intelligit quid agit. An insane person who knows not what he does cannot make a bargain, nor transact any business. 4 Coke, 126.

Furor contrahi matrimonium non sinit, quia consensu opus est. Insanity prevents marriage from being contracted, because consent is needed. 1 Ves. & B. Ch. 140; 1 Blackstone, Comm. 439; 4 Johns. Ch. N. Y. 343, 345.

Furtum non est ubi initium habet detentionis per dominum rei. It is not theft where the commencement of the detention arises through the owner of the thing. Coke, 3d Inst. 107.

Generale dictum generaliter est interpretandum. A general expression is to be construed generally. 8 Coke, 116; 1 Ed. Ch. 96.

Generale nihil certum implicat. A general expression implies nothing certain. 2 Coke, 34; Wingate, Max. 164.

Generale tantum valet in generalibus, quantum singulare in singulis. What is general prevails, or is worth as much, among things general, as what is particular among things particular. 11 Coke, 59.

Generalia præcedunt, specialia sequuntur. Things general precede, things special follow. Reg. Brev.; Branch, Princ.

Generalia specialibus non derogant. Things general do not derogate from things special. Jenk. Cent. Cas. 120.

Generalia sunt præponenda singularibus. General things are to be put before particular things.

Generalia verba sunt generaliter intelligenda. General words are understood in a general sense. Coke, 3d Inst. 76; Broom, Max. 3d Lond. ed. 577.

Generalibus specialia derogant. Things special take from things general. Halkers, Max. 51.

Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. A general clause does not extend to those things which are previously provided for specially. 8 Coke, 154.

Generalis regula generaliter est intelligenda. A general rule is to be understood generally. 6 Coke, 65.

Glossa viperina est quæ corrodit viscera textûs. That is a viperine gloss which eats out the vitals of the text. 10 Coke, 70; 2 Bulstr. 79.

Grammatica falsa non vitiat chartam. False grammar does not vitiate a deed. 9 Coke, 48.

Gravius est divinam quam temporalem lædere majestatem. It is more serious to hurt divine than temporal majesty. 11 Coke, 29.

Habemus optimum testem confitentem reum. We have the best witness, a confessing defendant. Foster, Crim. Law, 243. See 2 Hagg. 315; 1 Phillips, Ev. 397.

Hæredem Deus facit, non homo. God, and not man, makes the heir. Bracton, 62 *b.*

Hæredem est nomen collectivum. Heir is a collective name.

Hæredipetæ suo propinquo vel extraneo periculoso sane custodi nullus committatur. To the next heir, whether a relation or a stranger, certainly a dangerous guardian, let no one be committed. Coke, Litt. 88 *b.*

Hæreditas est successio in universum jus quod defunctus habuerat. Inheritance is the succession to every right which was possessed by the late possessor. Coke, Litt. 237.

Hæreditas nihil aliud est, quàm successio in universum jus, quod defunctus habuerit. The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased. Dig. 50. 17. 62.

Hæreditas nunquam ascendit. The inheritance never ascends. Glanville, l. 7, c. 1; Broom, Max. 2d Lond. ed. 469; 2 Sharswood, Blackst. Comm. 212, n.; 3 Greenleaf, Cruise, Real Prop. 331; 1 Stephen, Comm. 378. Abrogated by stat. 3 & 4 Will. IV. c. 106, § 6.

Hæredum appellatione veniunt hæredes hæredum in infinitum. By the title of heirs, come the heirs of heirs to infinity. Coke, Litt. 9.

Hæres est alter ipse, et filius est pars patris. An heir is another self, and a son is a part of the father.

Hæres est aut jure proprietatis aut jure representationis. An heir is either by right of property or right of representation. 3 Coke, 40.

Hæres est eadem persona cum antecessore. The heir is the same person with the ancestor. Coke, Litt. 22.

Hæres est nomen juris, filius est nomen naturæ. Heir is a term of law; son, one of nature.

Hæres est pars antecessoris. The heir is a part of the ancestor. Coke, Litt. 22 *b;* 3 Hill, N. Y. 165, 167.

Hæres hæredis mei est meus hæres. The heir of my heir is my heir. Wharton, Law Dict.

Hæres legitimus est quem nuptiæ demonstrant. He is the lawful heir whom the marriage demonstrates. Mirror of Just. 70; Fleta, l. 6, c. 1; Dig. 2. 4. 5; Coke, Litt. 7 *b;* Broom, Max. 3d Lond. ed. 457. As to the application of the principle when the marriage is subsequent to the birth of the child, see 2 Clark & F. Hou. L. 571; 6 Bingh. N. C. 385; 5 Wheat. 226, 262, n.

Hæres minor uno et vigenti annis non respondebit, nisi in casu dotis. An heir minor, under twenty-one years of age, is not answerable, except in the matter of dower. F. Moore, 348.

He who has committed iniquity shall not have equity. Francis, 2d Max.

He who will have equity done to him must do equity to the same person. 4 Bouvier, Inst. n. 3723.

Hoc servabitur quod initio convenit. This shall

be preserved which is useful in the beginning. Dig 50. 17. 23; Bracton, 73 *b*.

Home ne sera puny pur suer des briefes en court le roy, soit il a droit ou a tort. A man shall not be punished for suing out writs in the king's court, whether he be right or wrong. Coke, 2d Inst. 228.

Hominum causâ jus constitutum est. Law is established for the benefit of man.

Homo potest esse habilis et inhabilis diversis temporibus. A man may be capable and incapable at divers times. 5 Coke, 98.

Homo vocabulum est naturæ; persona juris civilis. Man (*homo*) is a term of nature; person (*persona*), of the civil law. Calvinus, Lex.

Hora non est multum de substantiâ negotii, licet in appello de eâ aliquando fiat mentio. The hour is not of much consequence as to the substance of business, although in appeal it is sometimes mentioned. 1 Bulstr. 82.

Hostes sunt qui nobis vel quibus nos bellum decernimus; cæteri traditores vel prædones sunt. Enemies are those upon whom we declare war, or who declare it against us; all others are traitors or pirates. 7 Coke, 24; Dig. 50. 16. 118; 1 Sharswood, Blackst. Comm. 257.

Id certum est quod certum reddi potest. That is certain which may be rendered certain. 1 Bouvier, Inst. n. 929; 2 Blackstone, Comm. 143; 4 Kent, Comm. 462; 4 Pick. Mass. 179; Broom, Max. 3d Lond. ed. 556.

Id perfectum est quod ex omnibus suis partibus constat. That is perfect which is complete in all its parts. 9 Coke, 9.

Id possumus quod de jure possumus. We are able to do that which we can do lawfully. Lane, 116.

Id quod est magis remotum, non trahit ad se quod est magis junctum, sed è contrario in omni casu. That which is more remote does not draw to itself that which is nearer, but the contrary in every case. Coke, Litt. 164.

Id quod nostrum est, sine facto nostro, ad alium transferri non potest. What belongs to us cannot be transferred to another without our consent. Dig. 50. 17. 11. But this must be understood with this qualification, that the government may take property for public use, paying the owner its value. The title to property may also be acquired, without the consent of the owner, by a judgment of a competent tribunal.

Idem agens et patiens esse non potest. To be at once the person acting and the person acted upon is impossible. Jenk. Cent. Cas. 40.

Idem est facere, et nolle prohibere cum possis. It is the same thing to do a thing as not to prohibit it when in your power. 3 Coke, Inst. 158.

Idem est nihil dicere et insufficienter dicere. It is the same thing to say nothing and not to say sufficiently. Coke, 2d Inst. 178.

Idem est non probari et non esse; non deficit jus, sed probatio. What does not appear, and what is not, are the same; it is not the defect of the law, but the want of proof.

Idem est scire aut scire debet aut potuisse. To be able to know is the same as to know. This maxim is applied to the duty of every one to know the law.

Idem non esse et non apparet. It is the same thing not to exist and not to appear. Jenk. Cent. Cas. 207.

Idem semper antecedenti proximo refertur. Idem always relates to the next antecedent. Coke, Litt. 385.

Identitas vera colligitur ex multitudine signorum. True identity is collected from a number of signs. Bacon, Reg. 29.

Ignorantia eorum quæ quis scire tenetur non excusat. Ignorance of those things which every one is bound to know excuses not. Hale, Pl. Cr. 42. See Tindal, C. J., 10 Clark & F. Hou. L. 210; Broom, Max. 3d Lond. ed. 245; 4 Sharswood, Blackst. Comm. 27.

Ignorantia excusatur, non juris sed facti. Ignorance of fact may excuse, but not ignorance of law. See IGNORANCE.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of facts excuses, ignorance of law does not excuse. 1 Coke, 177; 4 Bouvier, Inst. n. 3828; Broom, Max. 3d Lond. ed. 231; 1 Fonblanque, Eq. 5th ed. 119, n. See IGNORANCE.

Ignorantia judicis est calamitas innocentis. The ignorance of the judge is the misfortune of the innocent. Coke, 2d Inst. 591.

Ignorantia juris non excusat. Ignorance of the law is no excuse. 8 Wend. N. Y. 267, 284; 18 *id.* 586, 588; 6 Paige, Ch. N. Y. 189, 195; 1 Edw. Ch. N. Y. 467, 472.

Ignorantia juris quod quisque scire tenetur, neminem excusat. Ignorance of law which every one is bound to know, excuses no one. 2 Coke, 3 *b*; 1 Plowd. 343; per *Ld. Campbell*, 9 Clark & F. 324; Broom, Max. 3d Lond. ed. 232; 7 Carr. & P. 456; 2 Kent, Comm. 491.

Ignorantia legis neminem excusat. Ignorance of law excuses no one. See IGNORANCE; 4 Bouvier, Inst. n. 3828; 1 Story, Eq. Jur. § 111.

Ignoratis terminis, ignoratur et ars. Terms being unknown, the art also is unknown. Coke, Litt. 2.

Ignoscitur ei qui sanguinem suum qualiter redemptum voluit. The law holds him excused who chose that his blood should be redeemed on any terms. Dig. 48. 21. 1; 1 Sharswood, Blackst. Comm. 131.

Illud quod alias licitum non est, necessitas facit licitum, et necessitas inducit privilegium quod jure privatur. That which is not otherwise lawful necessity makes lawful, and necessity makes a privilege which supersedes the law. 10 Coke, 61.

Illud quod alteri unitur extinguitur, neque amplius per se vacare licet. That which is united to another is extinguished, nor can it be any more independent. Godolph. 169.

Immobilia situm sequuntur. Immovables follow (the law of) their locality. 2 Kent, Comm. 67.

Imperitia culpæ annumeratur. Ignorance, or want of skill, is considered a fault, *i.e.* a negligence, for which one who professes skill is responsible. Dig. 50. 17. 132; 1 Bouvier, Inst. n. 1004; 2 Kent, Comm. 588; 4 Ark. 523.

Imperitia est maxima mechaneorum pœna. Lack of skill is the greatest punishment of artisans. 11 Coke, 54 *a*.

Impersonalitas non concludit nec ligat. Impersonality neither concludes nor binds. Coke, Litt. 352.

Impius et crudelis judicandus est qui libertati non favet. He is to be judged impious and cruel who does not favor liberty. Coke, Litt. 124.

Impossibilium nulla obligatio est. There is no obligation to perform impossible things. Dig. 50. 18. 185; 1 Pothier, Obl. pt. 1, c. 1, s. 4, § 3; 2 Story, Eq. Jur. 6th ed. 763; Broom, Max. 3d Lond ed. 228.

Impotentia excusat legem. Impossibility is an excuse in the law. Coke, Litt. 29; Broom, Max. 3d Lond. ed. 223.

Impunitas continuum affectum tribuit delinquenti. Impunity offers a continual bait to a delinquent. 4 Coke, 45.

Impunitas semper ad deteriora invitat. Impunity always invites to greater crimes. 5 Coke, 109.

In ædificiis lapis male positus non est removendus. In buildings a stone badly placed is not to be removed. 11 Coke, 69.

In æquali jure melior est conditio possidentis. When the parties have equal rights, the condition of the possessor is the better. Mitford, Eq. Plead. 215; Jeremy, Eq. Jur. 285; 1 Maddock, Chanc.

Pract. 170; Dig. 50. 17. 128; Broom, Max. 3d Lond. ed. 634; Plowd. 296.

In alternativis electio est debitoris. In alternatives, the debtor has the election.

In ambiguâ voce legis ea potiùs accipienda est significatio, quæ vitio caret; præsertim cùm etiam voluntas legis ex hoc colligi possit. When obscurities, ambiguities, or faults of expression render the meaning of an enactment doubtful, that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature. Dig. 1. 3. 19; Broom, Max. 3d Lond. ed. 513; Bacon, Max. Reg. 3; Coke, 2d Inst. 173.

In ambiguis orationibus maximè sententia spectanda est ejus qui eas protulisset. When there are ambiguous expressions, the intention of him who uses them is especially to be regarded. This maxim of Roman law was confined to wills. Dig. 50. 17. 96; Broom, Max. 3d Lond. ed. 506.

In atrocioribus delictis punitur affectus licet non sequatur effectus. In more atrocious crimes, the intent is punished though the effect does not follow. 2 Rolle, 89.

In casu extremæ necessitatis omnia sunt communia. In cases of extreme necessity, every thing is in common. Hale, Pl. Cr. 54; Broom, Max. 1.

In commodato hæc pactio, ne dolus præstetur, rata non est. If in a contract for a loan there is inserted a clause that fraud should not be accounted of, such clause is void. Dig. 13. 7. 17.

In conjunctivis oportet utramque partem esse veram. In conjunctives each part must be true. Wingate, Max. 13.

In consimili casu consimile debet esse remedium. In similar cases, the remedy should be similar. Hardr. 65.

In consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda. In customs, not the length of time but the strength of the reason should be considered. Coke, Litt. 141.

In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est. In contracts, the interpretation or construction should be liberal; in wills, more liberal; in restitutions, most liberal. Coke, Litt. 112 *a*.

In contractibus tacitè insunt quæ sunt moris et consuetudinis. In contracts, those things which are of custom and usage are tacitly implied. Broom, Max. 3d Lond. ed. 759; 3 Bingh. N. C. 814, 818; Story, Bills, § 143; 3 Kent, Comm. 260.

In contrahenda venditione, ambiguum pactum contra venditorem interpretandum est. In negotiating a sale, an ambiguous agreement is to be interpreted against the seller. Dig. 50. 17. 172; 18. 1. 21.

In conventionibus contrahentium voluntatem potius quam verba spectari placuit. In agreements, the rule is to regard the intention of the contracting parties rather than their words. Dig. 50. 16. 219; 2 Kent, Comm. 555; Broom, Max. 3d Lond. ed. 491; 17 Johns. N. Y. 150.

In criminalibus, probationes debent esse luce clariores. In criminal cases, the proofs ought to be clearer than the light. Coke, 3d. Inst. 210.

In criminalibus sufficit generalis malitia intentionis cum facto pari gradu. In criminal cases, a general malice of intention is sufficient, with an act of equal or corresponding degree. Bacon, Max. Reg. 15; Broom, Max. 3d Lond. ed. 291.

In criminalibus voluntas reputabitur pro facto. In criminal acts, the will will be taken for the deed. Coke, 3d Inst. 106.

In disjunctivis sufficit alteram partem esse veram. In disjunctives, it is sufficient if either part be true. Wingate, Max. 13; Coke, Litt. 225 *a*; 10 Coke, 50; Dig. 50. 17. 110.

In dubiis benigniora præferenda sunt. In doubtful matters, the more favorable are to be preferred. Dig. 50. 17. 56: 2 Kent, Comm. 557.

In dubiis magis dignum est accipiendum. In doubtful cases, the more worthy is to be taken. Branch, Princ.

In dubiis non præsumitur pro testamento. In doubtful cases, there is no presumption in favor of the will. Croke Car. 51.

In dubio hæc leges constructio quam verba ostendunt. In a doubtful case, that is the construction of the law which the words indicate.

In dubio pars melior est sequenda. In doubt, the gentler course is to be followed.

In dubio sequendum quod tutius est. In doubt, the safer course is to be adopted.

In eo quod plus sit semper inest et minus. The less is always included in the greater. Dig. 50. 17. 110.

In expositione instrumentorum, mala grammatica, quod fieri potest, vitanda est. In the construction of instruments, bad grammar is to be avoided as much as possible. 6 Coke, 39; 2 Parsons, Contr. 26.

In facto quod se habet ad bonum et malum magis de bono quam de malo lex intendit. In a deed which may be considered good or bad, the law looks more to the good than to the bad. Coke, Litt. 78.

In favorabilibus magis attenditur quod prodest quam quod nocet. In things favored, what does good is more regarded than what does harm. Bacon, Max. Reg. 12.

In favorem vitæ, libertatis, et innocentiæ omnia præsumuntur. In favor of life, liberty, and innocence, all things are to be presumed. Lofft, 125.

In fictione juris semper æquitas existit. A legal fiction is always consistent with equity. 11 Coke, 51; Broom, Max. 3d Lond. ed. 120, 123; 17 Johns. N. Y. 348; 3 Sharswood, Blackst. Comm. 43–283.

In generalibus versatur error. Error dwells in general expressions. 3 Sumn. C. C. 290.

In genere quicunque aliquid dicit, sive actor sive reus, necesse est ut probat. In general, whoever says any thing, whether plaintiff or defendant, must prove it. Best, Ev. 294, § 252.

In hæredes non solent transire actiones quæ pœnales ex maleficio sunt. Penal actions arising from any thing of a criminal nature do not pass to heirs. Coke, 2d Inst. 442.

In iis enim quæ sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extentio statuti. In things that are favorable to the spirit, though injurious to property, an extension of the statute should be sometimes made. 10 Coke, 101.

In iis quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est allegando. In those things which by common right are conceded to all, the custom of a particular country or place is not to be alleged. 11 Coke, 85.

In judiciis minori ætati succurritur. In judicial proceedings, infancy is aided or favored. Jenk. Cent. Cas. 46.

In judicio non creditur nisi juratis. In law, none is credited unless he is sworn. All the facts must, when established by witnesses, be under oath or affirmation. Croke Car. 64.

In jure non remota causâ, sed proxima, spectatur. In law, the proximate and not the remote cause is to be looked to. Bacon, Max. Reg. 1; Broom, Max. 3d Lond. ed. 202. See 2 Parsons, Contr. 455.

In majore summâ continetur minor. In the greater sum is contained the less. 5 Coke, 115.

In maleficiis voluntas spectatur non exitus. In offences, the intention is regarded, not the event. Dig. 48. 8. 14; Bacon, Max. Reg. 7; Broom, Max. 3d Lond. ed. 292.

In maleficio ratihabitio mandato comparetur. In a tort, ratification is equivalent to a command. Dig. 50. 17. 152. 2.

In maximâ potentiâ minima licentia. In the greatest power there is the least liberty. Hob. 159.

In mercibus illicitis non sit commercium. No commerce should be in illicit goods. 3 Kent, Comm. 262, n.

In obscura voluntate manumittentis favendum est libertati. Where the expression of the will of one who seeks to manumit a slave is ambiguous, liberty is to be favored. Dig. 50. 17. 179.

In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet. Where there is obscurity, we usually regard what is probable and what is generally done. Dig. 50. 17. 114.

In obscuris quod minimum est sequimur. In obscure cases, we follow that which is least so. Dig. 50. 17. 9.

In odium spoliatoris omnia præsumuntur. All things are presumed against a wrong-doer. 1 Vern. Ch. 19; 1 P. Will. 731; 1 Chanc. Cas. 292.

In omni actione ubi duæ concurrunt districtiones, videlicit in rem et in personam, illa districtio tenenda est quæ magis timetur et magis ligat. In every action where two distresses concur, as those *in rem* and *in personam*, that is to be chosen which is most dreaded, and which binds most firmly. Bracton, 372; Fleta, l. 6, c. 14, § 28.

In omni re nascitur res quæ ipsam rem exterminat. In every thing, the thing is born which destroys the thing itself. Coke, 2d Inst. 15.

In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur. In every contract, whether nominate or innominate, there is implied an exchange, *i.e.* a consideration.

In omnibus obligationibus, in quibus dies non ponitur, præsenti die debetur. In all obligations, when no time is fixed for the payment, the thing is due immediately. Dig. 50. 17. 14.

In omnibus pœnalibus judiciis, et ætati et imprudentiæ succurritur. In all trials for penal offences, allowance is made for youth and lack of discretion. Dig. 50. 17. 108; Broom, Max. 3d Lond. ed. 282.

In omnibus quidem maximè tamen in jure, æquitas spectanda sit. In all affairs indeed, but principally in those which concern the administration of justice, equity should be regarded. Dig. 50. 17. 90.

In pari causa possessor potior haberi debet. When two parties have equal rights, the advantage is always in favor of the possessor. Dig. 50. 17. 128.

In pari delicto melior est conditio possidentis. When the parties are equally in the wrong, the condition of the possessor is better. 11 Wheat. 258; 3 Cranch, 244; Cowp. 341; Broom, Max. 325; 4 Bouvier, Inst. n. 3724.

In pari delicto potior est conditio defendentis (et possidentis). Where both parties are equally in fault, the condition of the defendant is preferable. 11 Mass. 376; Broom, Max. 3d Lond. ed. 265; 1 Story, Contr. 4th ed. 591, 592.

In personam actio est, qua cum eo agimus qui obligatus est nobis ad faciendum aliquid vel dandum. The action *in personam* is that by which we sue him who is under obligation to us to do something or give something. Dig. 44. 7. 25; Bracton, 101 *b*.

In pœnalibus causis benignius interpretandum est. In penal cases, the more favorable interpretation is to be made. Dig. 50. 17. 155. 2; Plowd. 86 *b*; 2 Hale, Pl. Cr. 365.

In præparatoriis ad judicium favetur actori. In things preparatory before trial, the plaintiff is favored. Coke, 2d Inst. 57.

In præsentia majoris potestatis, minor potestas cessat. In the presence of the superior power, the minor power ceases. Jenk. Cent. Cas. 214; Cas. temp. Hardw. 28; 13 How. 142; 13 Q. B. 740.

In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire. In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other. 1 Story, Contr. 4th ed. 606.

In propria causâ nemo judex. No one can be judge in his own cause. 12 Coke, 13.

In quo quis delinquit, in eo de jure est puniendus. In whatever thing one offends, in that he is rightfully to be punished. Coke, Litt. 233 *b*.

In re communi neminem dominorum jure facere quicquam, invito altero, posse. One co-proprietor can exercise no authority over the common property against the will of the other. Dig. 10. 3. 28.

In re dubia benigniorem interpretationem sequi, non minus justius est, quam tutius. In a doubtful case, to follow the milder interpretation is not less the more just than it is the safer course. Dig. 50. 17. 192. 2; 28. 4. 3.

In re dubiâ magis inficiato quam affirmatio intelligenda. In a doubtful matter, the negative is to be understood rather than the affirmative. Godb. 37.

In re lupanari, testes lupanares admittentur. In a matter concerning a brothel, prostitutes are admitted as witnesses. 6 Barb. N. Y. 320, 324.

In re pari, potiorem causam esse prohibentis constat. Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger. Dig. 10. 3. 28; 3 Kent, Comm. 45; Pothier, *Traité du Con. de Soc.* n. 90; 16 Johns. N. Y. 438, 491.

In re propria iniquum admodum est alicui licentiam tribuere sententiæ. It is extremely unjust that any one should be judge in his own cause.

In rebus manifestis errat qui auctoritates legum allegat; quia perspicua vera non sunt probanda. He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved. 5 Coke, 67.

In rem actio est per quam rem nostram quæ ab alio possidetur petimus, et semper adversus eum est qui rem possidet. The action *in rem* is that by which we seek our property which is possessed by another, and is always against him who possesses the property. Dig. 44. 7. 25; Bracton, 102.

In republicâ maximè conservanda sunt jura belli. In the state, the laws of war are to be greatly preserved. Coke, 2d Inst. 58.

In restitutionem, non in pœnam, hæres succedit. The heir succeeds to the restitution, not the penalty. Coke, 2d Inst. 198.

In restitutionibus benignissima interpretatio facienda est. The most favorable construction is to be made in restitutions. Coke, Litt. 112.

In satisfactionibus non permittitur amplius fieri quam semel factum est. In payments, more must not be received than has been received once for all. 9 Coke, 53.

In stipulationibus cùm quæritur quid actum sit verba contra stipulatorem interpretanda sunt. In contracts, when the question is what was agreed upon, the terms are to be interpreted against the party offering them. Dig. 45. 1. 38. 18. Chancellor Kent remarks that the true principle appears to be "to give the contract the sense in which the person making the promise believes the other party to have accepted it, if he in fact did so understand and accept it." 2 Kent, Comm. 7th ed. 721; 2 Day, Conn. 281; 1 Duer, Ins. 159, 160; Broom, Max. 3d Lond. ed. 534; Dig. 45. 1. 38. § 18.

In stipulationibus id tempus spectatur quo contrahimus. In agreements, reference is had to the time at which they were made. Dig. 50. 17. 144. 1.

In suo quisque negotio hebetior est quam in alieno. Every one is more dull in his own business than in that of another. Coke, Litt. 377.

In testamentis plenius testatoris intentionem scrutamur. In testaments, we should seek diligently the will of the testator. But, says *Dodderidge*, C. J., "this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of the law; 2d, his intent ought to be collected out of the words of the will." 3 Bulstr. 103; Broom, Max. 3d Lond. ed. 494.

In testamentis plenius voluntates testantium inter-

pretantur. In testaments, the will of the testator should be liberally construed. That is to say, a will shall receive a more liberal construction than its strict meaning, if alone considered, would permit. Dig. 50. 17. 12; Cujac. *ad loc.* cited 3 Pothier, Pand. 46; Broom, Max. 3d Lond. ed. 507.

In toto et pars continetur. A part is included in the whole. Dig. 50. 17. 113.

In traditionibus scriptorum chartarum non quod dictum est, sed quod gestum factum est, inspicitur. In the delivery of writings (deeds), not what is said but what is done is to be considered. 9 Coke, 137.

In veram quantitatem fidejussor teneatur, nisi pro certâ quantitate accessit. Let the surety be holden for the true quantity unless he agreed for a certain quantity. 17 Mass. 597.

In verbis non verba sed res et ratio quærenda est. In words, not the words, but the thing and the meaning is to be inquired after. Jenk. Cent. Cas. 132.

In vocibus videndum non à quo sed ad quid sumatur. In discourses, it is to be seen not from what, but to what, it is advanced. Ellesmere, Postn. 62.

Incendium æra alieno non exuit debitorum. A fire does not release a debtor from his debt. Code, 4. 2. 11.

Incerta pro nullius habentur. Things uncertain are held for nothing. Dav. 33.

Incerta quantitas vitiat actum. An uncertain quantity vitiates the act. 1 Rolle, 465.

Incivile est, nisi tota lege prospecta, una aliqua particula ejus proposita, judicare, vel respondere. It is improper, unless the whole law has been examined, to give judgment or advice upon a view of a single clause of it. Dig. 1. 3. 24. See Hob. 171 *a.*

Incivile est nisi tota sententia inspectâ, de aliqua parte judicare. It is improper to pass an opinion on any part of a sentence without examining the whole. Hob. 171.

Inclusio unius est exclusio alterius. The inclusion of one is the exclusion of another. 11 Coke, 58.

Incolas domicilium facit. Residence creates domicile. Arnold, United Ins. Co., 1 Johns. Cas. N. Y. 363, 366. See DOMICILE.

Incommodum non solvit argumentum. An inconvenience does not solve an argument.

Incorporalia bello non adquiruntur. Things incorporeal are not acquired by war. 6 Maule & S. 104.

Inde datæ leges ne fortior omnia posset. Laws were made lest the stronger should have unlimited power. Dav. 36.

Indefinitum æquipollet universali. The undefined is equivalent to the whole. 1 Ventr. 368.

Indefinitum supplet locum universalis. The undefined supplies the place of the whole. 4 Coke, 77.

Independenter se habet assecuratio a viaggio navis. The voyage insured is an independent or distinct thing from the voyage of the ship. 3 Kent, Comm. 318, n.

Index animi sermo. Speech is the index of the mind.

Inesse potest donationi, modus, conditio sive causa: ut *modus est; si conditio;* quia *causa.* In a gift there may be manner, condition, and cause: as (*ut*), introduces a manner; if (*si*), a condition; because (*quia*), a cause. Dy. 138.

Infans non multum a furioso distat. An infant does not differ much from a lunatic. Bracton, l. 3, c. 2, § 8; Dig. 50. 17. 5. 40; 1 Story, Eq. Jur. §§ 223, 224, 242.

Infinitum in jure reprobatur. That which is infinite or endless is reprehensible in law. 9 Coke, 45.

Iniquissima pax est anteponenda justissimo bello. The most unjust peace is to be preferred to the justest war. 18 Wend. N. Y. 257, 305.

Iniquum est alios permittere, alios inhibere mercaturam. It is inequitable to permit some to trade and to prohibit others. Coke, 3d Inst. 181.

Iniquum est aliquem rei sui esse judicem. It is unjust for any one to be judge in his own cause. 12 Coke, 13.

Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem. It is against equity for freemen not to have the free disposal of their own property. Coke, Litt. 223. See 1 Bouvier, Inst. nn. 455, 460.

Injuria fit ei cui convicium dictum est, vel de eo factum carmen famosum. An injury is done to him of whom a reproachful thing is said, or concerning whom an infamous song is made. 9 Coke, 60.

Injuria non excusat injuriam. A wrong does not excuse a wrong. Broom, Max. 3d Lond. ed. 247, 343, 349; 11 Exch. 822; 15 Q. B. 276; 6 Ell. & B. 76; Branch, Princ.

Injuria non præsumitur. A wrong is not presumed. Coke, Litt. 232.

Injuria propria non cadet in beneficium facientis. No one shall profit by his own wrong.

Injustum est, nisi tota lege inspectæ, de unâ aliquâ ejus particulâ propositâ judicare vel respondere. It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law. 8 Coke, 117 *b.*

Insanus est qui, abjectâ ratione, omnia cum impetu et furore facit. He is insane who, reason being thrown away, does every thing with violence and rage. 4 Coke, 128.

Instans est finis unius temporis et principium alterius. An instant is the end of one time and the beginning of another. Coke, Litt. 185.

Intentio cæca mala. A hidden intention is bad. 2 Bulstr. 179.

Intentio inservire debet legibus, non leges intentioni. Intentions ought to be subservient to the laws, not the laws to intentions. Coke, Litt. 314.

Intentio mea imponit nomen operi meo. My intent gives a name to my act. Hob. 123.

Inter alias causas acquisitiones magna, celebris, et famosa est causa donationis. Among other methods of acquiring property, a great, much-used, and celebrated method is that of gift. Bracton, 11.

Inter alios res gestas aliis non posse præjudicium facere sæpe constitutum est. It has been often settled that things which took place between other parties cannot prejudice. Code, 7. 60. 1. 2.

Interdum evenit ut exceptio quæ prima facie justa videtur, tamen iniquè noceat. It sometimes happens that a plea which seems *primâ facie* just, nevertheless is injurious and unequal. Inst. 4. 14; 4. 14. 1. 2.

Interest reipublicæ ne maleficia remaneant impunita. It concerns the commonwealth that crimes do not remain unpunished. Jenk. Cent. Cas. 30, 31.

Interest reipublicæ ne sua quis malè utatur. It concerns the republic that no one misuse his property. 6 Coke, 36.

Interest reipublicæ quod homines conserventur. It concerns the commonwealth that we be preserved. 12 Coke, 62.

Interest reipublicæ res judicatas non rescindi. It concerns the commonwealth that things adjudged be not rescinded. See RES JUDICATA.

Interest reipublicæ suprema hominum testamenta rata haberi. It concerns the commonwealth that men's last wills be sustained. Coke, Litt. 236.

Interest reipublicæ ut carceres sint in tuto. It concerns the commonwealth that prisons be secure. Coke, 2d Inst. 589.

Interest reipublicæ ut pax in regno conservetur, et quæcunque paci adversentur providè declinentur. It benefits the state to preserve peace in the kingdom, and to prudently decline whatever is adverse to it. Coke, 2d Inst. 158.

Interest reipublicæ ut qualibet re suâ bene utatur. It concerns the commonwealth that every one use his property properly. 6 Coke, 37.

Interest reipublicæ ut sit finis litium. It concerns the commonwealth that there be a limit to litigation. Coke, Litt. 303.

Interpretare et concordare leges legibus est optimus interpretandi modus. To interpret and reconcile laws so that they harmonise is the best mode of construction. 8 Coke, 169.

Interpretatio fienda est ut res magis valeat quam pereat. Such a construction is to be made that the subject may have an effect rather than none. Jenk. Cent. Cas. 198.

Interpretatio talis ambiguis semper fienda est, ut evitetur inconveniens et absurdum. In ambiguous things, such a construction should be made, that what is inconvenient and absurd may be avoided. Coke, 4th Inst. 328.

Interruptio multiplex non tollit præscriptionem semel obtentam. Repeated interruptions do not defeat a prescription once obtained. Coke, 2d Inst. 654.

Intestatus decedit, qui aut omnino testamentum non fecit aut non juri fecit, aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo hæres extitit. He dies intestate who either has made no will at all or has not made it legally, or whose will which he had made has been annulled or become ineffectual, or from whom there is no living heir. Inst. 3. 1. pr.; Dig. 38. 16. 1; 50. 16. 64.

Inutilis labor, et sine fructu, non est effectus legis. Useless labor and without fruit is not the effect of law. Coke, Litt. 127; Wingate, Max. 38.

Invenions libellum famosum et non corrumpens punitur. He who finds a libel and does not destroy it, is punished. F. Moore, 813.

Invito beneficium non datur. No one is obliged to accept a benefit against his consent. Dig. 50. 17. 69; Broom, Max. 3d Lond. ed. 625. But if he does not dissent, he will be considered as assenting. See ASSENT.

Ipsæ leges cupiunt ut jure regantur. The laws themselves desire that they should be governed by right. Coke, Litt. 174 *b*, quoted from Cato.

Ira furor brevis est. Anger is a short insanity. 4 Wend. N. Y. 336, 355.

Ita lex scripta est. The law is so written. 26 Barb. N. Y. 374, 380.

Ita semper fiat relatio ut valeat dispositio. Let the relation be so made that the disposition may stand. 6 Coke, 76.

Iter est jus eundi, ambulandi hominis; non etiam jumentum agendi vel vehiculum. Iter is the right of going or walking, and does not include the right of driving a beast of burden or a carriage. Coke, Litt. 56 *a*; Inst. 2. 3. pr.; 1 Mack. Civ. Law, 343, § 314.

Judex æquitatem semper spectare debet. A judge ought always to regard equity. Jenk. Cent. Cas. 45.

Judex ante oculos æquitatem semper habere debet. A judge ought always to have equity before his eyes. Jenk. Cent. Cas. 58.

Judex bonus nihil ex arbitrio suo faciat, nec propositione domesticæ voluntatis, sed juxta leges et jura pronunciet. A good judge should do nothing from his own arbitrary will, or from the dictates of his private wishes; but he should pronounce according to law and justice. 7 Coke, 27 *a*.

Judex damnatur cum nocens absolvitur. The judge is condemned when the guilty are acquitted.

Judex debet judicare secundum allegata et probata. The judge ought to decide according to the allegations and the proofs.

Judex est lex loquens. The judge is the speaking law. 7 Coke, 4 *a*.

Judex habere debet duos sales, salem sapientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus. A judge should have two salts: the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be devilish. Coke, 3d Inst. 147.

Judex non potest esse testis in propriâ causâ. A judge cannot be a witness in his own cause. Coke, 4th Inst. 279.

Judex non potest injuriam sibi datam punire. A judge cannot punish a wrong done to himself. 12 Coke, 114.

Judex non reddit plus quam quod petens ipse requirit. The judge does not give more than the plaintiff demands. 2 Inst. 286, case 84.

Judicandum est legibus non exemplis. We are to judge by the laws, not by examples. 4 Coke, 33 *b*; 4 Sharswood, Blackst. Comm. 405; 19 Johns. N. Y. 513.

Judices non tenentur exprimere causam sententiæ suæ. Judges are not bound to explain the reason of their sentence. Jenk. Cent. Cas. 75.

Judici officium suum excedenti non paretur. To a judge who exceeds his office or jurisdiction no obedience is due. Jenk. Cent. Cas. 139.

Judici satis pœna est quod Deum habet ultorem. It is punishment enough for a judge that he is responsible to God. 1 Leon. 295.

Judicia in curiâ regis non adnihilentur, sed stent in robore suo quousque per errorem aut attinctum adnullentur. Judgments in the king's courts are not to be annihilated, but to remain in force until annulled by error or attaint. Coke, 2d Inst. 539.

Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam. Judgments frequently become matured by deliberation, never by hurried process. Coke, 3d Inst. 210.

Judicia posteriora sunt in lege fortiora. The latter decisions are stronger in law. 8 Coke, 97.

Judicia sunt tanquam juris dicta, et pro veritate accipiuntur. Judgments are, as it were, the dicta or sayings of the law, and are received as truth: Coke, 2d Inst. 537.

Judiciis posterioribus fides est adhibenda. Faith or credit is to be given to the later decisions. 13 Coke, 14.

Judicis est in pronuntiando sequi regulam, exceptione non probatâ. The judge in his decision ought to follow the rule, when the exception is not proved.

Judicis est judicare secundum allegata et probata. A judge ought to decide according to the allegations and proofs. Dyer, 12 *a*; Halkers, Max. 73.

Judicis est jus dicere non dare. It is the duty of a judge to declare the law, not to enact it. Lofft, 42.

Judicis officium est opus diei in die suo perficere. It is the duty of a judge to finish the work of each day within that day. Dy. 12.

Judicis officium est ut res ita tempora rerum quærere, quæsito tempore tutus eris. It is the duty of a judge to inquire the times of things, as well as into things; by inquiring into the time you will be safe. Coke, Litt. 171.

Judicium a non suo judice datum nullius est momenti. A judgment given by an improper judge is of no moment. 10 Coke, 76 *b*; 2 Q. B. 1014; 13 *id.* 143; 14 Mees. & W. Exch. 124; 11 Clark & F. Hou. L. 610.

Judicium est quasi juris dictum. Judgment is as it were a saying of the law. Coke, Litt. 168.

Judicium non debet esse illusorium, suum effectum habere debet. A judgment ought not to be illusory, it ought to have its proper effect. Coke, 2d Inst. 341.

Judicium redditur in invitum, in præsumptione legis. In presumption of law, a judgment is given against inclination. Coke, Litt. 248 *b*, 314 *b*.

Judicium semper pro veritate accipitur. A judgment is always taken for truth. Coke, 2d Inst. 380; 17 Mass. 237.

Juncta juvant. Things joined have effect. 11 East, 220.

Jura ecclesiastica limitata sunt infra limites separatos. Ecclesiastical laws are limited within separate bounds. 3 Bulstr. 53.

Jura eodem modo destituuntur quo constituuntur. Laws are abrogated or repealed by the same means by which they are made. Broom, Max. 3d Lond. ed. 785.

Jura naturæ sunt immutabilia. The laws of nature are unchangeable. Branch, Princ.; Oliver, Forms, 56.

Jura publica anteferenda privatis. Public rights are to be preferred to private. Coke, Litt. 130.

Jura publica ex privato promiscuè decidi non debent. Public rights ought not to be decided promiscuously with private. Coke, Litt. 181 *b*.

Jura regis specialia non conceduntur per generalia verba. The special rights of the king are not granted by general words. Jenk. Cent. Cas. 103.

Jura sanguinis nullo jure civili dirimi possunt. The right of blood and kindred cannot be destroyed by any civil law. Dig. 50. 17. 9; Bacon, Max. Reg. 11; Broom, Max. 3d Lond. ed. 474.

Juramentum est indivisibile, et non est admittendum in parte verum et in parte falsum. An oath is indivisible; it is not to be held partly true and partly false. Coke, 4th Inst. 274.

Jurare est Deum in testum vocare, et est actus divini cultus. To swear is to call God to witness, and is an act of religion. Coke, 3d Inst. 165. See 3 Bouvier, Inst. 3180, note; 1 Bentham, Ev. 376, 371, note.

Jurato creditur in judicio. He who makes oath is to be believed in judgment. Coke, 3d Inst. 79.

Juratores debent esse vicini, sufficientes et minus suspecti. Jurors ought to be neighbours, of sufficient estate, and free from suspicion. Jenk. Cent. Cas. 141.

Juratores sunt judices facti. Jurors are the judges of the facts. Jenk. Cent. Cas. 68.

Jure naturæ æquum est, neminem cum alterius detrimento, et injuriâ fieri locupletiorem. According to the laws of nature, it is just that no one should be enriched with detriment and injury to another, *i.e.* at another's expense. Dig. 50. 17. 200.

Juri non est consonum quod aliquis accessorius in curiâ regis convincatur antequam aliquis de facto fuerit attinctus. It is not consonant to justice that any accessory should be convicted in the king's court before any one has been attainted of the fact. Coke, 2d Inst. 183.

Juris effectus in executione consistit. The effect of a law consists in the execution. Coke, Litt. 289 *b*.

Jurisdictio est potestas de publico introducta, cum necessitate juris dicendi. Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice. 10 Coke, 73 *a*.

Jurisprudentia est divinarum atque humanarum rerum notitia; justi atque injusti scientia. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust. Dig. 1. 1. 10. 2; Inst. 1. 1. 1; Bracton, 3; 8 Johns. N. Y. 290, 295.

Jurisprudentia legis communis Angliæ est scientia socialis et copiosa. The jurisprudence of the common law of England is a science sociable and copious. 7 Coke, 28 *a*.

Jus accrescendi inter mercatores locum non habet, pro beneficio commercii. The right of survivorship does not exist among merchants, for the benefit of commerce. Coke, Litt. 182; 1 Bouvier, Inst. n. 682.

Jus accrescendi præfertur oneribus. The right of survivorship is preferred to incumbrances. Coke, Litt. 185.

Jus accrescendi præfertur ultimæ voluntati. The right of survivorship is preferred to a last will. Coke, Litt. 185 *b*.

Jus civile est quod sibi populus constituit. The civil law is what a people establishes for itself. 1 Johns. N. Y. 424, 426.

Jus descendit, et non terra. A right descends, not the land. Coke, Litt. 345.

Jus dicere, et non jus dare. To declare the law, not to make it. 7 Term, 696; Arg. 10 Johns. N. Y. 566; 7 Exch. 543; 2 Ed. Ch. 29; 4 C. B. 560, 561; Broom, Max. 3d Lond. ed. 140.

Jus dicere, non jus dare. To declare the law, not to make it. 10 Johns. N. Y. 563, 566.

Jus est ars boni et æqui. Law is the science of what is good and just. Dig. 1. 1. 1. 1.

Jus est norma recti; et quicquid est contra normam recti est injuria. The law is the rule of right; and whatever is contrary to the rule of right is an injury. 3 Bulstr. 313.

Jus et fraus nunquam cohabitant. Right and fraud never live together.

Jus ex injuria non oritur. A right cannot arise from a wrong. 4 Bingh. 639.

Jus in re inhærit oneribus usufructuarii. A right in the thing cleaves to the person of the usufructuary.

Jus naturale est quod apud homines eandem habet potentiam. Natural right is that which has the same force among all men. 7 Coke, 12.

Jus nec inflecti gratiâ, nec frangi potentiâ, nec adulterari pecuniâ potest; quod si non modo oppressum, sed desertum aut negligentiâ reservatum fuerit, nihil est quod quisquam se habere certum, aut à patre accepturum, aut liberis esse relicturum, arbitretur. Favor ought not to be able to bend justice, power to break it, nor money to corrupt it; for not only if it be overborne, but if it be abandoned or negligently observed, no one can think that he holds any thing securely, or that he will inherit any thing from his father, or be able to leave any thing to his children. Cic.

Jus non habenti, tutè non paretur. It is safe not to obey him who has no right. Hob. 146.

Jus publicum privatorum pactis mutari non potest. A public right cannot be changed by agreement of private parties.

Jus quo universitates utuntur, est idem quod habent privati. The law which governs corporations is the same which governs individuals. 16 Mass. 44.

Jus respicit æquitatem. Law regards equity. Coke, Litt. 24 *b*; Broom, Max. 3d Lond. ed. 143; 17 Q. B. 292.

Jus superveniens auctori accressit successori. A right growing to a possessor accrues to a successor. Halkers, Max. 76.

Jus vendit quod usus approbavit. The law dispenses what use has approved. Ellesmere, Postn. 35.

Jusjurandi forma verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur. The form of taking an oath differs in language, agrees in meaning; for it ought to have this sense, that the Deity is invoked. Grotius, b. 2, c. 13, s. 10.

Jusjurandum inter alios factum nec nocere nec prodesse debet. An oath made in another cause ought neither to hurt nor profit. Coke, 4th Inst. 279.

Justicia est virtus excellens et Altissimo complacens. Justice is an excellent virtue and pleasing to the Most High. Coke, 4th Inst. 58.

Justitia debet esse LIBERA, *quia nihil iniquius venali justitiâ;* PLENA, *quia justitia non debet claudicare; et* CELERIS, *quia dilatio est quædam negatio.* Justice ought to be *unbought*, because nothing is more hateful than venal justice; *full*, for justice ought not to halt; and *quick*, for delay is a kind of denial. Coke, 2d Inst. 56.

Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Inst. 11. pr.: Dig. 1. 1. 10.

Justitiâ firmatur solium. By justice the throne is established. Coke, 3d Inst. 140.

Justitia nemini neganda est. Justice is to be denied to none. Jenk. Cent. Cas. 178.

Justitia non est neganda, non differenda. Justice is not to be denied nor delayed. Jenk. Cent. Cas. 76.

Justitia non novit patrem nec matrem, solum veritatem spectat justitia. Justice knows neither father nor mother, justice looks to truth alone. 1 Bulstr. 199.

Justum non est aliquem antenatum mortuum facere bastardum, qui pro totâ vitâ suâ pro legitimo habetur. It is not just to make a bastard after his death one elder born who all his life has been accounted legitimate. 8 Coke, 101.

L'obligation sans cause, ou sur une fausse cause, ou sur cause illicite, ne peut avoir aucun effet. An obligation without consideration, or upon a false consideration (which fails), or upon unlawful consideration, cannot have any effect. Cod. 3. 3. 4; Chitty, Contr. 10th Am. ed. 25, note.

L'ou le ley done chose, la ceo done remedie a venir a ceo. Where the law gives a right, it gives a remedy to recover. 2 Rolle, 17.

La conscience est la plus changeante des règles. Conscience is the most changeable of rules.

La ley favour' la vie d'un home. The law favors a man's life. Year B. Hen. VI. 51.

La ley favour l'inheritance d'un home. The law favors a man's inheritance. Year B. Hen. VI. 51.

La ley voit plus tost suffer un mischiefe que un inconvenience. The law would rather suffer a mischief than an inconvenience. Littleton, § 231.

Late culpa dolo æquiparatur. Gross negligence is equal to fraud.

Law construeth every act to be lawful when it standeth indifferent whether it be lawful or not. Wingate, Max. 194; Finch, Law; Coke, b. 1, c. 3, n. 76.

Law construeth things according to common possibility or intendment. Wingate, Max. 189.

Law construeth things to the best. Wingate, Max. 193.

Law construeth things with equity and moderation. Wingate, Max. 183; Finch, Law; Coke, b. 1, c. 3, n. 74.

Law disfavoreth impossibilities. Wingate, Max. 165.

Law disfavoreth improbabilities. Wingate, Max. 161.

Law favoreth charity. Wingate, Max. 135.

Law favoreth common right. Wingate, Max. 144.

Law favoreth diligence, and therefore hateth folly and negligence. Wingate, Max. 172; Finch, Law, b. 1, c. 3, n. 70.

Law favoreth honor and order. Wingate, Max. 199.

Law favoreth justice and right. Wingate, Max. 141.

Law favoreth life, liberty, and dower. 4 Bacon, Works, 345.

Law favoreth mutual recompense. Wingate, Max. 100; Finch, Law, b. 1, c. 3, n. 42.

Law favoreth possession where the right is equal. Wingate, Max. 98; Finch, Law, b. 1, c. 3, n. 36.

Law favoreth public commerce. Wingate, Max. 198.

Law favoreth public quiet. Wingate, Max. 200; Finch, Law, b. 1, c. 3, n. 54.

Law favoreth speeding of men's causes. Wingate, Max. 175.

Law favoreth things for the commonwealth. Wingate, Max. 197; Finch, Law, b. 1, c. 3, n. 53.

Law favoreth truth, faith, and certainty. Wingate, Max. 154.

Law hateth delays. Wingate, Max. 176; Finch, Law, b. 1, c. 3, n. 71.

Law hateth new inventions and innovations. Wingate, Max. 204.

Law hateth wrong. Wingate, Max. 146; Finch, Law, b. 1, c. 3, n. 62.

Law of itself prejudiceth no man. Wingate, Max. 148; Finch, Law, b. 1, c. 3, n. 63.

Law respecteth matter of substance more than matter of circumstance. Wingate, Max. 101; Finch, Law, b. 1, c. 3, n. 39.

Law respecteth possibility of things. Wingate, Max. 104; Finch, Law, b. 1, c. 3, n. 40.

Law respecteth the bonds of nature. Wingate, Max. 78; Finch, Law, b. 1, c. 3, n. 29.

Lawful things are well mixed, unless a form of law oppose. Bacon, Max. Reg. 23. "*The law giveth that favour to lawful acts, that although they be executed by several authorities, yet the whole act is good.*" *Id. ibid.*

Le contrat fait la loi. The contract makes the law.

Le ley de Dieu et le ley de terre sont tout un, et l'un et l'autre preferre et favour le common et publique bien del terre. The law of God and the law of the land are all one; and both preserve and favor the common and public good of the land. Keilw. 191.

Le ley est le plus haut enheritance que le roy ad, car par le ley, il mesme et touts ses sujets sont rules, et si le ley ne fuit, nul roy ne nul enheritance serra. The law is the highest inheritance that the king possesses; for by the law both he and all his subjects are ruled; and if there were no law, there would be neither king nor inheritance.

Le salut du peuple est la suprême loi. Montes. Esprit des Lois, l. xxvii. ch. 23; Broom, Max. 3d Lond. ed. 1.

Legatos violare contra jus gentium est. It is contrary to the law of nations to do violence to ambassadors. Branch, Princ.

Legatum morte testatoris tantum confirmatur, sicut donatio inter vivos traditione solâ. A legacy is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery alone. Dy. 143.

Legatus, regis vice fungitur a quo destinatur, et honorandus est sicut ille cujus vicem gerit. An ambassador fills the place of the king by whom he is sent, and is to be honored as he is whose place he fills. 12 Coke, 17.

Legem enim contractus dat. The contract makes the law. 22 Wend. N. Y. 215, 233.

Legem terræ amittentes perpetuam infamiæ notam inde meritò incurrunt. Those who do not preserve the law of the land, thence justly incur the ineffaceable brand of infamy. Coke, 3d Inst. 221.

Leges Angliæ sunt tripartitæ: jus commune, consuetudines, ac decreta comitiorum. The laws of England are threefold: common law, customs, and decrees of parliament.

Leges figendi et refigendi consuetudo est periculosissima. The custom of making and unmaking laws is a most dangerous one. 4 Coke, pref.

Leges humanæ nascuntur, vivunt, et moriuntur. Human laws are born, live, and die. 7 Coke, 25; 2 Atk. 674; 11 C. B. 767; 1 Blackst. Comm. 89.

Leges naturæ perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, moriuntur. The laws of nature are most perfect and immutable; but the condition of human law is an unending succession, and there is nothing in it which can continue perpetually. Human laws are born, live, and die. 7 Coke, 25.

Leges non verbis sed rebus sunt impositæ. Laws are imposed on things, not words. 10 Coke, 101.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal prior conflicting ones. 2 Rolle, 410; 11 Coke, 626, 630.

Leges suum ligent latorem. Laws should bind the proposers of them. Fleta, b. 1, c. 17, § 11.

Leges vigilantibus, non dormientibus subveniunt. The laws aid the vigilant, not the negligent. Fanning; Dunham; 5 Johns. Ch. 122, 145; Toole; Cook; 16 How. Pr. 142, 144.

Legibus sumptis desinentibus, lege naturæ utendum est. When laws imposed by the state fail, we must act by the law of nature. 2 Rolle, 298.

Legis constructio non facit injuriam. The construction of law does no wrong. Coke, Litt. 183.

Legis figendi et refigendi consuetudo periculosissima est. The custom of fixing and refixing (making and annulling) laws is most dangerous.

Legis interpretatio legis vim obtinet. The construction of law obtains the force of law. Branch, Princ.

Legis minister non tenetur, in executione officii sui, fugere aut retrocedere. The minister of the law is not bound, in the execution of his office, either to fly or retreat. 6 Coke, 68.

Legislatorum est viva vox, rebus et non verbis, legem imponere. The voice of legislators is a living voice, to impose laws on things and not on words. 10 Coke, 101.

Legitime imperanti parere necesse est. One who commands lawfully must be obeyed. Jenk. Cent. Cas. 120.

Les fictions naissent de la loi, et non la loi des fictions. Fictions arise from the law, and not law from fictions.

Les lois ne se chargent de punir que les actions extérieures. Laws do not undertake to punish other than outward actions. Montes. Es. de Lois, b. 12, c. 11; Broom, Max. 3d Lond. ed. 279.

Lex æquitate gaudet; appetit perfectum; est norma recti. The law delights in equity; it covets perfection; it is a rule of right. Jenk. Cent. Cas. 36.

Lex aliquando sequitur æquitatem. The law sometimes follows equity. 3 Wils. 119.

Lex Angliæ est lex misericordiæ. The law of England is a law of mercy. Coke, 2d Inst. 315.

Lex Angliæ non patitur absurdum. The law of England does not suffer an absurdity. 9 Coke, 22.

Lex Angliæ nunquam matris sed semper patris conditionem imitari partum judicat. The law of England rules that the offspring shall always follow the condition of the father, never that of the mother. Coke, Litt. 123.

Lex Angliæ nunquam sine parliamento mutari potest. The law of England cannot be changed but by parliament. Coke, 2d Inst. 218, 619.

Lex beneficialis rei consimili remedium præstat. A beneficial law affords a remedy in a similar case. Coke, 2d Inst. 689.

Lex citius tolerare vult privatum damnum quam publicum malum. The law would rather tolerate a private loss than a public evil. Coke, Litt. 152 *b*.

Lex de futuro, judex de præterito. The law provides for the future, the judge for the past.

Lex deficere non potest in justitiâ exhibendâ. The law ought not to fail in dispensing justice. Coke, Litt 197.

Lex dilationes semper exhorret. The law always abhors delay. Coke, 2d Inst. 240.

Lex est ab æterno. The law is from everlasting. Branch, Princ.

Lex est dictamen rationis. Law is the dictate of reason. Jenk. Cent. Cas. 117.

Lex est norma recti. Law is a rule of right.

Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet. Law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary. Coke, Litt. 319 *b*.

Lex est sanctio sancta, jubens honesta, et prohibens contraria. Law is a sacred sanction, commanding what is right and prohibiting the contrary. Coke, 2d Inst. 587.

Lex est tutissima cassis; sub clypeo legis nemo decipitur. Law is the safest helmet; under the shield of the law no one is deceived. Coke, 2d Inst. 56.

Lex favet doti. The law favors dower. 3 & 4 Will. IV. c. 105.

Lex fingit ubi subsistit æquitas. Law feigns where equity subsists. 11 Coke, 90; Branch, Princ.

Lex intendit vicinum vicini facta scire. The law presumes that one neighbor knows the actions of another. Coke, Litt. 78 *b*.

Lex judicat de rebus necessario faciendis quasi re ipsa factis. The law judges of things which must necessarily be done as if actually done. Branch, Princ.

Lex necessitatis est lex temporis, i.e. *instantis.* The law of necessity is the law of time, that is, time present. Hob. 159.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things. Wingate, Max. 600; 3 Sharswood, Blackst. Comm. 144; 2 Bingh. N. C. 121; 13 East, 420; 7 Penn. St. 206, 214; 3 Johns. N. Y. 598.

Lex neminem cogit ostendere quod nescire præsumitur. The law forces no one to make known what he is presumed not to know. Loft, 569.

Lex nemini facit injuriam. The law does wrong to no one. Branch, Princ.

Lex nemini operatur iniquum, nemini facit injuriam. The law never works an injury, or does him a wrong. Jenk. Cent. Cas. 22.

Lex nil facit frustra, nil jubet frustra. The law does nothing and commands nothing in vain. 3 Bulstr. 279; Jenk. Cent. Cas. 17.

Lex non cogit ad impossibilia. The law requires nothing impossible. Coke, Litt. 231 *b*; Hob. 96; 1 Bouvier, Inst. n. 851.

Lex non curat de minimis. The law does not regard small matters. Hob. 88.

Lex non deficit in justitia exhibenda. The law does not fail in showing justice. Jenk. Cent. Cas. 31.

Lex non favet votis delicatorum. The law favors not the wishes of the dainty. 9 Coke, 58 *a*.

Lex non intendit aliquid impossibile. The law intends not any thing impossible. 12 Coke, 89 *a*.

Lex non patitur fractiones et divisiones statuum. The law suffers no fractions and divisions of estates. 1 Coke, 87; Branch, Princ.

Lex non præcipit inutilia, quia inutilis labor stultus. The law commands not useless things, because useless labor is foolish. Coke, Litt. 197; 5 Coke, 89 *a*.

Lex non requirit verificare quod apparet curiæ. The law does not require that to be proved which is apparent to the court. 9 Coke, 54.

Lex plus laudatur quando ratione probatur. The law is the more praised when it is consonant to reason. 3 Term, 146; 7 *id.* 252; 7 Adolph. & E. 657; Broom, Max. 3d Lond. ed. 151.

Lex posterior derogat priori. A prior statute shall give place to a later. Mackeldey, Civ. Law, 5; Broom, Max. 3d Lond. ed. 27.

Lex prospicit, non respicit. The law looks forward, not backward. Jenk. Cent. Cas. 284. See RETROSPECTIVE.

Lex punit mendacium. The law punishes falsehood. Jenk. Cent. Cas. 15.

Lex rejicit superflua, pugnantia, incongrua. The law rejects superfluous, contradictory, and incongruous things. Jenk. Cent. Cas. 133, 140, 176.

Lex reprobat moram. The law disapproves of delay.

Lex respicit æquitatem. Law regards equity. See 14 Q. B. 504, 511, 512.

Lex semper dabit remedium. The law will always give a remedy. 3 Bouvier, Inst. n. 2411; Bacon, Abr. *Actions in General* (B); Branch, Princ.; Broom, Max. 3d Lond. ed. 181; 12 Adolph. & E. 266; 7 Q. B. 451.

Lex semper intendit quod convenit rationi. The law always intends what is agreeable to reason. Coke, Litt. 78.

Lex spectat naturæ ordinem. The law regards the order of nature. Coke, Litt. 197; Broom, Max. 3d Lond. ed. 231.

Lex succurrit ignoranti. The laws succor the ignorant. Jenk. Cent. Cas. 15.

Lex succurrit minoribus. The law assists minors. Jenk. Cent. Cas. 57.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth. Coke, 2d Inst. 184.

Lex vigilantibus non dormientibus subvenit. Law assists the wakeful, not the sleeping. 1 Story, Contr. 4th ed. 502.

Liberata pecunia non liberat offerentem. Money being restored does not set free the party offering. Coke, Litt. 207.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi quod de jure aut vi prohibetur. Liberty is the natural power of doing whatever one pleases, except that which is restrained by law or force. Coke, Litt. 116.

Libertas inæstimabilis res est. Liberty is an inestimable good. Dig. 50. 17. 106; Fleta, lib. 2, c. 51, § 13.

Libertas non recipit æstimationem. Freedom does not admit of valuation. Bracton, 14.

Libertas omnibus rebus favorabilior est. Liberty is more favored than all things. Dig. 50. 17. 122.

Liberum corpus æstimationem non recipit. The body of a freeman does not admit of valuation. Dig. 9. 3. 7.

Liberum est cuique apud se explorare an expediat sibi consilium. Every one is free to ascertain for himself whether a recommendation is advantageous to his interests. 6 Johns. N. Y. 181, 184.

Librorum appellatione continentur omnia volumina, sive in chartâ, sive in membranâ sint, sive in quavis alia materia. Under the name of books are contained all volumes, whether upon paper, or parchment, or any other material. Dig. 32. 52. *pr. et per tot.*

Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum intervenient nove actu. Although the grant of a future interest be inoperative, yet a declaration precedent may be made which may take effect, provided a new act intervene. Bacon, Max. Reg. 14; Broom, Max. 3d Lond. ed. 600.

Licita bene miscentur, formula nisi juris obstet. Lawful acts may well be fused into one, unless some form of law forbid: *e. g.* two having a right to convey, each a moiety, may unite and convey the whole. Bacon, Max. 94; Crabb, Real Prop. 179.

Ligeantia est quasi legis essentia; est vinculum fidei. Allegiance is, as it were, the essence of the law; it is the bond of faith. Coke, Litt. 129.

Ligeantia naturalis, nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur. Natural allegiance is restrained by no barriers, curbed by no bounds, compressed by no limits. 7 Coke, 10.

Ligna et lapides sub armorum appellatione non continentur. Sticks and stones are not contained under the name of arms. Bracton, 144 *b*.

Linea recta est index sui et obliqui; lex est linea recti. A right line is an index of itself and of an oblique; law is a line of right. Coke, Litt. 158.

Linea recta semper præfertur transversali. The right line is always preferred to the collateral. Coke, Litt. 10; Fleta, lib. 6, c. 1; 1 Stephen, Comm. 4th ed. 406.

Literæ patentes regis non erunt vacuæ. Letters-patent of the king shall not be void. 1 Bulstr. 6.

Litus est quousque maximus fluctus a mari pervenit. The shore is where the highest wave from the sea has reached. Dig. 50. 16. 96; Angell, Tide-Waters, 67.

Litis nomen actionem significat, sive in rem, sive in personam sit. The word "*lex*," i.e. a lawsuit, signifies every action, whether *in rem* or *in personam*. Coke, Litt. 292.

Locus contractus regit actum. The place of the contract governs the act. 2 Kent, Comm. 458.

Locus pro solutione redditûs aut pecuniæ secundum conditionem dimissionis aut obligationis est strictè observandus. The place for the payment of rent or money is to be strictly observed according to the condition of the lease or obligation. 4 Coke, 73.

Longa patientia trahitur ad consensum. Long sufferance is construed as consent. Fleta, lib. 4, c. 26, § 4.

Longa possessio est pacis jus. Long possession is the law of peace. Coke, Litt. 6.

Longa possessio parit jus possidendi, et tollit actionem vero domino. Long possession produces the right of possession, and takes away from the true owner his action. Coke, Litt. 110.

Longum tempus, et longus usus qui excedit memoria hominum, sufficit pro jure. Long time, and long use beyond the memory of man, suffices for right. Coke, Litt. 115.

Loquendum ut vulgus, sentiendum ut docti. We should speak as the common people, we should think as the learned. 7 Coke. 11.

Lubricum linguæ non facile trahendum est in pœnam. The slipperiness of the tongue *i.e.* its liability to err—ought not lightly to be subjected to punishment. Croke Car. 117.

Lucrum facere ex pupilli tutela tutor non debet. A guardian ought not to make money out of the guardianship of his ward. 1 Johns. Ch. N. Y. 527, 535.

Lunaticus, qui gaudet in lucidis intervallis. He is a lunatic who enjoys lucid intervals. 1 Story, Contr. 4th ed. 70.

Magis dignum trahit ad se minus dignum. The more worthy draws to itself the less worthy. Year B. 20 Hen. VI. 2 arg.

Magister rerum usus; magistra rerum experientia. Use is the master of things; experience is the mistress of things. Coke, Litt. 69, 229; Wingate, Max. 752.

Magna Charta and Charta de Foresta are called les deux grand chartres. Magna Charta and the Charter of the Forest are called the two great charters. Coke, 2d Inst. 570.

Magna culpa dolus est. Great neglect is equivalent to fraud. Dig. 50. 16. 226; 2 Spears, So. C. 256; 1 Bouvier, Inst. n. 646.

Magna negligentia culpa est, magna culpa dolus est. Gross negligence is a fault, gross fault is a fraud. Dig. 50. 16. 226. *Culpa* is an intermediate degree of negligence between *negligentia*, or lack of energetic care, and *dolus*, or fraud, seeming to approach nearly to our "negligence" in meaning.

Mahemium est homicidium inchoatum. Mayhem is incipient homicide. Coke, 3d Inst. 118.

Maihemium est inter crimina majora minimum, et inter minora maximum. Mayhem is the least of great crimes, and the greatest of small. Coke, Litt. 127.

Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus. A greater inheritance comes to every one of us from right and the laws than from parents. Coke, 2d Inst. 56.

Major numerus in se continet minorem. The greater number contains in itself the less. Bracton, 16.

Majore pœnâ affectus quam legibus statuta est, non est infamis. One affected with a greater punishment than is provided by law is not infamous. Coke, 4th Inst. 66.

Majori continet in se minus. The greater includes the less. 19 Viner, Abr. 379.

Majori summæ minor inest. The lesser is included in the greater sum. 2 Kent, Comm. 618; Story, Ag. § 172.

Majus dignum trahit ad se minus dignum. The more worthy or the greater draws to it the less worthy or the lesser. 5 Viner, Abr. 584, 586; Coke, Litt. 43, 355 *b*; Coke, 2d Inst. 307; Finch, Law, 22.

Majus est delictum seipsum occidere quam alium. It is a greater crime to kill one's self than another.

Mala grammatica non vitiat chartam; sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est. Bad grammar does not vitiate a deed; but in the construction of instruments, bad grammar, as far as it can be done, is to be avoided. 6 Coke, 39; 9 *id.* 48; Viner, Abr. *Grammar* (A); Lofft, 441; Broom, Max. 3d Lond. ed. 612.

Maledicta expositio quæ corrumpit textum. It is a cursed construction which corrupts the text. 2 Coke, 24; 4 *id.* 85; 11 *id.* 34; Wingate, Max. 26.

Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinquenti. Evil deeds ought not to remain unpunished, and impunity affords continual incitement to the delinquent. 4 Coke, 45.

Maleficia propositis distinguuntur. Evil deeds are distinguished from evil purposes. Jenk. Cent. Cas. 290.

Malitia est acida, est mali animi affectus. Malice is sour, it is the quality of a bad mind. 2 Bulstr. 49.

Malitia supplet ætatem. Malice supplies age. Dy. 104; 1 Blackstone, Comm. 464; 4 *id.* 22, 23, 312, Broom, Max. 3d Lond. ed. 284. See MALICE.

Malum hominum est obviandum. The malicious plans of men must be avoided. 4 Coke, 15.

Malum non habet efficientem, sed deficientem causam. Evil has not an efficient, but a deficient, cause. Coke, 3d Inst. Præme.

Malum non præsumitur. Evil is not presumed. 4 Coke, 72; Branch, Princ.

Malum quo communius eo pejus. The more common the evil, the worse. Branch, Princ.

Malus usus est abolendus. An evil custom is to be abolished. Coke, Litt. 141; Broom, Max. 3d Lond. ed. 827; Littleton, § 212; 5 Q. B. 701; 12 *id.* 845; 2 Mylne & K. 449.

Mandata licita strictam recipiunt interpretationem, sed illicita latam et extensam. Lawful commands receive a strict interpretation, but unlawful, a wide or broad construction. Bacon, Max. Reg. 16.

Mandatarius terminos sibi positos transgredi non potest. A mandatary cannot exceed the bounds of his authority. Jenk. Cent. Cas. 53.

Mandatum nisi gratuitum nullum est. Unless a mandate is gratuitous, it is not a mandate. Dig. 17. 1. 1. 4; Inst. 3. 27; 1 Bouvier, Inst. n. 1070.

Manifesta probatione non indigent. Manifest things require no proof. 7 Coke, 40 *b.*

Maris et fœminæ conjunctio est de jure naturæ. The union of male and female is founded on the law of nature. 7 Coke, 13.

Matrimonia debent esse libera. Marriages ought to be free. Halkers, Max. 86; 2 Kent, Comm. 102.

Matrimonium subsequens tollit peccatum præcedens. A subsequent marriage cures preceding criminality.

Matter en ley ne serra mise en bouche del jurore. Matter of laws shall not be put into the mouth of jurors. Jenk. Cent. Cas. 180.

Maturiora sunt vota mulierum quam virorum. The wishes of women are of quicker growth than those of men; *i.e.* women arrive at maturity earlier than men. 6 Coke, 71 *a;* Bracton, 86 *b.*

Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas, atque quod maximè omnibus probetur. A maxim is so called because its dignity is chiefest, and its authority the most certain, and because universally approved by all. Coke, Litt. 11.

Maximè paci sunt contraria, vis et injuria. The greatest enemies to peace are force and wrong. Coke, Litt. 161.

Maximus erroris populus magister. The people is the greatest master of error. Bacon.

Melior est causa possidentis. The cause of the possessor is preferable. Dig. 50. 17. 126. 2.

Melior est conditio defendentis. The cause of the defendant is the better. Broom, Max. 3d Lond. ed. 639, 642; Dig. 50. 17. 126. 2; Hob. 199; 1 Mass. 66.

Melior est conditio possidentis et rei quam actoris. Better is the condition of the possessor and that of the defendant than that of the plaintiff. Coke, 4th Inst. 180; Vaugh. 58, 60; Hob. 103.

Melior est conditio possidentis, ubi neuter jus habet. Better is the condition of the possessor where neither of the two has a right. Jenk. Cent. Cas. 118.

Melior est justitia verè præveniens quam severè puniens. That justice which justly prevents a crime is better than that which severely punishes it.

Meliorem conditionem suum facere potest minor, deteriorem nequaquam. A minor can improve or make his condition better, but never worse. Coke, Litt. 337 *b.*

Melius est in tempore occurrere, quam post causam vulneratum remedium quærere. It is better to restrain or meet a thing in time, than to seek a remedy after a wrong has been inflicted. Coke, 2d Inst. 299.

Melius est omnia mala pati quam consentire. It is better to suffer every wrong or ill, than to consent to it. Coke, 3d Inst. 23.

Melius est recurrere quam malo currere. It is better to recede than to proceed wrongly. Coke, 4th Inst. 176.

Mens testatoris in testamentis spectanda est. In wills, the intention of the testator is to be regarded. Jenk. Cent. Cas. 277.

Mentiri est contra mentem ire. To lie is to go against the mind. 3 Bulstr. 260.

Mercis appellatio ad res mobiles tantum pertinet. The term merchandise belongs to movable things only. Dig. 50. 16. 66.

Mercis appellatione homines non contineri. Under the name of merchandise men are not included. Dig. 50. 16. 207.

Merx est quidquid vendi potest. Merchandise is whatever can be sold. 3 Mete. Mass. 365. See MERCHANDISE.

Messis sementem sequitur. The harvest follows the sowing. Erskine, Inst. 174. 26; Bell, Dict.

Meum est promittere, non dimittere. It is mine to promise, not to discharge. 2 Rolle, 39.

Minima pœna corporalis est major qualibet pecuniariâ. The smallest bodily punishment is greater than any pecuniary one. Coke, 2d Inst. 220.

Minimè mutanda sunt quæ certam habuerunt interpretationem. Things which have had a certain interpretation are to be altered as little as possible. Coke, Litt. 365.

Minimum est nihilo proximum. The least is next to nothing. Bacon, Arg. Low's Case of Tenures.

Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire. A minor before majority cannot act in a case of property, nor even agree. Coke, 2d Inst. 291.

Minor jurare non potest. A minor cannot make oath. Coke, Litt. 172 *b.* An infant cannot be sworn on a jury. Littleton, 289.

Minor minorem custodire non debet; alios enim præsumitur male regere qui seipsum regere nescit. A minor ought not to be guardian of a minor, for he is presumed to govern others ill who does not know how to govern himself. Coke, Litt. 88.

Minor non tenetur respondere durante minori ætati; nisi in causâ dotis, propter favorem. A minor is not bound to answer during his minority, except as a matter of favor in a cause of dower. 3 Bulstr. 143.

Minor, qui infra ætatem 12 annorum fuerit, utlagari non potest, nec extra legem poni, quia ante talem ætatem, non est sub lege aliquâ, nec in decennâ. A minor who is under twelve years of age cannot be outlawed, nor placed without the laws, because before such age he is not under any laws, nor in a decennary. Coke, Litt. 128.

Minor 17 annis, non admittitur fore executorem. A minor under seventeen years of age is not admitted to be an executor. 6 Coke, 67.

Minus solvit, qui tardius solvit; nam et tempore minus solvitur. He does not pay who pays too late; for, from the delay, he is judged not to pay. Dig. 50. 16. 12. 1.

Misera est servitus, ubi jus est vagum aut incertum. It is a miserable slavery where the law is vague or uncertain. Coke, 4th Inst. 246; 9 Johns. N. Y. 427; 11 Pet. 286.

Mitius imperanti melius paretur. The more mildly one commands, the better is he obeyed. Coke, 3d Inst. 24.

Mobilia non habet situm. Movables have no *situs*. 4 Johns. Ch. N. Y. 472.

Mobilia personam sequuntur, immobilia situm. Movable things follow the person; immovable, their locality. Story, Confl. Laws, 3d ed. 638, 639.

Mobilia sequuntur personam. Movables follow the person. Story, Confl. Laws, 3d ed. 638, 639; Broom, Max. 3d Lond. ed. 462.

Modica circumstantia facti jus mutat. A small circumstance attending an act may change the law.

Modus de non decimando non valet. A *modus* (prescription) not to pay tithes is void. Lofft, 427; Croke Eliz. 511; 2 Sharswood, Blacket. Comm. 31.

Modus et conventio vincunt legem. The form of agreement and the convention of the parties overrule the law. 2 Coke, 73.

Modus legem dat donationi. The manner gives law to a gift. Coke, Litt. 19 *a*; Broom, Max. 3d Lond. ed. 615.

Moneta est justum medium et mensura rerum commutabilium, nam per medium monetæ fit omnium rerum conveniens, et justa æstimatio. Money is the just medium and measure of all commutable things, for by the medium of money a convenient and just estimation of all things is made. See 1 Bouvier, Inst. n. 922.

Monetandi jus comprehenditur in regalibus quæ nunquam a regio sceptro abdicantur. The right of coining is comprehended amongst those rights of royalty which are never relinquished by the kingly sceptre. Dav. 18.

Mora reprobatur in lege. Delay is disapproved of in law. Jenk. Cent. Cas. 51.

Mors dicitur ultimum supplicium. Death is denominated the extreme penalty. Coke, 3d Inst. 212.

Mors omnia solvit. Death dissolves all things.

Mortis momentum est ultimum vitæ momentum. The last moment of life is the moment of death. 4 Bradf. Surr. N. Y. 245, 250.

Mortuus exitus non est exitus. To be dead-born is not to be born. Coke, Litt. 29. See 2 Paige, Ch. N. Y. 35; Domat, liv. prél. t. 2, s. 1, n. 4, 6; 2 Bouvier, Inst. nn. 1721, 1935.

Mos retinendus est fidelissimæ vetustatis. A custom of the truest antiquity is to be retained. 4 Coke, 78.

Muleta damnum famæ non irrogat. A fine does not impose a loss of reputation. Code, 1. 54; Calvinus, Lex.

Multa concedantur per obliquum quæ non concedantur de directo. Many things are conceded indirectly which are not allowed directly. 6 Coke, 47.

Multa fidem promissa levant. Many promises lessen confidence. 11 Cush. Mass. 350.

Multa ignoramus quæ nobis non lateret si veterum lectio nobis fuit familiaris. We are ignorant of many things which would not be hidden from us if the reading of old authors were familiar to us. 10 Coke, 73.

Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt. Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. Coke, Litt. 70; Broom, Max. 3d Lond. ed. 150; 2 Coke, 75. See 3 Term, 146; 7 *id.* 262.

Multa multo exercitatione facilius quam regulis percipies. You will perceive many things much more easily by practice than by rules. Coke, 4th Inst. 50.

Multa non vetat lex, quæ tamen tacitè damnavit. The law fails to forbid many things which yet it has silently condemned.

Multa transeunt cum universitate quæ non per se transeunt. Many things pass as a whole which would not pass separately. Coke, Litt. 12 *a*.

Multi multa, nemo omnia novit. Many men know many things, no one knows every thing. Coke, 4th Inst. 348.

Multi utilius est pauca idonea effundere, quam multis inutilibus homines gravari. It is much more useful to pour forth a few useful things than to oppress men with many useless things. 4 Coke, 20.

Multiplex et indistinctum parit confusionem; et questiones quo simpliciores, eo lucidiores. Multiplicity and indistinctness produce confusion: the more simple questions are, the more lucid they are. Hob. 335.

Multiplicatâ transgressione crescat pœnæ inflictio. The infliction of punishment should be in proportion to the increase of crime. Coke, 2d Inst. 479.

Multitudinem decem faciunt. Ten make a multitude. Coke, Litt. 247.

Multitudo errantium non parit errori patrocinium. The multitude of those who err is no protection for error. 11 Coke, 75.

Multitudo imperitorum perdit curiam. A multitude of ignorant practitioners destroys a court. Coke, 2d Inst. 219.

Natura appetit perfectum, ita et lex. Nature aspires to perfection, and so does the law. Hob. 144.

Natura fidejussionis sit strictissimi juris et non durat, vel extendatur de re ad rem, de personâ ad personam, de tempore ad tempus. The nature of the contract of suretyship is *strictissimi juris*, and cannot endure nor be extended from thing to thing, from person to person, or from time to time. Burge, Sur. 40.

Natura non facit saltum, ita nec lex. Nature makes no leap, nor does the law. Coke, Litt. 238.

Natura non facit vacuum, nec lex supervacuum. Nature makes no vacuum, the law nothing purposeless. Coke, Litt. 79.

Naturæ vis maxima; natura bis maxima. The force of nature is greatest; nature is doubly great. Coke, 2d Inst. 564.

Naturale est quidlibet dissolvi eo modo quo ligatur. It is natural for a thing to be unbound in the same way in which it was bound. Jenk. Cent. Cas. 66; 4 Dev. N. Y. 414, 417; Broom, Max. 3d Lond. ed. 785.

Nec curia deficeret in justitiâ exhibendâ. Nor should the court be deficient in showing justice. Coke, 4th Inst. 63.

Nec tempus nec locus occurrit regi. Neither time nor place bars the king. Jenk. Cent. Cas. 190.

Nec veniam effuso sanguine, casus habet. Where blood is spilled, the case is unpardonable. Coke, 3d Inst. 57.

Nec veniam, læso numine, casus habet. Where the Divinity is insulted the case is unpardonable. Jenk. Cent. Cas. 167.

Necessarium est quod non potest aliter se habere. That is necessary which cannot be otherwise.

Necessitas est lex temporis et loci. Necessity is the law of a particular time and place. 8 Coke, 69; Hale, Hist. Pl. Cr. 54.

Necessitas excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. Necessity excuses or extenuates delinquency in capital cases, but not in civil. See NECESSITY.

Necessitas facit licitum quod aliàs non est licitum. Necessity makes that lawful which otherwise is unlawful. 10 Coke, 61.

Necessitas inducit privilegium quoad jura privata.

With regard to private rights, necessity privileges. Bacon, Max. Reg. 5.

Necessitas non habet legem. Necessity has no law. Plowd. 18. See NECESSITY, and 15 Viner, Abr. 534; 22 *id.* 540.

Necessitas publica major est quam privata. Public necessity is greater than private. Bacon, Max. Reg. 5; Noy, Max. 9th ed. 34; Broom, Max. 3d Lond. ed. 18.

Necessitas, quod cogit, defendit. Necessity defends what it compels. Hale, Hist. Pl. Cr. 54.

Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. Necessity is not restrained by law; since what otherwise is not lawful, necessity makes lawful. Coke, 2d Inst. 326; Fleta, l. 5, c. 23, § 14.

Necessitas vincit legem. Necessity overcomes the law. Hob. 144.

Necessity creates equity.

Negatio conclusionis est error in lege. The denial of a conclusion is error in law. Wingate, Max. 268.

Negatio destruit negationem, et ambæ faciunt affirmationem. A negative destroys a negative, and both make an affirmative. Coke, Litt. 146.

Negatio duplex est affirmatio. A double negative is an affirmative.

Negligentia semper habet infortuniam comitem. Negligence always has misfortune for a companion. Coke, Litt. 246; Sheppard, Touchst. 476.

Neminem oportet esse sapientiorem legibus. No man need be wiser than the laws. Coke, Litt. 97.

Nemo admittendus est inhabilitare seipsum. No one is allowed to incapacitate himself. Jenk. Cent. Cas. 40. But see To STULTIFY; 5 Whart. Penn. 371; 2 Kent, Comm. 451, n.

Nemo agit in seipsum. No man acts against himself, Jenk. Cent. Cas. 40: therefore no man can be a judge in his own cause. Broom, Max. 3d Lond. ed. 201, n.; 4 Bingh. 151; 2 Exch. 595; 18 C. B. 253; 2 Barnew. & Ald. 822.

Nemo alienæ rei, sine satisdatione, defensor idoneus intelligitur. No man is considered a competent defender of another's property, without security. 1 Curt. C. C. 202.

Nemo alieno nomine lege agere potest. No man can sue at law in the name of another. Dig. 50. 17. 123.

Nemo aliquam partem rectè intelligere potest, antequam totum iterum atque iterum perlegit. No one can properly understand any part of a thing till he has read through the whole again and again. 3 Coke, 59.

Nemo allegans suam turpitudinem, audiendus est. No one alleging his own turpitude is to be heard as a witness. Coke, 4th Inst. 279; 3 Stor. C. C. 514, 516.

Nemo bis punitur pro eodem delicto. No one can be punished twice for the same crime or misdemeanor. 2 Hawkins, Pl. Cr. 377; 4 Sharswood, Blackst. Comm. 315.

Nemo cogitur rem suam vendere, etiam justo pretio. No one is bound to sell his property, even for a just price. But see EMINENT DOMAIN.

Nemo contra factum suum venire potest. No man can contradict his own deed. Coke, 2d Inst. 66.

Nemo damnum facit, nisi qui id facit quod facere jus non habet. No one is considered as doing damage, unless he who is doing what he has no right to do. Dig. 50. 17. 151.

Nemo dat qui non habet. No one can give who does not possess. Jenk. Cent. Cas. 250.

Nemo de domo sua extrahi debet. A citizen cannot be taken by force from his house to be conducted before a judge or to prison. Dig. 50. 17. 103. This maxim in favor of Roman liberty is much the same as that *every man's house is his castle.* Broom, Max. 3d Lond. ed. 384.

Nemo debet aliená jacturâ locupletari. No one ought to gain by another's loss. 2 Kent, Comm. 336.

Nemo debet bis puniri pro uno delicto. No one ought to be punished twice for the same offence. 4 Coke, 43; 11 *id.* 59 *b.*

Nemo debet bis vexari pro eadem causa. No one should be twice harassed for the same cause. 2 Johns. N. Y. 24, 27, 182; 13 *id.* 153; 8 Wend N. Y. 10, 38; 2 Hall, N. Y. 454; 3 Hill, N. Y. 420; 6 *id.* 133; 2 Barb. N. Y. 285; 6 *id.* 32.

Nemo debet bis vexari pro unâ et eadem causa. No one ought to be twice vexed for the same cause. 5 Pet. 61; 1 Archbold, Pract. Chitty ed. 476 (*Nemo bis debet*, etc.); 2 Mass. 355; 17 *id.* 425.

Nemo debet bis vexari, si constat curiæ quod sit pro unâ et eâdem causâ. No man ought to be twice punished, if it appear to the court that it is for one and the same cause. 5 Coke, 61; Broom, Max. 3d Lond. ed. 294.

Nemo debet esse judex in propriâ causâ. No one should be judge in his own cause. 12 Coke, 114; Broom, Max. 3d Lond. ed. 111.

Nemo debet immiscere se rei alienæ—ad se nihil pertinenti. No one should interfere in what no way concerns him. Jenk. Cent. Cas. 18.

Nemo debet in communione invitus teneri. No one should be retained in a partnership against his will. 2 Sandf. N. Y. 568, 593; 1 Johns. N. Y. 106, 114.

Nemo debet locupletari ex alterius incommodo. No one ought to be made rich out of another's loss. Jenk. Cent. Cas. 4; 10 Barb. N. Y. 626, 633.

Nemo debet rem suam sine facto aut defectu suo amittere. No one should lose his property without his act or negligence. Coke, Litt. 263.

Nemo duobus utatur officiis. No one should fill two offices. Coke, 4th Inst. 100.

Nemo ejusdem tenementi simul potest esse hæres et dominus. No one can be at the same time heir and lord of the same fief. 1 Reeve, Hist. Eng. Law, 106.

Nemo est hæres viventis. No one is an heir to the living. Coke, Litt. 22 *b*; 2 Blackstone, Comm. 70, 107, 208; Viner, Abr. *Abeyance;* 2 Bouvier, Inst. 1694, 1832; 2 Johns. N. Y. 36.

Nemo ex alterius facto prægravari debet. No man ought to be burdened in consequence of another's act. 2 Kent, Comm. 646; Pothier, Obl. Evans ed. 133.

Nemo ex consilio obligatur. No man is bound for the advice he gives. Story, Bailm. § 155.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong. Broom, Max. 3d Lond. ed. 270.

Nemo ex suo delicto meliorem suam conditionem facere potest. No one can improve his condition by his own wrong. Dig. 50. 17. 134. 1.

Nemo in propria causa testis esse debet. No one can be a witness in his own cause. But to this rule there are many exceptions. 1 Sharswood, Blackst. Comm. 443; 3 *id.* 370.

Nemo inauditus condemnari debet, si non sit contumax. No man ought to be condemned unheard, unless he be contumacious. Jenk. Cent. Cas. 18.

Nemo militans Deo implicetur secularibus negotiis. No man warring for God should be troubled by secular business. Coke, Litt. 70.

Nemo nascitur artifex. No one is born an artificer. Coke, Litt. 97.

Nemo patriam in qua natus est exuere, nec ligeantiæ debitum ejurare potest. No man can renounce the country in which he was born, nor abjure the obligation of his allegiance. Coke, Litt. 129 *a*; 3 Pet. 155; Broom, Max. 3d Lond. ed. 72. See ALLEGIANCE; EXPATRIATION; NATURALIZATION.

Nemo plus commodi hæredi suo relinquit quàm ipse habuit. No one leaves a greater benefit to his heir than he had himself. Dig. 50. 17. 120.

Nemo plus juris ad alienum transferre potest, quàm ipse habet. One cannot transfer to another a larger

right than he himself has. Coke, Litt. 309 *b*; Wingate, Max. 56; 2 Kent, Comm. 324; 1 Story, Contr. 4th ed. 417, n.; 5 Coke, 113; 10 Pet. 161, 175.

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. The issue upon a record cannot be tried by a jury. Coke, 2d Inst. 380.

Nemo potest esse dominus et hæres. No one can be both owner and heir. Hale, Hist. Com. Law, c. 7.

Nemo potest esse simul actor et judex. No one can be at the same time judge and suitor. Broom, Max. 3d Lond. ed. 112; 13 Q. B. 327; 17 *id.* 1; 15 C. B. 796; 1 C. B. N. S. 323.

Nemo potest esse tenens et dominus. No man can be at the same time tenant and landlord (of the same tenement). Gilbert, Ten. 102.

Nemo potest facere per alium quod per se non potest. No one can do that by another which he cannot do by himself. Jenk. Cent. Cas. 237.

Nemo potest facere per obliquum quod non potest facere per directum. No one can do that indirectly which cannot be done directly. 1 Ed. Ch. 512.

Nemo potest mutare consilium suum in alterius injuriam. No one can change his purpose to the injury of another. Dig. 50. 17. 75; Broom, Max. 3d Lond. ed. 33; 7 Johns. N. Y. 477.

Nemo potest sibi debere. No one can owe to himself. See CONFUSION OF RIGHTS.

Nemo præsens nisi intelligat. One is not present unless he understands. See PRESENCE.

Nemo præsumitur alienam posteritatem suæ prætulisse. No one is presumed to have preferred another's posterity to his own. Wingate, Max. 285.

Nemo præsumitur donare. No one is presumed to give.

Nemo præsumitur esse immemor suæ æternæ salutis, et maximè in articulo mortis. No man is presumed to be forgetful of his eternal welfare, and particularly at the point of death. 6 Coke, 76.

Nemo præsumitur ludere in extremis. No one is presumed to trifle at the point of death.

Nemo præsumitur malus. No one is presumed to be bad.

Nemo prohibetur plures negotiationes sive artes exercere. No one is restrained from exercising several kinds of business or arts. 11 Coke, 54.

Nemo prohibetur pluribus defensionibus uti. No one is restrained from using several defences. Coke, Litt. 304; Wingate, Max. 479.

Nemo prudens punit ut præterita revocentur, sed ut futura præveniantur. No wise one punishes that things done may be revoked, but that future wrongs may be prevented. 3 Bulstr. 17.

Nemo punitur pro alieno delicto. No one is to be punished for the crime or wrong of another. Wingate, Max. 336.

Nemo punitur sine injuriâ, facto, seu defalto. No one is punished unless for some wrong, act, or default. Coke, 2d Inst. 287.

Nemo, qui condemnare potest, absolvere non potest. No one who may condemn is unable to acquit. Dig. 50. 17. 37.

Nemo sibi esse judex vel suis jus dicere debet. No man ought to be his own judge, or to administer justice in cases where his relations are concerned. 12 Coke, 113; Cod. 3. 5. 1; Broom, Max. 3d Lond. ed. 111.

Nemo sine actione experitur, et hoc non sine breve sive libello conventionali. No one goes to law without an action, and no one can bring an action without a writ or bill. Bracton, 112.

Nemo tenetur ad impossibile. No one is bound to an impossibility. Jenk. Cent. Cas. 7.

Nemo tenetur armare adversarium contra se. No one is bound to arm his adversary. Wingate, Max. 665.

Nemo tenetur divinare. No one is bound to foretell. 4 Coke, 28; 10 *id.* 55 *a*.

Nemo tenetur edere instrumenta contra se. No man is bound to produce writings against himself. Bell, Dict.

Nemo tenetur informare qui nescit sed quisquis scire quod informat. No one who is ignorant of a thing is bound to give information of it, but every one is bound to know that which he gives information of. Branch, Princ.; Lane, Exch. 110.

Nemo tenetur jurare in suam turpitudinem. No one is bound to testify to his own baseness.

Nemo tenetur seipsum accusare. No one is bound to accuse himself. Wingate, Max. 486; Broom, Max. 3d Lond. ed. 871; 1 Sharswood, Blackst. Comm. 443; 14 Mees. & W. Exch. 286.

Nemo tenetur seipsum infortuniis et periculis exponere. No one is bound to expose himself to misfortune and dangers. Coke, Litt. 253.

Nemo tenetur seipsum prodere. No one is bound to expose himself. 10 N. Y. 10, 33; 7 How. Pract. N. Y. 57, 58.

Nemo unquam vir magnus fuit sine aliquo divino afflatu. No one was ever a great man without some divine inspiration. Cicero.

Nemo videtur fraudare eos qui sciunt, et consentiunt. No one is considered as deceiving those who know and consent. Dig. 20. 17. 145.

Nihil aliud potest rex quàm quod de jure potest. The king can do nothing but what he can do justly. 11 Coke, 74.

Nihil consensui tam contrarium est quam vis atque metus. Nothing is so contrary to consent as force and fear. Dig. 50. 17. 116.

Nihil dat qui non habet. He gives nothing who has nothing.

Nihil de re accrescit ei qui nihil in re quando jus accresceret habet. Nothing accrues to him who, when the right accrues, has nothing in the subject-matter. Coke, Litt. 188.

Nihil est enim liberale quod non idem justum. For there is nothing generous which is not at the same time just. 2 Kent, Comm. 441, note *a*.

Nihil est magis rationi consentaneum quam eodem modo quodque dissolvere quo conflatum est. Nothing is more consonant to reason than that every thing should be dissolved in the same way in which it was made. Sheppard, Touchst. 323.

Nihil facit error nominis cum de corpore constat. An error in the name is nothing when there is certainty as to the thing. 11 Coke, 21; 2 Kent, Comm. 292.

Nihil habet forum ex scenâ. The court has nothing to do with what is not before it.

Nihil in lege intolerabilius est, eandem rem diverso jure censeri. Nothing in law is more intolerable than that the same case should be subject (in different courts) to different views of the law. 4 Coke, 93.

Nihil infra regnum subditos magis conservat in tranquilitate et concordiâ quam debita legum administratio. Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws. Coke, 2d Inst. 158.

Nihil magis justum est quam quod necessarium est. Nothing is more just than what is necessary. Dav. 12.

Nihil nequam est præsumendum. Nothing wicked is to be presumed. 2 P. Will. 583.

Nihil perfectum est dum aliquid restat agendum. Nothing is perfect while something remains to be done. 9 Coke, 9.

Nihil peti potest ante id tempus, quo per rerum naturam persolvi possit. Nothing can be demanded before that time when, in the nature of things, it can be paid. Dig. 50. 17. 186.

Nihil possumus contra veritatem. We can do nothing against truth. St. Albans, Doct. & Stu. Dial. 2, c. 6.

Nihil præscribitur nisi quod possidetur. There is

no prescription for that which is not possessed. 5 Barnew. & Ald. 277.

Nihil quod est contra rationem est licitum. Nothing against reason is lawful. Coke, Litt. 97.

Nihil quod est inconveniens est licitum. Nothing inconvenient is lawful. 4 Hou. L. Cas. 145, 195.

Nihil simul inventum est et perfectum. Nothing is invented and perfected at the same moment. Coke, Litt. 230; 2 Sharswood, Blackst. Comm. 298, n.

Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est. Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. Coke, 2d Inst. 360; Broom, Max. 3d Lond. ed. 785. See Sheppard, Touchst. 323.

Nihil tam conveniens est naturali æquitati, quàm voluntatem domini volentis rem suam in alium transferre, ratam haberi. Nothing is more conformable to natural equity than to confirm the will of an owner who desires to transfer his property to another. Inst. 2. 1. 40; 1 Coke, 100.

Nihil tam naturale est, quàm eo genere quidque dissolvere, quo colligatum est. Nothing is so natural as that an obligation should be dissolved by the same principles which were observed in contracting it. Dig. 50. 17. 35. See 1 Coke, 100; Coke, 2d Inst. 359.

Nihil tam proprium imperio quam legibus vivere. Nothing is so becoming to authority as to live according to the law. Fleta, l. 1, c. 17, § 11; Coke, 2d Inst. 63.

Nil agit exemplum litem quod lite resolvit. An example does no good which settles one question by another. Hatch *ve.* Mann, 15 Wend. 44, 49.

Nil facit error nominis si de corpore constat. An error in the name is immaterial if the body is certain. Broom, Max. 3d Lond. ed. 566; 11 C. B. 406.

Nil sine prudenti fecit ratione vetustas. Antiquity did nothing without a good reason. Coke, Litt. 65.

Nil temere novandum. Nothing should be rashly changed. Jenk. Cent. Cas. 163.

Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit. Too great subtlety is disapproved of in law; for such nice pretence of certainty confounds true and legal certainty. Broom, Max. 3d Lond. ed. 175; 4 Coke, 5.

Nimium altercando veritas amittitur. By too much altercation truth is lost. Hob. 344.

No man can hold the same land immediately of two several landlords. Coke, Litt. 152.

No man is presumed to do any thing against nature. 22 Viner, Abr. 154.

No man may be judge in his own cause.

No man shall set up his infamy as a defence. 2 W. Blackst. 364.

No man shall take by deed but parties, unless in remainder.

No one can grant or convey what he does not own. 25 Barb. N. Y. 284; 301. See 20 Wend. N. Y. 267; 23 N. Y. 252; 13 *id.* 121; 6 Du. N. Y. 232. And see ESTOPPEL.

Nobiles magis plectuntur pecuniâ; plebes verò in corpore. The higher classes are more punished in money; but the lower in person. Coke, 3d Inst. 220.

Nobiles sunt qui arma gentilitia antecessorum suorum proferre possunt. The gentry are those who are able to produce armorial bearings derived by descent from their own ancestors. Coke, 2d Inst. 595.

Nobiliores et benigniores presumptiones in dubiis sunt præferendæ. When doubts arise, the most generous and benign presumptions are to be preferred. Reg. Jur. Civ.

Nomen est quasi rei notamen. A name is as it were the note of a thing. 11 Coke, 20.

Nomen non sufficit si res non sit de jure aut de facto. A name does not suffice if the thing do not exist by law or by fact. 4 Coke, 107.

Nomina si nescis perit cognitio rerum. If you know not the names of things, the knowledge of things themselves perishes. Coke, Litt. 86.

Nomina sunt mutabilia, res autem immobiles. Names are mutable, but things immutable. 6 Coke, 66.

Nomina sunt notæ rerum. Names are the notes of things. 11 Coke, 20.

Nomina sunt symbola rerum. Names are the symbols of things.

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram. Words ought not to be accepted to import a false description, which may have effect by way of true limitation. Bacon, Max, Reg. 13; 2 Parsons, Contr. 62-65; Broom, Max. 3d Lond. ed. 573; 3 Barnew. & Ad. 459; 4 Exch. 604; 3 Taunt. 147.

Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio. A person may not be punished differently than according to what the sentence enjoins. Coke, 3d Inst. 217.

Non aliter à significatione verborum recedi oportet quam càm manifestum est, aliud sensisse testatorem. We must never depart from the signification of words, unless it is evident that they are not conformable to the will of the testator. Dig. 32. 69 pr.; Broom, Max. 3d Lond. ed. 500; 2 De Gex. M. & G. Ch. 313.

Non auditur perire volens. One who wishes to perish ought not to be heard. Best, Ev. § 385.

Non concedantur citationes priusquam exprimatur super qua re fieri debet citatio. Summonses or citations should not be granted before it is expressed upon what ground a citation ought to be issued. 12 Coke, 47.

Non consentit qui errat. He who errs does not consent. 1 Bouvier, Inst. n. 581; Bracton, 44.

Non dat qui non habet. He gives nothing who has nothing. Broom, Max. 3d Lond. ed. 417.

Non debeo melioris conditionis esse, quam auctor meus à quo jus in me transit. I ought not to be in better condition than he to whose rights I succeed. Dig. 50, 17. 175. 1.

Non deberet alii nocere, quod inter alios actum esset. No one ought to be injured by that which has taken place between other parties. Dig. 12. 2. 10.

Non debet adduci exceptio ejus rei cujus petitur dissolutio. A plea of the same matter the dissolution of which is sought ought not to be made. Bacon, Max. Reg. 2; Broom, Max. 3d Lond. ed. 157; 3 P. Will. 317; 1 Ld. Raym. 57; 2 *id.* 1433.

Non debet alteri per alterum iniqua conditio inferri. A burdensome condition ought not to be brought upon one man by the act of another. Dig. 50. 17. 74.

Non debet, cui plus licet, quod minus est, non licere. He who is permitted to do the greater may with greater reason do the less. Dig. 50. 17. 21; Broom, Max. 3d Lond. ed. 165.

Non debit actori licere, quod reo non permittitur. That which is not permitted to the defendant ought not to be to the plaintiff. Dig. 50. 17. 41.

Non decet homines dedere causa non cognita. It is unbecoming to surrender men when no cause is shown. 4 Johns. Ch. N. Y. 106, 114; 3 Wheel. Crim. N. Y. 473, 482.

Non decipitur qui scit se decipi. He is not deceived who knows himself to be deceived. 5 Coke, 60.

Non definitur in jure quid sit conatus. What an attempt is, is not defined in law. 6 Coke, 42.

Non differunt quæ concordant re, tametsi non in verbis iisdem. Those things which agree in substance, though not in the same words, do not differ. Jenk. Cent. Cas. 70.

Non dubitatur, etsi specialiter venditor evictionem non promiserit, re evictâ, ex empto competere actionem. It is certain that although the vendor has not given a special guarantee, an action *ex empto* lies against him, if the purchaser is evicted. C. 8. 45. 6. But see Doctor & Stud. b. 2, c. 47; Broom, Max. 3d Lond. ed. 690.

Non efficit affectus nisi sequatur effectus. The intention amounts to nothing unless some effect follows. 1 Rolle, 226.

Non est arctius vinculum inter homines quam jusjurandum. There is no stronger link among men than an oath. Jenk. Cent. Cas. 126.

Non est certandum de regulis juris. There is no disputing about rules of law.

Non est disputandum contra principia negantem. There is no disputing against a man denying principles. Coke, Litt. 343.

Non est justum aliquem antenatum post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur. It is not just to make an elder-born a bastard after his death, who during his lifetime was accounted legitimate. 12 Coke, 44.

Non est novum ut priores legis ad posteriores trahantur. It is not a new thing that prior statutes shall give place to later ones. Dig. 1. 3. 26; 1. 1. 4; Broom, Max. 3d Lond. ed. 27.

Non est recedendum à communi observantiâ. There should be no departure from a common observance. 2 Coke, 74.

Non est regula quin fallat. There is no rule but what may fail. Off. Ex. 212.

Non est singulis concedendum, quod per magistratum publicè possit fieri, ne occasio sit majoris tumultus faciendi. That is not to be conceded to private persons which can be publicly done by the magistrate, lest it be the occasion of greater tumults. Dig. 50. 17. 176.

Non ex opinionibus singulorum, sed ex communi usu, nomina exaudiri debent. Names of things ought to be understood according to common usage, not according to the opinions of individuals. Dig. 33. 10. 7. 2.

Non facias malum, ut inde veniat bonum. You are not to do evil that good may come of it. 11 Coke, 74 *a*.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a quibus constituuntur. A derogatory clause does not prevent things or acts from being dissolved by the same power, by which they were originally made. Bacon, Max. Reg. 19.

Non in legendo sed in intelligendo leges consistunt. The laws consist not in being read, but in being understood. 8 Coke, 167.

Non jus, sed seisina facit stipitem. Not right, but seisin, makes a stock from which the inheritance must descend. Fleta, l. 6, cc. 14, 2, § 2; Noy, Max. 9th ed. 72, n. (*h*); Broom, Max. 3d Lond. ed. 466; 2 Sharswood, Blackst. Comm. 209; 1 Stephen, Comm. 365, 368, 394; 4 Kent, Comm. 388, 389; 4 Scott, N. R. 468.

Non licet quod dispendio licet. That which is permitted only at a loss is not permitted to be done. Coke, Litt. 127.

Non nasci, et natum mori, paria sunt. Not to be born, and to be dead-born, are the same.

Non obligat lex nisi promulgata. A law is not obligatory unless it be promulgated.

Non observatâ formâ, infertur adnullatio actûs. When the form is not observed, it is inferred that the act is annulled. 12 Coke, 7.

Non efficit conatus nisi sequatur effectus. An attempt does not harm unless a consequence follow. 11 Coke, 93.

Non omne damnum inducit injuriam. Not every loss produces an injury, *i.e.* gives a right of action. See 3 Blackstone, Comm. 219; 1 Smith, Lead. Cas. 131; Broom, Max. 93; 2 Bouvier, Inst. n. 2211.

Non omne quod licet honestum est. It is not every thing which is permitted that is honorable. Dig. 50. 17. 144.

Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest. A reason cannot always be given for the institutions of our ancestors. 4 Coke, 78; Broom, Max. 3d Lond. ed. 149; Branch, Princ.

Non possessori incumbit necessitas probandi possessiones ad se pertinere. It is not incumbent on the possessor of property to prove his right to his possessions. Code, 4. 19. 2; Broom, Max. 3d Lond. ed. 639.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio. A plea of the same matter, the dissolution of which is sought by the action, cannot be brought forward. Bacon, Max. Reg. 2. When an action is brought to annul a proceeding, the defendant cannot plead such proceeding in bar. Broom, Max. 3d Lond. ed. 154; Wingate, Max. 647; 3 P. Will. 317.

Non potest probari quod probatum non relevat. That cannot be proved which proved is irrelevant. See 1 Exch. 91, 92, 102.

Non potest quis sine brevi agere. No one can sue without a writ. Fleta, l. 2, c. 13, § 4.

Non potest rex gratiam facere cum injuriâ et damno aliorum. The king cannot confer a favor which occasions injury and loss to others. Coke, 3d Inst. 236; Broom, Max. 3d Lond. ed. 60; Vaugh. 338; 2 Ell. & B. 874.

Non potest rex subditum renitentem onerare impositionibus. The king cannot load a subject with imposition against his consent. Coke, 2d Inst. 61.

Non potest videri desisse habere, qui nunquam habuit. He cannot be considered as having ceased to have a thing, who never had it. Dig. 50. 17. 208.

Non prætat impedimentum quod de jure non sortitur effectum. A thing which has no effect in law is not an impediment. Jenk. Cent. Cas. 162; Wingate, Max. 727.

Non quod dictum est, sed quod factum est, inspicitur. Not what is said, but what is done, is to be regarded. Coke, Litt. 36; 6 Bingh. 310; 1 Mete. Mass. 353; 11 Cush. Mass. 536.

Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds. 10 Coke, 52.

Non refert quid ex æquipollentibus fiat. It matters not what becomes of equipollent expressions. 5 Coke, 122.

Non refert quid notum sit judici, si notum non sit in formâ judicii. It matters not what is known to the judge, if it is not known to him judicially. 3 Bulstr. 115.

Non refert verbis an factis fit revocatio. It matters not whether a revocation be by words or by acts. Croke Car. 49; Branch, Princ.

Non remota causa sed proxima spectatur. See CAUSA PROXIMA.

Non respondebit minor, nisi in causâ dotis, et hoc pro favore doti. A minor shall not answer unless in a case of dower, and this in favor of dower. 4 Coke, 71.

Non reus nisi mens sit rea. Not guilty unless the intent be guilty. 1 Story, Contr. 4th ed. 87.

Non solent quæ abundant vitiare scripturas. Surplusage does not usually vitiate writings. Dig. 50. 17. 94; Broom, Max. 3d Lond. ed. 559, n.

Non solum quid licet, sed quid est conveniens considerandum, quia nihil quod inconveniens est licitum. Not only what is permitted, but what is convenient, is to be considered, because what is inconvenient is illegal. Coke, Litt. 66 *a*.

Non sunt longa ubi nihil est quod demere possis. There is no prolixity where there is nothing that can be omitted. Vaugh. 138.

Non temere credere, est nervus sapientiæ. Not to

believe rashly is the nerve of wisdom. 5 Coke, 114.

Non valet exceptio ejusdem rei cujus petitur dissolutio. A plea of that of which the dissolution is sought is not valid. 2 Ed. Ch. 134.

Non valet impedimentum quod de jure non sortitur effectum. An impediment is of no avail which by law has no effect. 4 Coke, 31 *a*.

Non verbis sed ipsis rebus, leges imponimus. Not upon words, but upon things themselves, do we impose law. Code, 6. 43. 2.

Non videntur qui errant consentire. He who errs is not considered as consenting. Dig. 50. 17. 116; Broom, Max. 3d Lond. ed. 240; 2 Kent, Comm. 477; 14 Ga. 207.

Non videntur rem amittere quibus propria non fuit. They are not considered as losing a thing whose own it was not. Dig. 50. 17. 85.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit. He does not appear to have retained his consent, who has changed any thing at the command of a party threatening. Bacon, Max. Reg. 22; Broom, Max. 3d Lond. ed. 254.

Non videtur perfectè cujusque id esse, quod ex casu auferri potest. That does not truly belong to any one which can be taken from him upon occasion. Dig. 50. 17. 159. 1.

Non videtur quisquam id capere, quod ei necesse est alii restituere. One is not considered as acquiring property in a thing which he is bound to restore. Dig. 50. 17. 51.

Non videtur vim facere, qui jure suo utitur, et ordinariâ actione experitur. He is not judged to use force who exercises his own right and proceeds by ordinary action. Dig. 50. 17. 155. 1.

Non volet confirmatio, nisi ille, qui confirmat, sit in possessione rei vel juris unde fieri debet confirmatio; et eodem modo, nisi ille cui confirmatio fit, sit in possessione. Confirmation is not valid unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made, and, in like manner, unless he to whom confirmation is made is in possession. Coke, Litt. 295.

Noscitur à sociis. It is known from its associates. The meaning of a word may be ascertained by reference to the meaning of words associated with it. Broom, Max. 3d Lond. ed. 523; 9 East, 267, 13 *id.* 531; 6 Taunt. 294; 1 Ventr. 225; 1 Barnew. & C. 644; Arg. 10 *id.* 496, 519; 18 C. B. 102, 893; 5 Mann. & G. 639, 667; 3 C. B. 437; 5 *id.* 380; 4 Exch. 511, 519; 5 *id.* 294; 11 *id.* 113; 3 Term, 87; 8 *id.* 118; 1 N. Y. 47, 69; 11 Barb. N. Y. 43, 63; 20 *id.* 644.

Noscitur ex socio, qui non cognoscitur ex se. He who cannot be known from himself may be known from his associate. F. Moore, 817; 1 Ventr. 225; 3 Term, 87; 9 East, 267; 13 *id.* 531; 6 Taunt. 294; 1 Barnew. & C. 644.

Notitia dicitur à noscendo; et notitia non debet claudicare. Notice is called from a knowledge being had; and notice ought not to halt, *i.e.* be imperfect. 6 Coke, 29.

Nova constitutio futuris formam imponere debet, non præteritis. A new enactment ought to impose form upon what is to come, not upon what is past. Coke, 2d Inst. 292; Broom, Max. 3d Lond. ed. 33, 36; T. Jones, 108; 2 Show. 16; 6 Mees. & W. Exch. 285; 7 *id.* 536; 2 Mass. 122; 2 Gall. C. C. 139; 2 N. Y. 245; 7 Johns. N. Y. 503 *et seq.*, where this rule is fully considered and the authorities reviewed.

Novatio non præsumitur. A novation is not presumed. Halkers, Max. 104.

Novitas non tam utilitate prodest quam novitate perturbat. Novelty benefits not so much by its utility as it disturbs by its novelty. Jonk. Cent. Cas. 167.

Novum judicium non dat novum jus, sed declarat antiquum. A new judgment does not make a new law, but declares the old. 10 Coke, 42.

Noxa sequitur caput. The injury (*i.e.* liability to make good an injury caused by a slave) follows the head or person, *i.e.* attaches to his master. Heineccius, Elem. Jur. Civ. l. 4, t. 8, § 1231.

Nuda pactio obligationem non parit. A naked promise does not create an obligation. Dig. 2. 14. 7. 4; Code, 4. 65. 27; Broom, Max. 3d Lond. ed. 670; Brisson, *Nudus.*

Nuda ratio et nuda pactio non ligant aliquem debitorem. Naked reason and naked promise do not bind any debtor. Fleta, l. 2, c. 60, § 25.

Nudum pactum est ubi nulla subest causa propter conventionem; sed ubi subest causa, fit obligatio, et parit actionem. Nudum pactum is where there is no consideration for the undertaking or agreement; but when there is a consideration, an obligation is created and an action arises. Dig. 2. 14. 7. 4; 2 Sharswood, Blackst. Comm. 445; Broom, Max. 3d Lond. ed. 669; Plowd. 309; 1 Powell, Contr. 330 *et seq.*; 3 Burr. 1670 *et seq.*; Viner, Abr. *Nudum Pactum* (A); 1 Fonblanque, Eq. 5th ed. 335 *a*.

Nudum pactum ex quo non oritur actio. Nudum pactum is that upon which no action arises. Code, 2. 3. 10; 5. 14. 1; Broom, Max. 3d Lond. ed. 676.

Nul ne doit s'enrichir aux dépens des autres. No one ought to enrich himself at the expense of others.

Nul prendra advantage de son tort demesne. No one shall take advantage of his own wrong. Broom, Max. 3d Lond. ed. 265.

Nulla curia quæ recordum non habet potest imponere finem, neque aliquem mandare carceri; quia ista spectant tantummodo ad curias de recordo. No court which has not a record can impose a fine, or commit any person to prison: because those powers belong only to courts of record. 8 Coke, 60.

Nulla impossibilia aut inhonesta sunt præsumenda; vera autem et honesta et possibilia. No impossible or dishonorable things are to be presumed; but things true, honorable, and possible. Coke, Litt. 78.

Nullâ pactione effici potest ne dolus præstetur. By no agreement can it be effected that there shall be no accountability for fraud. Dig. 2. 14. 27. 3; Broom, Max. 3d Lond. ed. 622, 118, n.; 5 Maule & S. 466.

Nulle régle sans faute. There is no rule without a fault.

Nulle terre sans seigneur. No land without a lord. Guyot, Inst. Feod. c. 28.

Nulli enim res sua servit jure servitutis. No one can have a servitude over his own property. Dig. 8. 2. 26; 17 Mass. 443; 2 Bouvier, Inst. n. 1600.

Nullius hominis auctoritas apud nos valere debet, ut meliora non sequeremur si quis attulerit. The authority of no man ought to avail with us, that we should not follow better [opinions] should any one present them. Coke, Litt. 383 *b*.

Nullum crimen majus est inobedientiâ. No crime is greater than disobedience. Jenk. Cent. Cas. 77.

Nullum exemplum est idem omnibus. No example is the same for all purposes. Coke, Litt. 212 *a*.

Nullum iniquum est præsumendum in jure. Nothing unjust is to be presumed in law. 4 Coke, 72.

Nullum matrimonium, ibi nulla dos. No marriage, no dower. 4 Barb. N. Y. 192, 194.

Nullum simile est idem. Nothing which is like another is the same, *i.e.* no likeness is exact identity. 2 Stor. C. C. 512; Story, Partn. 90; Coke, Litt. 3 *a*; 2 Sharswood, Blackst. Comm. 162.

Nullum simile quatuor pedibus currit. No simile runs upon four feet, or, as ordinarily expressed, "on all fours." Coke, Litt. 3 *a*; Eunomus, Dial. 2 p. 155; 1 Stor. C. C. 143.

Nullum tempus occurrit regi. Lapse of time does not bar the right of the crown. Coke, 2d Inst. 273;

1 Sharswood, Blackst. Comm. 247; Broom, Max. 3d Lond. 62; Hob. 347; 2 Stephen, Comm. 504; 1 Mass. 356; 2 Brock. C. C. 393; 18 Johns. N. Y. 127; 10 Barb. N. Y. 139.

Nullum tempus occurrit reipublicæ. Lapse of time does not bar the commonwealth. 11 Grat. 572; Hilliard, Real Prop. 173; 8 Tex. 410; 16 *id.* 305; 5 McLean, C. C. 133; 19 Mo. 667.

Nullus commodum capere potest de injuriâ suâ propriâ. No one shall take advantage of his own wrong. Coke, Litt. 148 *b*; Broom, Max. 3d Lond. ed. 265; 4 Bingh. N. C. 395; 4 Barnew. & Ald. 409; 10 Mees. & W. Exch. 309; 11 *id.* 680.

Nullus debet agere de dolo, ubi alia actio subest. Where another form of action is given, no one ought to sue in the action *de dolo*. 7 Coke, 92.

Nullus dicitur accessorius post feloniam sed ille qui novit principalem feloniam fecisse, et illum receptavit et comfortavit. No one is called an accessory after the fact but he who knew the principal to have committed a felony, and received and comforted him. Coke, 3d Inst. 138.

Nullus dicitur felo principalis nisi actor, aut qui præsens est, abettans aut auxilians actorem ad feloniam faciendam. No one shall be called a principal felon except the party actually committing the felony, or the party present aiding and abetting in its commission. Coke, 3d Inst. 138.

Nullus idoneus testis in re suâ intelligitur. No one is understood to be a competent witness in his own cause. Dig. 22. 5. 10; 1 Sumn. C. C. 328, 344.

Nullus jus alienum forisfacere potest. No man can forfeit another's right. Fleta, l. 1, c. 28, § 11.

Nullus recedat e curiâ cancellariâ sine remedio. No one ought to depart out of the court of chancery without a remedy. Year B. 4 Hen. VII. 4.

Nullus videtur dolo facere qui suo jure utitur. No man is to be esteemed a wrong-doer who avails himself of his legal right. Dig. 50. 17. 55; Broom, Max. 3d Lond. ed. 124, 118, n. (*q*); 14 Wend. N. Y. 399, 492.

Nunquam crescit ex post facto præteriti delicti æstimatio. The quality of a past offence is never aggravated by that which happens subsequent. Dig. 50. 17. 138. 1; Bacon, Max. Reg. 8; Broom, Max. 3d Lond. ed. 41.

Nunquam decurritur ad extraordinarium sed ubi deficit ordinarium. We are never to recur to what is extraordinary, till what is ordinary fails. Coke, 4th Inst. 84.

Nunquam fictio sine lege. There is no fiction without law.

Nunquam nimis dicitur quod nunquam satis dicitur. What is never sufficiently said is never said too much. Coke, Litt. 375.

Nunquam præscribitur in falso. There is never prescription in case of falsehood (*crimen falsi*). Bell, Dict.

Nunquam res humanæ prosperè succedunt ubi negliguntur divinæ. Human things never prosper when divine things are neglected. Coke, Litt. 95; Wingate, Max. 2.

Nuptiæ non concubitus, sed consensus facit. Not co-habitation but consent makes the marriage. Dig. 50. 17. 30; 1 Bouvier, Inst. n. 239; Coke, Litt. 33.

Obedientia est legis essentia. Obedience is the essence of the law. 11 Coke, 100.

Obtemperandum est consuetudini rationabili tanquam legi. A reasonable custom is to be obeyed like law. 4 Coke, 38.

Occupantis fiunt derelicta. Things abandoned become the property of the (first) occupant. 1 Pet. Adm. 53.

Odiosa et inhonesta non sunt in lege præsumanda. Odious and dishonest acts are not presumed in law. Coke, Litt. 78; 6 Wend. N. Y. 228, 231; 18 N. Y. 295, 300.

Odiosa non præsumuntur. Odious things are not presumed. Burr. Sett. Cas. 190.

Officers may not examine the judicial acts of the court.

Officia judicialia non concedantur antequam vacent. Judicial offices ought not to be granted before they are vacant. 11 Coke, 4.

Officia magistratus non debent esse venalia. The offices of magistrates ought not to be sold. Coke, Litt. 234.

Officit conatus si effectus sequatur. The attempt becomes of consequence, if the effect follows.

Officium nemini debet esse damnosum. An office ought to be injurious to no one. Bell, Dict.

Omissio eorum quæ tacite insunt nihil operatur. The omission of those things which are silently expressed is of no consequence. 2 Bulstr. 131.

Omne actum ab intentione agentis est judicandum. Every act is to be estimated by the intention of the doer. Branch, Princ.

Omne crimen ebrietas et incendit et detegit. Drunkenness inflames and reveals every crime. Coke, Litt. 247.

Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo. All law has either been derived from the consent of the people, established by necessity, or confirmed by custom. Dig. 1. 3. 40; Broom, Max. 3d Lond. ed. 616, n.

Omne magis dignum trahit ad se minus dignum sit antiquius. Every worthier thing draws to it the less worthy, though the latter be more ancient. Coke, Litt. 355.

Omne magnum exemplum habet aliquid ex iniquo, quod publicâ utilitate compensatur. Every great example has some portion of evil, which is compensated by its public utility. Hob. 279.

Omne majus continet in se minus. The greater contains in itself the less. 5 Coke, 115 *a*; Wingate, Max. 206; Story, Ag. § 172; Broom, Max. 3d Lond. ed. 173.

Omne majus dignum continet in se minus dignum. The more worthy contains in itself the less worthy. Coke, Litt. 143.

Omne majus minus in se complecitur. Every greater embraces in itself the minor. Jenk. Cent. Cas. 208.

Omne principale trahit ad se accessorium. Every principal thing draws to itself the accessory. 17 Mass. 425; 1 Johns. N. Y. 580.

Omne quod inædificatur solo cedit. Every thing belongs to the soil which is built upon it. Dig. 41. 1. 7. 10; 47. 3. 1; Inst. 2. 1. 29; Broom, Max. 3d Lond. ed. 355; Fleta, l. 3, c. 2, § 12.

Omne sacramentum debet esse de certa scientiâ. Every oath ought to be founded on certain knowledge. Coke, 4th Inst. 279.

Omne testamentum morte consummatum est. Every will is consummated by death. 3 Coke, 29 *b*; 4 *id.* 61 *b*; 2 Sharswood, Blackst. Comm. 500; Sheppard, Touchst. 401.

Omnes actiones in mundo infra certa tempora habent limitationem. All actions in the world are limited within certain periods. Bracton, 52.

Omnes homines aut liberi sunt aut servi. All men are freemen or slaves. Inst. 1. 3. pr.; Fleta, l. 1, c. 1, § 2.

Omnes licentiam habere his quæ pro se indulta sunt, renunciare. All shall have liberty to renounce those things which have been established in their favor. Code, 2. 3. 29; 1. 3. 51; Broom, Max. 3d Lond. ed. 625.

Omnia præsumuntur ritè et solenniter esse acta. All things are presumed to have been rightly and regularly done. Coke, Litt. 232 *b*; Broom, Max. 3d Lond. ed. 847; 12 C. B. 788; 3 Exch. 191; 6 *id.* 716. *Omnia ritè esse acta præsumuntur.* 11 Cush. Mass. 441; 2 Ohio St. 246, 247; 4 *id.* 148; 6 *id.* 293.

Omnia præsumuntur ritè et solenniter esse acta

donec probetur in contrarium. All things are presumed to have been done regularly and with due formality until the contrary is proved. Broom, Max. 3d Lond. ed. 157, 849; 3 Bingh. 381; 2 Campb. 44; 1 Crompt. & M. Exch. 461; 17 C. B. 183; 5 Barnew. & Ad. 550; 12 Mees. & W. Exch. 251; 12 Wheat. 69, 70.

Omnes prudentes, illa admittere solent quæ probantur iis qui in arte suâ bene versati sunt. All prudent men are accustomed to admit those things which are approved by those who are well versed in the art. 7 Coke, 19.

Omnia delicta in aperto leviora sunt. All crimes committed openly are considered lighter. 8 Coke, 127.

Omnia præsumuntur contra spoliatorem. All things are presumed against a wrong-doer. Broom, Max. 3d Lond. ed. 843.

Omnia præsumuntur legitime facta donec probetur in contrarium. All things are presumed to be done legitimately until the contrary is proved. Coke, Litt. 232.

Omnia præsumuntur rite esse acta. All things are presumed to be done in due form. Coke, Litt. 6.

Omnia quæ jure contrahuntur, contrario jure pereunt. Obligations contracted under a law are destroyed by a law to the contrary. Dig. 50. 17. 100.

Omnia quæ sunt uxoris sunt ipsius viri. All things which are the wife's belong to the husband. Coke, Litt. 112; 2 Kent. Comm. 130, 143.

Omnis actio est loquela. Every action is a complaint. Coke, Litt. 292.

Omnis conclusio boni et veri judicii sequitur ex bonis et veris præmissis et dictis juratorum. Every conclusion of a good and true judgment arises from good and true premises, and the verdicts of jurors. Coke, Litt. 226.

Omnis consensus tollit errorem. Every consent removes error. Coke, 2d Inst. 123.

Omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit. Every definition in the civil law is dangerous, for there is very little that cannot be overthrown. There is no rule in the civil law which is not liable to some exception: and the least difference in the facts of the case renders its application useless. Dig. 50. 17. 202; 2 Wooddeson, Lect. 196.

Omnis definitio in jure periculosa est; parum est enim ut non subverti possit. Every definition in law is perilous, for it is within an ace of being subverted. Dig. 50. 17. 202; 2 Wooddeson, Lect. 196.

Omnis exceptio est ipsa quoque regula. An exception is in itself also a rule.

Omnis innovatio plus novitate perturbat quam utilitate prodest. Every innovation disturbs more by its novelty than it benefits by its utility. 2 Bulstr. 338; 1 Salk. 20.

Omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur. The interpretation of instruments is to be made, if they will admit of it, so that all contradictions may be removed. Jenk. Cent. Cas. 96.

Omnis interpretatio vel declarat, vel extendit, vel restringit. Every interpretation either declares, extends, or restrains.

Omnis novus constitutio futuris temporibus formam imponere debet, non præteritis. Every new statute ought to set its stamp upon the future, not the past. Bracton, 228; Coke, 2d Inst. 95.

Omnis persona est homo, sed non vicissim. Every person is a man, but not every man a person. Calvinus, Lex.

Omnis privatio præsupponit habitum. Every privation presupposes former enjoyment. Coke, Litt. 339.

Omnis querela et omnis actio injuriarum limitata est infra certa tempora. Every plaint and every action for injuries is limited within certain times. Coke, Litt. 114.

Omnis ratihabitio retro trahitur et mandato æquiparatur. Every subsequent ratification has a retrospective effect, and is equivalent to a prior command. Coke, Litt. 207 *a*; Story, Ag. 4th ed. 102; Broom, Max. 3d Lond. ed. 715; 2 Bouvier, Inst. 25; 4 *id.* 26; 8 Wheat. 363; 7 Exch. 726; 10 *id.* 845; 9 C. B. 532, 607; 14 *id.* 53.

Omnis regula suas patitur exceptiones. Every rule of law is liable to its own exceptions.

Omnium contributione sarciatur quod pro omnibus datum est. What is given for all shall be compensated for by the contribution of all. 4 Bingh. 121; 2 Marsh. 309.

Omnium rerum quarum usus est, potest esse abusus, virtute solâ excepta. There may be an abuse of every thing of which there is an use, virtue only excepted. Dav. 79.

Once a fraud, always a fraud. 13 Viner. Abr. 539.

Once a mortgage, always a mortgage. 1 Hilliard, Real Prop. 378.

Once a recompense, always a recompense. 19 Viner, Abr. 277.

Once quit and cleared, ever quit and cleared. Skene. *de verb. sign. iter ad fin.*

One may not do an act to himself.

One should be just before he is generous.

Opinio quæ favet testamento est tuenda. That opinion is to be followed which favors the will.

Oportet quod certæ personæ, terræ, et certi status, comprehendantur in declaratione usuum. It is necessary that certain persons, lands, and estates be comprehended in a declaration of uses. 9 Coke, 9.

Oportet quod certa res deducatur in judicium. A thing, to be brought to judgment, must be certain or definite. Jenk. Cent. Cas. 84; Bracton, 15 *b*.

Oportet quod certa sit res quæ venditur. A thing, to be sold, must be certain or definite.

Oppositа juxta se posita magis elucescunt. Opposites placed next each other appear in a clearer light. 4 Bacon, Works, 256, 258, 353.

Optima enim est legis interpres consuetudo. Usage is the best interpreter of law. Coke, 2d Inst. 18; Broom, Max. 3d Lond. ed. 823.

Optima est lex, quæ minimum relinquit arbitrio judicis. That is the best system of law which confides as little as possible to the discretion of the judge. Bacon, Aph. 46.

Optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum. The best interpretress of a statute is (all the separate parts being considered) the statute itself. 8 Coke, 117; Wingate, Max. 139, max. 68.

Optimam esse legem, quæ minimum relinquit arbitrio judicis; id quod certitudo ejus præstat. That law is the best which leaves the least discretion to the judge; and this is an advantage which results from its certainty. Bacon, Aph. 8.

Optimus interpres rerum usus. Usage is the best interpreter of things. Coke, 2d Inst. 282.

Optimus interpretandi modus est sic legis interpretare ut leges legibus accordant. The best mode of interpreting laws is to make them accord. 8 Coke, 169.

Optimus judex, qui minimum sibi. He is the best judge who prefers as little as possible on his own discretion. Bacon, Aph. 46.

Optimus legum interpres consuetudo. Custom is the best interpreter of laws. Coke, 4th Inst. 75; 2 Parsons, Contr. 53.

Ordine placitandi servato, servantur et jus. The order of pleading being preserved, the law is preserved. Coke, Litt. 303.

Origine propriâ neminem posse voluntate suâ eximi manifestum est. It is manifest that no one by his own will can renounce his origin (put off or discharge his natural allegiance). Code, 10. 34.

4. See 1 Sharswood, Blackst. Comm. c. 10; 20 Johns. N. Y. 313; 3 Pet. 122, 246; Broom, Max. 3d Lond. ed. 74.

Origo rei inspici debet. The origin of a thing ought to be inquired into. 1 Coke, 99.

Paci sunt maxime contraria, vis et injuria. Force and wrong are especially contrary to peace. Coke, Litt. 161.

Pacta conventa, quæ neque contra leges, neque dolo malo inita sunt, omni modo observanda sunt. Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. Cod. 2. 3. 29; Broom, Max. 3d Lond. ed. 624.

Pacta dant legem contractui. Agreements give the law to the contract. Halkers, Max. 118.

Pacta privata juri publico derogare non possunt. Private contracts cannot derogate from the public law. 7 Coke, 23.

Pacta quæ contrà leges constitutionesque vel contrà bonos mores fiunt, nullam vim habere, indubitati juris est. It is indubitable law that contracts against the laws, or good morals, have no force. Cod. 2. 3. 6; Broom, Max. 3d Lond. ed. 620.

Pacta quæ turpem causam continent non sunt observanda. Contracts founded upon an immoral consideration are not to be observed. Dig. 2. 14. 27. 4; 2 Pet. 539; Broom, Max. 3d Lond. ed. 658.

Pactis privatorum juri publico non derogatur. Private contracts do not derogate from public law. Broom, Max. 3d Lond. ed. 621; per Dr. Lushington, Arg. 4 Clark & F. Hou. L. 241; Arg. 3 *id.* 621.

Pacto aliquod licitum est, quid sine pacto non admittitur. By a contract something is permitted, which, without it, could not be admitted. Coke, Litt. 166.

Par in parem imperium non habet. An equal has no power over an equal. Jenk. Cent. Cas. 174. Example: One of two judges of the same court cannot commit the other for contempt.

Parens est nomen generale ad omne genus cognationis. Parent is a general name for every kind of relationship. Coke, Litt. 80; Littleton, § 108; Mag. Cart. Joh. c. 50.

Paria copulantur paribus. Similar things unite with similar.

Paribus sententiis reus absolvitur. When opinions are equal, a defendant is acquitted. Coke, 4th Inst. 64.

Parole font plea. Words make the plea. 5 Mod. 458; Year B. 19 Hen. VI. 48.

Parte quocumque integrante sublata, tollitur totum. An integral part being taken away, the whole is taken away. 8 Coke, 41.

Partus ex legitimo thoro non certius novit matrem quam genitorem suam. The offspring of a legitimate bed knows not his mother more certainly than his father. Fortesque, c. 42.

Partus sequitur ventrem. The offspring follow the condition of the mother. Inst. 2. 1. 19. This is the law in the case of slaves and animals, 1 Bouvier, Inst. n. 167, 502; but with regard to freemen, children follow the condition of the father.

Parum caret natura. Nature takes little heed. 2 Johns. Cas. N. Y. 127, 166.

Parum differunt quæ re concordant. Things differ but little which agree in substance. 2 Bulstr. 66.

Parum est latam esse sententiam, nisi mandetur executioni. It is not enough that sentence should be given unless it be committed to execution. Coke, Litt. 289.

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum. It avails little to know what ought to be done, if you do not know how it is to be done. Coke, 2d Inst. 503.

Pater is est quem nuptiæ demonstrant. The father is he whom the marriage points out. 1 Blackst. Comm. 446; 7 Mart. n. s. 548, 553; Dig. 2. 4. 5; 1 Bouvier, Inst. n. 273, 304, 322; Broom, Max. 3d Lond. ed. 458.

Patria laboribus et expensis non debet fatigari. A jury ought not to be harassed by labors and expenses. Jenk. Cent. Cas. 6.

Patria potestas in pietate debet, non in atrocitate consistere. Paternal power should consist in affection, not in atrocity.

Peccata contra naturam sunt gravissima. Offences against nature are the heaviest. Coke, 3d Inst. 20.

Peccatum peccato addit qui culpæ quam facit patrocinium defensionis adjungit. He adds one offence to another, who, when he commits a crime, joins to it the protection of a defence. 5 Coke, 49.

Pendente lite nihil innovetur. During a litigation nothing should be changed. Coke, Litt. 344. See 20 How. 106: Cross, Lien, 140; 1 Story, Eq. Jur. § 406; 2 Johns. Ch. N. Y. 441; 6 Barb. N. Y. 33.

Per alluvionem id videtur adjici, quod ita paulatim adjicitur, ut intelligere non possumus quantum quoquo momento temporis adjiciatur. That is said to be added by alluvion which is so added little by little that we cannot tell how much is added at any one moment of time. Dig. 41. 1. 7. 1: Hale, de Jur. Mar. pars 1, c. 4; Fleta, l. 3, c. 2, § 6.

Per rationes perrenitur ad legitimam rationem. By reasoning we come to legal reason. Littleton, § 386.

Per rerum naturam, factum negantis nulla probatio est. It is in the nature of things that he who denies a fact is not bound to give proof.

Per varios actus, legem experientia facit. By various acts experience frames the law. Coke, 4th Inst. 50.

Perfectum est cui nihil deest secundum suæ perfectionis vel naturæ modum. That is perfect which wants nothing according to the measure of its perfection or nature. Hob. 151.

Periculosum est res novas et inusitatas inducere. It is dangerous to introduce new and unaccustomed things. Coke, Litt. 379.

Periculosum existimo quod bonorum virorum non comprobatur exemplo. I think that dangerous which is not warranted by the example of good men. 9 Coke, 97.

Periculum rei venditæ, nondum traditæ, est emptoris. The purchaser runs the risk of the loss of a thing sold, though not delivered. 1 Bouvier, Inst. n. 939; 2 Kent, Comm. 498, 499; 4 Barnew. & C. 481, 941.

Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt. They are perjured who, preserving the words of an oath, deceive the ears of those who receive it. Coke, 3d Inst. 166.

Perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit ab initio non valet. It is a perpetual law that no human or positive law can be perpetual; and a clause in a law which precludes the power of abrogation is void *ab initio.* Bacon, Max. Reg. 19; Broom, Max. 3d Lond. ed. 27.

Perpetuities are odious in law and equity.

Persona conjuncta æquiparatur interesse proprio. The interest of a personal connection is sometimes regarded in law as that of the individual himself. Bacon, Max. Reg. 18; Broom, Max. 3d Lond. ed. 474.

Persona est homo, cum statu quodam consideratus. A person is a man considered with reference to a certain *status.* Heineccius, Elem. Jur. Civ. l. 1, tit. 3, § 75.

Personæ vice fungitur municipium et decuria. Towns and boroughs act as if persons. 23 Wend. N. Y. 103, 144.

Personal things cannot be done by another. Finch, Law, b. 1, c. 3, n. 14.

Personal things cannot be granted over. Finch, Law, b. 1, c. 3, n. 15.

Personal things die with the person. Finch, Law, b. 1, c. 3, n. 16.

Perspicua vera non sunt probanda. Plain truths need not be proved. Coke, Litt. 16.

Pirata est hostis humani generis. A pirate is an enemy of the human race. Coke, 3d Inst. 113.

Plena et celeris justitia fiat partibus. Let full and speedy justice be done to the parties. Coke, 4th Inst. 67.

Pluralis numerus est duobus contentus. The plural number is contained in two. 1 Rolle, 476.

Pluralities are odious in law.

Plures coheredes sunt quasi unum corpus, propter unitatem juris quod habent. Several co-heirs are as one body, by reason of the unity of right which they possess. Coke, Litt. 163.

Plures participes sunt quasi unum corpus, in eo quod unum jus habent. Several part-owners are as one body, by reason of the unity of their rights. Coke, Litt. 164.

Plus exempla quam peccata nocent. Examples hurt more than offences.

Plus peccat auctor quam actor. The instigator of a crime is worse than he who perpetrates it. 5 Coke, 99.

Plus valet unus oculatus testis, quam auriti decem. One eye-witness is better than ten ear-ones. Coke, 4th Inst. 279.

Plus vident oculi quam oculus. Eyes see more than one eye. Coke, 4th Inst. 160.

Pœna ad paucos, metus ad omnes. Punishment to few, dread or fear to all.

Pœna ad paucos, metus ad omnes perveniat. If punishment be inflicted on a few, a dread comes to all.

Pœna ex delicto defuncti, hæres teneri non debet. The heir ought not to be bound in a penalty inflicted for the crime of the ancestor. Coke, 2d Inst. 198.

Pœna non potest, culpa perennis erit. Punishment cannot be, crime will be, perpetual. 21 Viner, Abr. 271.

Pœnæ potius molliendæ quam exasperandæ sunt. Puni-hments should rather be softened than aggravated. Coke, 3d Inst. 220.

Pœnæ sint restringendæ. Punishments should be restrained. Jenk. Cent. Cas. 29.

Pœnæ suos tenere debet actores et non alios. Punishment ought to be inflicted upon the guilty, and not upon others. Bracton, 380 *b;* Fleta, l. 1, c. 38, § 12; l. 4, c. 17, § 17.

Politiæ legibus non leges politiis adaptandæ. Politics are to be adapted to the laws, and not the laws to politics. Hob. 154.

Ponderantur testes non numerantur. Witnesses are weighed, not counted. 1 Starkie, Ev. 554; Best, Ev. 426, § 389; 14 Wend. N. Y. 105, 109.

Posito uno oppositorum negatur alterum. One of two opposite positions being affirmed, the other is denied. 3 Rolle, 422.

Possessio est quasi pedis positio. Possession is, as it were, the position of the foot. 3 Coke, 42.

Possessio fratris de feodo simplici facit sororem esse hæredem. Possession of the brother in fee-simple makes the sister to be heir. 3 Coke, 42; 2 Sharswood, Blackst. Comm. 227; Broom, Max. 3d Lond. ed. 473.

Possessio pacifica pour anns 60 facit jus. Peaceable possession for sixty years gives a right. Jenk. Cent. Cas. 26.

Possession is a good title, where no better title appears. 20 Viner, Abr. 278.

Possession of the termor, possession of the reversioner.

Possessor has right against all men but him who has the very right.

Possibility cannot be on a possibility.

Posteriora derogant prioribus. Posterior things derogate from things prior. 1 Bouvier, Inst. n. 90.

Postliminium fingit eum qui captus est in civitate semper fuisse. Postliminy feigns that he who has been captured has never left the state. Inst. 1. 12. 5; Dig. 49. 51.

Potentia debet sequi justitiam, non antecedere. Power ought to follow, not to precede justice. 3 Bulstr. 199.

Potentia inutilis frustra est. Useless power is vain.

Potentia non est nisi ad bonum. Power is not conferred but for the public good.

Potest quis renunciare pro se, et suis, jus quod pro se introductum est. A man may relinquish, for himself and those claiming under him, a right which was introduced for his own benefit. See 1 Bouvier, Inst. n. 83.

Potestas strictè interpretatur. Power should be strictly interpreted. Jenk. Cent. Cas. 17.

Potestas suprema seipsam dissolvere potest, ligare non potest. Supreme power can dissolve, but cannot bind itself. Bacon, Max. Reg. 19.

Potior est conditio defendentis. Better is the condition of the defendant, than that of the plaintiff. Broom, Max. 3d Lond. ed. 664; 15 Pet. 471.

Potior est conditio possidentis. Better is the condition of the possessor. Broom, Max. 3d Lond. ed. 201, n.

Præpropera consilia, raro sunt prospera. Hasty counsels are seldom prosperous. Coke, 4th Inst. 57.

Præscriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis. Prescription is a title by authority of law, deriving its force from use and time. Coke, Litt. 113.

Præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ. Prescription and the execution of a contract do not affect the validity of the contract, but the time and manner of bringing an action. 3 Mass. 84; Decouche *vs.* Savetier, 3 Johns. Ch. N. Y. 190, 219.

Præsentare nihil aliud est quam præsto dare seu offerre. To present is no more than to give or offer on the spot. Coke, Litt. 120.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis. The presence of the body cures the error in the name; the truth of the name cures an error in the description. Bacon, Max. Reg. 25; Broom, Max. 3d Lond. ed. 568; 6 Coke, 66; 3 Barnew. & Ad. 640; 6 Term, 675; 11 C. B. 996; 1 Hou. L. Cas. 792; 3 De Gex, M. & G. Ch. 140.

Præstat cautela quam medela. Prevention is better than cure. Coke, Litt. 304.

Præsumatur pro justitia sententiæ. The justice of a sentence should be presumed. Best, Ev. Int. 42; Masscardus *de prob. conc.* 1237. n. 2.

Præsumitur pro legitimatione. Legitimacy is to be presumed. 5 Coke, 98 *b;* 1 Sharswood, Blackst. Comm. 457.

Præsumitur pro legitimatione. There is a presumption in favor of legitimation. 5 Coke, 98 *b;* 1 Sharswood, Blackst. Comm. 457.

Præsumptio, ex eo quod plerumque fit. Presumptions arise from what generally happens. 22 Wend. N. Y. 425, 475.

Præsumptio violenta, plena probatio. Violent presumption is full proof.

Præsumptio violenta valet in lege. Strong presumption avails in law. Jenk. Cent. Cas. 58.

Præsumptiones sunt conjecturæ ex signo verisimili ad probandum assumptæ. Presumptions are conjectures from probable proof, assumed for purposes of evidence. J. Voet. *ad Pand.* l. 22, tit. 3, n. 14.

Prætextu liciti non debet admitti illicitum. Under pretext of legality, what is illegal ought not to be admitted. 10 Coke, 88.

Praxis judicum est interpres legum. The practice of the judges is the interpreter of the laws. Hob. 96; Branch, Princ.

Precedents have as much law as justice.

Precedents that pass sub-silentio are of little or no authority. 16 Viner, Abr. 499.

Pretium succedit in locum rei. The price stands in the place of the thing sold. 1 Bouvier, Inst. n. 930; 2 Bulstr. 312.

Previous intentions are judged by subsequent acts. 4 Den. N. Y. 319, 320.

Prima pars æquitatis æqualitas. The radical element of justice is equality.

Primo excutienda est verbi vis, ne sermonis vitio obstructur oratio, sive lex sine argumentis. The force of a word is to be first examined, lest by the fault of diction the sentence be destroyed or the law be without arguments. Coke, Litt. 68.

Princeps et respublica ex justâ causâ possunt rem meam auferre. The king and the commonwealth for a just cause can take away my property. 12 Coke, 13.

Princeps legibus solutus est. The emperor is free from laws. Dig. 1. 3. 31; Hallifax, Anal. pref. vi, vii, note.

Principalis debet semper excuti antequam perveniatur ad fidei jussores. The principal should always be exhausted before coming upon the sureties. Coke, 2d Inst. 19.

Principia data sequuntur concomitantia. Given principles are followed by their concomitants.

Principia probant, non probantur. Principles prove, they are not proved. 3 Coke, 40. See PRINCIPLES.

Principiis obsta. Oppose beginnings. Branch, Princ.

Principiorum non est ratio. There is no reasoning of principles. 2 Bulstr. 239. See PRINCIPLES.

Principium est potissima pars cujusque rei. The beginning is the most powerful part of a thing. 10 Coke, 49.

Prior tempore, potior jure. He who is first in time is preferred in right. Coke, Litt. 14 *a*; 2 P. Will. 491; 1 Term, 733; 9 Wheat. App. 24.

Privatio præsupponit habitur. A deprivation presupposes a possession. 2 Rolle, 419.

Privatis pactionibus non dubium est non lædi jus cæterorum. There is no doubt that the rights of others cannot be prejudiced by private agreements. Dig. 2. 15. 3. pr; Broom, Max. 3d Lond. ed. 623.

Privatorum conventio juri publico non derogat. Private agreements cannot derogate from public law. Dig. 50. 17. 45. 1.

Privatum commodum publico cedit. Private yields to public good. Jenk. Cent. Cas. 273.

Privatum incommodum publico bono pensatur. Private inconvenience is made up for by public good.

Privilegium est beneficium personale et extinguitur cum persona. A privilege is a personal benefit and dies with the person. 3 Bulstr. 8.

Privilegium est quasi privata lex. A privilege is, as it were, a private law. 2 Bulstr. 189.

Privilegium non valet contra rempublicam. A privilege avails not against the commonwealth. Bacon. Max. 25; Broom, Max. 3d Lond. ed. 17.; Moy. Max. 9th ed. 34.

Pro possessore habetur qui dolo injuriâve destit possidere. He is esteemed a possessor whose possession has been disturbed by fraud or injury. Off. of Ex. 166.

Probandi necessitas incumbit illi qui agit. The necessity of proving lies with him who sues. Inst. 2. 20. 4.

Probationes debent esse evidentes, (id est) perspicuæ et facilem intelligi. Proofs ought to be made evident, (that is) clear and easy to be understood. Coke, Litt. 283.

Probatis extremis, præsumitur media. The extremes being proved, the intermediate proceedings are presumed. 1 Greenleaf, Ev. § 20.

Processus legis est gravis vexatio, executio legis coronat opus. The process of the law is a grievous vexation; the execution of the law crowns the work. Coke, Litt. 289.

Prohibetur ne quis faciat in suo quod nocere possit alieno. It is prohibited to do on one's own property that which may injure another's. 9 Coke, 59.

Proles sequitur sortem paternam. The offspring follows the condition of the father. 1 Sandf. Ch. N. Y. 583, 660.

Propinquior excludit propinquum; propinquâ remotum; et remotus remotiorem. He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is more remote. Coke, Litt. 10.

Propositum indefinitum æquipollet universali. An indefinite proposition is equal to a general one.

Proprietas totius navis carinæ causam sequitur. The property of the whole ship follows the ownership of the keel. Dig. 6. 1. 61. Provided it had not been constructed with the materials of another. *Id.*; 2 Kent, Comm. 362.

Proprietas verborum est salus proprietatum. The propriety of words is the safety of property.

Proprietates verborum observandæ sunt. The proprieties (*i. e.* proper meanings) of words are to be observed. Jenk. Cent. Cas. 136.

Protectio trahit subjectionem, subjectio protectionem. Protection draws to it subjection; subjection, protection. Coke, Litt. 65.

Proviso est providere præsentia et futura, non præterita. A proviso is to provide for the present and the future, not the past. 2 Coke, 72; Vaugh. 279; Broom. Max. 3d Lond. ed. 275.

Proximus est cui nemo antecedit; supremus est quem nemo sequitur. He is next whom no one precedes; he is last whom no one follows. Dig. 50. 16. 92.

Prudentur agit qui præcepto legis obtemperat. He act prudently who obeys the commands of the law. 5 Coke, 49.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children. 3 Coke, 40.

Pupillus pati posse non intelligitur. A pupil is not considered able to do an act which would be prejudicial to him. Dig. 50. 17. 110. 2; 2 Kent, Comm. 245.

Purchaser without notice not obliged to discover to his own hurt. See 4 Bouvier, Inst. n. 4336. See INFRA PRÆSIDIA.

Quæ ab hostibus capiuntur, statim capientium fiunt. Things taken from public enemies immediately become the property of the captors. Inst. 2. 1. 17; Grotius *de jur. Bell.* l. 3, c. 6, § 12.

Quæ ab initio inutilis fuit institutio, ex post facto convalescere non potest. An institution void in the beginning cannot acquire validity from after-matter. Dig. 50. 17. 210.

Quæ accessionum locum obtinent, extinguuntur cùm principales res peremptæ fuerint. When the principal is destroyed, those things which are accessory to it are also destroyed. Pothier, Obl. pt. 3, c. 6, art. 4; Dig. 33. 8. 2; Broom, Max. 3d Lond. ed. 439.

Quæ ad unum finem loquuta sunt; non debent ad alium detorqueri. Words spoken to one end ought not to be perverted to another. 4 Coke, 14.

Quæ cohærent personæ à personâ separari nequeunt. Things which belong to the person ought not to be separated from the person. Jenk. Cent. Cas. 28.

Quæ communi legi derogant stricte interpretantur. Laws which derogate from the common law ought to be strictly construed. Jenk. Cent. Cas. 221.

Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam. Things introduced contrary to the reason of the law ought not to be drawn into precedents. 12 Coke, 75.

Quæ dubitationis causâ tollendæ inseruntur communem legem non lædunt. Whatever is inserted for the purpose of removing doubt does not hurt or affect the common law. Coke, Litt. 205.

Quæ dubitationis tollendæ causâ contractibus inseruntur, jus commune non lædunt. Particular clauses inserted in agreements to avoid doubts and ambiguity do not prejudice the common law. Dig. 50. 17. 81.

Quæ in curiâ acta sunt rite agi præsumuntur. Whatever is done in court is presumed to be rightly done. 3 Bulstr. 43.

Quæ in partes dividi nequeunt solida, a singulis præstantur. Things (*i.e.* services and rents) which cannot be divided into parts are rendered entire by each severally. 6 Coke, 1.

Quæ in testamento ita sunt scripta ut intelligi non possunt, perinde sunt ac si scripta non essent. Things which are so written in a will that they cannot be understood, are as if they had not been written. Dig. 50. 17. 73. 3.

Quæ incontinenter vel certo fiunt in esse videntur. Whatever things are done at once and certainly, appear part of the same transaction. Coke, Litt. 236.

Quæ inter alios acta sunt nemini nocere debent, sed prodesse possunt. Transactions between strangers may benefit, but cannot injure, persons who are parties to them. 6 Coke, 1.

Quæ legi communi derogant non sunt trahenda in exemplum. Things derogatory to the common law are not to be drawn into precedent. Branch, Princ.

Quæ legi communi derogant strictè interpretantur. Those things which derogate from the common law are to be construed strictly. Jenk. Cent. Cas. 29.

Quæ mala sunt inchoata in principio vix bono peregruntur exitu. Things had in the commencement seldom end well. 4 Coke, 2.

Quæ non valeant singula, juncta juvant. Things which may not avail singly, when united have an effect. 3 Bulstr. 132.

Quæ præter consuetudinem et morem majorum fiunt, neque placent, neque recta videntur. What is done contrary to the custom and usage of our ancestors, neither pleases nor appears right. 4 Coke, 78.

Quæ propter necessitatem recepta sunt, non debent in argumentum trahi. Things which are tolerated on account of necessity ought not to be drawn into precedent. Dig. 50. 17. 162.

Quæ rerum naturâ prohibentur, nullâ lege confirmata sunt. What is prohibited in the nature of things can be confirmed by no law. Finch, Law, 74.

Quæ sunt minoris culpæ sunt majoris infamiæ. Things which are of the smaller guilt are of the greater infamy. Coke, Litt. 6.

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law, is considered within the law itself. Coke, 2d Inst. 689.

Quælibet concessio fortissime contra donatorem interpretanda est. Every grant is to be taken most strongly against the grantor. Coke, Litt. 183 *a*.

Quælibet jurisdictio cancellos suos habet. Every jurisdiction has its bounds. Jenk. Cent. Cas. 139.

Quælibet pœna corporalis, quamvis minima, major est quâlibet pœnâ pecuniariâ. Every corporal punishment, although the very least, is greater than any pecuniary punishment. Coke, 3d Inst. 220.

Quæras de dubiis, legem bene discere si vis. Inquire into doubtful points if you wish to understand the law well. Littleton, § 443.

Quære de dubiis, quia per rationes pervenitur ad legitimam rationem. Inquire into doubtful points, because by reasoning we arrive at legal reason. Littleton, § 377.

Quærere dat sapere quæ sunt legitima verè. To investigate is the way to know what things are really lawful. Littleton, § 443.

Qualitas quæ inesse debet, facile præsumitur. A quality which ought to form a part is easily presumed.

Quam longum debet esse rationabile tempus, *non definitur in lege, sed pendet ex discretione justiciariorum.* What is *reasonable time* the law does not define; it is left to the discretion of the judges. Coke, Litt. 56. See 11 Coke, 44.

Quam rationabilis debet esse finis, non definitur, sed omnibus circumstantiis inspectis pendet ex justiciariorum discretione. What a reasonable fine ought to be is not defined, but is left to the discretion of the judges, all the circumstances being considered. 11 Coke, 44.

Quamvis aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. Although in itself a thing may not be bad, yet if it holds out a bad example it is not to be done. Coke, 2d Inst. 564.

Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cessat. Although the law speaks generally, it is to be restrained, since when the reason on which it is founded fails, it fails. Coke, 4th Inst. 330.

Quando abest proviso partis, adest proviso legis. When a provision of the party is lacking, the provision of the law is at hand. 13 C. B. 960.

Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. When any thing is granted, that also is granted without which it cannot be of effect. 9 Barb. N. Y. 516, 518; 10 *id.* 354, 359.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When any thing is commanded, every thing by which it can be accomplished is also commanded. 5 Coke, 116. See 7 C. B. 886; 14 *id.* 107; 6 Exch. 886, 889; 10 *id.* 449; 2 Ell. & B. 301; Story, Ag. 4th ed. 110, 179, 242, 299; Broom, Max. 3d Lond. ed. 431.

Quando aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. When any thing by itself is not evil, and yet may be an example for evil, it is not to be done. Coke, 2d Inst. 564.

Quando aliquid prohibetur ex directo, prohibetur et per obliquum. When any thing is prohibited directly, it is also prohibited indirectly. Coke, Litt. 223.

Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud. When any thing is prohibited, every thing by which it is reached is prohibited. Coke, 2d Inst. 48; Broom, Max. 3d Lond. ed. 432; Wingate, Max. 618. See 7 Clark & F. Hou. L. 509, 546; 4 Barnew. & C. 187, 193; 2 Term, 251, 252; 8 *id.* 301, 415; 15 Mees. & W. Exch. 7; 11 Wend. N. Y. 329.

Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest. When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. 3 Kent, Comm. 421.

Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia. When a deed contains a general clause, and afterwards descends to special words, consistent with the general clause, the deed is to be construed according to the special words. 8 Coke, 154.

Quando de uno et eâdem re, duo onerabiles existunt, unus, pro insufficientiâ alterius, de integro onerabitur. When two persons are liable concerning one and the same thing, if one makes default the other must bear the whole. Coke, 2d Inst. 277.

Quando dispositio referri potest ad duas res, ita quod secundum relationem unam vitiatur et secundum alteram utilis sit, tum facienda est relatio ad illam ut valeat dispositio. When a disposition may be made to refer to two things, so that according to

one reference it would be vitiated and by the other it would be made effectual, such a reference must be made that the disposition shall have effect. 6 Coke, 76 *b*.

Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem. When different acts are required to the formation of an estate, the law chiefly regards the original act. 10 Coke, 49.

Quando duo jura concurrent in unâ personâ, æquum est ac si essent in diversis. When two rights concur in one person, it is the same as if they were in two separate persons. 4 Coke, 118.

Quando jus domini regis et subditi concurrunt jus regis præfer i debet. When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. 1 Coke, 129; Coke, Litt 30 *b*; Broom. Max. 3d Lond. ed. 66.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. When the law gives any thing, it gives the means of obtaining it. 5 Coke, 47; 3 Kent, Comm. 421.

Quando lex aliquid alicui concedit, omnia incidentia tacitè conceduntur. When the law gives any thing, it gives tacitly what is incident to it. Coke, 2d Inst. 326; Hob. 234.

Quando lex aliquid aliquo concedit, conceditur et id sine quo res ipsa esse non potest. When the law grants a thing to any one, it grants that also without which the thing itself cannot exist. 15 Barb. N. Y. 153, 160.

Quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda. When the law is special, but its reason is general, the law is to be understood generally. Coke, 2d Inst. 83; 10 Coke, 101.

Quando licet id quod majus, videtur licere id quod minus. When the greater is allowed, the less seems to be allowed also. Sheppard, Touchst. 429.

Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. When more is done than ought to be done, that too shall be considered as performed which should have been performed: as, if a man having a power to make a lease for ten years, make one for twenty years, it shall be void only for the surplus. Broom, Max. 3d Lond. ed. 166; 5 Coke, 115; 8 *id.* 85 *a*.

Quando quod ago non valet ut ago, valeat quantum valere potest. When that which I do does not have effect as I do it, let it have as much effect as it can. 16 Johns. N. Y. 172, 178; 3 Barb. Ch. N. Y. 242, 261.

Quando res non valet ut ago, valeat quantum valere potest. When a thing is of no force as I do it, it shall have as much as it can have. Cowp. 600; Broom, Max. 3d Lond. ed. 483; 2 Smith, Lead. Cas. 294; 6 East, 105; 1 Ventr. 216; 1 H. Blackst. 614, 620.

Quando verba et mens congruunt, non est interpretationi locus. When the words and the mind agree, there is no place for interpretation.

Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutum est intelligendum. When the words of a statute are special, but the reason or object of it general, the statute is to be construed generally. 10 Coke, 101 *b*.

Quemadmodum ad quæstionem facti non respondent judices, ita ad quæstionem juris non respondent juratores. In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law. Coke, Litt. 295.

Qui accusat integræ famæ sit et non criminosus. Let him who accuses be of clear fame, and not criminal. Coke, 3d Inst. 26.

Qui adimit medium dirimit finem. He who takes away the means destroys the end. Coke. Litt. 161.

Qui aliquid statuerit parte inauditâ alterâ, æquum licet dixerit, haud æquum fecerit. He who decides any thing, a party being unheard, though he should decide right, does wrong. 6 Coke, 52; 4 Blackstone, Comm. 483.

Qui alterius jure utitur, eodem jure uti debet. He who uses the right of another ought to use the same right. Pothier, Tr. *De Change*, pt. 1, c. 4, § 114; Broom, Max. 3d Lond. ed. 421.

Qui bene distinguit, bene docet. He who distinguishes well, teaches well. Coke, 2d Inst. 470.

Qui bene interrogat, bene docet. He who questions well learns well. 3 Bulstr. 227.

Qui cadit à syllaba cadit à totâ causa. He who fails in a syllable fails in his whole cause. Bract. fol. 211; Stat. Wales, 12 Edw. I.; 3 Sharswood, Blackst. Comm. 407.

Qui concedit aliquid, concedere videtur et id sine quo concessio est irrita, sine quo res ipsa esse non potuit. He who grants any thing is considered as granting that without which his grant would be idle, without which the thing itself could not exist. 11 Coke, 52; Jenk. Cent. Cas. 32.

Qui confirmat nihil dat. He who confirms does not give. 2 Bouvier, Inst. n. 2069.

Qui contemnit præceptum, contemnit præcipientem. He who contemns the precept contemns the party giving it. 12 Coke, 96.

Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus. He who contracts knows, or ought to know, the quality of the person with whom he contracts (otherwise he is not excusable). Dig. 50. 17. 19; 2 Hagg. Cons.; Story, Confl. Laws, § 76.

Qui dat finem, dat media ad finem necessaria. He who gives an end gives the means to that end. 3 Mass. 129.

Qui destruit medium, destruit finem. He who destroys the means destroys the end. 11 Coke, 51; Sheppard, Touchst. 342; Coke, Litt. 161 *a*.

Qui doit inheriter al père, doit inheriter al fits. He who ought to inherit from the father ought to inherit from the son. 2 Sharswood, Blackst. Comm. 250, 273; Broom, Max. 3d Lond. ed. 459.

Qui evertit causam, evertit causatum futurum. He who overthrows the cause overthrows its future effects. 10 Coke, 51.

Qui ex damnato coitu nascuntur, inter liberos non computentur. They who are born of an illicit union should not be counted among children. Coke, Litt. 8. See 1 Bouvier, Inst. n. 259; Bracton, 5; Broom, Max. 3d Lond. ed. 460.

Qui facit id quod plus est, facit id quod minus est, sed non convertitur. He who does that which is more does that which is less, but not vice versâ. Bracton, 207 *b*.

Qui facit per alium facit per se. He who acts by or through another acts himself; *i.e.* the acts of an agent are the acts of the principal. 1 Sharswood, Blackst. Comm. 429; Story, Ag. § 440; 2 Bouvier, Inst. nn. 1273, 1335, 1336; 7 Mann. & G. 32, 33; 16 Mees. & W. 26; 8 Scott, N. R. 590; 6 Clark & F. Hou. L. 600; 10 Mass. 155.

Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi. He who has jurisdiction to loosen has jurisdiction to bind. 12 Coke. 59.

Qui hæret in litera, hæret in cortice. He who adheres to the letter adheres to the bark. Coke, Litt. 289; 5 Coke, 4 *b*; 11 *id.* 34 *b*; 12 East, 372.

Qui ignorat quantum solvere debeat, non potest in probus videri. He who does not know what he ought to pay does not want probity in not paying. Dig. 50. 17. 99.

Qui in jus dominiumve alterius succedit jure ejus uti debet. He who succeeds to the right or property of another ought to use his right, *i.e.* holds it subject to the same rights and liabilities as attached to it in the hands of the assignor. Dig. 50. 17. 177; Broom, Max. 3d Lond. ed. 420, 425.

Qui in utero est, pro jam nato habetur quoties de ejus commodo quæritur. He who is in the womb is considered as born, whenever his benefit is concerned.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal rights harms no one.

Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est. He who does any thing by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. 10 Coke, 76; Dig. 50. 17. 167. 1.

Qui male agit, odit lucem. He who acts badly hates the light. 7 Coke, 66.

Qui mandat ipse fecisse videtur. He who commands (a thing to be done) is held to have done it himself. Story, Bailm. § 147.

Qui melius probat, melius habet. He who proves most recovers most. 9 Viner, Abr. 235.

Qui molitur insidias in patriam, id facit quod insanus nauta perforare navem in quâ vehitur. He who betrays his country is like the insane sailor who bores a hole in the ship which carries him. Coke, 3d Inst. 36.

Qui nascitur sine legitimo matrimonio, matrem sequitur. He who is born out of lawful matrimony follows the condition of the mother.

Qui non cadunt in constantem virum, vani timores sunt æstimandi. Those are to be esteemed vain fears which do not affect a man of a firm mind. 7 Coke, 27.

Qui non habet, ille non dat. Who has not, he gives not. Sheppard, Touchst. 243; 4 Wend. N. Y. 619.

Qui non habet in ære luat in corpore, ne quis peccetur impunè. He who cannot pay with his purse must suffer in his person, lest he who offends should go unpunished. Coke, 2d Inst. 173; 4 Blackstone, Comm. 20.

Qui non habet potestatem aliemandi habet necessitatem retinendi. He who has not the power of alienating is obliged to retain. Hob. 336.

Qui non improbat, approbat. He who does not disapprove approves. Coke, 3d Inst. 27.

Qui non libere veritatem pronunciat, proditor est veritatis. He who does not freely speak the truth is a betrayer of the truth.

Qui non obstat quod obstare potest facere videtur. He who does not prevent what he can, seems to commit the thing. Coke, 2d Inst. 146.

Qui non prohibet cum prohibere possit, jubet. He who does not forbid when he can forbid, commands. 1 Sharswood, Blackst. Comm. 430.

Qui non prohibet quod prohibere potest assentire videtur. He who does not forbid what he can forbid, seems to assent. Coke, 2d Inst. 308; 8 Exch. 304.

Qui non propulsat injuriam quando potest, infert. He who does not repel a wrong when he can, occasions it. Jenk. Cent. Cas. 271.

Qui obstruit aditum, destruit commodum. He who obstructs an entrance destroys a conveniency. Coke, Litt. 161.

Qui omne dicit, nihil excludit. He who says all excludes nothing. Coke, 4th Inst. 81.

Qui parcit nocentibus innocentibus punit. He who spares the guilty punishes the innocent. Jenk. Cent. Cas. 126.

Qui peccat ebrius, luat sobrius. He who offends drunk must be punished when sober. Car. 133.

Qui per alium facit per seipsum facere videtur. He who does any thing through another is considered as doing it himself. Coke, Litt. 258.

Qui per fraudem agit, frustra agit. He who acts fraudulently acts in vain. 2 Rolle, 17.

Qui potest et debet retare, jubet. He who can and ought to forbid, and does not, commands.

Qui primum pecat ille facit rixam. He who first offends causes the strife.

Qui prior est tempore, potior est jure. He who is first or before in time is stronger in right. Coke, Litt. 14 *a*; 1 Story, Eq. Jur. § 64 *d*; Story, Bailm. § 312; 1 Bouvier, Inst. n. 952: 4 *id.* 3728; 1 Smith, Lead. Cas. 4th Hare & W. ed. 440; 3 East, 93; 24 Miss. 298.

Qui pro me aliquid facit, mihi facisse videtur. He who does any benefit (to another) for me is considered as doing it to me. Coke, 2d Inst. 501.

Qui providet sibi, providet hæredibus. He who provides for himself provides for his heirs.

Qui rationem in omnibus quærunt, rationem subvertunt. He who seeks a reason for every thing subverts reason. 2 Coke, 75; Broom, Max. 3d Lond. ed. 149.

Qui semel actionem renunciaverit, amplius repetere non potest. He who renounces his action once cannot any more bring it. 8 Coke, 59. See RETRAXIT.

Qui semel malus, semper præsumitur esse malus in eodem genere. He who is once bad is presumed to be always so in the same degree. Croke Car. 317; Best, Ev. 345.

Qui sentit commodum, sentire debet et onus. He who derives a benefit from a thing ought to bear the disadvantages attending it. 2 Bouvier, Inst. n. 1433; 2 Woodb. & M. C. C. 217; 1 Stor. Const. 78; Broom, Max. 3d Lond. ed. 630.

Qui sentit onus, sentire debet et commodum. 1 Coke, 99 *a*; Broom, Max. 3d Lond. ed. 638; 1 Serg. & R. Penn. 180; Coote, Mortg. 3d ed. 517 (*d*); Francis, Max. 5.

Qui tacet consentire videtur. He who is silent appears to consent. Jenk. Cent. Cas. 32.

Qui tacet consentire videtur ubi tractatur de ejus commodo. He who is silent is considered as assenting, when his advantage is debated. 9 Mod. 38.

Qui tacet non utique fatetur, sed tamen verum est eum non negare. He who is silent does not indeed confess, but yet it is true that he does not deny. Dig. 50. 17. 142.

Qui tardius solvit, minus solvit. He who pays tardily pays less than he ought. Jenk. Cent. Cas. 38.

Qui timent, cavent et vitant. They who fear take care and avoid. Off. Ex. 162; Branch, Prine.

Qui vult decipi, decipiatur. Let him who wishes to be deceived, be deceived. De Gex, M. & G. Ch. 687, 710; Sheppard, Touchst. 56.

Quicquid acquiritur servo, acquiritur domino. Whatever is acquired by the servant is acquired for the master. 15 Viner, Abr. 327.

Quicquid demonstratæ rei additur satis demonstratæ frustra est. Whatever is added to the description of a thing already sufficiently described is of no effect. Dig. 33. 4. 1. 8; Broom, Max. 3d Lond. ed. 562.

Quicquid est contra normam recti est injuria. Whatever is against the rule of right is a wrong. 3 Bulstr. 313.

Quicquid in excessu actum est, lege prohibitur. Whatever is done in excess is prohibited by law. Coke, 2d Inst. 107.

Quicquid judicis auctoritati subjicitur, novitati non subjicitur. Whatever is subject to the authority of a judge is not subject to innovation. Coke, 4th Inst. 66.

Quicquid plantatur solo, solo cedit. Whatever is affixed to the soil belongs to it. Went. Off. Ex. 145. See Ambl. 113; 3 East, 51; FIXTURES.

Quicquid recipitur, recipitur secundum modum recipientis. Whatever is received is received according to the intention of the recipient. Broom, Max. 3d Lond. ed. 727; Halkers, Max. 149: Law Mag. 1855, p. 21: 2 Bingh. N. C. 461; 2 Barnew. & C. 72; 14 Sim. Ch. 522; 2 Clark & F. Hou. L. 681; 2 Crompt. & J. Exch. 678; 14 East, 239, 243 *e*.

Quicquid solvitur, solvitur secundum modum solventis. Whatever is paid is to be applied according to the intention of the payor. 2 Vern. 606. See APPROPRIATION OF PAYMENTS.

Quid sit jus, et in quo consistit injuria, legis est definire. What constitutes right, and what injury, it is the business of the law to declare. Coke, Litt. 158 *b*.

Quieta non movere. Not to unsettle things which are established. 28 Barb. N. Y. 9, 22.

Quilibet potest renunciare juri pro se introducto. Any one may renounce a law introduced for his own benefit. To this rule there are some exceptions. See 1 Bouvier, Inst. n. 83; 3 Curt. C. C. 393; 1 Exch. 657.

Quisquis est qui velit juris consultus haberi, continuet studium, velit a quocunque doceri. Whoever wishes to be held a jurisconsult, let him continually study, and desire to be taught by every body.

Quo ligatur, eo dissolvitur. As a thing is bound, so it is unbound. 2 Rolle, 21.

Quocunque modo velit, quocunque modo possit. In any way he wishes, in any way he can. 14 Johns. N. Y. 484, 492.

Quod ù quoque pœnæ nomine exactum est id eidem restituere nemo cogitur. That which has been exacted as a penalty no one is obliged to restore. Dig. 50. 17. 46.

Quod ab initio non valet, in tractu temporis non convalescet. What is not good in the beginning cannot be rendered good by time. Merlin, Rép. verb. *Regle de Droit.* This, though true in general, is not universally so. 4 Coke, 26; Broom, Max. 3d Lond. ed. 166, 172, n.

Quod ad jus naturale attinet, omnes homines æquales sunt. All men are equal as far as the natural law is concerned. Dig. 50. 17. 32.

Quod ædificatur in aredâ legatâ cedit legato. Whatever is built upon land given by will passes with the gift of the land. Amos & F. Fixtures, 2d ed. 246; Broom, Max. 3d Lond. ed. 377.

Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. What is otherwise good and just, if sought by force or fraud, becomes bad and unjust. 3 Coke, 78.

Quod alias non fuit licitum necessitas licitum facit. Necessity makes that lawful which otherwise were unlawful. Fleta, l. 5, c. 23, § 14.

Quod approbo non reprobo. What I accept I do not reject. Broom, Max. 3d Lond. ed. 636.

Quod attinet ad jus civile, servi pro nullis habentur, non tamen et jure naturali, quia, quod ad jus naturale attinet, omnes homines æquali sunt. So far as the civil law is concerned, slaves are not reckoned as persons, but not so by natural law, for so far as regards natural law all men are equal. Dig. 50. 17. 32.

Quod constat clarè, non debet verificari. What is clearly apparent need not be proved. 10 Mod. 150.

Quod constat curiæ opere testium non indiget. What appears to the court needs not the help of witnesses. Coke, 2d Inst. 662.

Quod contra juris rationem receptum est, non est producendum ad consequentias. What has been admitted against the reason of the law, ought not to be drawn into precedents. Dig. 50. 17. 141; 12 Coke, 75.

Quod contra legem fit, pro infecto habetur. What is done contrary to the law, is considered as not done. 4 Coke, 31. No one can derive any advantage from such an act.

Quod datum est ecclesiæ, datum est Deo. What is given to the church is given to God. Coke, 2d Inst. 590.

Quod demonstrandi causâ additur rei satis demonstratæ, frustra fit. What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain. 10 Coke, 113.

Quod dubitas, ne feceris. When you doubt about a thing, do not do it. 1 Hale, Pl. Cr. 310.

Quod enim semel aut bis existit, præterenut legislatores. That which never happens but once or twice, legislators pass by. Dig. 1. 3. 17.

Quod est ex necessitate nusquam introducitur, nisi quando necessarium. What is introduced of necessity, is never introduced except when necessary. 2 Rolle, 512.

Quod est inconveniens, aut contra rationem non permissum est in lege. What is inconvenient or contrary to reason, is not allowed in law. Coke, Litt. 178.

Quod est necessarium est licitum. What is necessary is lawful. Jenk. Cent. Cas. 76.

Quod factum est, cum in obscuro sit, ex affectione cujusque capit interpretationem. When there is doubt about an act or expression, it receives interpretation from the (known) feelings or affections of the actor or writer. Dig. 50. 17. 168. 1.

Quod fieri debet facile præsumitur. That is easily presumed which ought to be done. Halkers, Max. 153.

Quod fieri non debet, factum valet. What ought not to be done, when done, is valid. 5 Coke, 38; 12 Mod. 438; 6 Mees. & W. Exch. 58; 9 *id.* 636.

Quod in jure scripto "jus" appellatur, id in lege Angliæ "rectum" esse dicitur. What in the civil law is called "*jus*," in the law of England is said to be "*rectum*" (right). Coke, Litt. 260; Fleta, l. 6, c. 1, § 1.

Quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori. What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less. Coke, Litt. 260.

Quod in uno similium valet, valebit in altero. What avails in one of two similar things, will avail in the other. Coke, Litt. 191.

Quod inconsulto fecimus, consultius revocemus. What is done without consideration or reflection, upon better consideration we should revoke or undo. Jenk Cent. Cas. 116.

Quod initio vitiosum est, non potest tractu temporis convalescere. Time cannot render valid an act void in its origin. Dig. 50. 17. 29.

Quod ipsis, qui contraxerunt, obstat; et successoribus eorum obstabit. That which bars those who have contracted will bar their successors also. Dig. 50. 17. 103.

Quod jussu alterius solvitur pro eo est quasi ipsi solutum esset. That which is paid by the order of another is, so far as such person is concerned, as if it had been paid to himself. Dig. 50. 17. 180.

Quod meum est, sine facto sive defectu nostro, amitti seu in alium transferri non potest. That which is ours cannot be lost or transferred to another without our own act or default. 8 Coke, 92; Broom, Max. 3d Lond. ed. 415; 1 Preston, Abstr. 147, 318.

Quod meum est sine me auferri non potest. What is mine cannot be taken away without my consent. Jenk. Cent. Cas. 251. But see EMINENT DOMAIN.

Quod minus est in obligationem videtur deductum. That which is the less is held to be imported into the contract: *e. g.* A offers to hire B's house at six hundred dollars at the same time B offers to let it for five hundred dollars; the contract is for five hundred dollars. 1 Story, Contr. 4th ed. 481.

Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium. That which natural reason has established among all men, is called the law of nations. Dig. 1. 1. 9; Inst. 1. 2. 1; 1 Sharswood, Blackst. Comm. 43.

Quod necessariò intelligitur id non deest. What is necessarily understood is not wanting. 1 Bulstr. 71.

Quod necessitas cogit, defendit. What necessity forces, it justifies. Hale, Pl. Cr. 54.

Quod non apparet non est, et non apparet judicialiter ante judicium. What appears not does not exist, and nothing appears judicially before judgment. Coke, 2d Inst. 479; Jenk. Cent. Cas. 207.

Quod non capit Christus, capit fiscus. What the church does not take, the treasury takes. Year B. 19 Hen. VI. 1.

Quod non habet principium non habet finem. What has no beginning has no end. Coke, Litt. 345; Broom, Max. 3d Lond. ed. 170, 171.

Quod non legitur, non creditur. What is not read is not believed. 4 Coke, 304.

Quod non valet in principalia, in accessoria seu consequentia non valebit; et quod non valet in magis propinquo, non valebit in magis remoto. What is not good as to things principal, will not be good as to accessories or consequences; and what is not of force as regards things near, will not be of force as to things remote. 8 Coke, 78.

Quod nullius esse potest, id ut alicujus fieret nulla obligatio valet efficere. No agreement can avail to make that the property of any one which cannot be acquired as property. Dig. 50. 17. 182.

Quod nullius est, est domini regis. That which belongs to nobody belongs to our lord the king. Fleta, l. 3; Broom, Max. 3d Lond. ed. 317; Bacon, Abr. *Prerogative* (B); 2 Sharswood, Blackst. Comm. 260.

Quod nullius est id ratione naturali occupanti conceditur. What belongs to no one, by natural reason belongs to the first occupant. Inst. 2. 1. 12; 1 Bouvier, Inst. n. 491; Broom, Max. 3d Lond. ed. 316.

Quod omnes tangit, ab omnibus debet supportari. That which concerns all ought to be supported by all. 3 How. St. Trials, 818, 1087.

Quod pendet, non est pro eo, quasi sit. What is in suspense is considered as not existing during such suspense. Dig. 50. 17. 109, 1.

Quod per me non possum, nec per alium. What I cannot do in person, I cannot do through the agency of another. 4 Coke, 24 *b*; 11 *id.* 87 *a*.

Quod per me non possum, nec per alium. What I cannot do for myself I cannot do through the agency of another. 4 Coke, 24 *b*; 11 *id.* 87 *a*.

Quod per recordum probatum, non debet esse negatum. What is proved by the record, ought not to be denied.

Quod populus postremum jussit, id jus ratum esto. What the people have last enacted, let that be the established law. 1 Sharswood, Blackst. Comm. 89.

Quod principi placuit, legis habet rigorem; utpote cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat. The will of the emperor has the force of law; for, by the royal law which has been made concerning his authority, the people has conferred upon him all its own sovereignty and power. Dig. 1. 4. 1; Inst. 1. 2. 1; Fleta, l. 1, c. 17, § 7; Bracton, 107; Selden, *Diss. ad Flet.* c. 3, §§ 2–5.

Quod prius est verius est; et quod prius est tempore potius est jure. What is first is truest; and what comes first in time is best in law. Coke, Litt. 347.

Quod pro minore licitum est, et pro majore licitum est. What is lawful in the less is lawful in the greater. 8 Coke, 43.

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. He who suffers a damage by his own fault is not held to suffer damage. Dig. 50. 17. 203.

Quod quis sciens indebitum dedit hâc mente, ut postea repeteret, repetere non potest. What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back. Dig. 2. 6. 50.

Quod quisque norit in hoc se exerceat. Let every one employ himself in what he knows. 11 Coke, 10.

Quod remedio destituitur ipsâ re valet si culpa absit. What is without a remedy is by that very fact valid if there be no fault. Bacon, Max. Reg. 9; 3 Blackstone, Comm. 20.

Quod semel aut bis existit præterenut legislatores. Legislators pass over what happens (only) once or twice. Dig. 1. 3. 6; Broom, Max. 3d Lond. ed. 45.

Quod semel meum est amplius meum esse non potest. What is once mine cannot be mine more completely. Coke, Litt. 49 *b*; Sheppard, Touchst. 212; Broom, Max. 3d Lond. ed. 415, n.

Quod semel placuit in electione, amplius displicere non potest. That which in making his election a man has once been pleased to choose, he cannot afterwards quarrel with. Coke, Litt. 146.

Quod solo inædificatur solo cedit. Whatever is built on the soil is an accessory of the soil. Inst. 2. 1. 29; 16 Mass. 449; 2 Bouvier, Inst. n. 1571.

Quod sub certâ formâ concessum vel reservatum est, non trahitur ad valorem vel compensationem. That which is granted or reserved under a certain form, is not to be drawn into valuation or compensation. Bacon, Max. Reg. 4.

Quod subintelligitur non deest. What is understood is not wanting. 2 Ld. Raym. 832.

Quod tacite intelligitur deesse non videtur. What is tacitly understood does not appear to be wanting. 4 Coke, 22.

Quod vanum et inutile est, lex non requirit. The law does not require what is vain and useless. Coke, Litt. 319.

Quod verò contra rationem juris receptum est, non est producendum ad consequentias. But that which has been admitted contrary to the reason of the law, ought not to be drawn into precedents. Dig. 1. 3, 14; Broom, Max. 3d Lond. ed. 150.

Quod voluit non dixit. He did not say what he intended to. 1 Kent, Comm. 468, n.; 4 Maule & S. 522, *arg.*; 1 Johns. Ch. N. Y. 235.

Quodcunque aliquis ob tutelam corporis sui fecerit jure id fecisse videtur. Whatever one does in defence of his person, that he is considered to have done legally. Coke, 2d Inst. 590.

Quodque dissolvitur eodem modo quo ligatur. In the same manner that a thing is bound, it is unbound. 2 Rolle, 39; Broom, Max. 3d Lond. ed. 788; 2 Mann. & G. 729.

Quomodo quid constituitur eodem modo dissolvitur. In whatever modo a thing is constituted, in the same manner is it dissolved. Jenk. Cent. Cas. 74.

Quorum prætexta, nec auget nec minuit sententiam, sed tantum confirmat præmissa. "Quorum prætexta" neither increases nor diminishes the meaning, but only confirms that which went before. Plowd. 52.

Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit. Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty. Dig. 50. 17. 20.

Quotiens idem sermo duas sententias exprimit, ea potissimum excipiuntur, quæ rei gerendæ aptior est. Whenever the same words express two meanings, that is to be taken which is the better fitted for carrying out the proposed end. Dig. 50. 17. 67.

Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quo agitur, in tuto sit. Whenever in stipulations the expression is ambiguous, it is most proper to give it that interpretation by which the subject matter may be in safety. Dig. 41. 1. 80; 50. 16. 219.

Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est. When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Coke, Litt. 147; Broom, Max. 3d Lond. ed. 850.

Quum de lucro duorum quæratur, melior est conditio possidentis. When the gain of one of two is in question, the condition of the possessor is the better. Dig. 50. 17. 126. 2.

Quum in testamento ambigue aut etiam perperam scriptum est, benigne interpretari et secundum id quod credibile et cogitatum, credendum est. When in a will an ambiguous or even an erroneous expression occurs, it should be construed liberally and in accordance with what is thought the probable meaning of the testator. Dig. 34. 5. 24; Broom, Max. 3d Lond. ed. 437. See Brisson, *Perperam.*

Quum (cùm) principalis causa non consistit ne ea quidem quæ sequuntur locum habent. When the principal does not hold its ground, neither do the accessories find place. Dig. 50. 17. 129. 1; Broom, Max. 3d Lond. ed. 438; 1 Pothier, Obl. 413.

Ratihabitio mandato æquiparatur. Ratification is equal to a command. Dig. 46. 3. 12. 4; Broom, Max. 3d Lond. ed. 771; Story, Ag. 4th ed. 302.

Ratio est formalis causa consuetudinis. Reason is the source and mould of custom.

Ratio est legis anima, mutata legis ratione mutatur et lex. Reason is the soul of the law; the reason of the law being changed, the law is also changed. 7 Coke, 7.

Ratio est radius divini luminis. Reason is a ray of divine light. Coke, Litt. 232.

Ratio et auctoritas duo clarissima mundi lumina. Reason and authority are the two brightest lights in the world. Coke, 4th Inst. 320.

Ratio in jure æquitas integra. Reason in law is perfect equity.

Ratio legis est anima legis. The reason of the law is the soul of the law. Jenk. Cent. Cas. 45.

Ratio non clauditur loco. Reason is not confined to any place.

Ratio potest allegari deficiente lege, sed vera et legalis et non apparens. Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent. Coke, Litt. 191.

Re, verbis, scripto, consensu, traditione, junctura vestes, nunere pacta solent. Compacts usually take their clothing from the thing itself, from words, from writing, from consent, from delivery. Plowd. 161.

Recedi tur a placitis juris, potius quam injuriæ et delicta maneant impunita. Positive rules of law will be receded from rather than crimes and wrongs should remain unpunished. Bacon, Max. Reg. 12; Broom, Max. 3d Lond. ed. 9. This applies only to such maxims as are called *placita juris;* these will be dispensed with rather than crimes should go unpunished. *quia salus populi suprema lex,* because the public safety is the supreme law.

Recorda sunt vestigia vetustatis et veritatis. Records are vestiges of antiquity and truth. 2 Rolle, 296.

Recurrendum est ad extraordinarium quando non valet ordinarium. We must have recourse to what is extraordinary when what is ordinary fails.

Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. The rule is, that ignorance of the law does not excuse, but that ignorance of a fact may excuse a party from the legal consequences of his conduct. Dig. 22. 6. 9; Broom, Max. 3d Lond. ed. 232. See Irving, Civ. Law, 4th ed. 74.

Regula pro lege, si deficit lex. In default of the law, the maxim rules.

Regulariter non valet pactum de re mea non alienanda. Regularly a contract not to alienate my property is not binding. Coke, Litt. 223.

Rei turpis nullum mandatum est. A mandate of an illegal thing is void. Dig. 17. 1. 6. 3.

Reipubl ex interest voluntates defunctorum effectum sortiri. It concerns the state that the wills of the dead should have their effect.

Relatio est fictio juris et intenta ad unum. Relation is a fiction of law, and intended for one thing. 3 Coke, 28.

Relatio semper fiat ut valeat dispositio. Reference should always be had in such a manner that a disposition in a will may avail. 6 Coke, 76.

Relation never defeats collateral acts. 18 Viner, Abr. 292.

Relation shall never make good a void grant or devise of the party. 18 Viner, Abr. 292.

Relative words refer to the next antecedent, unless the sense be thereby impaired. Noy, Max. 4; Wingate, Max. 19; Broom, Max. 3d Lond. ed. 606; Jenk. Cent. Cas. 180.

Relativorum cognito uno, cognoscitur et alterum. Of things relating to each other, one being known, the other is known. Cioke Jac. 539.

Remainder can depend upon no estate but what beginneth at the same time the remainder doth.

Remainder must vest at the same instant that the particular estate determines.

Remainder to a person not of a capacity to take at the time of appointing it, is void. Plowd. 27.

Remedies for rights are ever favorably extended. 18 Viner, Abr. 521.

Remedies ought to be reciprocal.

Remissius imperanti melius paretur. A man commanding not too strictly is better obeyed. Coke, 3d Inst. 233.

Remoto impedimento, emergit actio. The impediment being removed, the action arises. 5 Coke, 76; Wingate, Max. 20.

Rent must be reserved to him from whom the state of the land moveth. Coke, Litt. 143.

Repellitur a sacramento infamis. An infamous person is repelled or prevented from taking an oath. Coke, Litt. 158; Bracton, 185.

Repellitur exceptione cedendarum actionum. He is defeated by the plea that the actions have been assigned. 1 Johns. Ch. N. Y. 409, 414.

Reprobata pecunia liberat solventem. Money refused liberates the debtor. 9 Coke, 79. But this must be understood with a qualification. See TENDER.

Reputatio est vulgaris opinio ubi non est veritas. Reputation is a common opinion where there is no certain knowledge. 4 Coke, 107. But see CHARACTER.

Rerum ordo confunditur, si unicuique jurisdictio non servatur. The order of things is confounded if every one preserves not his jurisdiction. Coke, 4th Inst. Procm.

Rerum progressus ostendunt multa, quæ in initio præcaveri seu præcideri non possunt. In the course of events many mischiefs arise which at the beginning could not be guarded against or foreseen. 6 Coke, 40.

Rerum suarum quilibet est moderator et arbiter. Every one is the manager and disposer of his own matters. Coke, Litt. 223.

Res accessoria sequitur rem principalem. An accessory follows its principal. Broom, Max. 3d Lond. ed. 433. For a definition of *res accessoria,* see Mackeldey, Civ. Law, 155.

Res denominatur a principaliori parte. A thing is named from its principal part. 5 Coke, 47.

Res est misera ubi jus est vagum et incertum. It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512.

Res, generalem habet significationem, quia tam corporea, quam incorporea, cujuscunque sunt generis, naturæ sive speciei, comprehendit. The word things has a general signification, because it comprehends as well corporeal as incorporeal objects, of whatever nature, sort, or species. Coke, 3d Inst. 482; 1 Bouvier, Inst. n. 415.

Res inter alios acta alteri nocere non debet. Things done between strangers ought not to injure those who are not parties to them. Coke, Litt. 132; 3 Curt. C. C. 403; 11 Q. B. 1028.

Res inter alios judicatæ nullum aliis præjudicium faciant. Matters adjudged in a cause do not prejudice those who were not parties to it. Dig. 44. 2. 1.

Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum. A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. 1 Bouvier, Inst. n. 840.

Res judicata pro veritate accipitur. A thing

adjudged must be taken for truth. Coke, Litt. 103; Dig. 50. 17. 207; 2 Kent, Comm. 120; 13 Mees. & W. Exch. 679. See RES JUDICATA.

Res per pecuniam æstimatur, et non pecunia per res. The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to the thing. 9 Coke, 76; 1 Bouvier, Inst. n. 922.

Res perit domino suo. The destruction of the thing is the loss of its owner. 2 Bouvier, Inst. nn. 1456, 1466; Story, Bailm. 426; 2 Kent, Comm. 591.

Res propria est quæ communis non est. A thing is private which is not common. 8 Paige, Ch. N. Y. 261, 270.

Res quæ intra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt ex gentium jure. Things which have not yet been introduced within the enemy's lines, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed. Grotius, *de Jur. Bell.* l. 3, c. 9, § 16; l. 3, c. 6, § 3.

Res sacra non recipit æstimationem. A sacred thing does not admit of valuation. Dig. 1. 8. 9. 5.

Res transit cum suo onere. The thing passes with its burden. Fleta, l. 3, c. 10, § 3.

Reservatio non debet esse de proficuis ipsis quia ea conceduntur, sed de redditu novo extra proficua. A reservation ought not to be of the annual increase itself, because it is granted, but of new rent apart from the annual increase. Coke, Litt. 142.

Resignatio est juris proprii spontanea refutatio. Resignation is the spontaneous relinquishment of own's own right. Godb. 284.

Resoluto jure concedentis resolvitur jus concessum. The right of the grantor being extinguished, the right granted is extinguished. Mackeldey, Civ. Law, 179; Broom, Max. 3d Lond. ed. 417.

Respiciendum est judicanti, nequid aut durius aut remissius construatur quam causa deposcit; nec enim aut severitatis aut clementiæ gloria affectanda est. It is a matter of import to one adjudicating that nothing should be either more leniently or more severely construed than the cause itself demands; for the glory neither of severity nor clemency should be affected. Coke, 3d Inst. 220.

Respondeat raptor, qui ignorare non potuit quod pupillum alienum abduxit. Let the ravisher answer, for he could not be ignorant that he has taken away another's ward. Hob. 99.

Respondeat superior. Let the principal answer. Coke, 4th Inst. 114; 2 Bouvier, Inst. n. 1337; 4 *id.* n. 3586; 3 Lev. 352; 1 Salk. 408; 1 Bingh. N. C. 418; 4 Maule & S. 259; 10 Exch. 656; 2 Ell. & B. 216; 7 *id.* 426; 1 Bos. & P. 404; 1 C. B. 578; 8 Mees. & W. Exch. 302; 10 Exch. 656.

Respondera son soverayne. His superior or master shall answer. Articuli sup. Chart. c. 18.

Responsio unius non omnino auditur. The answer of one witness shall not be heard at all. 1 Greenleaf, Ev. § 260. This is a maxim of the civil law, where every thing must be proved by two witnesses.

Reus excipiendo fit actor. The defendant by a plea becomes plaintiff. Bannier, *Tr. des preuves*, §§ 152, 320; Best, Evid. 294, § 252.

Reus læsæ majestatis punitur, ut pereat unus ne pereant omnes. A traitor is punished that one may die lest all perish. 4 Coke, 124.

Rex non debet esse sub homine sed sub Deo et lege. The king should not be under the authority of man, but of God and the law. Broom, Max. 3d Lond. ed. 46, 111; Bracton, 5.

Rex non potest fallere nec falli. The king cannot deceive or be deceived. Grounds & Rud. of Law, 438.

Rex non potest peccare. The king can do no wrong. 2 Rolle, 304; Jenk. Cent. Cas. 9, 308; Broom, Max. 3d Lond. ed. 51; 1 Sharswood, Blackst. Comm. 246.

Rex nunquam moritur. The king never dies. Broom, Max. 3d Lond. ed. 49; Branch, Max. 5th ed. 197; 1 Sharswood, Blackst. Comm. 249.

Rights never die.

Riparum usus publicus est jure gentium, sicut ipsius fluminis. The use of river-banks is by the law of nations public, like that of the stream itself. Dig. 1. 8. 5. pr.; Fleta, l. 3, c. 1, § 5; Loccenius *de Jur. Mar.* l. 1, c. 6, § 12.

Roy n'est lié per aucun statute, si il ne soit expressement nosmé. The king is not bound by any statute, if he is not expressly named. Jenk. Cent. Cas. 307; Broom, Max. 3d Lond. ed. 69.

Sacramentum habet in se tres comites, veritatem, justitiam et judicium: veritas habenda est in jurato; justitia et judicium in judice. An oath has in it three component parts—truth, justice, and judgment: truth in the party swearing; justice and judgment in the judge administering the oath. Coke, 3d Inst. 166.

Sacramentum si falsum fuerit, licet falsum, tamen non committit perjurium. A foolish oath, though false, makes not perjury. Coke, 2d Inst. 167.

Sacrilegus omnium prædorum cupiditatem et scelerem superat. A sacrilegious person transcends the cupidity and wickedness of all other robbers. 4 Coke, 106.

Sæpe constitutum est, res inter alios judicatas aliis non præjudicare. It has often been settled that matters adjudged between others ought not to prejudice those who were not parties. Dig. 42. 1. 63.

Sæpe viatorem nova non vetus orbita fallit. Often it is the new track, not the old one, which deceives the traveller. Coke, 4th Inst. 34.

Sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur. Frequently where the propriety of words is attended to, the meaning of truth is lost. 7 Coke, 27.

Salus populi est suprema lex. The safety of the people is the supreme law. Bacon, Max. Reg. 12; Broom, Max. 1; 13 Coke, 139.

Salus ubi multi consiliarii. In many counsellors there is safety. Coke, 4th Inst. 1.

Sanguinis conjunctio benevolentia devincit homines et caritate. A tie of blood overcomes men through benevolence and family affection. 5 Johns. Ch. N. Y. 1, 13.

Sapiens incipit a fine, et quod primum est in intentione, ultimum est in executione. A wise man begins with the last, and what is first in intention is last in execution. 10 Coke, 25.

Sapiens omnia agit cum consilio. A wise man does every thing advisedly. Coke, 4th Inst. 4.

Sapientia legis nummario pretio non est æstimanda. The wisdom of the law cannot be valued by money. Jenk. Cent. Cas. 108.

Sapientis judicis est cogitare tantum sibi esse permissum, quantum commissum et creditum. It is the duty of a wise judge to think so much only permitted to him as is committed and intrusted to him. Coke, 4th Inst. 163.

Satisfaction should be made to that fund which has sustained the loss. 4 Bouvier, Inst. n. 3751.

Satius est petere fontes quam sectari rivulos. It is better to seek the fountain than to follow rivulets. 10 Coke, 118. It is better to drink at the fountain than to sip in the streams.

Scientia sciolorum est mixta ignorantia. The knowledge of smatterers is mixed ignorance. 8 Coke, 159.

Scientia utriusque par pares contrahentes facit. Equal knowledge on both sides makes the contracting parties equal. 3 Burr. 1910.

Scienti et volunti non fit injuria. A wrong is not done to one who knows and wills it.

Scire debes eum quo contrahis. You ought to

know with whom you deal. 11 Mees. & W. Exch. 405, 632; 13 *id.* 171.

Scire leges, non hoc est verba earum tenere, sed vim et potestatem. To know the laws, is not to observe their mere words, but their force and power. Dig. 1. 3. 17.

Scire proprè est, rem ratione et per causam cognoscere. To know properly is to know a thing by its cause and in its reason. Coke, Litt. 183.

Scribere est agere. To write is to act. 2 Rolle, 89; 4 Sharswood, Blackst. Comm. 80.

Scriptæ obligationes scriptis tolluntur, et nudi consensus obligatio, contrario consensu dissolvitur. Written obligations are dissolved by writing, and obligations of naked agreement by naked agreement to the contrary.

Secta est pugna civilis, sicut actores armantur actionibus, et quasi accinguntur gladiis, ita rei (à contra) muniuntur exceptionibus, et defenduntur quasi clypeis. A suit is a civil battle, as the plaintiffs are armed with actions and as it were girt with swords, so on the other hand the defendants are fortified with pleas, and defended as it were by helmets. Hob. 20; Bracton, 339 *b*.

Secta quæ scripto nititur a scripto variari non debet. A suit which relies upon a writing ought not to vary from the writing. Jenk. Cent. Cas. 65.

Secundum naturam est, commoda cujusque rei eum sequi, quem sequuntur incommoda. It is natural that he who bears the charge of a thing should receive the profits. Dig. 50. 17. 10.

Securius expediuntur negotia commissa pluribus, et plus vident oculi quam oculus. Business intrusted to several speeds best, and several eyes see more than one eye. 4 Coke, 46.

Seisina facit stipitem. Seisin makes the stock. 2 Sharswood, Blackst. Comm. 209; Broom, Max. 3d Lond. ed. 466; 1 Stephen, Comm. 367; 4 Kent, Comm. 388, 389; 13 Ga. 238.

Semel malus semper præsumitur esse malus in eodem genere. Whoever is once bad is presumed to be so always in the same degree. Croke Car. 317.

Semper in dubiis benigniora præferunda sunt. In dubious cases the more liberal constructions are always to be preferred. Dig. 50. 17. 56.

Semper in dubiis id agendum est, ut quam tutissimo loco res sit bona fide contracta, nisi quum aperte contra leges scriptum est. Always in doubtful cases that is to be done by which a bona fide contract may be in the greatest safety, except when its provisions are clearly contrary to law. Dig. 34. 5. 21.

Semper in obscuris quod minimum est sequimur (sequare). In obscure cases we always follow that which is least. Dig. 50. 17. 9; Broom, Max. 3d Lond. ed. 613, n; 3 C. B. 962.

Semper in stipulationibus et in cæteris contractibus id sequimur quod actum est. In stipulations and other contracts we always follow that which was done (*i.e.* agreed). Dig. 50. 17. 34.

Semper ita fiat relatio ut valeat dispositio. Let the reference always be so made that the disposition may avail. 6 Coke, 76.

Semper necessitas probandi incumbit ei qui agit. The claimant is always bound to prove: the burden of proof lies on him.

Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari. The presumption is always in favor of legitimacy, for filiation cannot be proved. Coke, Litt. 126. See 1 Bouvier, Inst. n. 308; 5 Coke, 98 *b*.

Semper præsumitur pro negante. The presumption is always in favor of the one who denies. See 10 Clark & F. Hou. L. 534; 3 Ell. & B. 723.

Semper præsumitur pro sententiâ. Presumption is always in favor of the sentence. 3 Bulstr. 42.

Semper qui non prohibet pro se intervenire, mandare creditur. He who does not prohibit the intervention of another in his behalf is supposed to authorize it. 2 Kent, Comm. 616; Dig. 14. 6. 16; 43 3. 12. 4.

Semper sexus masculinus etiam femininum continet. The male sex always includes the female. Dig. 32. 62.

Semper specialia generalibus insunt. Special clauses are always comprised in general ones. Dig. 50. 17. 147.

Senatores sunt partes corporis regis. Senators are part of the body of the king. Staundford, 72 E; Coke, 4th Inst. 53, in marg.

Sensus verborum est anima legis. The meaning of words is the spirit of the law. 5 Coke, 2.

Sensus verborum est duplex, mitis et asper, et verba semper accipienda sunt in mitiore sensu. The meaning of words is twofold, mild and harsh; and words are to be received in their milder sense. 4 Coke, 13.

Sensus verborum ex causâ dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam. The sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject-matter. 4 Coke, 14.

Sententia à non judice lata nemini debet nocere. A sentence pronounced by one who is not a judge should not harm any one. Fleta, l. 6, c. 6, § 7.

Sententia contra matrimonium nunquam transit in rem judicatam. A sentence against marriage never passes into a judgment (conclusive upon the parties). 7 Coke, 43.

Sententia facit jus, et legis interpretatio legis vim obtinet. The sentence makes the law, and the interpretation has the force of law.

Sententia facit jus, et res judicata pro veritate accipitur. Judgment creates the right, and what is adjudicated is taken for truth. Ellesmere, Postn. 55.

Sententia interlocutoria revocari potest, diffinitiva non potest. An interlocutory sentence or order may be revoked, but not a final. Bacon, Max. Reg. 20.

Sententia non fertur de rebus non liquidis. Sentence is not given upon a thing which is not clear.

Sequi debet potentia justitiam, non præcedere. Power should follow justice, not precede it. Coke, 2d Inst. 454.

Sermo index animi. Speech is an index of the mind. 5 Coke, 118.

Sermo relata ad personam, intelligi debet de conditione personæ. A speech relating to the person is to be understood as relating to his condition. 4 Coke, 16.

Servanda est consuetudo loci ubi causa agitur. The custom of the place where the action is brought is to be observed. 3 Johns. Ch. N. Y. 190, 219.

Servitia personalia sequuntur personam. Personal services follow the person. Coke, 2d Inst. 374; Fleta, l. 3, c. 11, § 1.

Si a jure discedas vagus eris, et erunt omnia omnibus incerta. If you depart from the law, you will wander without a guide, and every thing will be in a state of uncertainty to every one. Coke, Litt. 227.

Si alicujus rei societas sit, et finis negotio impositus est, finitur societas. If there is a partnership in any matter, and the business is ended, the partnership ceases. 16 Johns. N. Y. 438, 489.

Si aliquid ex solemnibus deficiat, cum æquitas poscit subveniendum est. If any thing be wanting from required forms, when equity requires it will be aided. 1 Kent, Comm. 157.

Si assuetis mederi possis nova non sunt tentanda. If you can be relieved by accustomed remedies, new ones should not be tried. 10 Coke, 142.

Si judicas, cognosce. If you judge, understand.

Si meliores sunt quos ducit amor, plures sunt quos corrigit timor. If those are better who are led by love, those are the greater number corrected by fear. Coke, Litt. 392.

Si non appareat quid actum est erit consequens, ut id sequamur quod in regione in qua actum est, frequentatur. If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made. Dig. 50. 17. 34.

Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu. If there be no inference which leads to a different result, words are to be understood according to their proper meaning, not in a grammatical, but in a popular and ordinary, sense. 2 Kent, Comm. 555.

Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum; et ad veritatem copulativè requiritur quod utrăque pars sit vera, si dicisim, cuilibet vel alteri eorum sătis est obtemperare; et in disjunctivis, sufficit alteram partem esse veram. If some conditions are conjunctively written in a gift, the whole of them must be complied with; and with respect to their truth, it is necessary that every part be true, taken jointly; if the conditions are separate, it is sufficient to comply with either one or other of them; and being disjunctive, that one or the other be true. Coke, Litt. 225.

Si plures sint fidejussores, quodquit erunt numero, singuli in solidum tenentur. If there are more sureties than one, how many soever they shall be, they shall each be held for the whole. Inst. 3. 21. 4; 4. 116; 1 W. Blackst. 388.

Si quid universitati debetur singulis non debetur, nec quod debet, universitas singuli debent. If any thing is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes. Dig. 3. 4. 7; 1 Sharswood, Blackst. Comm. 484.

Si quidem in nomine, cognomine, prænomine, agnomine legatarii erraverit; cùm de personâ constat, nihilhominùs valet legatum. If the testator has erred in the name, cognomen, prænomen, or title of the legatee, whenever the person is rendered certain, the legacy is nevertheless valid. Inst. 2. 20. 29; Broom, Max. 3d Lond. ed. 574; 2 Domat, b. 2, t. 1, s. 6, §§ 10, 19.

Si quis custos fraudem pupillo fecerit, a tutela removendus est. If a guardian behave fraudulently to his ward, he shall be removed from the guardianship. Jenk. Cent. Cas. 39.

Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse. If a man dies, leaving his wife pregnant, he shall not be considered as having died childless.

Si quis unum percusserit, cum alium percutere vellet, is felonia tenetur. If a man kill one, meaning to kill another, he is held guilty of felony. Coke, 3d Inst. 51.

Si suggestio non sit vera, literæ patentes vacuæ sunt. If the suggestion of a patent is false, the patent itself is void. 10 Coke, 113.

Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat. Every one ought so to improve his land as not to injure his neighbor's. 3 Kent, Comm. 441.

Sic interpretandum est ut verba accipiantur cum effectu. Such an interpretation is to be made that the words may have an effect. Coke, 3d Inst. 80.

Sic utere tuo ut alienum non lædas. So use your own as not to injure another's property. 1 Blackstone, Comm. 306; Broom, Max. 3d Lond. ed. 206, n., 246, 327, 332, 336, 340, 348, 353; 2 Bouvier, Inst. n. 2379; 5 Exch. 797; 12 Q. B. 739; 4 Adolph. & E. 384; 15 Johns. N. Y. 218; 17 *id.* 99; 17 Mass. 334; 4 M'Cord, So. C. 472; 9 Coke, 59.

Sicut natura nil facit per saltum, ita nec lex. As nature does nothing by a bound or leap, so neither does the law. Coke, Litt. 238.

Sigillum est cera impressa, quia cera sine impressione non est sigillum. A seal is a piece of wax impressed, because wax without an impression is not a seal. Coke, 3d Inst. 169. But see SEAL.

Silence shows consent. 6 Barb. N. Y. 28, 35.

Silent leges inter arma. Laws are silent amidst arms. Coke, 4th Inst. 70.

Similitudo legalis est, casuum diversorum inter se collatorum similis ratio; quod in uno similium valet, valebit in altero. Dissimilium, dissimilis est ratio. Legal similarity is a similar reason which governs various cases when compared with each other, for what avails in one similar case will avail in the other. Of things dissimilar, the reason is dissimilar. Coke, Litt. 191.

Simplex commendatio non obligat. A simple recommendation does not bind. Dig. 4. 3. 37; 2 Kent, Comm. 485; Broom, Max. 3d Lond. ed. 709; 4 Taunt. 488; 16 Q. B. 282, 283; Croke Jac. 4; 5 Johns. N. Y. 354; 4 Barb. N. Y. 95.

Simplex et pura donatio dici poterit, ubi nulla est adjecta conditio nec modus. A gift is said to be pure and simple when no condition or qualification is annexed. Bracton. 1.

Simplicitas est legibus amica, et nimia subtilitas in jure reprobatur. Simplicity is favorable to the law, and too much subtlety is blameworthy in law. 4 Coke, 8.

Sine possessione usucapio procedere non potest. There can be no prescription without possession.

Singuli in solidum tenentur. Each is bound for the whole. 6 Johns. Ch. N. Y. 242, 252.

Sive tota res evincatur, sive pars habet regressum emptor in venditorem. The purchaser who has been evicted in whole or in part has an action against the vendor. Dig. 21. 2. 1; Broom, Max. 3d Lond. ed. 690.

Socii mei socius, meus socius non est. The partner of my partner is not my partner. Dig. 50. 17. 47. 1.

Sola ætas per se senectus donationem testamentum aut transactionem non vitiat. Old age does not alone and of itself vitiate a will or a gift. 5 Johns. Ch. N. Y. 148, 158.

Solemnitates juris sunt observandæ. The solemnities of law are to be observed. Jenk. Cent. Cas. 13.

Solo cedit quod solo implantatur. What is planted in the soil belongs to the soil. Inst. 2. 1. 32; 2 Bouvier, Inst. n. 1572.

Solo cedit quod solo inædificatur. Whatever is built on the soil belongs to the soil. Inst. 2. 1. 29. See 1 Mackeldey, Civ. Law, § 268; 2 Bouvier, Inst. n. 1571.

Solus Deus hæredem facit. God alone makes the heir. Coke, Litt. 5.

Solutio pretii, emptionis loco habetur. The payment of the price stands in the place of a sale. Jenk. Cent. Cas. 56.

Solvendo esse nemo intelligitur nisi qui solidum potest solvere. No one is considered to be solvent unless he can pay all that he owes. Dig. 50. 16. 114.

Solvitur adhuc societas etiam morte socii. A partnership is moreover dissolved by the death of a partner. Inst. 3. 26. 5; Dig. 17. 2.

Spes est vigilantis somnium. Hope is the dream of the vigilant. Coke, 4th Inst. 203.

Spes impunitatis continuum affectum tribuit delinquendi. The hope of impunity holds out a continual temptation to crime. Coke, 3d Inst. 236.

Spoliatus debet ante omnia restitui. He who has been despoiled ought to be restored before any thing else. Coke, 2d Inst. 714; 4 Sharswood, Blackst. Comm. 353.

Spondet peritiam artis. He promises to use the skill of his art. Pothier, *Louage*, n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, liv. 1, t. 4, s. 8, n. 1; 1 Story, Bailm. § 431; 1 Bell, Comm. 5th ed. 459; 1 Bouvier, Inst. n. 1004.

Spontè virum fugiens mulier et adultera facta, doti sua careat, nisi sponte retracta. A woman leaving her husband of her own accord, and committing adultery, loses her dower, unless her hus-

band takes her back of his own accord. Coke, Litt. 37.

Stabit præsumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved. Hob. 297; 3 Sharswood, Blackst. Comm. 371; Broom, Max. 3d Lond. ed. 852; 16 Mass. 87.

Stare decisis, et non quieta movere. To adhere to precedents, and not to unsettle things which are established. Yates *ve.* Lansing, 9 Johns. 395, 428; Driggs *ve.* Rockwell, 11 Wend. 504, 507; Bates *ve.* Relyea, 23 *id.* 336, 340; Moore *ve.* Lyons, 25 *id.* 119, 142; Hanford *ve.* Artcher, 4 Hill, 271, 323; Taylor *ve.* Heath, 4 *id.* 592, 595; Calkins *ve.* Long, 22 Barb. 97, 106.

Stat pro ratione voluntas. The will stands in place of a reason. 1 Barb. N. Y. 408, 411; 16 *id.* 514, 525.

Stat pro ratione voluntas populi. The will of the people stands in place of a reason. 25 Barb. N. Y. 344, 376.

Statuta pro publico commodo late interpretantur. Statutes made for the public good ought to be liberally construed. Jenk. Cent. Cas. 21.

Statutum affirmativum non derogat communi legi. An affirmative statute does not take from the common law. Jenk. Cent. Cas. 24.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally. 10 Coke, 101.

Statutum speciale statuto speciali non derogat. One special statute does not take away from another special statute. Jenk. Cent. Cas. 199.

Sublatâ causâ tollitur effectus. Remove the cause and the effect will cease. 2 Blackstone. Comm. 203.

Sublatâ veneratione magistratuum, respublica ruit. The commonwealth perishes, if respect for magistrates be taken away. Jenk. Cent. Cas. 48.

Sublato fundamento cadit opus. Remove the foundation, the structure or work falls. Jenk. Cent. Cas. 106.

Sublato principali tollitur adjunctum. If the principal be taken away, the adjunct is also taken away. Coke, Litt. 389.

Subrogatio est transfusio unius creditoris in alium, eadem vel mitiori conditione. Subrogation is the substituting one creditor in the place of another in the same or a better condition. Merlin, *Qu. de Droit. Subrogation.*

Succurritur minori; facilis est lapsus juventutis. A minor is to be aided; youth is liable to err. Jenk. Cent. Cas. 47.

Summa caritas est facere justitiam singulis et omni tempore quando necesse fuerit. The greatest charity is to do justice to every one, and at any time whenever it may be necessary. 11 Coke, 70.

Summa est lex quæ pro religione facit. That is the highest law which favors religion. 10 Mod. 117, 119; 2 Chanc. Cas. 18.

Summa ratio est quæ pro religione facit. That consideration is strongest which determines in favor of religion. Coke, Litt. 341 *a;* Broom, Max. 3d Lond. ed. 18; 5 Coke, 14 *b;* 10 *id.* 55 *a;* 2 Chanc. Cas. 18.

Summam esse rationem quæ pro religione facit. That consideration is strongest which determines in favor of religion. Dig. 11. 7. 43, cited in Grotius *de Jur. Bello*, l. 3, c. 12, s. 7. See 10 Mod. 117, 119.

Summum jus, summa injuria. The rigor or height of law is the height of wrong. Hob. 125.

Sunday is dies non juridicus. 12 Johns. N. Y. 178, 180.

Superflua non nocent. Superfluities do no injury. Jenk. Cent. Cas. 184.

Suppressio veri, expressio falsi. Suppression of the truth is (equivalent to) the expression of what is false. 11 Wend. N. Y. 374, 417.

Suppressio veri, suggestio falsi. Suppression of the truth is (equivalent to) the suggestion of what is false. 23 Barb. N. Y. 521, 525.

Supremus est, quem nemo sequitur. He is last whom no one follows. Dig. 50. 16. 92.

Surplusagium non nocet. Surplusage does no harm. 3 Bouvier, Inst. n. 2949; Broom, Max. 3d Lond. ed. 559.

Tacita quædam habentur pro expressis. Certain things though unexpressed are considered as expressed. 8 Coke, 40.

Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium. Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, and so that the judgment be not nugatory. 1 Coke, 52.

Talis non est eadem, nam nullum simile est idem. What is like is not the same, for nothing similar is the same. 4 Coke, 18.

Tantum bona valent, quantum vendi possunt. Things are worth what they will sell for. Coke, 3d Inst. 305.

Tempus enim modus tollendi obligationes et actiones, quia tempus currit contra desides et sui juris contemptores. For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights. Fleta, l. 4, c. 5, § 12.

Tenor est qui legem dat feudo. It is the tenor of the feudal grant which regulates its effect and extent. Craig, *Jus Feud.*, 3d ed. 66. See Coke, Litt. 19 *a;* 2 Sharswood, Blackst. Comm. 310; 2 Coke, 71; Broom, Max. 3d Lond. ed. 410; Wright, Ten. 21, 52, 152.

Terminus annorum certus debet esse et determinatus. A term of years ought to be certain and determinate. Coke, Litt. 45.

Terminus et (ac) feudum non possunt constare simul in eâdemque persona. A term and the fee cannot both be in one and the same person at the same time. Plowd. 29; 3 Mass. 141.

Terra manens vacua occupanti conceditur. Land lying unoccupied is given to the occupant. 1 Bid. 347.

Terra transit cum onere. Land passes with the incumbrances. Coke, Litt. 231; Broom, Max. 3d Lond. ed. 437, 630.

Testamenta latissimam interpretationem habere debent. Wills ought to have the broadest interpretation. Jenk. Cent. Cas. 81.

Testamentum est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit. A testament is the just expression of our will concerning that which any one wishes done after his death: or, as Blackstone translates, "the legal declaration of a man's intentions which he wills to be performed after his death." 2 Sharswood, Blackst. Comm. 499; Dig. 28. 1. 1; 29. 3. 2. 1.

Testamentum omne morte consummatum. Every will is completed by death. Coke. Litt. 232.

Testatoris ultima voluntas est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his real intention. Coke, Litt. 322.

Testes ponderantur, non numerantur. See the maxim PONDERANTIA TESTES.

Testibus deponentibus in pari numero dignioribus est credendum. When the number of witnesses is equal on both sides, the more worthy are to be believed. Coke, 4th Inst. 279.

Testis de visu præponderat aliis. An eye-witness outweighs others. Coke. 4th Inst. 470.

Testis nemo in sua causa esse potest. No one can be a witness in his own cause. Otherwise in England, by stat. 14 & 15 Vict. 99, and many of the states of the United States.

Testis oculatus unus plus valet quam auriti decem. One eye-witness is worth ten ear-witnesses. Coke, 4th Inst. 279. See 3 Bouvier, Inst. n. 3154.

Testmoignes ne poent testifié le negative, mes l'affirmative. Witnesses cannot witness to a negative; they must witness to an affirmative. Coke, 4th Inst. 279.

That which I may defeat by my entry I make good by my confirmation. Coke, Litt. 300.

The fund which has received the benefit should make the satisfaction. 4 Bouvier, Inst. n. 3730.

Things accessary are of the nature of the principal. Finch, Law, b. 1, c. 3, n. 25.

Things are construed according to that which was the cause thereof. Finch, Law, b. 1, c. 3, n. 4.

Things are dissolved as they be contracted. Finch, Law, b. 1, c. 3, n. 7.

Things grounded upon an ill and void beginning cannot have a good perfection. Finch, Law, b. 1, c. 3, n. 8.

Things in action, entry, or re-entry cannot be granted over. 19 N. Y. 100, 103.

Things incident cannot be severed. Finch, Law, b. 3, c. 1, n. 12.

Things incident pass by the grant of the principal. 25 Barb. N. Y. 284, 310.

Things incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Coke, Litt. 152 *a*, 151 *b*; Broom, Max. 3d Lond. ed. 433.

Things shall not be void which may possibly be good.

Timores vani sunt æstimandi qui non cadunt in constantem virum. Fears which do not affect a brave man are vain. 7 Coke, 17.

Titulus est justa causa possidendi id quod nostrum est. Title is a just cause of possessing that which is ours. 8 Coke, 153 (305); Coke, Litt. 345 *b*.

Tolle voluntatem et erit omnis actus indifferens. Take away the will, and every action will be indifferent. Bracton, 2.

Totum præfertur unicuique parte. The whole is preferable to any single part. 3 Coke, 41 *a*.

Tout ce que la loi ne defend pas est permis. Every thing is permitted which is not forbidden by law.

Toute exception non surveillée tend à prendre la place du principe. Every exception not watched tends to assume the place of the principle.

Tractent fabrilia fabri. Let smiths perform the work of smiths. 3 Coke, Epist.

Traditio loqui facit chartam. Delivery makes the deed speak. 5 Coke, 1.

Traditio nihil amplius transferre debet vel potest, ad eum qui accipit, quàm est apud eum qui tradit. Delivery cannot and ought not to transfer to him who receives more than was in possession of him who made the delivery. Dig. 41. 1. 20.

Transgressione multiplicata, crescat pœna infligenda. When transgression is multiplied, let the infliction of punishment be increased. Coke, 2d Inst. 479.

Transit in rem judicatam. It passes into a judgment. Broom, Max. 3d Lond. ed. 298; 11 Pet. 100. See, also, 18 Johns. N. Y. 463; 2 Sumn. C. C. 436; 6 East, 251.

Transit terra cum onere. The land passes with its burden. Coke, Litt. 231 *a*; Sheppard, Touchst. 178; 5 Barnew. & C. 607; 7 Mees. & W. Exch. 530; 3 Barnew. & Ald. 587; 18 C. B. 845; 24 Barb. N. Y. 365; Broom, Max. 3d Lond. ed. 437, 630.

Tres faciunt collegium. Three form a corporation. Dig. 50. 16. 85; 1 Sharswood, Blackst. Comm. 469.

Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. Trial ought always to be had where the jury can have the best knowledge. 7 Coke, 1.

Trusts survive.

Turpis est pars quæ non convenit cum suo toto. That part is bad which accords not with its whole. Plowd. 161.

Tuta est custodia quæ sibimet creditur. That guardianship is secure which trusts to itself alone. Hob. 340.

Tutius erratur ex parte mitiori. It is safer to err on the side of mercy. Coke, 3d Inst. 220.

Tutius semper est errare acquietando, quam in puniendo; ex parte misericordiâ quam ex parte justitiâ. It is always safer to err in acquitting than punishing, on the side of mercy than on the side of justice. Branch, Princ.; 2 Hale, Pl. Cr. 290.

Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest. When any thing is granted, that also is granted without which the thing granted cannot exist. Broom, Max. 3d Lond. ed. 429; 13 Mees. & W. Exch. 706.

Ubi aliquid impeditur propter unum, eo removto, tollitur impedimentum. When any thing is impeded by one single cause, if that be removed the impediment is removed. 5 Coke 77 *a*.

Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium. When a common remedy ceases to be of service, recourse must be had to an extraordinary one. 4 Coke, 93.

Ubi culpa est, ibi pœna subesse debet. Where the crime is committed, there the punishment should be inflicted. Jenk. Cent. Cas. 325.

Ubi damna dantur, victus victori in expensis condemnari debet. Where damages are given, the losing party should be adjudged to pay the costs of the victor. Coke, 2d Inst. 289; 3 Sharswood, Blackst. Comm. 399.

Ubi eadem ratio, ibi idem lex. Where there is the same reason, there is the same law. 7 Coke, 18; Broom, Max. 3d Lond. ed. 145.

Ubi et dantis et accipientis turpitudo versatur, non posse repeti dicimus; quotiens autem accipientis turpitudo versatur, repeti posse. Where there is turpitude on the part of both giver and receiver, we say it cannot be recovered back, but as often as the turpitude is on the side of the receiver (alone) it can be recovered back. 17 Mass. 562.

Ubi factum nullum, ibi fortia nulla. Where there is no act, there can be no force. 4 Coke, 43.

Ubi jus, ibi remedium. Where there is a right, there is a remedy. 1 Term, 512; Coke, Litt. 197 *b*; 3 Bouvier, Inst. n. 2411; 4 *id.* 3726.

Ubi jus incertum, ibi jus nullum. Where the law is uncertain, there is no law.

Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima. Where the law compels a man to show cause, it is necessary that the cause be just and legal. Coke, 2d Inst. 269.

Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est. Where the law is special and the reason of it is general, it ought to be taken as being general. Coke, 2d Inst. 43.

Ubi lex non distinguit, nec nos distinguere debemus. Where the law does not distinguish, we ought not to distinguish. 7 Coke, 5.

Ubi major pars est, ibi totum. Where is the greater part, there is the whole. F. Moore, 578.

Ubi matrimonium, ibi dos. Where there is marriage, there is dower. Bracton, 92.

Ubi non adest norma legis, omnia quasi pro suspectis habenda sunt. When the law fails to serve as a rule, almost every thing ought to be suspected. Bacon, Aph. 25.

Ubi non est condendi auctoritas, ibi non est parendi necessitas. Where there is no authority to establish, there is no necessity to obey. Dav. 69.

Ubi non est directa lex, standum est arbitrio judicis, vel procedendum ad similia. Where there is no direct law, the judgment of the judge must be depended upon, or reference made to similar cases.

Ubi non est lex, ibi non est transgressio quoad mundum. Where there is no law, there is no transgression, as it regards the world. 4 Coke, 1 *b*.

Ubi non est manifesta injustitia, judices habentur pro bonis viris, et judicatum pro veritate. Where

there is no manifest injustice, the judges are to be regarded as honest men, and their judgment as truth. 1 Johns. Cas. N. Y. 341, 345.

Ubi non est principalis, non potest esse accessorius. Where there is no principal, there can be no accessory. 4 Coke, 43.

Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate non grammatica sed populari ex usu. Where there is no inference which would lead in any other direction, words are to be understood according to their proper meaning, non grammatical, but according to popular usage. Grotius, *de Jur. Belli*, l. 2, c. 16, § 2.

Ubi nullum matrimonium, ibi nullum dos. Where there is no marriage there is no dower. Coke, Litt. 32 a.

Ubi periculum, ibi et lucrum collocatur. He at whose risk a thing is, should receive the profits arising from it.

Ubi pugnantia inter se in testamento juberentur, neutrum ratum est. When two directions conflicting with each other are given in a will, neither is held valid. Dig. 50. 17. 188 pr.

Ubi quid generaliter conceditur, in est hæc exceptio, si non aliquid sit contra jus fasque. Where a thing is conceded generally, this exception arises, that there shall be nothing contrary to law and right. 10 Coke, 78.

Ubi quis delinquit ibi punietur. Let a man be punished where he commits the offence. 6 Coke, 47.

Ubi verba conjuncta non sunt, sufficit alteratum esse factum. Where words are used disjunctively, it is sufficient that either one of the things enumerated be performed. Dig. 50. 17. 110. 3.

Ubicunque est injuria, ibi damnum sequitur. Wherever there is a wrong, there damage follows. 10 Coke, 116.

Ultima voluntas testatoris est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Coke, Litt. 322; Broom, Max. 3d Lond. ed. 505.

Ultimum supplicium esse mortem solam interpretamur. The extremest punishment we consider to be death alone. Dig. 48. 19. 21.

Ultra posse non potest esse, et vice versa. What is beyond possibility cannot exist, and the reverse, what cannot exist is not possible. Wingate, Max. 100.

Un ne doit prise advantage de son tort demesne. One ought not to take advantage of his own wrong. 2 And. 38, 40.

Una persona vix potest supplere vices duarum. One person can scarcely supply the place of two. 4 Coke, 118.

Unius omnino testis responsio non audiatur. Let not the evidence of one witness be heard at all. Code, 4. 20. 9; 3 Sharswood, Blackst. Comm. 370.

Uniuscujusque contractus initium spectandum est, et causa. The beginning and cause of every contract must be considered. Dig. 17. 1. 8; Story, Bailm. § 56.

Universalia sunt notiora singularibus. Things universal are better known than things particular. 2 Rolle, 294; 2 C. Rob. Adm. 294.

Universitas vel corporatio non dicitur aliquid facere nisi id sit collegialiter deliberatum, etiamsi major pars id faciat. An university or corporation is not said to do any thing unless it be deliberated upon collegiately, although the majority should do it. Dav. 48.

Uno absurdo dato, infinita sequuntur. One absurdity being allowed, an infinity follow. 1 Coke, 102.

Unumquodque dissolvatur eodem ligamine quo ligatur. Every thing is dissolved by the same mode in which it is bound together. Broom, Max. 3d Lond. ed. 792.

Unumquodque eodem modo quo colligatum est dissolvitur. In the same manner in which any thing is bound it is loosened. 2 Rolle, 39.

Unumquodque est id quod est principalius in ipso. That which is the principal part of a thing is the thing itself. Hob. 123.

Unumquodque ligamen dissolvitur eodem ligamine quod ligatur. Every obligation is dissolved in the same manner in which it is contracted. 12 Barb. N. Y. 366, 375.

Unumquodque principiorum est sibimetipsi fides; et perspicua vera non sunt probanda. Every principle is its own evidence, and plain truths are not to be proved. Coke, Litt. 11; Branch, Princ.

Usucapio constituta est ut aliquis litium finis esset. Prescription was instituted that there might be an end to litigation. Dig. 41. 10. 5; Broom, Max. 3d Lond. ed. 801, n.; Wood, Civ. Law, 3d ed. 123.

Usury is odious in law.

Usus est dominium fiduciarium. A use is a fiduciary ownership. Bacon, Uses.

Ut pœna ad paucos, metus ad omnes perveniat. That punishment may happen to a few, the fear of it affects all. Coke, 4th Inst. 63.

Ut res magis valeat quam pereat. That the thing may rather have effect than be destroyed.

Utile per inutile non vitiatur. What is useful is not vitiated by the useless. 3 Bouvier, Inst. nn. 2949, 3293; 2 Wheat. 221; 2 Serg. & R. Penn. 298; 17 *id.* 297; 6 Mass. 303; 12 *id.* 438; 9 Ired. No. C. 254. See 18 Johns. N. Y. 93, 94.

Uxor et filius sunt nomina naturæ. Wife and son are names of nature. 4 Bacon, Works, 350.

Uxor non est sui juris, sed sub potestate viri. A wife is not her own mistress, but is under the power of her husband. Coke, 3d Inst. 108.

Vagabundum nuncupamus eum qui nullibi domicilium contraxit habitationis. We call him a vagabond who has acquired nowhere a domicile of residence. Phillimore, Dom. 23, note.

Valeat quantum valere potest. It shall have effect as far as it can have effect. Cowp. 600; 4 Kent, Comm. 493; Sheppard, Touchst. 87.

Vana est illa potentia quæ nunquam venit in actum. Vain is that power which is never brought into action. 2 Coke, 51.

Vani timores sunt æstimandi, qui non cadunt in constantem virum. Vain are those fears which affect not a firm man. 7 Coke, 27.

Vani timoris justa excusatio non est. A frivolous fear is not a legal excuse. Dig. 50. 17. 184; Coke, 2d Inst. 483; Broom, Max. 3d Lond. ed. 256, n.

Velle non creditur qui obsequitur imperio patris vel domini. He is not presumed to consent who obeys the orders of his father or his master. Dig. 50. 17. 4.

Vendens eandem rem duobus fallaciter est. He is fraudulent who sells the same thing twice. Jenk. Cent. Cas. 107.

Venia facilitas incentivum est delinquendi. Facility of pardon is an incentive to crime. Coke, 3d Inst. 236.

Verba accipienda sunt secundum subjectum materiam. Words are to be interpreted according to the subject-matter. 6 Coke, 6, n.

Verba accipienda ut sortiantur effectum. Words are to be taken so that they may have some effect. 4 Bacon, Works, 258.

Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiori sensu. Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Coke, 20.

Verba aliquid operari debent—debent intelligi ut aliquid operentur. Words ought to have some effect—words ought to be interpreted so as to give them some effect. 8 Coke, 94.

Verba aliquid operari debent, verba cum effectu sunt accipienda. Words are to be taken so as to

have effect. Bacon, Max. Reg. 3, p. 47. See 1 Duer, Ins 210, 211, 216.

Verba artis ex arte. Terms of art should be explained from the art. 2 Kent, Comm. 556, n.

Verba chartarum fortius accipiuntur contra proferentem. The words of deeds are to be taken most strongly against the person offering them. Coke, Litt. 36 *a;* Bacon, Max. Reg. 3; Noy, Max. 9th ed. p. 48; 3 Bos. & P. 399, 403; 1 Crompt. & M. Exch. 657; 8 Term, 605; 15 East, 546; 1 Ball & B. 335; 2 Parsons, Contr. 22; Broom, Max. 3d Lond. ed. 72 (n.), 529.

Verba cum effectu accipienda sunt. Words are to be interpreted so as to give them effect. Bacon, Max. Reg. 3.

Verba currentis monetæ, tempus solutionis designant. The words "current money" refer to the time of payment. Dav. 20.

Verba debent intelligi cum effectu. Words should be understood effectively. 2 Johns. Cas. N. Y. 97, 101.

Verba debent intelligi ut aliquid operentur. Words ought to be so understood that they may have some effect. 8 Coke, 94 *a.*

Verba dicta de personâ, intelligi debent de conditione personæ. Words spoken of the person are to be understood of the condition of the person. 2 Rolle, 72.

Verba generalia generaliter sunt intelligenda. General words are to be generally understood. Coke, 3d Inst. 76.

Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ. General words must be restricted to the nature of the subject-matter or the aptitude of the person. Bacon, Max. Reg. 10; 11 C. B. 254, 356.

Verba generalia restringuntur ad habilitatem rei vel personæ. General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bacon, Max. Reg. 10; Broom, Max. 3d Lond. ed. 575.

Verba illata (relata) inesse videntur. Words referred to are to be considered as if incorporated. Broom, Max. 3d Lond. ed. 600, 603; 11 Mees. & W. Exch. 183, 188; 10 C. B. 261, 263, 266.

Verba in differenti materia per prius, non per posterius, intelligenda sunt. Words referring to a different subject are to be interpreted by what goes before, not by what follows. Calvinus, Lex.

Verba intelligenda sunt in casu possibili. Words are to be understood in reference to a possible case. Calvinus, Lex.

Verba intentioni, et non è contra, debent inservire. Words ought to wait upon the intention, not the reverse. 8 Coke, 94; 2 Sharswood, Blackst. Comm. 379.

Verba intentioni, non è contra, debent inservire. Words ought to be made subservient to the intent, not contrary to it. 8 Coke, 94; 1 Spence, Eq. Jur. 527.

Verba ita sunt intelligenda, ut res magis valeat quam pereat. Words are to be so understood that the subject-matter may be preserved rather than destroyed. Bacon, Max. Reg. 3; Plowd. 156; 2 Blackstone, Comm. 380; 2 Kent, Comm. 555.

Verba merè æquivoca, ei per communem usum loquendi in intellectu certo sumuntur, talis intellectus præferendus est. When words are merely equivocal, if by common usage of speech they acquire a certain meaning, such meaning is to be preferred. Calvinus, Lex.

Verba nihil operari melius est quam absurde. It is better that words should have no operation, than to operate absurdly. Calvinus, Lex.

Verba non tam intuenda, quam causa et natura rei, ut mens contrahentium ex eis potius quam ex verbis appareat. Words are not to be looked at so much as the cause and nature of the thing, since the intention of the contracting parties may appear from those rather than from the words. Calvinus, Lex.

Verba offendi possunt, imò ab eis recedere licet, ut verba ad sanum intellectum reducantur. You may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning. Calvinus, Lex.

Verba ordinationis quando verificari possunt in sua vera significatione, trahi ad extraneum intellectum non debent. When the words of an ordinance can be made true in their true signification, they ought not to be warped to a foreign meaning. Calvinus, Lex.

Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent, sunt referenda. Subsequent words added for the purpose of certainty are to be referred to preceding words in which certainty is wanting. Wingate, Max. 167; 6 Coke, 236.

Verba pro re et subjecta materia accipi debent. Words should be received most favorably to the thing and the subject-matter. Calvinus, Lex.

Verba quæ aliquid operari possunt non debent esse superflua. Words which can have any effect ought not to be treated as surplusage. Calvinus, Lex.

Verba quantumvis generalia, ad aptitudinem restringuntur, etiamsi nullam aliam paterentur restrictionem. Words, howsoever general, are restrained to fitness (*i.e.* to harmonize with the subject-matter) though they would bear no other restriction. Spiegelius.

Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur. Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. Coke, Litt. 359; Broom, Max. 3d Lond. ed. 599; 14 East, 568.

Verba secundum materiam subjectam intelligi nemo est qui nescit. There is no one who is ignorant that words should be understood according to the subject-matter. Calvinus, Lex.

Verba semper accipienda sunt in mitiori sensu. Words are always to be taken in their milder sense. 4 Coke, 17.

Verba stricta significationis ad latam extendi possunt, si subsit ratio. Words of a strict signification can be given a wide signification if reason require. Calvinus, Lex; Spiegelius.

Verba sunt indices animi. Words are indications of the intention. Latch, 106.

Verbum imperfecti temporis rem adhuc imperfectam significat. The imperfect tense of the verb indicates an incomplete matter. 6 Wend. N. Y. 103, 120.

Veredictum, quasi dictum veritatis; ut judicium, quasi juris dictum. A verdict is as it were the *saying of the truth,* in the same manner that a judgment is the *saying of the law.* Coke, Litt. 226.

Veritas demonstrationis tollit errorem nominis. The truth of the description removes the error of the name. 1 Ld. Raym. 303. See LEGATEE.

Veritas habenda est in juratore; justitia et judicium in judice. Truth is the desideratum in a juror; justice and judgment, in a judge. Bracton, 185 *b.*

Veritas nihil veretur nisi abscondi. Truth fears nothing but concealment. 9 Coke, 20.

Veritas nimium altercando amittitur. By too much altercation truth is lost. Hob. 344.

Veritas nominis tollit errorem demonstrationis. The truth of the name takes away the error of description. Bacon, Max. Reg. 25; Broom, Max. 3d Lond. ed. 571; 8 Taunt. 313; 2 Jones, Eq. No. C. 72.

Veritatem qui non liberè pronunciat, proditor est veritatis. He who does not speak the truth freely is a traitor to the truth. Coke, 4th Inst. Epil.

Via antiqua via est tuta. The old way is the safe way. 1 Johns. Ch. N. Y. 527, 530.

Via trita est tutissima. The beaten road is the safest. 10 Coke, 142; 4 Maule & S. 168.

Via trita, via tuta. The old way is the safe way. 5 Pet. 223.

Vicarius non habet vicarium. A deputy cannot appoint a deputy. Branch, Max. 38; Broom, Max. 3d Lond. ed. 758; 2 Bouvier, Inst. n. 1300.

Vicini viciniora præsumuntur scire. Neighbors are presumed to know things of the neighborhood. Coke. 4th Inst. 173.

Videbis ea sæpe committi, quæ sæpe vindicantur. You will see those things frequently committed which are frequently punished. Coke, 3d Inst. Epileg.

Videtur qui surdus et mutus ne poet faire alienation. It seems that a deaf and dumb man cannot alienate. 4 Johns. Ch. N. Y. 441, 444.

Vigilantibus et non dormientibus jura subserviunt. The laws serve the vigilant, not those who sleep. 2 Bouvier, Inst. n. 2327. See LACHES; Broom, Max. 3d Lond. ed. 799.

Vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam. It is lawful to repel force by force; but let it be done with the self-control of blameless defence,—not to take revenge, but to repel injury. Coke, Litt. 162.

Viperina est expositio quæ corrodit viscera textus. That is a viperous exposition which gnaws or eats out the bowels of the text. 11 Coke, 34.

Vir et uxor consentur in lege una persona. Husband and wife are considered one person in law. Coke, Litt. 112; Jenk. Cent. Cas. 27.

Vires acquirit eundo. It gains strength by continuance. 1 Johns. Ch. N. Y. 231, 237.

Vis legibus est inimica. Force is inimical to the laws. Coke, 3d Inst. 176.

Vitium clerici nocere non debet. Clerical errors ought not to prejudice. Jenk. Cent. Cas. 23; Dig. 34. 5. 3.

Vitium est quod fugi debet, ne, si rationem non invenias, mox legem sine ratione esse clames. It is a fault which ought to be avoided, that if you cannot discover the reason you should presently exclaim that the law is without reason. Ellesmere, Postn. 86.

Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti prospiciat, utilis est. Scarcely any law can be made which is beneficial to all; but if it benefit the majority it is useful. Plowd. 369.

Vocabula artium explicanda sunt secundum definitiones prudentium. Terms of art should be explained according to the definitions of those who are most experienced in that art. Puffendorff, *de Off. Hom.* l. 1, c. 17, § 3; Grotius, *Jur. de Bell.* l. 2, c. 16. § 3.

Void in part, void in toto. 15 N. Y. 9, 96.

Void things are as no things. 9 Cow. N. Y. 778, 784.

Volenti non fit injuria. He who consents cannot receive an injury. 2 Bouvier, Inst. nn. 2279, 2327; Broom, Max. 3d Lond. ed. 245; Shelford, Marr. & D. 449; Wingate, Max. 482; 4 Term, 657; Plowd. 501.

Voluit sed non dixit. He willed but did not say. 4 Kent, Comm. 538.

Voluntas donatoris, in chartâ doni sui manifestè expressa observetur. The will of the donor, clearly expressed in the deed, should be observed. Coke, Litt. 21 *a.*

Voluntas et propositum distinguunt maleficia. The will and the proposed end distinguish crimes. Bracton, 2 *b*, 136 *b.*

Voluntas facit quod in testamento scriptum valeat. The will of the testator gives validity to what is written in the will. Dig. 30. 1. 12. 3.

Voluntas in delictis non exitus spectatur. In offences, the will and not the consequences are to be looked to. Coke, 2d Inst. 57.

Voluntas reputabatur pro facto. The will is to be taken for the deed. Coke, 3d Inst. 69.

Voluntas testatoris ambulatoria est usque ad mortem. The will of a testator is ambulatory until his death: that is, he may change it at any time. See 1 Bouvier, Inst. n. 83; 4 Coke, 61.

Voluntas testatoris habet interpretationem latam et benignam. The will of a testator has a broad and liberal interpretation. Jenk. Cent. Cas. 260; Dig. 50. 17. 12.

Voluntas ultima testatoris est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Coke, Litt. 322.

Vox emissa volat,—litera scripta manet. Words spoken vanish, words written remain. A written contract cannot be varied by parol proof. Broom, Max. 3d Lond. ed. 594; 1 Johns. N. Y. 571, 572.

What a man cannot transfer, he cannot bind by articles.

When many join in one act, the law says it is the act of him who could best do it; and things should be done by him who has the best skill. Noy, Max,

When no time is limited, the law appoints the most convenient.

When the common law and statute law concur, the common law is to be preferred. 4 Coke, 71.

When the foundation fails, all fails.

When the law gives any thing, it gives a remedy for the same.

When the law presumes the affirmative, the negative is to be proved. 1 Rolle, 83; 3 Bouvier, Inst. nn. 3063, 3090.

When two titles concur, the best is preferred. Finch, Law, b. 1, c. 4, n. 82.

Where there is equal equity, the law must prevail. 4 Bouvier, Inst. n. 3727.

Where two rights concur, the more ancient shall be preferred.

MAY. Is permitted to; has liberty to.

2. Whenever a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as *shall.* For example, the 23 H. VI. says the sheriff may take bail; that is construed he *shall,* for he is compellable to do so. Carth. 293; Salk. 609; Skinn. 370.

3. The words *shall* and *may,* in general acts of the legislature or in private constitutions, are to be construed imperatively, 3 Atk. Ch. 166; but the construction of those words in a deed depends on circumstances. 3 Atk. Ch. 282. See 1 Vern. Ch. 152, case 142; 18 Ala. 390.

MAYHEM. In Criminal Law. The act of unlawfully and violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary. 8 Carr. & P. 167. The cutting or disabling, or weakening, a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhems. 7 Humphr. Tenn. But cutting off the ear or nose, or the like, are not held to be mayhems at common law. 4 Blackstone, Comm. 205.

2. These and other severe personal injuries are punished by the Coventry Act, which has been re-enacted in several of the states, Ryan, Med. Jur. 191, Phil. ed. 1832; and by congress. See Act of April 30, 1790, s. 13, 1

Story, U. S. Laws, 85; Act of March 3, 1825, s. 22, 3 *id.* 2006; 10 Ala. N. s. 928; 5 Ga. 404; 7 Mass. 245; 1 Ired. No. C. 121; 6 Serg. & R. Penn. 224; 2 Va. Cas. 198; 4 Wisc. 168. Mayhem is not an offence at common law, but only an aggravated trespass. 7 Mass. 248; 3 Binn. Penn. 595. See 11 Rich. So. C. 165.

MAYHEMAVIT. Maimed. This is a term of art which cannot be supplied in pleadings by any other word, as *mutilavit, truncavit*, etc. 3 Thomas, Co. Litt. 548; 7 Mass. 247.

MAYOR (Lat. *major;* Spelman, Gloss. *Meyr, miret, maer*, one that keeps guard. Cowel; Blount; Webster). The chief governor or executive magistrate of a city. The old word was portgreve. The word mayor first occurs in 1189, when Rich. I. substituted a mayor for the two bailiffs of London. The word is common in Bracton. Bracton, 57. In London, York, and Dublin, he is called lord mayor. Wharton, Lex. 2d Lond. ed.

He is usually elected annually; and it is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen, and the like. But the power and authority which mayors possess, being given to them by local regulations, vary in different places.

MAYOR'S COURT. The name of a court usually established in cities, composed of a mayor, recorder, and aldermen, generally having jurisdiction of offences committed within the city, and of other matters specially given them by the statute.

MAYORAZGO. In Spanish Law. A species of entail known to Spanish law. 1 White, New Rec. 119.

MEANDER. To wind as a river or stream. Webster.

The winding or bend of a stream.

To survey a stream according to its *meanders* or windings. Wisc. Rev. Stat. c. 34, § 1; 2 Wisc. 317.

MEASURE. A means or standard for computing amount. A certain quantity of something, taken for a unit, and which expresses a relation with other quantities of the same thing.

2. The constitution of the United States gives power to congress to "fix the standard of weights and measures." Art. 1, s. 8. Hitherto this has remained as a dormant power, though frequently brought before the attention of congress.

The states, it seems, possess the power to legislate on this subject, or, at least, the existing standards at the adoption of the constitution remain in full force. 3 Story, Const. 21; Rawle, Const. 102.

3. By a resolution of congress, of the 14th of June, 1836, the secretary of the treasury is directed to cause a complete set of all weights and measures adopted as standards, and now either made or in the progress of manufacture, for the use of the several custom-houses and for other purposes, to be delivered to the governor of each state in the Union, or to such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States.

4. MEASURES OF LENGTH.

12 inches = 1 foot.
3 feet = 1 yard.
5½ yards = 1 rod or pole.
40 poles = 1 furlong.
8 furlongs = 1 mile.
69 1/7 miles = 1 degree of a great circle of the earth.

An inch is the smallest lineal measure to which a name is given, but subdivisions are used for many purposes. Among mechanics, the inch is commonly divided into eighths. By the officers of the revenue, and by scientific persons, it is divided into tenths, hundredths, etc. Formerly it was made to consist of twelve parts, called lines; but these have fallen into disuse.

Particular Measures of Length.

First. Used for measuring cloth of all kinds.

1 nail = 2¼ inches.
1 quarter = 4 inches.
1 yard = 4 quarters.
1 ell = 5 quarters.

Second. Used for the height of horses.

1 hand = 4 inches.

Third. Used in measuring depths.

1 fathom = 6 feet.

Fourth. Used in land measure, to facilitate computation of the contents, 10 square chains being equal to an acre.

1 link = 7 92/100 inches.
1 chain = 100 links.

5. MEASURES OF SURFACE.

144 square inches = 1 square foot.
9 square feet = 1 square yard.
30¼ square yards = 1 perch or rod.
40 perches = 1 rood.
4 roods or 160 perches = 1 acre.
640 acres = 1 square mile.

MEASURES OF SOLIDITY AND CAPACITY.

First. Measures of solidity.

1728 cubic inches = 1 cubic foot.
27 cubic feet = 1 cubic yard.

Second. Measures of capacity for all liquids and for all goods not liquid, except such as are comprised in the next division.

4 gills = 1 pint = 34¾ cubic inches nearly.
2 pints = 1 quart = 69¼ " "
4 quarts = 1 gallon = 277¼ " "
2 gallons = 1 peck = 554½ " "
8 gallons = 1 bushel = 2218½ " "
8 bushels = 1 quarter = 10¼ cubic feet "
5 quarters = 1 load = 51¼ " "

The last four denominations are used only for goods, not liquids. For liquids, several denominations have heretofore been adopted, namely, for beer the firkin of 9 gallons, the kilderkin of 18, the barrel of 36, the hogshead of 54, and the butt of 108 gallons. For wine or spirits there are the anker, runlet, tierce, hogshead, puncheon, pipe, butt, and tun: these are, however, rather the names of the casks in which the commodities are imported, than as expressing any definite number of gallons. It is the practice to gauge all such vessels, and to charge them according to their actual contents.

Third. Measures of capacity for coal, lime, potatoes, fruit, and other commodities sold by heaped measure.

2 gallons = 1 peck = 704 cubic in. nearly.
8 gallons = 1 bushel = $2815\frac{1}{2}$ " "
3 bushels = 1 sack = $4\frac{8}{9}$ cubic feet, "
12 sacks = 1 chaldron = $58\frac{2}{3}$ " "

6. Measures of Weights.

See Weights.

Angular Measure; or, Division of the Circle.

60 seconds = 1 minute.
60 minutes = 1 degree.
30 degrees = 1 sign.
90 degrees = 1 quadrant.
360 degrees, or 12 signs = 1 circumference.

Formerly the subdivisions were carried on by sixties; thus, the second was divided into sixty thirds, the third into sixty fourths, etc. At present, the second is more generally divided decimally into tens, hundreds, etc. The degree is frequently so divided.

Measure of Time.

60 seconds = 1 minute.
60 minutes = 1 hour.
24 hours = 1 day.
7 days = 1 week.
28 days, or 4 weeks = 1 lunar month.
28, 29, 30, or 31 days = 1 calendar month.
12 calendar months = 1 year.
365 days = 1 common year.
366 days = a leap year.

The second of time is subdivided like that of angular measure.

FRENCH MEASURES.

7. The fundamental, invariable, and standard measure, by which all weights and measures are formed, is called the *mètre*, a word derived from the Greek, which signifies measure. It is a lineal measure, and is equal to 3 feet, 0 inches, $11\frac{44}{1000}$ lines, Paris measure, or 3 feet, 3 inches, $\frac{370}{1000}$, English. This unit is divided into ten parts; each tenth, into ten hundredths; each hundredth, into ten thousandths, etc. These divisions, as well as those of all other measures, are infinite. As the standard is to be invariable, something has been sought from which to make it, which is not variable or subject to any change. The fundamental base of the mètre is the quarter of the terrestrial meridian, or the distance from the pole to the equator, which has been divided into ten millions of equal parts, one of which is the length of the *mètre*. All the other measures are formed from the *mètre*, as follows:

Measure of Capacity.

8. The *litre*. This is the *décimètre*, or one-tenth part of the cubic *mètre;* that is, if a vase be made of a cubic form, of a décimètre every way, it would be of the capacity of a *litre*. This is divided by tenths, as the *mètre*. The measures which amount to more than a single litre are counted by tens, hundreds, thousands, etc. of litres.

Measures of Weights.

The *gramme*. This is the weight of a cubic *centimètre* of distilled water at the temperature of zero: that is, if a vase be made of a cubic form, of a hundredth part of a mètre every way, and it be filled with distilled water, the weight of that water will be that of the gramme.

Measures of Surfaces.

The *arc*, used in surveying. This is a square, the sides of which are of the length of ten mètres, or what is equal to one hundred square mètres. Its divisions are the same as in the preceding measures.

Measures of Solidity.

9. The *stère*, used in measuring fire-wood. It is a cubic mètre. Its subdivisions are similar to the preceding. The term is used only for measuring fire-wood. For the measure of other things, the term *cube mètre*, or cubic mètre, is used, or the tenth, hundredth, etc. of such a cube.

Money.

The *franc*. It weighs five grammes. It is made of nine-tenths of silver, and one-tenth of copper. Its tenth part is called a *decime*, and its hundredth part a *centime*.

One measure being thus made the standard of all the rest, they must be all equally invariable; but, in order to make this certainty perfectly sure, the following precautions have been adopted. As the temperature was found to have an influence on bodies, the term zero, or melting ice, has been selected in making the models or standard of the mètre. Distilled water has been chosen to make the standard of the gramme, as being purer and less encumbered with foreign matter than common water. The temperature having also an influence on a determinate volume of water, that with which the experiments were made was of the temperature of zero, or melting ice. The air, more or less charged with humidity, causes the weight of bodies to vary: the models which represent the weight of the gramme have, therefore, been taken in a vacuum.

10. It has already been stated that the divisions of these measures are all uniform, namely, by tens, or decimal fractions; they may, therefore, be written as such. Instead of writing,

1 mètre and 1-tenth of a mètre, we may write, 1 m. 1.
2 mètre and 8-tenths,—2 m. 8.
10 mètre and 4-hundredths,—10 m. 04.
7 litres, 1-tenth, and 2-hundredths,—7 lit. 12, etc.

Names have been given to each of these divisions of the principal unit; but these names always indicate the value of the fraction, and the unit from which it is derived. To the name of the unit have been prefixed the particles *déci*, for tenth, *centi*, for hundredth, and *milli*, for thousandth. They are thus expressed: a décimètre, a décilitre, a décigramme, a décistère, a déciare, a centimètre, a centilitre, a centigramme, etc. The facility with which the divisions of the unit are reduced to the same expression is very apparent; this cannot be done with any other kind of measures.

11. As it may sometimes be necessary to express great quantities of units, collections have been made of them in tens, hundreds, thousands, tens of thousands, etc., to which names derived from the Greek have been given: namely, *déca*, for tens; *hecto*, for hundreds; *kilo*, for thousands; and *myria*, for tens of thousands; they are thus expressed: a *décamètre*, a *décalitre*, etc.; a *hectomètre*, a *hectogramme*, etc.; a *kilomètre*, a *kilogramme*, etc.

The following table will facilitate the reduction of these weights and measures into our own:

The *Mètre* is 3.28 feet, or 39.371 in.
Are is 1076.441 square feet.
Litre is 61.028 cubic inches.
Stère is 35.317 cubic feet.
Gramme is 15.4441 grains troy, or 5.6481 drams avoirdupois.

MEASURE OF DAMAGES. In Practice. A rule or method by which the damage sustained is to be estimated or measured.

The defendant is to make compensation for all the natural and proximate consequences of his wrong, but not for secondary or remote consequences. There are cases in which this principle of compensation is departed from: as, where exemplary damages are awarded, or double or treble damages are allowed by statute. But, in general, the law seeks to give compensation. The measure of this compensation has been somewhat definitely fixed, as to many classes of cases, by rules, of which the following are important and well established:

2. Bills of Exchange. The rate of damages to be paid to the holder of a bill of exchange which is dishonored has been the subject of distinct statute regulation in nearly all the states of the Union. The following is an abstract of these regulations, and is believed to contain all in force at the present time:

Alabama. Damages on inland bills of exchange protested for non-payment are ten per cent., and on foreign bills fifteen per cent., on the sum drawn for. Code of Ala. 1852, c. 3, pt. 2, § 1537.

These damages are in lieu of all charges except costs of protests incurred previous to and at the time of giving notice of non-payment; but the holder may recover legal interest on the amount of the bill and damages, from the time at which payment was demanded, and costs of protest. *Id.* § 1538.

The same damages are allowed on protest for non-acceptance; but interest is recoverable on the amount of the bill only. *Id.* § 1541.

3. *Arkansas.* It is provided by an act passed Feb. 28, 1838, that every bill of exchange, expressed to be for value received, drawn or negotiated within the state, payable after date, to order or bearer, which shall be duly presented for acceptance or payment, and protested for non-acceptance or non-payment, shall be subject to damages in the following cases. *First*, if the bill have been drawn on any person at any place within the state, at the rate of two per cent. on the principal sum specified in the bill; *second*, if the bill shall be drawn on any person, and payable in Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or at any point on the Ohio river, at the rate of four per cent. on the principal sum; *third*, if the bill shall have been drawn on any person, and payable at any other place within the United States, at the rate of five per cent. on the principal sum; *fourth*, if the bill shall have been drawn on any person, and payable at any port or place beyond the United States, at the rate of ten per cent. on the sum specified in the bill. Digest of Statutes, 1858, 209, c. 25, § 8.

If any bill of exchange, expressed to be for value received, and made payable to order or bearer, shall be drawn on any person at any place within the state, and accepted and protested for non-payment, there shall be allowed and paid to the holder, by the acceptor, damages in the following cases. *First*, if the bill be drawn by any person at any place within the state, at the rate of two per cent. on the principal sum; *second*, if the bill be drawn at any place without the state, but within the United States, at the rate of six per cent. on the sum therein specified; *third*, if the bill be drawn on any person at any place without the United States, at the rate of ten per cent. on the sum therein specified. *Id.* § 9.

In addition to the damages allowed in the two preceding sections to the holder of any bill of exchange protested for non-payment or non-acceptance, he shall be entitled to costs of protest, and interest at the rate of ten per cent. per annum on the amount specified in

the bill, from the date of the protest until the amount of the bill shall be paid. *Id.* § 10.

4. *California.* The damages allowed on protest for non-payment of bills drawn or negotiated within the state are,—if the bill were drawn on any person in any of the United States east of the Rocky Mountains, fifteen per cent.; if drawn on a person in any foreign country, twenty per cent. Laws of Cal. 1850–53, 148, § 12.

These damages are in lieu of interest, protest fees, and all other charges up to the time of notice of non-payment. But the holder is entitled to recover interest on the amount of the principal sum, and the damages from the time at which notice of protest for non-payment was given, and payment of the principal sum demanded. *Id.* § 13.

5. *Connecticut.* When drawn on another place in the United States. When drawn upon persons in the city of New York, two per cent. When in other parts of the state of New York, or the New England states (other than this), New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or the District of Columbia, three per cent. When on persons in North or South Carolina, Georgia, or Ohio, five per cent. On other states, territories, or districts in the United States, eight per cent. on the principal sum in each case, with interest on the amount of such sum, with the damage after notice and demand. Stat. tit. 71, Notes and Bills, 413, 414. When drawn on persons residing in Connecticut, no damages are allowed.

When the bill is drawn on persons out of the United States, twenty per cent. is said to be the amount which ought reasonably to be allowed. Swift, Ev. 336. There is no statutory provision on the subject.

6. *Delaware.* The damages on bills drawn on any person beyond seas and returned unpaid with legal protest, are, as to all concerned, twenty per cent. on the contents of the bill. Rev. Code of Del. 1852, 183, c. 63, § 4.

Florida. Damages on foreign protested bills of exchange shall be at the rate of five per cent. Thompson, Digest of Laws of Florida, 1847, 349, § 6.

8. *Georgia.* No damages are allowed on protested bills drawn in the state on a person in the state; except that on bank bills ten per cent. damages are allowed for refusal to pay in specie. On bills drawn or negotiated within the state on persons out of the state but within the United States, five per cent. and interest is allowed. On bills drawn on a person out of the United States, ten per cent. damages, and postage, protest, and necessary expenses; also the premium, if any, on the bill; but if a discount, the discount must be deducted. Cobb, Dig. of Laws of Georgia, 1851, 521.

9. *Illinois.* On foreign bills protested for non-acceptance or non-payment, legal interest on the bill from the time it ought to have been paid, with ten per cent. damages in addition, and charges of protest. On bills drawn payable within the United States or their territories, but out of the state, the same rule applies, except that the damages are only five per cent. Laws of Ill. 1858, 291.

10. *Indiana.* No damages are allowed on a bill drawn within the state on a person within the state. On a bill drawn for value on a person in another state, territory, or district, five per cent. damages are recoverable; and if on a person out of the United States, ten per cent. No interest or charges prior to protest are allowed; but interest from date of protest may be recovered. And no damages are recoverable of drawer or indorser beyond costs of protest, if the principal sum is paid on notice of protest and demand. 1 Rev. Stat. of Ind. cc. 77, 379, §§ 7, 8, 9, 10.

11. *Iowa.* On bills drawn on a person out of the United States, or in California, Oregon, Utah, or New Mexico, ten per cent. damages, with interest from date of protest, are allowed. If drawn on a person in Iowa, Missouri, Illinois, Wisconsin, or Minnesota, three per cent. with interest. If drawn on a person in Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, Indiana, Ohio, Virginia, the District of Columbia, Pennsylvania, Maryland, New Jersey, New York, Massachusetts, Rhode Island, or Connecticut, five per cent. and interest; if on any other place in the United States, eight per cent. and interest. Rev. Code of Iowa, 1851, 151, § 965.

12. *Kentucky.* On bills drawn on a person at any place within the United States, no damages are allowed. Bills drawn on a person out of the United States, and protested for non-acceptance or non-payment, bear interest at the rate of ten per cent. per year from the date of protest for not longer than eighteen months, unless payment be sooner demanded from the party to be charged. Such interest is then recoverable up to the time of judgment; and the judgment bears legal interest. No other damages are allowed. Rev. Stat. of Ky. 1852, 193, c. 22, § 10.

13. *Louisiana.* On protest for non-acceptance or for non-payment of bills drawn on foreign countries, ten per cent. is allowed; on bills drawn in other states of the United States, five per cent. Rev. Stat. of La. 1856, 44, § 2.

These damages are in lieu of interest and all other charges incurred previous to time of giving notice of non-acceptance or non-payment; but the principal and damages bear interest thereafter. *Id.* § 3.

If the bill is drawn in United States moneys, the damages are to be ascertained without any reference to the rate of exchange existing between the state and the place on which the bill was drawn. *Id.* § 4.

14. *Maine.* Damages are allowed as follows, in addition to interest: On bills for $100 or more, drawn, accepted, or indorsed in the state, at a place seventy-five miles distant from the place where drawn, one per cent.; on bills for any sum drawn, accepted, or indorsed in the state, if payable in New York or in any state north of it, except Maine, three per cent.; if payable in any Atlantic state south of New York and north of Florida,

six per cent.; if payable in any other state, nine per cent. Rev. Stat. of Me. 1857, 519, ch. 82, § 35.

As to bills drawn payable out of the United States, there is no statutory provision. It is the usage to allow the holder of the bill the money for which it was drawn, reduced to the currency of the state, at par, and also the charges of protest, with American interest, upon those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or above par. Per *Parsons*, Ch. J., 6 Mass. 157, 161. See 6 Mass. 162.

15. *Maryland.* No damages are allowed when the bill is drawn in the state on another person in Maryland.

When it is drawn on any person in any other of the United States, eight per cent. damages on the amount of the bill are allowed, and an amount to purchase another bill, at the current exchange, and interest and losses of protest.

If the bill be drawn on a foreign country, fifteen per cent. damages are allowed, and the expense of purchasing a new bill, as above, besides interest and costs of protest. 1 Dorsey, Laws of Md. 197, ch. 38.

16. *Massachusetts.* When a bill drawn or indorsed within the state, and payable without the limits of the United States (excepting places in Africa beyond the Cape of Good Hope, and places in Asia and the islands thereof), is protested for non-acceptance or non-payment, the party liable on such bill shall pay the same at the current rate of exchange at the time of the demand, and five per cent. damages, with interest, from date of protest, in full of all damages, charges, and expenses. Gen. Stat. of Mass. 1860, 293, § 11.

When the bill is payable at a place in Africa beyond the Cape of Good Hope, or at any place in Asia or the islands thereof, the party liable shall pay the same at the par value, with twenty per cent., in full of all damages, interest, and charges. *Id.* § 12.

When the bill is drawn payable without the state, but within the United States, damages are as follows: if payable in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, or New York, two per cent.; if in New Jersey, Pennsylvania, Maryland, or Delaware, three per cent.; if in Virginia, North Carolina, South Carolina, Georgia, or the District of Columbia, four per cent.; if in any other of the states or territories of the United States, five per cent. *Id.* § 13.

When the bill is payable within the state, if it is for not less than $100, and is payable at a place not less than seventy-five miles distant from the place where it is drawn or indorsed, two per cent. damages are payable. *Id.* § 14.

17. *Michigan.* When a bill is drawn in the state on a person in the state, no damages are allowed.

When drawn or indorsed within the state, and payable out of it, within the United States, if payable within the states of Wisconsin, Illinois, Indiana, Pennsylvania, Ohio, or New York, three per cent. interest on the contents of the bill, and charges, are allowed; if payable within the states of Missouri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, or the District of Columbia, five per cent.; if payable elsewhere in the United States, out of Michigan, ten per cent. 1 Compiled Laws of Mich. 408, ch. 31, §§ 8, 9.

18. *Minnesota.* When a bill payable out of the United States is protested for non-acceptance or non-payment, the party liable shall pay the bill at the current rate of exchange and ten per cent. damages, with interest from date of protest, in full of all damages, charges, and expenses. Stat. of Minnesota, 1858, 375, § 8.

When the bill is drawn on a person out of Minnesota, but within the United States, the party shall pay the bill, with interest, and five per cent. damages, together with costs and charges of protest. *Id.* § 9.

19. *Mississippi.* Bills drawn on a person out of the state, but within the United States, draw five per cent. damages, and interest on the principal; bills payable out of the United States, ten per cent., besides interest. In all cases the holder is entitled to all costs and charges. No damages allowed on domestic bills. Rev. Code of Miss. 1857, 356, sect. ii. §§ 5, 6.

Missouri. On bills drawn on a person within the state, the damages are four per cent.; when on a person in another state or territory of the United States, ten per cent.; when on a person out of the United States, twenty per cent. Rev. Stat. of Mo. 1855, 294, §§ 7, 8.

20. *New York.* Upon bills drawn or negotiated within the state upon any person at any place within the six states east of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages are three per cent. If drawn upon a person at a place within North or South Carolina, Georgia, Kentucky, or Tennessee, five per cent. If upon any person in any other state or territory of the United States, or at any other place on, or adjacent to, this continent, and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the western Atlantic ocean, or in Europe, ten per cent. These damages are in lieu of interest, charges of protest, and all other charges incurred previous to, and at the time of, giving notice of non-acceptance or non-payment. But the holder is entitled to interest upon the aggregate amount of the principal sum and damages from time of notice of the protest. If the contents of the bill are expressed in the money of the United States, the amount due and the

damages for non-payment are to be ascertained and determined without reference to the rate of exchange existing between New York and the place on which the bill is drawn. But if in the currency of any foreign country, then the amount due, exclusive of the damages, is to be ascertained by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment. 1 Rev. Stat. of N. Y. 1st ed. 770, § 18; 3 *id.* 5th ed. 1859, 70, §§ 18–22.

These damages are only recoverable by a holder who has purchased the bill or some interest therein for a valuable consideration. *Il.* 71, § 23.

21. *North Carolina.* On bills drawn on a person in any other state or territory of the United States, three per cent. damages are allowed; if drawn on any other place in North America, except the northwest coast, or on any of the West India or Bahama Islands, ten per cent.; if on the island of Madeira, the Canary Islands, the Azores, the Cape Verd Islands, or in any other state or place in Europe, or in South America, fifteen per cent.; if on any other part of the world, twenty per cent. In all cases, interest is recoverable from maturity of the bill. Rev. Code of N. C. 1855, 111, § 8.

22. *Ohio.* By a late statute the former laws relative to damages on bills of exchange were repealed; and it is provided that damages on protested bills of exchange drawn by any person or corporation within the state shall not be recoverable on any contract entered into after the passage of this act. Laws of Ohio, 1859, 153.

23. *Oregon.* On bills drawn payable out of the United States, and protested for non-acceptance or non-payment, the party liable shall pay the same at the current rate of exchange at the time of demand, and damages at the rate of ten per cent. with interest on the contents of the bill from the date of protest; the amount of contents, damages, and interest to be in full of all damages, charges, and expenses.

On bills drawn within the United States but out of Oregon, the drawer or indorser shall pay the bill with legal interest according to its tenor, and five per cent. damages, with costs and charges of protest. Stat. of Oregon, 1855, 531, c. 1, §§ 8, 9.

24. *Pennsylvania.* The following damages are allowed on protest of a bill of exchange for non-payment. They are in lieu of interest and all other charges, except charges of protest, to the time when notice of protest is given and demand of payment made, but are in addition to the charges of protest and interest on the amount of principal, damages, and charges from the time of such notice and demand. If the bill is drawn on a person in any place in the United States or the territories, except California (Upper or Lower), New Mexico, and Oregon, five per cent.; if upon any place on the west coast of South America, fifteen per cent.; if upon any place in China, India, or other parts of Asia or Africa, or islands in the Pacific ocean, twenty per cent.; if upon any other part of the world (including California, New Mexico, and Oregon above excepted), ten per cent.

The amount of the bill and damages are ascertained by the rate of exchange or value of the currency mentioned in the bill at the time of notice of protest and demand of payment. Purdon, Digest, 91, §§ 1, 2.

Rhode Island. On foreign bills drawn or indorsed within the state and returned from any place without the United States, protested for non-acceptance or non-payment, the damages are ten per cent. and charges of protest, and the bill carries interest at six per cent. from date of protest. The same rule applies to inland bills, except that the damages are five per cent. only. Rev. Stat. of R. I. 278, c. 122, §§ 1, 3.

25. *South Carolina.* This state does not appear to have any statute fully covering the subject of damages on bills of exchange. It is decided that on inland bills the damages to be recovered are the costs of protest and interest. On foreign bills the damages are compounded of the ordinary expenses incurred, and the price of re-exchange, which is the difference between the value of money where the bill is drawn and the value where it is payable. 1 Const. R. (by Mills) 108. The distinction between an inland and a foreign bill as established in South Carolina is that an inland bill is one that is to be paid where it is drawn; while a foreign bill is drawn within one state and is payable in another. 1 Const. R. 100, 107; 1 Hill, 44.

By section six of the act of 1811 and subsequent acts, banks in South Carolina are authorized to discount *inland* bills of exchange at the ordinary rates of exchange among merchants. From the preamble of this act,—"to facilitate the exchange between this and our sister states,"—it has been held to apply to bills drawn in South Carolina and payable in others of the United States, as well as bills drawn and payable within the state of South Carolina. Whatever sum is paid as discount is recoverable, if it does not exceed the current rate of exchange. 11 Richardson, 679.

If bills such as these, drawn in South Carolina and payable in another state, are dishonored, the plaintiff is entitled to recover, in the absence of other proof, ten per cent. damages. 11 Richardson, 684.

26. *Tennessee.* On bills payable out of the state and protested for non-payment, damages in addition to interest and charges of protest are recoverable as follows: if the bill was drawn on a person in any of the states (except Tennessee) or territories of the United States, three per cent.; if on any other state or place in North America, bordering upon the Gulf of Mexico, or in any of the West India Islands, fifteen per cent.; if on any other part of the world, twenty per cent. Code of Tenn. 400, § 1963.

27. *Texas.* The holder of any protested draft or bill of exchange drawn within the

state and payable beyond the limits of it, may recover ten per cent. as damages, with interest and costs of suit. But this provision shall not be construed to embrace drafts drawn by persons other than merchants upon their agents or factors. Oldham & White, Dig. of Laws of Texas, 1859, 53, art. 100.

28. *Virginia.* When a bill of exchange drawn or indorsed within this state is protested for non-acceptance or non-payment, there shall be paid by the party liable for the principal of such bill, in addition to what else he is liable for, damages upon the principal at the rate of three per cent. if the bill be payable out of Virginia and within the United States; at the rate of ten per cent. if the bill be payable without the United States. Code of Virginia, 1849, 582, § 9.

29. *Wisconsin.* On bills drawn payable without the United States, damages are allowed at the rate of five per cent., with interest on the contents of the bill from the date of protest. These damages and interest are in full of all damages, charges, and expenses. On bills drawn payable out of the state and in any state or territory of the United States adjoining the state, damages at the rate of five per cent. are allowed, with interest on the bill according to its tenor, and costs and charges of protest. On bills drawn payable out of the state, but within some state or territory of the United States not adjoining the state, the damages are ten per cent., with interest and charges as last mentioned. Rev. Stat. of Wisc. 1848, 409, §§ 8–10.

30. Carriers. Upon a total failure to deliver goods, the carrier is liable for the value of the goods at their place of destination, with interest, deducting the freight. 12 Serg. & R. Penn. 186; 8 Johns. N. Y. 213; 10 *id.* 1; 14 *id.* 170; 15 *id.* 24; 14 Ill. 146; 24 N. H. 297; 1 Cal. 108; 10 La. Ann. 412; 5 Rich. So. C. 462; 9 *id.* 465; 17 Mass. 62. Upon a failure to take the goods at all for transportation, he is liable for the difference between the value at the place of shipment and at the place of destination, less his freight; or, if another conveyance can be found, the difference between the freight agreed on with defendant, and the sum (if greater) which the shipper would be compelled to pay another carrier. 10 Watts, Penn. 418; 4 N. Y. 340; 1 Abb. Adm. 119. Upon a delay to deliver the goods, the plaintiff is entitled to an indemnity for his loss incurred by the delay, taking into account any fall in the market occurring between the time when the property should have been delivered by the carrier and the time when it actually was. 12 N. Y. 509; 22 Barb. 278. But see 19 Barb. N. Y. 36.

31. Collision. The general principle followed by the courts of admiralty in cases of collision between vessels is that the damages awarded against the offending vessel must be sufficient to restore the other to the condition she was in at the time of the collision, if restoration is practicable. Both damages to vessel and cargo are to be made good. But hypothetical and consequential damages are excluded. The loss of the use of the injured vessel while undergoing repairs is proper to be included. If the injured vessel is a total loss, her market-value at the time is the measure of damages. Consult Abbott, Adm. 100; Olc. Adm. 188, 246, 388, 444, 505; 13 How. 106; 17 *id.* 170; 2 Wall. Jr. C. C. 52; 6 McLean, C. C. 238.

32. Contracts. Where a contract prescribes a price to be paid, the compensation recoverable for a part-performance will be measured by the contract price if practicable, and not by the actual value of the services or goods, etc. furnished.

Contracts for Land. Where a vendor of real property fails to convey according to his contract, a distinction is taken, in many of the cases, growing out of the motive of the party in default. If he acted in good faith and supposed he had good title and could convey, the purchaser's damages have been limited to the amount of his advance, if any, interest, and expenses of examining the title. 2 W. Blackst. 1078; 10 Barnew. & C. 416; 8 C. B. 133; 2 Wend. N. Y. 399; 4 Den. N. Y. 546; 6 Barb. N. Y. 646; 20 N. Y. 140; 2 Bibb, Ky. 415; 1 Litt. Ky. 358; 9 Md. 250; 11 Penn. St. 127. But in case of a wilful or fraudulent refusal to convey, the purchaser has been held entitled to the value of the land, with interest. 6 Barnew. & C. 31; 1 Exch. 850; 6 Wheat. 109; Hard. Ky. 41; 2 Bibb, Ky. 40, 434; 9 Leigh, Va. 111. See 21 Me. 484; 21 Vt. 77; 1 Iowa, 26; 9 Ala. N.S. 252; 12 *id.* 820; 19 *id.* 184; 1 Gill & J. Md. 440; 11 Ired. No. C. 99; 14 B. Monr. Ky. 364.

When the purchaser refuses to perform, the measure has been held, in England, to be the difference between the price fixed in the contract and the value of the land at the time fixed for the delivery of the deed. 7 Mees. & W. Exch. 474; 17 Barb. N. Y. 260. But the rule does not appear to be well settled in this country. See 4 Me. 258; 21 Wend. N. Y. 457; 24 *id.* 304; 2 Den. N. Y. 610; 18 Vt. 27.

33. Eviction. The damages recoverable for an eviction, in an action for breach of covenants of seisin and warranty in a deed, are the consideration-money, interest thereon, and the costs, if any, of defending the eviction, 6 Watts & S.; in *Arkansas*, 1 Ark. 323; *Georgia*, 17 Ga. 602; *Illinois*, 2 Ill. 310; *Indiana*, 2 Blackf. Ind. 147; *Kentucky*, 4 Dan. Ky. 253; *Mississippi*, 31 Miss. 433; *Missouri*, 1 Mo. 552; 3 *id.* 391; 19 *id.* 435; *North Carolina*, 2 Dev. No. C. 30; *New Hampshire*, 25 N. H. 229; 30 *id.* 531; *New Jersey*, 4 Halst. N. J. 139; *New York*, 4 Johns. N. Y. 1; 13 *id.* 50; 13 Barb. N. Y. 267; *Ohio*, 3 Ohio, 211; see 8 *id.* 49; 10 *id.* 317; *Pennsylvania*, 4 Dall. 441; 12 Penn. St. 372; 27 *id.* 288; *South Carolina*, 1 McCord, 585; 2 *id.* 413; *Tennessee*, 2 Wheat. 64; 8 Humphr. Tenn. 647; *Virginia*, 2 Rand. Va. 132; 2 Leigh, Va. 451; 11 *id.* 261; while in *Connecticut*, 14 Conn. 245; *Louisiana*, 13

La. 143; *Maine*, 12 Me. 1; 27 *id.* 525; *Massachusetts*, 3 Mass. 523; 4 *id.* 108; 2 Metc. Mass. 518; 9 *id.* 63; and *Vermont*, 12 Vt. 481, it is the value of the land at the time of eviction, together with the expenses of the suit, etc. See 2 Greenleaf, Ev. § 264; Sedgwick, Dam. 165; 4 Kent, Comm. 474.

34. Incumbrances. On a breach of a covenant in a deed against incumbrances, the purchaser is entitled to recover his expenses incurred in extinguishing the incumbrance. 22 Pick. Mass. 490; 1 Du. N. Y. 331; 7 Johns. N. Y. 358; 13 *id.* 105; 16 *id.* 122; 34 Me. 422; 4 Ind. 130.

Insurance. In cases of loss of goods which have been insured from maritime dangers, when an adjustment is made, the damages are settled by valuing the property, not according to prime cost, but at the price at which it may be sold at the time of settling the average. Marshall, Ins. b. 1, c. 14, s. 2, p. 621. See ADJUSTMENT.

35. Sales. Where the seller of chattels fails to perform his agreement, the measure of damages is the difference between the contract-price and the market-value of the article at the time and place fixed for delivery. 5 N. Y. 537; 12 *id.* 41; 3 Mich. 55; 6 McLean, C. C. 102, 497; 4 Tex. 289; 12 Ill. 184. The same rule applies as to the deficiency where there is a part-delivery only. 16 Q. B. 941. Where, however, the purchaser has paid the price in advance, some of the cases, particularly in England and New York, allow the highest market-price up to the time of the trial. Where the purchaser refuses to take and pay for the goods, the seller may sell them fairly, and charge the buyer with the difference between the contract-price and the best market-price obtainable within a reasonable time after the refusal. Where the goods are delivered and received, but do not correspond in quality with a warranty given, the vendee may recover the difference between the value of the goods delivered and the value they would have had if they had corresponded with the contract.

MEASON-DUE. A corruption of *Maison de Dieu*.

MEDIATE POWERS. Those incident to primary powers, given by a principal to his agent. For example: the general authority given to collect, receive, and pay debts due by or to the principal is a primary power. In order to accomplish this, it is frequently required to settle accounts, adjust disputed claims, resist those which are unjust, and answer and defend suits: these subordinate powers are sometimes called mediate powers. Story, Ag. § 58. See 1 Campb. 43, note; 4 *id.* 163; 6 Serg. & R. Penn. 149.

MEDIATION. The act of some mutual friend of two contending parties, who brings them to agree, compromise, or settle their disputes. Vattel, Droit des Gens, liv. 2, c. 18, § 328.

MEDIATOR. One who interposes between two contending parties, with their consent, for the purpose of assisting them in settling their differences. Sometimes this term is applied to an officer who is appointed by a sovereign nation to promote the settlement of disputes between two other nations. See MINISTER.

MEDICAL EVIDENCE. Testimony given by physicians or surgeons in their professional capacity as experts, or derived from the statements of writers of medical or surgical works.

This kind of evidence was first recognized by Charles V. of Germany, and incorporated in the "Caroline Code," framed at Ratisbon in 1532, wherein it was ordained that the opinion of medical men—at first surgeons only—should be received in cases of death by violent or unnatural means, when suspicion existed of a criminal agency. The publication of this code encouraged the members of the medical profession to renewed activity, tending greatly to advance their sciences and the cause of justice generally. Many books soon appeared on the subject of medical jurisprudence, and the importance of medical evidence was more fully understood. Elwell, Malp. & Med. Ev. 285.

2. The evidence of the medical witness is strictly that of an expert. Elwell, Malp. & Med. Ev. 275; 10 How. Pract. N. Y. 289; 2 Conn. 514; 1 Chandl. Wisc. 178; 2 Ohio, 452; 27 N. H. 157; 17 Wend. N. Y. 136; 4 Den. N. Y. 311; 7 Cush. Mass. 219; 1 Phillipps, Ev. 780; Smith, Lead. Cases.

The professional witness should not be permitted to make up an opinion to be given in evidence from what other witnesses say of the facts in the case; because under such circumstances he takes the place of the jury as to the credibility of the witness, and in that case he also determines what part of the testimony of other witnesses properly applies to the case,—a duty that belongs to the court. In the case of Rogers, 7 Metc. Mass. 505, C. J. Shaw presiding, the court held: "If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his [the witness's] opinion the party was insane, and what the nature and character of that insanity; and what state did they indicate, and what he would expect would be the conduct of such a person in any supposed circumstance." Under this ruling the medical witness passes upon the condition of the person whose condition is at issue. To do it correctly, he must hear all the evidence that the jury hears; he must judge as to the relevance of the evidence of others, and make an application of the facts that legally and properly bear upon the case to it, and reject all others: in short, he is judge and jury in the case. Since the trial of Rogers, a different rule has been adopted by the courts in Massachusetts. In the case of the United States *vs.* McGlue, reported in 1 Curt. C. C., Mr. Justice Curtis instructed the jury that medical experts "were not allowed to give opinions in the case. It is not the province of the expert to draw inferences of fact from the evidence, but simply to disclose his opinion on a known or hypothetical state of facts; and,

therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider any of these states of fact put to the medical witness are proved, then the opinions thereon are admissible to be weighed by you; otherwise their opinions are not applicable to the case." In the McNaughten Case, 10 Clark & F. Hou. L. 210, the twelve judges held in the same way. The attention of the witness being called to a definite state of facts constituting a hypothetical case, his opinion is then unembarrassed by any collateral questions or considerations, and the jury, under the instructions of the court, determines how far the facts sustain the hypothetical case, and, consequently, how far the opinion of the witness applies to the case under investigation. See Elwell, Malp. & Med. Ev. 311.

3. The medical witness is not a privileged witness. A difference of opinion has existed among medico-legal writers, and perhaps still exists. Fonblanque, a distinguished English barrister, holds that when the ends of justice absolutely require the disclosure, a medical witness is not only bound but compellable to give evidence on all matters that will enlighten the case; and in the important case of the Duchess of Kingston, Lord Mansfield said, "In a court of justice medical men are bound to divulge secrets when required to do so. If a medical man was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honor and of great indiscretion; but to give that information, which, by the law of the land, he is bound to do, will never be imputed to him as any indiscretion whatever." In this case Sir C. Hawkins, who had attended the duchess as medical man, was compelled to disclose what had been committed to him in confidence. While this is the common-law rule, the states of New York, Missouri, Wisconsin, Iowa, Indiana, Michigan, and perhaps some others, have enacted statutory provisions relieving the physician from the obligation of the common-law rule to reveal professional secrets. The language used in the statutes generally is, "No person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." Under this statute, in New York it has been held that when a physician was consulted by the defendant in an action on the case for seduction, as to the means of producing abortion, he cannot claim the protection of the statute, not being privileged. 21 Wend. N. Y. 79; Elwell, Malp. & Med. Ev. 320.

4. Medical books are not received in evidence. They are subject to the same rule that applies to scientific and other professional books. Even the elementary works on law are not admissible in evidence as to what the law is. 5 Carr. & P. 73; 2 Carr. & K. 270. In the case of Commonwealth *vs.* Wilson, 1 Gray, 338, *Shaw*, J. C., said, "Facts or opinions on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony under oath of persons skilled in such matter. Whether stated in the language of the court or of the counsel in a former case, or cited from works of legal or medical writers, they are still statements of facts, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person not an expert. The principles governing the admissibility of such evidence have been fully considered by this court since the trial of Rogers; and the more recent English authorities are against the admission of such evidence." 6 Carr. & P. 586; Elwell, Malp. & Med. Ev. 332.

MEDICAL JURISPRUDENCE. That science which applies the principles and practice of medicine to the elucidation and settlement of doubtful questions which arise in courts of laws.

2. These questions are properly embraced in five different classes:

The *first* includes questions arising out of the relations of sex: as, impotence and sterility, hermaphroditism, rape, pregnancy, legitimacy, delivery.

The *second*, injuries inflicted upon the living organization: as, infanticide, wounds, poisons, persons found dead.

The *third*, those arising out of disqualifying diseases: as, the different forms of mental alienation.

The *fourth*, those arising out of deceptive practices: as, feigned diseases.

The *fifth* is made up of miscellaneous questions: as, age, identity, presumption of seniorship, life assurance, and medical evidence.

3. Independent of works on several of the particular subjects above mentioned, the following are those, English and American, which can be the most profitably consulted:

Male's Medical Jurisprudence, 1 vol.
Smith, Dr. John Gordon, Principles of Forensic Medicine, 1 vol.
Paris & Fonblanque's Medical Jurisprudence, 3 vols.
Chitty's Medical Jurisprudence, 1 vol.
Ryan's Medical Jurisprudence, 1 vol.
Taylor's Medical Jurisprudence, 1 vol.
Guy's Principles of Forensic Medicine, 1 vol.
Dean's Principles of Medical Jurisprudence, 1 vol.
Beck's Elements of Medical Jurisprudence, 2 vols.
Wharton & Stille's Medical Jurisprudence, 1 vol.
Ray's Medical Jurisprudence of Insanity, 1 vol.
Elwell's Malpractice and Medical Evidence, 1 vol.

The French writers are numerous: Briand, Biessy, Esquirol, Georget, Falret, Trebuchet, Marc, and others, have written treatises or published papers on this subject; the learned Foderé published a work entitled "Les Lois eclairées par les Sciences physiques, ou Traité de Médecine légale et d'Hygiène publique;" the "Annale d'Hygiène et de Médecine légale" is one of the most valued works on this subject. Among the Germans may be found Rose's Manual on Medico-Legal Dissection, Metzger's Principles of Legal Medicine, and others. The reader is referred for a list of authors and their works on Medical Jurisprudence to Dupin, Profession d'Avocat, tom. ii. p. 343, art. 1617 to 1636 *bis*. For a history of the rise and progress of Medical Jurisprudence, see Traill, Med. Jur. 13.

MEDICINE-CHEST. A box containing an assortment of medicines.

Statutory provisions in the United States require all vessels above a certain size to keep a medicine-chest. 1 Story, U. S. Laws, 106: 2 *id.* 971.

MEDIETATIS LINGUÆ (Lat. half-tongue). A term denoting that a jury is to be composed of persons one-half of whom speak the English and one-half a foreign language. See JURY.

MELANCHOLIA. In Medical Jurisprudence. A name given by the ancients to a species of partial intellectual mania, now more generally known by the name of *monomania*. It bore this name because it was supposed to be always attended by dejection of mind and gloomy ideas. See MANIA.

MELIORATIONS. In Scotch Law. Improvements of an estate, other than mere repairs; betterments. 1 Bell, Comm. 73.

MELIUS INQUIRENDUM VEL INQUIRENDO. In Old English Practice. A writ which in certain cases issued after an imperfect inquisition returned on a *capias utlagatum* in outlawry. This *melius inquirendum* commanded the sheriff to summon another inquest in order that the value, etc. of lands, etc. might be better or more correctly ascertained.

MEMBER. A limb of the body useful in self-defence. *Membrum est pars corporis habens destinatum operationem in corpore.* Coke, Litt. 126 *a*.

An individual who belongs to a firm, partnership, company, or corporation. See CORPORATION; PARTNERSHIP.

One who belongs to a legislative body, or other branch of the government: as, a member of the house of representatives; a member of the court.

MEMBER OF CONGRESS. A member of the senate or house of representatives of the United States.

MEMBERS. In English Law. Places where a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. 1 Chitty, Comm. Law, 726.

MEMBRANA (Lat.). **In Civil and Old English Law.** Parchment; a skin of parchment. Vocab. Jur. Utr.; DuCange. The English rolls were composed of several skins, sometimes as many as forty-seven. Hale, Hist. Comm. Law, 17.

MEMORANDUM (Lat. from *memorare*, to remember). An informal instrument recording some fact or agreement: so called from its beginning, when it was made in Latin. It is sometimes commenced with this word though written in English: as, "Memorandum, that it is agreed;" or it is headed with the words, Be it remembered that, etc. The term memorandum is also applied to the cause of an instrument.

In English Practice. The commencement of a record in king's bench, now written in English, "Be it remembered," and which gives name to the whole clause.

It is only used in proceedings by bill, and not in proceedings by original, and was introduced to call attention to what was considered the bye-business of the court. 2 Tidd, Pract. 775. Memorandum is applied, also, to other forms and documents in English practice: *e.g. memorandum in error*, a document alleging error in fact and accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, § 158. Also, a *memorandum of appearance*, etc., in the general sense of an informal instrument, recording some fact or agreement.

A writing required by the Statute of Frauds. Vide "*Note or memorandum.*"

In Insurance. A clause in a policy limiting the liability of the insurer.

2. Policies of insurance on risks of transportation by water generally contain exceptions of all liability from loss on certain articles other than total, or for contributions for general average; and for liability for particular average on certain other articles supposed to be perishable or specially liable to damage, under specified rates on each, varying from three per cent. to twenty, and for any loss whatever under three or five per cent. Some seventy or eighty articles are subject to these exceptions of particular average in the divers forms of policy in use in different places. 1 Phillips, Ins. § 54, n. These exceptions were formerly introduced under a "memorandum," or "N. B.," and hence have been called "memorandum articles," and the body of exceptions the "memorandum." The list of articles and rates of exceptions vary much in different places, and from time to time at the same place. 19 N. Y. 272.

3. The construction of these exceptions has been a pregnant subject in jurisprudence. 2 Phillips, Ins. c. xviii.; Marshall, Ins. 240; 1 Stark. 436; 3 Campb. 429; Park, Ins. 177; 4 Maule & S. 503; 5 *id.* 47; 1 Ball & B. Ch. Ir. 358; 3 Barnew. & Ad. 20; 5 *id.* 225; 4 Barnew. & C. 736; 7 *id.* 219; 8 Bingh. 458; 16 Eng. L. & Eq. 461; 1 Bingh. N. C. 526; 2 *id.* 383; 3 *id.* 266; 3 Pick. Mass. 46; 3 Penn. St. 1550; 4 Term, 783; 7 *id.* 210; 5 Bos. & P. 213; 7 Johns. N. Y. 385; 2 Johns. Cas. N. Y. 246; 7 Cow. N. Y. 202;

5 Mart. La. N. S. 289; 2 Sumn. C. C. 366; 3 *id.* 221; 16 Me. 207; 31 *id.* 455; 1 Wheat. 219; 6 Mass. 465; 15 East, 559; 9 Gill & J. Md. 337; 7 Cranch, 415; 8 *id.* 84; 1 Stor. C. C. 463; Stevens, Av. p. 214; Benecke, Av. by Phill. 402; 3 Conn. 357; 19 N. Y. 272.

MEMORANDUM CHECK. It is not unusual among merchants, when one makes a temporary loan to another, to give the lender a check on a bank, with the express or implied agreement that it shall be redeemed by the maker himself, and that it shall not be presented at the bank for payment: such understanding being denoted by the word *memorandum* upon it. If passed to a third person, it will be valid in his hands like any other check. 4 Du. N. Y. 122; 11 Paige, Ch. N. Y. 612.

MEMORIAL. A petition or representation made by one or more individuals to a legislative or other body. When such instrument is addressed to a court, it is called a petition.

MEMORY. Understanding; a capacity to make contracts, a will, or to commit a crime, so far as intention is necessary.

Memory is sometimes employed to express the capacity of the understanding, and sometimes its power: when we speak of a retentive memory, we use it in the former sense; when of a ready memory, in the latter. Shelford, Lun. Intr. 29, 30.

The reputation, good or bad, which a man leaves at his death.

This memory, when good, is highly prized by the relations of the deceased; and it is therefore libellous to throw a shade over the memory of the dead, when the writing has a tendency to create a breach of the peace, by inciting the friends and relations of the deceased to avenge the insult offered to the family. 4 Term, 126; 5 Coke, 125; Hawkins, Pl. Cr. b. 1, c. 73, s. 1.

MEMORY, TIME OF. According to the English common law, which has been altered by 2 & 3 Will. IV. c. 71, the time of memory commenced from the reign of Richard the First, A. D. 1189. 2 Blackstone, Comm. 31.

But proof of a regular usage for twenty years, not explained or contradicted, is evidence upon which many public and private rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription. 2 Saund. 175 *a*, *d*; Peake, Ev. 336; 2 Price, Exch. 450; 4 *id.* 198.

MENACE. A threat; a declaration of an intention to cause evil to happen to another.

When menaces to do an injury to another have been made, the party making them may, in general, be held to bail to keep the peace; and when followed by any inconvenience or loss, the injured party has a civil action against the wrong-doer. Comyns, Dig. *Battery* (D); Viner, Abr.; Bacon, Abr. *Assault;* Coke, Litt. 161 *a*, 162 *b*, 253 *b;* 2 Lutw. 1428.

MENIAL. This term is applied to servants who live under their master's roof. See stat. 2 Hen. IV. c. 21.

MENSA (Lat.). An obsolete term, comprehending all goods and necessaries for livelihoods.

MENSA ET THORO. See SEPARATION A MENSA ET THORO.

MERCANTILE LAW. That branch of law which defines and enforces the rights, duties, and liabilities arising out of mercantile transactions and relations. As to the origin of this branch of law, see LAW MERCHANT; and for its various principles, consult the articles upon the various classes of commercial property, relations, and transactions.

MERCATUM (Lat.). A market. Du-Cange. A contract of sale. *Id.* Supplies for an army (*commeatus*). *Id.* See Bracton, 56; Fleta, l. 4, c. 28, §§ 13, 14.

MERCEN-LAGE. The law of the Mercians. One of the three principal systems of laws which prevailed in England about the beginning of the eleventh century. It was observed in many of the midland counties, and those bordering on the principality of Wales. 1 Blackstone, Comm. 65.

MERCES (Lat.). **In Civil Law.** Reward of labor in money or other things. As distinguished from *pensis*, it means the rent of farms (*prædia rustici*). Calvinus, Lex.

MERCHANDISE (Lat. *merx*). A term including all those things which merchants sell, either wholesale or retail: as, dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. See Pardessus, n. 8; Dig. 13. 3. 1; 19. 4. 1; 50. 16. 66; 8 Pet. 277; 6 Wend. N. Y. 335.

Mere evidences of value, as bank-bills, are not merchandise. "The fact that a thing is sometimes bought and sold does not make it merchandise." *Story*, J., 2 Stor. C. C. 10, 53, 54. See 2 Mass. 467; 20 Pick. Mass. 9; 3 Metc. Mass. 367; 2 Parsons, Contr. 331, note *w*.

MERCHANT (Lat. *mercator*, *merx*). A man who traffics or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale. Webster, Dict.; Lex Mercatoria, 23. These are known by the name of shipping-merchants. See Comyns, Dig. *Merchant* (A); Dy. 279 *b;* Bacon, Abr. *Merchant.*

One whose business it is to buy and sell merchandise: this applies to all persons who habitually trade in merchandise. 1 Watts & S. Penn. 469; 2 Salk. 445.

Merchants, in the Statute of Limitations, means not merely those trading beyond sea, as formerly held, 1 Chanc. Cas. 152; 1 Watts & S. Penn. 469; but whether it includes common retail tradesmen, *quære*, 1 Mod. 238; 4 Scott, N. R. 819; 2 Parsons, Contr. 369, 370.

See, also, 5 Cranch, 15; 6 Pet. 151; 12 *id.* 300; 5 Mas. C. C. 505.

According to an old authority, there are four species of merchants: namely, merchant adventurers, merchants dormant, merchant travellers, and merchant residents. 2 Brownl. 99. See, generally, 9 Salk. 445; Bacon, Abr.; Comyns, Dig.; 1 Sharswood, Blackst. Comm. 75, 260; 1 Pardessus, Droit Comm. n. 78; 2 Show. 326; Bracton, 334.

MERCHANTMAN. A ship or vessel employed in the merchant-service.

MERCY (Law Fr. *merci;* Lat. *misericordia*).

In Practice. The arbitrament of the king or judge in punishing offences not directly censured by law. 2 Hen. VI. c. 2; Jacob, Law Dict. So, to be in mercy, signifies to be liable to punishment at the discretion of the judge.

In Criminal Law. The total or partial remission of a punishment to which a convict is subject. When the whole punishment is remitted, it is called a pardon; when only a part of the punishment is remitted, it is frequently a conditional pardon; or, before sentence, it is called clemency or mercy. See Rutherforth, Inst. 224; 1 Kent, Comm. 265; 3 Story, Const. § 1488.

As to the construction of "mercy" in the exception to the Sunday laws in favor of deeds of necessity and mercy, see 2 Parsons, Contr. 262, notes.

MERE (Fr.). Mother. This word is frequently used, as, *in ventre sa mère*, which signifies a child unborn, or in the womb.

MERGER. The absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased.

In Estates. When a greater estate and less coincide and meet in one and the same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned, in the latter. For example, if there be a tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and no longer exists; but they must be to one and the same person, at one and the same time, in one and the same right. 2 Blackstone, Comm. 177; Latch, 153; Poph. 166; 6 Madd. Ch. 119; 1 Johns. Ch. N. Y. 417; 3 *id.* 53; 3 Mass. 172.

2. The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished. Preston, Conv. 7; Washburn, Real Prop. As a general rule, equal estates will not merge in each other.

The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. 4 Kent, Comm. 98. See Washburn, Real Prop. Index; 3 Preston, Conv.; 15 Viner, Abr. 361; 10 Vt. 293; 8 Watts, Penn. 146.

In Criminal Law. When a man commits a great crime which includes a lesser, the latter is merged in the former.

3. Murder, when committed by blows, necessarily includes an assault and battery; a battery, an assault; a burglary, when accompanied with a felonious taking of personal property, a larceny: in all these and similar cases, the lesser crime is merged in the greater.

But when one offence is of the same character with the other, there is no merger: as, in the case of a conspiracy to commit a misdemeanor, and the subsequent commission of the misdemeanor in pursuance of the conspiracy; the two crimes being of equal degree, there can be no legal merger. 4 Wend. N. Y. 265.

Of Rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment.

4. When there is a confusion of rights, and the debtor and creditor become the same person, there can be no right to put in execution; but there is an immediate merger. 2 Ves. Ch. 264. Example: a man becomes indebted to a woman in a sum of money, and afterwards marries her; there is immediately a confusion of rights, and the debt is merged or extinguished.

In Torts. Where a person in committing a felony also commits a tort against a private person, in this case the wrong is sunk in the felony, at least until after the felon's conviction.

5. The old rule, that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction, Latch, 144; Noy, 82; W. Jones, 147; Styles, 346; 1 Mod. 282; 1 Hale, Pl. Cr. 546, or acquittal. 12 East, 409; 1 Tayl. No. C. 58; 2 Hayw. No. C. 108. If the civil action be commenced before, the plaintiff will be nonsuited. Yelv. 90 *a*, n. See Hammond, Nisi P. 63; Kel. 48; Cas. *temp.* Hardw. 350; Lofft, 88; 2 Term, 750; 3 Me. 458. Butler, J., says this doctrine is not extended beyond actions of trespass or tort. 4 Term, 333. See, also, 1 H. Blackst. 583, 588, 594; 15 Mass. 78, 336; 1 Gray, Mass. 83, 100.

6. The Revised Statutes of New York, pt. 3, c. 4, t. 1, s. 2, direct that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby. In Kentucky, Pr. Dec. 203, New Hampshire, 6 N. H. 454, and Massachusetts, 1 Gray, Mass. 83, 100, the owner of stolen goods may imme-

diately pursue his civil remedy. See, generally, 1 Ala. 8; 2 *id.* 70; 15 Mass. 336; 1 Gray, Mass. 83, 100; 1 Coxe, N. J. 115; 4 Ohio, 376; 4 N. H. 239; 1 Miles, Penn. 312; 6 Rand. Va. 223; 1 Const. So. C. 231; 2 Root, Conn. 90.

MERITS. A word used principally in matters of defence.

A defence upon the merits is one that rests upon the justice of the cause, and not upon technical grounds only: there is, therefore, a difference between a good defence, which may be technical or not, and a defence on the merits. 5 Barnew. & Ald. 703; 1 Ashm. Penn. 4; 3 Johns. N. Y. 245, 449; 4 *id.* 486; 5 *id.* 360, 536; 6 *id.* 131; 2 Cow. N. Y. 281; 7 *id.* 514; 6 Wend. N. Y. 511.

MERTON, STATUTE OF. An ancient English ordnance or statute, 20 Hen. III. (1253), which took its name from the place in the county of Surrey where parliament sat when it was enacted. 2 Inst. 79; Barrington, Stat. 41, 46; Hale, Hist. Comm. Law, 9, 10, 18.

MESCROYANT. Used in our ancient books. An unbeliever.

MESE. An ancient word used to signify house, probably from the French *maison*. It is said that by this word the buildings, curtilage, orchards, and gardens will pass. Coke, Litt. 56.

MESNE. Intermediate; the middle between two extremes; that part between the commencement and the end, as it relates to time.

Hence the profits which a man receives between disseisin and recovery of lands are called *mesne profits*. Process which is issued in a suit between the original and final process is called *mesne process*.

In England, the word mesne also applies to a dignity: those persons who hold lordships or manors of some superior who is called lord paramount, and grant the same to inferior persons, are called mesne lords.

MESNE LORD. A middle or intermediate lord. 2 Sharswood, Blackst. Comm. 59; 1 Stephen, Comm. 168, 174. See MESNE.

MESNE PROCESS. In Practice. All writs necessary to a suit between its beginning and end, that is, between primary process or summons and final process, or execution, whether for the plaintiff, against the defendant, or for either against any party whose presence is necessary to the suit. For example, the *capias* on mesne process or *ad respondendum* is issued after a writ of summons, and before execution. 3 Sharswood, Blackst. Comm. 279; 3 Stephen, Comm. 564; 1 Tidd, Pract. 243; Finch, Law, b. 4, c. 43. Proceedings are now usually begun with a *capias*, so that what was formerly mesne is now primary.

MESNE PROFITS. The value of the premises, recovered in ejectment, during the time that the lessor of the plaintiff has been illegally kept out of the possession of his estate by the defendant: such are properly recovered by an action of trespass, *quare clausum fregit*, after a recovery in ejectment. 11 Serg. & R. Penn. 55; Bacon, Abr. *Ejectment* (H); 3 Blackstone, Comm. 205.

2. As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years; for in that case the defendant may plead the statute of limitations. 3 Yeates, Penn. 13; Bouvier, Nisi P. 88.

The value of improvements made by the defendant may be set off against a claim for mesne profits; but profits before the demise laid should be first deducted from the value of the improvements. 2 Wash. C. C. 165. See, generally, Washburn, Real Prop.; Bacon, Abr. *Ejectment* (H); Woodfall, Landl. & T. ch. 14, s. 3; 2 Sellon, Pract. 140; Fonblanque, Eq. Index; 2 Phillipps, Ev. 208; Adams, Ej. 13; Dane, Abr. Index; Powell, Mortg. Index; Bouvier, Inst. Index.

MESNE, WRIT OF. The name of an ancient writ, which lies when the lord paramount distrains on the tenant paravail: the latter shall have a writ of mesne against the lord who is mesne. Fitzherbert, Nat. Brev. 316.

MESS BRIEF. In Danish Law. A certificate of admeasurement granted by competent authority at home-port of vessel. Jacobsen, Sea-Laws, 50.

MESSENGER. A person appointed to perform certain duties, generally of a ministerial character.

The officer who takes possession of an insolvent or bankrupt estate for the judge, commissioner, or other such officer.

MESSUAGE. A term used in conveyancing, and nearly synonymous with dwelling-house. A grant of a messuage with the appurtenances will not only pass a house, but all the buildings attached or belonging to it, as also its curtilage, garden, and orchard, together with the close on which the house is built. Coke, Litt. 5 *b*; 2 Saund. 400; Hammond, Nisi P. 189; 4 Cruise, Dig. 321; 2 Term, 502; 4 Blackf. Ind. 331. But see the cases cited in 9 Barnew. & C. 681. This term, it is said, includes a church. 11 Coke, 26; 2 Esp. Cas. 528; 1 Salk. 256; 8 Barnew. & C. 25. And see 3 Wils. 141; 2 W. Blackst. 726; 4 Mees. & W. Exch. 567; 2 Bingh. N. C. 617; 1 Saund. 6; 2 Washburn, Real Prop.

METES AND BOUNDS. The boundary-lines of land, with their terminal points and angles. Courses and distances control, unless there is matter of more certain description, *e.g.* natural monuments. 42 Me. 209. A joint tenant cannot convey by metes and bounds. 1 Hilliard, Real Prop. 582. See BOUNDARY.

METHOD. The mode of operating, or the means of attaining an object.

It has been questioned whether the method of making a thing can be patented. But it has been considered that a method or mode

may be the subject of a patent, because when the object of two patents or effects to be produced is essentially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. Dav. Pat. Cas. 290; 2 Barnew. & Ald. 350; 2 H. Blackst. 492; 8 Term, 106; 4 Burr. 2397; Perpigna, Manuel des Inventeurs, etc., c. 1. sect. 5, § 1, p. 22.

METRE (Greek). A measure. See MEASURE.

METUS (Lat.). A reasonable fear of an intolerable evil, as of loss of life or limb, such as may fall upon a brave man (*virum constantem*). 1 Sharswood, Blackst. Comm. 131; Calvinus, Lex. And this kind of fear alone will invalidate a contract as entered into through duress. Calvinus, Lex.

In a more general sense, fear.

MICHAELMAS TERM. In English Law. One of the four terms of the courts: it begins on the 2d day of November, and ends on the 25th of November. It was formerly a movable term. Stat. 11 Geo. IV. and 1 Will. IV. c. 70.

MICHEL-GEMOT (spelled, also, *micel-gemote*. Sax. great meeting or assembly). One of the names of the general council immemorially held in England. 1 Sharswood, Blackst. Comm. 147.

One of the great councils of king and noblemen in Saxon times.

These great councils were severally called *wittena-gemotes*, afterwards *micel synods* and *micel-gemotes*. Cowel, edit. 1727; Cunningham, Law Dict. *Micel-Gemotes*. See MICHEL-SYNOTH.

MICHEL-SYNOTH (Sax. great council). One of the names of the general council immemorially held in England. 1 Sharswood, Blackst. Comm. 147.

The Saxon kings usually called a *synod*, or mixed council, consisting both of ecclesiastics and the nobility, three times a year, which was not properly called a *parliament* till Henry III.'s time. Cowel, ed. 1727; Cunningham, Law Dict., *Synod, Micel-Gemotes*.

MICHIGAN. The name of one of the new states of the United States of America.

It was admitted into the Union by act of congress of January 26, 1837. 5 U. S. Stat. at Large, 44. See Act of Congr. June 15, 1836, 5 U. S. Stat. at Large, 49.

2. The first constitution of the state was adopted by a convention held at Detroit, in May, 1835. This was superseded by the one at present in force, which was adopted in 1850.

Every person above the age of twenty-one years, who has resided in this state three months, and in the township or ward in which he offers to vote ten days, next preceding election, and who is either a white male citizen, or a white male inhabitant who resided in the state June 24, 1835, or a white male inhabitant who resided in the state January 1, 1850, who had declared his intention to become a citizen of the United States pursuant to the laws thereof six months preceding an election, or who has resided in this state two years and six months and declared his intention as aforesaid, or who is a civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, is an elector and entitled to vote.

The Legislative Power.

3. The *Senate* consists of thirty-two members, elected by the people in each district for the term of two years. Senators must be citizens of the United States, and qualified voters of the district they represent.

The *House of Representatives* is to consist of not less than sixty-five nor more than one hundred members, elected in their respective districts for the term of two years. The elections take place on the Tuesday after the first Monday in November, in the even years. Each county entitled to more than one representative is to be divided by the supervisors into districts, each of which is to elect one representative. A representative must be a citizen of the United States, and a qualified voter of the county he represents.

The members of both houses are privileged from arrest on civil process during the session and for fifteen days before and afterwards. The constitution contains the usual provisions making each house judge of the qualifications, election, and returns of each of its members; providing for organization of the houses and continuance of the session; for regulating the conduct of its members; for keeping and publishing a journal of proceedings; for open sessions.

The Executive Power.

4. The *Governor* is elected by the people of the state for the term of two years. He must be thirty years old at least; for five years a citizen of the United States, and for two years next preceding the election a citizen of the state; and no member of congress, nor any person holding office under the United States, may be governor. He is commander-in-chief of the military and naval forces, and may call out such forces to execute the laws, to suppress insurrections, and to repel invasions; is to transact all necessary business with the officers of government, and may require information in writing, from the officers of the executive department, upon any subject relating to the duties of their respective offices; must take care that the laws be faithfully executed; may convene the legislature on extraordinary occasions, and at an unusual place when the seat of government becomes dangerous from disease or a common enemy; may grant reprieves, commutations, and pardons after convictions, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He must communicate to the legislature at each session information of each case of reprieve, commutation, or pardon granted, and the reasons therefor.

5. The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications, as the governor. He is, by virtue of his office, president of the senate.

In case of the impeachment of the governor, his removal from office, death, inability, 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 ceases.

During a vacancy in the office of governor, if the lieutenant-governor die, resign, be impeached, displaced, be incapable of performing the duties of his office, or absent from the state, the president

pro tempore of the senate is to act as governor until the vacancy be filled or the disability cease.

The Judicial Power.

6. *The Supreme Court* consists of one chief and three associate justices, chosen by the electors of the state for the term of eight years. One of the judges goes out of office every two years. Four terms are to be held annually, two at Lansing and two at Detroit, and three of the judges constitute a quorum. It has a general supervisory power over inferior courts, and general appellate jurisdiction of cases brought up by appeal, by certificate of judges of lower courts, or by consent of parties on agreed statements of facts. The statute provides that the supreme court shall by rules of practice simplify the practice of the state. The changes to be secured are specified as the following: to wit, abolition of the distinction between law and equity; of fictions and unnecessary proceedings; shortening and simplification of pleadings; expediting decisions; regulation of decisions; remedying abuses and imperfections of practice; abolition of unnecessary forms and technicalities; non-abatement of suits through misjoinder or non-joinder of parties, so far as justice will allow; providing for omitting parties improperly joined, and joining those improperly omitted. Comp. Laws, 1857, 988.

7. *The Circuit Court* consists of eight judges, elected, one from each of the districts into which the state is divided, for the term of six years, and until a successor is chosen. This is the court of general original jurisdiction, having jurisdiction in all matters civil and criminal not expressly excepted, and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. It has also power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect its orders, judgments, and decrees, and give it a general control over inferior courts and tribunals within the respective districts. It sits also as a court of chancery, having powers coextensive with the powers of the court of chancery in England, with various modifications, however, both constitutional and statutory. Two terms at least are held annually in each county organized for judicial purposes, and four terms in counties containing ten thousand inhabitants. The stated terms are also terms of the court of chancery.

The District Court of the Upper Peninsula. The counties of Mackinac, Chippewa, Delta, Marquette, Schoolcraft, Houghton, Ontonagon and the islands attached, the islands of Lake Superior, Huron, and Michigan, and those in Green Bay, the Straits of Mackinac, and the river Ste. Marie, form a separate judicial district and elect a district judge. This court has the same jurisdiction as the circuit court; and in case of the disability of the judge, a circuit judge may hold the term.

8. A *Probate Court* is held in each county by a judge elected by the people of the county for the term of four years and till a successor is chosen. It may take probate of wills, and has cognizance of all matters appertaining to the settlement of the estates of decedents and the care of minors, including the appointment and superintendence of guardians of minors, etc.

Justices of the Peace are elected by the people of each township for four years. Not more than four are to be elected in each township, and they are to be classified. They have exclusive civil jurisdiction in all cases where the amounts involved are less than one hundred dollars, and concurrent jurisdiction over all sums less than three hundred dollars. They have a criminal jurisdiction over all cases of larceny where the amount taken does not exceed twenty-five dollars; of assault and battery, not committed riotously nor upon a public officer in the discharge of his duty; of killing, maiming, or disfiguring cattle, where the damage done does not exceed twenty-five dollars; and of other minor offences.

9. A *Circuit Court Commissioner* is elected in each county for two years, who has the judicial power of a judge of the circuit court at chambers. He is to perform the duties of a master in chancery, has power to grant injunctions, etc. He must be an attorney and counsellor-at-law.

Municipal or Police Courts exist in the larger town and the cities, with a limited jurisdiction.

Jurisprudence.

The truth may be given in evidence to the jury in libel cases. The persons and houses of citizens are to be free from unreasonable searches and seizure. Right of jury trial must be demanded by parties; otherwise it is deemed to be waived, in civil cases. No person shall be imprisoned for debt arising out of, or founded on, a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment. No person is incompetent as a witness on account of his opinions in religious matters.

MIDDLE THREAD. See AD MEDIUM FILUM.

MIDDLEMAN. One who has been employed as an agent by a principal, and who has employed a sub-agent under him by authority of the principal, either express or implied. He is not, in general, liable for the wrongful acts of the sub-agent, the principal being alone responsible. 3 Campb. 4; 6 Term, 411; 14 East, 605.

A person who is employed both by the seller and purchaser of goods, or by the purchaser alone, to receive them into his possession, for the purpose of doing something in or about them: as, if goods be delivered from a ship by the seller to a wharfinger, to be by him forwarded to the purchaser, who has been appointed by the latter to receive them; or if goods be sent to a packer, for and by orders of the vendee, the packer is to be considered as a middleman.

The goods in both these cases will be considered *in transitu*, provided the purchaser has not used the wharfinger's or the packer's warehouse as his own, and have an ulterior place of delivery in view. 4 Esp. 82; 2 Bos. & P. 457; 3 *id.* 127, 469; 1 Campb. 282; 1 Atk. Ch. 245; 1 H. Blackst. 364; 3 East, 93.

MIDWIFE. In Medical Jurisprudence. A woman who practises midwifery; a woman who pursues the business of an *accoucheuse*.

A midwife is required to perform the business she undertakes with proper skill; and if she be guilty of any *mala praxis* she is liable to an action or an indictment for the misdemeanor. See Viner, Abr. *Physician;* Comyns, Dig. *Physician;* 8 East, 348; 2 Wils. 359; 4 Carr. & P. 398, 407 *a;* 2 Russell, Crimes, 288.

MIESES. In Spanish Law. Grain crops.

MILE. A length of a thousand paces, or seventeen hundred and sixty yards, or five thousand two hundred and eighty feet. It

contains eight furlongs, every furlong being forty poles, and each pole sixteen feet six inches. 2 Stark. 89.

MILEAGE. A compensation allowed by law to officers for their trouble and expenses in travelling on public business.

In computing mileage, the distance by the road usually travelled is that which must be allowed, whether in fact the officer travels a more or less distant way to suit his own convenience. 16 Me. 431.

MILES. In Civil Law. A soldier. (*Vel a "militia" aut a "multitudine," aut a numero, "mille hominum."* L. 1, § 1, D., *de testam. milit.*) Vocab. Jur. Utr.

In Old English Law. A knight, because military service was part of the feudal tenure. Also, a tenant by military service, not a knight. 1 Sharswood, Blackst. Comm. 404; Selden, Tit. Hon. 334.

MILITARY LAW. A system of regulations for the government of an army. 1 Kent, Comm. 377, n.

That branch of the laws which respects military discipline and the government of persons employed in the military service. De Hart, Courts-Mart. 16.

Military law is to be distinguished from martial law. Martial law extends to all persons; military law to all military persons only, and not to those in a civil capacity. Martial law supersedes and suspends the civil law, but military law is superadded and subordinate to the civil law. See 2 Kent, Comm. 10; 34 Me. 126; MARTIAL LAW.

2. The body of the military law of the United States is contained in the "act establishing rules and articles for the government of the armies of the United States," approved April 30, 1806, and various subsequent acts, some of the more important of which are those of May 29, 1830; August 6, 1846; July 29, 1861; August 3, 1861; August 5, 1861; December 24, 1861; February 13, 1862; March 13, 1862. See, also, Act of February 28, 1795; 5 Wheat. 1; 3 Serg. & R. Penn. 156, 790, the general regulations, and the orders of the president.

The act of 1806 consists of three sections, the first section containing one hundred and one articles, which describe very minutely the various military offences, the punishments which may be inflicted, the manner of summoning and the organization of courts-martial. These articles are called the articles of war. Their provisions extend to the militia mustered into the United States service, and to marines when serving with the army.

The military law of England is contained in the Mutiny Act, which has been passed annually since April 12, 1689, and the additional articles of war made and established by the sovereign.

3. In addition, there are in both countries various usages which constitute an unwritten military law, which applies to those cases where there are no express provisions. 12 Wheat. 19; Benèt, Mil. Law, 3.

The sovereign, in England, has authority to ordain, by articles of war, with regard to crimes not specified by military law, every punishment not reaching to death or mutilation; the president of the United States cannot ordain any penalty for any military crime not expressly declared by act of Congress.

Consult Benèt, De Hart, Cross, Samuels, Tytler, on Military Law.

MILITIA. The military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.

2. The constitution of the United States provides on this subject that congress shall have power 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.

In accordance with these provisions, congress, in 1792, act of May 8, passed an act relating to the militia, which has remained, with slight modifications, till the present time. In 1814 an act was passed prescribing the manner of holding courts. The term of service was lengthened from three months to nine in 1862, and in 1863 a law was passed which has changed in many particulars the old law.

The acts of the national legislature which regulate the militia are the following, namely: Act of May 8, 1792, 1 Story, U. S. Laws, 252; Act of Feb. 28, 1795, 1 *id.* 390; Act of March 2, 1803, 2 *id.* 888; Act of April 10, 1806, 2 *id.* 1005; Act of April 20, 1816, 3 *id.* 1573; Act of May 12, 1820, 3 *id.* 1786; Act of March 2, 1821, 3 *id.* 1811.

The militia, until mustered into the United States service, is considered as a state force. 3 Serg. & R. Penn. 169; 5 Wheat. 1. The president of the United States is to judge when the exigency has arisen which requires the militia to be called out. 12 Wheat. 19. See 8 Mass. 548. See 1 Kent, Comm. 262; Story, Const. §§ 1194–1210. See MILITARY LAW; MARTIAL LAW.

MILL. A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion.

The house or building that contains the machinery for grinding, etc. Webster, Dict.

Mills are so very different and various, that it is not easy to give a definition of the term. They are used for the purpose of grinding and pulverizing grain and other matters, to extract the juices of vegetables, to make various articles of manufacture. They take their names from the uses to which they are employed; hence we have paper-mills, fulling-mills, iron-mills, oil-mills, saw-mills, etc. In another respect their kinds are various; they are

either fixed to the freehold or not. 'Those which are a part of the freehold are either water-mills, wind-mills, steam-mills, etc.; those which are not so fixed are hand-mills, and are merely personal property. Those which are fixed, and make a part of the freehold, are buildings with machinery calculated to attain the object proposed in their erection.

2. It has been held that the grant of a mill and its appurtenances, even without the land, carries the whole right of water enjoyed by the grantor, as necessary to its use, and as a necessary incident. Croke Jac. 121. And a devise of a mill carries the land used with it, and the right to use the water. 1 Serg. & R. Penn. 169. And see 5 Serg. & R. Penn. 107; 10 *id.* 63; 2 Caines, Cas. N. Y. 87; 3 N. H. 190; 7 Mass. 6; 6 Me. 154, 436; 16 *id.* 281.

3. A mill means not merely the building in which the business is carried on, but includes the site, the dam, and other things annexed to the freehold, necessary for its beneficial enjoyment. 3 Mass. 280. See 6 Me. 436.

4. Whether manufacturing machinery will pass under the grant of a mill must depend mainly on the circumstances of each case. 1 Brod. & B. 506. In England, the law appears not to be settled. 1 Bell, Comm. 754, n. 4, 5th ed. In this note are given the opinions of Sir Samuel Romilly and Mr. Leech on a question whether a mortgage of a piece of land on which a mill was erected would operate as a mortgage of the machinery. Sir Samuel was clearly of opinion that such a mortgage would bind the machinery; and Mr. Leech was of a directly opposite opinion.

5. The American law on this subject appears not to be entirely fixed. 1 Hill, Abr. 16; 1 Bail. So. C. 540; 3 Kent, Comm. 440. See Amos & F. Fixt. 188 *et seq.*; 1 Atk. Ch. 165; 1 Ves. Ch. 348; Sugden, Vend. 30; 10 Serg. & R. Penn. 63; 17 *id.* 415; 2 Watts & S. Penn. 116, 390; 6 Me. 157; 6 Johns. N. Y. 5; 20 Wend. N. Y. 626; 1 H. Blackst. 259, note; 10 Am. Jur. 58; 1 Mo. 620; 3 Mas. C. C. 464.

MILL. The tenth part of a cent in value.

MILLED MONEY. This term means merely coined money; and it is not necessary that it should be marked or rolled on the edges. Running's case, Leach, Cr. Cas. 708.

MIL-REIS. The name of a coin. The mil-reis of Portugal is taken as money of account, at the custom-house, to be of the value of one hundred and twelve cents. The mil-reis of Azores is deemed of the value of eighty-three and one-third cents. The mil-reis of Madeira is deemed of the value of one hundred cents. Act of March 3, 1843, 5 U. S. Stat. at Large, 625.

MIND AND MEMORY. A testator must have a sound and disposing mind and memory. In other words, he "ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the object of his bounty, and the manner in which it is to be distributed between them." *Washington*, J., 3 Wash. C. C. 585, 586; 4 *id.* 262; 1 Green, Ch. N. J. 82, 85; 2 *id.* 563, 604; 26 Wend. N. Y. 255, 306, 311, 312; 8 Conn. 265; 9 *id.* 105.

MINE. An excavation in the earth for the purpose of obtaining minerals.

2. Mines may be either by excavating a portion of the surface, as is common in some classes of gold-mines, or almost entirely beneath the surface.

Mines of gold, silver, and the precious metals belong to the sovereign, 1 Plowd. 310; 3 Kent, Comm. 378, n.; but are held by him concurrently with the ownership of the soil, and pass by a grant of the land without exception or reservation. 14 Cal. 375; 17 *id.* 199; 2 Washburn, Real Prop. 626. In New York and Pennsylvania the state's right as sovereign is asserted. See 1 Kent, Comm. 378, n.

Mines of other minerals belong to the owner of the soil, and pass by a grant thereof, unless separated, 1 N. Y. 564; 19 Pick. Mass. 314; but the owner may convey his mines by a separate and distinct grant so as to create one freehold in the soil and another in the mines. 1 Penn. 726; 7 Cush. Mass. 361; 8 *id.* 21; 5 Mees. & W. Exch. 50.

3. In case of a separate ownership, the owner of the mine must support the superincumbent soil, 12 Q. B. 739; 5 Mees. & W. Exch. 60; 12 Exch. 259; and ancient buildings or other erections. 2 Hurlst. & N. Exch. 828.

Opening new mines by a tenant is waste, unless the demise includes them, Coke, Litt. 53 *b*; 2 Blackstone, Comm. 282; 1 Taunt. 410; Hob. 234; but if the mines be already open it is not waste to work them even to exhaustion. 1 Taunt. 410; 19 Penn. St. 324; 6 Munf. Va. 134; 1 Rand. Va. 258; 10 Pick. Mass. 460; 1 Cow. N. Y. 460. See Smith, Landl. & Ten. Morris ed. 192, 193, n. A mortgagee has been allowed for large sums expended in working a mine which he had a right to work, 39 Eng. L. & Eq. 130; but in another case, expenses incurred in opening a mine were disallowed. 16 Sim. Ch. 445.

4. In California, the occupant of public lands, who holds them for agricultural purposes merely, holds them subject to the right of any person to dig for gold, 5 Cal. 36, 97; but the miner must take them as he finds them, subject to prior rights of the same character. 5 Cal. 140, 308; 6 *id.* 148.

An injunction lies for interference with mines. 6 Ves. Ch. 147. See 17 Ves. Ch. 281; 18 *id.* 515; 19 *id.* 159; 1 Swanst. Ch. 208.

See Bainbridge, Collier, on Mines; 1 Kent, Comm.; Washburn, Real Prop.; Washburn, Easements; Tudor, Lead. Cas.

MINERALS (L. Lat. *minera*, a vein of metal). All fossil bodies or matters dug out of mines or quarries, whence any thing may be dug; such as beds of stone which

may be quarried, 14 Mees. & W. Exch. 859, in construing 55 Geo. III. c. 18; Broom, Leg. Max. 175*, 176*.

Any natural production, formed by the action of chemical affinities, and organized when becoming solid by the powers of crystallization. Webster, Dict. But see 5 Watts, Penn. 34; 1 Crabb, Real Prop. 95.

MINISTER. In Governmental Law. An officer who is placed near the sovereign, and is invested with the administration of some one of the principal branches of the government.

Ministers are responsible to the king or other supreme magistrate who has appointed them. 4 Conn. 134.

In Ecclesiastical Law. One ordained by some church to preach the gospel.

Ministers are authorized in the United States, generally, to solemnize marriage, and are liable to fines and penalties for marrying minors contrary to the local regulations. As to the right of ministers or parsons, see 3 Am. Jur. 268; Sheppard, Touchst. Anthon ed. 564; 2 Mass. 500; 10 *id.* 97; 14 *id.* 333; 11 Me. 487.

In International Law. An officer appointed by the government of one nation, with the consent of two other nations who have a matter in dispute, with a view by his interference and good office to have such matter settled.

A name given to public functionaries who represent their country with foreign governments, including ambassadors, envoys, and residents.

A custom of recent origin has introduced a new kind of ministers, without any particular determination of character: these are simply called *ministers*, to indicate that they are invested with the general character of a sovereign's mandatories, without any particular assignment of rank or character.

The minister represents his government in a vague and indeterminate manner, which cannot be equal to the first degree; and he possesses all the rights essential to a public minister.

There are also *ministers plenipotentiary*, who, as they possess full powers, are of much greater distinction than simple ministers. These, also, are without any particular attribution of rank and character, but by custom are now placed immediately below the ambassador, or on a level with the envoy extraordinary. Vattel, liv. 4, c. 6, § 74; 1 Kent, Comm. 10th ed. 48; Merlin, Répert.

Formerly no distinction was made in the different classes of public ministers, but the modern usage of Europe introduced some distinctions in this respect, which, on account of a want of precision, became the source of controversy. To obviate these, the congress of Vienna, and that of Aix-la-Chapelle, put an end to these disputes by classing ministers as follows:—1. Ambassadors, and papal legates or nuncios. 2. Envoys, ministers, or others accredited to sovereigns (auprès des souverains). 3. Ministers resident, accredited to sovereigns. 4 Chargés d'Affaires, accredited to the minister of foreign affairs. Récez du Congrès de Vienne. du 19 Mars, 1815: Protocol du Congrès d'Aix-la-Chapelle, du 21 Novembre, 1818; Wheaton, Int. Law, pt. 3, c. 1, § 6.

The United States sends no envoys of the rank of ambassadors.

MINISTERIAL. That which is done under the authority of a superior; opposed to judicial: as, the sheriff is a ministerial officer bound to obey the judicial commands of the court.

When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment. See 10 Me. 377; Bacon, Abr. *Justices of the Peace* (E); 1 Conn. 295; 3 *id.* 107; 9 *id.* 275; 12 *id.* 464; MANDAMUS.

MINISTERIAL TRUSTS (also called instrumental trusts). Those which demand no further exercise of reason or understanding than every intelligent agent must necessarily employ: as, to convey an estate. They are a species of special trusts, distinguished from discretionary trusts, which necessarily require much exercise of the understanding. 2 Bouvier, Inst. n. 1896.

MINNESOTA. One of the new states of the United States of America.

2. It was created a territory by act of congress, March 3, 1849, and admitted into the Union as a state, May 11, 1858, under a constitution framed and adopted by a convention at St. Paul, on the 29th day of August, 1857, pursuant to an act of congress of February 26, 1857, and submitted to and ratified by the people on the 13th of October, 1857.

The *Bill of Rights* provides that there shall be neither slavery nor involuntary servitude, otherwise than for the punishment of crime; that there shall be no imprisonment for debt; that a reasonable amount of property shall be exempt from execution; that all future leases of agricultural lands for a longer period than twenty-one years, reserving any rent, shall be void; and that no person shall be rendered incompetent as a witness in consequence of his religious opinions.

3. The *Right of Suffrage* is vested in all male persons over twenty-one years of age, who have resided in the United States one year and in the state four months next preceding any election, and who are either white citizens of the United States, white persons of foreign birth who have declared their intention to become citizens, or persons of Indian blood who have adopted the language and habits of civilization and have been pronounced by any district court of the state capable of enjoying the rights of citizenship. But all persons convicted of any felony, not restored to civil rights, and all persons insane, or under guardianship, are excluded. All elections are by ballot. No arrest by civil process is allowed on any day of election. All legal voters are eligible by the people to any office, except as hereinafter specified.

4. *Amendments to the Constitution.* A majority of both branches of the legislature may submit amendments to the constitution to the people, which, if ratified by the voters present, shall be part of the constitution. A convention may also be called for the purpose of amending it.

The Legislative Department.

The *Senate* is composed of a number of senators not exceeding one for every five thousand inhabit-

sents, elected for the term of two years by the people. A senator must have resided one year in the state and six months next preceding the election in the district from which he is elected, and must be a qualified elector. One-half the senate is elected each year, the districts numbered with odd and even numbers electing alternate years.

5. The *House of Representatives* is composed of a number of representatives not exceeding one for every two thousand inhabitants, elected annually by the people for the term of one year. The qualifications necessary are the same as those of the senators.

The constitution contains the usual provisions for the organization and continuance of the two houses, regulating the conduct and judging of the qualifications of members, recording and publishing proceedings, securing freedom of debate, exempting members from arrest on civil process, etc.

All elections by the legislature are to be made *viva voce*. The legislature cannot authorize a lottery or the sale of lottery-tickets. The legislature is to provide a uniform system of public schools. The proceeds of certain lands are secured as a permanent fund, the income of which the legislature is to distribute among the townships. The legislature cannot create a corporation by special act for any but municipal purposes. It may pass a general banking law; may not suspend specie payments; must provide that all banks shall hold state or United States stocks as security for their notes. It may, by vote of two-thirds in both houses, contract a debt for extraordinary expenses, not exceeding two hundred and fifty thousand dollars. A tax must be levied each year large enough to pay the expenses of that year and cover the deficiency of the preceding year if any exists. Provision must be made at the time of creating any debt for the payment of interest and its extinction in ten years.

The Executive Power.

6. The *Governor* is elected by the people, for the term of two years. He must have attained the age of twenty-five, be a citizen of the United States, and have resided in the state for one year next preceding his election. He is commander-in-chief of the army and navy; informs the legislature at each session of the condition of the country; may require the written opinion of the heads of the departments on subjects relating to their respective offices; may grant reprieves and pardons, except in cases of impeachment; may, with the consent of the senate, appoint a state librarian and notaries public; and may appoint commissioners to take acknowledgments of deeds. He is invested with the veto power, may call extra sessions of the legislature, shall see that the laws are executed, and may fill vacancies that may occur in the office of secretary of state, treasurer, auditor, attorney-general, and other state and district offices hereafter to be created by law, until the next annual election, and order elections to fill vacancies in the legislature.

7. The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications, as the governor. He presides over the senate, and acts as governor during any vacancy occurring in that office. A president *pro tempore* of the senate is elected at the close of each session by the senate, who becomes lieutenant-governor in case of vacancy in that office.

The Judicial Power.

This is vested in a supreme court, district court, courts of probate, and justices of the peace; but the legislature may, by a two-thirds vote, establish other inferior courts, of which the judges must be elected, for a term not longer than seven years, by the electors of the district for which the courts are created.

The *Supreme Court* consists of one chief and two associate justices, elected by the people of the state at large for the term of seven years. The number of associate justices may be increased to four by a vote of two-thirds of both houses of the legislature. Its original jurisdiction is prescribed by law, and it has appellate jurisdiction in all cases both in law and equity, but holds no jury terms.

The *District Court* consists of one judge elected from each of the six judicial districts into which the state is divided, by the electors thereof, for the term of seven years. Each judge holds the court in his own district, except where convenience or the public interest require, when the judges may exchange services. One or more terms of the court are held in each county per annum. It has original jurisdiction in all civil cases where the amount involved exceeds one hundred dollars, the distinction between suits at law and in equity being abolished, and in all criminal cases where the penalty is three months' imprisonment or more, or where a fine of more than one hundred dollars is imposed. It has power, also, to change the names of people, towns, or counties.

A *Probate Court* is held in each organized county in the state, by a judge elected by the people of the county for the term of two years. The judge must be a resident of the county at the time of his election, and continue to be during his term. The court has jurisdiction over the estates of decedents, and over persons under guardianship.

Justices of the Peace are elected, two for each town (subject to variation by laws), by the people, for the term of two years. They have jurisdiction in civil cases where the amount involved is one hundred dollars or less, and in criminal cases where the criminal is imprisoned for three months or less, or a fine not exceeding one hundred dollars. They have no jurisdiction in any case involving the title to real estate.

MINOR (Lat. less; younger). A minor; one not a major, *i.e.* not twenty-one. Coke, 2d Inst. 291; Coke, Litt. 88, 128, 172 *b;* 6 Coke, 67; 3 Bulstr. 143; Bracton, 340 *b;* Fleta, l. 2, c. 60, § 26.

Of less consideration; lower. Calvinus, Lex. *Major* and *minor* belong rather to civil law. The common-law terms are adult and infant.

MINORITY. The state or condition of a minor; infancy.

The lesser number of votes of a deliberative assembly: opposed to majority, which see.

MINT. The place designated by law where money is coined by authority of the government of the United States.

The mint was established by the act of April 2, 1792, 1 Story, U. S. Laws, 227, and located at Philadelphia, where, by virtue of sundry acts of congress, it still remains. Act of April 24, 1800, 1 Story, U. S. Laws, 770; Act of March 3, 1801, 1 *id.* 816; Act of May 19, 1828, 4 Sharswood, cont. of Story, U. S. Laws, 2120.

See, also, the following acts of congress relating to the mint:—Act of January 18, 1837, 4 Sharswood, cont. of Story, U. S. Laws, 2120; Act of May 19, 1828, 4 *id.* 2120; Act of May 3, 1835; Act of February 13, 1837; Act of March 3, 1849; Act of March 3, 1851, § 11. See, also, COIN; FOREIGN COIN; MONEY.

MINUTE. Measures. In divisions of the circle or angular measures, a minute is equal to sixty seconds, or one-sixtieth part of a degree.

In the computation of time, a minute is equal to sixty seconds, or the sixtieth part of an hour. See MEASURE.

In Practice. A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

Toullier says they are so called because the writing in which they were originally was small; that the word is derived from the Latin *minuta* (*scriptura*), in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toullier, n. 413.

Minutes are not considered as any part of the record. 1 Ohio, 268. See 23 Pick. Mass. 184.

MINUTE-BOOK. A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered.

MINUTE TITHES. Small tithes, usually belonging to the vicar: *e.g.* eggs, honey, wax, etc. 3 Burn, Eccl. Law. 680; 6 & 7 Will. IV. c. 71, §§ 17, 18, 27.

MIRROR DES JUSTICES. The Mirror of Justices, a treatise written during the reign of Edward II. Andrew Horne is its reputed author. It was first published in 1642, and in 1768 it was translated into English by William Hughes. Some diversity of opinion seems to exist as to its merits. Pref. to 9 & 10 Coke, Rep. As to the history of this celebrated book, see St. Armand's Hist. Essays on the Legislative Power of England, 58, 59.

MISADVENTURE. An accident by which an injury occurs to another.

When applied to homicide, misadventure is the act of a man who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues must be neither *malum in se* nor *malum prohibitum*. The usual examples under this head are: 1, when the death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico;* 3, from acts lawful and indifferent in themselves, done with proper and ordinary caution. 4 Blackstone, Comm. 182; 1 East, Pl. Cr. 221. See HOMICIDE; MANSLAUGHTER; CORRECTION.

MISBEHAVIOR. Improper or unlawful conduct. See 2 Mart. La. N. S. 683.

2. A party guilty of misbehavior, as, for example, to threaten to do injury to another, may be bound to his good behavior, and thus restrained.

Verdicts are not unfrequently set aside on the ground of misbehavior of jurors: as, when the jury take out with them papers which were not given in evidence, to the prejudice of one of the parties, Ld. Raym, 148; when they separate before they have agreed upon their verdict, 3 Day, Conn. 237, 310; see JURY; NEW TRIAL; when they cast lots for a verdict, 2 Lev. 205; or give their verdict, because they have agreed to give it for the amount ascertained, by each juror putting down a sum, adding the whole together, and then dividing by twelve, the number of jurors, and giving their verdict for the quotient. 15 Johns. N. Y. 87. See Bacon, Abr. *Verdict* (H).

3. A verdict will be set aside if the successful party has been guilty of any misbehavior towards the jury: as, if he say to a juror, "I hope you will find a verdict for me," or, "The matter is clearly of my side." 1 Ventr. 125; 2 Rolle, Abr. 716, pl. 17. See Code, 166, 401; Bacon, Abr. *Verdict* (I).

MISCARRIAGE. In Medical Jurisprudence. The expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fœtus at any time before birth is termed, in law, procuring miscarriage. Chitty, Med. Jur. 410; 2 Dunglison, Hum. Phys. 364. See ABORTION; FŒTUS.

In Practice. A term used in the Statute of Frauds to denote that species of wrongful act for the consequences of which the wrongdoer would be responsible at law in a civil action.

By the English Statute of Frauds, 29 Car. II. c. 3, § 4, 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.

The wrongful riding the horse of another, without his leave or license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, falls within the meaning of the word miscarriage. 2 Barnew. & Ald. 516; Burge, Sur. 21.

MISCASTING. An error in auditing and numbering. It does not include any pretended miscasting or misvaluing. 4 Bouvier, Inst. n. 4128.

MISCOGNIZANT. Ignorant, or not knowing. Stat. 32 Hen. VIII. c. 9. Little used.

MISCONDUCT. Unlawful behavior by a person intrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.

A verdict will be set aside when any of the jury have been guilty of such misconduct; and a court will set aside an award if it have been obtained by the misconduct of an arbitrator. 2 Atk. Ch. 501, 504; 2 Chitt. Bail, 44; 1 Salk. 71; 3 P. Will. Ch. 362; 1 Dick. Ch. 66.

MISCONTINUANCE. In Practice. A continuance of a suit by undue process. Its effect is the same as a discontinuance. 2

Hawkins, Pl. Cr. 299; Kitch. 231; Jenk. Cent. Cas. 57.

MISDEMEANOR. In Criminal Law. A term used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings. In its usual acceptation, it is applied to all those crimes and offences for which the law has not provided a particular name.

The word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances, but not including a multitude of offences over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault. Misdemeanors have sometimes been called misprisions.

MISDIRECTION. In Practice. An error made by a judge in charging the jury in a special case.

2. It is a rule, subject to the qualifications hereafter stated, that when the judge at the trial misdirects the jury on matters of *law* material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted, 6 Mod. 242; 2 Salk. 649; 2 Wils. 269; 4 Conn. 356; or, if such misdirection appear in the bill of exceptions, or otherwise upon the record, a judgment founded on a verdict thus obtained will be reversed. And although the charge of the court be not positively erroneous, yet, if it have a tendency to mislead the jury, and it be uncertain whether they would have found as they did if the instructions had been entirely correct, a new trial will be granted. 11 Wend. N. Y. 83; 6 Cow. N. Y. 682; 9 Humphr. Tenn. 411; 9 Conn. 107. When the issue consists of a mixed question of law and fact, and there is a conceded state of facts, the rest is a question for the court, 2 Wend. N. Y. 596; and a misdirection in this respect will avoid the verdict.

3. Misdirection as to matters of *fact* will, in some cases, be sufficient to vitiate the proceedings. For example: misapprehension of the judge as to a material circumstance, and a direction to the jury accordingly, 1 Const. So. C. 200; or instructing them upon facts which are purely hypothetical, whereby they are misled, 8 Ga. 114; submitting as a contested point what has been admitted, 9 Conn. 216; giving to the jury a peremptory direction to find in a given way, when there are facts in the case conducing to a conclusion. 7 J. J. Marsh. Ky. 410; 3 Wend. N. Y. 102; 19 *id.* 402; 12 Mass. 22; 5 Humphr. Tenn. 476. There are, however, many cases in which the court may instruct the jury, upon the whole evidence, to find for one or the other party; and when a verdict formed under such instruction is conformable to the law, the evidence, and the justice of the case, it is rarely disturbed. 3 Dan. Ky. 566. But to warrant an unqualified direction to the jury in favor of a party, the evidence must either be undisputed or the preponderance so decided that a verdict against it would be set aside. 16 Wend. N. Y. 663. When the court delivers its opinion to the jury on a matter of fact, it should be *as opinion*, and not as direction. 12 Johns. N. Y. 513. But it is, in general, allowed a very liberal discretion in this regard. 1 M'Clel. & Y. Exch. 286. Where the question is one of mere fact, no expressions of the judge, however strong or erroneous, will amount to a misdirection, provided the question is fairly presented to the jury and left with them for their decision. 5 Scott, 28; 4 Moore & S. 295; 19 Wend. N. Y. 186; 10 Pick. Mass. 252.

4. Unless the misdirection be excepted to, the party by his silence will be deemed to have waived it. 10 Mo. 515; 2 Pick. Mass. 145. But see 4 Wend. N. Y. 514; 2 Barb. N. Y. 420.

As to its effects, the misdirection must be calculated to do injustice; for if it be entirely certain that justice has been done, and that a re-hearing would produce the same result, or if the amount in dispute be very trifling, so that the injury is scarcely appreciable, a new trial will not be granted. 2 Caines, N. Y. 85; 7 Me. 442; 10 Ga. 429; 3 Graham & W. New Tr. 705–873; NEW TRIAL; CHARGE.

MISE (Lat. *mittere*, through the French *mettre*, to place). **In Pleading.** The issue in a writ of right. The tenant in a writ of right is said to *join the mise on the mere right* when he pleads that his title is better than the demandant's. 2 Wms. Saund. 45, *h*, *i*. It was equivalent to the general issue; and every thing except collateral warranty might be given in evidence under it by the tenant. Booth, Real Act. 98, 114; 3 Wils. 420; 7 Wheat. 31; 3 Pet. 133; 7 Cow. N. Y. 52; 10 Gratt. Va. 350. The prayee in aid, on coming into court, joined in the mise together with the tenant. 2 Wms. Saund. 45, d, note. It was the more common practice, however, for the demandant to traverse the tenant's plea when the cause could be tried by a common jury instead of the grand assize.

In Practice. Expenses. It is so commonly used in the entries of judgments, in personal actions: as, when the plaintiff recovers, the judgment is *quod recuperet damna sua* (that he recover his damages), and *pro mises et custagiis* (for costs and charges) so much, etc.

MISERABILE DEPOSITUM (Lat.). **In Civil Law.** The name of an involuntary deposit, made under pressing necessity: as, for instance, shipwreck, fire, or other inevitable calamity. Pothier, Proc. Civ. pt. 5, ch. 1, § 1; La. Code, 2935.

MISERICORDIA (Lat.). An arbitrary or discretionary amercement.

To be in mercy is to be liable to such punishment as the judge may in his discretion inflict. According to Spelman, misericordia

is so called because the party is in mercy, and to distinguish this fine from redemptions, or heavy fines. Spelman, Gloss. See Coke, Litt. 126 *b*; Madox, Exch. c. 14.

MISFEASANCE. The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury.

It differs from malfeasance or nonfeasance. See, generally, 2 Viner, Abr. 35; 2 Kent, Comm. 443; Doctrina Plac. 62; Story, Bailm. § 9.

It seems to be settled that there is a distinction between misfeasance and nonfeasance in the case of mandates. In cases of nonfeasance the mandatary is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it; but in cases of misfeasance the common law gives a remedy for the injury done, and to the extent of that injury. 5 Term, 143; 4 Johns. N. Y. 81; 2 Johns. Cas. N. Y. 92; 1 Esp. 74; 2 Ld. Raym. 909; Story, Bailm. § 165; Bouvier, Inst. Index.

MISJOINDER. In Pleading. The improper union of parties or causes of action in one suit at law or in equity.

Of Actions. The joining several demands which the law does not permit to be joined, to enforce by one proceeding several distinct, substantive rights of recovery. Gould, Plead. c. 4, § 98; Archbold, Civ. Plead. 61; Dane, Abr.

In equity, it is the joinder of different and distinct claims against one defendant, 1 Mylne & C. Ch. 608; 7 Sim. Ch. 241; 3 Barb. Ch. N. Y. 432, and is distinguished from multifariousness, which may exist only where there are several defendants disconnected with each other. Story, Eq. Plead. § 297, n. The grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill. 5 Ired. Eq. No. C. 313. See 21 Ala. N. S. 252; 9 Ga. 278; 3 Md. Ch. Dec. 46; 22 Conn. 171.

2. It may arise from the joinder of plaintiffs who possess distinct claims, 2 Sim. Ch. 331; 6 Madd. Ch. 94; 8 Pet. 123; but see 3 Harr. 412; 6 Johns. Ch. N. Y. 150; 8 Paige, Ch. N. Y. 605, or the joinder of distinct claims of the plaintiff in one bill. 2 Sim. & S. Ch. 79. But it seems that where there is a common liability of the defendants and a common interest in the plaintiffs, different claims *may* be united in the same suit. 1 Mylne & C. 623; 3 *id.* 85; 5 How. 127; 12 Metc. Mass. 323. And see 7 Sim. Ch. 241; 3 Price, Exch. 164; 2 Younge & C. Ch. 389; Story, Eq. Plead. § 536, n.; MULTIFARIOUSNESS.

At law, misjoinder vitiates the entire declaration, whether taken advantage of by general demurrer, 1 Maule & S. 355, motion in arrest of judgment, writ of error. 2 Bos. & P. 424; 4 Term, 347. It may be aided by verdict in some cases. 2 Lev. 110; 11 Mod. 196; 2 Maule & S. 533; 1 Chitty, Plead. 188.

3. Of Parties. The joining, as plaintiffs or defendants, parties who have not a joint interest.

In equity, the joinder of improper plaintiffs is a fatal defect. 2 Sandf. Ch. N. Y. 186; 3 Edw. Ch. N. Y. 48; 2 Ala. N. S. 406. But the court may exercise a discretion whether to dismiss the bill. 1 Barb. Ch. N. Y. 59; 3 Ohio St. 129. See 5 Fla. 110. It may be dismissed wholly, or only as to a portion of the plaintiffs. 18 Ohio, 72. The improper joinder of defendants is no cause of objection by a co-defendant. 2 Barb. Ch. N. Y. 618; 6 Ired. Eq. No. C. 62; 7 Ala. N. S. 362; 12 Ark. 720; 23 Me. 269. See 7 Conn. 387.

The objection must be taken *before the hearing*, 15 How. 546; 2 Hill, Ch. So. C. 567; 4 Paige, Ch. N. Y. 510; not, however, if it be vital, 30 N. H. 433; by *demurrer*, if apparent on the face of the bill, 9 Paige, Ch. N. Y. 410; 7 Ala. N. S. 362; but see 5 Ill. 424; *by plea and answer*; or otherwise. 13 Pet. 359; 1 T. B. Monr. Ky. 105. A defendant who is improperly joined must plead or demur. 1 Mo. 410. *At law*, see ABATEMENT; PLEADING.

MISKENNING (Fr. *mis*, wrong, and Sax. *cennan*, summon). A wrongful citation. A variance in a plea. 1 Mon. Angl. 237; Chart. Hen. II.; Jacob, Law Dict.; DuCange.

MISNOMER. The use of a wrong name.

In *contracts*, a mistake in the name will not avoid the contract, in general, if the party can be ascertained. 11 Coke, 20; Ld. Raym. 304; Hob. 125.

A *misnomer* of a legatee will not, in general, avoid a legacy, when the context furnishes the means of correction. See 19 Ves. Ch. 381; 1 Roper, Leg. 131; LEGACY.

Misnomer of one of the parties to a suit must be pleaded in abatement. See ABATEMENT.

The names of third persons must be correctly laid; for the error will not be helped by pleading the general issue; but, if a sufficient description be given, it has been held, in a civil case, that the misnomer was immaterial. Example: in an action for medicines alleged to have been furnished to defendant's wife, Mary, and his wife was named Elizabeth, the misnomer was held to be immaterial, the word wife being the material word. 2 Marsh. 159. In indictments, the names of third persons must be correctly given. Roscoe, Crim. Ev. 78. See Archbold, Chitty, Plead.; ABATEMENT; CONTRACT; PARTIES; LEGACY.

MISPLEADING. Pleading incorrectly, or omitting any thing in pleading which is essential to the support or defence of an action, is so called.

Pleading not guilty to an action of debt is an example of the first; setting out a defective title is an example of the second. See 3 Salk. 365.

MISPRISION. In Criminal Law. A term used to signify every considerable misdemeanor which has not a certain name given to it by law. Coke, 3d Inst. 36.

The concealment of a crime.

Negative misprision consists in the concealment of something which ought to be revealed.

Misprision of felony is the like concealment of felony, without giving any degree of maintenance to the felon, Act of Congress of April 30, 1790, s. 6, 1 Story, U. S. Laws, 84; for if any aid be given him, the party becomes an accessory after the fact.

Misprision of treason is the concealment of treason by being merely passive. Act of Congress of April 30, 1790, 1 Story, U. S. Laws, 83; 1 East, Pl. Cr. 139. If any assistance be given to the traitor, it makes the party a principal, as there are no accessories in treason.

Positive misprision consists in the commission of something which ought not to be done. 4 Blackstone, Comm. c. 9.

It is the duty of every good citizen, knowing of a treason or felony having been committed, to inform a magistrate. Silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision. 1 Russell, Crimes, 43; Hawkins, Pl. Cr. c. 59, s. 6; 4 Blackstone, Comm. 119.

Misprisions which are merely positive are denominated contempts or high misdemeanors: as, for example, dissuading a witness from giving evidence. 4 Blackstone, Comm. 126.

MISREADING. When a deed is read falsely to an illiterate or blind man who is a party to it, such false reading amounts to a fraud, because the contract never had the assent of both parties. 5 Coke, 19; 6 East, 309; Dane, Abr. c. 86, a. 3, § 7; 2 Johns. N. Y. 404; 12 *id.* 469; 3 Cow. N. Y. 537.

MISRECITAL. The incorrect recital of a matter of fact, either in an agreement or a plea: under the latter term is here understood the declaration and all the subsequent pleadings. See RECITAL.

MISREPRESENTATION. The statement made by a party to a contract that a thing relating to it is in fact in a particular way, when he knows it is not so.

2. The misrepresentation must be both false and fraudulent in order to make the party making it responsible to the other for damages. 3 Conn. 413; 10 Mass. 197; 1 Const. So. C. 328, 475; Metc. Yelv. 21 *a*, n. 1; Peake, Cas. 115; 3 Campb. 154; Marshall, Ins. b. 1, c. 10, s. 1. And see 5 Maule & S. 380; 12 East, 638; 3 Bos. & P. 370. Misrepresentation as to a material part of the consideration will avoid an executory contract. 1 Phillips, Ins. §§ 630, 675.

A misrepresentation, to constitute *fraud*, must be contrary to fact; the party making it must know it to be so, 2 Kent, Comm. 471; 1 Story, Eq. Jur. § 142; 4 Price, 135; 3 Conn. 597; 22 Me. 511; 7 Gratt. Va. 64, 239; 6 Ga. 458; 5 Johns. Ch. N. Y. 182; 6 Paige, Ch. N. Y. 197; 1 Stor. C. C. 172; 1 Woodb. & M. C. C. 342; excluding cases of mere mistake, 5 Q. B. 804; 9 *id.* 197; 10 Mees. & W. 147; 11 *id.* 401; 14 *id.* 651; 7 Cranch, 69; 13 How. 211; 8 Johns. N. Y. 25; 7 Wend. N. Y. 10; 11 *id.* 375; 1 Metc. Mass. 1; 27 Me. 309; 7 Vt. 67, 79; 6 N. H. 99; and including cases where he falsely asserts a personal knowledge, 18 Pick. Mass. 96; 1 Metc. Mass. 193; 3 *id.* 469; 6 *id.* 245; 27 Me. 309; 16 Wend. N. Y. 646; 16 Ala. 785; 1 Bibb, Ky. 244; 4 B. Monr. Ky. 601; 3 Cranch, 281, and one which gave rise to the contracting of the other party. Rawle, Cas. 3d ed. 622; 14 N. H. 331; 1 Woodb. & M. C. C. 90, 342; 2 *id.* 298; 2 Strobh. Eq. So. C. 14; 2 Bibb, Ky. 474; 8 B. Monr. Ky. 23; 4 How. Miss. 435; 6 *id.* 311; 25 Miss. 167; 3 Cranch, 282; 3 Yerg. Tenn. 178; 19 Ga. 448; 5 Blackf. Ind. 18. See 12 Me. 262; 13 Pet. 26; 23 Wend. N. Y. 260; 7 Barb. N. Y. 65.

MISSING SHIP. A ship which has been at sea and unheard from for so long a time as to give rise to the presumption that she has perished with all on board.

There is no precise time fixed as to when the presumption is to arise; and this must depend upon the circumstances of each case. 2 Strange, 1199; Park, Ins. 63; Marshall, Ins. 488; 2 Johns. N. Y. 150; 1 Caines, N. Y. 525; Holt, 242.

MISSISSIPPI. The name of one of the new states of the United States.

2. This state was admitted into the Union by a resolution of congress passed Dec. 10, 1817. 3 Story, U. S. Laws, 1716.

The constitution of this state was adopted at the town of Washington, the 15th day of August, 1817. It was revised by a convention, and adopted on the 26th of October, 1832, when it went into operation.

Every free white male person of the age of twenty-one years or upwards, who is a citizen of the United States and has resided in the state one year next preceding an election and the last four months within the county, city, or town in which he offers to vote, is a qualified elector.

The Legislative Power.

This is lodged in the Senate and the House of Representatives, the two houses together constituting "the Legislature of the State of Mississippi."

3. The *Senate* is composed of members elected, by the people of the district for which they are chosen, for the term of four years, and is never to be less than one-fourth nor more than one-third the whole number of representatives. One half the senate is changed every second year. A senator must be a citizen of the United States, thirty years of age at least, must have been an inhabitant of the state for four years next preceding his election, and for the last year thereof a resident of the district for which he is chosen. They are chosen the odd years.

4. The *House of Representatives* is composed of members elected by the people biennially, for the term of two years.

The number is limited between thirty-six and one hundred. A representative must be a citizen of the United States, twenty-one years old at least, must have been an inhabitant of the state two years next preceding his election, and for the last year thereof a resident of the county, city, or town for which he is chosen. There are the usual provisions for organization of the houses, giving authority to judge of the qualifications and regulate the conduct of members, providing for keeping a record of proceedings and publication thereof, for open sessions except in special cases; that nei-

ther house shall adjourn, without consent of the other, for more than three days; that members shall be exempt from arrest in civil process during the session of the legislature and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened; that no senator or representative shall, during his term of service, or for a year afterwards, take an office which has been created or the pay of which has been increased during said term,—except those of which there is an election by the people; that no judge of any court of law or equity, secretary of state, attorney-general, clerk of any court of record, sheriff, or collector, or any person holding a lucrative office under the United States or this state, shall be eligible to the legislature: provided that offices in the militia to which there is attached no annual salary, and the office of justice of the peace, shall not be deemed lucrative.

The Executive Power.

5. The *Governor* is elected by the people, for the term of two years. He must be at least thirty years old, have been a citizen of the United States for twenty years, have resided in the state at least five years next preceding the day of his election; cannot hold the office more than four in any six years. He is commander-in-chief of the army and navy of the state, and of the militia except when they are called into the service of the United States; may convene the legislature at an unusual time, and in an unusual place, if necessary, in case of emergency; may adjourn them not beyond the day of the next stated meeting of the legislature, in case of disagreement as to time of adjournment.

6. In all criminal and penal cases, except in those of treason and impeachment, he has power to grant reprieves and pardons and remit fines, and, in cases of forfeiture, to stay the collection until the end of the next session of the legislature, and to remit forfeitures, by and with the advice and consent of the senate. In cases of treason, he has power to grant reprieves by and with the advice and consent of the senate, and may alone respite the sentence until the end of the next session of the legislature. Art. 5, sec. 10.

7. It is provided by the constitution that "whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified; and in case of the death, resignation, removal from office, or other disqualifications of the president of the senate so exercising the office of governor, the speaker of the house of representatives shall exercise the office until a president of the senate shall have been chosen; and when the offices of governor, president of the senate, and speaker of the house shall become vacant in the recess of the senate, the person acting as secretary of state for the time-being shall by proclamation convene the senate, that a president may be chosen to exercise the office of governor." Art. 5, sect. 17.

The Judicial Power.

8. The *High Court of Errors and Appeals* consists of three judges, elected by the people for the term of six years. Rev. Code, 91. The terms of office are so arranged that one judge is elected every second year. The state is divided into three districts, and one judge must come from each district. A judge must be thirty years old at the time of his election. Two of the judges constitute a quorum, and must concur in a decision. Terms of the court are held twice each year for all the districts, at Jackson, the seat of government. It has no original jurisdiction, but sits only as a court of errors and appeals.

The *Circuit Court* consists of ten judges, elected one in each of the districts into which the state is divided, by the people thereof, for the term of four years. A judge must be at least twenty-six years old at the time of his election, and must be and continue a resident of the district for which he is elected. This is the court of general original jurisdiction in law and equity. It has original jurisdiction in all civil cases where the amounts involved exceed fifty dollars, and appellate jurisdiction from inferior courts, and a full and exclusive criminal jurisdiction, except that of the justices of the peace and of the United States courts. It may authorize the alteration of names, may legitimate offspring, and authorize the adoption of children. The judges may, even in vacation, issue writs of *habeas corpus*, *mandamus*, *certiorari*, error, *supersedeas*, and attachment, returnable to any circuit or other court, grant injunctions and writs of *ne exeat*, as well as other writs. Two terms of the court are held annually in each county.

9. *Courts of Chancery* are held by the judges of the circuit court at the times of holding the county court. One week at least of each term is to be given to chancery business. The court sitting in chancery has a full equity jurisdiction of all cases involving amounts over fifty dollars.

Probate Courts are held in each county by a single judge, elected by the people of the county. This court takes the control generally of all property of decedents, takes probate of wills, may order partition of lands, takes charge of the property of minors, lunatics, etc., appointing guardians, and may take acknowledgment of deeds.

It sits also as a court of inquiry in criminal matters, and may bind over persons suspected, to the circuit court, for trial.

10. A *Board of Police* exists in each county, composed of five members, elected one from each of the five districts into which the county is divided. They have the general control of the internal police of the county, including the jurisdiction over patrols and paupers, the care of roads and bridges and county buildings, with power to levy county taxes.

A *Justice of the Peace* is elected in each of the five police districts of each county, by the people of the district, for the term of two years. He has a civil jurisdiction, coextensive with the county, over all cases involving not more than fifty dollars in amount.

In cases where the parties require, he may summon a jury, which shall be composed of six persons selected from the twelve summoned. He has also a limited criminal jurisdiction of minor offences. He must hold not less than one nor more than two terms each month, and may hear and decide cases between the regular terms, where justice requires it.

Jurisprudence.

11. A full revision of the laws of the state was ordered in 1854, by act of the legislature, which was completed and went into effect Nov. 1857. It is known as "The Revised Code of 1857."

By its provisions the disqualification of interest has been removed, so that parties to the suit, or persons in any way interested, may testify in open court, but not so as to establish a claim against a decedent's estate beyond the amount of fifty dollars; husband and wife may testify for each other in criminal cases; changes have been made in the law of dower. See DOWER; CURTESY.

A full and minute criminal code has been enacted, which contains full provisions for the prevention of crime, by requiring bonds of offenders to preserve the peace, and especially not to repeat the same offence for the space of two years.

MISSOURI. The name of one of the new states of the United States of America.

2. It was formed out of part of the territory ceded to the United States by the French Republic by treaty of April 30, 1803. L. U. S.

This state was admitted into the Union by a resolution of congress approved March 2, 1821. L. U. S.

To this resolution there was a condition, which, having been performed, the admission of Missouri as a state was completed by the president's proclamation, dated August 10, 1821. 3 Little & Brown's edit. L. U. S. App. 2.

The convention which formed the constitution of this state met at St. Louis, on Monday, June 12, 1820, and continued by adjournment till July 19, 1820, when the constitution was adopted, establishing "an independent republic, by the name of the 'State of Missouri.'"

All free white male citizens of the United States, of the age of twenty-one years, who have resided in the state one year before an election, the last three months whereof must have been in the county or district in which they offer to vote, are qualified electors. But no soldier, seaman, or marine in the regular army or navy of the United States is entitled to vote at any election.

The Legislative Power.

3. This is lodged in a General Assembly, consisting of a Senate and House of Representatives.

The *Senate* is to consist of not less than fourteen nor more than thirty-three members, chosen by the qualified electors for the term of four years; but one-half of the senators are to be chosen every second year. A senator must be thirty years old at least, a free white citizen of the United States for four years, an inhabitant of the state and of the district from which he is elected for one year.

The *House of Representatives* consists of one hundred and forty members, chosen every second year, by the qualified electors of the several districts into which the state is divided for the purpose. Amend. 1848–9. A representative must be twenty-four years of age at least, and otherwise possess the same qualifications as a senator.

The Executive Power.

4. The *Governor* is elected by the people, and holds his office for four years and until a successor is duly appointed and qualified. He is commander-in-chief of the militia of the state, except when called into the service of the United States; has power to remit fines and grant reprieves and pardons, except in cases of impeachment; is to communicate information to general assembly, and recommend measures, take care that the laws are executed, fill vacancies in offices, and may veto bills, which, however, may be passed over his objections by a majority of both houses.

The *Lieutenant-Governor* is elected at the same time, in the same manner, and for the same term, and is to possess the same qualifications, as the governor. He is, by virtue of his office, president of the senate, may debate and give the casting vote. When the office of the governor becomes vacant by death, resignation, absence from the state, refusal to qualify, impeachment, or otherwise, the lieutenant-governor possesses all the powers and discharges all the duties of governor until such vacancy be filled or the governor so absent or impeached returns or is acquitted.

5. Whenever a vacancy occurs in the office of governor, the lieutenant-governor, or other person exercising the powers of governor for the time-being, is to cause an election to fill such vacancy, giving three months' notice thereof. But if such vacancy happens within eighteen months of the end of the late governor's term, it is not to be filled.

A *Secretary of State*, an *Attorney-General*, an *Auditor of Public Accounts*, a *State Treasurer*, and a *Register of Lands*, are elected by the qualified electors of the state; and each holds his office for the term of four years.

The Judicial Power.

6. The *Supreme Court* consists of three judges, elected by the people for six years and until a successor is qualified, who may be removed on the address of two-thirds of each house of the assembly, such address stating the cause of removal. This process does not, however, take the place of impeachment. A judge of this court must not be less than thirty years old, nor can he sit after he is sixty-five. Two of the judges constitute a quorum. This court has an appellate jurisdiction from inferior courts, coextensive with the state, may issue, hear, and determine writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and has a general superintending control of inferior courts.

7. The *Circuit Court* consists of sixteen judges, chosen by the people of the respective districts for the term of six years. Their necessary qualifications are the same as those of the supreme judges. Each judge must reside in the circuit for which he is chosen. This is the court of general original jurisdiction, exercising also a superintending control over such inferior courts as are now established, or may be from time to time, and justices of peace. It has exclusive original jurisdiction over all civil cases not cognizable before justices of the peace. As a court of chancery, it has original and appellate jurisdiction in all matters of equity, and a general control over executors, administrators, guardians, and minors, subject to appeal in all cases to the supreme court, under such limitations as the general assembly may by law provide. It is also the court of original criminal jurisdiction, having jurisdiction in all cases not otherwise provided for. It has also full original jurisdiction in chancery; and no other court of chancery exists, the power of that court having been transferred to the circuit and supreme courts. No person is eligible as judge, either of the supreme or circuit court, who is less than thirty years of age; nor can any person continue to exercise the office after he is sixty-five. Any judge of the supreme court or the circuit court may be removed from office on the address of two-thirds of each house of the general assembly to the governor for that purpose; but each house shall state, in its respective journal, the cause for which it shall wish the removal of such judge, and give him notice thereof; and he shall have the right to be heard in his defence in such manner as the general assembly shall by law direct; but no judge shall be removed in this manner for any cause for which he might have been impeached.

8. The *County Court* in each county is composed of three judges, chosen by the people of the county for six years. Four terms are held annually. It takes probate of wills, controls the settlement of estates of decedents, appoints and controls guardians of minors, lunatics, etc., and, in addition, has the control of the county property.

Justices of the Peace are elected by the people, four in each township, and two in each ward in St. Louis. They have civil jurisdiction over all matters arising from contracts, and to recover statutory penalties where the amount involved, in case of injuries to persons, or where the damages claimed, are not over twenty dollars, and jurisdiction concurrent with the circuit court in each case where the damages are over twenty dollars and under fifty dollars, with an appeal to the circuit court for their county. They have also a criminal jurisdiction over all breaches of the peace where the fine is less than one hundred dollars.

9. In St. Louis, there are the criminal court, the court of common pleas, the land court, the probate court, and the law commissioners' court.

The criminal court has the criminal jurisdiction of the circuit court in other counties. The court of common pleas has the civil jurisdiction of the same court.

The land court takes acknowledgments of deeds, and tries all questions of titles to land in St. Louis.

The law commissioners' court has a limited jurisdiction in civil matters, including actions arising from contracts where the sum claimed is not over one hundred and fifty dollars, actions under the Landlord and Tenant Act, the forcible entry and detainer process, and contracts relative to boats for sums under one hundred dollars.

MISTAKE. Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. Story, Eq. Jur. § 110.

That result of ignorance of law or fact which has misled a person to commit that which, if he had not been in error, he would not have done. Jeremy, Eq. Jur. b. 2, pt. 2, p. 358.

2. As a general rule, both at law and in equity, mistakes of law do not furnish an excuse for wrongful acts or a ground of relief from the consequences of acts done in consequence of such a mistake. 6 Clark & F. Hou. L. 964–971; 9 Mees. & W. Exch. 54; 5 Hare, Ch. 91; 8 Wheat, 214; 1 Pet. 15; 9 How. 55; 7 Paige, Ch. N. Y. 99*, 137; 2 Johns. Ch. N. Y. 60; Story, Eq. Jur. §§ 125–138. See 2 M'Cord, Ch. 455; 6 Harr. & J. Md. 500; 25 Vt. 603; De Gex, M. & G. 76; 21 Ala. N. S. 252; 13 Ark. 129; 6 Ohio, 169; 11 *id.* 480; 21 Ga. 118; Beasl. Ch. N. J. 165.

An act done or a contract made under a mistake or ignorance of a material fact is voidable and relievable in equity. Story, Eq. Jur. § 140. The rule applies to cases where there has been a studied suppression of facts by one side, and to cases of mutual ignorance or mistake. 3 Burr. 21; 26 Beav. Rolls, 454; 12 Sim. Ch. 465; 9 Ves. Ch. 275; 3 Chanc. Cas. 56; 2 Barb. N. Y. 475; 1 Hill, N. Y. 287; 11 Pet. 71; 8 B. Monr. Ky. 580; 4 Mas. C. C. 414; 5 R. I. 130. But the fact must be material to the contract, *i.e.* essential to its character, and an efficient cause of its concoction. 1 Ves. Ch. 126, 210; De Gex & S. 83; 6 Binn. Penn. 102; 11 Gratt. Va. 468; 2 Barb. N. Y. 37; 2 Sandf. Ch. N. Y. 298; 13 Penn. St. 371.

3. An award may be set aside for a mistake of law or fact by the arbitrators apparent on the face of the award. 2 Bos. & P. 371; 1 Dall. Penn. 487; 1 Sneed, Tenn. 321. See 6 Metc. Mass. 136; 17 How. 344; 6 Pick. Mass. 148; 2 Gall. C. C. 61; 4 N. H. 357; 3 Vt. 308; 6 *id.* 529; 15 Ill. 461; 2 Barnew. & Ald. 691; 3 *id.* 237; 1 Bingh. 104; 1 Dowl. & R. 366; 1 Taunt. 152; 6 *id.* 254; 3 C. B. 705; 2 Exch. 344; 3 East, 18.

The word which the parties intended to use in an instrument may be substituted for one which was actually used by a clerical error, in equity. Adams, Eq. 169 *et seq.*; 13 Gray, Mass. 373; 6 Ired. Eq. No. C. 462; 17 Ala. N. S. 562.

As to the rule for the correction of mistakes in wills, see Story, Eq. Jur. § 179; 2 Ves. Ch. 216; 3 *id.* 321; 1 Brown, Ch. 85; 3 *id.* 446; 1 Keen, 692: 2 Kay & J. Ch. 740; 1 Jones, Eq. No. C. 110; 22 Mo. 518; 2 Stockt. Ch. N. J. 582.

A mistake sometimes prevents a forfeiture in cases of violation of revenue laws, Paine, C. C. 129; Gilp. Dist. Ct. 235; 4 Call, Va. 158; breach of embargo acts, 3 Day, Conn. 296; Paine, C. C. 16; 7 Cranch, 22; 3 Wheat. 59; 11 How. 47; and some other cases. 1 Bishop, Crim. Law, § 697; 4 Cranch, 347; 11 Wheat. 1; 12 *id.* 1; 1 Mass. 347.

MISTRIAL. A trial which is erroneous on account of some defect in the persons trying, as if the jury come from the wrong county, or because there was no issue formed as if no plea be entered, or some other defect of jurisdiction. 3 Croke, 284; 2 Maule & S. 270.

2. Consent of parties cannot help such a trial, when past. Hob. 5.

It is error to go to trial without a plea or an issue, in the absence of counsel and without his consent, although an affidavit of defence be filed in the case, containing the substance of a plea, and the court has ordered the case on the list for trial. 3 Penn. St. 501.

On an indictment for paying, an infant under the age of twenty-one years, and not otherwise qualified, not having, in fact, been summoned, personated his father as a juror. Here was a mistrial, because the verdict in the case was the verdict of but eleven jurors. "To support a judgment," observed Judge Holroyd, "it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mistrial." 7 Dowl. & R. 684. And see 4 Barnew. & Ald. 430; 18 N. Y. 128.

MISUSER. An unlawful use of a right.

In cases of public offices and franchises, a misuser is sufficient to cause the right to be forfeited. 2 Blackstone, Comm. 153; 5 Pick. Mass. 163.

MITIGATION. Reduction; diminution; lessening of the amount of a penalty or punishment.

Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment: as, for example, the fact that one who stole a loaf of bread was starving.

In actions for the recovery of damages, matters may often be given in evidence in mitigation of damages which are no answer to the action itself. See DAMAGES; CHARACTER.

MITIOR SENSUS. See IN MITIORI SENSU.

MITTER (L. Fr.). To put, to send, or to pass: as, *mitter l'estate*, to pass the estate; *mitter le droit*, to pass a right. 2 Blackstone, Comm. 324; Bacon, Abr. *Release* (C); Coke,

Litt. 193, 273 *b*. *Mitter a large*, to put or set at large.

MITTIMUS. **In Old English Law.** A writ enclosing a record sent to be tried in a county palatine: it derives its name from the Latin word mittimus, "we send." It is the jury process of these counties, and commands the proper officer of the county palatine to command the sheriff to summon the jury for the trial of the cause, and to return the record, etc. 1 Mart. La. 278; 2 *id.* 88.

In Criminal Practice. A precept in writing, under the hand and seal of a justice of the peace, or other competent officer, directed to the jailer or keeper of a prison, commanding him to receive and safely keep a person charged with an offence therein named, until he shall be delivered by due course of law. Coke, Litt. 590.

MIXED ACTION. **In Practice.** An action partaking of the nature both of a real and of a personal action, by which real property is demanded, and also damages for a wrong sustained. An ejectment is of this nature. 4 Bouvier, Inst. n. 3650. See ACTION.

MIXED GOVERNMENT. A government established with some of the powers of a monarchical, aristocratical, and democratical government. See GOVERNMENT; MONARCHY.

MIXED LARCENY. Compound larceny, which see.

MIXED PROPERTY. That kind of property which is not altogether real nor personal, but a compound of both. Heir-looms, tombstones, monuments in a church, and title-deeds to an estate, are of this nature. Sharswood, Blackst. Comm. 428; 3 Barnew. & Ad. 174; 4 Bingh. 106.

MIXED TITHES. **In Ecclesiastical Law.** "Those which arise not immediately from the ground, but from those things which are nourished by the ground:" *e.g.* colts, chickens, calves, milk, eggs, etc. 3 Burn, Eccl. Law, 380; 2 Sharswood, Blackst. Comm. 24.

MIXT CONTRACT. **In Civil Law.** A contract in which one of the parties confers a benefit on the other, and requires of the latter something of less value than what he has given: as, a legacy charged with something of less value than the legacy itself. Pothier, Obl. n. 12.

MIXTION. The putting of different goods or chattels together in such a manner that they can no longer be separated: as, putting the wines of two different persons into the same barrel, the grain of several persons into the same bag, and the like.

The intermixture may be occasioned by the wilful act of the party, or owner of one of the articles, by the wilful act of a stranger, by the negligence of the owner or a stranger, or by accident. See CONFUSION OF GOODS.

MOBBING AND RIOTING. **In Scotch Law.** A general term, including all those convocations of the lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighborhood in which it takes place. The two phrases are usually placed together; but, nevertheless, they have distinct meanings, and are sometimes used separately in legal language,—the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behavior of a single individual. Alison, Crim. Law, c. 23, p. 509.

MOBILIA. See MOVABLES.

MODEL. A machine made on a small scale to show the manner in which it is to be worked or employed.

The act of congress of July 4, 1836, section 6, requires an inventor who is desirous to take out a patent for his invention to furnish a model of his invention, in all cases which admit of representation by model, of a convenient size to exhibit advantageously its several parts. Such model must not exceed one foot in any of its dimensions, under the present rules of the patent-office.

MODERATE CASTIGAVIT. **In Pleading.** The name of a plea in trespass by which the defendant justifies an assault and battery, because he *moderately corrected* the plaintiff, whom he had a right to correct. 2 Chitty, Plead. 576; 2 Bos. & P. 224. See CORRECTION; 15 Mass. 347; 2 Phillipps, Ev. 147; Bacon, Abr. *Assault* (C).

This plea ought to disclose, in general terms, the cause which rendered the correction expedient. 3 Salk. 47.

MODERATOR. A person appointed to preside at a popular meeting: sometimes he is called a chairman. The presiding officer of town meetings in New England is so called.

MODIFICATION. A change: as, the modification of a contract. This may take place at the time of making the contract, by a condition which shall have that effect: for example, if I sell you one thousand bushels of corn upon condition that my crop shall produce that much, and it produces only eight hundred bushels, the contract is modified; it is for eight hundred bushels, and no more.

It may be modified, by the consent of both parties, after it has been made. See 1 Bouvier, Inst. n. 733.

MODO ET FORMA (Lat. in manner and form). **In Pleading.** Technical words used to put in issue such concomitants of the principal matters as time, place, etc., where these circumstances were material. Their use when these circumstances were immaterial was purely formal. The words were translated literally, when pleadings began to be made in English, by "in manner and form." See Lawes, Plead. 120; Gould, Plead. c. 6, § 22; Stephen, Plead. 213; Dane, Abr. Index; Viner, Abr. *Modo et Forma*.

MODUS. **In Civil Law.** Manner;

means; way. Ainsworth, Lat. Dict. A rhythmic song. DuCange.

In Old Conveyancing. *Manner:* e.g. the *manner* in which an estate should be held, etc. A qualification, whether in restriction or enlargement of the terms of the instrument; especially with relation to the kind of grant called "*donatio*,"—the making those quasi heirs who were not in fact heirs according to the ordinary form of such conveyances. And this *modus* or qualification of the ordinary form became so common as to give rise to the maxim "*modus et conventio vincunt legem.*" Coke, Litt. 19 *a;* Bracton, 17 *b;* 1 Reeve, Hist. Eng. Law, 293. A consideration. Bracton, 17, 18.

In Ecclesiastical Law. A peculiar manner of tithing, growing out of custom. See MODUS DECIMANDI.

MODUS DECIMANDI. In Ecclesiastical Law. A peculiar manner of tithing, arising from immemorial usage, and differing from the payment of one-tenth of the annual increase.

To be a good *modus*, the custom must be—*first*, certain and invariable; *second*, beneficial to the parson; *third*, a custom to pay something different from the thing compounded for; *fourth*, of the same species; *fifth*, the thing substituted must be in its nature as durable as the tithes themselves; *sixth*, it must not be too large: that would be a *rank modus*. 2 Sharswood, Blackst. Comm. 30. See 2 & 3 Will. IV. c. 100; 13 Mees. & W. Exch. 822.

MODUS DE NON DECIMANDO. In Ecclesiastical Law. A custom or prescription not to pay tithes, which is not good, except in case of abbey-lands. 2 Sharswood, Blackst. Comm. 31, note.

MOHAMMEDAN LAW. A system of native law prevailing among the Mohammedans in India, and administered there by the British government. See HINDU LAW.

MOHATRA. In French Law. The name of a fraudulent contract made to cover a usurious loan of money.

It takes place when an individual buys merchandise from another on a credit at a high price, to sell it immediately to the first seller, or to a third person who acts as his agent, at a much less price for cash. 16 Toullier, n. 44; 1 Bouvier, Inst. n. 1118.

MOIETY. The half of any thing: as, if a testator bequeath one moiety of his estate to A, and the other to B, each shall take an equal part. Joint tenants are said to hold by moieties. Littleton, 125; 3 C. B. 274, 283.

MOLESTATION. In Scotch Law. The name of an action competent to the proprietor of a landed estate against those who disturb his possession. It is chiefly used in questions of commonty, or of controverted marches. Erskine, Inst. 4. 1. 48.

MOLITURA. Toll paid for grinding at a mill; multure. Not used.

MOLLITER MANUS IMPOSUIT (Lat.). He laid his hands on gently.

In Pleading. A plea in justification of a trespass to the person. It is a good plea when supported by the evidence, 12 Viner, Abr. 182; Hammond, Nisi P. 149; where an amount of violence proportioned to the circumstances, 20 Johns. N. Y. 427; 4 Den. N. Y. 448; 2 Strobh. So. C. 232; 17 Ohio, 454; has been done to the person of another in defence of property, 3 Cush. Mass. 154; 3 Ohio St. 159; 9 Barb. N. Y. 652; 23 Penn. St. 424; see 19 N. H. 562; 25 Ala. N. S. 41; 4 Cush. Mass. 597, or the prevention of crime. 2 Chitty, Plead. 574; Bacon, Abr. *Assault and Battery* (C 8).

MONARCHY. That government which is ruled, really or theoretically, by one man, who is wholly set apart from all other members of the state.

2. A wording to the etymology of the word monarchy is, that government in which one person rules supreme,—alone. In modern times the terms autocracy, autocrat, have come into use to indicate that monarchy of which the ruler desires to be exclusively considered the source of all power and authority. The Russian emperor styles himself Autocrat of all the Russias. Autocrat is the same with despot; but the latter term has fallen somewhat into disrepute. Monarchy is contradistinguished from republic. Although the etymology of the term monarchy is simple and clear, it is by no means easy to give a definition either of monarchy or of republic. The constitution of the United States guarantees a republican government to every state. What is a republic? In this case the meaning of the term must be gathered from the republics which existed at the time of the formation of our government, and which were habitually called republics. Lieber, in a paper on the question, "Shall Utah be admitted into the Union?" (in Putnam's Magazine.) declared that the Mormons did not form a republic.

3. The fact that one man stands at the head of a government does not make it a monarchy. We have a president at the head. Nor is it necessary that the one person have an unlimited amount of power, to make a government a monarchy. The power of the king of England is limited by law and theory, and reduced to a small amount in reality; yet England is called a monarchy. Nor does hereditariness furnish us with a distinction. The pope is elected by the cardinals, yet the States of the Church are a monarchy; and the stadtholder of several states of the Netherlands was hereditary, yet the states were republics. We cannot find any better definition of monarchy than this: a monarchy is that government which is ruled (really or theoretically) by one man, who is wholly set apart from all other members of the state (called his subjects); while we call republic that government in which not only there exists an organism by which the opinion of the people, or of a portion of the people (as in aristocracies), passes over into public will, that is, law, but in which also the supreme power, or the executive power, returns, either periodically or at stated times (where the chief-magistracy is for life), to the people, or a portion of the people, to be given anew to another person; or else, that government in which the hereditary portion (if there be any) is not the chief and leading portion of the government, as was the case in the Netherlands.

4. Monarchy is the prevailing type of government. Whether it will remain so with our cis-Cau-

casian race is a question not to be discussed in a law dictionary. The two types of monarchy as it exists in Europe are the limited or constitutional monarchy, developed in England, and centralized monarchy—to which has been added the modern French type, which consists in the adoption of Rousseau's idea of sovereignty, and applying it to a transfer of all the sovereign power of the people to one Cæsar, who thus becomes an unqualified and unmitigated autocrat or despot. It is a relapse into coarse absolutism.

Paley has endeavored to point out the advantages and disadvantages of the different classes of government,—not successfully, we think. The great advantages of the monarchical element in a free government are: first, that there remains a stable and firm point in the unavoidable party struggle; and secondly, that, supreme power, and it may be said the whole government, being represented by or symbolized in one living person, authority, respect, and, with regard to public money, even public morality, stand a better chance to be preserved.

5. The great disadvantages of a monarchy are that the personal interests or inclinations of the monarch or his house (of the dynasty) are substituted for the public interest; that to the chance of birth is left what with rational beings certainly ought to be the result of reason and wisdom; and that loyalty to the ruler comes easily to be substituted for real patriotism, and frequently passes over into undignified and pernicious man-worship. Monarchy is, assuredly the best government for many nations, at the present period, and the only government under which in this period they can obtain security and liberty; yet, unless we believe in a pre-existing divine right of the monarch, monarchy can never be any thing but a substitute—acceptable, wise, even desirable, as the case may be—for something more dignified, which, unfortunately, the passions or derelictions of men prevent. The advantages and disadvantages of republics may be said to be the reverse of what has been stated regarding monarchy. A frequent mistake in modern times is this: that a state simply for the time without a king—a kingless government—is called a republic. But a monarchy does not change into a republic simply by expelling the king or the dynasty; as we have seen in France in 1848. Few governments are less acceptable than an elective monarchy; for it has the disadvantages of the monarchy without its advantages, and the disadvantages of a republic without its advantages. See GOVERNMENT; ABSOLUTISM.

MONEY. Gold and silver coins. The common medium of exchange in a civilized nation.

There is some difference of opinion as to the etymology of the word money; and writers do not agree as to its precise meaning. Some writers define it to be the common medium of exchange among civilized nations; but in the United States constitution there is a provision which has been supposed to make it synonymous with coins: "The congress shall have power to coin money." Art. 1, sect. 8. Again: "No state shall coin money, or make any thing but gold and silver a legal tender in payment of debt." Art. 1, sect. 10. Hence the money of the United States consists of gold and silver coins. And so well has the congress of the United States maintained this point, that the copper coins heretofore struck, and the nickel cent of recent issues, although authorised to "pass current," are not money in an exact sense, because they are not made a legal tender in the payment of debts. The question has been made whether a paper currency can be constitutionally authorized by congress and constituted a legal tender in the payment of private debts. Such a power has been exercised and adjudged valid by the highest tribunal of several of the states, but has not been passed upon by the supreme court of the United States.

For many purposes, bank-notes, 1 Younge & J. Exch. 380; 3 Mass. 405; 14 *id.* 122; 17 *id.* 560; 4 Pick. Mass. 74; 2 N. H. 333; 7 Cow. N. Y. 662; Brayt. Vt. 24; a check, 4 Bingh. 179, and negotiable notes, 3 Mass. 405, will be considered as money. To support a count for money had and received, the receipt by the defendant of bank-notes, promissory notes, 3 Mass. 405; 9 Pick. Mass. 93; 14 Me. 285; 7 Johns. 132, credit in account in the books of a third person, 3 Campb. 199, or any chattel, is sufficient, 4 Pick. Mass. 71; 17 Mass. 560, and will be treated as money. See 7 Wend. N. Y. 311; 8 *id.* 641; 7 Serg. & R. Penn. 246; 8 Term, 687; 3 Bos. & P. 559; 1 Younge & J. Exch. 380.

MONEY OF ADIEU. In French Law. Earnest-money: so called because given at parting in completion of the bargain. Pothier, Sale, 507. *Arrhes* is the usual French word for earnest-money; money of adieu is a provincialism found in the province of Orléans.

MONEY BILLS. Bills or projects of laws providing for raising revenue, and for making grants or appropriations of the public treasure.

2. The first clause of the seventh section of the constitution of the United States declares, "all bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills." See Story, Const. §§ 871–877.

3. What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. Tucker, Blackst. Comm. App. 261, and note; Story, Const. § 877. In practice, the power has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue. Story, *id.*; 2 Elliott, Deb. 283, 284.

MONEY COUNTS. In Pleading. The *common counts* in an action of assumpsit.

They are so called because they are founded on express or implied promises to pay *money* in consideration of a precedent debt. They are of four descriptions: the *indebitatus assumpsit;* the *quantum meruit;* the *quantum valebant;* and the account stated. See these titles.

2. Although the plaintiff cannot resort to an implied promise when there is a general contract, yet he may, in many cases, recover on the common counts notwithstanding there was a special agreement, provided it has been executed. 1 Campb. 471; 12 East, 1; 7 Cranch, 299; 5 Mass. 391; 10 *id.* 287; 7 Johns. N. Y. 132; 10 *id.* 136. It is, therefore, advisable to insert the money counts in an

action of assumpsit, when suing on a special contract. 1 Chitty, Plead. 333, 334.

MONEY HAD AND RECEIVED. **In Pleading.** The technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that the defendant *had and received* certain money, etc.

2. An action of assumpsit will lie to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents it, the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain, on a count for money had and received. 6 Serg. & R. Penn. 369; 10 *id.* 219; 1 Dall. Penn. 148; 2 *id.* 154; 3 J. J. Marsh. Ky. 175; 1 Harr. N. J. 447; 1 Harr. & G. Md. 258; 7 Mass. 288; 6 Wend. N. Y. 290; 13 *id.* 488; Addison, Contr. 230.

3. When the money has been received by the defendant in consequence of some tortious act to the plaintiff's property, as when he cut down the plaintiff's timber and sold it, the plaintiff may waive the tort and sue in assumpsit for money had and received. 1 Dall. Penn. 122; 1 Blackf. Ind. 181; 4 Pick. Mass. 452; 5 *id.* 285; 12 *id.* 120; 1 J. J. Marsh. Ky. 543; 4 Binn. Penn. 374; 3 Watts, Penn. 277; 4 Call, Va. 451.

4. In general, the action for money had and received lies only where *money* has been received by the defendant. 14 Serg. & R. Penn. 179; 1 Pick. Mass. 204; 1 J. J. Marsh. Ky. 544; 3 *id.* 6; 7 *id.* 100; 11 Johns. N. Y. 464. But bank-notes or any other property received *as money* will be considered for this purpose as money. 3 Mass. 405; 14 *id.* 122; 17 *id.* 560; Brayt. Vt. 24; 7 Cow. N. Y. 622; 4 Pick. Mass. 74. See 9 Serg. & R. Penn. 11.

5. No privity of contract between the parties is required in order to support this action, except that which results from the fact of one man's having the money of another which he cannot conscientiously retain. 17 Mass. 563, 579. See 2 Dall. Penn. 54; 5 Conn. 71.

MONEY LENT. **In Pleading.** The technical name of a declaration in an action of assumpsit for that the defendant promised to pay the plaintiff for money lent.

To recover, the plaintiff must prove that the defendant received his money, but it is not indispensable that it should be originally lent. If, for example, money has been advanced upon a special contract, which has been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money to pay it back as money lent. 7 Bingh. 266; 3 Mees. & W. Exch. 434; 9 *id.* 729. See 1 N. Chipm. Vt. 214; 3 J. J. Marsh. Ky. 37.

MONEY PAID. **In Pleading.** The technical name of a declaration in assumpsit, in which the plaintiff declares for money paid for the use of the defendant.

2. When one advances money for the benefit of another with his consent, or at his express request, although he be not benefited by the transaction, the creditor may recover the money in an action of assumpsit declaring for money paid for the defendant. 5 Serg. & R. Penn. 9. But one cannot by a voluntary payment of another's debt make himself creditor of that other. 1 Const. So. C. 472; 1 Gill & J. Md. 497; 5 Cow. N. Y. 603; 3 Johns. N. Y. 434; 8 *id.* 436; 10 *id.* 361; 14 *id.* 87; 2 Root, Conn. 84; 2 Stew. Ala. 500; 4 N. H. 138; 1 South. N. J. 150.

3. Assumpsit for money paid will not lie where property, not money, has been paid or received. 7 Serg. & R. Penn. 246; 10 *id.* 75; 14 *id.* 179; 7 J. J. Marsh. Ky. 18. But see 7 Cow. N. Y. 662.

But where money has been paid to the defendant either for a just, legal, or equitable claim, although it could not have been enforced at law, it cannot be recovered as money paid. See MONEY HAD AND RECEIVED.

The form of declaring is for "money paid by the plaintiff for the use of the defendant and at his request." 1 Mees. & W. Exch. 511.

MONEYED CORPORATION. A corporation having the power to make loans upon pledges or deposits, or authorized by law to make insurance. 1 N. Y. Rev. Stat. 3d ed. 731; 3 N. Y. 479.

MONITION. **In Practice.** A process in the nature of a summons, which is used in the civil law, and in those courts which derive their practice from the civil law. See Benedict, Adm.

A *general monition* is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel filed in the case should not be sustained, and the prayer of relief granted. This is adopted in prize cases, admiralty suits for forfeitures, and other suits *in rem*, when no particular individuals are summoned to answer. In such cases the taking possession of the property libelled, and this general citation or monition, served according to law, are considered constructive notice to the world of the pendency of the suit; and the judgment rendered thereupon is conclusive upon the title of the property which may be affected. In form, the monition is substantially a warrant of the court, in an admiralty cause, directed to the marshal or his deputy, commanding him, in the name of the president of the United States, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The

monition is served in the manner directed in the warrant.

A *mixed monition* is one which contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is served by newspaper advertisements, by notifications posted in public places, and by delivery of a copy attested by the officer to each person specially named, or by leaving it at his usual place of residence.

A *special monition* is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. It is served by delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but the service should be personal, if possible. Clerke, Prax. tit. 21; Dunlap, Adm. Pract. 135. See Conkling, Adm.; Parsons, Marit. Law.

MONITORY LETTER. **In Ecclesiastical Law.** The process of an official, a bishop, or other prelate having jurisdiction, issued to compel, by ecclesiastical censures, those who know of a crime, or other matter which requires to be explained, to come and reveal it. Merlin, Répert.

MONOCRACY. A government by one person only.

MONOCRAT. A monarch who governs alone; an absolute governor.

MONOGAMY. The state of having only one husband or one wife at a time.

A marriage contracted between one man and one woman, in exclusion of all the rest of mankind. The term is used in opposition to bigamy and polygamy. Wolff, Dr. de la Nat. § 857.

MONOGRAM. A character or cipher composed of one or more letters interwoven, being an abbreviation of a name.

A signature made by a monogram would perhaps be binding provided it could be proved to have been made and intended as a signature. 1 Den. N. Y. 471.

There seems to be no reason why such a signature should not be as binding as one which is altogether illegible.

MONOMANIA. **In Medical Jurisprudence.** Insanity only upon a particular subject, and with a single delusion of the mind.

The most simple form of this disorder is that in which the patient has imbibed some single notion, contrary to common sense and to his own experience, and which seems, and no doubt really is, dependent on errors of sensation. It is supposed the mind in other respects retains its intellectual powers. In order to avoid any civil act done or criminal responsibility incurred, it must manifestly appear that the act in question was the effect of monomania. Cyclop. Pract. Med. *Soundness and Unsoundness of Mind;* Ray, Ins. § 203; 13 Ves. Ch. 89; 3 Brown, Ch. 444; 1 Add. Eccl. 283; 2 *id.* 82; Hagg. 18; 2 Add. 79, 94, 209; 5 Carr. & P. 163; Burrows, Ins. 484, 485. See DELUSION; MANIA; Trebuchet, Jur. de la Méd. 55–58.

MONOPOLY. **In Commercial Law.** The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public.

Any combination among merchants to raise the price of merchandise to the injury of the public.

An institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using any thing is given. Bacon, Abr.; Coke, 3d Inst. 181.

The constitutions of Maryland, North Carolina, and Tennessee declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed." See COPYRIGHT; PATENT.

MONSTER. An animal which has a conformation contrary to the order of nature. 2 Dunglison, Hum. Phys. 422.

A monster, although born of a woman in lawful wedlock, cannot inherit. Those who have, however, the essential parts of the human form, and have merely some defect of conformation, are capable of inheriting, if otherwise qualified. 2 Blackstone, Comm. 246; 1 Beck, Med. Jur. 366; Coke, Litt. 7, 8; Dig. 1. 5. 14; 1 Swift, Syst. 331; Fred. Code, pt. 1, b. 1, t. 4, § 4.

No living human birth, however much it may differ from human shape, can be lawfully destroyed. Traill, Med. Jur. 47. See Briand, Méd. Lég. pt. 1, c. 6, art. 2, § 3; 1 Foderé, Méd. Lég. §§ 402–405.

MONSTRANS DE DROIT (Fr. showing of right). A common-law process by which restitution of personal or real property is obtained from the crown by a subject. Chitty, Prerog. of Cr. 345; 3 Sharswood, Blackst. Comm. 256. By this process, when the facts of the title of the crown are already on record, the facts on which the plaintiff relies, not inconsistent with such record, are shown, and judgment of the court prayed thereon. The judgment, if against the crown, is that of *ouster le main*, which vests possession in the subject without execution. Bacon, Abr. *Prerogative* (E); 1 And. 181; 5 Leigh, Va. 512; 12 Gratt. Va. 564.

MONSTRANS DE FAIT (Fr. showing of a deed). A profert. Bacon, Abr. *Pleas* (I 12, n. 1).

MONSTRAVERUNT, WRIT OF. **In English Law.** A writ which lies for the tenants of ancient demesne who hold by free charter, and not for those tenants who hold by copy of court-roll, or by the rod, according to the custom of the manor. Fitzherbert, Nat. Brev. 31.

MONTES PIETATIS, MONTS DE PIETE. Institutions established by public authority for lending money upon pledge of goods.

In these establishments a fund is provided, with suitable warehouses and all necessary accommodations. They are managed by directors. When the money for which the goods pledged is not returned in proper time, the goods are sold to reimburse the institutions. They are found principally on the continent of Europe. With us, private persons, called pawnbrokers, perform this office,—sometimes with doubtful fidelity. See Bell, Inst. 5. 2. 2.

MONTH. A space of time variously computed, as it is applied to astronomical, civil or solar, or lunar months.

The *astronomical month* contains one-twelfth part of the time employed by the sun in going through the zodiac. In law, when a month simply is mentioned, it is never understood to mean an astronomical month.

The *civil* or *solar month* is that which agrees with the Gregorian calendar; and these months are known by the names of January, February, March, etc. They are composed of unequal portions of time. There are seven of thirty-one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and in leap-years of twenty-nine.

The *lunar month* consists of twenty-eight days.

2. By the law of England, a month means ordinarily, in common contracts, as in leases, a lunar month. A contract, therefore, made for a lease of land for twelve months would mean a lease for forty-eight weeks only. 2 Blackstone, Comm. 141; 6 Coke, 62; 6 Term, 224; 1 Maule & S. 111; 1 Bingh. 307. A distinction has been made between "twelve months" and "a twelve-months:" the latter has been held to mean a year. 6 Coke, 61.

But in mercantile contracts a month simply signifies a calendar month: a promissory note to pay money in twelve months would, therefore, mean a promise to pay in one year, or twelve calendar months. Chitty, Bills, 406; 3 Brod. & B. 187; 1 Maule & S. 111; Story, Bills, § 143; Story, Partn. § 213; 2 Mass. 170; 4 *id.* 460; 6 Watts & S. Penn. 179; 1 Johns. Cas. N. Y. 99.

3. In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar month. Comyns, Dig. *Anno* (B); 4 Wend. N. Y. 512; 15 Johns. N. Y. 358. See 2 Cow. N. Y. 518, 605. In all legal proceedings, as in commitments, pleadings, etc., a month means four weeks. 3 Burr. 1455; 1 W. Blackst. 450; Dougl. 446, 463.

In Pennsylvania and Massachusetts, and perhaps some other states, 1 Hill, Abr. 118, n., a month mentioned generally in a statute has been construed to mean a calendar month. 2 Dall. Penn. 302; 4 *id.* 143; 4 Mass. 461; 4 Bibb, Ky. 105. In England, in the ecclesiastical law, months are computed by the calendar. 3 Burr. 1455; 1 Maule & S. 111.

4. In New York, it is enacted that whenever the term "month" or "months" is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar, month, unless otherwise expressed. Rev. Stat. pt. 1, c. 19, tit. 1, § 4.

See, generally, 2 Sim. & S. Ch. 476; 2 Campb. 294; 1 Esp. 146; 6 Term, 224; 1 Maule & S. 111; 6 *id.* 227; 3 East, 407; 3 Brod. & B. 187; 2 A. K. Marsh. Ky. 245; 3 Johns. Ch. N. Y. 74; 4 Dall. Penn. 143; 4 Mass. 461.

MONUMENT. A thing intended to transmit to posterity the memory of some one A tomb where a dead body has been deposited.

In this sense it differs from a cenotaph, which is an empty tomb. Dig. 11. 7. 2. 6; 11. 7. 2. 42.

Coke says that the erecting of monuments in church, chancel, common chapel, or churchyard in convenient manner is lawful; for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.

2. The defacing of monuments is punishable by the common law, Year B. 9 Edw. IV. c. 14; and trespass may be maintained. 10 F. Moore, 494; 1 Cons. So. C. 172. An heir may bring an action against one that injures the monument of his ancestor. Coke, 3d Inst. 202; Gibs. 453. Although the fee of church or churchyard be in another, yet he cannot deface monuments. Coke, 3d Inst. 202. The fabric of a church, however, is not to be injured or deformed by the caprice of individuals, 1 Cons. So. C. 145; and a monument may be taken down if placed inconveniently. 1 Lee, Eccl. 640. A monument containing an improper inscription can be removed. 1 Curt. Eccl. 880.

3. Inscriptions on funeral monuments, especially in questions of pedigree, are admissible as original evidence. Those which are proved to have been made by or under the direction of a deceased relative are admitted as his declarations. But if they have been publicly exhibited, and are well known to the family, the publicity of them supplies the defect of proof in not showing that they were declarations of deceased members of the family; and they are admitted on the ground of tacit and common consent. It is presumed the relatives of the family would not permit an inscription without foundation to remain. Mural and other funereal inscriptions are, from necessity, provable by copies. Their value as evidence depends much on the authority under which they were set up, and the distance of time between their erection and the events they commemorate. See some remarkable mistakes of fact in such inscriptions mentioned in 1 Phillipps, Ev. 234, and note 4. See DECLARATIONS; HEARSAY.

MONUMENTS. Permanent landmarks established for the purpose of indicating boundaries.

2. Monuments may be either natural or artificial objects: as, rivers, known streams,

springs, or marked trees. 6 Wheat. 582; 7 *id.* 10; 9 Cranch, 173; 6 Pet. 498; 1 Pet. C. C. 64; 3 Ohio, 284; 5 *id.* 534; 5 N. H. 524; 3 Dev. No. C. 75. Even posts set up at the corners, 5 Ohio, 534, and a clearing, 7 Cow. N. Y. 723, are considered as monuments. But see 3 Dev. No. C. 75.

3. When monuments are established, they must govern although neither courses nor distances nor computed contents correspond. 1 Cow. N. Y. 605; 5 *id.* 346; 6 *id.* 706; 7 *id.* 723; 2 Mass. 380; 6 *id.* 131; 3 Pick. Mass. 401; 5 *id.* 135; 3 Gill & J. Md. 142; 2 Harr. & J. Md. 260; 5 *id.* 163, 255; 1 Harr. & M'H. Md. 355; 2 *id.* 416; Wright, Ohio, 176; 5 Ohio, 534; Cooke, Tenn. 146; 4 Hen. & M. Va. 125; 1 Call, Va. 429; 3 *id.* 239; 11 Me. 325; 1 Hayw. No. C. 22; 3 Hawks, No. C. 91; 3 Murph. No. C. 88; 4 T. B. Monr. Ky. 32; 5 *id.* 175; 5 J. J. Marsh. Ky. 578; 6 Wheat. 582; 4 Wash. C. C. 15. See BOUNDARY.

MOORING. In Maritime Law. The securing of a vessel by a hawser or chain, or otherwise, to the shore, or to the bottom by a cable and anchor. The being "moored in safety," under a policy of insurance, is being moored in port, or at the usual place for landing and taking in cargo, free from any immediate impending peril insured against. 1 Phillipps, Ins. 968; 3 Johns. N. Y. 88; 11 *id.* 358; 2 Strange, 1243; 5 Mart. La. 637; 6 Mass. 313; Code de Comm. 152.

MOOT (from Sax. *gemot*, meeting together. Anc. Laws and Inst. of England).

In English Law. A term used in the inns of court, signifying the exercise of arguing imaginary cases, which young barristers and students used to perform at certain times, the better to be enabled by this practice to defend their clients' cases. Orig. Jur 212.

To plead a mock cause. (Also spelled *meet*, from Sax. *motain*, to meet; the sense of debate being from meeting, encountering. Webster, Dict.) A *moot question* is one which has not been decided.

MOOT COURT. A court where moot questions are argued. Webster, Dict.

In law schools this is one of the methods of instruction; an undecided point of law is argued by students appointed as counsel on either side of the cause, one or more of the professors sitting as judge in presence of the school. The argument is conducted as in cases reserved for hearing before the full bench.

MOOT HILL. Hill of meeting (*gemot*), on which the Britons used to hold their courts, the judge sitting on the eminence, the parties, etc. on an elevated platform below. Encyc. Lond.

MORA. A moor, barren or unprofitable ground; marsh; a heath; a watery bog or moor. Coke, Litt. 5; Fleta, l. 2, c. 71. See IN MORA.

MORAL CERTAINTY. That degree of certainty which will justify a jury in grounding on it their verdict. It is only probability; but it is called certainty, because every sane man assents to it necessarily, from a habit produced by the necessity of acting. Bessaria, dei Delitti e delle Pena, c. 14. Nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us. Puffendorff, Law of Nature, b. 1, c. 2, § 11. 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. A certainty beyond a reasonable doubt. *Shaw*, C. J., Commonwealth *vs.* Webster, Bemis' rep. of the trial, 469, 470. Such a certainty "as convinces beyond all reasonable doubt." *Parke*, B., Best, Presumpt. 257, note; 6 Rich. Eq. So. C. 217.

MORAL INSANITY. In Medical Jurisprudence. A morbid perversion of the moral feelings, affections, inclinations, temper, habits, and moral dispositions, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination. Prichard, art. *Insanity*, in Cyclopædia of Practical Medicine.

2. It is contended that some human beings exist who, in consequence of a deficiency in the moral organs, are as blind to the dictates of justice as others are deaf to melody. Combe, Moral Philosophy, Lect. 12.

3. In some, this species of malady is said to display itself in an irresistible propensity to commit murder; in others, to commit theft, or arson. Though most persons afflicted with this malady commit such crimes, there are others whose disease is manifest in nothing but irascibility. Annals de Hygiène, tom. i. p. 284. Many are subjected to melancholy and dejection, without any delusion or illusion. This, perhaps without full consideration, has been judicially declared to be a "groundless theory." The courts, and lawwriters, have not given it their full assent. 1 Chitty, Med. Jur. 352; 1 Beck, Med. Jur. 553; Ray, Med. Jur. Prel. Views, § 23, p. 49.

MORAL OBLIGATION. A duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil.

These obligations are of two kinds: 1st, those founded on a natural right: as, the obligation to be charitable, which can never be enforced by law. 2d, those which are supported by a good or valuable antecedent consideration: as, where a man owes a debt barred by the act of limitations, this cannot be recovered by law, though it subsists in morality and conscience; but if the debtor promise to pay it, the moral obligation is a sufficient consideration for the promise, and the creditor may maintain an action of assumpsit to recover the money. 1 Bouvier, Inst. n. 623. See CONSIDERATION.

MORATUR IN LEGE. He demurs in law. He rests on the pleadings of the case, and abides the judgment of the court.

MORE OR LESS. Words, in a conveyance of lands or contract to convey lands, importing that the quantity is uncertain and not warranted, and that no right of either party under the contract shall be affected by a deficiency or excess in the quantity. 17 Ves. Ch. 394; Powell, Pow. 397. So in contracts of sale generally. 2 Barnew. & Ad. 106.

2. In case of an executory contract, equity will enforce specific performance without changing the price, if the excess or deficiency is very small, 17 Ves. Ch. 394; Powell, Pow. 397; 24 Miss. 597; 13 Tex. 223; but not if the excess or deficiency is great, even though the price reserved be per acre. In 2 Barnew. & Ad. 106, it was held that an excess of fifty quarters over three hundred quarters of grain was not covered by the words "three hundred more or less," if it was not shown that so large an excess was in contemplation. 1 Esp. 229. But a deed adding words more or less to description of the property is not a sufficient fulfilment of a contract to convey the described property, when more or less was not in such original contract, if there is an actual deficiency. But after such a conveyance is made and a note given for the purchase-money, the note cannot be defended against on ground of deficiency. 2 Penn. St. 533; 9 Serg. & R. Penn. 80; 13 *id.* 143; 10 Johns. N. Y. 297; 4 Mass. 414.

3. In case of an executed contract, equity will not disturb it, unless there be a great deficiency, 2 Russ. Ch. 570; 1 Pet. C. C. 49, or excess, 8 Paige, Ch. N. Y. 312; 2 Johns. N. Y. 37; Ow. 133; 1 Ves. & B. Ch. Ir. 375, or actual misrepresentation without fraud, and there be a material excess or deficiency. 14 N. Y. 143.

Eighty-five feet, more or less, means eighty-five feet, unless the deed or situation of the land in some way controls it. 20 Pick. Mass. 62.

The words more or less will not cover a distinct lot. 24 Mo. 574. See CONSTRUCTION.

MORGANATIC MARRIAGE. A lawful and inseparable conjunction of a single man of noble and illustrious birth with a single woman of an inferior or plebeian station, upon this condition, that neither the wife nor children should partake of the title, arms, or dignity of the husband, nor succeed to his inheritance, but should have a certain allowance assigned to them by the morganatic contract.

This relation was frequently contracted during the middle ages; the marriage ceremony was regularly performed, the union was for life and indissoluble, and the children were considered legitimate, though they could not inherit. Fred. Code, b. 2, art. 3; Pothier, Du Mar. 1, c. 2, § 2; Shelford, Marr. & D. 10; Pruss. Code, art. 835.

MORT D'ANCESTOR. An ancient and now almost obsolete remedy in the English law. An assize of *mort d'ancestor* was a writ which was sued out where, after the decease of a man's ancestor, a stranger abated, and entered into the estate. Coke, Litt. 159. The remedy in such case is now to bring ejectment.

MORTGAGE. The conveyance of an estate or property by way of pledge for the security of debt, and to become void on payment of it. 4 Kent, Comm. 136.

An estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. 1 Washburn, Real Prop. 475.

Both real and personal property may be mortgaged, and in substantially the same manner, except that a mortgage being in its nature a transfer of title, the laws respecting the necessity of possession of personal property and the nature of instruments of transfer being different, require the transfer to be made differently in the two cases.

The nature of the estate is indicated by the etymology of its name, *mort-gage*,—the French translation of the *vadium mortuum*, that is, dormant or dead pledge, in contrast with *vadium vivum*, an active or living one. They were both, ordinarily, securities for the payment of money. In the one there was no life or active effect in the way of creating the means of its redemption by producing rents, because, ordinarily, the mortgagor continued to hold possession and receive these. In the other, the mortgagee took possession and received the rents towards his debt, whereby the estate worked out as it were its own redemption. Besides, in the one case, if the pledge is not redeemed, it is lost or dead as to the mortgagor; whereas in the other the pledge always survives to the mortgagor when it shall have accomplished its purposes. Cooto, Mortg. 4; Coke, Litt. 205. In the case of Welsh mortgages, however, which are now disused, the mortgagee entered, taking the rents and profits by way of interest on the debt, and held the estate till the mortgagor paid the principal.

Mortgages are to be distinguished from sales with a contract for re-purchase. The distinction is important, 2 Call, Va. 428; 7 Watts, Penn. 401; but turns rather upon the evidence in each case than upon any general rule of distinction. 6 Blackf. Ind. 113; 15 Johns. N. Y. 205; 4 Pick. Mass. 349. And see 7 Cranch, 218; 12 How. 139; 3 Watts & S. Penn. 384; 6 Metc. Mass. 479; 3 Gray, Mass. 594; 8 Paige, Ch. N. Y. 243; 4 Den. N. Y. 493; 27 Mo. 113; 5 Ala. N. s. 698; 28 *id.* 226; 3 Tex. 119; 2 J. J. Marsh. Ky. 113; 3 *id.* 353; 2 Yerg. Tenn. 6; 4 Ind. 101; 3 Tex. 119; 10 Cal. 197; 37 Me. 543; 28 Miss. 328; 7 Ired. Eq. No. C. 13, 167; 2 Schoales & L. Ir. Ch. 393.

A mortgage differs from a pledge: the general property passes by a mortgage, whilst by a pledge only the possession or, at most, a special property passes. Possession is inseparable from the nature of a pledge, but is not necessary to a mortgage. 3 Mo. 516; 5 Johns. N. Y. 258; 10 *id.* 741; 12 *id.* 146; 2 Pick. Mass. 610; 2 N. H. 13; 5 Vt. 532; 26 Me. 499.

Mortgages were at common law held conveyances upon condition, and unless the condition was performed at the appointed time the estate became absolute; in equity, however, the debt was con-

sidered as the principal matter, and the failure to perform at the appointed time a matter merely requiring compensation by interest in the way of damages for the delay. This right to redeem became known as the equity of redemption, and has been limited by statute, a common period being three years. Courts of law have now adopted the doctrines of equity with respect to redemption, and in other respects to a considerable extent. See 1 Washburn, Real Prop. 477.

An *equitable* mortgage is one in which the mortgagor does not actually convey the property, but does some act by which he manifests his determination to bind the same as a security. See EQUITABLE MORTGAGE.

A *legal* mortgage is a conveyance of property intended by the parties at the time of making it to be a security for the performance of some prescribed act. 1 Washburn, Real Prop. 479.

2. All kinds of property, real or personal, which are capable of an absolute sale, may be the subject of a mortgage: rights in remainder and reversion, franchises, and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot. 2 Story, Eq. Jur. § 1012; 4 Kent, Comm. 144; 1 Powell, Mortg. 17, 23; 3 Mer. Ch. 667.

As to the *form*, such a mortgage must be in writing, when it is intended to convey the legal title. 1 Penn. 240. It is either in one single deed which contains the whole contract,—and which is the usual form,—or it is two separate instruments, the one containing an absolute conveyance and the other a defeasance, 2 Johns. Ch. N. Y. 189; 15 Johns. N. Y. 555; 3 Wend. N. Y. 208; 7 *id.* 248; 2 Me. 152; 11 *id.* 346; 12 Mass. 456; 7 Pick. Mass. 157; 3 Watts, Penn. 188; 6 *id.* 405; and generally, whenever it is proved that a conveyance was made for purposes of security, equity regards and treats it as a mortgage, and attaches thereto its incidents. 9 Wheat. 489; 1 How. 118; 12 *id.* 139; 2 Des. Eq. So. C. 564; 1 Hard. Ky. 6; 2 Cow. N. Y. 246; 9 N. Y. 416; 25 Vt. 273; 1 Md. Ch. Dec. 536; 3 *id.* 508; 1 Murph. No. C. 116; 10 Yerg. Tenn. 376; 3 J. J. Marsh. Ky. 353; 5 Ill. 156; 4 Ind. 101; 2 Pick. Mass. 211; 20 Ohio, 464; 36 Me. 115; 1 Cal. 203; 1 Wisc. 527; 9 Serg. & R. Penn. 434. In law, the defeasance must be of as high a nature as the conveyance to be defeated. 1 N. H. 39; 13 Pick. Mass. 411; 22 *id.* 526; 43 Me. 206; 2 Johns. Ch. N. Y. 191; 7 Watts, Penn. 361. The rule as to the admission of parol evidence to establish the character of a conveyance as a mortgage varies in the different states. See 26 Ala. N. s. 312; 29 *id.* 254; 7 Ark. 505; 18 *id.* 34; 8 Cal. 424; 9 *id.* 538; 8 Conn. 186; 15 Ill. 519, 528; 4 Blackf. Ind. 67; 2 B. Monr. Ky. 72; 9 Dan. Ky. 109; 36 Me. 562; 43 *id.* 206; 6 Harr. & J. Md. 138, 435; 3 Md. Ch. Dec. 508; 13 Pick. Mass. 411; 22 *id.* 526; 3 Mich. 645; 23 Miss. 375; 10 Mo. 483; 22 *id.* 77; 11 N. H. 571; Saxt. Ch. N. J. 534; 10 Barb. N. Y. 582; 1 Johns. Ch. N. Y. 425, 594; 5 Paige, Ch. N. Y. 9; 9 N. Y. 416; 2 Jones, Eq. No. C. 172, 256; 33 Penn. St. 158; 1 R. I. 30; 3 Rich. So. C. 153; 10 Yerg. Tenn. 373; 11 Humphr. Tenn. 587; 3 Tex. 1; 14 *id.* 142; 9 Vt. 279; 19 *id.* 9; 2 Call, Va. 421; 2 Munf. Va. 40; 1 Wisc. 527; 4 Kent, Comm. 143; 1 Washburn, Real Prop. 483.

3. The mortgagor has, technically speaking, in law a mere tenancy, subject to the right of the mortgagee to enter immediately unless restrained by his agreement to the contrary. See 34 Me. 187; 9 Serg. & R. Penn. 302; 1 Pick. Mass. 87; 19 Johns. N. Y. 325; 2 Conn. 1; 4 Ired. No. C. 122; 5 Bingh. 421; 1 Washburn, Real Prop. 518. In equity, however, the mortgage is held a mere security for the debt, and only a chattel interest; and until a decree of foreclosure the mortgagor is regarded as the real owner. 2 Jac. & W. Ch. 190; 4 Johns. N. Y. 41; 11 *id.* 534; 4 Conn. 235; 9 Serg. & R. Penn. 302; 6 Harr. & J. Md. 312; 3 Pick. Mass. 484.

The mortgagee, at law, is the owner of the land, subject, however, to a defeat of title by performance of the condition, with a right to enter at any time. See 21 N. H. 400; 9 Conn. 216; 19 Me. 53; 2 Den. N. Y. 170. He is, however, accountable for the profits before foreclosure. 31 Me. 104; 32 *id.* 97; 5 Paige, Ch. N. Y. 1; 11 *id.* 436; 24 Conn. 1; 1 Halst. Ch. N. J. 346; 2 *id.* 548; 2 Cal. 387; 6 Fla. 1; 1 Washburn, Real Prop. 577. The different states fluctuate somewhat between the rules of equity and those of law, or, rather, have engrafted the equitable rules upon the legal to an unequal extent. 31 Penn. St. 295; 10 Ga. 65; 27 Barb. N. Y. 503; 3 Mich. 581; 3 Greene, Iowa, 87; 4 Iowa, 571; 4 M'Cord, So. C. 336; 9 Cal. 123, 365; 1 Washburn, Real Prop. 517 *et seq.*

4. *Assignment* of mortgages must be made in accordance with the requirements of the Statute of Frauds. 15 Mass. 233; 17 *id.* 419; 6 Gray, Mass. 152; 32 Me. 197; 33 *id.* 196; 18 Penn. St. 394; 7 Blackf. Ind. 210; 5 Den. N. Y. 187; 3 Ohio St. 471; 27 N. H. 300; 5 Halst. Ch. N. J. 156; 21 Ala. N. s. 497; 1 Washburn, Real Prop. 520.

Foreclosure may result from occupation by the mortgagee for twenty years, or a period equal to the length of time necessary to bar a writ of entry, 2 Metc. Mass. 26; by bill for strict foreclosure to obtain possession, which is the common practice in England and in some of the United States, a time being generally allowed for redemption before the decree is made absolute, see Williams, Real Prop. 356; 1 Washburn, Real Prop. 600, for a full abstract of the laws of the various states; by bill to obtain a decree for sale; by entry and holding possession for a term of years fixed by law; and by a sale under a power of attorney for the purpose, inserted in the original conveyance.

Consult Washburn, Williams, on Real Property; Hilliard, Coote, on Mortgages; Story, Equity; Kent, Comm. Lect. I.–VIII.

MORTGAGEE. He to whom a mortgage is made. See MORTGAGE.

MORTGAGOR. He who makes a mortgage. See MORTGAGE.

MORTIFICATION. In Scotch Law. A term nearly synonymous with mortmain.

MORTMAIN. A term applied to denote the possession of lands or tenements by any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious houses, in consequence of which lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations. 2 Blackstone, Comm. 268; Coke, Litt. 2 *b*; Erskine, Inst. 2. 4. 10; Barrington, Stat. 27, 97. See Story, Eq. Jur. § 1137; Shelford, Mortm.

MORTUARY. In Ecclesiastical Law. A burial-place. A kind of ecclesiastical heriot, being a customary gift of the second best living animal belonging to the deceased, claimed by and due to the minister in many parishes, on the death of his parishioners, whether buried in the church-yard or not. These mortuaries, like lay heriots, were originally voluntary bequests to the church in lieu of tithes or ecclesiastical dues neglected in lifetime. See SOULSCOT. They were reduced to a certain amount by 21 Hen. VIII. c. 6. They were sometimes payable to the lord. Paroch. Antiq. 470. The mortuary seems to have been carried to church with the corpse, and was therefore sometimes called corpse-present. 2 Burn, Eccl. Law, 563. Anciently, a parishioner could not make a valid will without an assignment of a sufficient mortuary or gift to the church. 2 Sharswood, Blackst. Comm. 427.

MORTUUM VADIUM. A mortgage.

MORTUUS (Lat.). Dead. Ainsworth, Lex. So in sheriff's return *mortuus est*, he is dead. O. Bridgm. 469; Brooke, Abr. *Retorne de Briefe*, pl. 125; 19 Viner, Abr. *Return*, lib. 2, pl. 12.

MOTHER. A woman who has borne a child.

2. It is generally the duty of a mother to support her child, when she is left a widow, until he becomes of age or is able to maintain himself, 8 Watts, Penn. 366; 16 Mass. 135; 3 N. H. 29; 4 *id.* 95; and even after he becomes of age, if he be chargeable to the public, she may, perhaps in all the states, be compelled, when she has sufficient means, to support him. But when the child has property sufficient for his support, she is not, even during his minority, obliged to maintain him, 1 Brown, Ch. 387; 2 Mass. 415; 4 *id.* 97; but will be entitled to an allowance out of the income of his estate, and, if need be, out of the principal, for his maintenance. 2 Fla. 36; 2 Atk. Ch. 447; 5 Ves. Ch. 194; 7 *id.* 403; 3 Dutch. N. J. 388. During the life of the father she is not bound to support her child, though she have property settled to her separate use and the father be destitute. 4 Clark & F. Hou. L. 323; 11 Bligh. N. S. 62.

3. When the father dies without leaving a testamentary guardian at common law, the mother is entitled to be the guardian of the person and estate of the infant until he arrives at fourteen years, when he is able to choose a guardian. Littleton, § 123; 3 Coke, 38; Coke, Litt. 84 *b*; 2 Atk. Ch. 14; Comyns, Dig. *Feme* (B, D, E); 7 Ves. Ch. 348. See 10 Mass. 135, 140; 2 *id.* 415; Harp. So. C. 9; 1 Root, Conn. 487; 22 Barb. N. Y. 178; 2 Dutch. N. J. 388; 2 Green, Ch. N. J. 221; 3 Dev. & B. No. C. 325; 9 Ala. 197. The right of the widowed mother to the earnings and services of her minor child does not appear to have been precisely determined; but it is by no means so absolute as that of the father. 31 Me. 240; 15 N. H. 486; 4 Binn. Penn. 487; 3 Hill, N. Y. 400; 14 Ala. 123; 15 Mass. 272; 16 *id.* 28; Harp. So. C. 9.

4. In Pennsylvania, when the father dies without leaving a testamentary guardian, the orphans' court will appoint a guardian until the infant shall attain his fourteenth year. During the joint lives of the parents, the father has the only control and custody of the children, except when in special cases, as when they are of tender years, or when the habits of the father render him an unsuitable guardian, the mother is allowed to have possession of them. 6 Rich. Eq. So. C. 344; 1 P. Browne, Penn. 143; 3 Binn. Penn. 320; 2 Serg. & R. Penn. 174; 13 Johns. N. Y. 418; 2 Phill. 786; 2 Coll. 661.

5. The mother of a bastard child, as natural guardian, has a right to the custody and control of such child, even as against the putative father, and is bound to maintain it, 2 Mass. 109; 12 *id.* 387, 433; 2 Johns. N. Y. 375; 15 *id.* 208; 6 Serg. & R. Penn. 255; but after her death the court will, in its discretion, deliver such child to the father in opposition to the claims of the maternal grandfather. 1 Ashm. Penn. 55; Strange, 1162. See BASTARD.

MOTHER-IN-LAW. The mother of one's wife or of one's husband.

MOTION. In Practice. An application to a court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.

When the motion is made on some matter of fact, it must be supported by an affidavit that such facts are true; and for this purpose the party's affidavit will be received, though it cannot be read on the hearing. 1 Binn. Penn. 145; 2 Yeates, Penn. 546. See 3 Blackstone, Comm. 305; 2 Sellon, Pract. 356; 15 Viner, Abr. 495; Graham, Pract. 542; Smith, Chanc. Pract. Index.

MOTIVE. The inducement, cause, or reason why a thing is done.

See CAUSE; CONSIDERATION; MISTAKE; WITNESS.

MOURNING. The apparel worn at funerals, and for a time afterwards, in order to manifest grief for the death of some one, and to honor his memory.

The expenses paid for such apparel.

It has been held, in England, that a demand for mourning furnished to the widow and family of the testator is not a funeral expense. 2 Carr. & P. 207. See 14 Ves. Ch. 346; 1 Ves. & B. Ch. Ir. 364. See 2 Bell, Comm. 156.

MOVABLES. Such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable.

2. Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. So in the civil law *mobilia;* but this term did not properly include living movables, which were termed *moventia.* Calvinus, Lex. But these words, *mobilia* and *moventia,* are also used synonymously, and in the general sense of "movables." *Ibid.* Movables are further distinguished into such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house, or such as are in the possession of another, and can only be recovered by action, which are therefore said to be in action, as a debt. See PERSONAL PROPERTY; Fonblanque, Eq. Index; Powell, Mortg. Index; 2 Sharswood, Blackst. Comm. 384; La. Civ. Code, art. 464–472; 1 Bouvier, Inst. n. 462; 2 Stephen, Comm. 67; Sheppard, Touchst. 447; 1 P. Will. Ch. 267.

3. In a will, "movables" is used in its largest sense, but will not pass growing crop, nor building-materials on ground. 2 Williams, Exec. 1014; 3 A. K. Marsh. Ky. 123; 1 Yeates, Penn. 101; 2 Dall. Penn. 142.

In Scotch Law. Every right which a man can hold which is not heritable: opposed to heritage. Bell, Dict.

MULATTO. A person born of one white and one black parent. 7 Mass. 88; 2 Bail. So. C. 558.

MULCT. A fine imposed on the conviction of an offence.

An imposition laid on ships or goods by a company of trade for the maintenance of consuls and the like. It is obsolete in the latter sense, and but seldom used in the former.

MULIER. Of ancient time, *mulier* was taken for a wife, as it is commonly used for a woman, and sometimes for a widow; but it has been held that a virgin is included under the name *mulier.* Coke, Litt. 170, 243; 2 Blackstone, Comm. 248.

The term is used always in contradistinction to a bastard. mulier being always legitimate, Coke, Litt. 243, and seems to be a word corrupted from *melior,* or the French *meilleur,* signifying lawful issue born in wedlock. But by Glanville, lawful issue are said to be *mulier,* not from *melior,* but because begotten *à muliere,* and not *ex concubinâ,* for he calls such issue *filios mulieratos,* opposing them to bastards. Glanville, lib. 7, c. 1. If the said lands "should, according to the queen's lawes, descend to the right heire, then in right it ought to descend to him, as next heire being *mulierlie* borne, and the other not so borne." Holinshed, Chron. of Ireland, an. 1558.

MULTIFARIOUSNESS. In Equity Pleading. The demand in one bill of several matters of a distinct and independent nature against several defendants. Cooper, Eq. Plead. 182; 18 Ves. Ch. 80; 2 Mas. C. C. 201; 4 Cow. N. Y. 682; 2 Gray, Mass. 467.

The uniting in one bill against a single defendant several matters perfectly distinct and unconnected. This latter is more properly called misjoinder, which title see.

The subject admits of no general rules, but the courts seem to consider the circumstances of each case with reference to avoiding on one hand a multiplicity of suits, and on the other inconvenience and hardship to the defendants from being obliged to answer matters with which they have, in great part, no connection, and the complication and confusion of evidence. 1 Mylne & C. Ch. 618: 5 Sim. Ch. 288; 3 Stor. C. C. 25; 2 Gray, Mass. 471; Story, Eq. Plead. §§ 274, 530. It is to be taken advantage of by demurrer, 2 Anstr. 469, or by plea and answer previous to a hearing, Story, Eq. Plead. 530, n., or by the court of its own accord at any time. 1 Mylne & K. 546; 3 How. 412; 5 *id.* 127. See, generally, Story, Eq. Plead. §§ 274–290, 530–540; 4 Bouvier, Inst. n. 4243.

MULTIPLE POINDING. In Scotch Law. Double distress: a name given to an action which may be brought by a person in possession of goods claimed by different persons pretending a right thereto, calling the claimants and all others to settle their claims, so that the party who sues may be liable only "in once and single payment." Bell, Dict.; 2 Bell, Comm. 299; Stair, Inst. 3. 1. 39.

MULTITUDE. The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. Coke, Litt. 257.

MULTURE. In Scotch Law. The quantity of grain or meal payable to the proprietor of the mill, or to the multurer, his tacksman, for manufacturing the corns. Erskine, Inst. 2. 9. 19.

MUNERA. The name given to grants made in the early feudal ages, which were merely tenancies at will or during the pleasure of the grantor. Dalrymple, Feud. 198, 199; Wright, Ten. 19.

MUNICEPS (Lat. from *munus,* office, and *capere,* to take). **In Roman Law.** Eligible to office.

A freeman born in a municipality or town other than Rome, who had come to Rome, and though a Roman citizen, yet was looked down upon as a provincial, and not allowed to hold the higher offices (*dignitates.*)

The inhabitants of a municipality entitled

to hold municipal offices. Voc. Jur. Utr.; Calvinus, Lex.

MUNICIPAL. Strictly, this word applies only to what belongs to a city.

Among the Romans, cities were called *municipia:* these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates.* With us this word has a more extensive meaning: for example, we call *municipal law* not the law of a city only, but the law of the state. 1 Blackstone, Comm. Municipal is used in contradistinction to international: thus, we say, an offence against the law of nations is an international offence, but one committed against a particular state or separate community is a municipal offence.

MUNICIPAL CORPORATION. A public corporation, created by government for political purposes, and having subordinate and local powers of legislation: *e.g.* a county, town, city, etc. 2 Kent, Comm. 275; Angell & A. Corp. 9, 29; 1 Baldw. C. C. 222. An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Glover, Mun. Corp. 1.

MUNICIPAL LAW. In contradistinction to international law, is the system of law proper to any single nation or state. It is the rule or law by which a particular district, community, or nation is governed. 1 Blackstone, Comm. 44.

Municipal law contrasts with international law, in that it is a system of law proper to a single nation, state, or community. See MUNICIPAL LAW. In any one state the municipal law of another state is foreign law. See FOREIGN LAW. A conflict of laws arises where a case arising in one state involves foreign persons or interests, and the foreign and the domestic law do not agree as to the proper rule to be applied. See CONFLICT OF LAWS.

The various provinces of municipal law are characterized according to the subjects with which they respectively treat: as, *criminal or penal law, civil law, military law,* and the like. *Constitutional law, commercial law, parliamentary law,* and the like, are departments of the general province of civil law, as distinguished from criminal and military law.

MUNICIPALITY. The body of officers, taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests.

MUNIMENTS. The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate. Termes de la Ley; Coke, 3d Inst. 170.

MUNUS. A gift; an office; a benefice, or feud. A gladiatorial show or spectacle. Calvinus, Lex.; DuCange.

MURAGE. A toll formerly levied in England for repairing or building public walls.

MURAL MONUMENTS. Monuments made in walls.

Owing to the difficulty or impossibility of removing them, secondary evidence may be given of inscriptions on walls, fixed tables, gravestones, and the like. 2 Stark. 274.

MURDER. In Criminal Law. The wilful killing of any subject whatever, with malice aforethought, whether the person slain shall be an Englishman or a foreigner. Hawkins, Pl. Cr. b. 1, c. 13, s. 3. Russell says, the killing of any person under the king's peace, with malice prepense or aforethought, either express or implied by law. 1 Russell, Crimes, 421; 5 Cush. Mass. 304. When a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. Coke, 3d Inst. 47.

This latter definition, which has been adopted by Blackstone, 4 Comm. 195; Chitty, 2 Crim. Law, 724, and others, has been severely criticized. What, it has been asked, are *sound memory and understanding?* What has soundness of memory to do with the act? be it ever so imperfect, how does it affect the guilt? If discretion is necessary, can the crime ever be committed? for is it not the highest indiscretion in a man to take the life of another, and thereby expose his own? If the person killed be an idiot or a new-born infant, is he a reasonable creature? Who is in the king's peace? What is malice afterthought? Can there be any malice aforethought? Livingston, Pen. Law, 186. It is, however, apparent that some of the criticisms are merely verbal, and others are answered by the construction given in the various cases to the requirements of the definition. See, especially, 5 Cush. Mass. 304.

2. According to Coke's definition, there must be, *first,* sound mind and memory in the agent. By this is understood there must be a *will* and legal *discretion. Second,* an actual killing; but it is not necessary that it should be caused by direct violence: it is sufficient if the acts done apparently endanger life, and eventually prove fatal. Hawkins, Pl. Cr. b. 1, c. 31, s. 4; 1 Hale, Pl. Cr. 431; 1 Ashm. Penn. 289; 9 Carr. & P. 356; 2 Palm. 545. *Third,* the party killed must have been a reasonable being, alive and in the king's peace. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; but if it has come wholly forth, but is still connected by the umbilical cord, such killing will be murder. 2 Bouvier, Inst. n. 1722, note. Fœticide would not be such a killing: he must have been *in rerum naturâ. Fourth,* malice, either express or implied. It is this circumstance which distinguishes murder from every description of homicide. See MALICE.

3. In some of the states, by legislative enactments, murder has been divided into degrees. In Pennsylvania, the act of April 22, 1794, 3 Smith, Laws, 186, makes "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson,

rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find the person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." Many decisions have been made under this act, to which the reader is referred. See Wharton, Crim. Law.

Similar enactments have been made in Massachusetts, Tennessee, and Virginia. 3 Yerg. Tenn. 283; 5 *id.* 340; 6 Rand. Va. 721. See, generally, Bishop, Gabbett, Russell, Wharton, Crim. Law; Roscoe, Crim. Ev.; Archbold, Crim. Pract.; Hawkins, Hale, Pleas of the Crown.

In Pleading. In an indictment for murder, it must be charged that the prisoner "did kill and murder" the deceased; and unless the word murder be introduced into the charge, the indictment will be taken to charge manslaughter only. Foster, Crim. Law, 424; Yelv. 205; 1 Chitty, Crim. Law, *243, and the authorities and cases there cited.

MURDRUM. In Old English Law. During the times of the Danes, and afterwards till the reign of Edward III., murdrum was the killing of a man in a secret manner; and in that it differed from simple homicide.

When a man was thus killed, and he was unknown, by the laws of Canute he was presumed to be a Dane, and the vill was compelled to pay forty marks for his death. After the conquest, a similar law was made in favor of Frenchmen, which was abolished by 3 Edw. III.

The fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*. Prin. Pen. Law, 219, note *r*.

MUSICAL COMPOSITION. The act of congress of February 3, 1831, authorizes the granting of a copyright for a musical composition. A question was formerly agitated whether a composition published *on a single sheet of paper* was to be considered a book; and it was decided in the affirmative. 2 Campb. 28, n.; 11 East, 244. See COPYRIGHT.

TO MUSTER. To collect together and exhibit soldiers and their arms. To employ recruits, and put their names down in a book to enrol them.

MUSTER-ROLL. A written document containing the names, ages, quality, place of residence, and, above all, place of birth, of every person of the ship's company. It is of great use in ascertaining the ship's neutrality. Marshall, Ins. b. 1, c. 9, s. 6, p. 407; Jacobson, Sea Laws, 161; 2 Wash. C. C. 201.

MUSTIRO. A name given to the issue of an Indian and a negro. Dudl. So. C. 174.

MUTATION. In French Law. This term is synonymous with change, and is particularly applied to designate the change which takes place in the property of a thing in its transmission from one person to another. Permutation therefore happens when the owner of the thing sells, exchanges, or gives it. It is nearly synonymous with transfer. Merlin, Répert.

MUTATION OF LIBEL. In Practice. An amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another. Dunlap, Adm. Pr. 213; Law, Eccl. Law, 165–167; 1 Paine, C. C. 435; 1 Gall. C. C. 123; 1 Wheat. 261.

MUTATIS MUTANDIS (Lat.). The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like.

MUTE (*mutus*). When a prisoner upon his arraignment totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to stand mute.

In the case of the United States *vs.* Hare et al., Circuit Court, Maryland Dist. May sess. 1818, the prisoner standing mute was considered as if he had pleaded not guilty. The act of congress of March 3, 1825, 3 Story, U. S. Laws, 2002, has since provided as follows: § 14, That if any person, upon his or her arraignment upon any indictment before any court of the United States for any offence *not capital*, shall stand mute, or will not answer or plead to such indictment, the court shall, notwithstanding, proceed to the trial of the person so standing mute, or refusing to answer or plead, as if he or she had pleaded not guilty, and, upon a verdict being returned by the jury, may proceed to render judgment accordingly. A similar provision is to be found in the laws of Pennsylvania and New York. 2 Rev. Stat. 730.

In former times, in England, the terrible punishment or sentence of *penance* or *peine* (probably a corrupted abbreviation of *prisone*) *fort et dure* was inflicted where a prisoner would not plead, and stood obstinately mute. This judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked,—unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear; and, more, that he have no sustenance, save only on the first day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison-door; and in this situation this should be alternately his daily diet till he died or (as anciently the judgment ran) till he answered. Britton,

c. 4, 22; Fleta, lib. 1, c. 34, § 33. See PEINE FORTE ET DURE.

MUTILATION. In Criminal Law. The depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amounts to *mayhem*. 1 Blackstone, Comm. 130.

MUTINY. In Criminal Law. The unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; a revolt.

2. By the act for establishing rules and articles for the government of the armies of the United States, it is enacted as follows: Article 7. Any officer or soldier, who shall begin, excite, or cause, or join in, any mutiny or sedition in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted. Article 8. Any officer, non-commissioned officer, or soldier who, being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or, coming to the knowledge of any intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by the sentence of a court-martial, with death, or otherwise, according to the nature of his offence.

3. And by the act for the better government of the navy of the United States, it is enacted as follows: Article 13. If any person in the navy shall make or attempt to make any mutinous assembly, he shall, on conviction thereof by a court-martial, suffer death; and if any person as aforesaid shall utter any seditious or mutinous words, or shall conceal or connive at any mutinous or seditious practices, or shall treat with contempt his superior, being in the execution of his office, or, being witness to any mutiny or sedition, shall not do his utmost to suppress it, he shall be punished at the discretion of a court-martial. See 2 Strange, 1264; 2 U. S. Stat. at Large, 359.

4. Mutiny, revolt, and the endeavor to make a revolt or mutiny, on board merchant-vessels, are made criminal, and the punishment provided for, by sec. 8, Act of 30 April, 1790, 1 U. S. Stat. at Large, 113, and the 1st & 2d sections of the Act of 3d March, 1835. 4 *id.* 775; 2 Curt. C. C. Rep. 225; 1 Woodb. & M. C. C. 306; 2 Sumn. C. C. 582.

MUTINY ACT. In English Law. A statute, annually passed, to punish mutiny and desertion, and for the better payment of the army and their quarters. It was first passed 12th of April, 1689. See 22 Vict. cc. 4, 5. The passage of this bill is the only provision for the payment of the army, and, like our appropriation bills, it must be passed or the wheels of government will be stopped. There is a similar act with regard to the navy. 1 Sharswood, Blackst. Comm. 416, 417, n.

MUTUAL CREDITS. Credits given by two persons mutually, *i.e.* each giving credit to the other. It is a more extensive phrase than mutual debts. Thus, the sum credited by one may be due at once, that by the other payable *in futuro:* yet the credits are mutual, though the transaction would not come within the meaning of mutual debts. 1 Atk. Ch. 230; 7 Term, 378. And it is not necessary that there should be intent to trust each other: thus, where an acceptance of A came into hands of B, who bought goods of A, not knowing the acceptance to be in B's hands, it was held a mutual credit. 3 Term, 507, n.; 4 *id.* 211; 3 Ves. Ch. 65; 8 Taunt. 156, 499; 1 Holt, 408; 2 Smith, Lead. Cas. 179; 26 Barb. N. Y. 310; 4 Gray, Mass. 284.

MUTUAL PROMISES. Promises simultaneously made by two parties to each other, each promise being the consideration of the other. Hob. 88; 14 Mees. & W. Exch. 855; Addison, Contr. 22. If one of the promises be voidable, it will yet be good consideration, but not if void. Story, Contr. § 81; 2 Stephen, Comm. 114.

MUTUALITY. Reciprocity; an acting in return. Webster, Dict.; Addison, Contr. 622.

MUTUARY. A person who borrows personal chattels to be consumed by him and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

MUTUUM. A loan of personal chattels to be consumed by the borrower and to be returned to the lender in kind and quantity: as, a loan of corn, wine, or money which are to be used or consumed, and are to be replaced by other corn, wine, or money. Story, Bailm. § 228. See LOAN FOR USE.

MYSTERY (said to be derived from the French *mestier*, now written *métier*, a trade). A trade, art, or occupation. Coke, 2d Inst. 668.

Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery*. See Hawkins, Pl. Cr. c. 23, s. 11.

MYSTIC TESTAMENT. A will under seal. La. Civ. Code, art. 1567; 5 Mart. La. 182; 5 La. 396; 10 *id.* 328; 15 *id.* 88.

N.

NAIL. A measure of length, equal to two inches and a quarter. See MEASURE.

NAKED. This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power or it possesses a limited power. A naked contract is one made without consideration, and for that reason it is void; a naked authority is one given without any right in the agent, and wholly for the benefit of the principal. 2 Bouvier, Inst. n. 1302. See NUDUM PACTUM.

NAME. One or more words used to distinguish a particular individual: as, Socrates, Benjamin Franklin.

2. Names are Christian, as Benjamin, or surnames, as Franklin. One Christian name only is recognized in law, 1 Ld. Raym. 562; Bacon, Abr. *Misnomer* (A); though two or more names usually kept separate, as John and Peter, may undoubtedly be compounded, so as to form in contemplation of law but one. 5 Term, 195. A letter put between the Christian and surname as an abbreviation of a part of the Christian name, as John B. Peterson, is no part of either. 4 Watts, Penn. 329; 5 Johns. N. Y. 84; 14 Pet. 322; 3 *id.* 7; 2 Cow. N. Y. 463; 17 Ala. N. S. 179; 10 Miss. 391; Coke, Litt. 3 *a;* 1 Ld. Raym. 562; Viner, Abr. *Misnomer* (C 6, pl. 5, 6); Comyns, Dig. *Indictment* (G 1, note u); Willes, 654; Bacon, Abr. *Misnomer and Addition;* 3 Chitty, Pract. 164, 173. But see 7 Watts & S. Penn. 406; 19 Ohio, 423; 1 Swan, Tenn. 162. As to the use of *junior* and *senior*, see 1 Pick. Mass. 388; 2 Caines, N. Y. 165; 9 N. H. 519; 22 Me. 171; 8 Conn. 280.

3. In general, a corporation must contract and sue, and be sued, by its corporate name. 8 Johns. N. Y. 295; 14 *id.* 238; 19 *id.* 300; 4 Rand. Va. 359. Yet a slight alteration in stating the name is unimportant if there be no possibility of mistaking the identity of the corporation suing. 12 La. 444. See 20 Me. 41; 2 Va. Cas. 362; 16 Mass. 141; 12 Serg. & R. Penn. 389.

The real name of a party to be arrested must be inserted in the warrant, if known, 8 East, 328; 6 Cow. N. Y. 456; 9 Wend. N. Y. 520; if unknown, some description must be given, 1 Chitty, Crim. Law, 39, 40, with the reason for the omission. 1 Mood. & M. 281.

4. As to mistakes in devises, see LEGACY. As to the use of names having the same sound, see IDEM SONANS. As to the effect of using a name having the same derivation, see 2 Rolle, Abr. 135; 1 Wash. C. C. 285. As to the effect of a change of name, see 1 Roper, Leg. 102; 3 Maule & S. 453; 10 Mass. 78.

When a person uses a name in making a contract under seal, he will not be permitted to say that it is not his name: as, if he sign and seal a bond "A and B" (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A and B. 1 T. Raym. 2; 1 Salk. 214. And if a man describes himself in the body of a deed by the name of James, and signs it John, he cannot, on being sued by the latter name, plead that his name is James. 3 Taunt. 505; Croke Eliz. 897, n. a. See 3 Perr. & D. 271; 11 Ad. & E. 594.

NAMIUM. An old word which signifies the taking or distraining another person's movable goods. Coke, 2d Inst. 140; 3 Blackstone, Comm. 149. A distress. Dalrymple, Feud. Pr. 113.

NARR (an abbreviation of the word *narratio*). A declaration in a cause.

NARRATOR. A pleader who draws narrs. *Serviens narrator*, a serjeant-at-law. Fleta, l. 2, c. 37. Obsolete.

NARROW SEAS. In English Law. Those seas which adjoin the coast of England. Bacon, Abr. *Prerogative* (B 3).

NATALE. The state or condition of a man acquired by birth.

NATION. An independent body politic. A society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

But every combination of men who govern themselves independently of all others will not be considered a nation: a body of pirates, for example, who govern themselves, are not a nation. To constitute a nation, another ingredient is required. The body thus formed must respect other nations in general, and each of their members in particular. Such a society has her affairs and her interests; she deliberates and takes resolutions in common,—thus becoming a moral person, who possesses an understanding and will peculiar to herself, and is susceptible of obligations and rights. Vattel, Prelim. §§ 1, 2; 5 Pet. 52.

It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother-country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged. 1 Johns. Ch. N. Y. 543; 13 Johns. N. Y. 141, 561. See 5 Pet. 1; 1 Kent, Comm. 21.

NATIONAL DOMAIN. See PUBLIC DOMAIN.

NATIONALITY. Character, status, or condition with reference to the rights and duties of a person as a member of some one state or nation rather than another.

The term is in frequent use with regard to

ships. See, generally, CITIZEN; DENIZEN; DOMICIL; NATURALIZATION.

NATIVE, NATIVE CITIZEN. A natural-born subject. 1 Sharswood, Blackst. Comm. 366. A person born within the jurisdiction of the United States, whether after declaration of independence or before, if he did not withdraw before the adoption of the constitution; or the child of a citizen born abroad, if his parents have ever resided here; or the child of an alien born abroad, if he be in the country at the time his father is naturalized. 8 Paige, Ch. N. Y. 433; Act of Congr. of Feb. 10, 1855; 2 Kent, Comm. 9th ed. 38 *et seq.*

NATURAL AFFECTION. The affection which a husband, a father, a brother, or other near relative naturally feels towards those who are so nearly allied to him, sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. See BARGAIN AND SALE; COVENANT TO STAND SEIZED.

NATURAL CHILDREN. Bastards; children born out of lawful wedlock.

In Civil Law. Children by procreation, as distinguished from children by adoption.

In Louisiana. Illegitimate children who have been adopted by the father. La. Civ. Code, art. 220.

NATURAL DAY. That space of time included between the rising and the setting of the sun. See DAY.

NATURAL EQUITY. That which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono.*

It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouvier, Inst. n. 3720.

NATURAL FOOL. An idiot; one born without the reasoning powers or a capacity to acquire them.

NATURAL FRUITS. The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes, or plants.

This expression is used in contradistinction to artificial or figurative fruits: for example, apples, peaches, and pears are natural fruits; interest is the fruit of money, and this is artificial.

NATURAL LAW. The law of nature. The divine will, or the dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature. Sometimes used of the law of human reason, in contradistinction to the revealed law, and sometimes of both, in contradistinction to positive law.

They are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall within the exclusive province of the jury, who are to pass upon the facts. 3 Bouvier, Inst. n. 3064; Greenleaf, Ev. § 44.

NATURAL OBLIGATION. One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Pothier, nn. 173, 191. See OBLIGATION.

NATURAL PRESUMPTIONS. In Evidence. Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience.

NATURALIZATION. The act by which an alien is made a citizen of the United States of America.

The constitution of the United States, art. 1, s. 8, vests in congress the power to establish a uniform rule of naturalization, and various laws have been passed in pursuance of this authority. See Acts of Congr. Apr. 14, 1802; Mar. 26, 1804; July 30, 1813; Mar. 22, 1816; May 26, 1824; May 24, 1828, June 26, 1848. See 2 U. S. Stat. at Large, 153, 292, 811; 3 *id.* 259; 4 *id.* 69, 310; 9 *id.* 240; 1 Woodb. & M. C. C. 323; 4 McLean, C. C. 75; 1 Cranch, C. C. 219; 2 Gall. C. C. 11; 7 Cranch, 420; 4 Pet. 393, 406; 16 Wend. N. Y. 607; 6 N. Y. 263; 8 Paige, Ch. N. Y. 433; 10 Ark. 625; 5 Cal. 300; 8 Blackf. Ind. 395; 2 Nott. & M'C. So. C. 351.

NATURALIZED CITIZEN. One who, being born an alien, has lawfully become a citizen of the United States under the constitution and laws.

He has all the rights of a natural-born citizen, except that of being eligible as president or vice-president of the United States. In foreign countries he has a right to be treated as such, and will be so considered even in the country of his birth, at least for most purposes. 1 Bos. & P. 430. See CITIZEN; DOMICIL; INHABITANT.

NAUCLERUS (Lat.). Master or owner of a vessel. Vicat, Voc. Jur.; Calvinus, Lex.

NAUFRAGE. In French Maritime Law. When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *naufrage.*

It differs from *échouement*, which is when the vessel remains whole, but is grounded; or from *brie*, which is when it strikes against a rock or a coast;

or from *sombrer*, which is the sinking of the vessel in the sea when it is swallowed up, and which may be caused by any accident whatever. Pardessus, n. 643. See WRECK.

NAULUM (Lat.). Freight or passage money. 1 Parsons, Mar. Law, 124, n.; Dig. 1. 6, § 1, *qui potiores in pignore*.

NAUTA (Lat.). One who charters (*exercet*) a ship. L. 1, § 1, ff. *nautæ, caupo;* Calvinus, Lex. Any one who is on board a vessel for the purpose of navigating her. 3 Sumn. C. C. 213; Vicat, Voc. Jur.; 2 Emerigon, 448; Pothier, Pand. lib. 4, tit. 9, n. 2; lib. 47, tit. 5, nn. 1, 2, 3, 8, 10. A carrier by water. 2 Ld. Raym. 917.

NAVAL LAW. A system of regulations for the government of the navy. 1 Kent, Comm. 377, n. Consult Act of Apr. 3, 1800; Act of Dec. 21, 1861; Act of July 16, 1862; Homans, Nav. Laws; DeHart, Courts-Martial.

NAVAL OFFICER. An officer of the customs of the United States.

His office relates to the estimating duties, countersigning permits, clearances, etc., certifying the collectors' returns, and similar duties.

NAVARCHUS, NAVICULARIUS (Lat.). **In Civil Law.** The master of an armed ship. *Navicularius* also denotes the master of a ship (*patronus*) generally; also, a carrier by water (*exercitor navis*). Calvinus, Lex.

NAVIGABLE. Capable of being navigated.

2. In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide,—in other words, to tide-waters, the bed or soil of which is the property of the crown. All other waters are, in this sense of the word, unnavigable, and are, *primâ facie*, strictly private property; but in England even such waters, if navigable in the popular sense of the term, are, either of common right or by dedication, subject to the use of the public as navigable highways, the fee or soil remaining in the riparian proprietors. Dav. Dist. Ct. 149; 5 Taunt. 705; 1 Pick. Mass. 180; 5 *id.* 199; Woolrych, Waterc. 40; Angell, Tide Wat. 2d ed. 75–79.

3. In the United States, this technical use of the term has been adopted in many of the states, in so far as it is employed to designate and define the waters the bed or soil of which belongs to the state. 4 N. Y. 472; 26 Wend. N. Y. 404; 4 Pick. Mass. 268; 2 Conn. 481; 3 Me. 269; 31 *id.* 9; 16 Ohio, 540; 1 Halst. N. J. 31; 4 Wisc. 486; 2 Swan, Tenn. 9. But in Pennsylvania, 2 Binn. Penn. 475; 14 Serg. & R. Penn. 71; in North Carolina, 1 M'Cord, So. C. 580; 3 Ired. No. C. 277; 2 Dev. No. C. 30; 3 *id.* 59; in Iowa, 3 Iowa, 1; 4 *id.* 199; and in Alabama, 11 Ala. 436, the technical use of the term has been entirely discarded, and the large fresh-water rivers of those states have been decided to be navigable, not only as being subject to public use as navigable highways, but also as having their bed or soil vested in the state.

4. The rule of the common law, by which the ebb and flow of the tide has been made the criterion of navigability, has never been adopted in any of the United States, or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants. According to the rule administered in the courts of this country, all rivers which are found "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market," 8 Barb. N. Y. 239, or which are capable of use "for the floating of vessels, boats, rafts, or logs," 31 Me. 9, are subject to the free and unobstructed navigation of the public, independent of usage or of legislation. 20 Johns. N. Y. 90; 5 Wend. N. Y. 358; 42 Me. 552; 18 Barb. N. Y. 277; 5 Ind. 8; 2 Swan, Tenn. 9; 29 Miss. 21; 6 Cal. 180; 2 Stockt. N. J. 211.

In New York, it seems that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law. 8 Barb. N. Y. 239. See ARM OF THE SEA; RELICTION; RIVER; TIDE-WATER.

NAVIGATION ACT. The stat. 12 Car. II. c. 78. It was repealed by 6 Geo. IV. cc. 109, 110, 114. See 16 & 17 Vict. c. 107; 17 & 18 Vict. c. 120.

NAVIGATION, RULES OF. Rules and regulations which govern the motions of ships or vessels when approaching each other under such circumstances that a collision may possibly ensue.

These rules are firmly maintained in the United States courts.

2. The rules of navigation which prevailed under the general maritime law, in the absence of statutory enactments, will first be considered, although, as hereinafter stated, they have lately been superseded by express enactment in most of the commercial countries of the world.

These rules were derived mainly from the decisions of the high court of admiralty in England, and of the superior court of the United States, and they are based upon the rules promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 W. Rob. Adm. 488. These rules are substantially as follows:

For Sailing-Vessels about to meet.

3. *First*, those having the wind *fair* shall *give way* to those on a wind [or close-hauled].

Second, when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

Third, when both vessels have the wind large or abeam, and meet, they shall pass each other in the same way, on the larboard

hand; to effect which two last-mentioned objects the helm must be put to port.

For a Sailing and a Steam Vessel about to meet.

4. *First*, steam-vessels are to be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack.

Second, a steam-vessel and a sailing-vessel going large, when about to meet, should each port her helm and pass on the larboard side of the other. 1 W. Rob. Adm. 478; 2 *id.* 515; 4 Thornt. Adm. Cas. 40.

But in the United States courts it has been almost uniformly held, and the rule is now firmly established, that when a sailing-vessel and a steamer are about to meet, the sailing-vessel must, under ordinary circumstances, and whether going large, or before the wind, or close-hauled by the wind, keep her course, and the steamer must take all the measures necessary to avoid a collision. 17 Bost. Law Rep. 384; 18 *id.* 181; 10 How. 557; 17 *id.* 152, 178; 18 *id.* 581; 2 West. Law Month. 425; 3 Blatchf. C. C. 92.

For Steam-Vessels about to meet.

5. *First*, when steam-vessels on different courses are about to meet under such circumstances as to involve the risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of the other.

Second, a steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The following abstract of authorities may also be referred to as furnishing rules of decision (in addition to the general rules of navigation) in the particular cases alluded to; and they will generally be found applicable in cases of collision arising under the new regulations, as well as in cases arising under the general maritime law.

When a steamer or other vessel is about to pass another vessel proceeding in the same general direction, she must allow the foremost boat to keep her way and course, and must take the necessary measures to avoid a collision. 6 N. Y. Leg. Obs. 12; 23 How. 448; Abb. Adm. Pract. 108, 110; Olc. Adm. 505; 1 Blatchf. C. C. 363.

A vessel under sail or steam is bound to keep clear of a vessel stationary or at anchor, provided the latter is in a proper place, and exhibits a proper light,—the presumption in such cases being that the vessel in motion is at fault. 1 How. 89; 19 *id.* 103; 3 Kent, Comm. 231; Conkling, Adm. 394, 395; Dav. Dist. Ct. 359; 1 Am. Law Journ. 387; 1 Swab. Adm. 88; 3 W. Rob. Adm. 49.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid a collision, 18 How. 584; Dav. Dist. Ct. 359; and in the night-time she ought generally to have her whole crew on deck. *Id.* And see 3 Kent, Comm. 231; 1 Dods. Adm. 467.

6. By the general maritime law, vessels upon the high seas are not ordinarily required constantly to exhibit a light, 2 W. Rob. Adm. 4; 3 *id.* 49; 2 Wall. Jr. C. C. 268; but by statute law in England, the United States, Canada, and most of the continental maritime states, steam and sailing vessels were heretofore required in the night-time, and under the circumstances and in the situation pointed out, to carry lights. See 5 U. S. Stat. at Large, 306, § 10; 9 *id.* 382, § 4; 10 *id.* 72, § 29, and the regulations of the supervising inspectors under the latter act; the English Merchant Shipping Act of 1854, 17 & 18 Vict. c. 104, § 295; and the regulations made under the same, which will be found in Pratt on Sea Lights, and Appendix; the statutes of Canada, and also the ordinances or regulations of France, Russia, Prussia, Holland, Norway, Denmark, Sweden, and Mecklenburg-Schwerin, in regard to lights and the rules of navigation, given in the Appendix to Pratt on Sea Lights.

7. The general rules above given may be, and have been, abrogated by regulations made by various governments, and which are binding upon all vessels within the jurisdiction of that government, The Aurora before V. C. Adm. Judge Black, at Quebec, Oct. 1860; Story, Confl. Laws, ch. 14; 1 Swab. Adm. 38, 63, 96; 1 How. 28; 19 Bost. Law Rep. 220; 14 Pet. 99; but it is beyond the power of the legislature to make rules applicable to foreign vessels when beyond their jurisdiction; that is, more than a marine league from their shores. 1 Swab. Adm. 96. And see 18 How. 223; 21 *id.* 184. It has, accordingly, been held that the new English rule is not applicable in a case of collision on the high seas between a British and a foreign vessel, and that the latter could not set up in its defence a violation of the English statute by the British vessel, 1 Swab. Adm. 63, 96; and it was declared that in such a case the general maritime law must be the rule of the court.

8. The rules of navigation under the general maritime law, particular statutes, and also the rules of the maritime law, and of prior enactments, in regard to vessels carrying lights, have, in most commercial countries, been entirely superseded by general rules of navigation, and general regulations in respect to vessels' lights, which were agreed upon by the governments of Great Britain and France in 1863 (1 Lush. Adm. Appendix lxxii.), and which have since been adopted by most of the commercial countries of Europe, and by Brazil and most of the South American republics, as well as by the United States and Canada. *Id.* lxxvii. and lxxviii.; 13 U. S. Stat. at Large, 58; Acts of Canadian Parl. 1864. These rules and regulations will be found in the act of congress above referred to, and which took effect September 1, 1864.

9. This act is in the following words:

Be it enacted, by the senate and house of representatives of the United States of America in congress assembled, That from and after September one, eighteen hundred and sixty-four, the following

rules and regulations for preventing collisions on the water be adopted in the navy and the mercantile marine of the United States: Provided, That the exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the secretary of the navy, the commander-in-chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.

Article I. In the following rules, every steamship which is under sail and not under steam is to be considered a sailing-ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

Art. II. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

Art. III. All steam-vessels, when under way, shall carry,—

(*a.*) At the foremast head a bright white light, so fixed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz.: from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b.*) On the starboard side a green light, so constructed as to throw a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*c.*) On the port side a red light, so constructed as to show a uniform unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d.*) The said green and red side-lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

10. Art. IV. Steamships, when towing other ships, shall carry two bright white masthead lights, vertically, in addition to their side-lights, so as to distinguish them from other steamships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.

Art. V. Sailing-ships under way or being towed shall carry the same lights as steamships under way, with the exception of the white masthead lights, which they shall never carry.

Art. VI. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and be provided with suitable screens.

Art. VII. Ships, whether steamships or sailing-ships, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all around the horizon, at a distance of at least one mile.

11. Art. VIII. Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Art. IX. Open fishing-boats, and other open boats, shall not be required to carry side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side, and on the approach of or to other vessels such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing-vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light. Fishing-vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

12. Art. X. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes, viz.:

(*a.*) Steamships under way shall use a steam whistle placed before the funnel, not less than eight feet from the deck.

(*b.*) Sailing-ships under way shall use a fog-horn.

(*c.*) Steamships and sailing-ships when not under way shall use a bell.

Art. XI. If two sailing-ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. XII. When two sailing-ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

13. Art. XIII. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. XIV. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. XV. If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such direction as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.

Art. XVI. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at moderate speed.

Art. XVII. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. XVIII. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.

14. Art. XIX. In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to

any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.

Art. XX. Nothing in these rules shall exonerate any ship, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

15. It is evident that these rules and regulations were intended to supersede all other rules of navigation, and every other system of vessels' lights, wherever they may be adopted. They establish a well-devised and complete system of vessels' lights, and furnish plain and simple rules of navigation applicable to all the ordinary cases of vessels approaching each other under such circumstances as to involve the risk of collision,—leaving extraordinary cases, such as the meeting of vessels in extremely narrow or other very difficult channels (in respect to which no safe general rule can be devised), to the practical good sense and professional skill of those in charge of such vessels. To such cases, and to cases in which one vessel has been suddenly and unexpectedly brought into circumstances of *immediate* danger entirely through the fault or mismanagement of another, or by inevitable accident, the exceptions contained in article 19 will apply. But a departure from these rules, to be justifiable even in such cases, must *be necessary in order to avoid immediate* danger. But that necessity must not have been caused by the negligence or fault of the party disobeying the rule; and courts of admiralty lean against these exceptions. 11 N. Y. Leg. Obs. 353, 355; 18 How. 581, 583; 1 W. Rob. Adm. 157, 478. And see 2 Curt. C. C. 141, 363; 18 How. 581.

16. The maritime law, however, requires that in collision cases every violation of a rule of navigation, and every other act or omission alleged to be a fault, shall be considered in connection with all the attending circumstances; and when by inevitable accident, or the fault of one of two colliding vessels, a vessel free from fault is suddenly brought into such circumstances of imminent danger as probably to render the deliberate or proper exercise of the judgment and skill of an experienced seaman impossible, an error of judgment, or other mistake, is not regarded as a legal fault. 3 Blatchf. C. C. 92; 12 How. 461.

The proper and continual exhibition of the bright and coloured lights which these rules and regulations prescribe, and their careful observance by the officer of the deck and the look-out of every vessel, constitute the very foundation of the system of navigation established by such rules and regulations. The exhibition of such lights, and the strict compliance with the rules in respect to *stationing* and *keeping* a competent and careful person in the proper place and exclusively devoted to the discharge of the duties of a look-out, are of the utmost importance.

The stringent requirements of our maritime courts in respect to look-outs may be learned by consulting the following authorities. 10 How. 585; 12 *id.* 443; 18 *id.* 108, 223; 21 *id.* 548, 570; 23 *id.* 448; 3 Blatchf. C. C. 92.

17. The neglect to carry or display the lights prescribed by these rules and regulations will always be held, *primâ facie*, a fault, in a collision case. 5 How. 441, 465; 21 *id.* 548, 556; 3 W. Rob. Adm. 191; Swab. Adm. 120, 245, 253, 519; 1 Lush. Adm. 382. And, upon the same principles, the neglect, in a fog, to use the prescribed fog-signals will also be considered, *primâ facie*, a fault.

It will be observed that the duty of slackening speed, in all cases when risk of collision is involved, is absolutely and imperatively imposed upon every steam-vessel, by these regulations, and that they require that every steam-vessel shall stop and reverse her engine when necessary to avoid a collision.

The duty of slackening speed in order to avoid a collision had been frequently declared by the maritime courts before the adoption of these regulations, 3 Hagg. Adm. 414; 3 Blatchf. C. C. 92; Swab. Adm. 138; 2 W. Rob. Adm. 1; 3 *id.* 95, 270, 377; 10 How. 557; 12 *id.* 443; 18 *id.* 108; but there was no inflexible rule requiring a steamer to slacken speed in all cases when there was risk of collision; and the neglect to do it was held to be a fault only in those cases where its necessity was shown by the proofs. This left the question open to be determined by the courts in each particular case, and perhaps upon vague and unreliable estimates of time and distance and bearings, or upon conflicting and unsatisfactory testimony; but the legislature, in view of the great power and speed of the steamers now in general use, and the very disastrous consequences of a collision of such vessels when running at their ordinary speed, has wisely made the duty imperative.

18. Some of the rules of navigation which these rules and regulations prescribe are quite different from those applied to similar cases by the general maritime law. They will be most apparent upon an examination of the new rules for the *crossing* of two steam-vessels, or of two sailing-vessels, in connection with the rules formerly applied to similar cases. And until the construction of the new rules has been settled by judicial decisions, it is quite likely that the changes they have introduced will increase, rather than diminish, the number of collisions. But the construction of these rules will soon be determined; and, as they are now applicable to the vessels of most commercial countries, the new system is likely, ere long, to become nearly universal; and for that reason, if for no other, its adoption will doubtless reduce the number of collisions.

NAVY. The whole shipping, taken collectively, belonging to the government of an

independent nation, and appropriated for the purposes of naval warfare. It does not include ships belonging to private individuals nor (in the United States, at least) revenue vessels or transports in the service of the war department. See Brightly, Dig. U. S. Laws, *Navy*.

NE ADMITTAS (Lat.). The name of a writ, so called from the first words of the Latin form, by which the bishop is *forbidden to admit* to a benefice the other party's clerk during the pendency of a *quare impedit*. It ought to be issued within six months after avoidance of the benefice, before title to present has devolved upon the bishop by lapse, or it will be useless. Fitzherbert, Nat. Brev. 37; Reg. Orig. 31; 3 Sharswood, Blackst. Comm. 248; 1 Burn, Eccl. Law, 31.

NE BAILA PAS (he did not deliver). **In Pleading.** A plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

NE DISTURBA PAS. In Pleading. The general issue in *quare impedit*. Hob. 162. See Rastell, Entr. 517; Winch, Entr. 703.

NE DONA PAS, NON DEDIT. In Pleading. The general issue in formedon. It is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, etc., and says that the said E F did not give the said manor, with the appurtenances, or any part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Wentworth, Plead. 182.

NE EXEAT REPUBLICA (Lat.). **In Practice.** The name of a writ issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he, the sheriff, do commit the defendant to prison.

2. This writ is issued to prevent debtors from escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case. 2 Kent, Comm. 32; 1 Clark, 551; Beames, *Ne Exeat;* 13 Viner, Abr. 537; 1 Suppl. to Ves. Jr. 33, 352, 467; 4 Ves. Ch. 577; 5 *id.* 91; Bacon, Abr. *Prerogative* (C); 8 Comyns, Dig. 232; 1 Blackstone, Comm. 138; Blake, Chanc. Pract. Index; Maddox, Chanc. Pract. Index; 1 Smith, Chanc. Pract. 576; Story, Eq. Index.

3. The *writ* may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure. 3 Johns. Ch. N. Y. 75, 412; 7 *id.* 192; 1 Hopk. Ch. N. Y. 499. On the same principle which has been adopted in the courts of law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law. 8 Ves. Ch. 594.

4. This writ can be issued only for equitable demands. 4 Des. Eq. So. C. 108; 1 Johns. Ch. N. Y. 2; 6 *id.* 138; 1 Hopk. Ch. N. Y. 499. It may be allowed in a case to prevent the failure of justice. 2 Johns. Ch. N. Y. 191. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law. 2 Johns. Ch. N. Y. 170. In all cases when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill. 3 Johns. Ch. N. Y. 414.

The amount of bail is assessed by the court itself; and a sum is usually directed sufficient to cover the existing debt, and a reasonable amount of future interest, having regard to the probable duration of the suit. 1 Hopk. Ch. N. Y. 501.

NE LUMINIBUS OFFICIATUR (Lat.). **In Civil Law.** The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8. 4. 15. 17.

NE RECIPIATUR (Lat.). That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sellon, Pract. 8.

NE RELESSA PAS (Law Fr.). The name of a replication to a plea of release, by which the plaintiff insists he *did not release*. 2 Bulstr. 55.

NE UNJUSTE VEXES (Lat.). **In Old English Law.** The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

It was a prohibition to the lord, *not unjustly* to distrain or *vex* his tenant. Fitzherbert, Nat. Brev.

NE UNQUES ACCOUPLE (Law Fr.). **In Pleading.** A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. 118; 10 Wentworth, Plead. 158; 2 H. Blackst. 145; 3 Chitty, Plead. 599.

NE UNQUES EXECUTOR. In Pleading. A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chitty, Plead. 484;

1 Saund. 274, n. 3; Comyns, Dig. *Pleader* (2 D 2); 2 Chitty, Plead. 498.

NE UNQUES SEISIE QUE DOWER. In Pleading. A plea by which a defendant denies the right of a widow who sues for and demands her dower in lands, etc., late of her husband, because the husband was not on the day of her marriage with him, or at any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Wentworth, Plead. 159; 3 Chitty, Plead. 598, and the authorities there cited.

NE UNQUES SON RECEIVER. In Pleading. The name of a plea in an action of account-render, by which the defendant affirms that he never was receiver of the plaintiff. 12 Viner, Abr. 183.

NE VARIETUR (Lat. that it be not changed). A form sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. 8 Wheat. 338.

NEAT, NET. The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

NEATNESS. In Pleading. The statement in apt and appropriate words of all the necessary facts, and no more. Lawes, Plead. 62.

NEBRASKA. One of the territories of the United States.

The territory was erected by act of congress, approved May 30, 1854. It includes all that portion of the territory of the United States included in the following boundaries: beginning at a point in the Missouri river where the fortieth parallel of north latitude crosses the same; thence west on said parallel to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence on said summit northwardly to the forty-ninth parallel of north latitude; thence east on said parallel to the west boundary of the territory of Minnesota; thence southwardly on said boundary to the Missouri river; thence down the main channel of said river to the place of beginning, with an exception of the Indian reservations included from the territorial jurisdiction, unless with their consent. There is also a proviso that when admitted as a state the said territory or any part of the same shall be received into the Union with or without slavery, as their constitution may prescribe at the time of their admission. In addition to the above, that part of Utah and Washington territories between the forty-first and forty-third degrees of north latitude and east of the thirty-third meridian of longitude west of Washington is added to the territory of Nebraska by act of congress approved March 2, 1861. U. S. Stat. at Large, 1860–61 (Little & Brown's ed.), 244. The provisions of the organic act, with the exceptions here given, are the same as those of the act establishing the territory of New Mexico, which see. The secretary holds his office for the term of five years, subject to renewal by the president. The house of representatives is to be composed of twenty-six members; but the number may be increased to thirty-nine.

NECESSARIES. Such things as are proper and necessary for the sustenance of man.

2. The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties. 7 Serg. & R. Penn. 247. Ornaments and superfluities of dress, such as are usually worn by the party's rank and situation in life, 1 Campb. 129; 3 *id.* 326; 7 Carr. & P. 52; 1 Hodg. 31; 8 Term, 578; 1 Leigh, Nisi P. 135; some degree of education, 4 Mees. & W. Exch. 727; 6 *id.* 48; 16 Vt. 683; see 10 Barb. N. Y. 489; Chitty, Contr. 140; 1 Parsons, Contr. 246; lodging, and house-rent, 2 Bulstr. 69; 1 Bos. & P. 340; see 12 Metc. Mass. 559; 13 *id.* 306; 1 Mees. & W. Exch. 67; 5 Q. B. 606; horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles, have been held not to be necessaries. 1 Bibb, Ky. 519; 1 M'Cord, So. C. 572; 2 Nott & M'C. So. C. 524; 2 Humphr. Tenn. 27; 2 Strange, 1101; 1 Mann. & G. 550. And see 7 Carr. & P. 52; 4 *id.* 104; Holt, 77; Cart. 216; 11 N. H. 51; 8 Exch. 680.

3. The rule for determining what are necessaries is that whether articles of a certain *kind* or certain *subjects* of expenditure are or are not such necessaries as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question, also, as to *quantity*, are generally matters for the jury to determine. 1 Parsons, Contr. 241; 10 Vt. 225; 12 Metc. Mass. 559; 11 N. H. 51; 1 Bibb, Ky. 519; 2 Humphr. Tenn. 27; 3 Day, Conn. 37; 1 Mann. & G. 550; 6 Mees. & W. Exch. 42; 6 Carr. & P. 690.

4. Infants may contract for necessaries, 4 Mees. & W. Exch. 727; 13 *id.* 252; but are not liable for borrowed money, though expended for necessaries. 1 Salk. 279; 2 Esp. 472, n.; 10 Mod. 67; 1 Bibb, Ky. 519; 7 Watts & S. Penn. 83, 88; 10 Vt. 225. See 1 P. Will. 558; 5 Esp. 28; 7 N. H. 368; 2 Hill, So. C. 400; 32 N. H. 345. Necessaries for the infant's wife and children are necessaries for himself. Strange, 168; Comyns, Dig. *Enfant* (B 5); 1 Sid. 112; 2 Starkie, Ev. 725; 3 Day, Conn. 37; 1 Bibb, Ky. 519; 2 Nott & M'C. So. C. 524; 9 Johns. N. Y. 141; 16 Mass. 31; 14 B. Monr. Ky. 232; Bacon, Abr. *Infancy* (I). See 13 Mees. & W. Exch. 252.

5. A wife is allowed to make contracts for necessaries, and her husband is generally responsible upon them, because his assent is presumed; and even if notice be given not to trust her, still he would be liable for all such necessaries as she stood in need of; but in this case the creditor would be required to show she did stand in need of the articles furnished. 1 Salk. 118; 2 Ld. Raym. 1006 But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries; the very fact of the elopement

and separation is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards gives it at his peril. 1 Salk. 119; Strange, 647; 1 Sid. 109; 1 Lev. 4; 11 Johns. N. Y. 281; 12 *id.* 293; 3 Pick. Mass. 289; 2 Halst. 146; 2 Kent, Comm. 123; 2 Starkie, Ev. 696; Bacon, Abr. *Baron and Feme* (H); Chitty, Contr. Index; 1 Hare & W. Sel. Dec. 104, 106; Hammond, Part. 217.

NECESSITY. That which makes the contrary of a thing impossible.

Whatever is done through necessity is done without any intention; and as the act is done without will (*q. v.*) and is compulsory, the agent is not legally responsible. Bacon, Max. Reg. 5. Hence the maxim, Necessity has no law: indeed, necessity is itself a law which cannot be avoided nor infringed. Clef des Lois Rom.; Dig. 10. 3. 10. 1; Comyns, Dig. *Pleader* (3 M 20, 3 M 30). As to the circumstances which constitute necessity, see 1 Russell, Crimes, 16, 20; 2 Starkie, Ev. 713.

NEGATIVE AVERMENT. In Pleading. An averment in some of the pleadings in a case in which a negative is asserted.

NEGATIVE CONDITION. One where the thing which is the subject of it must not happen. 1 Bouvier, Inst. n. 751.

NEGATIVE PREGNANT. In Pleading. Such a form of negative expression as may imply or carry within it an affirmative.

Thus, where a defendant pleaded a license from the plaintiff's daughter, and the plaintiff rejoined that he did not enter by her license, the rejoinder was objected to successfully as a negative pregnant. Croke Jac. 87. The fault here lies in the ambiguity of the rejoinder, since it does not appear whether the plaintiff denies that the license was given or that the defendant entered by the license. Stephen, Plead. 381.

This ambiguity constitutes the fault, Hob. 295; which, however, does not appear to be of much account in modern pleading. 1 Lev. 88; Comyns, Dig. *Pleader* (R 6); Gould, Plead. c. 6, § 36.

NEGATIVE STATUTE. One which is enacted in negative terms, and which so controls the common law that it has no force in opposition to the statute. Bacon, Abr. *Statutes* (G); Brooke, Abr. *Parliament*, pl. 72.

NEGLIGENCE. Want of due diligence.

2. As to the amount of diligence required in case of bailments, and for the general principles of the division of negligence into degrees, see BAILMENT; FRAUD.

In general, a party who has caused an injury or loss to another by his negligence is responsible for all the consequences. Hob. 134; 3 Wils. 126; 1 Chitty, Plead, 129, 130; 2 Hen. & M. Va. 423; 1 Strange, 596; 3 East, 596. An example of this kind may be found in the case of a person who drives his carriage during a dark night on the wrong side of the road, by which he commits an injury to another. 3 East, 593; 1 Campb. 497; 2 *id.* 466; 5 Bos. & P. 119. See Gale & W. Easem. Index; 6 Term, 659; 1 East, 106; 4 Barnew. & Ald. 590; 1 Taunt. 568; 2 Stark. 272; 2 Bingh. 170; 5 Esp. 35, 263; 5 Barnew. & C. 550. Whether the incautious conduct of the plaintiff will excuse the negligence of the defendant, see 1 Q. B. 29; 4 Perr. & D. 642; 3 C. B. 9.

3. When the law imposes a duty on an officer, whether it be by common law or statute, and he neglects to perform it, he may be indicted for such neglect, 1 Salk. 380; 6 Mod. 96; and in some cases such neglect will amount to a forfeiture of the office. 4 Blackstone, Comm. 140. See Bouvier, Inst. Index.

Wherever there is a legal duty, and death comes by means of omission to discharge it, the party omitting is guilty of a felonious homicide. 1 Burnett & H. Lead. Cas. 49; 2 Carr. & K. 368; 3 *id.* 123; 7 Cox, Cr. Cas. 301; 1 Den. Cr. Cas. 356; 8 Carr. & P. 325; 7 *id.* 438; 1 Russell, Crimes, Greaves ed. 19. See 6 Mass. 134; 8 Mo. 561; 2 Strange, 882; 1 Carr. & P. 320; 5 *id.* 333; 6 *id.* 396, 629; 7 *id.* 499; 9 *id.* 672; 4 McLean, C. C. 463. But it must appear that the death was the direct and immediate result of the personal neglect or default of the defendant. For instance, where trustees appointed under a local act for the purpose of repairing roads within a particular district, with a power to contract for executing such repairs, neglected so to contract, and by reason of such neglect one of such roads became out of repair, and a person using it was accidentally killed in consequence of its so being out of repair, it was held that the trustees were not chargeable with manslaughter. 17 Q. B. 34. See 2 Carr. & K. 343, 368; 7 *id.* 425.

NEGLIGENT ESCAPE. The omission on the part of a gaoler to take such care of a prisoner as he is bound to take, when in consequence thereof the prisoner departs from his confinement without the knowledge or consent of the gaoler, and eludes pursuit.

For a negligent escape, the sheriff or keeper of the prison is liable to punishment, in a criminal case; and in a civil case he is liable to an action for damages at the suit of the plaintiff. In both cases the prisoner may be retaken. 3 Blackstone, Comm. 415. See ESCAPE.

NEGOTIABLE. In Mercantile Law. A term applied to a contract the right of action on which is capable of being transferred by indorsement (of which delivery is an essential part), in case the undertaking is to A or his order, A or his agent, and the like, or by delivery alone, in case the undertaking is to A or bearer,—the assignee in either case having a right to sue in his own name.

At common law, *choses in action* were not assignable; but exceptions to this rule have grown up by mercantile usage as to some classes of simple contracts, and others have been introduced by legislative acts, so that now bills of exchange, promissory notes, and bank-notes, to order or bearer, are univer-

nally negotiable; and bills of lading, 14 Mees. & W. Exch. 403; 12 Pick. Mass. 314; 16 *id.* 474, and notes not to order or bearer, have become *quasi negotiable;* that is, an indorsement will give a right of action in the name of the assignor; and in some states, by statute, bonds and other specialties are assignable by indorsement.

And, in general, any *chose in action* can be assigned so that the assignee can bring action in name of assignor, and with same rights. See Hare & W. Sel. Dec. 158–194; 1 Parsons, Contr. 202.

NEGOTIATION. The deliberation which takes place between the parties touching a proposed agreement.

That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add, diminish, contradict, or alter a written instrument. 1 Dall. Penn. 426; 4 *id.* 340; 3 Serg. & R. Penn. 609.

In Mercantile Law. The act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.

Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note: the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional. 2 Mann. & G. 911.

NEGOTIORUM GESTOR (Lat.). **In Civil Law.** One who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs.

In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract; but the civil law raises a *quasi* mandate by implication for the benefit of the owner, in many such cases. Mackeldey, Civ. Law, § 460; 2 Kent, Comm, 616, n.; Story, Bailm. §§ 82, 189.

NEIF. In Old English Law. A woman who was born a villein, or a bond-woman.

NEMINE CONTRADICENTE (usually abbreviated *nem. con.*). Words used to signify the unanimous consent of the house to which they are applied. In England, they are used in the house of commons; in the house of lords, the words used to convey the same idea are *nemine dissentiente.*

NEPHEW. The son of a brother or sister. Ambl. 514; 1 Jac. Ch. 207.

The Latin *nepos*, from which *nephew* is derived, was used in the civil law for nephew, but more properly for grandson; and we accordingly find *neven*, the original form of nephew, in the sense of grandson. Britton, c. 119.

According to the civil law, a nephew is in the third degree of consanguinity; according to the common law, in the second: the latter is the rule of common law. 2 Sharswood, Blackst. Comm. 206. But in this country the rule of the civil law is adopted. 2 Hilliard, Real Prop. 194. In the United States generally, there is no distinction between whole and half blood. 1 Dev. No. C. 106; 2 Yerg. Tenn. 115; 2 Jones, Eq. No. C. 202; 1 M'Cord, So. C. 456.

NEPOS (Lat.). A grandson.

NEPTIS (Lat.). Granddaughter; sometimes great-granddaughter. Calvinus, Lex.; Vicat, Voc. Jur.; Code, 33.

NEUTRAL PROPERTY. Property which belongs to neutral owners, and is used, treated, and accompanied by proper *insignia* as such.

2. Where the insured party has property and commercial establishments and depositories in different countries, if the property and concerns of any one is in, or belongs to, a belligerent country, it will have the national character of such country though the national character of the owner may be that of a neutral. 1 Phillips, Ins. § 164; 5 W. Rob. Adm. 302; 1 Wheat. 159; 16 Johns. N. Y. 128. The declaration of war by a nation subsequently to the time in reference to which the policy takes effect will, however, only affect ownership thereafter acquired or acts thereafter done. 1 Phillips, Ins. ch. ii. § iii. ch. ix. §§ v.–viii.; 1 Wash. C. C. 219; 6 Cranch, 274; 7 *id.* 506; 4 Mas. C. C. 256; 1 Johns. N. Y. 192; 2 *id.* 168; 9 *id.* 388; 14 *id.* 308; 1 C. Rob. Adm. 107, 336; 2 *id.* 134; 5 *id.* 2; 6 *id.* 364; 1 Binn. Penn. 203, 293; 5 *id.* 464; 3 Wheat. 245; 3 Gall. C. C. 274; 5 East, 398; 12 Mass. 246; 8 Term, 230; 1 Johns. Ch. N. Y. 363; 2 *id.* 191.

3. The description of the subject in the policy of insurance, as neutral or belonging to neutrals, is, as in other cases, a warranty that it is, what it is described to be, the insured interest, and must, accordingly, in order to comply with the warranty, not only belong to neutral owners at the time of making the insurance, but must continue to be owned during the period for which it is insured, and must, so far as it depends upon the assured, be accompanied by the usual *insignia*, as such, and in all respects represented, managed, and used as such. 1 Phillips, Ins. ch. ix. § v.; Dougl. 732; 3 Term, 477; 1 Johns. N. Y. 1192; 2 *id.* 168; Skinn. 327; 1 Wash. C. C. 219; 2 Caines, N. Y. 73; 6 Cranch, 274; 4 Mas. C. C. 256; 1 C. Rob. Adm. 26, 336; 2 *id.* 133, 218; 1 Edw. Adm. 340.

NEUTRALITY. The state of a nation which takes no part between two or more other nations at war with each other.

2. Neutrality consists in the observance of a strict and honest impartiality, so as not to afford advantage in the war to either party, and particularly in so far restraining its trade to the accustomed course which is held in time of peace as not to render assistance to one of the belligerents in escaping the effects of the other's hostilities. Even a loan of money to one of the belligerent parties is considered a violation of neutrality. 9 J. B. Moore, p. 586. A fraudulent neutrality is considered as no neutrality.

3. The violation of neutrality by citizens of the United States, contrary to the provisions of the act of congress of April 20, 1818, renders the individual liable to an indictment. One fitting out and arming a vessel in the United States to commit hostilities against a foreign power at peace with them is, therefore, indictable. And by the 8th section of the act, the president, or such other person as he shall have empowered for that purpose, may employ the land and naval forces and the militia of the United States for the purpose of taking possession of and detaining any ship or vessel, with her prize or prizes, etc., and for the purpose of preventing the carrying on of any expedition or enterprise contrary to the provisions of that act. Wharton, Crim. Law, §§ 2778–2807, and cases there cited; Brightly & Dig. U. S. Law, 688–690, giving act of 1820, at length there cited; 6 Pet. 445; 1 Pet. C. C. 487. See United States, Curtis & Pritchard, and other Digests; Aldin's Index, Wheaton, Law of Nations; Phillimore, Int. Law; Marshall, Ins. 384 *a*; 1 Kent, Comm. 116; Burlamaqui, pt. 4, c. 5, ss. 16, 17; Bynkershoeck, lib. 1, c. 9; Cobbett, Parl. Deb. 406; Chitty, Law of Nat.; Vattel, l. 3, c. 7; § 104; Martens, Précis. liv. 8, c. 7, § 306; Boucher, Inst. nn. 1826–1831.

NEVADA. 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 in the following boundaries—viz.: beginning at the point of intersection of the forty-second degree of north latitude with the thirty-ninth degree of longitude west from Washington, thence running south on the line of said thirty-ninth degree of west longitude until it intersects the northern boundary-line of the territory of New Mexico, thence due west to the dividing ridge separating the waters of Carson Valley from those that flow into the Pacific, thence on said dividing ridge to the forty-first degree of north latitude, thence due north to the southerly boundary of the state of Oregon, thence due east to the point of beginning—into a separate territory, by the name of the territory of Nevada, with a temporary territorial government, with the exception that the act is not to apply to so much of the present state of California as is included within these boundaries, unless that state consents; and with the exception of all that part subject to Indian rights which have not been extinguished by treaty. U. S. Stat. at Large, 1861, ch. 83, Little & Brown's ed. 209. See, also, Act of Congress July 14, 1862, extending the boundaries.

The provisions of the organic act are substantially the same as those of the act erecting the territory of New Mexico. See NEW MEXICO.

NEVER INDEBTED. A plea to an action of *indebitatus assumpsit*, by which the defendant asserts that he is not indebted to the plaintiff. 6 Carr. & P. 545; 1 Mees. & W. Exch. 542; 1 Q. B. 77. The plea of never indebted has, in England, been substituted for *nil debet*, in certain actions specified in schedule B (36) of the Common Law Procedure Act of 1852; and the effect of the plea never indebted is to deny those facts from which the liability of the defendant arises. In actions on negotiable bills or notes, never indebted is inadmissible. Reg. Gen. Hil. T. 1853, §§ 6, 7; 3 Chitty, Stat. 560.

NEW AND USEFUL INVENTION A phrase used in the act of congress relating to granting patents for inventions.

The invention to be patented must not only be new, but useful,—that is, useful in contradistinction to frivolous or mischievous inventions. It is not meant that the invention should in all cases be superior to the modes now in use for the same purposes. 1 Mas. C. C. 182, 302; 4 Wash. C. C. 9; 1 Pet. C. C. 480, 481; 1 Paine, C. C. 203; 3 C. B. 425. The law as to the usefulness of the invention is the same in France. Renouard, c. 5, s. 16, n. 1, p. 177. See PATENT.

NEW ASSIGNMENT. A re-statement of the cause of action by the plaintiff, with more particularity and certainty, but consistently with the general statement in the declaration. Stephen, Plead. 241; 20 Johns. N. Y. 43.

2. Its purpose is to avoid the effect of an evasive plea which apparently answers the declaration, though it does not really apply to the matter which the plaintiff had in view. 1 Wms. Saund. 299 *b*, note 6. Thus, if a defendant has committed two assaults on the plaintiff, one of which is justifiable and the other not, as the declaration may not distinguish one from the other, the defendant may justify, and the plaintiff, not being able either to traverse, demur, or confess and avoid, must make a new assignment.

3. There may be several new assignments in the course of the same action. 1 Chitty, Plead. 614. A plaintiff may reply to a part of the plea and also make a new assignment. A new assignment is said to be in the nature of a new declaration, Bacon, Abr. *Trespass* (I 4, 2); 1 Saund. 299 *c*, but is more properly considered as a repetition of the declaration, 1 Chitty, Plead. 602; differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is, consequently, to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular. Bacon, Abr. *Trespass* (I 4, 2); 1 Chitty, Plead. 610; Stephen, Plead. 245. See 3 Blackstone, Comm. 311; Archbold, Civ. Plead. 286; Doctrina Plac. 318; Lawes, Civ. Plead. 163.

NEW BRUNSWICK. A province of British North America.

2. It is bounded north by the river Restigouché and the bay of Chaleur, east by the gulf of St. Lawrence, south by Nova Scotia and the bay of Fundy, and west by the state of Maine. Its length from north to south is one hundred and eighty miles, breadth one hundred and fifty miles, giving an area of twenty-five thousand square miles.

The capital of New Brunswick is Fredericton, a small place sixty miles back from the southern shore, or eighty miles up the river St. John, at

whose mouth is the city St. John, with a population of forty thousand.

New Brunswick was originally part of the French province of Acadie (see NOVA SCOTIA), but was made a distinct province in 1784, having been first settled by the French A.D. 1639, ceded to the English in 1713 by the treaty of Utrecht, and settled by the British government in 1764.

The government in its three branches resembles, as closely as circumstances permit, that of England.

The Executive Department.

This consists of the Governor and the Executive Council.

3. The *Governor* or *Lieutenant-Governor* represents the sovereign, and is captain-general and commander-in-chief of the militia of the province, and, together with his council, has, in general, the same powers as governors of other colonies,—such as the appointment and commissioning of sheriffs, coroners, magistrates, and other officers. He does not preside in chancery or vice-admiralty, but is one of the court of piracy.

By provincial act 21 Vict. c. 9, the lieutenant-governor and executive council, together with a chief superintendent (who virtually has the sole control), form the provincial board of education.

The *Executive Council* consists of nine members: six officeholders,—viz.: provincial secretary, attorney-general, solicitor-general, chief commissioner of the board of works, surveyor-general, and postmaster-general,—and three non-officeholding members.

Those members of the council who take office must be elected by the people; and if they are members of the house at the time of their appointment they thereby vacate their seats in the legislature and go back to their constituents for re-election: and members so holding office are at once a part of the legislature and of the executive. The governor and council, as the government, have the appointment, practically, at least, of all public officers; but the council commonly consult the wishes of the representatives of the counties where the appointments are made.

4. The expenditure of the public moneys is vested in the executive department; but the *budget* of the provincial secretary (who corresponds to the prime minister) must be laid before the house of assembly and passed by them.

The house can investigate the affairs of any department by calling on the governor to order the papers connected therewith to be brought before them.

The Legislative Department.

5. This consists of the Legislative Council, or Upper House, and the Lower House, or House of Assembly.

The *Legislative Council* consists of twenty-three members, appointed by the crown on the recommendation of the governor and council,—practically appointed by the governor and council.

They are usually men of wealth and political influence, and hold their seats for life or during good behavior.

Prior to 1834 the legislative and executive councils were united, but since that time they have been distinct bodies; but a seat in the legislature does not prevent one's being a member of the executive. In 1862 the executive council was composed of two members of the legislative council and seven members of the house of assembly.

The apportionment of representatives to counties is based upon the population,—eight counties sending two each, one sending three, and five sending four each, while the city of St. John sends two.

6. The *House of Assembly* consists of forty-one members, elected by the people.

The provincial act 18 Vict. 1855, c. 37, § 20, provides that the candidate shall be a male British subject, of age, and for six months previous to the teste of the writ of election legally seised as of freehold, for his own use, of land in the province of the value of three hundred pounds over and above all incumbrances whatever charged upon or affecting the same.

The qualification for a vote for representative is established by the provincial act 18 Vict. 1855, c. 37, § 1, which provides that voters for representatives shall be male British subjects, of age, not legally incapable, and who shall have been assessed, for the year in which the registry is made up, for real estate one hundred dollars, or personal property four hundred dollars, or real and personal four hundred dollars, or annual income four hundred dollars. In case no assessment is made in his parish, the possession of the *qualification* shall be sufficient.

7. The government is what is called "responsible government,"—a term which has given rise to much dispute, sticklers for the rights of the crown and lovers of monarchy proclaiming it an absurd self-contradiction, while the so-called liberals cling to it as a fit name for a government whose executive council are, directly or indirectly, dependent on the people for their places.

To give an idea of the working of this system, let us suppose the present government ousted. The lieutenant-governor would then summon the leaders of the stronger political party in the legislature, and call upon them to name a council. They would suggest nine men from their own party, or such as would act with them, and he would thereupon issue his proclamation making such men his executive council. Six of these taking office (supposing them appointed from the house of assembly) vacate their seats in the legislature and go back to their constituents for the re-election necessary to confirm them as councillors and to allow them to retain their seats in the lower house. If not re-elected, new appointments are made and the council filled.

Suppose them re-elected. The question now comes, Have the government, so constituted, the confidence of the people? If they are strong enough in the legislature, all goes smoothly; but as soon as the opposition can control a majority of votes in the house, they pass a vote of "want of confidence," and thereupon the executive council resign, and the appointing process is gone through with anew.

8. The *House of Assembly* is elected by the people every four years, by ballot. The government, i.e. executive council, is commonly, but not necessarily, chosen from the house of assembly, and is in accordance with the political strength of that body.

When an executive council cannot co-operate with the lieutenant-governor, they are dismissed or resign; and if then re-elected by the people, the governor asks her majesty to appoint his successor; or, if he still holds his office and continues to act improperly, the people appeal through the house to the crown, and all such appeals are fairly and promptly decided.

The Judicial Department.

9. This comprises the Supreme Court of Judicature, Circuit Courts, Probate Courts, Court of Marriage and Divorce, Court of Vice-Admiralty, Court for Trial and Punishment of Piracy and Other Offences upon the High Seas, Court of Common Pleas or Quarter Sessions of the County Magistrates, and the Petty Court or Inferior Court of Common Pleas, besides Police Courts and minor tribunals.

The *Supreme Court* consists of a chief justice and four puisne judges, appointed by the crown on recommendation of the governor and council. By

act of assembly 17 Vict. c. 67, the court of chancery was abolished, and the master of the rolls appointed a judge of the supreme court: hence all causes heretofore cognizable by the court of chancery are to be determined in the "equity side of the supreme court."

10. The terms of court are, as in England, four in number,—Hilary, first Tuesday in February; Easter, second Tuesday in April; Trinity, second Tuesday in June; Michaelmas, second Tuesday in October; and nisi prius sittings in county of York, second Tuesday in January and fourth Tuesday in June. Suits for twenty dollars or less can be heard before a justice or magistrate's court, or (in St. John city only, for forty dollars or less) before the petty court. Suits for from twenty to eighty dollars go before the court of common pleas or quarter sessions: and in the city of St. John the mayor and recorder are judges of the quarter sessions. Suits for over eighty dollars must go before the supreme court. Imprisonment for debt is still permitted; but the debtor is discharged on taking his oath that he has no property of any kind. Possession of a leasehold estate would prevent his taking the oath. Any imprisoned debtor who can get bail may go on the limits, the limits extending to a distance of three miles from the jail. In seizing under execution, tools of trade and fifty dollars' worth of household furniture are exempt, except for rent, in which case the landlord may take every thing on the premises. There is no proceeding of attachment on mesne process, as in some of the New England states. The laws in force are the common law of England, the statute laws of Great Britain so far as they are made to extend to the colonies, and provincial statutes not repugnant to the laws of England.

NEW FOR OLD. A term used in the law of insurance in cases of adjustment of a loss when it has been but partial. In making such adjustment, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See 1 Cow. N. Y. 265; 4 *id.* 245; 4 Ohio, 284; 7 Pick. Mass. 259; 14 *id.* 141.

NEW HAMPSHIRE. The name of one of the original thirteen United States of America.

2. It was subject to Massachusetts from 1641 to 1680. Many of its institutions and laws are to be traced to that connection. It was governed as a province, under royal commissions, by a governor and council appointed by the king, and a house of assembly elected by the people, until the revolution.

In January, 1776, a temporary constitution was adopted, which continued till 1784. The constitution adopted in 1784 was amended by a convention of delegates held at Concord, approved by the people in their town-meetings, and established by the convention in February, 1792. This constitution was amended in 1850, by abolishing the property qualification for certain offices, but is otherwise still in force.

Every male inhabitant of every town and place, of twenty-one years of age and upwards, except paupers and persons excused from paying taxes at their own request, is entitled to vote in the town-meetings for the officers elected by the people. By statute, the names of all voters are required to be placed by the selectmen on a check-list; and no vote will be received unless the name of the voter is so registered. Three months' residence in the town, six months' in the state, and the presentment to the selectmen of the record of naturalization of persons who have been aliens, thirty days before the day of meeting, are required to entitle a party to be registered on the check-list.

The Legislative Power.

3. This is lodged in the Senate and House of Representatives, each of which has a negative upon the other, and which together are styled the *General Court of New Hampshire.*

The *Senate* is composed of twelve members, elected for the term of —— years, one from each district, by the people of the district. If no person is elected by the people for any district, or if a vacancy occur, one is elected, by joint ballot of the two houses, from the two persons having the highest number of votes. A senator must be a Protestant, thirty years old, an inhabitant of the district, and, for seven years next before his election, of the state.

Representatives are elected annually, for the term of one year, by the voters of the several towns and districts, and in case of failure to elect, or vacancy, as senators are in like case. Each town having one hundred and fifty ratable polls of twenty-one years of age and upwards may elect one representative, and one more for each three hundred additional polls. Towns and places having less than one hundred and fifty ratable polls may be classed by law for the chance of a representative; and towns which cannot be classed without great inconvenience may be authorized by law to elect. A representative must be a Protestant, an inhabitant of the town for which he is elected, and, for two years next preceding his election, of the state. The constitution contains the usual provisions for securing the organization of each house, giving control of the conduct of members, providing for keeping and publishing a record of proceedings, for open sessions, limiting the power of adjournment of houses separately, securing members from arrest on civil process while going to, remaining at, and returning from the session, and for securing freedom of debate. The general assembly has full legislative powers, may constitute courts, regulate taxes, secure equal representation, etc., under restrictions similar to those contained in the constitutions of the other states.

The Executive Power.

4. This is lodged in a Governor and Council.

The *Governor* is elected annually, and holds his office for one year from the first Wednesday in June. If no person has a majority of votes, the senate and house of representatives, by joint ballot, elect one of the two persons having the highest number of votes. In case of a vacancy, the president of the senate exercises the powers of the office, but cannot then act as senator. The governor must be a Protestant, of the age of thirty years, and an inhabitant of the state for seven years next preceding his election.

The governor is commander-in-chief of all the military forces of the state. He has a limited veto upon the acts and resolves of the general court, which are invalid unless they are approved and signed by him; but if he does not return any bill to the house in which it originated, with his objections, within five days after it is presented to him, provided the general court continue in session, or if the two houses, after considering his objections, shall again pass the same by a vote of two-thirds of each house, the bill will become a law as if he had signed it. In case any cause of danger to the health of the members exists at their place of meeting, he may direct the session to be held at another place.

5. *Councillors* are elected annually, must have the qualifications of senators, and hold office for

the same term as the governor. The state is divided by law into five districts, in each of which a councillor is elected, and vacancies are filled by a like election. If no person has a majority of votes, the two houses, by joint ballot, elect a councillor from the two persons having the highest number of votes.

The *governor and council* may adjourn or prorogue the general court, in case of disagreement of the two houses, for any period not exceeding ninety days. They nominate and appoint all judicial officers, the attorney-general and solicitors, sheriffs and coroners, registers of probate, and all general and field officers of the militia,—each having a negative upon the other. Nominations must be made three days before an appointment can be made, unless a majority of the council assent. All commissions must be in the name and under the seal of the state, signed by the governor and attested by the secretary, and the tenure of the office stated therein.

The power of pardoning offences—after conviction only, however—is vested in the governor and council, except in cases of impeachment. No money can be drawn from the treasury of the state but by warrant of the governor, with the advice and consent of the council.

The Judicial Power.

6. The *Supreme Judicial Court* consists of a chief justice and five assistant justices, appointed by the governor and council, to hold during good behavior, until seventy years of age. It has original jurisdiction of all cases and proceedings at common law, civil and criminal, except those in which justices of the peace have jurisdiction; of all cases in equity; in all cases of divorce and alimony; and appellate jurisdiction in all appeals from courts of probate, and in all appeals from police courts and from justices of the peace.

Trial terms of the supreme court are held by a single judge in every county twice, and in the larger counties three times, a year; but two judges must attend in any capital trial. At these terms are entered and tried most cases at common law and appeals from police courts and justices of the peace; and all trials by jury are had there; but cases may be tried without a jury, by consent of parties. Any question of law arising at these terms may be transferred to the law terms for decision by the whole court.

Two law terms are held annually in each of the four judicial districts into which the state is divided. At these terms are entered and heard all cases in equity, cases of divorce, appeals from courts of probate, writs of error and certiorari, cases of mandamus, quo warranto, and the like, and all questions of law transferred from the trial terms. No trials by jury are held at law terms; but issues of fact are transferred to the trial terms. Four justices are a quorum at the law terms, and the concurrence of three is necessary to a decision of any law question.

7. *Judges of probate* are appointed by the governor and council in each county, who hold their office during good behavior, unless sooner removed by address of both houses or by impeachment. They have jurisdiction of all matters relating to the estates of persons deceased and the guardianship of minors, insane persons, and spendthrifts, subject to appeal to the supreme court.

Justices of the Peace are appointed in sufficient number by the governor and council, who hold their office during the term of five years, unless sooner removed by address of both houses of the legislature. They have jurisdiction of all civil causes at common law in which the damages demanded do not exceed thirteen dollars and thirty-three cents and where the title to real estate is not involved, and in many minor criminal cases, subject to appeal to the supreme court. They have authority to arrest, examine, and bind over for trial at the supreme court persons charged with higher offences.

Police Courts have exclusive jurisdiction, in the cities and places where they are established, in all cases where justices of the peace have jurisdiction elsewhere.

No judge, clerk, or register of any court, or justice of the peace, can act as attorney, be of counsel, or receive fees as advocate or counsel, in any case which may come before the court of which he is an officer.

County Commissioners are elected, three in each county, by the voters of the county, for the term of three years, one being elected each year. They have general control and management of the financial affairs of the county, of the public buildings, of the roads, of paupers, and of levying the county tax.

NEW JERSEY. The name of one of the original thirteen states of the United States of America.

2. The territory of which the state is composed was included within the patent granted by Charles II. to his brother James, duke of York, bearing date on the 12th of March 16$\frac{6}{4}$. This grant comprised all the lands lying between the western side of Connecticut river and the east side of Delaware bay, and conferred powers of government over the granted territory. At this time the province was in the possession and under the government of Holland. Before the close of the year the inhabitants of the province submitted to the government of England, on the 23d and 24th of June, 1664. The duke of York, by deeds of lease and release, conveyed to John Lord Berkely and Sir George Carteret, their heirs and assigns forever, "all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in 41 degrees and 40 minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude: which said tract of land is hereafter to be called Nova Cæsaria or New Jersey."

3. This grant first defined the boundaries and gave the name of the province. It conferred upon the grantees, with the territory, powers of government in as full and ample manner as they were conferred by the crown upon the duke of York. Lord Berkely and Sir George Carteret, being by virtue of this conveyance the sole proprietors of New Jersey, on the 10th of February, 16$\frac{6}{4}$ signed a constitution which they published under the title of "The consessions and agreement of the lords proprietors of the province of Nova Cæsaria or New Jersey to and with all and every of the adventures, and all such as shall settle or plant there." This document, under the title of "The Consessions," was regarded as the first constitution of New Jersey, and continued in force until the division of the province in 1676. The instrument was considered as irrevocable, and therefore of higher authority than the acts of assembly, which were subject to alteration and repeal. War having been declared by England against Holland in 1673, the Dutch were again in possession of the country, and the inhabitants submitted to their authority.

4. By the treaty of peace between England and Holland on the 9th of February, 1674, the country was restored to the possession of the English. On the conclusion of peace, in order to remove all

grounds of objection to his title on account of the recapture of the country by the Dutch, the duke of York obtained from the crown a new patent, similar to the first, and dated on the 29th of June, 1674. On the 20th of July in the same year, the duke of York made a second grant of a portion of the province to Sir George Carteret individually. The partition which this patent was intended to secure, in addition to the confirmation of Carteret's grant, was accomplished by deeds of partition executed July 1, 1676, between Carteret and the trustees of Byllinge. In 1702, the proprietors of the two provinces, called respectively East New Jersey and West New Jersey, surrendered their powers of government to Queen Anne, still retaining their title to the land. The two divisions constituted thenceforth but one colony. The colony was governed by a governor and council appointed by the crown, and an assembly of the representatives of the people chosen by the freeholders. This form of government continued till the American revolution.

5. The first constitution of the *state* of New Jersey was adopted by the provisional congress on the second day of July, 1776. This body was composed of representatives from all the counties of the state, who were elected on the fourth Monday of May, and convened at Burlington on the tenth day of June, 1776. It was finally adopted on the second day of July, but was never submitted to a popular vote. This constitution continued in force until the first day of September, 1844, when it was superseded by the existing constitution. A new constitution was adopted May 14, 1844, by a convention composed of delegates elected by the people in pursuance of an act passed by the legislature. The constitution thus framed, having been submitted to and adopted by the people at an election held on the thirteenth day of August, took effect and went into operation, pursuant to one of its provisions, on the twenty-second of September, 1844.

6. The right of suffrage is by the constitution vested in every white male citizen of the United States, of the age of twenty-one years, who has been a resident of the state one year, and of the county in which he claims his vote five months, next before the election: provided that no person in the military, naval, or marine service of the United States shall be considered a resident of the state by being stationed in any garrison, barrack, or military or naval place or station within the state; and no pauper, idiot, insane person, or person convicted of a crime which now excludes him from being a witness, unless pardoned or restored by law to the right of suffrage, shall enjoy the right of an elector.

The Legislative Power.

This is lodged in a Senate and General Assembly, which meet separately the second Tuesday in January each year.

The *Senate* is composed of one senator from each county, elected by the people for three years. They are divided into classes, so that one-third of the senate is changed each year. A senator must be entitled to vote, at least thirty years old, have been a citizen and inhabitant of the state for four years, and of the county for which he is chosen one year, next before election.

7. The *General Assembly* is composed of members elected annually by the voters of the several counties. They are apportioned on the basis of population; and each county is to have one member at least, and the whole number is not to exceed sixty. Each member must be entitled to vote, at least twenty-one years old, must have been a citizen and inhabitant of the state for two years, and of the county for which he is chosen one year, next before his election.

The Executive Power.

The *Governor* is elected by the legal voters of the state for the term of three years, commencing on the third Tuesday of January next ensuing his election. He is incapable of holding the office for three years next after his term of service. He must be not less than thirty years of age, and have been for twenty years at least a citizen of the United States, and a resident of this state seven years next before his election, unless he has been absent during that time on the public business of the United States or of this state.

8. He is the commander-in-chief of all the military and naval forces of the state; has power, except in cases of impeachment, to suspend the collection of fines and forfeitures, and to grant reprieves, to extend until the expiration of a time not exceeding ninety days after conviction; in connection with the chancellor and the six judges of the court of errors and appeals, or the major part of them, can remit fines and forfeitures, and grant pardons in all cases after conviction, except impeachment; and is liable to impeachment for misdemeanor in office during his continuance in office and for two years thereafter. In case of the death, resignation, or removal from office of the governor, the powers, duties, and emoluments of the office devolve upon the president of the senate; and in case of his death, resignation, or removal, then upon the speaker of the house of assembly, until another governor shall be elected and qualified; but in such case another governor shall be chosen at the next election for members of the legislature, unless such vacancy occur within thirty days preceding such election, in which case a governor shall be chosen at the next succeeding election for members of the legislature.

The Judicial Power.

9. The *Court of Errors and Appeals* consists of a chancellor, the justices of the supreme court, and six judges, or a major part of them, which judges are appointed for six years by the governor, with the consent of the senate.

The seat of one of the judges is vacated each year: so that one judge is annually appointed. No member of the court who has given a judicial opinion in the cause in favor of or against any error complained of, may sit as a member or have a voice on the hearing; but the reasons for such opinion shall be assigned to the court in writing. Four sessions are held annually, at Trenton. It is the highest court of appeals from decisions of the supreme court, court of chancery, and circuit court. After decision pronounced, the cause is remitted to the inferior courts for judgment and execution according to the decision.

The *Court of Chancery* consists of a chancellor, appointed by the governor for a term of seven years, who is also the ordinary or surrogate general and judge of the prerogative court. Appeals lie from the order or decree of the orphans' court to the prerogative court.

10. The *Supreme Court* consists of one chief and six assistant judges, appointed by the governor, with the advice and consent of the senate, for the term of seven years. This number may be increased or decreased by law, but may never be less than two. The judges are *ex officio* justices of the inferior court of common pleas, orphans' court, and court of general quarter sessions. Four stated terms are to be held annually, at Trenton, and special terms as court may appoint, not exceeding two a year. This is the court of general inquiry, common-law jurisdiction. When issues of fact arise, they are sent to the circuit court to be found by a jury and single judge.

Circuit Courts are held in every county in the state, by one or more justices of the supreme court, or a judge appointed for the purpose. For this purpose the state is divided into seven districts, and one

judge assigned to each district. In all cases within the county, except in those of a criminal nature, these courts have common-law jurisdiction concurrent with the supreme courts; and any final judgment of a circuit court may be docketed in the supreme court, and operates as a judgment obtained in the supreme court from the time of such docketing. Final judgments in any circuit court may be removed by writ of error into the supreme court, or directly into the court of errors and appeals; and questions of law which arise are to be certified by the presiding judge to the supreme court for decision.

11. *Common Pleas Court.* This in each county is composed of five judges, appointed for five years by senate and general assembly by joint ballot. One goes out of office each year.

Oyer and Terminer and General Jail Delivery. This court is held by one or more justices of the supreme court, and one or more of the court of common pleas, in each county, at the times of holding the circuit court, and such other times as the judge of the supreme court may appoint. It has cognizance of all crimes whatever of an indictable or presentable nature committed in the county where the court is held.

Court of Quarter Sessions. This court is composed of three or more justices of the court of common pleas in each county. It has cognizance of all crimes for purposes of indictment; but all capital crimes and those of the graver character must be tried by the court of oyer and terminer or supreme court.

The *Orphans' Court* is held in each county, by three or more judges of the common pleas court. It has the original jurisdiction of the probate of wills, settlement of the estates of decedents, appointment and control of administrators and executors, and the care of minors, including the appointment and control of guardians. Four terms of this court are held annually. An appeal lies to the prerogative court, held by the chancellor. The duties of clerk or register of this court are discharged by a surrogate, elected by the people of the county for five years.

Justices of the Peace are elected by the people of each township, or ward of city, not less than two nor more than five for each such division, for five years. They have cognizance within their counties of civil matters to an amount not exceeding one hundred dollars, except those cases involving land-titles, and actions of replevin, slander, or trespass for assault and battery or imprisonment. A jury of six must be impanelled on demand of either party.

NEW MATTER. In Pleading. Matter not previously alleged. Statements of fact not previously alleged by either party to the pleadings. Where special pleading prevails, such matter must be pleaded in avoidance, and it must, in general, be followed by a verification. Gould, Plead. c. 3, § 195; 1 Chitty, Plead. 538; Stephen, Plead. 251; Comyns, Dig. *Pleader* (E 32); 1 Wms. Saund. 103, n. 1; 2 Lev. 5; Ventr. 121; 3 Bouvier, Inst. n. 2983. See PLEA.

In equity, new matter, discovered by either plaintiff or defendant, may be introduced by cross or supplemental bill before a decree has been pronounced, but not by amendment after an answer has been filed. 1 Paige, Ch. N. Y. 200; Harr. Ch. Mich. 438; 4 Bouvier, Inst. nn. 4385–4387.

NEW MEXICO. One of the territories of the United States.

2. By act of congress, approved September 9, 1850, the territory of New Mexico is constituted and described as "all that territory of the United States beginning at the point in the Colorado river where the boundary with the republic of Mexico crosses the same; thence eastwardly with said boundary-line to the Rio Grande; thence, following the main channel of said river, to the parallel of the 32° of north latitude; thence east with said parallel to its intersection with the 103° of longitude W. of Greenwich; thence north with said degree of longitude to the parallel of 38° of north latitude; thence west with said parallel to the summit of Sierra Madre; thence south with the crest of said mountains to the 37th parallel of north latitude; thence west with said parallel to the boundary-line of the state of California; thence with said boundary-line to the place of beginning." A proviso is annexed that the United States may divide the territory into two or more, and that when admitted as a state the said territory, or any portion of the same, shall be received into the Union with or without slavery, as their constitution may prescribe at the time of admission. 9 U. S. Stat. at Large, 446. By the organic act, the powers of the territory are lodged in three branches,—the legislative, executive, and judicial. The operation of this act was suspended until the Texan boundary was agreed upon, when it went into force by proclamation of the president, December 13, 1850. 9 U. S. Stat. at Large, App.

3. The regulations as to the qualifications of voters, subject to change by the territorial legislature, are that all white male inhabitants who have lived three months in the territory and are citizens of the United States, or who have declared their intention to become such, and fifteen days next before election in the county in which they offer to vote, are qualified. In addition to these classes, also, all persons who are recognized as citizens under the treaties with Mexico are so entitled. But no person under guardianship, *non compos mentis*, or convicted of treason, felony, or bribery, may vote, unless restored to civil rights.

The Legislative Power.

The *Council* is composed of thirteen members, elected by the people of the districts into which the territory is divided, for the term of two years.

The *House of Representatives* consists of twenty-six members, elected by the people of the districts into which the territory is divided, for the term of one year. The two houses have power to legislate on all subjects of legislation not inconsistent with the laws and constitution of the United States. No laws may interfere with the primitive disposition of the soil. No tax may be levied of United States property. Property of non-residents may not be taxed higher than that of residents. No bank may be incorporated and no debt incurred by the territory.

The Executive Power.

4. The *Governor* is appointed by the president of the United States, by and with the advice and consent of the senate, for the term of four years, unless sooner removed. He must reside in the territory. He is commander-in-chief of the military of the territory; is superintendent of Indian affairs; is to approve all acts passed by the legislature before they can become laws; may grant pardons and remit fines for offences against the laws of the territory, and reprieves for offences against the laws of the United States till the will of the president can be known; must take care that the laws be executed.

A *Secretary of the Territory* is also appointed in the same manner and for the same time. He is to record and preserve laws passed by the legislature, and acts done by the governor, in his executive capacity, and to transmit copies, etc.

The Judicial Power.

5. The *Supreme Court* consists of a chief and two assistant justices, appointed by the president of the United States, with the advice and consent of the

senate, for the term of four years. Two of the three judges constitute a quorum. The jurisdiction is appellate solely, and extends to all matters of appeal and writs of error that may be taken from the judgments or decrees of the district courts, in cases of errors apparent from the face of the record.

Special terms may be called by the chief justice for the hearing of causes in both civil and criminal matters, when the parties or the accused, and the district attorney, agree. No jury trials are held by this court. An appeal lies to the supreme court of the United States as from a decision of the United States circuit court, where the amount involved exceeds a specified sum.

6. The *District Court* is held in each of the three districts into which the territory is divided for the purpose, by one of the judges of the supreme court.

It has exclusive original jurisdiction of all matters at law or in equity, except those of which justices of the peace have concurrent jurisdiction, and of all crimes and misdemeanors, except those of which justices of the peace have exclusive cognizance.

Probate Courts are also to be provided for by law. They have, in general, the control of the settlement of the estates of decedents, and the appointment and control of guardians.

Justices of the Peace have a jurisdiction coextensive with the county of all civil cases where the amount involved does not exceed one hundred dollars, except chancery cases, cases involving title or boundary to real estate, and cases of libel, slander, malicious prosecution and false imprisonment, seduction and crim. con.

An *Attorney* and a *Marshal* are also appointed, for four years, by the president and senate, and are subject to removal by them.

Justices of the Peace may be provided for by law, with a limited criminal and civil jurisdiction, not to exceed one hundred dollars.

NEW PROMISE. A contract made after the original promise has, for some cause, been rendered invalid, by which the promiser agrees to fulfil such original promise.

NEW TRIAL. **In Practice.** A re-hearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose. 4 Chitty, Gen. Pract. 30; 2 Graham & W. New Tr. 32. It is either upon the same, or different, or additional evidence, before a *new jury*, and probably, but not necessarily, before a different judge.

2. The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer. 3 Blackstone, Comm. 387, 388.

Courts have, in general, a discretionary power to grant or refuse new trials, according to the exigency of each particular case, upon principles of substantial justice and equity. The reasons which will induce them to exercise this power will be enumerated in what follows.

The *not giving the defendant sufficient notice* of the time and place of trial, unless waived by an appearance and making defence, will be a ground for setting aside the verdict. 3 Price, Exch. 72; 1 Wend. N. Y. 22. But to have this effect the defendant's ignorance of the trial must not have been owing to his own negligence, and the insufficiency of the notice must have been reasonably calculated to mislead him. 7 Term, 59; 2 Bibb, Ky. 177.

3. *Mistakes or omissions of officers* in summoning and drawing jurors, when the irregularity deprives the party complaining of a substantial right, will entitle him to a new trial. 2 Halst. N. J. 244. Likewise, where the officer summoning the jury is nearly related to one of the parties, 10 Serg. & R. Penn. 334; 1 South. N. J. 364; or is interested in the event, 5 Johns. N. Y. 133, unless the objection to the officer was waived by the party, 3 Me. 215; 21 Pick. Mass. 457, or the authority of the officer be so circumscribed as to put it out of his power to select an improper jury. 7 Ala. 253; 7 Cow. N. Y. 720. And the verdict will be set aside for the following causes: the unauthorized interference of a party, or his attorney, or the court, in selecting or returning jurors,—unless the interference can be satisfactorily explained, 2 Graham & W. New Tr. 173–179; 8 Humphr. Tenn. 412; that a juror not regularly summoned and returned personated another, Barnes, 455; 7 Dowl. & R. 684; but not if the juror personated another through mistake, was qualified in other respects, and no injustice has been done, 12 East, 229; that a juror sat on the trial after being challenged and set aside,—unless the party complaining knew of it, and did not object, 3 Yeates, Penn. 318; that a juror was discharged without any sufficient reason, after being sworn, 1 Ohio St. 66; but not if the juror was discharged by mistake and with the knowledge and acquiescence of the party, 9 Metc. Mass. 572; 5 Ired. No. C. 58; that the jury were not sworn, or that the oath was not administered in the form prescribed by law. 1 How. 497; 2 Me. 270.

4. The *disqualification of jurors*, if it has not been waived, will be ground for a new trial: as, the want of a property qualification, 4 Term, 473; 15 Vt. 61; relationship to one of the parties, 32 Me. 310, unless the relationship be so remote as to render it highly improbable that it could have had any influence, 12 Vt. 661; interest in the event, 2 Johns. N. Y. 194; 21 N. H. 438; conscientious scruples against finding a verdict of guilty, 13 N. H. 536; 16 Ohio, 364; 13 Wend. N. Y. 351; mental or bodily disease unfitting jurors for the intelligent performance of their duties, 6 Humphr. Tenn. 59; 8 Ill. 368; alienage. 6 Johns. N. Y. 332; 2 Ill. 476. But see 8 Ill. 202; 4 Dall. Penn 353.

5. When *indirect measures have been resorted to to prejudice the jury*, or tricks practised or disingenuous attempts made to suppress or stifle evidence or thwart the proceedings, or to obtain an unconscionable advantage, they will be defeated by granting a new trial. For example: where papers material on the point in issue, not previously submitted, are surreptitiously handed to the

jury, Cas. *temp.* Hardw. 116; 2 Yeates, Penn. 273; or where the party, or some one in his behalf, directly approaches the jury on the subject of the trial. 7 Serg. & R. Penn. 458; 13 Mass. 218. But if the other party is aware of such attempts, and neglects to correct them when in his power, he will be deemed to have waived all objection. 11 Mod. 118. If the interference with the jury comes from a stranger, be without fault in the jury, and without the knowledge of the parties, and no injury has thereby ensued, the verdict will not be disturbed. 5 Mo. 525; 3 Bibb, Ky. 8; 11 Humphr. Tenn. 169, 491. But see 9 Miss. 187; 16 *id.* 465; 20 *id.* 398. Where the jury, after retiring to deliberate, examine witnesses in the case, a new trial will be granted, Croke Eliz. 189; 2 Bay, So. C. 94; 1 Brev. No. C. 16; so, also, when one of their number communicates to his fellows private information possessed by him, which influences the finding, 1 Sid. 235; 1 Swan, Tenn. 61; 2 Yeates, Penn. 166; 4 Dall. Va. 112; 4 Yerg. Tenn. 111; or the judge addresses a note to them, or privately visits them, after they have retired to deliberate. 1 Pick. Mass. 337; 10 Johns. N. Y. 238; 13 *id.* 487.

6. *Misconduct of the jury* will sometimes avoid the verdict: as, for example, jurors betting as to the result, 4 Yerg. Tenn. 111; sleeping during the trial, 8 Ill. 368; unauthorized separation, 1 Va. Cas. 271; 11 Humphr. Tenn. 502; 3 Harr. N. J. 468; taking refreshment at the charge of the prevailing party, 1 Ventr. 124; 4 Wash. C. C. 32; drinking spirituous liquor, 4 Cow. N. Y. 17, 26; 7 *id.* 562; 4 Harr. N. J. 367; 1 Hill, N. Y. 207; talking to strangers on the subject of the trial, 3 Day, Conn. 223; 9 Humphr. Tenn. 646; determining the verdict by a resort to chance. 15 Johns. N. Y. 87; 8 Blackf. Ind. 32. But every irregularity which would subject jurors to censure will not overturn the verdict, unless there be some reason to suspect that it may have had an influence on the final result. In general, if it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, does not indicate any improper bias, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict will not be disturbed. Where, however, the misconduct of the jury amounts to a gross deviation from duty, decency, and order, a new trial will sometimes be granted, on grounds of public policy, without inquiring whether or not any injury has been sustained in that particular case. 2 Graham & W. New Tr. 478–594.

7. *Error of the judge* will be ground for a new trial: such as, admitting illegal evidence which has been objected to,—unless the illegal evidence was wholly immaterial, or it is certain that no injustice has been done; and where the illegal testimony was admitted in gross violation of the well-settled principles which govern proof, it has been deemed *per se* ground for a new trial, notwithstanding the jury were directed to disregard it, 13 Johns. N. Y. 350; 15 *id.* 239; but see 6 N. H. 333; improperly rejecting evidence tending in any degree to aid the jury in determining a material fact, 3 J. J. Marsh. Ky. 229; withdrawing testimony once legally before the jury,—unless the excluded testimony could not be used on a second trial, 4 Humphr. Tenn. 22; denying to a party the right to be heard through counsel, 2 Bibb, Ky. 76; 3 A. K. Marsh. Ky. 465; erroneously refusing to nonsuit, 19 Johns. N. Y. 154; improperly restricting the examination or cross-examination of witnesses, or allowing too great latitude in that respect, under circumstances which constitute a clear case of abuse, 6 Barb. N. Y. 383; 4 Edw. Ch. N. Y. 621; refusing to permit a witness to refer to documents to refresh his memory, where by the denial the complaining party has sustained injury, 3 Litt. Ky. 338; improperly refusing an adjournment, whereby injustice has been done, 2 South. N. J. 518; 9 Ga. 121; refusing to give such instructions to the jury as properly arise in the case, where it is manifest that the jury erred through want of instruction, 4 Ohio, 389; 1 Mo. 68; 9 *id.* 305; giving to the jury a positive direction to find, when there are circumstances in the case which ought to have been submitted to them, —unless the verdict is in strict accordance with the weight of evidence, 19 Wend. N. Y. 402; 5 Humphr. Tenn. 476; giving an erroneous exposition of the law on a point material to the issue,—unless it is certain that no injustice has been done, or the amount in dispute is very trifling, so that the injury is scarcely appreciable, 4 Conn. 356; 5 Sandf. N. Y. 180; 3 Johns. N. Y. 239; misleading the jury by a charge which is not explicit, or which is absurd and impossible, or contradictory, or argumentative and evasive, 9 Humphr. Tenn. 411; 11 Wend. N. Y. 83; 6 Cow. N. Y. 682; erroneous instruction as to the proof that is requisite, 3 Bibb, Ky. 481; 21 Me. 20; misapprehension of the judge as to a material fact, and a direction to the jury accordingly, whereby they are misled, 1 Mills, Tenn. 200; instructing the jury as to the law upon facts which are purely hypothetical,—but not if the charge was correct in point of law, and the result does not show that the jury were misled by the generality of the charge, 8 Ga. 114; 2 Ala. N. s. 694; submitting as a contested point what has been admitted, 9 Conn. 216; erroneously leaving to the jury the determination of a question that should have been decided by the court, whereby they have mistaken the law; charging as to the consequences of the verdict. 1 Pick. Mass. 106; 2 Graham & W. New Tr. 595–703; 3 *id.* 705–873.

8. *Surprise, as a ground for setting aside the verdict*, is cautiously allowed. When it is occasioned by the act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it, he has sometimes been relieved; but not when he might have been fully informed by the exercise of ordinary diligence, 6 Halst.

N. J. 242; although, even when the complainant is not entirely free from fault, the court, in cases where great wrong would otherwise be done, will, for the sake of promoting justice, grant a new trial. Among the cases of surprise which will justify the interposition of the court may be enumerated the following: the unexpectedly being summoned and detained as a witness or juror in another court, or sudden and serious illness, which prevents the party from attending at the trial, 3 T. B. Monr. Ky. 113; 7 *id.* 59; 4 Litt. Ky. 1; 1 Halst. N. J. 344; that the cause was brought on prematurely, in the absence of the party, 6 Dan. Ky. 89; erroneous ruling of the court as to the right to begin, which has worked manifest injustice, 4 Pick. Mass. 156; but see 8 Conn. 254, 296; perturbation of counsel, arising from sudden and dangerous sickness occurring in his family and coming to his knowledge during the trial, 14 Pick. Mass. 494; where some unforeseen accident has prevented the attendance of a material witness, 6 Mod. 22; 11 *id.* 1; 2 Salk. 645; 1 Harp. So. C. 267; that testimony beyond the reach of the party injured, and completely under the control of the opposite party, was not produced at the trial, 7 Yerg. Tenn. 502; 7 Wend. N. Y. 62; that competent testimony was unexpectedly ruled out on the trial, 9 Dan. Ky. 26; 2 Vt. 573; 2 J. J. Marsh. Ky. 515; where a party's own witnesses, through forgetfulness, mistake, contumacy, or perjury, testify differently than anticipated, or where evidence is unexpectedly sprung upon a party by his opponent, 8 Ga. 136; 18 Miss. 326; the withdrawal of a material witness before testifying, attended with suspicions of collusion, 25 Wend. N. Y. 663; that a material witness was suddenly deprived of the power of testifying by a paralytic stroke, or other affection, or that the testimony of the witness was incoherent on account of his being disconcerted at the trial, 1 Root, Conn. 175; where it is discovered after the trial that a material witness who testified is interested in the event, or where it is probable that the verdict was obtained by false testimony, which the party injured could not until after the trial contradict or expose. 2 C. B. 342; 3 Burr. 1771; 1 Bingh. 339; 1 Me. 322.

9. New trials *on account of after-discovered testimony* are granted but rarely, and with great caution. The court, in order to set aside the verdict on this ground, must be satisfied that the evidence has come to the applicant's knowledge since the trial, 3 Stor. C. C. 1; 21 N. H. 166; that it is not owing to the want of diligence that it did not come sooner, 6 Johns. Ch. N. Y. 479; 1 Blackf. Ind. 367; that it is so material that it will probably produce a different result, 1 Dudl. Ga. 85; and that it is not cumulative. 3 Woodb. & M. C. C. 348. Nor must the sole object of the newly-discovered evidence be to impeach witnesses examined on the former trial. 7 Barb. N. Y. 271; 11 *id.* 216; 8 Gratt. Va. 637. The moving party must state what the evidence is, and what diligence he has used in the preparation of his case; and his application must be accompanied by the affidavits of the newly-discovered witnesses, unless some cause be shown why they cannot be produced. 5 Halst. N. J. 250; 1 Tyl. Vt. 441; 22 Me. 246.

Excessive damages may be good cause for granting a new trial: first, where the measure of damages is governed by fixed rules and principles, as in actions on contracts, or for torts to property the value of which may be ascertained by evidence; second, in suits for personal injuries where, although there is no fixed criterion for assessing the damages, yet it is clear that the jury acted from passion, partiality, or corruption. 10 Ga. 37. In actions for personal torts, a new trial will not, in general, be granted on account of the smallness of the damages, unless the verdict is the result of contrivance by the defendant, or surprise on the plaintiff, or of partiality or misconduct of the jury, or unless the finding is entirely disproportioned to the injury. Where the verdict is for an amount exceeding the damages laid in the writ, it will be set aside unless the plaintiff will release the excess. 7 Wend. N. Y. 330.

10. *When the verdict is clearly against law,* it will be set aside notwithstanding the jury had power to decide both the law and the fact, or the issue was one exclusively of fact and there have been concurrent verdicts by two successive juries. Dudl. Ga. 213; 4 Ga. 193. If, however, substantial justice has been done, a new trial will not be granted though the law arising on the evidence would have justified a different result. 1 Burr. 54; 4 Term, 468; 3 Graham & W. New Tr. 1176–1202.

Courts are at all times reluctant to grant a new trial *on the ground that the verdict is against evidence;* and where the jury have passed upon a mere question of fact, they will only do so when the verdict is palpably against the evidence: injustice must have been done by the verdict, and there must be a probability that justice will be done on retrial. 21 Conn. 245; 5 Ohio, 509; 3 Strobh. So. C. 358. Where the verdict is founded on circumstantial evidence, the court will rarely, if ever, interfere with it. 16 Mass. 345; 11 Ill. 36. On the other hand, when the issue approximates to a purely legal question, courts are somewhat more liberal in granting new trials. 2 M'Mull. So. C. 44. The verdict will be set aside where the witnesses upon whose testimony it was obtained have since the trial been convicted of perjury, 3 Dougl. 24; so where the testimony on which the verdict is founded derives its credit from circumstances, and those circumstances are afterwards clearly falsified by affidavit. 1 Bos. & P. 427; 3 Graham & W. New Tr. 1203–1374.

The verdict may be void *for obscurity or uncertainty.* 1 Serg. & R. Penn. 367. It will be set aside where it is not responsive to the issue, or does not comprehend all of the issues unless the finding of one or more of

the issues will be decisive of the cause. 2 Ala. N. s. 359; 11 Pick. Mass. 45. That it was not recorded in open court, or was received in the absence of the plaintiff, or was altered after it was recorded and the jury dismissed, will be ground for a new trial. 1 Ill. 109; 1 Wend. N. Y. 36: 16 Serg. & R. Penn. 414. If rendered on Sunday, it will, in general, be void; but there are many instances in which verdicts have been sustained though rendered on that day. 1 South. N. J. 156; 15 Johns. N. Y. 119; 3 Watts, Penn. 56; 13 Ohio, 490.

11. *Courts of equity* have always proceeded with great caution in awarding new trials at law. At the present day they are but seldom applied to for this purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law. 1 Schoales & L. Ch. Ir. 201. But, in general, when it would have been proper for a court of law to have granted a new trial if the application had been made while that court had the power, it is equally proper for a court of equity to do so if the application be made on grounds arising after the court of law can no longer act. 1 A. K. Marsh. Ky. 237. A court of equity will not grant a new trial at law to enable a party to impeach a witness, or because the verdict is against evidence. 1 Johns. Ch. N. Y. 432. It will only interpose in cases of newly-discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defence by circumstances beyond his control. 1 Litt. Ky. 140; 2 Bibb, Ky. 241; 2 Hawks, No. C. 605; Willard, Eq. Jur. 357; 3 Graham & W. New Tr. 1455–1580.

12. A court of equity will often grant a second, and sometimes a third, fourth, and even fifth trial of a feigned issue, in cases where a court of law would not disturb a first verdict. 1 Edw. Ch. N. Y. 96. This arises from the consideration that the responsibility of the decision rests upon the judge in equity. 3 Graham & W. New Tr. 1570, 1571.

New trials may be granted *in criminal* as well as in civil cases, at the solicitation of the defendant, when he is convicted even of the highest offences. But a person once lawfully convicted on a sufficient indictment can never after, against his consent, be a second time put in peril for the same offence, unless the former conviction was instituted by the fraudulent procurement of the defendant with a view to shield himself from adequate punishment. 2 Graham & W. New Tr. 61–84. Where the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, the law, mingling justice with mercy *in favorem vitæ et libertatis*, does not permit a new trial. 16 Conn. 54. In civil actions for the recovery of penalties, and in some cases where the form of proceeding is criminal, if the object be only to establish a civil right, as in cases of *quo warranto* and the like, new trials may be granted even after acquittal. But, in such cases, when the verdict is for the defendant it will not, in general, be disturbed unless some rule of law be violated in the admission or rejection of evidence or in the charge of the court to the jury. 4 Term, 753; 2 Cow. N. Y. 811; 2 Graham & W. New Tr. 61.

NEW YORK. The name of one of the original states of the United States of America.

2. In its colonial condition this state was governed from the period of the revolution of 1688 by governors appointed by the crown, assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. b. 1, ch. 10.

There have been three constitutions adopted by the state since its colonial period: one in 1777, which remained in force until January 1, 1823, when the second went into operation. This second constitution remained until January 1, 1847, when the present constitution, which was adopted by a convention of the people at Albany, went into force.

The qualifications of the electors are thus described, namely: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days and an inhabitant of this state one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people; but such citizen shall have been for thirty days next preceding the election a resident of the district from which the officer is to be chosen for whom he offers his vote. But no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seised and possessed of a freehold estate of the value of two hundred and fifty dollars over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such election. And no person of color shall be subject to direct taxation unless he shall be seised and possessed of such real estate as aforesaid." Const. art. 2, § 1.

The Legislative Power.

3. This is lodged in a Senate and Assembly.

The *Senate* consists of thirty-two members, chosen, one for each senatorial district, for the term of two years, by the electors of the district.

The *Assembly* consists of one hundred and twenty-eight members, elected, one from each of the assembly districts, for the term of one year, by the people. A certain number of members is elected from each county, according to an apportionment by the legislature, and each county, except Hamilton, is to be always entitled to one member. The counties entitled to more than one member are divided into districts, each of which elects one member of the assembly. The allotment and division are to be revised after each census. No town is to be divided in forming assembly districts. The districts must contain, as nearly as possible, an equal number of inhabitants, excluding aliens and people of color not taxed. No member of the legislature can receive any civil appointment within the state, or to the senate of the United States, from the governor, or the governor and senate, or governor and legislature, during the term for which he was elected, and any person who after his election as a member of the legislature is elected to congress, or appointed to any office, civil or military, under the govern-

ment of the United States, by acceptance thereof vacates his seat.

4. The constitution contains the usual provisions for organization of the legislature; making each house judge of the qualifications of members; giving it power to regulate their conduct; for the keeping and publication of a record of proceedings; for open sessions; freedom of debate; preventing one house from adjourning without the consent of the other. No private or local bill may be passed which embraces more than one subject, and which does not express that subject in its title. Corporations may be formed by the legislature, but only under general laws, except in cases wherein, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. Special charters may not be granted to banks, but they may be formed under general laws. Const. art. 8, §§ 1–8.

The Executive Power.

5. The *Governor* is elected biennially, for the term of two years, by the people, or by the legislature in consequence of a failure to elect by the people. The governor must be a citizen of the United States, thirty years old at least, and have been for five years next preceding his election a resident within the state. He is commander-in-chief of the military and naval forces of the state; has power to convene the legislature (or the senate only) on extraordinary occasions; communicates by message to the legislature, at every session, the condition of the state, and recommends such matters to them as he judges expedient; transacts all necessary business with the officers of the government, civil and military; is to take care that the laws are faithfully executed; has the power to grant reprieves, commutations, and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he has power to suspend the execution of the sentence until the case is reported to the legislature at its next meeting, when the legislature either pardons or commutes the sentence, directs the execution of the sentence, or grants a further reprieve. He must anpually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve. He has the veto power, but a bill may be passed over his veto by a vote of two-thirds of both houses.

6. The *Lieutenant-Governor* is elected at the same time, for the same term, and must possess the same qualifications, as the governor. He is president of the senate,—with only a casting vote, however. In case of the impeachment of the governor, of his removal from office, death, inability to discharge the powers and duties of the said 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 ceases. But when the governor, with the consent of the legislature, is out of the state in time of war, at the head of a military force thereof, he continues commander-in-chief of all the military forces of the state. If during a vacancy of the office of governor the lieutenant-governor is impeached, displaced, resigns, dies, or becomes incapable of performing the duties of his office, or is absent from the state, the president of the senate acts as governor until the vacancy is filled or the disability ceases.

A Secretary of State, a Comptroller, a Treasurer, an Attorney-General, and a State Engineer and Surveyor are elected by the people biennially, for the term of two years each.

The Judicial Power.

7. The *Court of Appeals* consists of eight judges, four of whom are elected by the people of the state for eight years, and four selected from the justices of the supreme court having the shortest time to serve. Const. art. 6, § 2. The four judges taken from the supreme court serve only one year; and every second year one of those elected by the people at large goes out of office. Four terms of this court must be held each year, and five judges must concur in each decision. Code, §§ 11–15. It exercises an appellate jurisdiction for the correction of errors at law and in equity. It has exclusive jurisdiction to review upon appeal every act or determination (7 Barb. N. Y. 581; 1 N. Y. 428) made at a general term by the supreme court, or by the supreme court of the city of New York, or by the court of common pleas of the city and county of New York, in a judgment in an action of contract tried therein or brought there from another court, and, upon the appeal from such judgment, to review any intermediate order involving the merits and necessarily affecting the judgment (2 N. Y. 566–416) in an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, 1 N. Y. 188, 228, 423, 534; in a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment. But such appeal is not allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in a justices' court in the state. Code of Proc. tit. ii.; 2 Rev. Stat. 4th ed. 480.

8. The *Supreme Court* is composed of thirty-three judges, elected, four in each of the eight districts into which the state is divided, except the district composed of New York city, where five are at present elected and more may be authorized to be chosen, but not to exceed in the whole such number in proportion to its population, and shall be in conformity with the number of such judges in the residue of the state in proportion to its population. The justices in each district are classified so that one goes out of office every second year. The justice having the shortest time to serve, who is not a member of the court of appeals, is presiding judge in each district. Of those having the shortest time to serve, four taken from alternate districts are members of the court of appeals. The districts are further arranged in two classes, those numbered with the odd numbers constituting one class, those numbered with the even numbers the other, which elect their supreme judges alternate years. By this arrangement the vacancies in the court of appeals happen in the last year of service of four of the supreme judges every year. It is the court of general original jurisdiction. See Code of Proc. §§ 11–15.

The *Circuit Court* is held by one of the judges of the supreme court twice a year at least in each county.

9. The *Court of Oyer and Terminer* is composed in each county of a justice of the supreme court, the county judge, and two justices of the peace, elected for the purpose for the term of two years by the people of the county. The supreme judge and any two of the others constitute a quorum. In the city and county of New York the court is composed of a judge of the superior court and any two of the following: the judges of the court of common pleas, the mayor, recorder, or alderman. It is to inquire into all crimes and misdemeanors committed or triable in the county, to hear and determine all such, and to deliver the jails of all prisoners according to law.

Act of Sessions, more fully described as the court of general sessions of the peace, is held in each

county by the county judge, who must designate the terms at which a jury is to be drawn. This court is to inquire into all the crimes and misdemeanors committed or triable in the county, and to hear, determine, and punish according to law all crimes and misdemeanors not punishable with death or imprisonment in state prison for life.

County Courts are held in each county, by a single judge, elected by the people for the term of four years. They have original civil jurisdiction only in cases where money or personal property not exceeding one hundred dollars in amount is demanded, for the foreclosure of mortgages on real estate, and the collection of the balance due after sale of the property, partition of real estate in the county, admeasurement of dower, management of the property of infants, mortgage and sale of the property of religious corporations, etc. They have also supervision of, and an appellate jurisdiction from, the decisions of justices of the peace. The county judge acts also as surrogate in counties which have a population of less than forty thousand.

10. *Mayors' Courts* are held in the various cities, with a civil and criminal jurisdiction varying somewhat in the different cities.

Recorders' Courts are held in some cities of the state, with powers substantially those of the mayors' courts in other cities of the state.

Justices of the Peace are elected in the various towns and cities for the term of four years, in number and classes as directed by law. They have jurisdiction of actions on contracts, for personal damages, for penalty on a bond, for fraud in sale, purchase, or exchange of personal property to an amount not exceeding one hundred dollars.

The *Justices' Courts* of the various cities have jurisdiction in cases under the charters and by-laws where the penalty does not exceed one hundred dollars. It also extends to one hundred dollars, and, on confession of judgment, to two hundred and fifty dollars, with the exception of certain actions where the people are concerned, and where the title to land comes in question, and actions for an assault and battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, and seduction, and matters of account where the sum total of the accounts exceeds four hundred dollars, and actions against an executor or administrator.

11. A *Surrogate* is elected in each county having a population of more than forty thousand inhabitants: having less than that population, the county judge discharges the duties of the surrogate. The Code of Procedure does not apply to matters testamentary and intestacy; and hence the rules of evidence and practice in the surrogates' courts are the same as formerly. Willard's Law of Executors, 174 *et seq.*; Wilcox *vs.* Smith, 26 Barb. N. Y. 316. The appeal from the decision of the surrogate is to the supreme court, and from that court to the court of appeals. The former jurisdiction of the court of probate is vested in the surrogates, subject to appeal as aforesaid.

The *Superior Court of New York City* is composed of six judges, elected by the people, of whom one is selected by his associates as chief justice. It has jurisdiction of actions for the recovery of real property or an interest or estate therein; for the foreclosure of personal-property mortgages; for recovery of personal property distrained; for recovery of forfeitures imposed by statute; against an officer or person appointed by him for acts done in virtue of said office or appointment, where the cause has arisen or the property is situated in said city; and of all other actions where all the defendants reside or are personally served with summons within the city, and of actions against corporations having their place of business in the city.

The *Court of Common Pleas for the City and County of New York* is composed of three judges, elected by the people. It has the same jurisdiction as the superior court within its limits, and, in addition, has power to review the judgments of the marine court of New York city, and of justices in that city.

12. The *Marine Court of the City of New York* has the jurisdiction of justices of the peace, and also of actions arising under the charter or by-laws of New York city where the penalty is more than twenty-five and less than one hundred dollars; action of contract for services rendered on board a vessel on the high seas, where the state courts have jurisdiction, though the damage exceeds one hundred dollars. But no admiralty powers are given. Code of Procedure, part 1, tit. vii.; 2 Rev. Stat. 4th ed. 492. There are other local courts, as superior court of the city of Buffalo, city court of Brooklyn, with limited jurisdiction given by act creating them.

The distinctive features of the present constitution, compared with the two former, are, 1st: that the present constitution imposes more stringent limitations on the legislative power than either of the former. 2d. It has applied the elective principle to the judiciary, and to various other officers not before elective by the people. 3d. It has shortened the term of office of the judges of the various courts, and, by means of frequent elections, has brought the judges more under the influence of popular feeling than formerly. 4th. It has consolidated law and equity in the same tribunal.

All the changes produced by the Code of Procedure cannot be noticed in so brief an article. The prominent ones are—1, the abolition of the distinction between law and equity, according to the constitution, and the adoption of a new system of pleading applicable to all remedies. Code, § 140. 2. The abolition of the rule with respect to interest as a ground of exclusion of witnesses. Code, § 398. 3. The abolition of all bills of discovery, and allowing the parties to the action to be examined as witnesses for and against each other. Code, § 389, as amended in 1859, stat. of 1859, p. 970. 4. Requiring the real parties in interest to be the parties to the action. Code, § 111. 5. Preventing an action from abating by the death, marriage, or other disability of a party, or by any transfer of interest if the cause of action survive, and allowing the action to be continued in the name of the party in interest. Code, 121. 6. Providing as a substitute for voluntary and compulsory references either of all or any of the issues of law or fact, or both, to one, or not exceeding three, referees. Code, 270–273.

13. The constitution provides for tribunals of conciliation; but none such has been established.

The finances and funds of the state are regulated by article VIII. Amongst other things, it forbids the legislature to sell or lease the canals, or the salt-springs, or to loan the credit of the state to or in and of any individual, association, or corporation. It limits the power of the legislature in the creation of debts, and provides for submitting the question to the people with respect to the same. It also contains the two following general provisions: Section 13. Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object. Section 14. On the final passage in either house of the legislature of every act which imposes, continues, or revives a tax, or creates a debt or charge, or makes, continues, or revives any appropriation of public or trust money or property, or releases, discharges, or commutes any claim or demand of the state, the question shall be taken by ayes and noes, which shall be

duly entered on the journals; and three-fifths of all the members elected to either house shall in all such cases, if necessary, constitute a quorum thereof.

14. *Corporations* may be formed under general laws, and the legislature is expressly forbidden to create them by special acts, except in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. Dues from corporations must be secured by the individual liability of the corporators. The term corporation is defined so as to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals and partnerships. The legislature is forbidden to grant bank-charters, but allowed to pass general laws for their creation. The individual stockholders are individually responsible to the amount of their stock for all the debts of the bank. Bill-holders have a preference in case of a failure of the bank. Const. art. viii. sec. 1–8.

NEWLY DISCOVERED EVIDENCE. In Practice. Proof of some new and material fact in the case, which has been ascertained since the verdict.

The discovery of such evidence will afford a ground for a new trial; but courts only interfere with verdicts for this cause under very special circumstances.

To entitle the party to relief, certain well-defined conditions are indispensable. It is a rule subject to rare exceptions, and applied perhaps with more stringency in criminal than in civil cases, that the sole object of the new evidence must not be to impeach or contradict witnesses sworn on the former trial, 7 Barb. N. Y. 271; 8 Gratt. Va. 637; it must not merely multiply testimony to any one or more of the facts already investigated, but must bring to light some new and independent truth of a different character, 3 Woodb. & M. C. C. 348; 1 Sumn. C. C. 451; 6 Pick. Mass. 114; 10 *id.* 16; 2 Caines, N. Y. 129; 8 Johns. N. Y. 84; 15 *id.* 210; 4 Wend. N. Y. 579; 7 Watts & S. Penn. 415; 5 Ohio, 375; 11 *id.* 147; 4 Halst. N. J. 228; 1 Green, N. J. 177; 3 Vt. 72, 1 A. K. Marsh. Ky. 151; 3 *id.* 104; it must be to a point before in issue, and be so material as to impress the court with the belief that if a new trial were granted the result would probably be different, Dudl. Ga. 85; 3 Humphr. Tenn. 222; it must not have been known to the party until after the trial, 3 Stor. C. C. 1; 2 Sumn. C. C. 19; 2 N. H. 166; and the least fault in not procuring and using it at the trial must not be imputable to him. 6 Johns. Ch. N. Y. 482; 1 Blackf. Ind. 367; 5 Halst. N. J. 250; 7 *id.* 225; 1 Mo. 49; 11 Conn. 15; 10 Me. 218; 20 *id.* 246; 14 Vt. 415; 7 Metc. Mass. 748; 3 Graham & W. New Tr. 1015–1112. See NEW TRIAL, § 9.

NEWSPAPERS. Papers for conveying news, printed and distributed periodically.

NEXI. In Roman Law. Persons bound (*nexi*); that is, insolvents, who might be held in bondage by their creditors until their debts were discharged. Vicat, Voc. Jur.; Heineccius, Antiq. Rom. ad Inst. lib. 3, tit. 330; Calvinus, Lex.; Mackeldey, Civ. Law, § 486 *a*.

NEXT FRIEND. One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*.

NEXT OF KIN. This term is used to signify the relations of a party who has died intestate.

In general, no one comes within this term who is not included in the provisions of the statutes of distribution. 3 Atk. Ch. 422, 761; 1 Ves. Sen. Ch. 84. A wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word they are not. Hovenden, Fr. 288, 289; 1 Mylne & K. Ch. 82. See LEGACY; DISTRIBUTION; DESCENT.

NEXUM (Lat.). **In Roman Law.** The transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security.

2. In one sense *nexum* includes *mancipium;* in another sense, *mancipium* and *nexum* are opposed, in the same way as sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a transfer *per æs et libram*. The person who became *nexus* by the effect of a *nexum* placed himself in a servile condition, not becoming a slave, his *ingenuitas* being only in suspense, and was said *nexum inire*. The phrases *nexi datio, nexi liberatio,* respectively express the contracting and the release from the obligation.

3. The Roman law as to the payment of borrowed money was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt, as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judex*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio*, and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the prætor. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor, on three *nundinæ*, and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several creditors, the letter of the law allowed them to cut the debtor in pieces and take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor, who was *addictus*, as a slave, and compel him to work out his debt; and the treatment was often very severe. In this passage Gellius does not speak of *nexi*, but only of *addicti*, which is sometimes alleged as evidence of the identity of *nexus* and *addictus*, but it proves no such identity. If a *nexus* is what he is here supposed to be, the laws of the Twelve Tables could not apply; for when a man became *nexus* with respect to one creditor, he could not become *nexus* to another; and if he became *nexus* to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied to the case of a debtor being assigned over by a judicial sentence to several debtors, and it provided for a settlement of their conflicting claims. The precise

condition of a *nexus* has, however, been a subject of much discussion among scholars. Smith, Dict. Rom. & Gr. Antiq.; MANCIPIUM.

NIECE. The daughter of a brother or sister. Ambl. Ch. 514; 1 Jac. Ch. 207.

NIEFE. In Old English Law. A woman born in vassalage.

NIENT COMPRISE (Law Fr. not included). An exception taken to a petition because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Tomlyn, Law Dict.

NIENT CULPABLE (Law Fr. not guilty). The name of a plea used to deny any charge of a criminal nature, or of a tort.

NIENT DEDIRE (Law Fr. to say nothing).

Words used to signify that judgment be rendered against a party because he does not deny the cause of action: *i.e.* by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it in transitory actions; or, in local actions, they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd, Pract. 8th ed. 655.

NIENT LE FAIT (Law Fr.). **In Pleading.** The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

NIGHT. That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned. It is night when there is daylight, *crepusculum* or *diluculum*, enough left or begun to discern a man's face withal. 1 Hale, Pl. Cr. 550; 4 Blackstone, Comm. 224; Bacon, Abr. *Burglary* (D); 2 Russell, Crimes, 32; Roscoe, Crim. Ev. 278.

NIGHT WALKERS. Persons who sleep by day and walk by night, 5 Edw. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night.

Watchmen may undoubtedly arrest them; and it is said that private persons may also do so. 2 Hawkins, Pl. Cr. 120. But see 3 Taunt. 14; Hammond, Nisi P. 135. See 15 Viner, Abr. 555; Dane, Abr. Index.

NIHIL CAPIAT PER BREVE (Lat. that he take nothing by his writ). **In Practice.** The form of judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nihil capiat per billam*. Coke, Litt. 363.

NIHIL DICIT (Lat. he says nothing). The name of the judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the day assigned. In such a case, judgment is given against the defendant of course, as he says nothing why it should not. See 15 Viner, Abr. 556; Dane, Abr. Index.

NIHIL HABET (Lat. he has nothing). The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. 5 Whart. Penn. 367.

Two returns of *nihil* are, in general, equivalent to a service. Yelv. 112; 1 Cowen, 70 1 Law Rep. No. C. 491; 4 Blackf. Ind. 188; 2 Binn. Penn. 40.

NIL DEBET (Lat. he owes nothing). **In Pleading.** The general issue in debt on simple contract. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Stephen, Plead. 174, n.; 8 Johns. N. Y. 83; Dane, Abr. Index.

NIL HABUIT IN TENEMENTIS (Lat.). **In Pleading.** A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, denies his landlord's title to the premises alleging *that he has no interest in the tenements*. 2 Lilly, Abr. 214; 12 Viner, Abr. 184; 15 *id.* 556.

NISI PRIUS (Lat. unless before). **In Practice.** For the purpose of holding trials by jury. Important words in the writ (*venire*) directing the sheriff to summon jurors for the trial of causes depending in the superior courts of law in England, which have come to be adopted, both in England and the United States, to denote those courts or terms of court held for the trial of civil causes with the presence and aid of a jury.

The origin of the use of the term is to be traced to a period anterior to the institution of the commission of *nisi prius* in its more modern form. By Magna Charta it was provided that the common pleas should be held in one place, and should not follow the person of the king; and by another clause, that assizes of novel disseisin and of mort d'ancestor, which were the two commonest forms of actions to recover land, should be held in the various counties before the justices in eyre. A practice obtained very early, therefore, in the trial of trifling causes, to continue the cause in the superior court from term to term, provided the justices in eyre did not sooner (*nisi justiciarii diu*) come into the county where the cause of action arose, in which case they had jurisdiction when they so came. Bracton, l. 3, c. 1, § 11. By the statute of *nisi prius*, 13 Edw. I. c. 30, enforced by 14 Edw. III. c. 16, justices of assize were empowered to try common issues in trespass and other suits, and return them, when tried, to the superior court, where judgment was given. The clause was then left out of the continuance and inserted in the venire, thus: "*Præcipimus tibi quod venire facias coram justiciariis nostris apud Westm. in Octabis Scti Michælis*, nisi *talis et talis, tali die et loco, ad partes illas venerint, duodecim*," etc. (we command you that you cause to come before our justices at Westminster, on the octave of Saint Michael, *unless* such and such

a one, on such a day and place, shall come to those parts, twelve, etc.). Under the provisions of 42 Edw. III. c. 11, the clause is omitted from the venire, and the jury is respited in the court above, while the sheriff summons them to appear before the justices, upon a *habeas corpora juratorum*, or, in the king's bench, a *distringas*. See Sellon, Pract. Introd. lxv.; 1 Spence, Eq. Jur. 116; 3 Sharswood, Blackst. Comm. 352–354; 1 Reeve, Hist. Eng. Law, 245, 382.

See, also, ASSIZE; COURTS OF ASSIZE AND NISI PRIUS; JURY.

NISI PRIUS ROLL. In Practice. The transcript of a case made from the record of the superior court in which the action is commenced, for use in the nisi prius court.

It includes a history of all the proceedings in the case, including the declaration, plea, replication, rejoinder, issue, etc. It must be presented in proper manner to the nisi prius court. When a verdict has been obtained and entered on this record, it becomes the *postea*, and is returned to the superior court.

NO AWARD. The name of a plea to an action or award. 2 Ala. 520; 1 N. Chipm. Vt. 131; 3 Johns. N. Y. 367.

NO BILL. Words frequently indorsed on a bill of indictment by the grand jury when they have not sufficient cause for finding a true bill. They are equivalent to *Not found*, or *Ignoramus*. 2 Nott & M'C. So. C. 558.

NOBILE OFFICIUM. In Scotch Law. An equitable power of the court of sessions, by which it is able, to a certain extent, to give relief when none is possible at law. Stair, Inst. b. iv. tit. 3, § 1; Erskine, Inst. 1. 3. 22; Bell, Dict.

NOBILITY. An order of men, in several countries, to whom privileges are granted at the expense of the rest of the people.

2. The constitution of the United States provides that no state shall "grant any title of nobility; and no person can become a citizen of the United States until he has renounced all titles of nobility." The Federalist, No. 84; 2 Story, U. S. Laws, 851.

3. There is not in the constitution any general prohibition against any citizen whomsoever, whether in public or private life, accepting any foreign title of nobility. An amendment of the constitution in this respect has been recommended by congress; but it has not been ratified by a sufficient number of states to make it a part of the constitution. Rawle, Const. 120; Story, Const. § 1346.

NOCUMENTUM (Lat. harm, nuisance). **In Old English Law.** A thing done whereby another man is annoyed in his free lands or tenements. Also, the *assize* or writ lying for the same. Fitzherbert, Nat. Brev. 183; Old Nat. Brev. 108, 109. Manwood, For. Laws, c. 17, divides *nocumentum* into *generale, commune, speciale*. Reg. Orig. 197, 199; Coke, Will Case. *Nocumentum* was also divided into *damnosum*, for which no action lay, it being done by an irresponsible agent, and *injuriosum et damnosum*, for which there were several remedies. Bracton, 221; Fleta, lib. 4, c. 26, § 2.

NOLLE PROSEQUI. In Practice. An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further.

2. A *nolle prosequi* may be entered either in a criminal or a civil case. In *criminal* cases, before a jury is impanelled to try an indictment, and also after conviction, the attorney-general has power to enter a *nolle prosequi* without the consent of the defendant; but after a jury is impanelled a *nolle prosequi* cannot be entered without the consent of the defendant. 17 Pick. Mass. 395; 20 *id.* 356; 1 Gray, Mass. 490; 7 *id.* 328; 12 Metc. Mass. 444; 12 Vt. 93; 3 Hawks, 613; 7 Humphr. Tenn. 152; 1 Bail. So. C. 151; 9 Ga. 306. It is for the prosecuting officer to enter a nol. pros. in his discretion, 3 Hawks, No. C. 613; but in some states leave must be obtained of the court. 1 Hill, N. Y. 377; 1 Va. Cas. 139; 12 Vt. 93; 7 Smith, Pen. Laws, 227.

3. It may be entered as to one of several defendants. 11 East, 307.

The effect of a *nolle prosequi*, when obtained, is to put the defendant without day; but it does not operate as an acquittal; for he may be afterwards reindicted, and, it is said, even upon the same indictment fresh process may be awarded. 6 Mod. 261; 1 Salk. 59; Comyns, Dig. *Indictment* (K): 2 Mass. 172; 4 Cush. Mass. 235; 13 Ired. No. C. 256. See 3 Cox, Cr. Cas. 93; 7 Humphr. Tenn. 159.

4. In *civil cases*, a nolle prosequi is considered not to be of the nature of a *retraxit* or release, as was formerly supposed, but an agreement only not to proceed either against *some* of the defendants, or as to *part* of the suit. See 1 Wms. Saund. 207, note 2, and the authorities there cited; 1 Chitty, Plead. 546. A nolle prosequi is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff. 3 Term, 511; 1 Wils. 98.

5. In civil cases, a nolle prosequi may be entered as to one of several counts, 7 Wend. N. Y. 301, or to one of several defendants, 1 Pet. 80; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a nolle prosequi as to him, and proceed against the other. 1 Pick. Mass. 500. See, generally, 1 Pet. 74; 2 Rawle, Penn. 334; 1 Bibb, Ky. 337; 4 *id.* 387, 454; 3 Cow. N. Y. 335, 374; 5 Gill & J. Md. 489; 5 Wend. N. Y. 224; 12 *id.* 110; 20 Johns. N. Y. 126; 3 Watts, Penn. 460.

NOMEN (Lat.). **In Civil Law.** A name of a person or thing. In a stricter sense, the name which declared the *gens* or family: as, Porcius, Cornelius; the *cognomen* being the name which marked the individual: as, Cato, Marcus; *agnomen*, a name added to the cognomen for the purpose of description. The

name of the person himself: *e.g. nomen curiis addere.* The name denoting the condition of a person or class: *e.g. nomen liberorum,* condition of children. Cause or reason (*pro causa aut ratione*): *e.g. nomine culpæ,* by reason of fault. A mark or sign of any thing, corporeal or incorporeal. *Nomen supremum, i.e.* God. Debt, or obligation of debt. A debtor. See Vicat, Voc. Jur.; Calvinus, Lex.

In Old English Law. A name. The Christian name, *e.g.* John, as distinguished from the family name: it is also called *prænomen.* Fleta, lib. 4, c. 10, §§ 7, 9; Law Fr. & Lat. Dict.

In Scotch Law. *Nomen debiti.* Right to payment of a debt.

NOMEN COLLECTIVUM (Lat.). A word in the singular number which is to be understood in the plural in certain cases.

Misdemeanor, for example, is a word of this kind, and when in the singular may be taken as *nomen collectivum* and including several offences. 2 Barnew. & Ad. 75. *Heir,* in the singular, sometimes includes all the heirs. *Felony* is not such a term.

NOMEN GENERALISSIMUM (Lat.). A most universal or comprehensive term: *e.g.* land. 2 Sharswood, Blackst. Comm. 19; 3 *id.* 172; Taylor, Law Gloss. So *goods.* 2 Williams, Ex. 1014.

NOMINAL DAMAGES. In Practice. A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Wherever any act injures another's right, and would be evidence in future in favor of a wrong-doer, an action may be obtained for an invasion of the right without proof of any specific injury, 1 Wms. Saund. 346 *a;* 28 N. H. 438; 13 Conn. 269; and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown will award a trifling sum: as, a penny, one cent, six and a quarter cents, etc. 14 Ill. 301; 4 Den. N. Y. 554; Sedgwick, Dam. 47.

2. Thus, such damages may be awarded in actions for flowing lands, 2 Stor. C. C. 661; 1 Rawle, Penn. 27; 12 Me. 183; 28 N. H. 438; injuries to commons, 2 East, 154; violation of trade-marks, 4 Barnew. & Ad. 410; and see 7 Cush. Mass. 322; 2 R. I. 566; infringement of patents, 1 Gall. C. C. 429, 483; diversion of water-courses, 5 Barnew. & Ad. 1; 1 Bingh. N. C. 549; 17 Conn. 288; 2 Ill. 544; 6 Ind. 39; 32 N. H. 90; but see 21 Ala. N. S. 309; 6 Ohio St. 187; trespass to lands, 24 Wend. N. Y. 188; 2 Tex. 206; see 4 Jones, No. C. 139; neglect of official duties, in some cases, 5 Metc. Mass. 517; 12 *id.* 535; 1 Den. N. Y. 548; 27 Vt. 563; 23 *id.* 303; 12 N. H. 341; breach of contracts, 1 Du. N. Y. 363; 2 Hill, N. Y. 644; 5 *id.* 290, 505; 6 Md. 274; and many other cases where the effect of the suit will be to determine a right. 2 Wils. 414; 12 Ad. & E. 488; 3 Scott, N. R. 390; 13 Conn. 361; 20 Mo. 603; 28 Me. 505; 19 Miss. 98; 2 La. Ann. 907. And see, in explanation and limitation, 10 Barnew. & C. 145; 14 C. B. 595; 1 Q. B. 636; 18 *id.* 252; 22 Vt. 231; 1 Dutch. N. J. 255; 14 B. Monr. Ky. 330; 5 Ind. 250; 6 Rich. So. C. 75.

The title or right is as firmly established as though the damages were substantial. Sedgwick, Dam. 47. As to its effect upon costs, see Sedgwick, Dam. 55; 2 Metc. Mass. 96; 1 Dow, Parl. Cas. 201; 1 Curt. C. C. 434; 22 Vt. 231.

NOMINAL PLAINTIFF. One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

In general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it. 1 Wheat. 233; 7 Cranch, 152; 1 Johns. Cas. N. Y. 411; 3 *id.* 242; 1 Johns. N. Y. 532, n.; 3 *id.* 426; 11 *id.* 47; 12 *id.* 237; 1 Phillipps, Ev. 90, Cowen's note 172; Greenleaf, Ev. § 173.

NOMINATE CONTRACT. A contract distinguished by a particular name, the use of which name determines the rights of all the parties to the contract: as, purchase and sale, hiring, partnership, loan for use, deposit, and the like. The law thus supersedes the necessity for special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In Roman law there were twelve nominate contracts, with a particular action for each. Bell, Dict. *Nominate and Innominate;* Mackeldey, Civ. Law, §§ 395, 408; Dig. 2. 14. 7. 1.

NOMINATION (from Lat. *nominare,* to name). An appointment: as, I nominate A B executor of this my last will.

A proposition. The word nominate is used in this sense in the constitution of the United States, art. 2, s. 2: the president "shall nominate, and by and with the consent of the senate shall appoint, ambassadors," etc.

NOMINE PŒNÆ (Lat. in the nature of a penalty). **In Civil Law.** A condition annexed to heirship by the will of the deceased person. Domat, Civ. Law; Hallifax, Anal.

At Common Law. A penalty fixed by covenant in a lease for non-performance of its conditions. 2 Lilly, Abr. 221.

It is usually a gross sum of money, though it may be any thing else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Hammond, Nisi P. 411, 412.

To entitle himself to the *nomine pœnæ,* the landlord must make a demand of the rent on the very day, as in the case of a re-entry. 1 Saund. 287 *b,* note; 7 Coke, 28 *b;* Coke, Litt. 202 *a;* 7 Term, 117. A distress cannot be taken for a *nomine pœnæ* unless a special power to distrain be annexed to it by deed.

3 Bouvier, Inst. n. 2451. See Bacon, Abr. *Rent* (K 4); Woodfall, Landl. & T. 253; Dane, Abr. Index.

NOMINEE. One who has been named or proposed for an office.

NON ACCEPTAVIT (Lat. he did not accept). **In Pleading.** The name of a plea to an action of assumpsit brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 Mann. & G. 561.

NON-ACCESS. The non-existence of sexual intercourse between husband and wife is generally expressed by the words non-access of the husband to the wife; which expressions, in a case of bastardy, are understood to mean the same thing. 2 Starkie, Ev. 218, n.

In Pennsylvania, when the husband has access to the wife, no evidence short of absolute impotence of the husband is sufficient to convict a third person of bastardy with the wife. 6 Binn. Penn. 283.

In the civil law the maxim is, *Pater is est quem nuptiæ demonstrant.* Toullier, tom. 2, n. 787. The Code Napoléon, art. 312, enacts "*que l'enfant conçu pendant le mariage a pour père le mari.*" See, also, 1 Browne, Penn. Appx. xlvii.

A married woman cannot prove the non-access of her husband. See 8 East, 193, 202; 11 *id.* 132; 12 *id.* 550; 13 Ves. Ch. 58; 4 Term, 251, 336; 6 *id.* 330.

NON-AGE. By this term is understood that period of life from the birth till the arrival of twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing: as, when non-age is applied to one under the age of fourteen, who is unable to marry.

NON ASSUMPSIT (Lat. he did not undertake). **In Pleading.** The general issue in an action of assumpsit.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner and form as the said A B hath above complained. And of this he puts himself upon the country."

Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. Gilbert, C. P. 65; Salk. 279; 2 Strange, 738; 1 Bos. & P. 481. See 12 Viner, Abr. 189; Comyns, Dig. *Pleader* (2 G 1).

NON ASSUMPSIT INFRA SEX ANNOS (Lat. he has not undertaken within six years). **In Pleading.** The plea by which, when pleadings were in Latin, the defendant alleged that the obligation was not undertaken and the right of action had not accrued within six years, the period of limitation of the right to bring suit.

NON BIS IN IDEM. In Civil Law. A phrase which signifies that *no one shall be twice tried for the same offence:* that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried. Code, 9. 2. 9. 11; Merlin, Répert. See JEOPARDY.

NON CEPIT MODO ET FORMA (Lat. he did not take in manner and form). **In Pleading.** The plea which raises the general issue in an action of replevin.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (*or*, goods and chattels, according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It denies the taking the things and having them in the place specified in the declaration, both of which are material in this action. Stephen, Plead. 183, 184; 1 Chitty, Plead. 490.

NON-CLAIM. An omission or neglect by one entitled to make a demand within the time limited by law: as, when a continual claim ought to be made, a neglect to make such claim within a year and a day.

NON COMPOS MENTIS (Lat. not of sound mind, memory, or understanding). A generic term, including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness. Coke, Litt. 247; 4 Coke, 124; 1 Phill. 100; 4 Comyns, Dig. 613; 5 *id.* 186; Shelford, Lun. 1; IDIOCY; LUNACY.

NON CONCESSIT (Lat. he did not grant). **In English Law.** The name of a plea by which the defendant denies that crown granted to the plaintiff by letters the patent the rights which he claims as a concession from the king: as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right.

It does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration. 3 Burr. 1544; 6 Coke, 15 *b.*

NON-CONFORMISTS. In English Law. A name given to certain dissenters from the rites and ceremonies of the church of England.

NON CONSTAT (Lat. it does not appear). Words frequently used, particularly in argument, to express dissatisfaction with the conclusions of the other party: as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Swinburn, pt. 4, § 22, p. 331.

NON CULPABILIS (Lat.). **In Pleading.** Not guilty. It is usually abbreviated

non cul. 16 Viner, Abr. 1; 2 Gabbett, Crim. Law, 317.

NON DAMNIFICATUS (Lat. not injured). **In Pleading.** A plea to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage. 1 Bos. & P. 640, n. *a*; 1 Taunt. 428; 1 Saund. 116, n. 1; 2 *id.* 81; 7 Wentworth, Plead. 615, 616; 1 H. Blackst. 253; 2 Lilly, Abr. 224; 14 Johns. N. Y. 177; 5 *id.* 42; 20 *id.* 153; 3 Cow. N. Y. 313; 10 Wheat. 396, 405; 3 Halst. N. J. 1.

NON DEDIT. In Pleading. The general issue in formedon. See NE DONA PAS.

NON DEMISIT (Lat. he did not demise). **In Pleading.** A plea proper to be pleaded to an action of debt for rent, when the plaintiff declares on a parol lease. Gilbert, Debt, 436, 438; Buller, Nisi P. 177; 1 Chitty, Plead. 477.

It cannot be pleaded when the demise is stated to have been by indenture. 12 Viner, Abr. 178; Comyns, Dig. *Pleader* (2 W 48).

NON DETINET (Lat. he does not detain). **In Pleading.** The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (or "deeds and writings," according to the subject of the action) in the said declaration specified, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It puts in issue the detainer only: a justification must be pleaded specially. 8 Dowl. Pract. Cas. 347. It is a proper plea to an action of debt on a simple contract in the case of executors and administrators. 6 East, 549; Bacon, Abr. *Pleas* (I); 1 Chitty, Plead. 476.

NON EST FACTUM (Lat. is not *his* deed). **In Pleading.** A plea to an action of debt on a bond or other specialty.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (or "indenture," or "articles of agreement," according to the subject of the action) is not his deed. And of this he puts himself upon the country." 6 Rand. Va. 86; 1 Litt. Ky. 158.

It is a proper plea when the deed is the foundation of the action, 1 Wms. Saund. 38, note 3; 2 *id.* 187 *a.* note 2; 2 Ld. Raym. 1500; 11 Johns. N. Y. 476, and cannot be proved as declared on, 4 East, 585, on account of non-execution, 6 Term, 317, or variance in the body of the instrument. 1 Campb. 70; 11 East, 633; 6 Taunt. 394; 4 Maule & S. 470; 2 Dowl. & R. 662. Under this plea the plaintiff may show that the deed was void *ab initio*, 2 Wils. 341; 2 Campb. 272; 3 *id.* 33; 12 Mod. 101; 1 Ld. Raym. 315; 12 Johns. N. Y. 337; 13 *id.* 430; 10 Serg. & R. Penn. 25; 14 *id.* 208; see 2 Salk. 275; 6 Cranch, 219, or became so after making and before suit. 5 Coke, 119 *b*; 11 *id.* 27; 4 Cruise, Dig. 368. See 1 Chitty, Plead. 417, n.

In covenant, the defendant may, under this plea, avail himself of a mis-statement or omission of a qualifying covenant, Strange, 1146; 9 East, 188; 11 *id.* 639; 1 Campb. 70; 4 *id.* 20, or omission of a condition precedent. 11 East, 639; 7 Dowl. & R. 249.

NON EST INVENTUS (Lat. I have not found him). **In Practice.** The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chitty, Pract.

NON-FEASANCE. The non-performance of some act which ought to be performed.

When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment: as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. See 1 Russell, Crimes, 48. See, also, MANDATUM.

NON FECIT (Lat. he did not make it). The name of a plea, for example, in an action of assumpsit on a promissory note. 3 Mann. & G. 446.

NON FECIT VASTUM CONTRA PROHIBITIONEM (Lat. he did not commit waste against the prohibition). **In Pleading.** The name of a plea to an action founded on a writ of estrepement, that the defendant did not commit waste contrary to the prohibition. 3 Blackstone, Comm. 226, 227.

NON IMPEDIVIT (Lat. he did not impede). **In Pleading.** The plea of the general issue in *quare impedit.* 3 Sharswood, Blackst. Comm. 305; 3 Wooddeson, Lect. 36. In law French, *ne disturba pas.*

NON INFREGIT CONVENTIONEM (Lat. he has not broken the covenant). **In Pleading.** A plea in an action of covenant. This plea is not a general issue: it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bacon, Abr. *Covenant* (L); 3 Lev. 19; 2 Taunt. 278; 1 Aik. Vt. 150; 4 Dall. Penn. 436; 7 Cow. N. Y. 71.

NON-JOINDER. In Pleading. The omission of one or more persons who should have been made parties to a suit at law or in equity, as plaintiffs or defendants.

IN EQUITY. Parties may be omitted when the number is great. 1 Smedes & M. 404. The relief granted in such cases will be so modified as not to affect the interests of others. 1 Pet. 299; 2 Paine, C. C. 536; 11 Ill. 254; 2 Johns. Ch. N. Y. 242. See PARTIES, §§ **9, 16, 17, 19.** It must be taken ad

vantage of before the final hearing, Ril. Ch. So. C. 138; 1 Ala. N. s. 580; 18 *id.* 576; 21 Conn. 586; 1 Des. So. C. 315; 1 Stockt. Ch. N. J. 401; 10 Paige, Ch. N. Y. 445; 2 Sandf. Ch. N. Y. 17; 2 Iowa, 55; 2 McLean, C. C. 376, except in very strong cases, 1 Pet. 299, as, where a party indispensable to rendering a decree appears to the court to be omitted. 14 Vt. 178; 19 Ala N. s. 213; 5 Ill. 424; 24 Me. 119. The objection may be taken by demurree, if the defect appear on the face of the bill, 5 Ill. 424; 1 Des. So. C. 315; 8 Ga. 506; 19 Ala. N. s. 121; 4 Rand. Va. 451; or by plea, if it do not appear. 9 Mo. 605. See 3 Cranch, 220. The objection may be avoided by waiver of rights as to the party omitted, 4 Wisc. 54, or a supplemental bill filed, in some cases. 4 Johns. Ch. N. Y. 605. It will not cause dismissal of the bill in the first instance, 3 Cranch, 189; 6 Conn. 421; 17 Ala. 270; 1 T. B. Monr. Ky. 189; 1 Dev. Eq. No. C. 354; 1 Hill, So. C. 53; but will, if it continues after objection made, 17 Ala. 270; 5 Mas. C. C. 561, without prejudice, 5 Mas. C. C. 561; 1 J. J. Marsh. Ky. 76; 3 *id.* 103; 6 *id.* 622; 4 B. Monr. Ky. 594; 6 *id.* 330; 7 Paige, Ch. N. Y. 451; 1 Sandf. Ch. N. Y. 46. The cause is ordered to stand over in the first instance. 20 Me. 59; 9 Cow. N. Y. 320; 2 Edw. Ch. N. Y. 242.

In Law. See Abatement, **21, 22.**

NON-JURORS. **In English Law.** Persons who refuse to take the oaths, required by law, to support the government. See 1 Dall. Penn. 170.

NON LIQUET (Lat. it is not clear). **In Civil Law.** Words by which the judges (*judices*), in a Roman trial, were accustomed to free themselves from the necessity of deciding a cause when the rights of the parties were doubtful. On the tablets which were given to the judges wherewith to indicate their judgment, was written N. L. Vicat, Voc. Jur.

NON-OBSTANTE. **In English Law.** These words, which literally signify *notwithstanding*, are used to express the act of the English king by which he dispenses with the law, that is, authorizes its violation.

He cannot by his license or dispensation make an offence dispunishable which is *malum in se;* but in certain matters which are *mala prohibita* he may, to certain persons and on special occasions, grant a *non-obstante.* Vaugh. 330–359; Lev. 217; Sid. 6, 7; 12 Coke, 18; Bacon, Abr. *Prerogative* (D 7). See Judgment non-obstante Veredicto.

NON-OBSTANTE VEREDICTO. Notwithstanding the verdict. See Judgment non-obstante Veredicto.

NON OMITTAS (Lat. more fully, *non omittas propter libertatem*, do not omit on account of the liberty or franchise). **In Practice.** A writ which ies when the sheriff returns on writ to him directed, that he hath sent to the bailiff of such a franchise, which hath return of writs, and he hath not served the writ; then the plaintiff shall have this writ directed to the sheriff, that he *omit not on account of any franchise*, but himself enter into the franchise and execute the king's writ. Termes de la Ley.

This clause is now usually inserted in all processes addressed to sheriffs. Wharton, Lex. 2d Lond. ed.; 2 Will. IV. c. 39; 3 Chitty, Stat. 494; 3 Chitty, Pract. 190, 310.

NON-PLEVIN. **In Old English Law.** A neglect to replevin land taken into the hands of the king upon default, within fifteen days, by which seisin was lost, as by default. Heugh. de Magn. Ch. c. 8. By 9 Edw. III. c. 2, no man shall lose his land by *non-plevin.*

NON PROS. An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff, at any stage of the proceedings, fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment, and obtains costs against the plaintiff, who is said to be *non pros'd.* 2 Archbold, Pract. Chitty ed. 1409; 3 Sharswood, Blackst. Comm. 296; 1 Tidd, Pract. 458; Graham, Pract. 763; 3 Chitty, Pract. 10; 1 Penn. Pract. 84; Caines, Pract. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff. 1 Sellon, Pract., and authorities above cited.

NON-RESIDENCE. **In Ecclesiastical Law.** The absence of spiritual persons from their benefices.

NON SUBMISSIT (Lat.). The name of a plea to an action of debt, or a bond to perform an award, by which the defendant pleads that he did not submit. Bacon, Abr. *Arbitration, etc.* (G).

NON SUM INFORMATUS (Lat.). **In Pleading.** I am not informed.

NON TENENT INSIMUL (Lat. they do not hold together). **In Pleading.** A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff.

NON TENUIT (Lat. he did not hold). **In Pleading.** The name of a plea in bar in replevin, when the plaintiff has avowed for rent-arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges.

NON-TENURE. **In Pleading.** A plea in a real action, by which the defendant asserted that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration, 1 Mod. 250; in which case the writ abates as to the part with reference to which the plea is sustained. 8 Cranch, 242. It may be pleaded with or without a disclaimer. It was a dilatory plea, though not strictly in abatement, 2 Saund 44, n. 4; Dy. 210; Booth, Real Act. 179; 3 Mass. 312; 11 *id.* 216; but might be pleaded as to part along with a plea in bar as to the rest, 1 Lutw. 716; Rast. Ent. 231 *a, b;* and

was subsequently considered as a plea in bar. 14 Mass. 239; 1 Me. 54; 2 N. H. 10; Bacon, Abr. *Pleas* (I 9).

NON-TERM. The vacation between two terms of a court.

NON-USER. The neglect to make use of a thing.

2. A right which may be acquired by use may be lost by non-user; and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right in favor of some other adverse right. 5 Whart. Penn. 584; 23 Pick. Mass. 141. See ABANDONMENT; EASEMENT.

3. Every public officer is required to use his office for the public good: a non-user of a public office is, therefore, a sufficient cause of forfeiture. 2 Blackstone, Comm. 153; 9 Coke, 50. *Non-user* for a great length of time will have the effect of repealing an old law. But it must be a very strong case which will have that effect. 13 Serg. & R. Penn. 452; 1 Bouvier, Inst. n. 94.

NONSENSE. That which in a written agreement or will is unintelligible.

2. It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible and the whole makes nonsense, some words cannot be rejected to make sense of the rest, 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected. 14 Viner, Abr. 142; 15 *id.* 560. The maxim of the civil law on this subject agrees with this rule: Quæ in testamento ita sunt scripta, ut intelligi non possent: perinde sunt, ac si scripta non essent. Dig. 50. 17. 73. 3. See AMBIGUITY; CONSTRUCTION; INTERPRETATION.

3. In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected: as in ejectment where the declaration is of a demise on the *second* day of January, and that the defendant *postea scilicet*, on the *first* of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter. 5 East, 255; 1 Salk. 324.

NONSUIT. The name of a judgment given against the plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

A *voluntary* nonsuit is an abandonment of his cause by plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. 1 Dutch. N. J. 556.

An *involuntary* non-suit takes place when the plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict. 13 Johns. N. Y. 334.

2. In English practice, when issue has been joined, and the plaintiff neglects to bring on the issue to be tried during or before the following term and vacation, etc., the defendant may give twenty days' notice to the plaintiff to bring on the issue, to be tried at the sittings or assizes next after the expiration of the notice; and if plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of such notice of defendant, the defendant may suggest on record that the plaintiff has failed to proceed to trial, etc., and may sign judgment for his costs: provided that the judge may have power to extend time for proceeding to trial with or without terms. Comm. Law Proc. Act, 1852, §§ 100, 101; 3 Chitty, Stat. 519, 550.

3. A nonsuit is no bar to another action for same cause. The courts of the United States, 1 Pet. 469, 476; 9 Ind. 551; 14 Ark. 706; those of Pennsylvania, 1 Serg. & R. Penn. 360; 2 Binn. Penn. 234, 248; 4 *id.* 84; but see 26 Penn. St. 192; Massachusetts, 6 Pick. Mass. 117; Tennessee, 2 Ov. Tenn. 57; 4 Yerg. Tenn. 528; and Virginia, 1 Wash. Va. 87, 219, cannot order a nonsuit against a plaintiff who has given evidence of his claim. In Alabama, unless authorized by statute, the courts cannot enter a nonsuit. 1 Ala. 75; 4 *id.* 42. See 22 Ala. N. S. 613.

4. In *New York*, 12 Johns. N. Y. 299; 13 *id.* 334; 1 Wend. N. Y. 376; *South Carolina*, 2 Bay, So. C. 126, 445; 2 Bail. So. C. 321; 2 M'Cord, So. C. 26; *Maine*, 2 Me. 5; 3 *id.* 97; 41 *id.* 65; 42 *id.* 259; *New Hampshire*, 26 N. H. 351; 31 *id.* 92; *Ohio*, 4 Ohio, 628; *Illinois*, 17 Ill. 494; *Florida*, 5 Fla. 476; *Indiana*, 9 Ind. 179; *Georgia*, 16 Ga. 154; *California*, 1 Cal. 108, 125, 221; *Missouri*, 19 Mo. 101, a nonsuit may, in general, be ordered where the evidence is insufficient to support the action, but not till final submission of cause. 21 Mo. 93. See 3 Chitty, Pract. 910; 1 Sellon, Pract. 463; 1 Archbold, Pract. 787; Bacon, Abr.; 15 Viner, Abr. 560; 3 Sharswood, Blackst. Comm. 376; 2 Tidd, Pract. 916 *et seq.*

NORTH CAROLINA. The name of one of the original states of the United States of America.

2. The territory which now forms this state was included in the grant made in 1663 by Charles II., to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the province or their delegates, and they were invested with various other powers. Being dissatisfied with the form of government, the proprietaries procured the celebrated John Locke to draw up a plan of government for the colony, which was adopted, and proved to be impracticable: it was highly exceptionable on account of its disregard of the principles of reli-

gious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation, it was abandoned. The colony had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729 the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in substance similar to that established in other royal provinces. In 1732 the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

3. The constitution of North Carolina was adopted December 18, 1776. To this constitution amendments were made in convention June 4, 1835, which were ratified by the people on the 9th day of November of the same year, and took effect on the 1st day of January, 1836.

Every free white man of the age of twenty-one years, being a native or naturalized citizen of the United States, and who has been an inhabitant of the state for twelve months immediately preceding the day of any election, and has paid public taxes, is entitled to vote. See Acts 1856, c. 12, 13.

The Legislative Power.

The *Senate* consists of fifty members, chosen biennially, for the term of two years, by the qualified voters of the district. A senator must possess the qualifications of a voter, and, in addition, it is provided that no person who denies the being of God, the truth of the Christian religion, or the divine authority of the Old or New Testament, or who holds religious principles incompatible with the freedom or safety of the state, can hold any office of trust or profit in the civil department within the state.

The *House of Commons* is composed of one hundred and twenty representatives, apportioned among the counties in the ratio of the population as enumerated for the purposes of federal representation. They are elected biennially, for the term of two years. The qualifications required are the same as those of senators.

The Executive Power.

4. The *Governor* is elected biennially, by the qualified voters of the state, for the term of two years from the first day of January next following his election. He is not eligible more than four years in any term of six years. He must be thirty years of age, have resided five years in the state, and own in the state a freehold in lands and tenements to the value of one thousand pounds. The candidate having the largest number of votes is elected; and in case of no election or a contested election, the matter is to be decided by the joint action of the two houses.

The *Council* of the state consists of seven members, elected biennially by a joint vote of the senate and house of commons. Four of these form a quorum, and their duty is to advise the governor in the execution of his office, particularly in filling vacancies occurring during the recess of the general assembly in offices in which the right of appointment is by the constitution vested in that body. The appointees in such cases are to have a temporary commission, which expires with the end of the next session of the general assembly.

The Judicial Power.

5. The *Supreme Court* is composed of three judges, elected by joint ballot in the two houses of assembly, to hold their office during good behavior. Of these, one is selected by his associates to preside, and is styled the chief justice. It is almost entirely an appellate tribunal, having original jurisdiction only in proceedings by a bill in equity, or an information in the nature of a bill in equity, filed on behalf of the state, in the name of the attorney-general, to repeal grants and other letters patent obtained by fraud or false suggestions. It has appellate jurisdiction over all cases in law or equity brought before it by appeal or otherwise from a superior court of law or a court of equity. It has also power to issue writs of certiorari, scire facias, habeas corpus, and other writs which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law. Criminal cases are to be certified to the superior court from which the appeal was taken, which court proceeds to judgment in accordance with the decision of the supreme court.

6. A *Superior Court* is held by one judge, at the court-house in each county of the state, twice in each year. For this purpose the state is divided into seven circuits, each composed of ten or more counties; and the seven judges who are appointed to hold these courts ride the circuits alternately, with the power to interchange; but no judge rides the same circuit twice in succession. The judges are appointed in the same manner and for the same term as the supreme judges. The superior courts "have cognizance and legal jurisdiction, unless otherwise provided, of all pleas, real, personal, and mixed, and also all suits and demands relative to dower, partition, legacies, filial portions, and estates of intestates; and, unless it be otherwise provided, of all pleas of the state, and criminal matters of what nature, degree, or denomination soever, whether brought before them by original or by mesne process, or by certiorari, writ of error, appeal from any inferior court, or by any other way or manner whatsoever; and they are hereby declared to have full power and authority to give judgment and to award execution and all necessary process thereon," etc. See Revised Code, c. 31, § 17.

The same judges who hold the superior courts of law are required and authorized to hold, at the same times and places, courts of equity, and in doing so shall "possess all the powers and authorities within the same that the court of chancery, which was formerly held in this state under the colonial government, used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws and usages now in force and practice." See Revised Code, c. 32, §§ 1–3.

7. The *Courts of Pleas and Quarter Sessions* are held four times in each year, in the several counties of the state, by three or more justices of the peace, who "shall take cognizance of, and have full power and authority and original jurisdiction to hear, try, and determine, all causes of a civil nature whatever at the common law within their respective counties, where the original jurisdiction is not by statute confined to one or more magistrates out of court, or to the supreme or superior courts; of all penalties to the amount of one hundred dollars and upwards incurred by violation of the penal statutes of the state or of laws passed by the congress of the United States, where by such law jurisdiction is given to the courts of the several states; of suits for dower, partition, filial portions, legacies, and distributive shares of intestates' estates, and all other matters relating thereto; to try, hear, and determine all matters relating to orphans, idiots, and lunatics, and the management of their estates, in like manner as courts of equity exercise jurisdiction in such cases; to inquire of, try, hear, and determine all petit larcenies, assaults and batteries, all trespasses and breaches of the peace, and all other crimes and misdemeanors the judgment upon conviction whereof shall not extend to life, limb, or member: excepting those only whereof the original jurisdiction is given exclusively to a single justice or to two justices of the peace, to the superior or to the supreme court."

In some of the counties jury trials are abolished by special acts of the legislature, and in others such trials are had twice only in the year.

8. *Justices of the Peace* are recommended to the governor by the general assembly, who hold office during good behavior. They have jurisdiction, singly, of all debts and demands due on bonds, notes, or liquidated accounts, stated in writing and signed by the party owing the same, and all balances due on such debts and demands where the principal of such debt or demand, or balance due thereon, does not exceed one hundred dollars, though the principal and interest thereof may exceed that sum; and all judgments rendered on such debts and demands where the principal of the judgment may not exceed one hundred dollars, though the principal, interest, and cost may exceed that sum; and all debts and demands of sixty dollars and under due on any parol agreement, or for goods, wares, and merchandise sold and delivered, or for work or labor done, or for specific articles, and all balances of sixty dollars and under due on such last-mentioned debts or demands, and all judgments rendered thereon where the principal of the judgment may not exceed sixty dollars, though the principal, interest, and cost may exceed that sum, and all forfeitures or penalties not exceeding one hundred dollars," etc. See Revised Code, c. 31, § 6.

NOSOCOMI. **In Civil Law.** Persons who have the management and care of hospitals for paupers. Clef Lois Rom. mot *Administrateurs*.

NOT FOUND. Words indorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill. See IGNORAMUS.

NOT GUILTY. **In Pleading.** The general issue in several sorts of actions.

2. In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

3. Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove, 1 Bos. & P. 213; and no person is bound to justify who is not *primâ facie* a trespasser. 2 Bos. & P. 359; 2 Saund. 284 *d*. For example, the plea of not guilty is proper in trespass to *persons*, if the defendant have committed no assault, battery, or imprisonment, etc.; and in trespass to *personal* property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, etc.; and in trespass to *real* property, this plea not only puts in issue the fact of trespass, etc., but also the title, which, whether freehold or possessory in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *primâ facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies. 7 Term, 354; 8 *id*. 403; Willes, 222; Stephen, Plead. 178; 1 Chitty, Plead. 491, 492.

4. In *trespass on the case in general*, the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

5. This, it will be observed, is a mere traverse, or denial, of the facts alleged in the declaration, and therefore, on principle, should be applied only to cases in which the defence rests on such denial. But here a relaxation has taken place; for, under this plea, a defendant is permitted not only to contest the truth of the declaration, but, with some exceptions, to prove any matter of defence that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration: as, for example, a release given, or satisfaction made. Stephen, Plead. 182, 183; 1 Chitty, Plead. 486.

6. In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations; and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue. 7 Term, 391.

In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty. 1 Term, 462.

In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty. This plea makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment, information, or complaint. On the other hand, the defendant may give in evidence under this plea not only every thing which negatives the allegations in the indictment, but also all matter of excuse and justification.

NOT POSSESSED. **In Pleading.** A plea sometimes used in actions of trover, when the defendant was not possessed of the goods at the commencement of the action. 3 Mann. & G. 101, 103.

NOT PROVEN. **In Scotch Criminal Law.** It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of not proven, corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to not guilty; for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to thole an assize twice. But, although the verdict of not proven is so far tantamount to an acquittal that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation and character. He goes away from the bar of the court with an indelible stigma upon his fame. There stands recorded against him the opinion of a jury that the evidence respecting his guilt was so strong that they did

not dare to pronounce a verdict of acquittal. So that many of the evil consequences of a conviction follow, although the jury refuse to convict. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in 1554, he said, "It is better to be tried than to live suspected." But in Scotland a man may be not only tried, but acquitted, and yet live suspected, owing to the sinister influence of a verdict of not proven. Forsyth, Hist. Trial by Jury, 334–339.

NOTARIUS. In Civil Law. One who took notes or draughts in short-hand of what was said by another, or of proceedings in the senate or in a court. One who draughted written instruments, wills, conveyances, etc. Vicat, Voc. Jur.; Calvinus, Lex.

In English Law. A notary. Law Fr. & Lat. Dict.; Cowel.

NOTARY, NOTARY PUBLIC. An officer appointed by the executive or other appointing power, under the laws of different states.

2. Notaries are of ancient origin: they existed in Rome during the republic, and were called *tabelliones forenses*, or *personæ publicæ*. Their employment consisted in the drawing up of legal documents. They exist in all the countries of Europe, and as early as A.D. 803 were appointed by the Frankish kings and the popes. Notaries in England are appointed by the archbishop of Canterbury. 25 Hen. VIII. c. 21, § 4. They are officers of the civil and canon law.

3. Their duties differ somewhat in the different states, and are prescribed by statutes. They are generally as follows: to protest bills of exchange and draw up acts of honor; to authenticate and certify copies of documents; to receive the affidavits of mariners and draw up protests relating to the same; to attest deeds and other instruments, and to administer oaths.

By act of congress, Sept. 16, 1850, notaries are authorized to administer oaths and take acknowledgments in all cases where under the laws of the United States justices of the peace were formerly authorized to act.

4. The acts of notaries are respected by the custom of merchants and the law of nations. Their protest of a bill is received as evidence in the courts of all civilized countries. Except in cases of protest of bills, the signature of a notary to an instrument going to a foreign country ought to be authenticated by the consul or representative of that country.

5. The notaries of England have always considered themselves authorized to administer oaths; and the act 5 & 6 Will. IV. has placed it beyond dispute. In this country they do not exercise the power unless authorized by statute, except in cases where the oath is to be used out of the state or in the courts of the United States.

A notary is liable for any damage that may arise from the imperfect discharge of his duty. See, generally, 6 Toullier, 211; Burn, Eccl. Law; 2 Harr. & J. Md. 396; 7 Vt. 22; 8 Wheat. 326; 6 Serg. & R. Penn. 484; 1 Mo. 434; Manual for Notaries; Sewell, Bank.

NOTE OF A FINE. The fourth step of the proceedings in acknowledging a fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcel of land, and the agreement, and enrolled of record in the proper office. 2 Sharswood, Blackst. Comm. 351, App. n. iv. § 3; 1 Stephen, Comm. 518.

NOTE OF HAND. A popular name for a promissory note.

NOTE OR MEMORANDUM. An informal note or abstract of a transaction made on the spot, and required by the Statute of Frauds.

The form of it is immaterial; but it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without reference to parol evidence to show intent of parties. Browne, Stat. of Frauds, 353, 386, and cases cited; 43 Me. 158; 4 R. I. 14; 14 N. Y. 584; 1 E. D. Smith, N. Y. 144; 2 *id.* 93; 31 Miss. 17; 11 Cush. Mass. 127; 9 Rich. So. C. 215; 10 *id.* 60; 23 Mo. 423; 17 Ill. 354; 3 Iowa, 430. In some states, and in England, the consideration need not be stated in the note or memorandum. 5 East, 10; 4 Barnew. & Ald. 595; 5 Cranch, 142; 17 Mass. 122; 6 Conn. 81. See Browne, Stat. of Frauds.

NOTE OF PROTEST. A note or minute of the protest, made by the notary, at time of protest, on the bill, to be completed or filled out at his leisure. Byles, Bills, 5th ed. 9.

NOTES. See JUDGE'S NOTES; MINUTES.

NOTICE. The information given of some act done, or the interpellation by which some act is required to be done. Knowledge: as, A had notice that B was a slave. 5 How. 216; 7 Penn. Law Journ. 119.

Actual notice exists when knowledge is actually brought home to the party to be affected by it.

Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry, or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy. 2 Mas. C. C. 531; 14 Pick. Mass. 224; 4 N. H. 397; 14 Serg. & R. Penn. 333. The *recording* a deed, 23 Mo. 237; 25 Barb. N. Y. 635; 28 Miss. 354; 4 Kent, Comm. 182, n., an *advertisement in a newspaper*, when authorized by statute as a part of the process, *public acts* of government, and *lis pendens*, furnish constructive notice. Notice to an agent is, in general, notice to the principal. 25 Conn. 444; 10 Rich. So. C. 293.

2. The giving notice in certain cases, obviously, is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange

and promissory notes, the implied contract of an indorser is that he will pay the bill or note provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due *notice* of the dishonor, and without which he is discharged from all liability: consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, or some facts dispensing with such notice. 1 Chitty, Pract. 496.

3. Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So, in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery.

NOTICE, AVERMENT OF. In Pleading. The statement in a pleading that notice has been given.

2. When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof: as, when the defendant promised to give the plaintiff as much for a commodity as another person had given or should give for the like.

3. But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred. 1 Saund. 117, n. 2; 2 *id.* 62 *a*, n. 4; Freem. 285. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril. Comyns, Dig. *Pleader* (C 75). See Comyns, Dig. *Pleader* (C 73, 74, 75); Viner, Abr. *Notice;* Hardr. 42; 5 Term, 621.

4. The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default, Croke Jac. 432; but may be aided by verdict, 1 Strange, 214; 1 Saund. 228 *a;* unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict. Dougl. 679.

NOTICE OF DISHONOR. A notice given to a drawer or indorser of a bill, or an indorser of a negotiable note, by a subsequent party, that it has been dishonored either by non-acceptance in the case of a bill, or by non-payment in the case of an accepted bill or a note.

2. The notice must contain a description of the bill or note, 5 Cush. Mass. 546; 14 Conn. 362; 1 Fla. 301; 1 Wisc. 264, sufficient to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended. 3 Metc. Mass. 495; 5 Cush. Mass. 546; 7 Ala. N. s. 205; 12 N. Y. 551; 19 *id.* 518; 26 Me. 45; 11 Wheat. 431. See 10 N. Y. 279; 11 Mees. & W. Exch. 809; 5 Humphr. Tenn. 335. As to what is a mis-description, see 7 Exch. 578; 1 Mann. & G. 76; 11 Mees. & W. Exch. 809; 15 *id.* 231; 9 Q. B. 609; 9 Pet. 33; 11 Wheat. 431; 17 How. 606; 1 N. Y. 413; 7 *id.* 19; 13 Miss. 44; 19 *id.* 382; 2 Mich. 238; 12 Mass. 6; 2 Penn. St. 355; 14 *id.* 483; 2 Ohio St. 345.

3. It must also contain a clear statement of the dishonor of the bill, 7 Bingh. 530; 1 Bingh. N. c. 194; 3 *id.* 368; 2 Clark & F. Hou. L. 93; 2 Mees. & W. Exch. 799; 11 C. B. 1011; 3 Metc. Mass. 495; 18 Conn. 361; and something more than the mere fact of non-acceptance or non-payment must be stated, 3 Bingh. N. c. 688; 10 Ad. & E. 125; 8 Carr. & P. 355; 2 Q. B. 388; 14 Mees. & W. Exch. 44; 11 Wheat. 431; 3 Metc. Mass. 495; 9 *id.* 174; 5 Barb. N. Y. 490; 1 Speers, So. C. 244; 2 Ohio St. 345; 3 Md. 202, 251; 6 *id.* 5; 11 *id.* 148; 1 Litt. Ky. 194; 2 Hawks, No. C. 560; 5 How. Miss. 552; except in some cases, 5 Cush. Mass. 546; 1 Md. 59, 504; 4 *id.* 409, as to the effect of the use of the word *protested*. 11 Wheat. 431; 9 Pet. 33; 7 Ala. N. s. 205; 2 Dougl. Mich. 495; 1 N. Y. 413; 10 *id.* 279; 19 Me. 31; 23 *id.* 392; 10 N. H. 526; 9 Rob. La. 161; 14 Conn. 362; 5 Cush. Mass. 546; 1 Wisc. 264; 4 N. J. 71. See some cases where the notice was held sufficient, 2 Mees. & W. Exch. 109, 799; 6 *id.* 400; 7 *id.* 515; 14 *id.* 7, 44; 6 Ad. & E. 499; 10 *id.* 131; 2 Q. B. 421; 1 Ell. & B. 801; 5 C. B. 687; 1 Hurlst. & W. Exch. 3; and others where it was held insufficient. 2 Exch. 719; 1 Ell. & B. 801; 4 Barnew. & C. 339; 10 Ad. & E. 125; 7 Bingh. 530; 3 Bingh. N. c. 688; 8 Carr. & P. 355; 2 Q. B. 388; 1 Mann. & G. 76.

As to whether there must be a statement that the party to whom the notice is sent is looked to for payment, see 1 Term, 169; 11 Mees. & W. Exch. 372; 2 Exch. 719; 2 Q. B. 388, 419; 14 *id.* 200; 7 C. B. 400; 4 Dowl. & L. 744.

4. The notice is generally *in writing*, but may be oral. 4 Wend. N. Y. 566; 16 Barb. N. Y. 146; 3 Metc. Mass. 495; 8 Mo. 336; 7 C. B. 400; 11 *id.* 1011; 2 Mees. & W. Exch. 348; 8 Carr. & P. 355; 1 Hurlst. & W. Exch. 3. It need not be personally served, but may be sent by mail, 7 East, 385; 6 Wheat. 102; 6 Mass. 316; 14 *id.* 116; 1 Pick. Mass. 401; 28 Vt. 316; 15 Md. 285; 5 Penn. St. 178; 1 Conn. 329; 2 R. I. 467; 23 Mo. 213; 13 N. Y. 549; otherwise, perhaps, if the parties live in the same town, see 5 Metc. Mass. 352; 10 Johns. N. Y. 490; 20 *id.* 372; 3 McLean, C. C. 96; 1 Conn. 367; 28 N. H. 302; 15 Me.

141; 15 Md. 285; 3 Rob. La. 261; 6 Blackf. Ind. 312; 3 Jones, No. C. 387; 3 Ala. N. s. 34; 3 Harr. Del. 419; 8 Ohio, 507; 1 Parsons, Notes & B. 482, note *j*; or left in the care of a suitable person, representing the party to be notified. 15 Me. 207; 2 Johns. N. Y. 274; 20 Miss. 332; 16 Pick. Mass. 392; 14 La. 494; 19 Ill. 598; Holt, 476.

5. It should be sent to the place where it will most probably find the party to be notified most promptly, 6 Metc. Mass. 1, 7; 1 Pet. 578; 2 *id.* 543, whether the place of business, 1 Pet. 578; 3 McLean, C. C. 96; 5 Metc. Mass. 212, 352; 11 Johns. N. Y. 231; 15 Me. 139; 8 Watts & S. Penn. 138; 5 Penn. St. 178; 3 Harr. Del. 419; 6 Blackf. Ind. 312; 5 Humphr. Tenn. 403; 3 Rob. La. 261; 1 La. Ann. 95; 1 Maule & S. 545, or place of residence. 4 Wash. C. C. 464; 28 Vt. 316; 1 Conn. 329. When sent by mail, it should be to the post-office to which the party usually resorts. 2 Pet. 543; 4 Wend. N. Y. 328; 5 Den. N. Y. 329; 5 Penn. St. 160; 3 McLean, C. C. 91; 15 La. 38; 4 Humphr. Tenn. 86; 3 Ga. 486; 11 Md. 486; 3 Ohio, 307; 8 Mo. 443; 6 Metc. Mass. 106; 6 Harr. & J. Md. 172. See 2 Pet. 543; 8 Cush. Mass. 425; 2 Halst. N. J. 130.

Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action either on the paper or on the consideration for which the paper was given, is entitled to immediate notice. 1 Parsons, Notes & B. 499. The holder need give notice only to the parties and to the indorser whom he intends to hold liable. 25 Barb. N. Y. 138; 2 Johns. N. Y. 204; 19 Me. 62; 16 Mart. La. 220; 11 La. Ann. 137; 1 Ohio St. 206; 1 Rich. So. C. 369; 5 Miss. 272; 17 Ala. 258; 15 Mees. & W. Exch. 231.

6. Notice may be given by any party to a note or bill not primarily liable thereon as regards third parties, and not discharged from liability on it at the time notice is given. 8 Mo. 336; 23 *id.* 213; 16 Serg. & R. Penn. 157; 3 Dan. Ky. 126; 5 Miss. 272; 17 Ala. 258; 3 Wend. N. Y. 173; 25 Barb. N. Y. 138; 15 Md. 150; 15 La. 321; 14 Mass. 116; 2 Campb. 373; 4 *id.* 87; 5 Maule & S. 68; 3 Ad. & E. 193; 9 C. B. 46; 13 *id.* 249; 15 Mees. & W. Exch. 231. It may be by the holder's agent, 4 How. 336; 11 Rob. La. 454; 8 Mo. 704; 7 Ala. N. s. 205; 4 Dowl. & L. 744; 15 Mees. & W. Exch. 231; an indorsee for collection, 2 Hall, N. Y. 112; 3 N. Y. 243; a notary, see 2 How. 66; the administrator or executor of a deceased person. Story, Prom. Notes, § 304.

The notice must be forwarded as early as by a mail of the day after the dishonor which does not start at an unreasonably early hour. 9 N. H. 558; 2 Harr. N. J. 587; 24 Me. 458; 2 R. I. 437; 24 Penn. St. 148; 4 N. J. 71; 1 Ohio St. 206; 6 *id.* 542; 9 Miss. 261, 644; 11 *id.* 445; 13 Ark. 645; 14 *id.* 230; 7 Gill & J. Md. 78; 4 Wash. C. C. 464; 2 Stor. C. C. 416; 4 Bingh. 715.

Consult Bayley, Byles, Chitty, Story, on Bills of Exchange; Story, Promissory Notes, Parsons, Notes & Bills.

NOTICE TO PLEAD. Written notice to defendant, requiring him to plead within a certain time. It must always be given before plaintiff can sign judgment for want of a plea. 1 Chitty, Archb. Pract. Prent. ed. 221. Notice to plead, indorsed on the declaration or delivered separately, is sufficient without demanding plea or rule to plead, in England, by statute. See 3 Chitty, Stat. 515.

NOTICE OF PROTEST. A notice given to a drawer or indorser of a bill, or to an indorser of a note, by a prior party, that the bill has been protested for refusal of payment or acceptance. See NOTICE OF DISHONOR.

NOTICE TO PRODUCE PAPERS In Practice. When it is intended to give secondary evidence of a written instrument or paper which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted.

2. To this general rule there are some exceptions: *first*, in cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond, 14 East, 274; 4 Taunt. 865; 6 Serg. & R. Penn. 154; 4 Wend. N. Y. 626; 1 Campb. 143; *second*, where the party in possession has obtained the instrument by fraud. 4 Esp. 256. See 1 Phillipps, Ev. 425; 1 Starkie, Ev. 362; Roscoe, Civ. Ev. 4.

3. In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required. 2 Stark. 19. It seems, however, that the notice may be by parol. 1 Campb. 440. It must describe with sufficient certainty the papers or instruments called for, and must not be too general and by that means be uncertain. Ry. & M. 341; M'Clel. & Y. Exch. 139.

4. The notice may be given to the party himself, or to his attorney. 2 Term, 203, n.; 3 *id.* 306; Ry. & M. 327; 1 Mood. & M. 96.

The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question. 1 Stark. 283; Ry. & M. 47, 327; 1 Mood. & M. 96, 335, n.

5. When a notice to produce an instrument or paper in the cause has been proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and upon request in court he refuses or neglects to produce it, the party having given such notice and made such proof will be entitled to give secondary evidence of such paper or instrument thus withheld.

NOTICE TO QUIT. A request from a landlord to his tenant to quit the premises

leased, and to give possession of the same to him, the landlord, at a time therein mentioned. 3 Wend. N. Y. 337, 357; 7 Halst. N. J. 99.

2. *The form of the notice.* The notice or demand of possession should contain a request from the landlord to the tenant or person in possession to quit the premises which he holds from the landlord (which premises ought to be particularly described, as being situate in the street and city or place, or township and county), and to deliver them to him on or before a day certain,—generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties. Comyns, Dig. *Estate by Grant* (G 11, n. p.); 2 Campb. 96; 2 Mann. & R. 439. But it is the general and safest practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain and correct. Care should be taken that the words of a notice be clear and decisive, without ambiguity or giving an alternative to the tenant; for if it be really ambiguous or optional it will be invalid. Adams, Ej. 122.

3. *As to the person by whom the notice is to be given.* It must be given by the person interested in the premises, or his agent properly appointed. Adams, Ej. 120. See 3 C. B. 215. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time it is given. Where, therefore, several persons are jointly interested in the premises, they need not all join in the notice; but, if any of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. But see 5 East, 461; 2 Phillipps, Ev. 184; 2 Esp. 677; 1 Barnew. & Ad. 135; 7 Mees. & W. Exch. 139. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized. 3 Barnew. & Ald. 689. But see 10 Barnew. & C. 621.

4. *As to the person to whom the notice should be given.* When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice notwithstanding a part may have been underlet or the whole of the premises may have been assigned, Adams, Ej. 119; 5 Bos. & P. 330; 14 East, 234; 6 Barnew. & C. 41; unless, perhaps, the lessor has recognized the sub-tenant as his tenant. 10 Johns. N. Y. 270. When the premises are in possession of two or more as joint tenants or tenants in common, the notice should be to all. A notice addressed to all and served upon one only will, however, be a good notice. Adams, Ej. 123.

5. *As to the mode of serving the notice.* The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then, in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the demised premises, 2 Phillipps, Ev. 185, or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him, if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it; and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises has reached the other who resided in another place. 7 East, 553; 5 Esp. 196.

6. *At what time it must be served.* It must be given six months before the expiration of the lease at common law. 1 Term, 159; 3 *id.* 13; 8 Cow. N. Y. 13; 1 Vt. 311; 1 Dan. Ky. 30; 5 Yerg. Tenn. 431; 4 Ired. No. C. 291; 17 Mass. 287; see 2 Pick. Mass. 70, 71; 8 Serg. & R. Penn. 458; 2 Rich. So. C. 346; and three months is the common time under statutory regulations; and where the letting is for a shorter period the length of notice is regulated by the time of letting. 6 Bingh. 362; 5 Cush. Mass. 563; 23 Wend. N. Y. 616. Difficulties sometimes arise as to the period of the commencement of the tenancy; and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice, as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery: if the tenant, having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information a notice to quit

on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error. Adams, Ej. 130; 2 Esp. 635; 2 Phillipps, Ev. 186. In like manner, if the tenant at the time of delivery of the notice assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved. 4 Term, 361; 2 Phillipps, Ev. 183. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. C. 589.

7. *What will amount to a waiver of the notice.* The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver of it may be produced; but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views and under what circumstances the rent is paid and received. Adams, Ej. 139; 2 Campb. 387. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance: the rent must be paid and received *as rent*, or the notice will remain in force. Cowp. 243. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it. 2 East, 236; 10 *id.* 13; 1 Term, 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease,—that is, to clear and fence the land and pay the taxes. 1 Binn. Penn. 333. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and ocupation, the notice of course will be waived. Adams, Ej. 144; 1 H. Blackst. 311; 6 Term, 219; 19 Wend. N. Y. 391. See 13 C. B. 178.

NOTING. A term denoting the act of a notary in minuting on a bill of exchange, after it has been presented for acceptance or payment, the initials of his name, the date of the day, month, and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest: it will not supply the protest. 4 Term, 175.

NOTOUR. In Scotch Law. Open; notorious. A notour bankrupt is a debtor who, being under diligence by horning and caption of his creditor, retires to sanctuary, or absconds, or defends by force, and is afterwards found insolvent by court of sessions. Bell, Dict. Act of 1696, c. 5; Burton, Law of Scotl. 601.

NOVA CUSTOMA. An imposition or duty. See ANTIQUA CUSTOMA.

NOVA SCOTIA. A province of British North America.

It includes Nova Scotia proper, a peninsula two hundred and eighty miles long and from fifty to one hundred miles wide, trending E.N.E., and connected with the province of New Brunswick by an isthmus only eight miles wide in its widest part, and the island of Cape Breton, separated from the eastern extremity of Nova Scotia proper by the Gut of Canso. Nova Scotia proper lies between latitude 43° 25′ and 46° north, and long. 61° and 66° 30′ west.

England founds her claim to the original discovery of this province upon the patent granted by queen Elizabeth to Sir Humphrey Gilbert, A.D. 1578.

This was followed by De la Roche's unfortunate attempt to colonize the Isle of Sable.

De Monts, having in 1603 received an appointment from Henri IV. of France, sailed the following year, with Champlain, De Poutrincourt, and others.

After exploring the outer shore of the peninsula, having entered the bay of Fundy, De Poutrincourt settled Port Royal, A.D. 1605,—the first permanent settlement in British North America. From this time the English began to assert their claims, and colonists from Virginia expelled the colony of De Monts.

The French regained possession, but only to be again expelled by the strong force sent against them by Cromwell, A.D. 1654.

Thirteen years later, England ceded the province to France by the treaty of Breda, A.D. 1667; but in the new wars it was again ravaged by the English, who reacquired it A.D. 1713; and in 1749 it was formally colonized by the British government.

The French colonists, having resisted and joined the Indians, were defeated by the British, and their stronghold, Louisburgh on Cape Breton, was taken by Massachusetts colonists acting under a plan suggested by a Massachusetts lawyer.

In 1758 the province received its constitution, and in 1763 France, by the treaty of Paris, ceded all rights whatsoever.

In 1784 New Brunswick and Cape Breton were separated from Nova Scotia; but Cape Breton was reattached in 1819.

The Executive Department.

This is vested in the Governor and his Executive Council, together known as "The Government."

The *Governor*, technically called "Lieutenant-Governor," represents the sovereign, and is appointed by the crown.

He is captain-general and commander-in-chief within and for the province of Nova Scotia, com-

missions all officers of militia, and, together with his council, appoints all public officers. He pardons offences, except murder and high treason, presides solely in the court of chancery, and, within his jurisdiction, exercises the powers of the lord high-chancellor of England. He is ordinary, and has the power of granting probate of bills and administration, and, with his council, sits as the court of error.

The *Executive Council* consists of nine members, chosen by and from the party in power, and appointed by the governor, subject to a vote of "want of confidence."

The *Legislative Department* consists of a legislative council, or upper house, and a house of assembly, or lower house. The members of the upper house are appointed by the crown, on the recommendation of the "governor and council," or "government."

They hold their seats during life or good behavior, and are usually men of wealth and influence. The legislative assembly consists, by law, of fifty-five members, and continues for four years, unless sooner dissolved, and does not determine merely by the demise of the reigning sovereign.

The qualification for a representative is a freehold estate of the yearly value of at least eight dollars, situate in any part of the province.

Persons holding offices of emolument are disabled to sit. Judges of the supreme or vice-admiralty courts, officers and clerks of customs and of colonial and light duties, and the postmaster-general, are disabled to sit in either branch.

The privilege of voting recently extended to natural-born and naturalized subjects over twenty-one years of age who had resided five years in the province has this year (1863) been restricted, and a property qualification required (the possession of three hundred dollars real estate, or six hundred dollars personal property).

The apportionment of representatives to each county is based upon the population. The house of assembly holds the purse and controls the civil expenditures; and the whole sum derived from customs goes into the provincial treasury.

The legislature make the local laws not repugnant to the laws of England, the crown reserving the right to annul any law within three years after its publication.

An instance of this, in the case of New Brunswick, is the disallowance of the act of assembly providing for commissioners of New Brunswick to reside abroad, take affidavits, depositions, etc. This act passed the house, and was approved by the colonial government, and was part of the statute law of the province of New Brunswick for some months, but ceased to be law immediately upon being disallowed by the crown.

Laws vetoed by the governor may be passed by the queen's sanction. Any difficulty between the head of the executive and the executive council would result in the dismissal or resignation of the council. If the council were approved by the people, and could control the house, no new government could be formed without them, or, rather, it could be formed, but would be immediately overthrown by a vote of want of confidence.

If the governor could not frame a "government" which would control the house, he would resign; or, if he persisted in opposing the will of the people, they would appeal by petition to the home government,—the final resort in such a case,—who would fairly and promptly decide the matter.

The Judicial Department.

This consists of a chief justice and five judges of the supreme court, appointed by the governor, by commission under the great seal of the province, subject to the royal pleasure.

The appointee must be a barrister of the province for ten years, practising as such at least five years next before such appointment, and can hold no other office under the government, except that of judge of the admiralty or vice-president of the court of marriage and divorce.

The judge's tenure of office is during good behavior; or he may be removed by the governor upon the address of the legislative council and the house of assembly, subject to his right of appeal to the sovereign in privy council.

A *Custos Rotulorum* is appointed by commission from the lieutenant-governor, wherein he is styled "The Keeper of the Rolls of the Peace."

Besides his duties derived from the common law, he has others by provincial statutes. He presides at the general sessions of the peace for his county, and gives the casting vote when required on divisions.

The court of king's bench and the district courts are the same as in Canada (*q. v.*).

The laws in force are the whole of the common law of England (except such parts as are obviously inconsistent with the circumstances of the colony), such parts of the statute law as are obviously necessary and applicable, and all acts of assembly of the province not disallowed by the home government nor repugnant to the laws of England.

NOVA STATUTA. New statutes. A term including all statutes passed in the reign of Edw. III. and subsequently.

NOVÆ NARRATIONES. "*New counts or tallys.*" A book of such pleadings as were then in use, published in the reign of Edw. III. 3 Sharswood, Blackst. Comm. 297; 3 Reeve, Hist. Eng. Law, 151.

NOVATION (from Lat. *novare*, *novus*, new). The substitution of a new obligation for an old one, which is thereby extinguished.

In Civil Law. There are three kinds of novation.

2. *First*, where the debtor and creditor remain the same, but a *new debt* takes the place of the old one. Here, either the subject-matter of the debt may be changed, or the conditions of time, place, etc. of payment.

Second, where the debt remains the same, but a *new debtor* is substituted for the old. This novation may be made without the intervention or privity of the old debtor (in this case the new agreement is called *expromissio*, and the new debtor *expromissor*), or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor. This transaction is called *delegatio*. Domat lays down the essential distinction between a delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt.

Third, where the debt remains the same, but a *new creditor* is substituted for the old. This also is called *delegatio*, for the reason adduced above, to wit: that all three parties must assent to the new bargain. It differs from the *cessio nominis* of the civil law by completely cancelling the old debt, while the *cessio nominis* leaves the creditor a claim for any balance due after assignment.

3. In every novation the old debt is wholly

extinguished by the new. To effect such a transformation, several things are requisite.

First, there must be an *anterior obligation* of some sort, to serve as a basis for the new contract. If the old debt be void, as being, *e.g.*, *contra bonos mores*, then the new debt is likewise void; because the consideration for the pretended novation is null. But if the old contract is only voidable, in some cases the new one may be good, operating as a ratification of the old. Moreover, if the old debt be conditional, the new is also conditional, unless made otherwise by special agreement,—which agreement is rarely omitted.

Second, the parties innovating must *consent* thereto. In the modern civil law, every novation is voluntary. Anciently, a novation not having this voluntary element was in use. And not only consent is exacted, but a *capacity* to consent. But capacity to make or receive an absolute payment does not of itself authorize an agreement to innovate.

Third, there must be an *express intention* to innovate,—the *animus novandi*. A novation is never presumed. If an intent to destroy the old debt be not proved, two obligations now bind the debtor,—the old and the new. Conversely, if the new contract be invalid, without fraud in the transaction, the creditor has now lost all remedy. The anterior obligation is destroyed without being replaced by a new one.

4. An important rule of novation is that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the ancient agreement, they are cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms is the action *ex stipulatu* to be brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties.

Obviously, a single creditor may make a novation with two or more debtors who are each liable *in solido*. In this case any one debtor may make the contract to innovate; and if such a contract be completed, all his fellow-debtors are discharged with him from the prior obligation. Therefore Pothier says that, under the rule that novation cancels all obligations subsidiary to the main one, *sureties* are freed by a novation contracted by their principal. The creditor must specially stipulate that co-debtors and guarantors shall consent to be bound by the novation, if he wish to hold them liable. If they do not consent to such novation, the parties all remain, as before, bound under the old debt. So in Louisiana the debt due a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgages to secure its payment. 11 La. Ann. 687.

5. It follows that the new debtor, in a delegation, can claim nothing under the old contract, since he has consented to the destruction of that contract. For the same reason, a creditor cannot proceed against the discharged debtor. And this is true though the new debtor should become insolvent while the old remains solvent. And even though at the time of the novation the new debtor was insolvent, still the creditor has lost his remedy against the old debtor. But the rule, no doubt, applies only to a *bonâ fide* delegation. And a suit brought by the creditor against a delegated debtor is not evidence of intention to discharge the original debtor. 11 La. Ann. 93.

6. In a case of *mistake*, the rule is this: if the new debtor agree to be substituted for the old, under the belief that he himself owes so much to the discharged debtor, although he do not in fact owe the amount, yet he is bound to the creditor on the novation; because the latter has been induced to discharge the old debtor by the contract of the new, and will receive only his due in holding the new debtor bound. But where the supposed creditor had really no claim upon the original debtor, the substitute contracts no obligation with him; and even though he intended to be bound, yet he may plead the fact of no former debt against any demand of the creditor, as soon as this fact is made known to him.

A novation may be made dependent on a condition. In that case the parties remain bound, as before, until the condition is fulfilled. The new debtor is not freed from a conditional novation as to the creditor until the condition happens; and he is not liable in an action to the old debtor until it is performed.

7. Any obligation which can be destroyed at all may be destroyed by novation. Thus, legacies, judgment debts, etc., with mortgages, guarantees, and similar accessories, are as much the subjects of novation as simple contract debts. But a covenant by the obligee of a bond not to sue the obligor within a certain time is not an example of the civil-law novation. The agreement was not a release, not a substituted contract, but a covenant merely, for the breach of which the obligee has his action. 19 Johns. N. Y. 129.

The preceding summary is founded on Massi, Droit Commercial, liv. v. tit. 1, ch. 5, § 2; Mackeldey, Römischen Rechts, and Pothier, Traité des Obligations, pt. 3, ch. 2. See, also, Domat's Civil Law, trans. by Dr. Strahan (Cushing's ed.), part i. b. iv. tit. 3, 4; and Burge on Suretyship, b. 2, c. 5, Am ed. pp. 168–190.

At Common Law. The common-law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it.

8. The term novation is rarely employed. The usual common-law equivalent is assignment, and sometimes merger. Still, this form of contract found its way into common-law treatises as early as Fleta's day, by whom it was called *innovatio*. *Item, per innovationem, ut si transfusa sit obligatio de una persona in aliam, quæ in se susceperit obligationem.* Fleta, lib. 2, c. 60, § 12. The same words here quoted are also in Bracton, lib. 3, c. 2, § 13, but

we have *novationem* for *innovationem*. In England, recently, the term novation has been revived in some cases.

A case of novation is put in Tatlock *vs.* Harris, 3 Term, 180. "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover that sum against A."

There must always be a debt once existing and now cancelled, to serve as a *consideration* for the new liability. The action in all cases is brought on the new agreement. But in order to give a right of action there must be an extinguishment of the original debt. 4 Barnew. & C. 163; 1 Mees. & W. Exch. 124; 14 Ill. 34; 4 La. Ann. 281; 15 N. H. 129.

9. No mere agreement for the transformation of one contract into another is of effect until actually carried into execution and the consent of the parties thereto obtained. A good novation is an accord executed, 5 Barnew. & Ad. 925; 3 Nott & M'C. So. C. 171; 1 Strange, 426; 15 Mees. & W. Exch. 23; see 1 Ad. & E. 106; 2 Campb. 383; 1 La. 410; 1 Exch. 601; 24 Conn. 621; otherwise, if there be no satisfaction. 2 Scott, N. R. 938.

But where an agreement is entered into by deed, that deed gives in itself a substantial cause of action; and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt. Coke, Litt. 212 *b*; 1 Burr. 9; 2 Rich. So. C. 608; 3 Watts & S. Penn. 276; 1 Hill, N. Y. 567. See 1 Mas. C. C. 503; 11 Wend. N. Y. 321.

In the civil law *delegatio*, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration. 14 East, 582; 3 Mer. Ch. 652; 5 Wheat. 277; 12 Ga. 406; 15 *id.* 486; 5 Ad. & E. 115; 7 Harr. & J. Md. 213, 219; 21 Me. 484.

10. But in equity a creditor may assign his claim fully to another without any intervention of the debtor; and the assignee is not even compelled to sue in his assignor's name. 14 Conn. 141; 3 Swanst. 392; 4 Rand. Va. 392; Mart. & Y. Tenn. 378.

The extinction of the prior debt is consideration enough to support a novation. If A holds B's note, payable to A, and assigns this for value to C, B is by such transfer released from his promise to A, and this is sufficient consideration to sustain his promise to C. 1 Parsons, Contr. ch. 13; 2 Barb. N. Y. 349. And a consideration need not be expressed in the contract of novation; though one must be proved in order to defend in a suit brought by creditors of the assignor.

When assent or consideration is wanting, the novation operates only as a species of collateral security. The transferee cannot sue in his own name, and will be subject to all the equitable defences which the debtor had against the original creditor. This assent on the debtor's part is said to be essential, for the reason that he may have an account with his assignor, and he shall not be barred of his right to a set-off. Still, if any thing like an assent on the part of a holder of money can be inferred, he will be considered as the debtor. 4 Esp. 203; 6 Tex. 163. If the debtor's assent be not secured, the order of transfer may be revoked before it is acted on.

11. In a delegation, if the old debtor agree to provide a substitute, he must put his creditor into such a position that the latter can claim full satisfaction from the delegated debtor, or otherwise the original liability remains, and there is no novation. 19 Mo. 322, 637. See 3 Barnew. & Ald. 64; 5 *id.* 925; 5 Barnew. & C. 196; 4 Esp. 89; 4 Price, Exch. 200; 2 Mees. & W. Exch. 484; 6 Cranch, 253; 12 Johns. N. Y. 409; 7 *id.* 311; 21 Wend. N. Y. 450.

The existing Louisiana law is based upon the doctrines of the Civil Code considered above. It is held in numerous cases that "novation is not to be presumed:" hence the receipt of a bill or note is not necessarily a novation, or extinguishment of the debt for which it is given. An express declaration to that effect is required in most of our states, or else acts tantamount to a declaration. An intention to discharge the old debt must be shown in all cases; and this intention is sufficient to work a novation. 4 La. Ann. 329, 543; 6 *id.* 669; 9 *id.* 228, 497; 12 *id.* 299. "The delegation by which the debtor gives to the creditor another debtor, who obliges himself towards such creditor, does not operate a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation." 13 La. Ann. 238.

12. One of the most common of modern novations is the surrender and destruction of an old promissory note or bill of exchange, and the receipt of a new one in payment thereof. The rules of novation apply as completely to debts evidenced by mercantile paper as to all other obligations. Story, Bills, § 441; Pothier, de Change, n. 189; Thomson, Bills, ch. 1, § 3. Hence, everywhere, if the parties *intend* that a promissory note or bill shall be absolute payment, it will be so considered. 10 Ad. & E. 593; 4 Mas. C. C. 336; 1 Rich. So. C. 37, 112; 9 Johns. N. Y. 310; 13 Vt. 452. In some states, the receipt of a negotiable promissory note is *primâ facie* payment of the debt upon which it is given, and has an action upon the account unless the presumption is controverted. 12 Mass. 237; 12 Pick. Mass. 268; 2 Metc. Mass. 76; 5 Cush. Mass. 158; 8 Me. 298; 29 Vt. 32. "If a creditor gives a receipt for a draft in payment of his account, the debt is novated." 2 La. 109. But see the cases cited *supra* for the full Louisiana law. In most states, however, the rule is, as in England, that, whether the debt be pre-existing or arise at the time of giving the note, the receipt of a promissory note is *primâ facie* a conditional payment only, and works no novation.

13. It is payment only on fulfilment of

the condition, *i.e.* when the note is paid. 5 Beav. Rolls, 415; 40 Eng. L. & Eq. 625; 6 Cranch, 264; 2 Johns. Cas. N. Y. 438; 15 Johns. N. Y. 224, 247; 1 Cow. N. Y. 290; 27 N. H. 253; 11 Gill & J. Md. 416; 4 R. I. 383; 8 Cal. 501; 2 Speers, So. C. 438; 2 Rich. So. C. 244; 15 Serg. & R. Penn. 162.

If a vendor transfer his vendee's note, he can only sue on the original contract when he gets back the note, and has it in his power to return it to his vendee. 1 Pet. C. C. 262; 4 Rich. So. C. 59. See DISCHARGE; PAYMENT; 10 Pet. 532; 8 Cow. N. Y. 390; 6 Watts & S. Penn. 165; 1 Hill, N. Y. 516; 3 Wash. C. C. 396; 5 Day, Conn. 511; Add. Penn. 39; 9 Watts, Penn. 273; 10 Md. 27; 1 Sneed, Tenn. 501; 1 Hempst. Ark. 431; 27 Ala. N. s. 254; 1 Parsons, Contracts, c. 13; Dixon on Substituted Liabilities.

NOVEL ASSIGNMENT. See NEW ASSIGNMENT.

NOVEL DISSEISIN. The name of an old remedy which was given for a new or recent disseisin.

When tenant in fee-simple, fee-tail, or for term of life, was put out and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assize or novel disseisin; and if, upon trial, he could prove his title and his actual seisin, and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained. 3 Blackst. Comm. 187. This remedy is obsolete.

NOVELLÆ LEONIS. The ordinances of the emperor Leo, which were made from the year 887 till the year 893, are so called. These Novels changed many rules of the Justinian law. This collection contains one hundred and thirteen Novels, written originally in Greek, and afterwards, in 1560, translated into Latin by Agilæus.

NOVELS, NOVELLÆ CONSTITUTIONES. In Civil Law. The name given to the constitutions or laws of Justinian and his immediate successors, which were promulgated soon after the Code of Justinian.

2. It appears to have been the intention of Justinian, after the completion of the second and revised edition of the Code, to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the Code, but by supplementary laws. Such laws he promulgated from time to time; but no official compilation of them is known to have been made until after his death, when his laws, 159 in number, with those of the reigns of Justin II. and Tiberias, nine in number, were collected, together with some local edicts, under this name. They belong to various times between 535 and 565 A.D.

3. Although the Novels of Justinian are the best known, and when the word Novels only is mentioned those of Justinian are always intended, he was not the first who used that name. Some of the acts of Theodosius, Valentinian, Leo, Severus, Authennius, and others, were also called Novels. But the Novels of the emperors who preceded Justinian had not the force of law after the legislation of that emperor. Those Novels are not, however, entirely useless; because, the Code of Justinian having been compiled to a considerable extent from the Theodosian Code and the earlier Novels, the latter frequently remove doubts which arise on the construction of the Code.

4. The original language of the Novels was for the most part Greek; but they are represented in the Corpus Juris Civilis by a Latin translation of 134 of them. These form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law.

The 118th Novel is the foundation and groundwork of the English Statute of Distribution of Intestates' Effects, which has been copied in many states of the Union. See 1 P. Will. 27; Prec. in Chanc. 593.

NOVUS HOMO (Lat. a new man). This term is applied to a man who has been pardoned of a crime, by which he is restored to society and is rehabilitated.

NOXA (Lat.). **In Civil Law.** Damage resulting from an offence committed by an irresponsible agent. The offence itself. The punishment for the offence. The slave or animal who did the offence, and who is delivered up to the person aggrieved (*datur noxæ*) unless the owner choose to pay the damage. The right of action is against whoever becomes the possessor of the slave or animal (*noxa caput sequitur*). D. *de furt.* L. 41; Vicat, Voc. Jur.; Calvinus, Lex.

NOXAL ACTION. See NOXA.

NUBILIS (Lat.). **In Civil Law.** One who is of a proper age to be married. Dig. 32. 51.

NUDE. Naked. Figuratively, this word is applied to various subjects.

A nude contract, *nudum pactum*, is one without a consideration. Nude matter is a bare allegation of a thing done, without any evidence of it.

NUDUM PACTUM. A contract made without consideration.

It is a mere agreement, without the requisites necessary to confer upon it a legal obligation to perform. 3 McLean, C. C. 330; 2 Den. N. Y. 403; 6 Ired. No. C. 480; 1 Strobh. So. C. 329; 1 Ga. 294; 1 Dougl. Mich. 188. The term, and the rule which decides upon the nullity of its effects, are borrowed from the civil law: yet the common law has not in any degree been influenced by the notions of the civil law in defining what constitutes a *nudum pactum*. Dig. 19. 5. 5. See, on this subject, a learned note in Fonblanque, Eq. 335, and 2 Kent, Comm. 364. Toullier defines *nudum pactum* to be an agreement not executed by one of the parties. Tom. 6, n. 13, page 10.

It is of no consequence whether the agreement be oral or written, 7 Term, 350; 7 Brown, Parl. Cas. 550; 4 Johns. N. Y. 235; 5 Mass. 301, 392; 2 Day, Conn. 22; but a

contract under seal cannot be held a *nudum pactum* for lack of consideration, since the seal imports consideration. 2 Barnew & Ald. 551. See CONSIDERATION; MAXIMS, *Ex nudo pacto;* 2 Blackstone, Comm. 445; 16 Viner, Abr. 16.

NUISANCE. Any thing that unlawfully worketh hurt, inconvenience, or damage. 3 Blackstone, Comm. 5, 216.

The element of illegality should be added to the definition as given above; for many acts which work hurt, inconvenience, or damage, when legalized cease to be nuisances. For example, if a corporation obstruct a highway by putting down iron rails to the inconvenience of passers, it is a nuisance if they are not properly authorized; otherwise if they are. See 14 Gray, Mass. 93; 18 Q. B. 761; Washburn, Easements.

A *private* nuisance is any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Blackstone, Comm. 215.

A *public* or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197; 4 Blackstone, Comm. 166.

2. It is difficult to say what degree of annoyance constitutes a nuisance. If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance. 3 Jur. N. S. 571. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable it is a nuisance, 1 Burr. 333; 5 Esp. 217; for the neighborhood have a right to pure and fresh air. 2 Carr. & P. 485; 6 Rog. N. Y. 61.

A thing may be a nuisance in one place which is not so in another: therefore the situation or *locality* of the nuisance must be considered. A tallow-chandler setting up his business among other tallow-chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance unless the annoyance is much increased by the new manufactory. Peake, 91. Such an establishment might be a nuisance in a thickly-populated town of merchants and mechanics where no such business was carried on. Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travellers upon which it is a nuisance. 6 Gray, Mass. 473. See 7 Blackf. Ind. 534; 2 Carr. & P. 483. The trade may be offensive for *noise*, 2 Show. 327; 22 Vt. 321; 6 Cush. Mass. 80; or *smell*, 2 Carr. & P. 485; 13 Metc. Mass. 365; 1 Den. N. Y. 524; or for other reasons. 1 Johns. N. Y. 78; 1 Swan, Tenn. 213; Thach. Crim. Cas. Mass. 14; 3 East, 192; 3 Jur. N. S. 570.

3. To constitute a *public* nuisance, there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance: this is a fact, generally, to be judged of by the jury. 1 Burr. 337; 4 Esp. 200; 1 Strange, 686, 704; 2 Chitty, Crim. Law, 607, n.

Public nuisances arise in consequence of following *particular trades*, by which the air is rendered offensive and noxious, Croke Car. 510; Hawkins, Pl. Cr. b. 1, c. 75, § 10; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Strange, 686; from acts of public *indecency*, as bathing in a public river in sight of the neighboring houses, 1 Russell, Crimes, 302; 2 Campb. 89; Sid. 168; or for acts tending to a *breach of the public peace*, as for drawing a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood, 3 Barnew. & Ald. 184; or keeping a *disorderly house*, 1 Russell, Crimes, 298; or a *gaming-house*, 1 Russell, Crimes, 299; Hawkins, Pl. Cr. b. 1, c. 75, § 6; or a *bawdy-house*, Hawkins, Pl. Cr. b. 1, c. 74, § 1; Bacon, Abr. *Nuisance* (A); 9 Conn. 350; or a *dangerous animal*, known to be such, and suffering him to go at large, as a large bulldog accustomed to bite people, 4 Burn, Just. 578; or *exposing a person having a contagious disease*, as the small-pox, in public, 4 Maule & S. 73, 272; and the like. The bringing a horse infected with the glanders into a public place, to the danger of infecting the citizens, is a misdemeanor at common law. Dearsl. Cr. Cas. 24; 2 Hurlst. & N. Exch. 299. The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is an indictable nuisance, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325. See 3 Jur. N. S. 570.

4. Private nuisances may be to *corporeal* inheritances: as, for example, if a man should build his house so as to throw the rain-water which fell on it on my land, Fitzherbert, Nat. Brev. 184, or erect his building, without right, so as to obstruct my ancient lights, 9 Coke, 58; but see Washburn, Easements, keep hogs or other animals so as to incommode his neighbor and render the air unwholesome, 9 Coke, 58; or to *incorporeal* hereditaments: as, for example, obstructing a right of way by ploughing it up or laying logs across it, and the like, Fitzherbert, Nat. Brev. 183; 2 Rolle, Abr. 140; or obstructing a spring, 1 Campb. 463; 6 East, 208; interfering with a franchise, as a ferry or railroad, by a similar erection unlawfully made. See Washburn, Easements.

5. The remedies are by an *action* for the damage done, by the owner, in the case of a private nuisance, 3 Blackstone, Comm. 220; or by any party suffering special damage, in the case of a public nuisance, 4 Wend. N. Y. 9; 3 Vt. 529; 1 Penn. St. 309; Carth. 194; Vaugh. 341; 3 Maule & S. 472; 2 Bingh. 283; 1 Esp. 148; by *abatement* by the owner, when the nuisance is private, 2 Rolle, Abr. 565; Rolle, 394; 3 Bulstr. 198; see 3 Dowl. & R. 556; and in some cases when it is *public*, if no riot is committed, 9 Coke, 55; 2 Salk. 458; 3 Blackstone, Comm. 5; by *in-*

junction, see INJUNCTION; or by *indictment* for a public nuisance. 2 Bishop, Crim. Law, § 856.

NUL AGARD (L. Fr. no award). **In Pleading.** A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1730; 2 Strange, 923.

NUL DISSEISIN. **In Pleading.** No disseisin. A plea in a real action, by which the defendant denies that there was any disseisin. It is a species of the general issue.

NUL TIEL RECORD (Fr. no such record). **In Pleading.** A plea which is proper when it is proposed to rely upon facts which disprove the existence of the *record* on which the plaintiff founds his action.

Any matters may be introduced under it which tend to destroy the validity of the record as a record, provided they do not contradict the recitals of the record itself. 10 Ohio, 100. It is frequently used to enable the defendant to deny the jurisdiction of the court from which the alleged record emanates. 2 McLean, C. C. 129; 22 Wend. N. Y. 293.

It is said to be the proper plea to an action on a foreign judgment, especially if of a sister state, in the United States, 2 Leigh. Va. 72; 6 *id.* 570; 17 Vt. 302; 6 Pick. Mass. 232; 11 Miss. 210; 1 Penn. 499; 2 South. So. C. 778; 2 Breese, Ill. 2; though it is held that *nil debet* is sufficient, 33 Me. 268; 3 J. J. Marsh. Ky. 600, especially if the judgment be that of a justice of the peace. 3 Harr. N. J. 408. See CONFLICT OF LAWS.

NUL TORT (L. Fr. no wrong). **In Pleading.** A plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

NUL WASTE. **In Pleading.** The general issue in an action of waste. Coke, 3d Inst. 700 *a*, 708 *a*. The plea of *nul waste* admits nothing, but puts the whole declaration in issue; and in support of this plea the defendant may give in evidence any thing which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like. Coke, Litt. 283 *a*; 3 Wms. Saund. 238, n. 5.

NULL. Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toullier, n. 320.

NULLA BONA (L. Lat. no goods). The return made to a writ of fieri facias by the sheriff, when he has not found any goods of the defendant on which he could levy. 3 Bouvier, Inst. n. 3393.

NULLITY. An act or proceeding which has absolutely no legal effect whatever. See Chitty, Contr. 228.

NULLITY OF MARRIAGE. The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: 1. Unsoundness of mind in either of the parties. 2. Want of age; *i.e.* fourteen in males and twelve in females. 3. Fraud or error; but these must relate to the *essentials* of the relation, as personal identity, and not merely to the *accidentals*, as character, condition, or fortune. 4. Duress. 5. Physical impotence, which must exist at the time of the marriage and be incurable. 6. Consanguinity or affinity within the prohibited degrees. 7. A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil, impediments.

2. The distinction between the two is important,—the latter rendering the marriage absolutely *void*, while the former only renders it *voidable*. In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have the nullity of the marriage ascertained and declared: it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties: if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void from the beginning, as in the case of civil impediments.

For the origin and history of this distinction between void and voidable marriages, see Bishop, Marr. & Div. c. 4.

3. A suit for nullity is usually prosecuted in the same court, and is governed by substantially the same principles, as a suit for divorce. Bishop, Marr. & Div. c. 15.

In its consequences, a sentence of nullity differs materially from a divorce. The latter assumes the original validity of the marriage, and its operation is entirely prospective. The former renders the marriage void from the beginning, and nullifies all its legal results. The parties are to be regarded legally as if no marriage had ever taken place: they are single persons, if before they were single; their issue are illegitimate; and their rights of property as between themselves are to be viewed as having never been operated upon by the marriage. Thus, the man loses all right to the property, whether real or personal, which belongs to the woman; and the woman loses her right to dower. Bishop, Marr. & Div. §§ 647, 659.

Neither is the woman, upon a sentence of nullity, entitled to permanent alimony; though the better opinion is that she is entitled to alimony *pendente lite*. Bishop, Marr. & Div. §§ 563, 579–580. See ALIMONY.

NULLIUS FILIUS (Lat.). The son of no one; a bastard.

2. A bastard is considered *nullius filius* as far as regards his right to inherit. But the

rule of *nullius filius* does not apply in other respects, and has been changed by statute in most states so as to make him the child of his mother.

The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it. 6 Serg. & R. Penn. 255; 2 Johns. N. Y. 375; 15 *id.* 208; 2 Mass. 109; 12 *id.* 387, 433; 4 Bos. & P. 148. But see 5 East, 224, n.

3. The putative father, too, is entitled to the custody of the child as against all but the mother. 1 Ashm. Penn. 55. And it seems that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law. Add. Penn. 212. See BASTARD; CHILD; FATHER; MOTHER; PUTATIVE FATHER.

NULLUM ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is *no award*.

NULLUM FECERUNT ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an action of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, etc. Bacon, Abr. *Arbitr. etc.* (G).

NULLUM TEMPUS ACT. The statute 3 Geo. III. c. 16. See 32 Geo. III. c. 58, and 7 Will. III. c. 3. It was so called because the right of the crown to sue, etc. was limited by it to sixty years, in contradiction to the maxim, *Nullum tempus occurrit regi*. 3 Chitty, Stat. 63.

NUMBER. A collection of units.

2. In pleading, numbers must be stated truly when alleged in the recital of a record, written instrument, or express contract. Lawes, Plead. 48; 4 Term, 314; Croke Car. 262; Dougl. 669; 2 W. Blackst. 1104. But in other cases it is not, in general, requisite that they should be truly stated; because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto*. Bacon, Abr. *Trespass* (I 2); Lawes, Plead. 48.

3. And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain, 3 Bulstr. 31; Carth. 110; Bacon, Abr. *Trover* (F 1); and in an action for the loss of goods by burning the plaintiff's house, the articles may be described by the simple denomination of "goods" or "divers goods." 1 Kebl. 825; Plowd. 85. 118, 123; Croke Eliz. 837; 1 H. Blackst. 284.

NUMERATA PECUNIA (Lat.). **In Civil Law.** Money counted or paid; money given in payment by count. See PECUNIA NUMERATA and PECUNIA NON-NUMERATA. L. 3, 10, C. *de non numerat. pecun.*; Vicat, Voc. Jur.

NUNC PRO TUNC (Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

Leave of court must be obtained to do things *nunc pro tunc;* and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court. 3 C. B. 970. See 1 Ves. & B. Ch. Ir. 312; 1 Moll. 462; 13 Price, Exch. 604; 1 Hog. 110.

A plea puis darrein continuance may be entered *nunc pro tunc* after an intervening continuation, in some cases, 11 N. H. 299; and lost pleadings may be replaced by new pleadings made *nunc pro tunc*. 1 Mo. 327.

NUNCIATIO. In Civil Law. A formal proclamation or protest. It may be by acts (*realis*) or by words. Mackeldey, Civ. Law, § 237. Thus, *nunciatio novi operis* was an injunction which one man could place on the erection of a new building, etc. near him, until the case was tried by the prætor. *Id.;* Calvinus, Lex. An information against a criminal. Calvinus, Lex.

NUNCIO. The name given to the pope's ambassador. Nuncios are ordinary or extraordinary: the former are sent upon usual missions, the latter upon special occasions.

NUNCIUS. In International Law. A messenger; a minister; the pope's legate, commonly called a *nuncio*.

NUNCUPATIVE WILL. An oral will, declared by testator, *in extremis*, before witnesses, and afterwards reduced to writing. 4 Kent, Comm. 576; 2 Sharswood, Blackst. Comm. 500; 1 Jarman, Wills, Perkins ed. 130–136. See 1 Will. IV. c. 20; 1 Vict. c. 26, §§ 9, 11; 11 Eng. L. & Eq. 596, by which the privilege of making a nuncupative will is only allowed to soldiers and seamen in actual service. So in almost all the states. See, in general, 27 Ala. N. S. 296, 596; 26 N. H. 372; 9 N. Y. 196; 10 Gratt. Va. 548; 27 Miss. 119, 725; 2 R. I. 133; 4 Bradf. Surr. N. Y. 154; 22 Ga. 293, 603; 12 La. Ann. 114, 603; 1 Sneed, Tenn. 616; 1 Williams, Exec. 59; Swinburn, Wills; Ayliffe, Pand. 359; Roberts, Wills; 2 Bouvier, Inst. n. 436; 1 Brown, Civ. Law, 288.

NUNDINÆ (Law Lat.). **In Civil and Old English Law.** Fair or fairs. Dion. Halicarnass. lib. 2, p. 98; Vicat, Voc. Jur.; Law Fr. & Lat. Dict.

NUNQUAM INDEBITATUS (Lat. never indebted). **In Pleading.** A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. 6 Carr. & P. 545; 1 Mees & W. Exch. 542; 1 Q. B. 77.

NUNTIUS, NUNCIUS. In Old English Practice. One who made excuse for absence of one summoned. An apparitor, beadle, or sergeant. Cowel. A messenger

or legate: *e.g.* pope's nuncio. Jacob, Law Dict. *Essoniator* was sometimes wrongly used for *nuntius* in the first sense. Bracton, fol. 345, § 2.

NUPER OBIIT (Lat. he or she lately died). **In Practice.** The name of a writ which in the English law lies for a sister coheiress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor died seised of an estate in fee-simple. Termes de la Ley; Fitzherbert, Nat. Brev. 197.

NURTURE. The act of taking care of children and educating them. The right to the nurture of children generally belongs to the father till the child shall arrive at the age of fourteen years, and not longer. Till then he is guardian by nurture. Coke, Litt. 38 *b*. But in special cases the mother will be preferred to the father, 5 Binn. Penn. 520; 2 Serg. & R. Penn. 174; and after the death of the father the mother is guardian by nurture. Fleta, l. 1, c. 6; Comyns, Dig. *Guardian* (D). See GUARDIAN; HABEAS CORPUS.

NURUS (Lat.). A daughter-in-law. Dig. 50. 16. 50.

O.

OATH. An outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler, Oaths, 15.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it," 1 Starkie, Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth," 2 Leach, Cr. Cas. 482; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it." 10 Toullier, nn. 343-348; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by His laws.

In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

Assertory oaths are those required by law other than in judicial proceedings and upon induction to office: such, for example, as custom-house oaths.

Extra-judicial oaths are those taken without authority of law. Though binding *in foro conscientiæ*, they do not, when false, render the party liable to punishment for perjury.

Judicial oaths are those administered in judicial proceedings.

Promissory oaths are oaths taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned: as, the oath which an alien takes, on becoming naturalized, that he will support the constitution of the United States; the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury. 3 Zabr. N. J. 49.

The *form* of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience. 6 Mass. 262; 16 Pick. Mass. 154; 2 Gall. C. C. 346; 3 Park. Crim. N. Y. 590; 2 Hawks, No. C. 458; 7 Ill. 540; Ry. & M. 77. The most common form is upon the gospel, by taking the book in the hand: the words commonly used are, "You do swear that," etc., "so help you God," and then kissing the book. 9 Carr. & P. 137. The origin of this oath may be traced to the Roman law, Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1; and the kissing the book is said to be an imitation of the priest's kissing the ritual, as a sign of reverence, before he reads it to the people. Rees, Cycl. In New England and in Scotland the gospels are not generally used, but the party taking the oath holds up his right hand and repeats the words here given. 1 Leach, Cr. Cas. 412, 498; Cowp. 390.

Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," etc., "and this as you shall answer to God at the great day."

In another form of attestation, commonly called an affirmation (*q. v.*), the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that," etc.

A Jew is sworn on the Pentateuch, or Old Testament, with his head covered, Strange, 821, 1113; a Mohammedan, on the Koran, 1 Leach, Cr. Cas. 54; a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest, Wils. 549; a Chinaman, by breaking a china saucer. 1 Carr. & M. 248.

The form and time of administering oaths, as well as the person authorized to adminis-

ter, are usually fixed by statute. See Gilp. Dist. Ct. 439; 1 Tyl. Vt. 347; 1 South. So. C. 297; 4 Wash. C. C. 555; 2 Blackf. Ind. 35; 2 McLean, C. C. 135; 9 Pet. 238; 1 Va. Cas. 181; 8 Rich. So. C. 456; 1 Swan, Tenn. 157; 5 Mo. 21.

OATH OF CALUMNY. In Civil Law. An oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had *bonâ fide* a good cause of action. Pothier, Pand. lib. 5, tt. 16, 17, s. 124. This oath is somewhat similar to our affidavit of a cause of action. See Dunlap, Adm. Pract. 289, 290; JURAMENTUM CALUMNIÆ.

OATH DECISORY. In Civil Law. An oath which one of the parties defers or refers back to the other for the decision of the cause.

2. It may be deferred in any kind of civil contest whatever, in questions of possession or of claim, in personal actions, and in real. The plaintiff may defer the oath to the defendant whenever he conceives he has not sufficient proof of the fact which is the foundation of his claim; and in like manner the defendant may defer it to the plaintiff when he has not sufficient proof of his defence. The person to whom the oath is deferred ought either to take it or refer it back; and if he will not do either, the cause should be decided against him. Pothier, Obl. pt. 4, c. 3, s. 4.

3. The decisory oath has been practically adopted in the district court of the United States for the district of Massachusetts; and admiralty causes have been determined in that court by the oath decisory. But the cases in which this oath has been adopted have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary. Dunlop, Adm. Pract. 290, 291.

OATH IN LITEM. An oath which in the civil law was deferred to the complainant as to the value of the thing in dispute, on failure of other proof, particularly when there was a fraud on the part of the defendant and he suppressed proof in his possession. See Greenleaf, Ev. § 348; Tait, Ev. 280; 1 Vern. Ch. 207; 1 Eq. Cas. Abr. 229; 1 Me. 27; 1 Yeates, Penn. 34; 12 Viner, Abr. 24.

2. In general, the oath of the party cannot, by the common law, be received to establish his claim, but is admitted in two classes of cases: *first*, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. See 1 Pet. 591; 5 *id.* 240; 9 Wheat. 486; 5 Pick. Mass. 436; 8 *id.* 278; 15 *id.* 368; 16 Johns. N. Y. 193; 20 *id.* 144; 17 Ohio, 156; 3 N. H. 135. As, for example, where a trunk of goods was delivered to a shipmaster at one port to be carried to another, and on the passage he broke the trunk open and rifled it of its contents, in an action by the owners of the goods against the shipmaster, the facts above mentioned having been proved *aliunde*, the plaintiff was held a competent witness to testify as to the contents of the trunk. 1 Me. 27; 11 *id.* 412. And see 10 Watts, 335; 1 Greenleaf, Ev. § 348; 12 Metc. Mass. 44; 1 Yeates, Penn. 34; 2 Watts, Penn. 220; 10 *id.* 335; 3 Penn. St. 451; 12 Mass. 360; 16 *id.* 118; 1 Gilb. Ev. by Lofft, 244. *Second*, the oath *in litem* is also admitted on the ground of public policy where it is deemed essential to the purposes of justice. Tait, Ev. 280; 1 Pet. 596; 6 Mood. 137; 2 Strange, 1186. But this oath is admitted only on the ground of necessity. An example may be mentioned of a case where a statute can receive no execution unless the party interested be admitted as a witness. 16 Pet. 203.

OATH PURGATORY. An oath by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him: as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt, by swearing to a fact which is an ample excuse. See PURGATION.

OATH SUPPLETORY. In Civil and Ecclesiastical Law. An oath required by the judge from either party in a cause, upon half-proof already made, which being joined to half-proof, supplies the evidence required to enable the judge to pass upon the subject. See Strange, 80; 3 Blackstone, Comm. 270.

OBEDIENCE. The performance of a command.

2. Officers who obey the command of their superiors, having jurisdiction of the subject-matter, are not responsible for their acts. A sheriff may, therefore, justify a trespass under an execution, when the court has jurisdiction, although irregularly issued. 3 Chitty, Pract. 75; Hammond, Nisi P. 48.

3. A child, an apprentice, a pupil, a mariner, and a soldier owe respectively obedience to the lawful commands of the parent, the master, the teacher, the captain of the ship, and the military officer having command; and in case of disobedience submission may be enforced by correction.

OBIT. That particular solemnity or office for the dead which the Roman Catholic church appoints to be read or performed over the body of a deceased member of that communion before interment; also, the office which upon the anniversary of his death was frequently used as a commemoration or observance of the day. 2 Croke, 51; Dy. 313.

OBITER DICTUM. See DICTUM.

OBLATIO (Lat.). In Civil Law. A tender of money in payment of debt made by debtor to creditor. L. 9, C. *de solut.* What-

ever is offered to the church by the pious. Calvinus, Lex.; Vicat, Voc. Jur.

OBLIGATIO. In Roman Law. A legal bond which obliges us to the performance of something in accordance with the law of the land. Ortolan, Inst. 2, § 1179.

It corresponded nearly to our word contract. Justinian says, "*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*" Pr. J. 3. 13.

The Romans considered that obligations derived their validity solely from positive law. At first the only ones recognised were those established in special cases in accordance with the forms prescribed by the strict *jus civile*. In the course of time, however, the prætorian jurisdiction, in mitigation of the primitive rigor of the law, introduced new modes of contracting obligations and provided the means of enforcing them: hence the twofold division made by Justinian of *obligationes civiles*, and *obligationes prætoriæ*. Inst. 1. 3. 13. But there was a third class, the *obligationes naturales*, which derived their validity from the law of nature and nations, or the natural reason of mankind. These had not the binding force of the other classes, not being capable of enforcement by action, and are, therefore, not noticed by Justinian in his classification; but they had, nevertheless, a certain efficacy even in the civil law: for instance, though a debt founded upon a natural obligation could not be recovered by an action, yet if it was voluntarily paid by the debtor he could not recover it back, as he might do in the case of money paid by mistake, etc. where no natural obligation existed. L. 38, pr. D. 12. 6. And see Ortolan, 2, § 1180.

The second classification of obligations made by Justinian has regard to the way in which they arise. They were, in this aspect, either *ex contractu* or *quasi ex contractu*, or *ex maleficio* or *quasi ex maleficio*. Inst. 2. 3. 13. These will be discussed separately.

2. *Obligationes ex contractu*, those founded upon an express contract, are again subdivided into four classes, with reference to the mode in which they are contracted. The contract might be entered into *re*, *verbis*, *literis*, or *consensu*.

A contract was entered into *re* by the actual transfer of a *thing* from one party to the other. Though in such cases the understanding of the parties as to the object of the transfer, and the conditions accompanying it, formed an essential part of the contract, yet it was only by the actual delivery of the thing that the contract was generated. The only contracts which could be entered into in this way were those known to our law as bailments,—a term derived from the French word *bailler*, to deliver, and evidently pointing to the same characteristic feature in the translation which the Romans indicated by the word *re*. These were the *mutuum*, or loan of a thing to be consumed in the using and to be returned in kind, the *commodatum*, or gratuitous loan of a thing to be used and returned, the *depositum*, or delivery of a thing to be kept in safety for the benefit of the depositor, and the *pignus*, or delivery of a thing in pledge to a creditor, as security for his debt. See MUTUUM; COMMODATUM; DEPOSITUM; PIGNUS; Ortolan, Inst. §§ 1208 *et seq.*; Mackeldey, Röm. Recht, §§ 396–408. Besides the above-named *contractus reales*, a large class of contracts which had no special names, and were thence called *contractus innominati*, were included under this head, from the fact that they, like the former, gave rise to the *actio præscriptis verbis*. Some of these were the contracts of exchange, of mutual compromise, of doubtful or contested claims (somewhat resembling our accord and satisfaction), of factorship, etc. See Mackeldey, §§ 409–414.

3. Contracts were entered into *verbis*, by a formal interrogation by one party and response by the other. The interrogation was called *stipulatio*, and the party making it, *reus stipulandi*. The response was called *promissio*, and the respondent, *reus promittendi*. The contract itself, consisting of the interrogation and response, was often called *stipulatio*. In the time of the earlier jurists, the stipulation could only be entered into by the use of certain formulary words by the parties: as, for instance, *Spondes?* do you promise? *Spondeo*, I promise; *Dabis?* will you give? *Dabo*, I will give; *Facies?* will you do this? *Faciam*, I will do it, etc. etc. But by a constitution of the emperor Leo, A.D. 469, the obligation to use these particular words was done away, and any words which expressed the meaning of the parties were allowed to create a valid stipulation, and any language understood by the parties might be used with as much effect as Latin. Such contracts were called *verbis*, because their validity depended entirely upon the use of the words. The mere agreement of the parties without using the question and response could not beget a stipulation; and, on the other hand, if the question and response had been used, the obligation was created although there might be an absence of consent. In this latter case, however, equitable relief would be granted by the prætor. Ortolan, Inst. § 1240. Stipulations, and, indeed, all other forms of contracts, might be made either *pure*, *i.e.* absolutely, or *in diem*, *i.e.* to take effect at a future day, or *sub conditione*, *i.e.* conditionally. But some kinds of conditions, such as those physically impossible, were inadmissible, and invalidated the contract; while others, such as those which were absurd, were themselves invalidated, and the contract was considered as having been made absolutely. Mackeldey, §§ 415–421; Ortolan, Inst. §§ 1235–1413; Inst. 3. 13–20.

4. Contracts entered into *literis* were obsolete in the reign of Justinian. In the earlier days of Roman jurisprudence, every citizen kept a private account-book. If a creditor, *at the request of his debtor*, entered in such book his charge against his debtor, such entry, in pursuance of the request, constituted not merely evidence of a contract, but the contract itself. This was the contract formed *literis*, in writing. The debtor, on his part, might also make a corresponding entry of the transaction in his own book. This was, in fact, expected of him, and was generally done; but it seems not to have been necessary to the

validity of the contract. The entry was made in the form of a fictitious payment; it was allowable only in pecuniary transactions; it must be simple and unconditional, and could not be made to take effect at a future day. The charge might be made against the original debtor, *a re in personam*, or against a third person who agreed to take his place, *a persona in personam*. This species of literal contract was called *nomina, nomina transcriptitia*, or *acceptilatio et expensilatio*. Ortolan, Inst. §§ 1414–1428.

5. There were two other literal contracts known to the early jurisprudence, called *syngraphia* and *chirographia;* but these even in the time of Gaius had become so nearly obsolete that very little is known about them. All these, it must be borne in mind, were contracts themselves, not merely evidences of a contract; and this distinguishes them from the instruments of writing in use during the latter ages of the civil law. Ortolan, Inst. §§ 1414–1441; Mackeldey, § 422.

Contracts were made *consensu*, by the mere agreement of the contracting parties. Although such agreement might be *proved* by a written instrument, as well as in other ways, yet the writing was only evidence of the contract, not the contract itself. This species of consensual contracts are *emptio et venditio*, or sale, *locatio et conductio*, or hiring, *emphyteusis*, or conveyance of land reserving a rent, *societas*, or partnership, and *mandatum*, or agency. See these words.

6. *Obligationes quasi ex contractu.* In the Roman law, persons who had not in fact entered into a contract were sometimes treated as if they had done so. Their legal position in such cases had considerable resemblance to that of the parties to a contract, and is called an *obligatio quasi ex contractu*. Such an obligation was engendered in the cases of *negotiorum gestio*, or unauthorized agency, of *communio incidens*, a sort of tenancy in common not originating in a contract, of *solutio indebiti*, or the payment of money to one not entitled to it, of the *tutela* and *cura*, resembling the relation of guardian and ward, of the *additio hereditatis* and *agnitio bonorum possessionis*, or the acceptance of an heirship, and many others. Some include in this class the *constitutio dotis*, settlement of a dower. Ortolan, Inst. §§ 1522–1632; Mackeldey, §§ 457–468.

7. *Obligationes ex maleficio* or *ex delicto.* The terms *maleficium, delictum*, embraced most of the injuries which the common law denominates torts, as well as others which are now considered crimes. This class includes *furtum*, theft, *rapina*, robbery, *damnum*, or injury to property, whether direct or consequential, and *injuria*, or injury to the person or reputation. The definitions here given of *damnum* and *injuria* are not strictly accurate, but will serve to convey an idea of the distinction between them. All such acts, from the instant of their commission, rendered the perpetrator liable for damages to the party injured, and were, therefore, considered to originate an *obligatio*. Inst. 4. 1–4; Ortolan, Inst. §§ 1715–1780.

Obligationes quasi ex delicto. This class embraces all torts not coming under the denomination of *delicta* and not having a special form of action provided for them by law. They differed widely in character, and at common law would in some cases give rise to an action on the case, in others to an action on an implied contract. Ortolan, Inst. §§ 1781–1792.

Obligationes ex variis causarum figuris. Although Justinian confined the divisions of obligations to the four classes which have been enumerated, there are many species of obligations which cannot properly be reduced within any of these classes. Some authorities have, consequently, established a fifth class, to receive the odds and ends which belonged nowhere else, and have given to this class the above designation, borrowed from Gaius, l. 1, pr. § 1 D. 44, 7. See Mackeldey, §§ 474–482.

OBLIGATION (from Lat. *obligo, ligo*, to bind). A duty.

A tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made. Inst. 3. 14.

A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like, and which differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Coke, Litt. 172.

A deed whereby a man binds himself under a penalty to do a thing. Comyns, Dig. *Obligation* (A); 2 Serg. & R. Penn. 502; 6 Vt. 40; 1 Blackf. Ind. 241; Harp. So. C. 434; 1 Baldw. C. C. 129; Bouvier, Inst. Index.

An *absolute* obligation is one which gives no alternative to the obligor, but requires fulfilment according to the engagement.

An *accessory* obligation is one which is dependent on the principal obligation: for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title-papers which I have relating to it, to take care of the estate till it is delivered to you, and the like.

An *alternative* obligation is where a person engages to do or to give several things in such a manner that the payment of one will acquit him of all.

Thus, if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars, it is an *alternative* obligation. Pothier, Obl. pt. 2, c. 3, art. 6, no. 245.

In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively: where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor. Dougl. 14

1 Ld. Raym. 279; 4 Mart. La. N. S. 167. If one of the acts is prevented by the obligee or the act of God, the obligor is discharged from both. See 2 Evans, Pothier, Obl. 52–54; Viner, Abr. *Condition* (S b); CONJUNCTIVE; DISJUNCTIVE; ELECTION.

A *civil* obligation is one which has a binding operation in law, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. 4 Wheat. 197; 12 *id.* 318, 337.

Civil obligations are divided into express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, or mixed.

A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

A *determinate* obligation is one which has for its object a certain thing: as, an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

A *divisible* obligation is one which, being a unit, may nevertheless be lawfully divided with or without the consent of the parties.

It is clear that it may be divided by consent, as those who made it may modify or change it as they please. But some obligations may be divided without the consent of the obligor: as, where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire; yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars and the seller the other hundred. See APPORTIONMENT.

Express or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation.

Imperfect obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only: such as charity or gratitude. In this sense an obligation is a mere duty. Pothier, Obl. art. prél. n. 1.

An *implied* obligation is one which arises by operation of law: as, for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

An *indeterminate* obligation is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will discharge the obligation.

An *indivisible* obligation is one which is not susceptible of division: as, for example, if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share. See DIVISIBLE.

A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint, and the obligors do not promise separately to fulfil their engagement, they must be all sued, if living, to compel the performance; or, if any be dead, the survivors must all be sued. See PARTIES TO ACTIONS.

A *natural* or *moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice.

As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished. 5 Binn. Penn. 573. Although natural obligations cannot be enforced by action, they have the following effect: *first*, no suit will lie to recover back what has been paid or given in compliance with a natural obligation, 1 Term, 285; 1 Dall. Penn. 184: *second*, a natural obligation is a sufficient consideration for a new contract. 2 Binn. Penn. 591; 5 *id.* 33; Yelv. 41 *a*, n. 1; Cowp. 290; 2 Blackstone, Comm. 445; 3 Bos. & P. 249, n.; 2 East, 506; 3 Taunt. 311; 5 *id.* 36; 3 Pick. Mass. 207; Chitty, Contr. 10; CONSIDERATION.

A *penal* obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. See LIQUIDATED DAMAGES.

A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

A *personal* obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance.

It also denotes an obligation in which the obligor binds himself only, not including his heirs or representatives.

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

A *real* obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

A familiar example will explain this. When an estate owes an easement as a right of way, it is the thing, and not the owner, who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage: he is not liable for the debt, though his estate is. In these cases the owner has an interest only because he is seised of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is both personal and real when the obligor has bound himself and pledged his estate for the fulfilment of his obligations.

A *secondary* obligation is one which is contracted and is to be performed in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title; but I find I cannot, as the title is in another: then

my *secondary* obligation is to pay you damages for my non-performance of my obligation.

A *several* obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement. In this case each obligor may be sued separately; and if one or more be dead, their respective executors may be sued. See PARTIES TO ACTIONS.

A *single* obligation is one without any penalty: as, where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

OBLIGATION OF CONTRACTS. See IMPAIRING THE OBLIGATION OF CONTRACTS.

OBLIGEE. The person in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something. La. Code, art. 3522, no. 11.

Obligees are either several or joint. An obligee is several when the obligation is made to him alone; obligees are joint when the obligation is made to two or more; and in that event each is not a creditor for his separate share, unless the nature of the subject or the particularity of the expression in the instrument lead to a different conclusion. 2 Pothier, Obl. Evans ed. 56; Dy. 350 *a*, pl. 20; Hob. 172; 2 Brownl. 207; Yelv. 177; Croke Jac. 251.

OBLIGOR. The person who has engaged to perform some obligation. La. Code, art. 3522, no. 12. One who makes a bond.

2. Obligors are joint and several. They are joint when they agree to pay the obligation jointly; and then the survivors only are liable upon it at law, but in equity the assets of a deceased joint obligor may be reached. 1 Brown, Ch. 29; 2 Ves. Ch. 101, 371. They are several when one or more bind themselves each of them separately to perform the obligation. In order to become an obligor, the party must actually, either himself or by his attorney, enter into the obligation and execute it as his own. If a man sign and seal a bond as his own, and deliver it, he will be bound by it although his name be not mentioned in the bond. 4 Ala. 479; 4 Hayw. No. C. 239; 4 M'Cord, So. C. 203; 7 Cow. N. Y. 484; 2 Bail. So. C. 190; Brayt. Vt. 38; 2 Hen. & M. Va. 398; 5 Mass. 538; 2 Dan. Ky. 463; 4 Munf. Va. 380; 4 Dev. No. C. 272. When the obligor signs between the penal part and the condition, still the latter will be a part of the instrument. 7 Wend. N. Y. 345; 3 Hen. & M. Va. 144.

3. The execution of a bond by the obligor, in blank, with verbal authority to fill it up, does not bind the obligor, though it is afterwards filled up, unless the bond is redelivered or acknowledged or adopted. 1 Yerg. Tenn. 69, 149; 1 Hill, N. Y. 267; 2 Nott & M'C. So. C. 125; 2 Brock. 64; 1 Ohio, 368; 2 Dev. No. C. 369; 6 Gill & J. Md. 250. But see, *contra*, 17 Serg. & R. Penn. 438; and see 6 Serg. & R. Penn. 308; Wright, Ohio, 742.

OBREPTION. Acquisition of escheats, etc. from sovereign, by making false representations. Bell, Dict. *Subreption;* Calvinus, Lex.

OBROGATION. The annulling a law, in whole or in part, by passing a law contrary to it. The alteration of a law. Vicat, Voc. Jur.; Calvinus, Lex.

OBSCENITY. In Criminal Law. Such indecency as is calculated to promote the violation of the law and the general corruption of morals.

The exhibition of an obscene picture is an indictable offence at common law, although not charged to have been exhibited in public, if it be averred that the picture was exhibited to sundry persons for money. 2 Serg. & R. Penn. 91. See Duane, Cr. Cas. 64.

OBSERVE. In Civil Law. To perform that which has been prescribed by some law or usage. Dig. 1. 3. 32.

OBSOLETE. A term applied to laws which have lost their efficacy without being repealed.

A positive statute, unrepealed, can never be repealed by non-user alone. 4 Yeates, Penn. 181, 215; 1 P. A. Browne, Penn. App. 28; 13 Serg. & R. Penn. 447. The disuse of a law is at most only presumptive evidence that society has consented to such a repeal: however this presumption may operate on an unwritten law, it cannot, in general, act upon one which remains as a legislative act on the statute-book; because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists. 1 P. A. Browne, Penn. App. 28. "It must be a very strong case," says Chief-Justice Tilghman, "to justify the court in deciding that an act standing on the statute-book, unrepealed, is obsolete and invalid. I will not say that such case may not exist,—where there has been a non-user for a great number of years,—where, from a change of times and manners, an ancient sleeping statute would do great mischief if suddenly brought into action,—where a long practice inconsistent with it has prevailed, and specially where from other and latter statutes it might be inferred that in the apprehension of the legislature the old one was not in force." 13 Serg. & R. Penn. 452; Rutherforth, Inst. b. 2, c. 6, s. 19; Merlin, Répert. *Desuetude.*

OBSTRUCTING PROCESS. In Criminal Law. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process.

2. The officer must be prevented by actual violence, or by threatened violence accompanied by the exercise of force, or by those having capacity to employ it, by which the officer is prevented from executing his writ. The officer is not required to expose his person by a personal conflict with the offender. 2 Wash. C. C. 169. See 3 Wash. C. C. 335; 12 Ala. N. S. 199.

3. This is an offence against public justice of a very high and presumptuous nature; and more particularly so where the obstruction is of an arrest upon criminal process. A person opposing an arrest upon criminal process becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in high treason. 4 Blackstone, Comm. 128; 2 Haw-

kins, Pl. Cr. c. 17, s. 1; 1 Russell, Crimes, 360. See 2 Gall. C. C. 15; 2 Chitty, Crim. Law, 145, note *a*; 3 Vt. 110; 25 *id.* 415; 2 Strobh. So. C. 73; 15 Mo. 486.

OBVENTIO (Lat. *obvenire*, to fall in). **In Civil Law.** Rent or profit accruing from a thing, or from industry. It is generally used in the plural.

In Old English Law. The revenue of spiritual living, so called. Cowel. Also, in the plural, offerings. Coke, 2d Inst. 661.

OCCUPANCY. The taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use.

Pothier defines it to be the title by which one acquires property in a thing which belongs to nobody, by taking possession of it with design of acquiring it. Tr. du Dr. de Propriété, n. 20. The Civil Code of Louisiana, art. 3375, nearly following Pothier, defines occupancy to be "A mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with an intention of acquiring a right of ownership in it." Occupancy is sometimes used in the sense of occupation or holding possession; but this does not appear to be a common legal use of the term.

To constitute occupancy, there must be a taking of a thing corporeal, belonging to nobody, with an intention of becoming the owner of it. Coke, Litt. 416.

A right by occupancy attaches in the finder of lost goods unreclaimed by the owner; in the captor of beasts *ferœ naturæ*, so long as he retains possession, 2 Blackstone, Comm. 403; the owner of lands by accession, and the owner of goods acquired by confusion.

It was formerly considered, also, that the captor of goods contraband of war acquired a right by occupancy; but this is now held otherwise, such goods being now held to be primarily vested in the sovereign, and as belonging to individual captors only, to the extent and under such regulations as positive laws may prescribe. 2 Kent, Comm. 290.

OCCUPANT, OCCUPIER. One who has the actual use or possession of a thing.

When the occupiers of a house are entitled to a privilege in consequence of such occupation, as to pass along a way, to enjoy a pew, and the like, a person who occupies a part of such house, however small, is entitled to some right, and cannot be deprived of it. 2 Barnew. & Ald. 164; 1 Chitty, Pract. 209, 210; 4 Comyns, Dig. 64; 5 *id.* 199.

OCCUPATION. Use or tenure: as, the house is in the occupation of A B. A trade, business, or mystery: as, the occupation of a printer.

A putting out of a man's freehold in time of war. Coke, Litt. s. 412.

OCCUPAVIT (Lat.). **In Old Practice.** The name of a writ which lies to recover the possession of lands when they have been taken from the possession of the owner by occupation (*q. v.*).

OCCUPIER. One who is in the enjoyment of a thing.

He may be the occupier by virtue of a lawful contract, either express or implied, or without any contract. The occupier is, in general, bound to make the necessary repairs to the premises he occupies: the cleansing and repairing of drains and sewers, therefore, is *primâ facie* the duty of him who occupies the premises. 3 Q. B. 449.

OCHLOCRACY. A government where the authority is in the hands of the multitude; the abuse of a democracy. Vaumène, Dict. du Langage Politique.

OCTAVE (Law Lat. *utas*). **In Old English Practice.** The eighth day inclusive after a feast. 3 Sharswood, Blackst. Comm. 277.

OCTO TALES (Lat. eight such). If, when a trial at bar is called on, the number of jurors in attendance is too small, the trial must be adjourned, and a *decem* or *octo tales* awarded, according to the number deficient: as, at common law, namely, a writ to the sheriff to summon eight more such men as were originally summoned. 3 Sharswood, Blackst. Comm. 364.

ODHALL RIGHT. The same as allodial.

OF COURSE. That which may be done in the course of legal proceedings without making any application to the court; that which is granted by the court, without further inquiry, upon its being asked: as, a rule to plead is a matter of course.

OFFENCE. In Criminal Law. The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty. 1 Chitty, Pract. 14.

OFFER. A proposition to do a thing.

2. An offer ought to contain a right, if accepted, of compelling the fulfilment of the contract; and this right, when not expressed, is always implied.

By virtue of his natural liberty, a man may change his will at any time, if it is not to the injury of another: he may, therefore, revoke or recall his offers at any time before they have been accepted; and, in order to deprive him of this right, the offer must have been accepted on the terms in which it was made. 10 Ves. Ch. 438; 2 Carr. & P. 553.

3. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it. 4 Wheat. 225; 3 Johns. N. Y. 534; 7 *id.* 470; 6 Wend. N. Y. 103.

When the offer has been made, the party is presumed to be willing to enter into the contract for the time limited, and, if the time be not fixed by the offer, then until it be expressly revoked or rendered nugatory by a contrary presumption. 6 Wend. N. Y. 103

See 8 Serg. & R. Penn. 243; 1 Pick. Mass. 278; 10 *id.* 326; 12 Johns. N. Y. 190; 9 Port. Ala. 605; 1 Bell, Comm. 326, 5th ed.; Pothier, Vente, n. 32; 1 Bouvier, Inst. n. 577 *et seq.* And see ACCEPTANCE OF CONTRACTS; ASSENT; BID.

OFFICE. A right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Shelford, Mortm. 797; Cruise, Dig. Index; 3 Serg. & R. Penn. 149.

Judicial offices are those which relate to the administration of justice, and which must be exercised by persons of sufficient skill and experience in the duties which appertain to them.

Military offices are such as are held by soldiers and sailors for military purposes.

Ministerial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. 7 Mass. 280. See 5 Wend. N. Y. 170; 10 *id.* 514; 8 Vt. 512; 1 Ill. 280. It is a general rule that a judicial office cannot be exercised by deputy, while a ministerial may.

Political offices are such as are not connected immediately with the administration of justice or the execution of the mandates of a superior officer: the offices of the president of the United States, of the heads of departments, of the members of the legislature, are of this number.

In the United States, the tenure of office never extends beyond good behavior. In England, offices are public or private. The former affect the people generally; the latter are such as concern particular districts belonging to private individuals. In the United States, all offices, according to the above definition, are public; but in another sense employments of a private nature are also called offices: for example, the office of president of a bank, the office of director of a corporation. For the incompatibility of office, see INCOMPATIBILITY; 4 Serg. & R. Penn. 277; 4 Coke, Inst. 100; Comyns, Dig. b. 7. And see, generally, 3 Kent, Comm. 362; Cruise, Dig. tit. 25; 16 Viner, Abr. 101; Ayliffe, Parerg. 395; Pothier, Traité des Choses, § 2; 17 Serg. & R. Penn. 219; MANDAMUS; QUO WARRANTO.

OFFICE-BOOK. A book kept in a public office, not appertaining to a court, authorized by the law of any state.

An *exemplification* of any such office-book, when authenticated under the act of congress of 27th March, 1804, is to have such faith and credit given to it in every court and office within the United States as such exemplification has by law or usage in the courts or offices of the state from whence the same has been taken. See FOREIGN LAWS; FOREIGN JUDGMENT.

OFFICE-COPY. A transcript of a record or proceeding filed in an office established by law, certified under the seal of the proper officer.

OFFICE FOUND. **In English Law.** When an inquisition is made to the king's use of any thing, by virtue of office of him who inquires, and the inquisition is found, it is said to be office found. See INQUEST OF OFFICE.

OFFICER. He who is lawfully invested with an office.

Executive officers are those whose duties are mainly to cause the laws to be executed.

For example, the president of the United States of America, and the several governors of the different states, are executive officers. Their duties are pointed out in the national constitution and in the constitutions of the several states.

Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of congress and of the several state legislatures.

These officers are confined in their duties, by the constitution, generally to make laws; though sometimes, in cases of impeachment, one of the houses of the legislature exercises judicial functions somewhat similar to those of a grand jury, by presenting to the other articles of impeachment, and the other house acts as a court in trying such impeachments. The legislatures have, besides, the power to inquire into the conduct of their members, judge of their elections, and the like.

Judicial officers are those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law.

Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors.

Military officers are those who have command in the army; and

Naval officers are those who are in command in the navy.

Officers are also divided into public officers and those who are not public. Some officers may bear both characters: for example, a clergyman is a public officer when he acts in the performance of such a public duty as the marriage of two individuals, 4 Conn. 209; and he is merely a private person when he acts in his more ordinary calling of teaching his congregation. See 4 Conn. 134; 18 Me. 155.

Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may, in some cases, subject the offender to an indictment, 1 Yeates, Penn. 519; and in others he will be liable to the party injured. 1 Yeates, Penn. 506.

OFFICIAL. **In Old Civil Law.** The person who was the minister of, or attendant upon, a magistrate.

In Canon Law. The person to whom the bishop generally commits the charge of his spiritual jurisdiction bears this name. Wood, Inst. 30, 505; Merlin, Répert.

OFFICINA JUSTITIÆ. The workshop or office of justice. **In English Law.** The chancery is so called, because all writs issue from it, under the great seal, returnable into the courts of common law. See CHANCERY.

OHIO. One of the new states of the American Union.

2. Massachusetts, Connecticut, and Virginia claimed, under their respective charters, the terri-

tory lying northwest of the river Ohio. At the solicitation of the continental congress, these claims were, soon after the close of the war of independence, ceded to the United States. Virginia, however, reserved the ownership of the soil of three million seven hundred thousand acres between the Scioto and the Little Miami rivers, for military bounties to the soldiers of her line who had served in the revolutionary war; and Connecticut reserved three million six hundred and sixty-six thousand acres in northern Ohio, now usually called "the Western Reserve." The history of these reservations, and of the several "purchases" under which land-titles have been acquired in various parts of the state, will be found in Albachi's Annals of the West; in the Preliminary Sketch of the History of Ohio, in the first volume of Chase's Statutes of Ohio; and in Swan's Land Laws of Ohio. The conflicting titles of the states having been extinguished, congress, on July 13, 1787, passed the celebrated ordinance for the government of the territory northwest of the river Ohio. 1 Curwen's Revised Statutes of Ohio, 86. It provided for the equal distribution of the estates of intestates among their children, gave the widow dower as at common law, regulated the execution of wills and deeds, secured perfect religious toleration, the right of trial by jury, judicial proceedings according to the course of the common law, the benefits of the writ of habeas corpus, security against cruel and unusual punishments, the right of reasonable bail, the inviolability of contracts and of private property, and declared that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

3. These provisions have been, in substance, incorporated into the constitution and laws of Ohio, as well as of the other states which have since been formed within "the territory." The legal effect of the ordinance has been much discussed, and the supreme court of Ohio and the circuit court of the United States for the seventh circuit, on the one hand, and the supreme court of the United States, on the other, have arrived at directly opposite conclusions in respect to it. By the former it was considered a compact not incompatible with state sovereignty, and as binding on the state of Ohio as her own constitution; while the latter treated it as a mere temporary statute, which was abrogated by the adoption of the constitution of the United States. 5 Ohio, 410; 7 *id.* 416; 17 *id.* 425; 1 McLean, 336; 3 *id.* 226; 3 How. 212, 589; 10 *id.* 82: s. c., 8 Western Law Jour. 232.

On the 30th of October, 1802, congress passed an act making provision for the formation of a state constitution, under which, in 1803, Ohio was admitted into the Union, under the name of "the State of Ohio." This constitution was never submitted to a vote of the people. It continued to be the organic law of Ohio until September 1, 1851, when it was abrogated by the adoption of the present constitution.

4. The bill of rights which forms a part of this constitution contains the provisions common to such instruments in the constitutions of the different states. Such are the prohibitions against any laws impairing the right of peaceably assembling to consult for the common good, to bear arms, to have a trial by jury, to worship according to the dictates of one's own conscience, to have the benefit of the writ of *habeas corpus*, to be allowed reasonable bail, to be exempt from excessive fines and cruel and unusual punishments, not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, to have a copy of the indictment, the aid of counsel, compulsory process for witnesses, a speedy and public trial, to be privileged from testifying against one's self or to be twice put in jeopardy for the same offence. Provision is also made against the existence of slavery, against transporting offenders out of the state, against imprisonment for debt unless in cases of fraud, against granting hereditary honors, against quartering soldiers in private houses, for the security of persons from unreasonable arrest or searches, and for the freedom of speech and the press.

Every white male citizen of the United States, twenty-one years of age, who has resided in the state one year, and in the county, township, or ward such period as may be fixed by law, next preceding election, is entitled to vote.

The Legislative Power.

This is lodged in a General Assembly, consisting of a Senate and House of Representatives.

5. The *Senate* is composed of thirty-five members, elected biennially, one in each of the senatorial districts into which the state is divided, for the term of two years. Senators must have resided in their respective districts one year next before election, unless absent on business of the state or the United States.

The *House of Representatives* is composed of one hundred members, elected biennially, one in each of the representative districts of the state, for the term of two years, by the voters of the district. A representative must have resided one year next preceding the election in the county or district for which he is elected. No person can be elected to either house who holds office under the United States or an office of profit under the state. Provision is made for re-districting the state every ten years from 1851, by dividing and combining the existing districts, and affording additional representatives during a part of the decennial period to those districts which have a surplus population over the ratio. The assembly cannot grant special charters to corporations, but may provide for their creation by general laws. No association with banking powers can be authorized until the act creating it has been submitted to the people and approved by a majority voting at that election. A debt cannot be contracted for purposes of internal improvement. Cities and incorporated villages are corporations under general laws. The general assembly may not pass retroactive laws, but may authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings arising out of their want of conformity with the laws of the state.

The Executive Department.

6. The *Governor* is elected biennially, for the term of two years from the second Monday of January next following his election, and until his successor is qualified. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed; may, on extraordinary occasions, convene the general assembly by proclamation; in case of disagreement between the two houses in respect to the time of adjournment, has power to adjourn the general assembly to such time as he may think proper, but not beyond the regular meetings thereof; is commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States; and has power, after conviction, to grant reprieves, commutations, and pardons for all crimes and offences, except treason and cases of impeachment, upon such conditions as he may think proper, subject, however, to such regulations, as to the manner of applying for pardons, as may be

prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He must communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.

He has no veto power upon the acts of the legislature, and his power of appointment is extremely limited.

The *Lieutenant-Governor* is elected at the same time, and for the same term of office, as the governor.

In case of the death, impeachment, resignation, removal, or other disability of the governor, the powers and duties of the office, for the residue of the term, or until he is acquitted or the disability be removed, devolve upon the lieutenant-governor.

He is president of the senate *ex officio*, but possesses only a casting vote.

A *Secretary of State*, a *Treasurer*, and an *Attorney-General* are also elected at the same time, for the same term.

An *Auditor* is elected once in four years. If any of these offices become vacant, the governor appoints incumbents to serve till the next general election, after thirty days occurs, when a successor is elected for a full term.

The Judicial Power.

7. The *Supreme Court* consists of five judges, elected by the people for five years. The judges are so classified that one goes out of office each year. It has original jurisdiction over writs of quo warranto, mandamus, habeas corpus, and procedendo, and a large appellate jurisdiction by writs of error from inferior courts. It may issue writs of error and certiorari in any criminal case, and supersedeas in any case, and all writs, not provided for, which are necessary to enforce the administration of justice. Writs of error, certiorari, habeas corpus, and supersedeas may be issued by the judge in vacation.

The *District Court* is composed of one judge of the supreme court and the judges of the common-pleas court for the district in which the court is held. One session at least of this court is to be held annually in each county, or at least three sessions annually in three places in the district. It has like original and appellate jurisdiction with the supreme court upon writ of error granted by the supreme court, or some judge thereof in vacation.

The *Court of Common Pleas* is composed of three judges, elected by the people in each of the nine districts into which the state is divided, for the term of five years. Each of these nine districts is divided into three parts, following county-lines, and as nearly equal as possible; and in each of these sub-districts one judge is elected. Courts of common pleas are to be held by one or more of these judges; and more than one common-pleas court may be held in the district at the same time. This court has original jurisdiction of all civil causes where the matter in controversy exceeds one hundred dollars, and a service, personal or by attachment of property, can be made in the county or where the property in question is situated in the county. This court has also almost exclusively the criminal jurisdiction, with the exception of a petty jurisdiction exercised in some instances by local police courts. It has a supervisory jurisdiction in cases of distribution of decedents' property by the probate courts. Acts 1857, p. 202. It may effectuate the intentions of parties, by curing defective instruments. Acts 1859, p. 40. It exercises appellate jurisdiction also of cases brought from justices of the peace and all other inferior judicial tribunals. A writ of error lies from this court to the district court.

8. A *Probate Court* is held in each county by a probate-judge, elected for three years by the people of the county. This court has jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law.

A very extensive jurisdiction is now exercised over the administration of trusts upon assignments made by failing debtors for the benefit of their creditors, and over judgment debtors who are accused of secreting their effects.

Superior courts have been established, under authority of the constitution, in Cincinnati, Columbus, Dayton, and Cleveland, whose jurisdiction in civil causes is concurrent with the courts of common pleas within their respective territorial limits. Their decisions are supervised by the supreme court, by writ of error allowed by that court, or by one of its judges in vacation.

Jurisprudence.

The common law of England is the basis of the civil law of this state, modified by the judicial rejection of that part which is "inapplicable to the condition of the people of Ohio." The body of the general laws is contained in Chase's Statutes of Ohio from 1787 to 1833, three volumes, and in Curwen's Revised Statutes from 1833 to 1861, four volumes. No attempt has ever been made to arrange or classify the great mass of local legislation, including the charters of banks, turnpikes, railroads, and manufacturing companies, the boundaries of counties, sales of school lands, acts for the relief of private persons, and others of a kindred nature; and complete editions of these latter laws have now become very rare. A compendium of the laws in force has been published (1860) by Messrs. Swan & Critchfield, which, with Curwen's Revised Statutes, now constitute the ordinary works of reference in Ohio upon questions involving the present state of legislation.

The criminal law of the state is wholly statutory, and there are no offences recognized as common-law offences. The formal distinction between actions at law and in equity is abolished. Actions are brought by a petition stating the facts of the case.

OLD NATURA BREVIUM. The title of an old English book, so called to distinguish it from Fitzherbert's work entitled Natura Brevium. It contains the writs most in use in the reign of Edward III., together with a short comment on the application and properties of each of them.

OLD TENURES. The title of a small tract, which, as its title denotes, contains an account of the various tenures by which land was holden in the reign of Edward III. This tract was published in 1719, with notes and additions, with the eleventh edition of the First Institutes, and reprinted in 8vo, in 1764, by Serjeant Hawkins, in a Selection of Coke's Law Tracts.

OLERON, LAWS OF. A maritime code promulgated by Eleanor, duchess of

Guienne, mother of Richard I., at the isle of Oleron,—whence their name. They were modified and enacted in England under Richard I., and again promulgated under Henry III. and Edward III., and are constantly quoted in proceedings before the admiralty courts, as are also the Rhodian Laws. Coke, Litt. 2. See CODE, § 25.

OLIGARCHY (Gr. ὀλιγος and ἀρχη. The government of a few). A name given to designate the power which a few citizens of a state have usurped, which ought by the constitution to reside in the people. Among the Romans, the government degenerated several times into an oligarchy,—for example, under the decemvirs, when they became the only magistrates in the commonwealth.

OLOGRAPH. A term which signifies that an instrument is wholly written by the party. See La. Civ. Code, art. 1581; Code Civ. 970; 5 Toullier, n. 357; 1 Stu. Low. C. 327; 2 Bouvier, Inst. n. 2139. And see TESTAMENT; WILL.

OMISSION. The neglect to perform what the law requires.

When a public law enjoins on certain officers duties to be performed by them for the public, and they omit to perform them, they may be indicted: for example, supervisors of the highways are required to repair the public roads: the neglect to do so will render them liable to be indicted.

When a nuisance arises in consequence of an omission, it cannot be abated, if it be a private nuisance, without giving notice, when such notice can be given. See COMMISSION; NUISANCE.

OMNIA PERFORMAVIT (Lat. he has done all). **In Pleading.** A good plea in bar where all the covenants are in the affirmative. 1 Me. 189.

OMNIUM (Lat.). **In Mercantile Law.** A term used to express the aggregate value of the different stocks in which a loan is usually funded. 2 Esp. 361; 7 Term, 630.

ON ACCOUNT OF WHOM IT MAY CONCERN, FOR WHOM IT MAY CONCERN. A clause in policies of insurance, under which all are insured who have an insurable interest at the time of effecting the insurance and who were then contemplated by the party effecting the insurance. 2 Parsons, Marit. Law, 30.

ONCE IN JEOPARDY. Once in danger, *i.e.* of the penalties of the law, in life or limb. It is a principle of the common law that no man shall be put twice in jeopardy of life or limb. This is made a part of the constitution of the United States. But whether, under this clause, the unnecessary discharge of jury without the consent of the prisoner or his counsel can be pleaded in bar is doubtful. That it may be, see 6 Serg. & R. Penn. 577; 1 Hayw. No. C. 241; 10 Yerg. Tenn. 532; 16 Ala. 188; that it is not, see 2 Sumn. C. C. 42; 9 Mass. 194; 2 Pick. Mass. 521; 18 Johns. N. Y. 187; 1 Miss. 134; 2 Gall. C. C. 364; 2 McLean, C. C. 114. See, in general, 17 Penn. St. 426; 1 Swan, Tenn. 14, 34; 35 Me. 225; 5 Rich. So. C. 219; 14 Ga. 8; 23 Miss. 62; 24 *id.* 54; 27 Me. 266; 32 *id.* 530; 7 Gratt. Va. 593; 9 Humphr. Tenn. 677; 11 *id.* 599; 1 Iowa, 392; 12 Metc. Mass. 387; 6 Ark. 187; AUTREFOIS ACQUIT; JEOPARDY.

ONERARI NON (Lat. ought not to be burdened). **In Pleading.** The name of a plea by which the defendant says that he ought not to be charged. It is used in an action of debt. 1 Saund. 290, n. *a*.

ONERIS FERENDI (Lat. of bearing a burden). **In Civil Law.** The name of a servitude by which the wall or pillar of one house is bound to sustain the weight of the buildings of the neighbor.

The owner of the servient building is bound to repair and keep it sufficiently strong for the weight it has to bear. Dig. 8. 2. 23; 2 Bouvier, Inst. n. 1627.

ONEROUS CAUSE. In Civil Law. A valuable consideration.

ONEROUS CONTRACT. In Civil Law. One made for a consideration given or promised, however small. La. Civ. Code, art. 1767.

ONEROUS DEED. In Scotch Law. A deed given for valuable consideration. Bell, Dict.; CONSIDERATION.

ONEROUS GIFT. The gift of a thing subject to certain charges imposed by the giver on the donee. Pothier, Obl.

ONOMASTIC. A term applied to a signature which is in a different handwriting from the body of the instrument. 2 Bentham, Jud. Ev. 460, 461.

ONUS PROBANDI (Lat.). **In Evidence.** The burden of proof.

2. It is a general rule that the party who alleges the affirmative of any proposition shall prove it. It is also a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant: for example, when to a plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time. 1 Term, 648. But where the negative involves a criminal omission by the party, and, consequently, where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. See 11 Johns. N. Y. 513; 19 *id.* 345; 9 Mart. La. 48; 3 Mart. La. N. s. 576.

3. In general, wherever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative: as when the law raises a presumption as to the continuance of life, the legitimacy of children born in wedlock, or the satisfaction of a debt. See, generally, 1 Phillipps, Ev. 156; 1 Starkie, Ev. 376; Roscoe, Civ. Ev. 51; Roscoe, Crim. Ev. 55; Buller, Nisi P. 298; 2 Gall. C. C.

485; 1 M'Cord, S. C. 573; 12 Viner, Abr. 201; 4 Bouvier, Inst. n. 4411.

The party on whom the *onus probandi* lies is entitled to begin, notwithstanding the technical form of the proceedings. 1 Starkie, Ev. 584; 3 Bouvier, Inst. n. 3043. See BURDEN OF PROOF.

OPEN. To begin. He begins or opens who has the affirmative of an issue. 1 Greenleaf, Ev. § 74.

To open a case is to make a statement of the pleadings in a case, which is called the opening. This should be concise, very distinct, and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case and the points in issue. 1 Stark. 439; 2 *id.* 317.

To vacate; to relieve a party who has an equitable right to such relief against a proceeding which is to him a formal or legal bar; to allow a re-discussion on the merits.

For example, to open a rule of court. 2 Chitty, Bail, 265; 5 Taunt. 623; 1 Mann. & G. 555; 7 Ad. & E. 519. To open a judgment or default. 4 R. I. 324; 1 Wisc. 631. See OPENING A JUDGMENT. To open a marriage settlement or an estate-tail; *i.e.* to allow a new settlement of the estate. To open biddings; *i.e.* to allow a re-sale. See OPENING BIDDINGS. To open contract. 44 Me. 206.

OPEN ACCOUNT. A running or unsettled account.

OPEN A CREDIT. To accept or pay the draft of a correspondent who has not furnished funds. Pardessus, n. 296.

OPEN COURT. A court formally opened and engaged in the transaction of all judicial functions.

A court to which all persons have free access as spectators while they conduct themselves in an orderly manner.

The term is used in the first sense as distinguishing a court from a judge sitting in chambers or informally for the transaction of such matters as may be thus transacted. See CHAMBERS; COURT.

In the second sense, all courts in the United States are open; but in England, formerly, while the parties and probably their witnesses were admitted freely in the courts, all other persons were required to pay in order to obtain admittance. Stat. 13 Edw. I. cc. 42, 44; Barr. on the Stat. 126, 127. See Prin. of Pen. Law, 165.

OPEN POLICY. An open policy is one in which the amount of the interest of the insured is not fixed by the policy, and is to be ascertained in case of loss. See POLICY.

OPENING. In American Practice. The beginning. The commencement. The first address of the counsel.

The opening is made immediately upon the impanelling of the jury: it embraces the reading of such of the pleadings as may be necessary, and a brief outline of the case as the party expects to prove it, where there is a trial, or of the argument, where it is addressed to the court.

In English Practice. The address made immediately after the evidence is closed. Such address usually states—*first*, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; *second*, at least an outline of the evidence by which those claims are to be established; *third*, the legal grounds and authorities in favor of the claim or of the proposed evidence; *fourth*, an anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and the reasons why it ought to fail. But the court will sometimes restrict counsel from an anticipation of the defence. 3 Chitty Pract. 881; 3 Bouvier, Inst. n. 3044 *et seq.*

OPENING BIDDINGS. Ordering a re-sale. When estates are sold under decree of equity to the highest bidder, the court will, on notice of an offer of a sufficient advance on the price obtained, *open the biddings, i.e.* order a re-sale. But this will not generally be done after the confirmation of the certificate of the highest bidder. So, by analogy, a re-sale has been ordered of an estate sold under bankruptcy. Sugden, Vend. 90; 22 Barb. N. Y. 167; 8 Md. 322; 9 *id.* 228; 13 Gratt. Va. 639; 4 Wisc. 242; 31 Miss. 514.

OPENING A JUDGMENT. In Practice. An act of the court by which a judgment is so far annulled that it cannot be executed, although it still retains some qualities of a judgment: as, for example, its binding operation or lien upon the real estate of the defendant.

The opening of the judgment takes place when some person having an interest makes affidavit to facts which, if true, would render the execution of such judgment inequitable. The judgment is opened so as to be in effect an award of a collateral issue to try the facts alleged in the affidavit. 6 Watts & S. Penn. 493, 494.

OPENING OF A POLICY OF INSURANCE. The question has been made whether, and in what cases, if any, the valuation in a valued policy shall be opened. The valuation, being a part of the agreement of the parties, is not to be set aside as between them in any case. The question is, how shall it be treated where only a part of the subject insured and valued is put at a risk, and also in the settlement of a particular average? and the answer is the same in both cases: viz., when the proportion or rate per centum put at risk or lost is ascertained, the agreed valuation of the whole is to be applied to the part put at risk or the proportion lost, *pro rata*. 2 Phillips, Ins. 1203.

OPERATION OF LAW. A term applied to indicate the manner in which a party acquires rights without any act of his own: as, the right to an estate of one who dies intestate is cast upon the heir at law, by operation of law; when a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law. 5 Barnew. & C. 269; 9 *id.* 298; 2 Barnew. & Ad. 119; 5 Taunt. 518. See DESCENT; PURCHASE.

OPERATIVE. A workman; one employed to perform labor for another.

2. This word is used in the bankrupt law of 19th August, 1841, s. 5, which directs that any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of wages due to him for such labor, not exceeding twenty-five dollars: provided that such labor shall have been performed within six months next before the bankruptcy of his employer.

3. Under this act, it has been decided that an apprentice who had done work beyond a task allotted to him by his master, commonly called overwork, under an agreement on the part of the master to pay for such work, was entitled as an operative. 1 Penn. Law Journ. 368. See 3 C. Rob. Adm. 237; 2 Cranch, 240, 270.

OPINION. In Evidence. An inference or conclusion drawn by a witness, as distinguished from facts known to him as facts.

2. It is the province of the jury to draw inferences and conclusions; and if witnesses were in general allowed to testify what they judge as well as what they know, the verdict would sometimes prove not the decision of the jury, but that of the witnesses. Hence the rule that, in general, the witness cannot be asked his opinion upon a particular question. 29 N. H. 94; 16 Ill. 513; 18 Ga. 194, 573; 7 Wend. N. Y. 560; 24 *id.* 668; 2 N. Y. 514; 9 *id.* 371; 17 *id.* 340.

Some confusion in the application of this rule arises from the delicacy of the line which divides that which is to be regarded as matter of observation from that which is matter of judgment founded upon observation. Thus, it is held that an unprofessional witness may testify to the fact that a person whom he saw was intoxicated, whether he is able to state all the constituent facts which amount to drunkenness or not. 14 N. Y. 562; 26 Ala. N. S. 26. But, on the other hand, insanity or mental incapacity cannot, in general, be proved by the mere assertion of an unprofessional witness. 17 N. Y. 340; 7 Barb. N. Y. 314; 13 Tex. 568. And see 25 Ala. N. S. 21.

3. So handwriting may be proved by being recognized by a witness who has seen other writings of the party in the usual course of business, or who has seen him write. Peake, Nisi P. 21; 1 Esp. 15, 351; 2 Johns. Cas. N. Y. 211; 19 Johns. N. Y. 134. But, on the other hand, the authorship of an anonymous article in a newspaper cannot be proved by one professing to have a knowledge of the author's style. How, App. Cas. N. Y. 187, 202.

From necessity, an exception to this rule of excluding opinions is made in questions involving matters of science, art, or trade, where skill and knowledge possessed by a witness, peculiar to the subject, give a value to his opinion above that of any inference which the jury could draw from facts which he might state. 4 Hill, N. Y. 129; 1 Den. N. Y. 281; 3 Ill. 297; 2 N. H. 480; 2 Stor. C. C. 421. Such a witness is termed an expert; and he may give his opinion in evidence.

4. The following reference to some of the matters in which the opinions of expert witnesses have been held admissible will illustrate this principle. The unwritten or common law of foreign countries may be proved by the opinion of witnesses possessing professional knowledge, Story, Confl. of L. 530; 1 Cranch, 12, 38; 2 *id.* 236; 6 Pet. 763; Pet. C. C. 225; 2 Wash. C. C. 1, 175; 2 Wend. N. Y. 411; 5 *id.* 375; 3 Pick. Mass. 293; 4 Conn. 517; 6 *id.* 486; 4 Bibb, Ky. 73; 2 Marsh. Ky. 609; 5 Harr. & J. Md. 186; 1 Johns. N. Y. 385; 3 *id.* 105; 14 Mass. 455; 6 Conn. 508; 1 Vt. 336; 15 Serg. & R. Penn. 87; 1 La. 153; 3 *id.* 53; 6 Cranch, 274; see, also, 14 Serg. & R. Penn. 137; 3 N. H. 349; 3 Yeates, Penn. 527; 1 Wheel. Crim. Cas. N. Y. 205; 6 Rand. Va. 704; 2 Russell, Crimes, 623; 4 Campb. 155; Russ. & R. 456; 2 Esp. 58; 3 Phill. 449; 1 Eccl. 291; the degree of hazard of property insured against fire, 17 Barb. N. Y. 111; 4 Zabr. N. J. 843; handwriting, 35 Me. 78; 2 R. I. 319; 25 N. H. 87; 1 Jones, No. C. 94, 150; 13 B. Monr. Ky. 258; mechanical operations, the proper way of conducting a particular manufacture, and the effect of a certain method, 4 Barb. N. Y. 614; 19 *id.* 338; 3 N. Y. 322; negligence of a navigator, and its effect in producing a collision, 24 Ala. N. S. 21; sanity, 1 Add. 244; 12 N. Y. 358; 17 *id.* 340; impotency, 3 Phill. Eccl. 14; value of chattels, 22 Ala. N. S. 370; 11 Cush. Mass. 257; 22 Barb. N. Y. 652, 656; 23 Wend. N. Y. 354; value of land, 11 Cush. Mass. 201; 4 Gray, Mass. 607; 9 N. Y. 183; compare 4 Ohio St. 583; value of services, 15 Barb. N. Y. 550; 20 *id.* 387; benefit to real property by laying out a street adjacent thereto, 2 Gray, Mass. 107; survey-marks identified as being those made by United States surveyors, 24 Ala. N. S. 390; seaworthiness, Peake, Cas. 25; 10 Bingh. 57 And see 9 Cush. Mass. 226. So an engineer may be called to say what, in his opinion, is the cause that a harbor has been blocked up. 3 Dougl. 158; 1 Phillipps, Ev. 276; 4 Term, 498.

5. It is to be observed, however, that the principle of admitting such opinions is taken with the qualifications necessary to make, as far as possible, the judgment of the jury, and not that of the witness, the final means of determining the issue. Thus, opinions of experts are not admissible upon the question of damages, 4 Den. 311; 3 Hill, N. Y. 609; 21 Barb. N. Y. 331; 23 Wend. N. Y. 425; 2 N. Y. 514; 1 E. D. Smith, N. Y. 536; and experts are always confined to opinions within the scope of their professions, and are not allowed to give opinions on things of which the jury can as well judge. 5 Rog. Rec. N. Y. 26; 4 Wend. N. Y. 320; 14 Me. 398; 3 Dan. Ky. 382; 1 Penn. 161; 2 Halst. N. J. 244; 7 Vt. 161; 6 Rand. Va. 704; 4 Yeates, Penn. 262; 9 Conn. 102; 3 N. H. 349; 5 Harr. & J. Md. 438; 1 Den. N. Y. 281. A distinction is also to be observed between a feeble impression and a mere opinion or belief. 3 Ohio St. 406; 19 Wend. N. Y. 477.

In Practice. The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case. The judgment itself is sometimes called an opinion; and sometimes the opinion is spoken of as the judgment of the court.

A declaration, usually in writing, made by a counsel to his client of what the law is, according to his judgment, on a statement of facts submitted to him.

An opinion is in both the above cases a decision of what principles of law are to be applied in the particular case, with the difference that judicial opinions pronounced by the court are law and of authority, while the opinions of counsel, however eminent, are merely advice to his client or argument to the court.

6. Where there are several judges, and they do not all agree in the disposition of the cause, the opinion of the majority is termed the prevailing opinion, or the opinion of the court. The opinion of the minority is termed the dissenting opinion. The opinions of the courts, collected and provided with such preliminary statements of facts and of the arguments of counsel as may be necessary in each case to an understanding of the decision, make up the books of reports.

Opinions are said to be judicial or extra-judicial. A judicial opinion is one which is given on a question which is actually involved in the matter brought before the judge for his decision; an extra-judicial opinion is one which, although given by a judge in deciding a case, is not necessary to the judgment, Vaugh. 382; 1 Hale, Hist. 141; and, whether given in or out of court, is no more than the *prolatum* of him who gives it, and has no legal efficacy. 4 Penn. St. 28. Where a point is essential to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court. But if it appears from the report of the case that such point was not taken or inquired into at all, there is no ground for this presumption, and the authority of the case is proportionably weakened. 8 Abb. Pract. N. Y. 316.

7. Where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be presumed to have concurred in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion. 6 N. Y. 9. Where a judgment is reversed upon a part only of the grounds on which it went, it is still deemed an authority as to the other grounds not questioned. See 5 Johns. N. Y. 125.

8. Counsel should, in giving an opinion, as far as practicable, give, *first*, a direct and positive opinion, meeting the point and effect of the question, and, if the question proposed is properly divisible into several, treating it accordingly. *Second*, his reasons, succinctly stated, in support of such opinion. *Third*, a reference to the statutes or decisions on the subject. *Fourth*, when the facts are susceptible of a material difference in statement, a suggestion of the probability of such variation. When an opinion is sought as a guide in respect to maintaining an action or defence, some other matters should be noticed:—as, *Fifth*, any necessary precautionary suggestions in reference to the possibility of a fatal defect in the evidence, arising from the nature of the case. Thus, where some important fact is stated as resting principally on the statement of the party interested, if by the law of the place such party is incompetent to testify respecting it, a suggestion ought to be made to inquire how that fact is to be proved. *Sixth*, a suggestion of the proper mode of proceeding, or the process or pleadings to be adopted.

9. In English and American law, the opinions of counsel, however eminent, are not entitled to any weight with the court as *evidence* of the law. While the court will deem it their duty to receive such opinions as arguments and entitled to whatever weight they may have as such, they will not yield to them any authority. 4 Penn. 1, 28. In many cases, however, where a client acts in good faith under the advice of counsel, he may on that ground be protected from a liability which the court in its discretion might otherwise have imposed upon him.

OPPOSITION. In Practice. The act of a creditor who declares his dissent to a debtor's being discharged under the insolvent laws.

OPPRESSOR. One who having public authority uses it unlawfully to tyrannize over another: as, if he keep him in prison until he shall do something which he is not lawfully bound to do.

To charge a magistrate with being an oppressor is, therefore, actionable. 1 Starkie, Sland. 185.

OPPROBRIUM. In Civil Law. Ignominy; shame; infamy.

OPTION. Choice; election. See those titles.

OPTIONAL WRIT. An original writ in the alternative, commanding either to do a thing or show cause why it has not been done. 3 Sharswood, Blackst. Comm. 274; Finch, Law, 257.

OPUS LOCATUM (Lat.). **In Civil Law.** A work (*i.e.* the result of work) let to another to be used. A work (*i.e.* something to be completed by work) hired to be done by another. Vicat, Voc. Jur. *Opus*, *Locare;* L. 51, § 1, D. *Locat.;* L. 1, § 1, D. *ad leg. Rhod.*

OPUS MAGNIFICIUM or **MANIFICIUM** (from Lat. *opus*, work, *manus*, hand). **In Old English Law.** Manual labor. Fleta, l. 2, c. 48, § 3.

OR. A disjunctive particle.

2. As a particle, *or* is often construed *and*,

and *and* construed *or*, to further the intent of the parties, in legacies, devises, deeds, bonds, and writings. 3 Gill, Md. 492; 7 *id.* 197; 1 Call, Va. 212; 2 Roper, Leg. text and notes of American editor 1400, 1405; 3 Greenleaf, Ev. tit. 38, c. 9, § 18, note, and text, § 25; 1 Jarman, Wills, c. 17, p. 427, 2d ed., and cases cited in Perk. note.; 1 Williams, Ex. 932, notes k, l; 5 Coke, 112 *a;* Croke Jac. 322; 4 Zabr. N. J. 686; 3 Term, 470.

3. Where an indictment is in the alternative, as forged or caused to be forged, it is bad for uncertainty. 2 Strange, 900; Hardw. 370; 1 Younge & J. Exch. 22. But a description of a horse as of a brown or bay color, in an indictment for larceny of such horse, is good, 13 Vt. 687; and so an indictment describing a nuisance as in the highway or road. 1 Dall. Penn. 150. See 28 Vt. 583; 24 Conn. 286; 13 Ark. 397.

When the word *or* in a statute is used in the sense of *to wit*, that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus, it was held that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank-bills *or* promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute on which the indictment was framed, that promissory note was used merely as explanatory of bank-bill, and meant the same thing. 8 Mass. 59; 2 Gray, Mass. 502.

In general, see Croke Eliz. 832; 27 Hen. VIII. 18 *b;* Hardw. 91, 94; 1 Ventr. 148; 2 Sandf. N. Y. 369; 1 Jones, No. C. 309; 3 Atk. Ch. 291; 3 Term, 470; 6 *id.* 34; 12 East, 288; 1 Bingh. 500; 2 Drur. & Warr. 471; 7 Jur. 570.

ORACULUM (Lat.). **In Civil Law.** The name of a kind of decision given by the Roman emperors.

ORAL. Spoken, in contradistinction to written: as, oral evidence, which is evidence delivered verbally by a witness.

ORATOR. In Chancery Practice. The party who files a bill.

In Roman Law. An advocate. Code, 1. 3 33. 1.

ORDAIN. To ordain is to make an ordinance, to enact a law.

The preamble to the constitution of the United States declares that the people "do ordain and establish this constitution for the United States of America." The third article of the same constitution declares that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See 1 Wheat. 304, 324; 4 *id.* 316, 402.

ORDEAL. An ancient superstitious mode of trial.

When in a criminal case the accused was arraigned, he might select the mode of trial either by God and his country, that is, by jury, or by God only, that is, by ordeal.

The trial by ordeal was either by fire or by water. Those who were tried by the former passed barefooted and blindfolded over nine hot glowing ploughshares, or were to carry burning irons in their hands, and accordingly as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water, the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt, they were taken to be innocent of the crime.

It was supposed that God would, by the mere contrivance of man, exercise his power in favor of the innocent. 4 Blackstone, Comm. 342; 2 Am. Jur. 280. For a detailed account of the trial by ordeal, see Herbert, Antiq. of the Inns of Court, 146.

ORDER. Command; direction.

An informal bill of exchange or letter of request requiring the party to whom it is addressed to deliver property of the person making the order to some one therein edscribed.

A designation of the person to whom a bill of exchange or negotiable promissory note is to be paid.

This order, in the case of negotiable paper, is usually by indorsement, and may be either express, as, "Pay to C D," or implied merely, as by writing A B [the payee's name]. See INDORSEMENT.

In French Law. The act by which the rank of preferences of claims, among creditors who have liens over the price which arises out of the sale of an immovable subject, is ascertained. Dalloz, Dict.

In Governmental Law. By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders: namely, that of the senators, that of the patricians, and that of the plebeians.

In the United States there are no orders of men; all men are equal in the eye of the law. See RANK.

ORDER OF FILIATION. The name of a judgment rendered by two justices, having jurisdiction in such case, in which a man therein named is adjudged to be the putative father of a bastard child, and it is further adjudged that he pay a certain sum for its support.

The order must bear upon its face—*first*, that it was made upon the complaint of the township, parish, or other place where the child was born and is chargeable; *second*, that it was made by justices of the peace having jurisdiction, 1 Salk. 122, pl. 6; 2 Ld. Raym. 1197; *third*, the birthplace of the child; *fourth*, the examination of the putative father and of the mother, but it is said the presence of the putative father is not requisite if he has been summoned. Cald.

308; *fifth*, the judgment that the defendant is the putative father of the child, Sid. 363; Style, 154; Dalt. 52; Dougl. 662; *sixth*, that he shall maintain the child as long as he shall be chargeable to the township, parish, or other place, which must be named, 1 Salk. 121, pl. 2; Comb. 232; but the order may be that the father shall pay a certain sum weekly as long as the child is chargeable to the public, Style, 134; Ventr. 210; *seventh*, it must be dated, signed, and sealed by the justices. Such order cannot be vacated by two other justices. 15 Johns. N. Y. 208. See 4 Cow. N. Y. 253; 8 *id.* 623; 12 Johns. N. Y. 195; 2 Blackf. Ind. 42.

ORDER NISI. A conditional order, which is to be confirmed *unless* something be done, which has been required, by a time specified. Eden, Inj. 122.

ORDERS. Rules made by a court or other competent jurisdiction. The formula is generally in these words: *It is ordered*, etc.

The instructions given by the owner to the captain or commander of a ship, which he is to follow in the course of the voyage.

ORDINANCE. A law; a statute; a decree.

This word is more usually applied to the laws of a corporation than to the acts of the legislature: as, the ordinances of the city of Philadelphia. The following account of the difference between a statute and an ordinance is extracted from Bacon's Abridgment, *Statute* (A). "Where the proceeding consisted only of a petition from parliament and an answer from the king, these were entered on the *parliament roll*; and if the matter was of a public nature, the whole was then styled an *ordinance*: if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the *statute roll*." See Coke, Litt. 159 *b*, Butler's note; 3 Reeve, Hist. Eng. Law, 146.

According to Lord Coke, the difference between a statute and an ordinance is that the latter has not had the assent of the king, lords, and commons, but is made merely by two of these powers. Coke, 4th Inst. 25. See Barrington, Stat. 41, note (x).

ORDINARY. In Ecclesiastical Law. An officer who has original jurisdiction in his own right, and not by deputation.

In England, the ordinary is an officer who has immediate jurisdiction in ecclesiastical causes. Coke, Litt. 344.

In the United States, the ordinary possesses, in those states where such officer exists, powers vested in him by the constitution and acts of the legislature. In South Carolina, the ordinary is a judicial officer. 1 Const. So. C. 267; 2 *id.* 384.

ORDINARY CARE. That degree of care which men of ordinary prudence exercise in taking care of their own property. It can only be determined by the circumstances of each particular case whether ordinary care was used. This degree of care is that required of bailees for the mutual benefit of bailor and bailee. 3 Mass. 132; 8 Metc. Mass. 91; 2 Wisc. 316; 16 Ark. 308; 23 Conn. 443; 40 Me. 64; 19 Ga. 427; 28 Vt. 150, 458; 9 N. Y. 416; 26 Ala. N. s. 203; 1 Dutch. N. J. 556; 36 Eng. L. & Eq. 506; 4 Ind. 368; 1 E. D. Smith, N. Y. 36, 271.

ORDINARY SKILL. Such skill as a person conversant with the matter undertaken might be reasonably supposed to have. 11 Mees. & W. Exch. 113; 20 Mart. La. 68, 75; 1 H. Blackst. 158, 161; 6 Ga. 213, 219; 8 B. Monr. Ky. 515; 3 Barb. N. Y. 380; 13 Johns. N. Y. 211; 4 Burr. 2060; 3 Campb. 17, 19; 7 Carr. & P. 289; 6 Bingh. 460; 2 Bingh. N. c. 625; 16 Serg. & R. Penn. 368; 15 Mass. 316; 15 Pick. Mass. 440; 2 Cush. Mass. 316; 8 Carr. & P. 479; 3 Campb. 451; 4 Barnew. & C. 345.

One who undertakes to act in a professional or other clearly defined capacity is bound to exercise the skill appropriate to such capacity, though the undertaking be gratuitous. 20 Penn. St. 136; 31 N. H. 119.

ORDINATION. The act of conferring the orders of the church upon an individual.

ORDINIS BENEFICIUM. See BENEFICIUM ORDINIS.

ORDONNANCE DE LA MARINE. See CODE, § 24.

ORE TENUS (Lat.). Verbally; orally. Formerly the pleadings of the parties were *ore tenus*; and the practice is said to have been retained till the reign of Edward III. 3 Reeve, Hist. Eng. Law, 95; Stephen, Plead. 29. And see Bracton, 372 *b*.

In chancery practice, a defendant may demur at the bar *ore tenus*, 3 P. Will. 370, if he has not sustained the demurrer on the record. 1 Swanst. Ch. 288; Mitford, Plead. 176; 6 Ves. Ch. 779; 8 *id.* 405; 17 *id.* 215, 216.

OREGON. One of the new states of the United States.

2. In July, 1845, a territorial government was established by the people of Oregon territory, to last till such time as the United States should extend its jurisdiction over the territory. This was done in 1848 by act of congress approved Aug. 14. A convention assembled at Salem, Sept. 18, 1857, and framed a constitution, which was submitted to the people and by them adopted, as announced by the proclamation of the governor, dated Dec. 14, 1857. By act of congress, approved Feb. 14, 1859, Oregon was admitted into the Union on an equal footing with the other states, with the following boundaries: beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship-channel of the Columbia river; thence easterly to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near fort Walla-Walla, where the forty-sixth parallel of north latitude crosses said river; thence east on said parallel to the middle of the main

channel of the Shoshones or Snake river; thence up the middle of the main channel of said river to the mouth of the Owyhee river; thence due south to the parallel of latitude forty-two degrees north; thence west along said parallel to the place of beginning; including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with states and territories of which those rivers form a boundary in common with this state. The residue of the territory which had before constituted the territory of Oregon was incorporated into and made part of the territory of Washington. See WASHINGTON.

The Legislative Department.

3. The legislative authority is vested in a *legislative assembly*, consisting of a Senate and House of Representatives.

The *Senate* is to consist of sixteen members, which number may be increased to thirty, elected for the term of four years by the electors of the districts into which the state is divided for the purpose. The senate is divided into two classes: so that one-half the number may be changed every two years.

The *House of Representatives* is to consist of thirty-four members, which number may be increased to sixty, chosen by the electors from the respective districts into which the state is divided for the purpose, for the term of two years.

Senators and representatives must be twenty-one years old, citizens of the United States, and for a year at least preceding the election inhabitants of the county or district from which they were chosen. Sessions of the assembly are holden every second year.

The Executive Department.

4. The *Governor* is elected for the term of four years, by the qualified electors, at the time and places of choosing members of the assembly. He is commander-in-chief of the military and naval forces of the state; must take care that the laws are faithfully executed; may convene the legislative assembly on extraordinary occasions; may grant reprieves, commutations, and pardons, after conviction, for all offences but treason, subject to regulations prescribed by the assembly. He has the veto power. He must be thirty years old, a citizen of the United States, and must have been for three years preceding his election a resident in the state. In case of removal, death, resignation, or inability of the governor, the duties of his office devolve upon the secretary of state, and in case of his removal, death, resignation, or disability, upon the president of the senate, till a governor is elected.

A *Secretary of State* is elected, by the qualified electors, for the term of four years.

A *Treasurer of State* is elected, by the qualified electors, for the term of four years.

In each county, a county clerk, treasurer, sheriff, coroner, and surveyor are elected, for the term of two years.

The Judicial Department.

5. The *Supreme Court* consists of four justices (which number may be increased to seven), chosen in districts by the electors, for the term of six years; and the terms are so arranged that one, at least, is to be elected every second year. They must be citizens of the United States, and must have resided three years in the state, and after their election must reside in their respective districts. It has jurisdiction only to revise final decisions of the circuit courts; and the judge, when any case was tried in the circuit court, does not sit in that case. One term at least must be held annually at the seat of government, and concise statements of the decisions are filed with the secretary of state.

Circuit Courts are held twice, at least, in each county, by a judge of the supreme court. These courts are the courts of general original jurisdiction, having jurisdiction in all cases not specifically given to other courts. A distinct provision is made for reorganization when the population of the state shall amount to two hundred thousand.

County Courts are held in each county, by a judge elected for the term of four years. It has the jurisdiction pertaining to courts of probate and county commissioners, and may have, by act of assembly, civil jurisdiction to the extent of five hundred dollars, and "criminal jurisdiction not extending to death or imprisonment in the penitentiary."

A county clerk and sheriff are elected in each county, for the term of two years, and in each district composed of one or more counties a prosecuting attorney, who is a law officer of the state, and of the counties within his district.

A judge of the supreme court, or prosecuting officer, may be removed from office by the governor, upon the joint resolution of the legislative assembly in which two-thirds of the members present concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution.

ORFGILD (Sax. *orf*, cattle, *gild*, payment. Also called *cheapgild*). A payment for cattle, or the restoring them. Cowel.

A restitution made by the hundred or county of any wrong done by one that was in pledge. Lambard, Archaion. 125, 126.

A penalty for taking away cattle. Blount.

ORIGINAL. An authentic instrument of something, and which is to serve as a model or example to be copied or imitated. It also means first, or not deriving any authority from any other source: as, original jurisdiction, original writ, original bill, and the like.

2. Originals are single or duplicate: single, when there is but one; duplicate, when there are two. In the case of printed documents, all the impressions are *originals*, or in the nature of *duplicate originals*, and any copy will be primary evidence. 2 Stark. 130. But see 14 Serg. & R. Penn. 200; 2 Bouvier, Inst. n. 2001.

3. When an original document is not evidence at common law, and a copy of such original is made evidence by an act of the legislature, the original is not therefore made admissible evidence by implication. 2 Campb. 121, n.

ORIGINAL BILL. In Chancery Practice. A bill relating to a matter not before brought before the court by the same parties, standing in the same interests. Mitford, Eq. Plead. 33; Willis, Plead. 13 *et seq.*

Proceedings in a court of chancery are either commenced by way of information, when the matter concerns the state or those under its protection, or by original petition or bill, when the matter does not concern the state or those under its protection. The original bill states simply the cause of complaint, and asks for relief. It is composed of nine parts, Story, Eq. Plead. 7, 8, and is the foundation of all subsequent proceedings before the court. See 1 Daniell, Chanc. Pract. 351. See BILL.

ORIGINAL CONVEYANCES (called, also, primary conveyances) are those conveyances by means whereof the benefit or estate is created or first arises: viz. feoffment, gift,

grant, lease, exchange, partition. 2 Sharswood, Blackst. Comm. 309, 310*; 1 Stephen, Comm. 466.

ORIGINAL ENTRY. The first entry made by a merchant, tradesman, or other person in his account-books, charging another with merchandise, materials, work or labor, or cash, on a contract made between them.

2. Such an entry, to be admissible as evidence, must be made in a proper book. In general, the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered or work and labor done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries. 1 Rawle, Penn. 435; 4 *id.* 408; 2 Watts, Penn. 451; 4 *id.* 258; 5 *id.* 432; 6 Whart. Penn. 189; 2 Miles, Penn. 268. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered, but before they were delivered, is not a book of original entries. 4 Rawle, Penn. 404. And unconnected scraps of paper, containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries. 13 Serg. & R. Penn. 126. See 2 Whart. Penn. 33; 4 M'Cord, So. C. 76; 20 Wend. N. Y. 72; 1 Yeates, Penn. 198; 4 *id.* 341.

3. The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done: they ought not to be made after the lapse of one day. 1 Nott & McC. So. C. 130; 4 *id.* 77; 4 Serg. & R. Penn. 5; 9 *id.* 285; 8 Watts, Penn. 545. A book in which the charges are made when the goods are ordered is not admissible. 4 Rawle, Penn. 404; 3 Dev. No. C. 449.

The entry must be made in an intelligible manner, and not in figures or hieroglyphics which are understood by the seller only. 4 Rawle, Penn. 404. A charge made in the gross as "190 days' work," 1 Nott & M'C. So. C. 130, or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the general's daughters in curing the hooping-cough," 2 Cons. So. C. 476, were rejected. An entry of goods without carrying out any prices proves, at most, only a sale; and the jury cannot, without other evidence, fix any price. 1 South. So. C. 370. The charges should be specific, and denote the particular work or service charged as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price and value to each item. 2 Const. So. C. 745; 2 Bail. So. C. 449; 1 Nott & M'C. So. C. 130.

4. The entry must, of course, have been made by a person having authority to make it, 4 Rawle, Penn. 404, and with a view to charge the party. 8 Watts, Penn. 545.

The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it from the necessity of the case, although he has an interest in the matter in dispute. 5 Conn. 496; 12 Johns. N. Y. 461; 1 Dall. Penn. 239. When made by a clerk, it must be proved by him. But in either case, when the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence out of the state, the handwriting may be proved by a person acquainted with the handwriting of the person who made the entry. 2 Watts & S. Penn. 137. But the plaintiff is not competent to prove the hand writing of a deceased clerk who made the entries. 1 Browne, Penn. App. liii.

The books and original entries, when proved by the supplementary oath of the party, is *primâ facie* evidence of the sale and delivery of goods, or of work and labor done. 1 Yeates, Penn. 347; Swift, Ev. 84; 3 Vt. 463; 1 M'Cord, So. C. 481; 2 Root, Conn. 59; 1 Cooke, Tenn. 38. But they are not evidence of money lent or cash paid, 1 Day, Conn. 104; 1 Aik. Vt. 73, 74; Kirb. Conn. 289; nor of the time a vessel lay at the plaintiff's wharf; 1 Browne, Penn. 257; nor of the delivery of goods to be sold on commission. 2 Whart. Penn. 33.

These entries are evidence in suits between third parties, 8 Wheat. 326; 3 Campb. 305, 377; 2 Perr. & D. 573; 15 Mass. 380; 20 Johns. N. Y. 168; 7 Wend. N. Y. 160; 15 Conn. 206; 7 Serg. & R. Penn. 116; 16 *id.* 89; 2 Harr. & J. Md. 77; 2 Rand. Va. 87; 1 Younge & C. Exch. 53; and also in favor of the party himself. 2 Mart. La. N. s. 508; 4 *id.* 383; 2 Mass. 217; 1 Dall. Penn. 239; 2 Bay, So. C. 173, 362; 5 Vt. 313; 1 Phillipps, Ev. 266, Cowen & H. note.

ORIGINAL JURISDICTION. See JURISDICTION.

ORIGINAL WRIT. In English Practice. A mandatory letter issued in the king's name, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to have been done, requiring him to command the wrong-doer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. This writ is deemed necessary to give the courts of law jurisdiction.

In modern practice, however, it is often dispensed with, by recourse, as usual, to fiction, and a proceeding *by bill* is substituted. In this country, our courts derive their jurisdiction from the constitution, and require no original writ to confer it. Improperly speaking, the first writ which is issued in a case is sometimes called an original writ; but it is not so in the English sense of the word. See 3 Blackstone, Comm. 273; Walker, Am. Law, 514.

ORIGINALIA (Lat.). **In English Law.** The transcripts and other documents sent to the office of the treasurer-remembrancer in

exchequer are called by this name to distinguish them from *recorda*, which contain the judgments of the barons.

ORNAMENT. An embellishment. In questions arising as to which of two things is to be considered as principal or accessory, it is the rule that an ornament shall be considered as accessory.

ORPHAN. A minor or infant who has lost both of his or her parents. Sometimes the term is applied to such a person who has lost only one of his or her parents. 3 Mer. Ch. 48; 2 Sim. & S. Ch. 93; Aso & M. Inst. b. 1, t. 2, c. 1. See 14 Hazzard, Penn. Reg. 188, 189, for a correspondence between the Hon. Joseph Hopkinson and ex-president J. Q. Adams as to the meaning of the word *orphan*. See, also, Hob. 247.

ORPHANAGE. In English Law. The share reserved to an orphan by the custom of London.

By the custom of London, when a freeman of that city dies, his estate is divided into three parts, as follows: one-third part to the widow; another to the children advanced by him in his lifetime, which is called the *orphanage;* and the other third part may be by him disposed of by will. Now, however, a freeman may dispose of his estate as he pleases; but in cases of intestacy the Statute of Distribution expressly excepts and reserves the custom of London. Lovelace, Wills, 102, 104; Bacon, Abr. *Custom of London* (C).

ORPHANS' COURT. In American Law. Courts of more or less extended probate jurisdiction. See the accounts of the respective states.

ORPHANOTROPHI. In Civil Law. Persons who have the charge of administering the affairs of houses destined for the use of orphans. Clef des Lois Rom. *Administrateurs.*

OSTENSIBLE PARTNER. One whose name appears in a firm as a partner, and who is really such.

OTHER WRONGS. See ALIA ENORMIA.

OTHESWORTHE (Sax. *eoth*, oath). Worthy to make oath. Bracton, 185, 192.

OUNCE. The name of a weight. See WEIGHTS.

OUSTER (L. Fr. *outre, oultre;* Lat. *ultra*, beyond). Out; beyond; besides; farther; also; over and more. *Le ouster*, the uppermost. Over: *respondeat ouster*, let him answer over. Britton, c. 29. *Ouster le mer*, over the sea. Jacob. Law Dict. *Ouster eit*, he went away. 6 Coke, 41 *b;* 9 *id.* 120.

To put out; to oust. *Il oust*, he put out or ousted. *Oustes*, ousted. 6 Coke, 41 *b.*

In Torts. The actual turning out or keeping excluded the party entitled to possession of any real property corporeal.

An ouster can properly be only from real property corporeal, and cannot be committed of any thing movable, 1 Carr. & P. 123; 2 Bouvier, Inst. n. 2348; 1 Chitty, Pract. 148, n. r; nor is a mere temporary trespass considered as an ouster. Any continuing act of exclusion from the enjoyment constitutes an ouster, even by one tenant in common of his co-tenant. Coke, Litt. 199 *b*, 200 *a*. See 3 Sharswood, Blackst. Comm. 167; Archbold, Civ. Plead. 6, 14; 1 Chitty, Pract. 374, where the remedies for an ouster are pointed out. See JUDGMENT OF RESPONDEAT OUSTER; Roscoe, Real Actions, 502, 552, 574, 582; 2 Crabb, Real Prop. § 2454 *a;* 1 Wooddeson, Lect. 501; Washburn, Real Prop.

OUSTER LE MAIN (L. Fr. to take out of the hand). **In Old English Law.** A livery of lands out of the hands of the lord after the tenant came of age. If the lord refused to deliver such lands, the tenant was entitled to a writ to recover the same from the lord: this recovery out of the hands of the lord was called ouster le main.

OUT OF THE STATE. Beyond sea, which title see.

OUT OF TIME. In Marine Insurance. Missing. Generally speaking, a ship may be said to be missing or out of time when she has not been heard of after the longest ordinary time in which the voyage is safely performed. 1 Arnoult, Ins. 540; 2 Duer, Ins. 469, n.

OUTFIT. An allowance made by the government of the United States to a minister plenipotentiary, or chargé des affaires, on going from the United States to any foreign country.

The outfit can in no case exceed one year's full salary of such minister or chargé des affaires. No outfit is allowed to a consul. Act of Congr. May 1, 1810, s. 1. See MINISTER.

OUTHOUSES. Buildings adjoining or belonging to dwelling-houses.

Buildings subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. 1 Bishop, Crim. Law, § 175; 4 Conn. 46; 4 Gill & J. Md. 402; 2 Crawf. & D. Cr. Cas. 479.

It is not easy to say what comes within and what is excluded from the meaning of outhouse. It has been decided that a *school-room*, separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house, the two buildings, together with some other, and the court which inclosed them, being rented by the same person, was properly described as an outhouse. Russ. & R. Cr. Cas. 295. See, for other cases, Coke, 3d Inst. 67; Burn, Just. *Burning*, II; 1 Leach, Cr. Cas. 49; 2 East, Pl. Cr. 1020, 1021; 5 Carr. & P. 555; 6 *id.* 402; 8 Barnew. & C. 461; 1 Mood. Cr. Cas. 323, 336; 4 Conn. 446; 11 Ala. N. S. 594; 20 *id.* 30.

OUTLAW. In English Law. One who is put out of the protection or aid of the law. 22 Viner, Abr. 316; 1 Phillipps, Ev. Index; Bacon, Abr. *Outlawry;* 2 Sellon, Pract. 277; Doctrina Plac. 331; 3 Sharswood, Blackst. Comm. 283, 284.

OUTLAWRY. In English Law. The

act of being put out of the protection of the law, by process regularly sued out against a person who is in contempt in refusing to become amenable to the court having jurisdiction. The proceedings themselves are also called the outlawry.

Outlawry may take place in criminal or in civil cases. 3 Sharswood, Blackst. Comm. 283; Coke, Litt. 128; 4 Bouvier, Inst. n. 4196.

In the United States, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare. Dane, Abr. ch. 193 *a*, 34. See Bacon, Abr. *Abatement* (B), *Outlawry;* Gilbert, Hist. 196, 197; 2 Va. Cas. 244; 2 Dall. Penn. 92.

OUTRAGE. A grave injury; a serious wrong. This is a generic word which is applied to every thing which is injurious in a great degree to the honor or rights of another.

OUTRIDERS. In English Practice. Bailiffs employed by the sheriffs and their deputies to ride to the farthest places of their counties or hundreds, to summon such as they thought good to attend their county or hundred court.

OVERDRAW. To draw bills or checks upon an individual, bank, or other corporation, for a greater amount of funds than the party who draws is entitled to.

2. When a person has overdrawn his account without any intention to do so, and afterwards gives a check on a bank, the holder is required to present it, and on refusal of payment to give notice to the maker, in order to hold him bound for it; but when the maker has overdrawn the bank knowingly, having no funds there between the time the check is given and its presentment, the notice is not requisite. 2 Nott & M'C. So. C. 433.

OVERDUE. A bill, note, bond, or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.

The indorsement of a note or bill overdue is equivalent to drawing a new bill payable at sight. 2 Conn. 419; 18 Pick. Mass. 260; 9 Ala. N. S. 153.

A note, when passed or assigned, when overdue is subject to all the equities between the original contracting parties. 6 Conn. 5; 10 *id.* 30, 55; 3 Harr. N. J. 222.

OVER-INSURANCE. See DOUBLE INSURANCE.

OVERPLUS. What is left beyond a certain amount; the residue; the remainder of a thing. The same as surplus.

The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees, A, B, and C, shall take one-third. The overplus is uncertain where, for example, a testator does not know the value of his estate, and gives various legacies, and the *overplus* to another legatee: the latter will be entitled only to what may be left. 18 Ves. Ch. 466. See RESIDUE; SURPLUS.

OVERRULE. To annul; to make void.

This word is frequently used to signify that a case has been decided directly opposite to a former case: when this takes place, the first-decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority.

Mr. Greenleaf has made a very valuable collection of overruled cases, of great service to the practitioner.

It also signifies that a majority of the judges have decided against the opinion of the minority, in which case the latter are said to be overruled.

OVERSEERS OF THE POOR. Persons appointed or elected to take care of the poor with moneys furnished to them by the public authority.

The duties of these officers are regulated by local statutes. In general, the overseers are bound to perform those duties, and the neglect of them will subject them to an indictment. See 1 Sharswood, Blackst. Comm. 360; 16 Viner, Abr. 150; 1 Mass. 459; 3 *id.* 426; 1 Penn. N. J. 6, 136; Comyns, Dig. *Justices of the Peace* (B 63–65).

OVERSMAN. In Scotch Law. A person commonly named in a submission, to whom power is given to determine in case the arbiters cannot agree in the sentence. Sometimes the nomination of the oversman is left to the arbiters. In either case the oversman has no power to decide unless the arbiters differ in opinion. Erskine, Inst. 4. 3. 16. The office of an oversman very much resembles that of an umpire.

OVERT. Open.

An overt act in treason is proof of the intention of the traitor, because it opens his designs: without an overt act, treason cannot be committed. 2 Chitty, Crim. Law, 40. An overt act, then, is one which manifests the intention of the traitor to commit treason. Archbold, Crim. Plead. 379; 4 Sharswood, Blackst. Comm. 79; Coke, 3d Inst. 12; 1 Dall. Penn. 33; 2 *id.* 346; 4 Cranch, 75; 3 Wash. C. C. 234; 2 Gabbett, Crim. Law, 890, 891.

The mere contemplation or intention to commit a crime, although a sin in the sight of Heaven, is not an act amenable to human laws. The mere speculative wantonness of a licentious imagination, however dangerous or even sanguinary in its object, can in no case amount to a crime. But the moment that any overt act is manifest, the offender becomes amenable to the laws. See ATTEMPT; CONSPIRACY; Croke Car. 577.

OWELTY. The difference which is paid or secured by one coparcener to another for the purpose of equalizing a partition. Littleton, § 251; Coke, Litt. 169 *a;* 1 Watts, Penn. 265; 1 Whart. Penn. 292; Cruise, Dig. tit. 19, § 32; 1 Vern. Ch. 133; Plowd. 134; 16 Viner, Abr. 223, pl. 3; Brooke, Abr. *Partition*, § 5.

OWING. Something unpaid. A debt, for example, is owing while it is unpaid, and whether it be due or not.

In affidavits to hold to bail it is usual to state that the debt on which the action is founded is due, owing and unpaid. 1 Penn. Law Journ. 210.

OWLER. **In English Law.** One guilty of the offence of owling.

OWLING. **In English Law.** The offence of transporting wool or sheep out of the kingdom.

The name is said to owe its origin to the fact that this offence was carried on in the night, when the owl was abroad.

OWNER. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.

2. Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. The right of the absolute owner is more extended than that of him who has only a qualified ownership: as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stone, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imports an absolute owner; but it has been held in Ohio that the word owner, in the Mechanic Lien Law of that state, included the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the statute. 2 Ohio, 123.

3. The owner continues to have the same right although he perform no acts of ownership or be disabled from performing them, and although another perform such acts without the knowledge or against the will of the owner. But the owner may lose his right in a thing if he permit it to remain in the possession of a third person for a sufficient time to enable the latter to acquire a title to it by prescription or under the Statute of Limitation. See La. Civ. Code, b. 2, tit. 2, c. 1; Encyclopédie de M. d'Alembert, *Propriétaire.*

4. When there are several joint-owners of a thing,—as, for example, of a ship,—the majority of them have the right to make contracts in respect of such thing in the usual course of business or repair, and the like, and the minority will be bound by such contracts. Holt, 586; 1 Bell, Comm. 5th ed. 519; 5 Whart. Penn. 366.

OWNERSHIP. The right by which a thing belongs to some one in particular, to the exclusion of all others. La. Civ. Code, art. 480.

OXGANG (fr. Sax. *gang*, going, and ox; Law Lat. *bovata*). **In Old English Law.** So much land as an ox could till. According to some, fifteen acres. Coke, Litt. 69 *a*; Crompton, Jurisd. 220. According to Balfour, the Scotch *oxengang*, or *oxgate*, contained twelve acres; but this does not correspond with ancient charters. See Bell, Dict. *Ploughgate.* Skene says thirteen acres. Cowel.

OYER (Lat. *audire;* through L. Fr. *oyer*, to hear.).

In Pleading. A prayer or petition to the court that the party may hear read to him the deed, etc. stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a profert. The same end is now generally attained by giving a copy of the deed of which oyer is asked, or, in other instances, by setting forth the instrument in full in the plaintiff's statement of his case. Oyer as it existed at common law seems to be abolished in England. 1 Bos. & P. 646, n. *b;* 3 *id.* 398; 25 Eng. L. & Eq. 304. Oyer may be demanded of any specialty or other written instrument, as, bonds of all sorts, deeds-poll, indentures, letters testamentary and of administration, and the like, which the adverse party is obliged to plead with a *profert in curia.* But pleading with a profert unnecessarily does not give a right to demand oyer, 1 Salk. 497; and it may not be had except when profert is made. 1 Hempst. Ark. 265. Denial of oyer when it should be granted is ground for error. 1 Blackf. Ind. 126. In such cases the party making the claim should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading following the oyer, and demur, 1 Saund. 9 *b*, n. 1; Bac. Abr. *Pleas*, 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it. *Id.;* 2 Lev. 142; 6 Mod. 28. See PROFERT IN CURIA.

After craving oyer, the defendant may set forth the deed or a part thereof, or not, at his election, 1 Chitty, Pl. 372, and may afterwards plead *non est factum*, or any other plea, without stating the oyer, 2 Strange, 1241; 1 Wils. 97, and may demur if a material variance appear between the oyer and declaration. 2 Saund. 366, n.

See, generally, Comyns, Dig. *Pleader* (P), *Abatement* (I 22); 3 Bouvier, Inst. n. 2890.

OYER AND TERMINER. See ASSIZE; COURT OF OYER AND TERMINER.

OYEZ (Fr. hear ye). The introduction to any proclamation or advertisement by public crier. It is wrongly and usually pronounced oh yes. 4 Sharswood, Blackst. Comm. 340, n.

P.

PACE. A measure of length, containing two feet and a half. The geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

PACIFICATION (Lat. *pax*, peace, *facere*, to make). The act of making peace between two countries which have been at war; the restoration of public tranquillity.

PACK. To deceive by false appearances; to counterfeit; to delude: as, packing a jury. See JURY; Bacon, Abr. *Juries* (M); 12 Conn. 262.

PACT. In Civil Law. An agreement made by two or more persons on the same subject, in order to form some engagement, or to dissolve or modify one already made: *Conventio est duorum in idem placitum consensus de re solvendâ, id est faciendâ vel præstandâ.* Dig. 2. 14; Clef des Lois Rom.; Ayliffe, Pand. 558; Merlin, Rép. *Pacte.*

PACTIONS. In International Law. Contracts between nations which are to be performed by a single act, and of which execution is at an end at once. 1 Bouvier, Inst. n. 100.

PACTUM CONSTITUTÆ PECUNIÆ (Lat.). **In Civil Law.** An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined simply an agreement by which a person promises a creditor to pay him.

When a person by this pact promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Pothier, Obl. pt. 2, c. 6, s. 9.

There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumpsit.* The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt: it was not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished nor varied. 4 Coke, 91, 95. See 1 H. Blackst. 550–555, 850; Dougl. 6, 7; 3 Wood, Inst. 168, 169, n. *c;* 1 Viner. Abr. 270; Brooke, Abr. *Action sur le Case* (pl. 7, 69, 72); Fitzherbert, Nat. Brev. 94 A, n. a, 145 G; 4 Bos. & P. 295; 1 Chitty, Plead. 89; Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 4, nn. 388, 396.

PACTUM DE NON PETANDO (Lat.). **In Civil Law.** An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, of the common law. Wolff, Dr. de la Nat. § 755.

PACTUM DE QUOTA LITIS (Lat.). **In Civil Law.** An agreement by which a creditor of a sum difficult to recover promises a portion—for example, one-third—to the person who will undertake to recover it. In general, attorneys will abstain from making such a contract: yet it is not unlawful at common law.

PAGODA. In Commercial Law. A denomination of money in Bengal. In the computation of *ad valorem* duties it is valued at one dollar and ninety-four cents. Act of March 2, 1799, s. 61, 1 Story, U. S. Laws, 626. See FOREIGN COINS.

PAINE FORTE ET DURE. See PEINE FORTE ET DURE.

PAIS, PAYS. A French word, signifying country. In law, matter *in pais* is matter of fact, in opposition to matter of record: a trial *per pais* is a trial by the country,—that is, by a jury.

PALACE COURT. In English Law. A court which had jurisdiction of all personal actions arising between any parties within twelve miles of Whitehall, not including the city of London.

It was erected in the time of Charles I., and was held by the steward of the household, the knight-marshal and steward of the court, or his deputy. It had its sessions once a week, in the borough of Southwark. It was abolished by 12 & 13 Vict. c. 101, § 13.

PALFRIDUS (L. Lat.). A palfrey; a horse to travel on. Fitzherbert, Nat. Brev. 93.

PANDECTS. In Civil Law. The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law A.D. 533.

2. It is also known by the name of the Digest because in his compilation the writings of the jurists were reduced to order and condensed *quasi digestiæ.* The emperor, in 530, published an ordinance entitled *De Conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and, by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 533. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & R. Antiq. The

Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek.

The Digest is divided in two different ways: the first into fifty books, each book into several titles, and each title into several extracts or *leges*, and at the head of each series of extracts is the name of the lawyer from whose work they were taken.

3. The *first* book contains twenty-two titles. The subject of the first is *De Justicia et Jure*, of the division of person and things, of magistrates, etc. The *second*, divided into fifteen titles, treats of the power of magistrates and their jurisdiction, the manner of commencing suits, of agreements and compromises. The *third*, composed of six titles, treats of those who can and those who cannot sue, of advocates and attorneys and syndics, and of calumny. The *fourth*, divided into nine titles, treats of causes of restitution, of submissions and arbitrations, of minors, carriers by water, innkeepers, and those who have the care of the property of others. In the *fifth* there are six titles, which treat of jurisdiction and inofficious testaments. The subject of the *sixth*, in which there are three titles, is actions. The *seventh*, in nine titles, embraces whatever concerns usufructs, personal servitudes, habitations, the uses of real estate and its appurtenances, and of the sureties required of the usufructuary. The *eighth* book, in six titles, regulates urban and rural servitudes. The *ninth* book, in four titles, explains certain personal actions. The *tenth*, in four titles, treats of mixed actions. The object of the *eleventh* book, containing eight titles, is to regulate interrogatories, the cases of which the judge was to take cognizance, fugitive slaves, of gamblers, of surveyors who made false reports, and of funerals and funeral expenses. The *twelfth* book, in seven titles, regulates personal actions in which the plaintiff claims the title of a thing. The *thirteenth*, in seven titles, and the *fourteenth*, in six titles, regulate certain actions. The *fifteenth*, in four titles, treats of actions to which a father or master is liable in consequence of the acts of his children or slaves, and those to which he is entitled, of the *peculium* of children and slaves, and of the actions on this right.

4. The *sixteenth*, in three titles, contains the law relating to the senatus-consultum Velleianum, of compensation or set-off, and of the action of deposit. The *seventeenth*, in two titles, expounds the law of mandates and partnership. The *eighteenth* book, in seven titles, explains the contract of sale. The *nineteenth*, in five titles, treats of the actions which arise on a contract of sale. The law relating to pawns, hypothecation, the preference among creditors, and subrogation, occupy the *twentieth* book, which contains six titles. The *twenty-first* book explains, under three titles, the edict of the ediles relating to the sale of slaves and animals, then what relates to evictions and warranties. The *twenty-second* book, in six titles, treats of interest, profits, and accessories of things, proofs, presumptions, and of ignorance of law and fact. The *twenty-third*, in five titles, contains the law of marriage, and its accompanying agreements. The *twenty-fourth*, in three titles, and the *twenty-fifth*, in seven titles, regulates donations between husband and wife, divorces and their consequence. The *twenty-sixth* and *twenty-seventh*, each in two titles, contain the law relating to tutorship and curatorship. The *twenty-eighth*, in eight titles, and the *twenty-ninth*, in seven, contain the law on last will and testaments.

The *thirtieth*, *thirty-first* and *thirty-second*, each divided into two titles, contain the law of trusts and specific legacies.

The *thirty-third*, *thirty-fourth*, and *thirty fifth*—the first divided into ten titles, the second into nine titles, and the last into three titles—treat of various kinds of legacies. The *thirty-sixth*, containing four titles, explains the senatus-consultum Trebellianum, and the time when trusts become due.

5. The *thirty-seventh* book, containing fifteen titles, has two objects,—to regulate successions and to declare the respect which children owe their parents and freedmen their patrons. The *thirty-eighth* book, in seventeen titles, treats of a variety of subjects: of successions, and of the degree of kindred in successions; of possession; and of heirs The *thirty-ninth* explains the means which the law and the prætor take to prevent a threatened injury, and donations *inter vivos* and *mortis causâ*. The *fortieth*, in sixteen titles, treats of the state and condition of persons, and of what relates to freedmen and liberty. The different means of acquiring and losing title to property are explained in the *forty-first* book, in ten titles. The *forty-second*, in eight titles, treats of the *res judicata*, and of the seizure and sale of the property of a debtor. Interdicts, or possessory actions, are the object of the *forty-third* book, in three titles. The *forty-fourth* contains an enumeration of defences which arise in consequence of the *res judicata*, from the lapse of time, prescription, and the like. This occupies six titles; the seventh treats of obligations and actions. The *forty-fifth* speaks of stipulations, by freedmen or by slaves. It contains only three titles. The *forty-sixth*, in eight titles, treats of securities, novations and delegations, payments, releases, and acceptilations. In the *forty-seventh* book are explained the punishments inflicted for private crimes, *de privatis delictis*, among which are included larcenies, slander, libels, offences against religion and public manners, removing boundaries, and similar offences.

6. The *forty-eighth* book treats of public crimes, among which are enumerated those of *læsæ-majestatis*, adultery, murder, poisoning, parricide, extortion, and the like, with rules for procedure in such cases. The *forty-ninth*, in eighteen titles, treats of appeals, of the rights of the public treasury, of those who are in captivity, and of their repurchase. The *fiftieth* and last book, in seventeen titles, explains the rights of municipalities, and then treats of a variety of public officers.

These fifty books are allotted in seven parts: the first contains the first four books; the second, from the fifth to the eleventh book inclusive; the third, from the twelfth to the nineteenth inclusive; the fourth, from the twentieth to the twenty-seventh inclusive; the fifth, from the twenty-eighth to the thirty-sixth inclusive; the sixth commences with the thirty-seventh and ended with the forty-seventh book; and the seventh, or last, is composed of the last six books.

The division into *digestum vetus* (book first to and including title second of book twenty-fourth), *digestum infortiatum* (title third of book twenty-fourth, to and including book thirty-eighth), and *digestum novum* (from book thirty-ninth to the end), has reference to the order in which these three parts appeared.

The Pandects are more usually cited by English and American jurists by numbers, thus: Dig. 23. 3. 5. 6, meaning book 23, title 3, law or fragment 5, section 6; sometimes, also, otherwise, as, D. 23. 3. fr. 5. § 6; or fr. 5. § 6. D. 23. 3. The old mode of citing was by titles and initial words, thus: D. *de jure dotium*, L. *profectitia*, § *si pater*; or the same references in reverse order. From this afterwards originated the following: L. *profectitia* 5. § *si pater* 6, D. *de jure dotium*, and, lastly, L. 5. § 6. D. *de jure dotium*,—which is the form commonly used by the continental jurists of Europe. 1 Mackeldy, Civ. Law, 54, 55, § 65. And see Taylor, Civ. Law, 24, 25. The abbreviation *ff.* was commonly used instead of Dig. or Pandects.

7. The Pandects—as well indeed as all Justinian's laws, except some fragments of the Code and Novels—were lost to all Europe for a considerable period. During the pillage of Amalfi, in the war between the two soi-disant popes Innocent II. and Anaclet II., a soldier discovered an old manuscript, which attracted his attention by its envelope of many colors. It was carried to the Emperor Clothaire, and proved to be the Pandects of Justinian. The work was arranged in its present order by Warner, a German, whose Latin name is Irnerius, who was appointed by that emperor Professor of Roman Law at Bologna. 1 Fournel, Hist. des Avocats, 44, 46, 51. The style of the work is very grave and pure, and contrasts in this respect with that of the Code, which is very far from classical. On the other hand, the learning of the Digest stands rather in the discussing of subtle questions of law, and enumerations of the variety of opinions of ancient lawyers thereupon, than in practical matters of daily use, of which the Code so simply and directly treats. See Ridley, View, pt. i. ch. 1, 2.

PANEL (diminutive from either *pane*, apart, or *page*, *pagella*. Cowel). **In Practice.** A schedule or roll, containing the names of jurors summoned by virtue of a writ of *venire facias*, and annexed to the writ. It is returned into the court whence the *venire* issued. Coke, Litt. 158 *b*; 3 Sharswood, Blackst. Comm. 353.

In Scotch Law. The prisoner at the bar, or person who takes his trial before the court of justiciary for some crime. So called from the time of his appearance. Bell, Dict. Spelled. also, *pannel*.

PAPER-BOOK. In Practice. A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

Courts of error, and other courts, on arguments, require that the judges shall each be furnished with such a paper-book. In the court of king's bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined, in an issue in fact, is called the *paper-book*. Stephen, Plead. 95; 3 Sharswood, Blackst. Comm. 317; 3 Chitt. Pract. 521; 2 Strange, 1131, 1266; 1 Chitt. Bail, 277; 2 Wils. 243; Tidd, Pract. 727.

PAPER-DAYS. In English Law. Days on which special arguments are to take place. Tuesdays and Fridays in term-time are paper-days appointed by the court. Lee, Dict. of Pract.; Archbold, Pract. 101.

PAPER MONEY. The engagements to pay money which are issued by governments and banks, and which pass as money. Pardessus, Droit Com. n. 9. Bank-notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. See LEGAL TENDER.

PAR. In Common Law. Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; *above* par, or *below* par, when they sell for more or less.

PAR OF EXCHANGE. The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. The exchange between the two countries is said to be at par when bills are negotiated on this footing,—*i.e.* when a bill for £100 drawn on London sells in Paris for 2520 frs., and *vice versâ*. Bowen, Pol. Econ. 321. See 11 East, 267.

PARAGE. Equality of blood, name, or dignity, but more especially of land in the partition of an inheritance between co-heirs. Coke, Litt. 166 *b*. Hence disparage, and disparagement. Blount.

In Feudal Law. Where heirs took of the same stock and by same title, but from right of primogeniture, or some other cause, the shares were unequal, the younger was said to hold of the elder, *jure et titulo paragii*, by right and title of parage, being equal in every thing but the quantity, and owing no homage or fealty. Calvinus, Lex.

PARAGIUM (from the Latin adjective *par*, equal; made a substantive by the addition of *agium*. 1 Thomas, Coke, Litt. 681). Equality

In Ecclesiastical Law. The portion which a woman gets on her marriage. Ayliffe, Parerg. 336.

PARAMOUNT (*par*, by, *mounter*, to ascend). Above; upwards. Kelham, Norm. Dict. *Paramount especifié*, above specified. Plowd. 209 *a*.

That which is superior: usually applied to the highest lord of the fee of lands, tenements, or hereditaments. Fitzherbert, Nat. Brev. 135. Where A lets lands to B, and he underlets them to C, in this case A is the paramount and B is the mesne landlord. See MESNE; 2 Sharswood, Blackst. Comm. 91; 1 Thomas, Coke, Litt. 484, n. 79, 485, n. 81.

PARAPHERNA (Lat.). **In Civil Law.** Goods brought by wife to husband over and above her dower (*dos*). Voc. Jur. Utr.; Fleta, lib. 5, c. 23, § 6; Mackeldy, Civ. Law, § 529.

PARAPHERNALIA. Apparel and ornaments of a wife, suitable to her rank and degree. 2 Blackstone, Comm. 435.

These are subject to the control of the husband during his lifetime, 3 Atk. Ch. 394, but go to the wife upon his death, in preference to all other representatives, Croke Car. 343, and cannot be devised away by the husband. Noy, Max. They are liable to be sold to pay debts on a failure of assets. 1 P. Will. Ch. 730. See, also, 2 Atk. Ch. 642; 11 Viner, Abr 176. The judge of probate is, in the practice of most states, entitled to make an allowance to the widow of a deceased person which more than takes the place of the paraphernalia. See 4 Bouvier, Inst. 3996, 3997.

PARATITLA (Lat.). **In Civil Law** An abbreviated explanation of some titles or books of the Code or Digest.

PARATUM HABEO (Lat. I have ready). **In Practice.** A return made by

the sheriff to *a capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction, where the defendant was at large. Afterwards he was required, by statute, to take bail from the defendant, and he returned *cepi corpus* and bail-bond. But still he might be ruled to bring in the body. 7 Penn. St. 535.

PARAVAIL. Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail because it is presumed he has the avails or profits of the land. Fitzherbert, Nat. Brev. 135; Coke, 2d Inst. 296.

PARCEL. A part of the estate. 1 Comyns, Dig. *Abatement* (H 51), *Grant* (E 10). To parcel is to divide an estate. Bacon, Abr. *Conditions* (O).

A small bundle or package.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. Held an insufficient description. 7 Cox, Cr. Cas. 13.

PARCENARY. The state or condition of holding title to lands jointly by parceners, before the common inheritance has been divided. See COPARCENARY.

PARCENERS. The daughters of a man or woman seised of lands and tenements in fee-simple or fee-tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. See COPARCENERS.

PARCO FRACTO (Lat.). **In English Law.** The name of a writ against one who violently breaks a pound and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

PARCUS (Lat.). A park.

PARDON. An act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 7 Pet. 160.

Every pardon granted to the guilty is in derogation of the law: if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But, as human actions are necessarily imperfect, the pardoning power must be vested somewhere, in order to prevent injustice when it is ascertained that an error has been committed.

An *absolute* pardon is one which frees the criminal without any condition whatever.

A *conditional* pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. 1 Bail. So. C. 283; 10 Ark. 284; 1 M'Cord, So. C. 176; 1 Park. Crim. Cas. N. Y. 47.

A *general* pardon is one which extends to all offenders of the same kind. It may be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute. 2 Ov. Tenn. 423.

2. The pardoning power is lodged in the executive of the United States and of the various states, and extends to all offences except those which are punished by impeachment after conviction. In some states a concurrence of one of the legislative bodies is required. See U. S. Const. art. 3, § 2; N. Y. Rev. Stat. pt. 1, tit. 1, c. 8, § 3; Ill. Const. art. 4, § 8; Wisc. Const. art. 5, § 6; Tex. Const. art. 5, § 11; 12 Miss. 751; Penn. Const. art. 2, § 9; Mich. Const. art. 5, subs. 11; Iowa Const. art. 4, subs. 11; Ohio Const. art. 2, § 5; 1 M'Cord, So. C. 178; Mass. Const. art. 8, § 1; Me. Const. art. 5, § 11; Vt. Const. pt. 2, § 11; Va. Const. art. 4, subs. 4; 15 Ark. 427; 1 Jones, No. C. 1.

It is to be exercised in the discretion of the power with whom it is lodged. As to promises of pardon to accomplices, see 1 Chitty, Crim. Law, 83; 1 Leach, Cr. Cas. 115.

In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven. 4 Sharswood, Blackst. Comm. 400; 3 Wash. C. C. 335; 7 Ind. 359; 1 Jones, No. C. 1. In case of a conditional pardon, if there be a breach of condition the pardon is avoided. 1 M'Cord, So. C. 176; 1 Bail. So. C. 283; 2 *id.* 516; 2 Caines, N. Y. 57; 1 Park. Crim. Cas. N. Y. 47. See 3 Johns. Cas. N. Y. 333; 9 Port. Ind. 20; 1 Bay, So. C. 334.

3. The effect of a pardon is to protect from punishment the criminal for the offence pardoned, but for no other. 10 Ala. 475; 1 Bay, So. C. 34. It seems that the pardon of an assault and battery which afterwards becomes murder by the death of the person beaten would not operate as a pardon of the murder. 12 Pick. Mass. 496. See Plowd. 401; 1 Hall, N. Y. 426. In general, the effect of a full pardon is to restore the convict to all his rights. But to this there are some exceptions. *First*, it does not restore civic capacity. 2 Leigh, Va. 724. And see 1 Strobh. So. C. 150; 2 Wheel. Cr. Cas. N. Y. 451; 33 N. H. 388. *Second*, it does not affect a *status* of other persons which has been altered or a right which has accrued in consequence of the commission of the crime or its punishment. 10 Johns. N. Y. 232; 4 Wash. C. C. 64; 2 Bay, So. C. 565; 5 Gilm. Ill. 214.

4. When the pardon is general, either by an act of amnesty, or by the repeal of a penal law, it is not necessary to plead it; because the court is bound, *ex officio*, to take notice of it, 1 Baldw. C. C. 91; and the criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted; and for this reason it must be specially

pleaded, 7 Pet. 150, 162; and if he has obtained a pardon before arraignment, and instead of pleading it in bar he pleads the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. 1 Rolle, 297. See 1 Dy. 34 *a*; Keilw. 58; T. Raym. 13; 3 Metc. Mass. 453.

All contracts made for the buying or procuring a pardon for a convict are void; and such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy. 4 Bouvier, Inst. n. 3857.

See, generally, Bacon, Abr. *Pardon;* Comyns, Dig. *Pardon;* Viner, Abr. *Pardon;* 13 Petersdorf, Abr.; Dane, Abr.; Coke, 3d Inst. 233–240; Hawkins, Pl. Cr. b. 2, c. 37; 1 Chitty, Crim. Law, 762–778; 2 Russell, Crimes, 595; Starkie, Crim. Plead. 368, 380.

PARENS PATRIÆ (Lat.). Father of his country. In England, the king; in America, the people. 3 Sharswood, Blackst. Comm. 427; 2 Stephen, Comm. 528; 4 Kent, Comm. 508, n.; 17 How. 393; Shelford, Ins. 12.

PARENTAGE. Kindred in the direct ascending line. See 2 Bouvier, Inst. n. 1955.

PARENTS. The lawful father and mother of the party spoken of. 1 Murph. No. C. 336; 11 Serg. & R. Penn. 93.

The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an ascending line. It differs also from predecessor, which is applied to corporators. Wood, Inst. 68; 7 Ves. Ch. 522; 1 Murph. No. C. 336; 6 Binn. Penn. 255. See FATHER; MOTHER.

By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. Dict. de Jur. *Parente.* See 1 Ashm. Penn. 55; 2 Kent, Comm. 159; 5 East, 223; Bouvier, Inst. Index.

PARES (Lat.). A man's equals; his peers. 3 Sharswood, Blackst. Comm. 349.

PARES CURIÆ (Lat.). **In Feudal Law.** Those vassals who were bound to attend the lord's court. Erskine, Inst. b. 2, tit. 3, s. 17; 1 Washburn, Real Prop.

PARI DELICTO (Lat.). **In Criminal Law.** In a similar offence or crime; equal in guilt.

A person who is *in pari delicto* with another differs from a *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former. 8 East, 381, 382.

PARI MATERIA (Lat.). Of the same matter; on the same subject: as, laws *pari materia* must be construed with reference to each other. Bacon, Abr. *Statute* (I 3).

PARI PASSU (Lat.). By the same gradation. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

PARISH. A district of country, of different extents.

In Ecclesiastical Law. The territory committed to the charge of a parson, or vicar, or other minister. Ayliffe, Parerg. 404; 2 Sharswood, Blackst. Comm. 112.

In Louisiana. Divisions corresponding to counties. The state is divided into parishes.

In New England. Divisions of a town, originally territorial, but which now constitute quasi-corporations, consisting of those connected with a certain church. See 2 Mass. 501; 7 *id.* 447; 16 *id.* 457, 488, 492 *et seq.;* 1 Pick. Mass. 91.

PARIUM JUDICIUM (Lat. the decision of equals). The right of trial by one's peers: *i.e.* by jury in the case of a commoner, by the house of peers in the case of a peer.

PARK (L. Lat. *parcus*). An inclosure. 2 Sharswood, Blackst. Comm. 38. A pound. Reg. Orig. 166; Cowel. An enclosed chase extending only over a man's own grounds. 13 Car. II. c. 10; Manwood, For. Laws; Crompton, Jur. fol. 148; 2 Sharswood, Blackst. Comm. 38.

Pairk is still retained in Ireland for "pound."

PARLE HILL (also called Parling Hill). A hill where courts were held in old times. Cowel.

PARLIAMENT (said to be derived from *parler la ment,* to speak the mind, or *parum lamentum*).

In English Law. The legislative branch of the government of Great Britain, consisting of the house of lords and the house of commons.

2. The parliament is usually considered to consist of the king, lords, and commons. See 1 Sharswood, Blackst. Comm. 147*, 157*, Chitty's note; 2 Stephen, Comm. 537. In 1 Wooddeson, Lect. 30, the lords temporal, the lords spiritual, and the commons are called the three estates of the realm: yet the king is called a part of the parliament, in right of his prerogative of veto and the necessity of his approval to the passage of a bill. That the connection between the king and the lords temporal, the lords spiritual, and the commons, who when assembled in parliament form the three estates of the realm, is the same as that which subsists between the king and those estates—the people at large—out of parliament, the king not being in either case a member, branch, or co-estate, but standing solely in the relation of sovereign or head, see Colton, Records, 710; Rot. Parl. vol. iii. 623 *a;* 2 Mann. & G. 457, n.

3. Records of writs summoning knights, burgesses, and citizens to parliament are first found towards the end of the reign of Henry III., such writs having issued in the thirty-eighth and forty-ninth years of his reign. 4 Sharswood, Blackst. Comm. 425; Prynne, 4th Inst. 2. In the reign of Edward III. it assumed its present form. *Id.* Since the reign of Edward III. the history of England shows an almost constant increase in the power of parliament. Anne was the last sovereign who exercised the royal prerogative of *veto;* and, as this prerogative no longer practically exists, the authority of parliament is absolutely unrestrained. The parliament can only meet when convened by the sovereign, except on the demise of the sovereign with no parliament in being, in which case the last parliament is to assemble. 6 Anne, c. 7. The sovereign has also power to prorogue and dissolve the parliament. May, Imperial Parliament. The origin of the English parliament seems traceable to the *witena gemote* of the Saxon kings. Encyc. Brit. See HIGH COURT OF PARLIAMENT.

PARLIAMENTUM INDOCTUM

(Lat. unlearned parliament). A name applied to a parliament assembled, under a law that no lawyer should be a member of it, at Coventry. 6 Hen. IV.; 1 Sharswood, Blackst. Comm. 177; Walsingham, 412, n. 30; Rot. Parl. 6 Hen. IV.

PAROL (more properly, *parole*. A French word, which means, literally, word, or speech). A term used to distinguish contracts which are made verbally, or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties. 1 Chitty, Contr. 1; 7 Term, 350, 351, n.; 3 Johns. Cas. N. Y. 60; 1 Chitty, Plead. 88. It is proper to remark that when a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract. 2 Watts, Penn. 451; 9 Pick. Mass. 298; 13 Wend. N. Y. 71.

Pleadings are frequently denominated the *parol*. In some instances the term parol is used to denote the entire pleadings in a cause: as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, *i.e.* that the pleadings may be stayed till he shall attain full age. 3 Sharswood, Blackst. Comm. 300; 4 East, 485; 1 Hoffm. N. Y. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentworth, Plead. 43, and 2 Chitty, Plead. 520. But a devisee cannot pray the parol to demur. 4 East, 485.

PAROL EVIDENCE. Evidence verbally delivered by a witness. As to the cases when such evidence will be received or rejected, see Starkie, Ev. pt. 4, pl. 995–1055; 1 Phillipps, Ev. 466, c. 10, s. 1; Sugden, Vend. 97.

PAROL LEASE. An agreement made orally between parties, by which one of them leases to the other a certain estate.

By the English Statute of Frauds of 29 Car. II. c. 3, ss. 1, 2, 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered unless in writing." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union. 4 Kent, Comm. 95; 1 Hill, Abr. 130.

PAROLE. **In International Law.** The agreement of persons who have been taken by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war. Vattel, liv. 3, c. 8, § 151.

PARRICIDE (from Lat. *pater*, father, and *cedere*, to slay). **In Civil Law.** One who murders his father. One who murders his mother, his brother, his sister, or his children. Merlin, Rép. *Parricide;* Dig. 48. 9. 1. 3, 4.

2. This offence is defined almost in the same words in the penal code of China. Penal Laws of China, b. 1, s. 2, § 4.

The criminal was punished by being scourged, and afterwards sewed in a sort of sack, with a dog, a cock, a viper, and an ape, and then thrown into the sea or into a river; or, if there were no water, he was thrown in this manner to wild beasts. Dig. 48. 9. 9; Code, 9, 17. 1. l. 4, 18, 6; Brown, Civ. Law, 423; Wood, Civ. Law, b. 3, c. 10, s. 9.

3. By the laws of France, parricide is the crime of him who murders his father or mother, whether they be the legitimate, natural, or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Pénal, art. 297. This crime is there punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He is then exposed on the scaffold, while an officer of the court reads his sentence to the spectators; his right hand is then cut off, and he is immediately put to death. *Id.* art. 13.

The common law does not define this crime, and makes no difference between its punishment and the punishment of murder. 1 Hale, Pl. Cr. 380; Prin. Penal Law, c. 18, § 8, p. 243; Dalloz, Dict. *Homicide*, § 3.

PARS ENITIA (Lat.). **In Old English Law.** The share of the eldest daughter where lands were parted between daughters by lot, she having her first choice after the division of the inheritance. Coke, Litt. 166 *b;* Glanville, lib. 7, c. 3; Fleta, lib. 5, c. 10, § *in divisionem.*

PARS RATIONABILIS (Lat. reasonable part). That part of a man's goods which the law gave to his wife and children. 2 Sharswood, Blackst. Comm. 492; Magn. Chart.; 9 Hen. III. c. 18; 2 Stephen, Comm. 228, 254.

PARSON. **In Ecclesiastical Law.** One that hath full possession of all the rights of a parochial church.

So called because the church, which is an invisible body, is represented by his *person*. In England he is himself a body corporate, in order to protect and defend the church (which he personates) by a perpetual succession. Coke, Litt. 300.

The parson has, during life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues, unless these are appropriated, *i.e.* given away, to some spiritual corporation, sole or aggregate, which the law esteems as capable of providing for the service of the church as any single private clergyman. 4 Sharswood, Blackst. Comm. 384; 1 Hagg. Cons. 162; Plowd. 493; 3 Stephen, Comm. 70.

The ecclesiastical or spiritual rector of a rectory. 1 Wooddeson, Lect. 311; Fleta, lib. 7, c. 18; Coke, Litt. 300. Also, any clergyman having a spiritual preferment. Coke, Litt. 17, 18. Holy orders, presentation, institution, and induction are necessary for a parson; and a parson may cease to be such by death, resignation, cession, or deprivation, which last may be for simony, non-conformity to canons, adultery, etc. Coke, Litt. 120; 4 Coke, 75, 76.

PARSON IMPARSONA (Lat.). A *persona*, or parson, may be termed *impersonata*, or

impersonee, only in regard to the possession he hath of the rectory by the act of another. Coke, Litt. 300. One that is inducted and in possession of a benefice: *e.g.* a dean and chapter. Dy. 40, 221. He that is in possession of a church, be it presentative or appropriate, and with whom the church is full,—*persona* in this case meaning the patron who gives the title, and *persona impersonata* the parson to whom the benefice is given in the patron's right. Reg. Jud. 24.

PART. A share; a purpart. This word is also used in contradistinction to counterpart: covenants were formerly made in a script and rescript, or *part* and *counterpart*.

PART AND PERTINENT. In Scotch Law. A term in a conveyance including lands or servitudes held for forty years as part of, or pertinent to, lands conveyed, natural fruits before they are separated, woods and parks, etc.; but not steelbow stock, unless the lands have been sold on a rental. Bell, Dict.; Erskine, Inst. 2. 5. 3 *et seq.*

PART-OWNERS. Those who own a thing together, or in common.

In Maritime Law. A term applied to two or more persons who own a vessel together, and not as partners.

In general, when a majority of the part-owners are desirous of employing such a ship upon a particular voyage or adventure, they have a right to do so upon giving security in the admiralty by stipulation to the minority, if required, to bring her back and restore the ship, or, in case of her loss, to pay them the value of their respective shares. 4 Bouvier, Inst. n. 3780; Abbott, Shipp. 70; 3 Kent, Comm. 151, 4th ed.; Story, Partn. § 489; 11 Pet. 175. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security. 11 Pet. 175; 1 Hagg. Adm. 306; Jacobsen, Sea-Laws, 442.

When part-owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship. Story, Partn. § 439; Bee, Adm. 2; Gilp. Dist. Ct. 10; 18 Am. Jur. 486. See Parsons, Marit. Law.

PARTES FINIS NIL HABUERUNT (Lat. the parties to the fine had nothing: *i.e.* nothing which they could convey). **In Old English Pleading.** The plea to a fine levied by a stranger, and which only bound parties and privies. 2 Sharswood, Blackst. Comm. 356*; Hob. 334; 1 P. Will. Ch. 520; 1 Wooddeson, Lect. 315.

PARTIAL LOSS. A loss of a part of a thing or of its value, as contrasted with a total loss.

Where this happens by damage to an article, it is also called a particular average, which is to be borne by the owner, as distinguished from a general average loss, which is to be contributed for by the other interests exposed to the same perils. 1 Phillips, Ins. §§ 1269, 1422. See AVERAGE.

PARTICULAR AVERAGE. Every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be wholly borne by the proprietor of that concern or interest alone. See 2 Phillips, Ins. § 354; 1 Parsons, Marit. Law, 284; AVERAGE.

PARTICULAR AVERMENT. See AVERMENT.

PARTICULAR CUSTOM. A custom which only affects the inhabitants of some particular district.

To be good, a particular custom must have been used so long that the memory of man runneth not to the contrary; must have been continued; must have been peaceable; must be reasonable; must be certain; must be consistent with itself; must be consistent with other customs. 1 Blackstone, Comm. 74, 79.

PARTICULAR ESTATE. An estate which is carved out of a larger, and which precedes a remainder: as, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate. 2 Blackstone, Comm. 165; 4 Kent, Comm. 226; 16 Viner, Abr. 216; 4 Comyns, Dig. 32; 5 *id.* 346. See REMAINDER.

PARTICULAR LIEN. A right which a person has to retain property in respect of money or labor expended on such particular property. See LIEN.

PARTICULAR STATEMENT. In Pennsylvania Pleading and Practice. A statement particularly specifying the date of a promise, book-account, note, bond (penal or single), bill, or all of them, on which an action is founded and the amount believed by the plaintiff to be due from the defendant. 6 Serg. & R. Penn. 21. It is founded on the provisions of a statute passed March 21, 1806. See 4 Smith, Penn. Laws, 328. It is an unmethodical declaration, not restricted to any particular form. 2 Serg. & R. Penn. 537; 3 *id.* 405; 8 *id.* 316, 567; 2 Browne, Penn. 40.

PARTICULARS. See BILL OF PARTICULARS.

PARTIES (Lat. *pars*, a part). Those who take part in the performance of an act, as, making a contract, carrying on an action. A party in law may be said to be those united in interest in the performance of an act: it may then be composed of one or more persons. Parties includes every party to an act. It is also used to denote all the individual separate persons engaged in the act,—in which sense, however, a corporation may be a party.

2. To Contracts. Those persons who engage themselves to do or not to do the matters and things contained in an agreement.

In general, all persons may be parties to contracts. But no person can contract with himself in a different capacity, as there must be an agreement of minds. 1 Vern. Ch. 465;

2 Atk. Ch. 59; 9 Ves. Ch. 234; 12 *id.* 372; 13 *id.* 156; 2 Brown, Ch. 400; 1 Pet. C. C. 373; 3 Binn. Penn. 54; 7 Watts, Penn. 387; 13 Serg. & R. Penn. 210; 9 Paige, Ch. N. Y. 238, 650; 3 Sandf. N. Y. 61; 2 Johns. Ch. N. Y. 252; 4 How. 503. And no want, immaturity, or incapacity of mind, in the consideration of the law, disables a person from becoming a party. Such disability may be entire or partial, and must be proved. 2 Stark. 326; 1 Esp. 353; 1 Term, 648; 11 Ad. & E. 634; 17 Law Journ. Exch. 233.

Aliens were under greater disabilities at common law with reference to real than to personal property. 7 Coke, 25 *a*; 1 Ventr. 417; 6 Pet. 102; 11 Paige, Ch. N. Y. 292; 1 Cush. Mass. 531; 1 Parsons, Contr. 323. The disability is now removed, in a greater or less degree, by statutes in the various states, 2 Kent, Comm. Lect. 25; and alien friends stand on a very different footing from alien enemies. 2 Sandf. Ch. N. Y. 586; 11 Paige, Ch. N. Y. 292; 2 Woodb. & M. C. C. 1; 3 Stor. C. C. 458; 2 How. 65; 5 *id.* 103; 8 Cranch, 110; 3 Dall. Penn. 199.

3. *Bankrupts* and *insolvents* are disabled to contract, by various statutes, in England, as well as by insolvent laws in the states of the United States.

Duress renders a contract voidable at the option of him on whom it was practised. See DURESS.

Excommunication can have no effect in the United States, as there is no national church recognized by the law.

Infants are generally incapable of contracting before the age of twenty-one years. This provision is intended for their benefit; and therefore most of their contracts are voidable, and not void. It is the infant's privilege at maturity to elect whether to avoid or ratify the contract he has made during minority. Though the infant is not bound, the adult with whom it may contract is so. The infant may always sue, but cannot be sued, Strange, 937,—which seems to be an exception to the mutuality of contracts. The infant cannot avoid his contract for necessaries. 10 Vt. 225; 11 N. H. 51; 12 Metc. Mass. 559; 6 Mees. & W. Exch. 42; 1 Parsons, Contr. 245.

4. *Married women*, at common law, were almost entirely disabled to contract, their personal existence, by feudal principles, being almost entirely merged in that of their husbands, 2 J. J. Marsh. Ky. 82; 23 Me. 305; 2 Chitty, Bail, 117; 5 Exch. 388: so that contracts made by them before marriage may be taken advantage of and enforced by their husbands, but not by themselves. 13 Mass. 384; 17 Me. 29; 2 Dev. No. C. 360; 9 Cow. 230; 14 Conn. 99; 6 T. B. Monr. Ky. 257. The contract of a feme covert is, then, generally void, unless she be the agent of her husband, in which case it is the husband's contract, and not hers. 15 East, 607; 6 Mod. 171; 6 N. H. 124; 16 Vt. 390; 5 Binn. Penn. 285; 15 Conn. 347. See WIFE.

Non-compotes mentis. At common law, formerly, in this class were included *lunatics*, *insane persons*, and *idiots*. It is understood now to include drunkards, 3 Day, Conn. 90; 4 Conn. 203; 2 N. H. 435; 15 Johns. N. Y. 503; 2 Harr. & J. Md. 421; 11 Pick. Mass. 304; 1 Rice, So. C. 56; 5 Munf. Va. 465; 3 Blackf. Ind. 51; 1 Green, N. J. 233; 1 Bibb, Ky. 168; 17 Miss. 94; 13 Mees. & W. Exch. 623; *spendthrifts*, 13 Pick. Mass. 206; 1 Parsons, Contracts, 315; and *seamen*. Act of 1813 of U. S. ch. 2; 2 Sumn. C. C. 444; 2 Mas. C. C. 541; 2 Dods. Adm. 504; 3 Kent, Comm. 193. See these titles.

Outlawry does not exist in the United States.

5. *Slaves* can make no binding contracts with their masters, 11 B. Monr. Ky. 239; 9 Gill & J. Md. 19; see 3 Bos. & P. 69; 8 Mart. La. 161; nor can he appear as a suitor in court of law or equity to enforce any contract against any person; and the better opinion is that contracts made by a slave with one not his master, and without his master's consent, are void. 2 Const. So. C. 330; 9 Gill & J. Md. 27; 5 Harr. & J. Md. 190. See 8 Martin, 161; La. Civ. Code, art. 1785. This disability of the slave seems to extend even to marriage. 2 Kent, Comm. 88; 5 Harr. & J. Md. 193; 2 Dev. & B. No. C. 177; 5 Cow. N. Y. 397; 6 Mart. La. 559.

6. *As to the character* in which parties contract. They may act independently or severally, jointly, or jointly and severally. The decision of the question of the kind of liability incurred depends on the terms of the contract, if they are express, or, if not express, upon the intention of the parties as gathered from the circumstances of the case. Whenever, however, the obligation is undertaken by two or more, or a right given to two or more, it is a general presumption of law that it is a joint obligation or right; words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right. 1 Taunt. 7; 4 Tyrwh. 487; 13 Mees. & W. Exch. 499; 8 Carr. & P. 332; Sheppard, Touchst. 375; 6 Wend. N. Y. 629; 7 Mass. 58; 10 Barb. 385, 638; 14 *id.* 644; 1 Lutw. 695; Peake, Nisi P. 130; Holt, Nisi P. 474; 1 Barnew. & C. 407; 12 Gill & J. Md. 265. It may be doubted, however, whether any thing less than express words can raise at once a joint and several liability. Parties may act as the representatives of others, as *agents*, *factors* or *brokers*, *servants*, *attorneys*, *executors* or *administrators*, and *guardians*. See these titles.

They may act in a collective capacity, as corporations, joint-stock companies, or as partnerships. See these titles.

New parties may be made to contracts already in existence, by *novation*, *assignment*, and *indorsement*, which see.

7. To Suits in Equity. The person who seeks a remedy in chancery by suit, commonly called the plaintiff, or complainant, and the person against whom the remedy is sought, usually denominated the defendant, are the parties to a suit in equity

Active parties are those who are so involved in the subject-matter in controversy that no decree can be made without their being in court. *Passive* parties are those whose interests are involved in granting complete relief to those who ask it. 1 Wash. C. C. 517. See 7 Ala. 361.

Plaintiffs.

8. In general, all persons, whether natural or artificial, may sue in equity; and an equitable title only is sufficient. 10 Ill. 332. Incapacities which prevent suit are *absolute* which disable during their continuance, or *partial* which disable the party to sue alone. *Alien enemies* are under an absolute incapacity to sue.

Alien friends may sue, Mitford, Eq. Pl. 129; Cooper, Eq. Pl. 27, if the subject-matter be not such as to disable them, Coke, Litt. 129 *b*, although a sovereign. 2 Bligh, N. S. 1; 1 Dowl. N. S. 179; 1 Sim. Ch. 94; 2 Gall. C. C. 105; 8 Wheat. 464; 4 Johns. Ch. N. Y. 370; Adams, Eq. 314. In such case he has been recognized by the executive of the forum. Story, Eq. Pl. § 55; 3 Wheat. 324.

In such case the sovereign submits to the jurisdiction, as to the subject-matter, and must answer on oath. Mitford, Eq. Pl. 30; Adams, Eq. 313; 6 Beav. Rolls, 1.

9. *Attorney-general.* Government (in England, *the crown*) may sue both in its own behalf, for its own political rights and interests, and in behalf of the rights and interests of those partaking of its prerogatives or claiming its peculiar protection, Mitford, Eq. Pl. 421–424; Cooper, Eq. Pl. 21, 101; usually by the agency of the attorney-general or solicitor-general. Mitford, Eq. Pl. 7; Adams, Eq. 312. See INJUNCTION; QUO WARRANTO; TRUSTS.

Corporations, like natural persons, may sue, Grant, Corp. 198, although foreign, *id.* 200; but in such case the corporate act must be set forth, 1 Strange, 612; 1 Crompt. M. & R. Exch. 296; 4 Johns. Ch. N. Y. 327, as it must if they are domestic and created by a private act, 3 Conn. 199; 15 Viner, Abr. 198. All the members of a voluntary association must be joined, 15 Ill. 251, unless too numerous. 2 Pet. 566; 3 Barb. Ch. N. Y. 362.

Idiots and *lunatics* may sue by their committees. Mitford, Eq. Pl. 29; Adams, Eq. 301; Goldsb. Eq. 93. As to when a mere petition is sufficient, see 7 Johns. Ch. N. Y. 24; 2 Ired. Eq. No. C. 294.

Infants may sue, Mitford, Eq. Pl. 25, and, if they be on the wrong side of the suit, may be transferred at any time, on suggestion. 3 Edw. Ch. N. Y. 32. The bill must be filed by the next friend. Cooper, Eq. Pl. 27; 1 Smith, Chanc. Pract. 54; 2 Ala. 406, who must not have an adverse interest. 2 Ired. Eq. No. C. 478, and who may be compelled to give bail. 1 Paige, Ch. N. Y. 178. If the infant have a guardian, the court may decide in whose name the suit shall continue. 12 Ill. 424.

A *married woman* is under partial incapacity to sue. 7 Vt. 369. Otherwise, when in such condition as to be considered in law a *feme sole*. 2 Hayw. No. C. 406. She may sue on a separate claim by aid of a next friend of her own choice, Story, Eq. Pl. § 61; Fonblanque, Eq. b. 1, c. 2, § 6, note p; 1 Freem. Ch. 215; but see 2 Paige, Ch. N. Y. 454; and the defendant may insist that she shall sue in this manner. 2 Paige, Ch. N. Y. 255; 4 Rand. Va. 397.

Defendants.

10. Generally, all who are able to sue may be sued in equity. To constitute a person defendant, process must be prayed against him. 2 Bland, Ch. Md. 106; 4 Ired. Eq. No. C. 175; 5 Ga. 251; 1 A. K. Marsh. Ky. 594. Those who are under incapacity may be made defendants, but must appear in a peculiar manner. One, or more, interested with the plaintiff, who refuse to join, may be made defendants. 2 Bland, Ch. Md. 264; 3 Des. So. C. 31; 10 Ill. 534; 15 *id.* 251.

Corporations must be sued by their corporate names, unless authorized to come into court in the name of some other person, as president, etc. Story, Eq. Pl. § 70; 4 Ired. Eq. No. C. 195. Governments cannot, generally, be sued in their own courts, Story, Eq. Pl. § 69: yet the attorney-general may be made a party to protect its rights when involved, 1 Barb. Ch. N. Y. 157; and the rule does not prevent suits against officers in their official capacity. 1 Dougl. Mich. 225.

Idiots and *lunatics* may be defendants and defend by committees, usually appointed guardians *ad litem* as of course. Mitford, Eq. Pl. 103; Cooper, Eq. Pl. 30; Story, Eq. Pl. § 70; Shelford, Lun. 425; 6 Paige, Ch. N. Y. 237.

A guardian *de facto* may not have a bill against a lunatic for a balance due him, but must proceed by petition. 2 Dev. & B. Eq. No. C. 385; 2 Johns. Ch. N. Y. 242; 2 Paige, Ch. N. Y. 422; 8 *id.* 609.

Infants defend by guardians appointed by the court. Mitford, Eq. Pl. 103: Cooper, Eq. Pl. 20; 9 Ves. Ch. 357; 10 *id.* 159; 11 *id.* 563; 1 Madd. Ch. 290; 8 Pet. 128; 12 Mass. 16; 2 Tayl. No. C. 125.

On becoming of age, an infant is allowed, as of course, to put in a new plea, or to demur on showing that it is necessary to protect his rights. 6 Paige, Ch. N. Y. 353.

11. *Married women* may be made defendants, and may answer as if femes sole, if the husband is plaintiff, an exile, or an alien enemy, has abjured the realm or been transported under criminal sentence. Adams, Eq. 313; Mitford, Eq. Pl. 104.

She should be made defendant where her husband seeks to recover an estate held in trust for her separate use, 9 Paige, Ch. N. Y. 225, and, generally, where the interests of her husband conflict with hers in the suit, and he is plaintiff. 3 Barb. Ch. N. Y. 397. See, also, 11 Me. 145; Mitford, Eq. Pl. 104. See, generally, as to who may be defendants. JOINDER OF PARTIES.

At Law. *In actions ex contractu.*

Plaintiffs. In general, all persons who have a just cause of action may sue, unless some disability be shown. An action on a contract, of whatever description, must be brought in the name of the party in whom the legal interest is vested. 1 East, 497; Yelv. 25, n. 1; 1 Lev. 235, 3 Bos. & P. 147; 1 H. Blackst. 84; 5 Serg. & R. Penn. 27; 10 Mass. 230, 287; 13 *id.* 105; 15 *id.* 286; 1 Pet. C. C. 109; 2 Root, Conn, 119; 2 Wend. N. Y. 158; 21 *id.* 110; 1 Hempst. Ark. 541; 4 Dan. Ky. 474.

On simple contracts by the party from whom (in part, at least) the consideration moved, Browne, Act. 99; Broom. Part. 12; 1 Strange, 592; 2 Watts & S. Penn. 237; although the promise was made to another, if for his benefit, Browne, Act. 103; 10 Mass. 287; 3 Pick. Mass. 83; 2 Wend. N. Y. 158; 10 *id.* 87, 156; 5 Du. N. Y. 168; 5 Dan. Ky. 45, and not by a stranger to the consideration, even though the contract be for his sole benefit, Browne, Act. 101; Broom, Part. 13. On contracts under seal by parties to the instrument only. 10 Wend. N. Y. 87; Coke, Litt. 231.

12. *Agents* contracting in their own name, without disclosing their principals, may, in general, sue in their own names, 3 Barnew. & Ald. 280; 5 *id.* 393; 1 Campb. 337; 4 Barnew. & C. 656; 10 *id.* 672; 1 Crompt. M. & R. Exch. 413; 5 Mees. & W. Exch. 650; 2 Carr. & K. 152; 5 Penn. St. 41; or the principals may sue. 6 Cow. N. Y. 181; 3 Hill, N. Y. 72; 2 Ashm. Penn. 485; Broom, Part. 44.

So they may sue on contracts made for an unknown principal, 3 Eng. L. & Eq. 391, and also when acting under a *del credere* commission, 4 Maule & S. 566; 6 *id.* 172; 4 Campb. 195; 10 Barb. N. Y. 202; but not an ordinary merchandise broker. An auctioneer may sue for the price of goods sold, 1 H. Blackst. 81; 16 Johns. N. Y. 1; but a mere attorney having no beneficial interest may not sue in his own name. 10 Johns. N. Y. 383.

Alien enemies, unless resident under a license or contracting under specific license, cannot sue, nor can suit be brought for their benefit. Broom, Part. 84; 6 Term, 23; 1 Campb. 482; 1 Salk. 46; 15 East, 418; 1 Kent, Comm. 67; 11 Johns. N. Y. 418; 2 Paine, C. C. 639. License is presumed if they are not ordered away. 10 Johns. N. Y. 69; 6 Binn. Penn. 241. See, also, Coke, Litt. 129 *b*; 15 East, 260; 1 Kent, Comm. 68.

Alien friends may bring actions concerning personal property, Browne, Act. 304; Bacon, Abr. *Aliens*, for libel published here, 8 Scott, 182; and now, in regard to real estate generally, by statute, 3 Bouvier, Inst. 107; 12 Wend. N. Y. 342; see 15 Tex. 495; and, by common law, till office found, against an intruder. 13 Wend. N. Y. 546; 1 Johns. Cas. N. Y. 399; 3 *id.* 109; 3 Hill, N. Y. 79. But see 5 Cal. 373.

13. *Assignees* of choses in action cannot, at common law, maintain actions in their own names. Broom, Part. 10; 42 Me. 221. Promissory notes, bills of exchange, bail-bonds, and replevin-bonds, etc., are exceptions to this rule. Hammond, Part. 108.

An assignee of real estate may have an action in his own name for breaches of a covenant running with the land, occurring after assignment, 3 Bouvier, Inst. 150; Broom, Part. 9; 14 Johns. N. Y. 89; and he need not be named in an express covenant of this character. Broom, Part. 8.

An assignee in insolvency or bankruptcy should sue in his own name on a contract made before the act of bankruptcy or the assignment in insolvency. 1 Chitty, Pl. 14; Hammond, Part. 167; Comyns, Dig. *Abatement* (E 17); 3 Yeates, Penn. 520; 3 Dall. Penn. 276; 5 Serg. & R. Penn. 394; 7 *id.* 182; 9 *id.* 434. See 3 Salk. 61; 3 Term, 779. Otherwise of a suit by a foreign assignee. 11 Johns. N. Y. 488. The discharge of the insolvent pending suit does not abate it. 2 Johns. N. Y. 342; 11 *id.* 488. But see 1 Johns. N. Y. 118.

An assignee who is to execute trusts may sue in his own name. 4 Abbott, 106. *Cestuis que trust* cannot sue at law. 3 Bouvier, Inst. 135.

14. *Civil death* occurring in case of an outlaw, an attainted felon, or one sentenced to imprisonment for life, incapacitates the person for suing as plaintiff during the continuance of the condition. Broom, Part. 85. Sentence as above, during suit, abates it, 1 Du. N. Y. 664; but the right to sue is suspended only. Broom, Part. 85.

Corporations may sue in their true corporate name, on contracts made in their behalf by officers or agents, 2 Blatchf. C. C. 343; 6 Cal. 258; 3 Bouvier, Inst. 151 (M); 5 Vt. 500; 20 Me. 45; 3 N. J. 321; 9 Ind. 359: as, a bank, on a note given to a cashier. 5 Mo. 26; 4 How. Pract. 63; 21 Pick. Mass. 486. See, also, 15 Me. 443.

The name must be that at the time of suit, 3 Ind. 285; 4 Rand. Va. 359, with an averment of the change, if any, since the making of the contract, 6 Ala. 327, 494; even though a wrong name were used in making the contract. 6 Serg. & R. Penn. 16; 10 Mass. 360; 5 Ark. 234; 10 N. H. 123; 5 Halst. N. J. 323.

If the corporation be a foreign one, proof of its existence must be given. 1 Carr. & P. 569; 13 Pet. 519; 2 Gall. C. C. 105; 5 Wend. N. Y. 478; 7 *id.* 539; 6 Cow. 46; 1 Hill, 44; 10 Mass. 91; 2 Tex. 531; 1 T. B. Monr. Ky. 170; 7 *id.* 584; 2 Rand. Va. 465; 2 Green, N. J. 439; 1 Mo. 184.

As to their ability to sue in the United States courts, see 5 Cranch, 57.

15. *Executors* and *administrators* in whom is vested the legal interest are to sue in all personal contracts, 3 Term, 393; Williams, Exec. Index; see 15 Serg. & R. Penn. 183, or covenants affecting the realty but not running with the land, 2 H. Blackst. 310; and

on such covenants running with the land, for breach during the decedent's lifetime occasioning special damage. 2 Johns. Cas. N. Y. 17; 4 Johns. N. Y. 72. They must sue as such, on causes accruing prior to the death of the decedent, 1 Saund. 112; Comyns, Dig. *Pleader* (2 D 1); 3 Dougl. 36; 2 Swan, Tenn. 170, and as such, or in their own names, at their election, for those accruing subsequent, 16 Ark. 36; 3 Dougl. 36; Williams, Exec. 1590; and upon contracts made by them in their official capacity, 30 Ala. 482; 32 Miss. 319; 15 Tex. 44; in their own names only, in some states. 4 Jones, No. C. 159.

On death of an executor, his executor, or administrator *de bonis non* if he die intestate, is the legal representative of the original decedent. 7 Mees. & W. Exch. 306; 2 Swan, Tenn. 127; 2 Sharswood, Blackst. Comm. 503.

Foreign governments, whether monarchical or republican, 5 Du. N. Y. 634, if recognized by the executive of the forum, 3 Wheat. 324; Story, Eq. Pl. § 55; see 4 Cranch, 272; 9 Ves. Ch. 347; 10 *id.* 354; 11 *id.* 283, may sue. 26 Wend. N. Y. 212; 6 Hill, N. Y. 33.

16. *Husband must* sue alone for wages accruing to the wife, for the profits of business carried on by her, or money lent by her during coverture, Broom, Part. 71; 2 W. Blackst. 1239; 4 E. D. Smith, N. Y. 384; and see 1 Salk. 114; 2 Wils. 424; 9 East, 472; 1 Maule & S. 180; 4 Term, 516; for slanderous words spoken of the wife which are actionable only by reason of special damage, 2 Du. N. Y. 633; on a fresh promise, for which the consideration was in part some matter moving from him, renewing a contract made with the wife *dum sola*, 1 Maule & S. 180; and see 2 Penn. St. 827; for a legacy accruing to the wife during coverture, 22 Pick. Mass. 480; and as administrator of the wife to recover chattels real and personal not previously reduced into possession. Broom, Part. 74.

He may sue alone for property that belonged to the wife before coverture, 1 Murph. No. C. 41; 5 T. B. Monr. Ky. 264; on a joint bond given for a debt due to the wife *dum sola*, 1 Maule & S. 180; 4 Term, 616; 1 Chitty, Plead. 20; on a covenant running to both, Croke Jac. 399; 2 Mod. 217; 1 Barnew. & C. 443; 1 Bulstr. 31; to reduce choses in action into possession, 2 Maule & S. 396, n. (b); 2 Mod. 217; 2 Ad. & E. 30; and, after her death, for any thing he became entitled to during coverture. Coke, Litt. 351 *a*, n. 1. And see 4 Barnew. & C. 529.

Infants may sue only by guardian or *prochein ami*. 3 Bouvier, Inst. 138; 13 Mees. & W. Exch. 640; Broom, Part. 84; 11 How. Pract. 188; 13 *id.* 413; 13 B. Monr. Ky. 193.

Joint tenants. See JOINDER; PARTIES.

Lunatic, or *non-compos mentis*, may maintain an action, which should be in his own name. Broom, Part. 84; Browne, Act. 301; Hob. 215; 8 Barb. N. Y. 552. His wife may appear, if he have no committee. 7 Dowl. 22. An idiot may by a next friend who petitions for that purpose. Browne, Act. 301; 2 Chitty, Archbold, Pract. 7th ed. 909.

17. *Married women* cannot, in general, sue alone at common law, Broom, Part. 74; but a married woman may sue alone where her husband is civilly dead, see 4 Term, 361; Croke Eliz. 519; 9 East, 472; 4 Esp. 27; 2 Bos. & P. 165; 1 Selwyn, Nisi P. 286; or, in England, where he is an alien out of the country, on her separate contracts, 2 Esp. 544; 1 Bos. & P. 357; 2 *id.* 226; 11 East, 301; 3 Campb. 123, while he is in such condition. Broom, Part. § 114.

So she may sue alone after a sentence of nullity or divorce *a vinculo*, 1 Gow. 10; 9 Barnew. & C. 698; 8 Term, 548; but not after a divorce *a mensa et thoro*, or voluntary separation merely. 3 Barnew. & C. 297.

She may, where he is legally presumed to be dead, 2 Campb. 113; 5 Barnew. & Ad. 94; 2 Mees. & W. Exch. 894, or where he has been absent from the country for a very long time. 12 Mo. 30; 23 Eng. L. & Eq. 127. See 11 East, 301; 2 Bos. & P. 226.

When the wife survives the husband, she may sue on all contracts entered into by others with her before coverture, and she may recover all arrears of rent of her real estate which became due during the coverture, on their joint demise. 8 Taunt. 181; 1 Rolle, Abr. 350 *d*. She is also entitled to all her real property, and her chattels real and choses in action not reduced into possession by the husband. Broom, Part. 76.

18. *Partners*. One cannot, in general, sue another for goods sold, 9 Barnew. & C. 356; for work done, 1 Barnew. & C. 74; 7 *id.* 419; for money had and received in connection with a partnership transaction, 6 Barnew. & C. 194; or for contribution towards a payment made under compulsion of law. 5 Barnew. & Ad. 936; 1 Mees. & W. Exch. 504. See 1 Mees. & W. Exch. 168; 2 Term, 476. But one may sue the other for a final balance struck, Broom, Part. 57; 2 Term, 479; 5 Mees. & W. Exch. 21; 2 Crompt. & M. Exch. 361; see JOINDER; and they may sue the administrator of a deceased partner. 4 Wisc. 102.

Survivors. The survivor or survivors of two or more jointly interested in a contract not running with the land must sue as such. Addison, Contr. 285; Broom, Part. 21; Archbold, Plead. 54; 1 East, 497; Yelv. 177; 1 Dall. Penn. 65, 248; 4 *id.* 354; 2 Johns. Cas. N. Y. 374; 7 Ala. 89.

The survivor of a partnership must sue alone as such. 2 Salk. 444; 9 Barnew. & C. 538; 4 Barnew. & Ald. 374; 2 Maule & S. 225.

The survivor of several, parties to a simple contract, should describe himself as such. 3 Conn. 203.

Tenants in common may sue each other singly for actual ouster. Woodfall, Landl. & Ten. 789. See JOINDER.

Trustees must sue, and not the cestuis que trust. 1 Lev. 235; 15 Mass. 286; 12 Pick. Mass. 554; 4 Dan. Ky. 474. See JOINDER.

Defendants.

19. All persons having a direct and immediate legal interest in the subject-matter of the suit are to be made parties. The proper defendants to a suit on a specialty are pointed out by the instrument.

In case of simple contracts, the person made liable expressly by its terms, 3 Bingh. N. C. 732; 8 East, 12, or by implication of law, is to be made defendant. 2 Sharswood, Blackst. Comm. 443; 3 Campb. 356; 1 H. Blackst. 93; 2 *id.* 563. See 6 Mass. 253; 8 *id.* 198; 11 *id.* 335; 1 Chitty, Pl. 24. Where there are several persons parties, if the liability be joint, all must be joined as defendants, either on specialties, 1 Williams, Saund. 154, or simple contracts. Chitty, Contr. 99. If it be joint and several, all may be joined, 1 Williams, Saund. 154, n. 4, or each sued separately, 1 Williams, Saund. 191, c; Comyns, Dig. *Obligations* (G); 3 Term, 782; 1 Ad. & E. 207; if it be several, each must be sued separately. 1 East, 226. The presumption is, in such case, that a written agreement is joint, 2 Campb. 640; 3 *id.* 49, 51, n.; otherwise of verbal contracts. 1 Ad. & E. 691; 3 Barnew. & Ald. 89; 1 Bingh. 201; Broom, Part. 121.

Alien enemies may be sued, Broom, Part. 18–21; 1 W. Blackst. 30; Croke Eliz. 516; 4 Bingh. 421; Comyns, Dig. *Abatement* (E 3); and, of course, alien friends.

20. *Assignees* of a mere personal contract cannot, in general, be sued; of covenants running with the realty may be, for breach after assignment, 2 Saund. 304, n. 12; Woodfall, Landl. & Ten. 113; 1 Fonblanque, Eq. 359, n. y; 3 Salk. 4; 7 Term, 312; 1 Dall. Penn. 210, but not after an assignment by him. Bacon, Abr. *Covenant* (E 4). See, on this subject, Bouvier, Inst. 162.

Assignees of bankrupts cannot be sued as such at law. Cowp. 134; Chitty, Plead. 11, n. (f).

Bankrupts after discharge cannot be sued. An insolvent after discharge may be sued on his contracts, but his person is not liable to arrest in a suit on a debt which was due at the date of his discharge. Dougl. 93; 8 East, 311; 1 Saund. 241, n. 5; Ingalls, Insolv. 377.

See CONFLICT OF LAWS; BANKRUPTCY; INSOLVENCY.

Corporations must be sued by their true names. 7 Mass. 441; 2 Cow. 778; 15 Ill. 185; 4 Rand. Va. 359; 2 Blatchf. C. C. 343. The suit may be brought in the United States courts by a citizen of a foreign state. 2 How. 497. Assumpsit lies against a corporation aggregate on an express or implied promise, in the same manner as against an individual. 3 Halst. N. J. 182; 3 Serg. & R. Penn. 117: 4 *id.* 16; 12 Johns. N. Y. 231; 14 *id.* 118; 7 Cranch, 297; 2 Bay, So. C. 109; 10 Mass. 397; 1 Aik. Vt. 180; 9 Pet. 541; 3 Dall. Penn. 496; 1 Pick. Mass. 215; 2 Conn. 260; 5 Q. B. 547.

21. *Executors* and *administrators* of a deceased contractor or the survivor of several joint contractors may be sued, Hammond, Part. 156; but not if any of the original contractors survive. P. A. Browne, Penn. 31; 6 Serg. & R. Penn. 272; 2 Wheat. 344.

The liability does not commence till probate of the will. 2 Sneed, Tenn. 58. The executor or administrator *de bonis non* of a deceased person is the proper defendant. Broom, Part. 197.

The liability is limited by the amount of assets, and does not arise on subsequent breach of a covenant which could be performed only by the covenantor. Broom, Part. 118. They, or real representatives, may be parties, at election of the plaintiff, where both are equally liable. 1 Lev. 189, 303.

Foreign governments cannot be sued to enforce a remedy, but may be made defendants to give an opportunity to appear. 14 How. Pract. Rep. 517.

Heirs may be liable to suit under the ancestor's covenant, if expressly named, to the extent of the assets received. Broom, Part. 118; Platt, Cov. 449.

Husband may be sued alone for breach of joint covenant of himself and wife, 15 Johns. N. Y. 483; 17 How. 609, and *must* be on a mere personal contract of the wife made during coverture, Comyns, Dig. *Pleader* (2 A 2); 3 W. Raym. 6; 1 Lev. 25; 8 Term, 545; 2 Bos. & P. 105; Palm. 312; 1 Taunt. 217; 4 Price, Exch. 48; 16 Johns. N. Y. 281, even if made to procure necessaries when living apart, 6 Watts & S. Penn. 346; *may* be on a new promise for which the consideration is a debt due by the wife before marriage, Al. 72; 7 Term, 348; but such promise must be express, Broom, Part. 174, and have some additional considerations, as forbearance, etc., 1 Show. 183; 11 Ad. & E. 428, 451; on lease to both made during coverture, Comyns, Dig. *Baron & F.* (2 B); on lease to wife *dum sola*, for rent accruing during coverture, or to wife as executrix, Broom, Part. 178; Comyns, Dig. *Baron & F.* (T); 1 Rolle, Abr. 149; not on wife's contracts *dum sola* after her death, 3 Mod. 186; Rep. *temp.* Talb. 173; 3 P. Will. Ch. 410, except as administrator. 7 Term, 350; Croke Jac. 257; 1 Campb. 189, n.

He is liable, after death of the wife, in cases where he might have been sued alone during her lifetime.

22. *Idiots*, *lunatics*, and *non-compotes mentis*, generally, may be sued on contracts for necessaries. 2 Mees. & W. Exch. 2. See APPEARANCE.

Infants may be sued on their contracts for necessaries. 10 Mees. & W. Exch. 195; Macpherson, Inf. 447. Ratification in due form, 11 Ad. & E. 934, after arriving at full age, renders them liable to suit on contracts made before.

Partner is not liable to suit by his copartners. A sole ostensible partner, the others being dormant, may be sued alone by one contracting with him. Broom, Part. 172.

Survivor of two or more joint contractors must be sued alone. 1 Saund. 291, n. 2; Carth. 105; 2 Burr. 1196. A sole surviving

partner may be sued alone. Chitty, Pl. 152, note d; 1 Barnew. & Ald. 29.

In actions ex delicto.

Plaintiffs.

The plaintiff must have a legal right in the property affected, whether real, 2 Term, 684; 7 *id.* 50; Broom, Part. 202; Coke, Litt. 240 *b;* 2 Blackstone, Comm. 185, or personal, 11 Cush. Mass. 55; though a mere possession is sufficient for trespass, and trespass *quare clausum*, Croke Jac. 122; 11 East, 65; 4 Barnew. & C. 591; 2 Bingh. N. C. 98; 1 Ad. & E. 44; and the possession may be constructive in case of trespass for injury to *personal* property. 1 Term, 450; 6 Q. B. 606; 5 Barnew. & Ald. 603; 1 Hill, N. Y. 311. The property of the plaintiff may be absolute, 3 Campb. 187; 5 Bingh. 305; 1 Taunt. 190; 1 C. B. 672, or special. See 7 Term, 9; 4 Barnew. & C. 941; 3 Scott, N. S. 358.

23. *Agents* who have a qualified property in goods may maintain an action of tort in their own names for injury to the goods.

A principal may sue in the name of his agent for a false representation to the agent. 12 Wend. N. Y. 176.

Assignees of property may sue in their own names for tortious injuries committed after the assignment, 4 Bingh. 106; 3 Maule & S. 7; 5 *id.* 105; 1 Ad. & E. 580, although it has never been in their possession. 9 Wend. N. Y. 80; 2 N. Y. 293; 1 E. D. Smith, N. Y. 522; 8 Barnew. & C. 270; 5 Barnew. & Ald. 604; Williams, Saund. 252 *a*, n. (7).

Otherwise of the assignee of a mere right of action. 12 N. Y. 322; 18 Barb. N. Y. 500; 7 How. Pract. N. Y. 492. See 15 N. Y. 432. Assignees in insolvency may sue for torts to the property, 6 Binn. Penn. 186; 8 Serg. & R. Penn. 124, but not to the person of the assignee. W. Jones, 215.

Executors and *administrators* cannot, in general, sue in actions *ex delicto*, as such actions are said to die with the plaintiff. Broom, Part. 212; 13 N. Y. 322. See PERSONAL ACTION. They may sue in their own names for torts subsequent to the death of the deceased. 11 Rich. So. C. 363.

Heirs and *devisors* have no claim for torts committed during the lifetime of the ancestor or devisor. 2 Inst. 305.

24. *Husband must* sue alone for all injuries to his own property and person, 3 Blackstone, Comm. 143; 2 Ld. Raym. 1208; Croke Jac. 473; 1 Lev. 3; 2 *id.* 20, including personalty of the wife which becomes his upon marriage, 1 Salk. 141; 6 Call, Va. 55; 13 N. H. 283; Croke Eliz. 133; 6 Ad. & E. 259; 27 Vt. 17; 1 Hempst. Ark. 64, and including the continuance of injuries to such property commenced before marriage, 1 Salk. 141; 6 Call, Va. 55; 1 Selwyn, Nisi P. 10th ed. 656; in replevin for timber cut on land belonging to both, 8 Watts, Penn. 412; for personal injuries to the wife for the damages which he sustains, 3 Blackst. Comm. 140; Chitty, Plead. 718, n.; 4 Barnew. & Ald. 523; 4 Iowa, 420: as in battery, 2 Ld. Raym. 1208; 8 Mod. 342; 2 Brev. No. C. 170; slander, where words are not actionable *per se*, 1 Lev. 140; 1 Salk. 119; 3 Mod. 120; 4 Barnew. & Ad. 514; 22 Barb. N. Y. 396; 2 Hill, N. Y. 309; or for special damages. 4 Barnew. & Ad. 514.

He *may* sue alone, also, for injuries to personalty commenced before marriage and consummated afterwards, 2 Lev. 107; Ventr. 260; 2 Bos. & P. 407; and the right survives to him after death of the wife in all cases where he can sue alone, 1 Chitty, Plead. 75; Viner, Abr. *Baron & F.* (G); for cutting trees on land held by both in right of the wife, 16 Pick. Mass. 235; 1 Roper, Husb. & W. 2d ed. 215; and, generally, for injury to real estate of the wife during coverture, 18 Pick. Mass. 110; 20 Conn. 296; 2 Wils. 414, although her interests be reversionary only. 5 Mees. & W. Exch. 142.

Infants may sue by guardian for torts. Broom, Part. 238.

Lessors and *reversioners*, generally, may have an action for injury to their reversions. Broom, Part. 214. Damage necessarily to the reversion must be alleged and shown. 1 Maule & S. 234; 11 Ad. & E. 40; 5 Bingh. 153; 10 Barnew. & C. 145.

25. *Lessees* and *tenants*, generally, may sue for injuries to their possession. 4 Burr. 2141; 3 Lev. 209; Selwyn, Nisi P. 1417; Woodfall, Landl. & Ten. 661.

Married woman must sue alone for injury to her separate property, 29 Barb. N. Y. 512; especially after her husband's death. 37 N. H. 355.

The restrictions on her power to sue are the same as in actions *ex contractu*. Broom, Part. 233. Actions in which she might or must have joined her husband survive to her. Rolle, Abr. 349 (A).

Master has an action in tort for enticing away an apprentice, 3 Blackstone, Comm. 342; 3 Burr. 1345; 3 Maule & S. 191; and, upon the same principle, a parent for a child, 1 Halst. N. J. 322; 4 Barnew. & C. 660; 4 Litt. Ky. 25, and for personal injury to his servant, for loss of time, expenses, etc. 3 Blackstone, Comm. 342.

For seduction or debauchery, a master, Broom, Part. 227; 4 Cow. N. Y. 422, and, if any service be shown, a parent, 2 Mees. & W. Exch. 542; 6 *id.* 56; 2 Term, 166, has his action.

Survivor, whether sole or several, must sue for a tortious injury, the rule being that the remedy, and not the right, survives. Broom, Part. 212; 1 Show. 188; Carth. 170; 2 Maule & S. 225.

26. *Tenants in common* must sue strangers separately to recover land. 15 Johns. N. Y. 479; 1 Wend. N. Y. 380; 2 Caines, N. Y. 169; 5 Hill, N. Y. 26, 234.

A tenant in common may sue his co-tenant, where there has been actual ouster, in ejectment, Littleton, § 322; 1 Campb. 173; 11 East, 49; Cowp. 217, or trespass *quare clausum*, 7 Penn. St. 397, and trespass for mesne profits after recovery. 3 Wils. Ch. 118. Where

there is a total destruction or conversion of the property, one tenant in common may sue his co-tenant in trespass, Coke, Litt. 200 *a*, *b*; Croke Eliz. 157; 8 Barnew. & C. 257, or in trover. Selwyn, Nisi P. 1366; 1 Term, 658; 2 Ga. 73; 2 Johns. N. Y. 468; 3 *id.* 175; 9 Wend. N. Y. 338; 21 *id.* 72; 6 Ired. No. C. 388. For a misfeasance, waste, or case in the nature of waste, may be brought.

Defendants.

The party committing the tortious act or asserting the adverse title is to be made defendant: as, the wrongful occupant of land, in ejectment, 7 Term, 327; 1 Bos. & P. 573, the party converting, in trover, Broom, Part. 246, making fraudulent representations. 3 Term, 56; 5 Bingh. N. C. 97; 3 Mees. & W. Exch. 532; 4 *id.* 337. The act may, however, have been done by the defendant's agent, 2 Mees. & W. Exch. 650, his mischievous animal, 12 Q. B. 29, or by the plaintiff himself, if acting with due care and suffering from the defendant's negligence. 1 Q. B. 29; 3 Lev. 352; 1 Ld. Raym. 738; 10 Ill. 425.

Agents and *principals*, Story, Ag. § 425; Paley, Ag. 294, are both liable for tortious act or negligence of the agent under the direction, 1 Sharswood, Blackst. Comm. 431, n., or in the regular course of employment, of the principal. 10 Ill. 425; 1 Metc. Mass. 550. See 2 Den. N. Y. 115; 5 *id.* 639. As to the agent of a corporation acting erroneously without malice, see 1 East, 555.

Subsequent ratification is equivalent to prior authority. Broom, Part. 259.

Agents are liable to their principals for conversion. 14 Johns. N. Y. 128; 8 Penn. St. 442.

27. *Assignees* are liable only for torts committed by them: as, where one takes property from another who has possession unlawfully, Bacon, Abr. *Actions* (B), or continues a nuisance. 2 Salk. 460; 1 Bos. & P. 409.

Bankrupts, 3 Barnew. & Ald. 408; 2 Den. N. Y. 73, and *insolvents*, Broom, Part. 284; 2 Chitty, Bail, 222; 2 Barnew. & Ald. 407; 9 Johns. N. Y. 161; 10 *id.* 289; 14 *id.* 128, are liable even after a discharge, for torts committed previously.

Corporations are liable for torts committed by their agents, 7 Cow. N. Y. 485; 2 Wend. N. Y. 452; 17 Mass. 503; 4 Serg. & R. Penn. 16; 9 *id.* 94; 2 Ark. 255; 4 Ohio, 500; 4 Wash. C. C. 106; 5 Ind. 252; but not, it seems, at common law, in replevin, Kyd, Corp. 205, or trespass *quare clausum*. 9 Ohio, 31.

Death of a tort-feasor, at common law, takes away all cause of action for torts disconnected with contract. 5 Term, 651; 1 Saund. 291 *c*. But actions against the personal representatives are provided for by statute in most of the states, and in England by stat. 3 & 4 Will. IV. c. 42, § 2.

Executors and *administrators*, at common law, are liable for the continuance of torts first committed by the deceased, W. Jones, 173; 5 Dan. Ky. 34; see 28 Ala. N. S. 360; but such continuance must be laid to be, as it really is, the act of the executor. 1 Cowp. 373; Williams, Exec. 1358; 13 Penn. St. 54; 1 Harr. Mich. 7.

28. *Husband* must be sued alone for his torts, and in detinue for goods delivered to himself and wife. 2 Bulstr. 308; 1 Leon. 312.

He may be sued alone for a conversion by the wife during coverture. 2 Roper, Husb. & W. 127.

Idiots and *lunatics* are liable, civilly, for torts committed, Hob. 134; Bacon, Abr. *Trespass* (G), though they may be capable of design. Broom, Part. 281. But if the lunatic is under control of chancery, proceedings must be in that court, or it will constitute a contempt. 3 Paige, Ch. N. Y. 199.

Infants may be sued in actions *ex delicto*, whether founded on positive wrongs or constructive torts, 21 Kent, Comm. 241; Broom, Part. 280; Coke, Litt. 180 *b*, n. 4: as, in detinue for goods delivered for a specific purpose, 4 Bos. & P. 140; for tortiously converting or fraudulently obtaining goods, 3 Pick. Mass. 492; 5 Hill, N. Y. 391; 4 M'Cord, So. C. 387; for uttering slander, 8 Term, 337; but only if the act be wholly tortious and disconnected from contract. 8 Term, 35; 6 Watts, Penn. 1; 6 Cranch, 226.

Lessor and *lessee* are respectively liable for their part of the tort in case of a wrong commenced by one and continued by the other: as, for example, a nuisance. 2 Salk. 460; Broom, Part. 253; Woodfall, Landl. & Ten. 671.

29. *Master* is liable for a negligent tortious act or default of his servant while acting within the scope of his employment, 6 Cow. N. Y. 189; 1 Pick. Mass. 465; 2 Gray, Mass. 181; 23 N. H. 157; 16 Me. 241; 5 Rich. So. C. 44; 18 Mo. 362, although not in his immediate employ, 5 Barnew. & C. 554; 8 Ad. & E. 109; see 3 Gray, Mass. 349; for the direct effect of such negligence, 17 Mass. 132; but not to one servant for the neglect of another engaged in the same general business, 36 Eng. L. & Eq. 486; 4 Metc. Mass. 49; 3 Cush. Mass. 270; 23 Penn. St. 384; 15 Barb. N. Y. 574; 6 Ind. 205; 22 Ala. N. S. 294; 23 Me. 269; 4 Sneed, Tenn. 36; see 5 Du. N. Y. 39; 37 Eng. L. & Eq. 281, if the servant injured be not unnecessarily exposed. 28 Vt. 59; 6 Cal. 209; 4 Sneed, Tenn. 36.

And the servant is also liable: 1 Sharswood, Blackst. Comm. 431, n. For wilful acts. 9 Carr. & P. 607; 3 Barb. 42, for those not committed while in the master's service, 26 Penn. St. 482, or not within the scope of his employment, he alone is liable.

Partners may be sued separately for acts of the firm, its agents or servants. 4 Gill, Md. 406; 1 Carr. & M. 93; 17 Mass. 182; 1 Metc. Mass. 560; 11 Wend. N. Y. 571; 18 *id.* 175.

PARTITION. The division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels, which belong to them as co-heirs or co-proprietors. The term is more technically applied to the division of real estate made

between coparceners, tenants in common, or joint tenants.

Compulsory is that which takes place without regard to the wishes of one or more of the owners.

Voluntary partition is that made by the owners by mutual consent.

2. Voluntary partition is effected by mutual conveyances or releases, to each person, of the share which he is to hold, executed by the other owners.

Compulsory partition is made by virtue of special laws providing that remedy. "It is presumed," says Chancellor Kent, 4 Comm. 360, "that the English statutes of 31 & 32 Henry VIII. have been generally re-enacted and adopted in this country, and, probably, with increased facilities for partition." In some states the courts of law have jurisdiction. The courts of equity have for a long time exercised jurisdiction in awarding partition. 1 Johns. Ch. N. Y. 113, 302; 4 Rand. Va. 493. In Massachusetts, the statute authorizes a partition to be effected by petition without writ. 2 Mass. 462; 15 *id.* 155. In Pennsylvania, intestates' estates may be divided upon petition to the orphans' court. By the Civil Code of Louisiana, art. 1214 *et seq.*, partition of a succession may be made. See, generally, Cruise, Dig. tit. 32, c. 6, s. 15; Comyns, Dig. *Pleader* (3 F), *Parcener* (C); 16 Viner, Abr. 217; 1 Suppl. Ves. Jr. 168, 171; La. Civ. Code, b. 3, t. 1, c. 8.

3. Courts of equity exercise jurisdiction in cases of partition on various grounds, in cases of such complication of titles that no adequate remedy can be had at law, 17 Ves. Ch. 551; 2 Freem. Ch. 26; but even in such cases the remedy in equity is more complete, for equity directs conveyances to be made, by which the title is more secure. "Partition at law and in equity," says Lord Redesdale, "are very different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it, which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyance, the partition cannot be effectually had." 2 Schoales & L. Ch. Ir. 371. See 1 Hilliard, Abr. c. 55, where may be found an abstract of the laws of the several states on this subject. See Washburn, Real Prop.

PARTNERS. In Contracts. Members of a partnership.

Dormant partners are those whose names and transactions as partners are professedly concealed from the world.

Nominal partners are ostensible partners who have no interest in the firm or business.

Ostensible partners are those whose names appear to the world as partners, and who in reality are such.

2. *Who may be.* Persons who have the legal capacity to make other contracts may enter into that of partnership. Collyer, Partn. §§ 11, 12. A lunatic seems not to be absolutely incapable of being a partner. 2 Mylne & K. 125; 6 Beav. Rolls, 324; 1 Lindley, Partn. 76, 77. A minor may contract the relation of partner, as he may make any other trading contract which may possibly turn out to be for his benefit. 1 Stark. 25; 8 Taunt. 35; 5 Barnew. & Ald. 147. This contract is subject to the right of avoidance by the minor; but, as in the case of *continuing* contracts, he is presumed to ratify it, and will be liable on subsequent contracts made on the credit of the partnership, if he do not, within a reasonable time after he has attained his full age, give notice of his disaffirmance of, or otherwise repudiate, the partnership. 5 Barnew. & Ald. 147; 9 Vt. 368; 2 Hill, So. C. 479; 3 Cush. Mass. 372; Collyer, Partn. § 528; Chitty, Contr. 1860 ed. 170, 171; Story, Partn. § 37; 3 Kent, Comm. 68; 1 Lindley, Partn. 74–76. It has been held that if a party who was a member of a firm during his minority does in any manner concur in carrying on the partnership, or receive profits from it, after he comes of age, it amounts to a confirmation, and will render him liable on the contracts of the firm made during his minority. 2 Hill, So. C. 497. The person with whom the minor contracts will be bound by all the consequences. Strange, 939; 2 Maule & S. 205.

Persons domiciled and trading in different countries at war with each other cannot be partners. Collyer, Partn. § 14; 15 Johns. N. Y. 57; 16 *id.* 438; 3 Kent, Comm. 62, 67; 1 Lindley, Partn. 79.

3. A married woman cannot by the common law sustain the character of partner. Collyer, Partn. § 15; Story, Partn. § 10; 3 De Gex, M. & G. 18; 1 Lindley, Partn. 77; 9 Exch. 422. Where a married woman is authorized by custom to carry on a trade as a *feme sole*, it has been supposed that she may be a partner, Bohun, Priv. Lond. 187; 2 Bos. & P. 93; see 3 All. Mass. 127; 41 Me. 405; 46 *id.* 239; but the consent of the husband that his wife may carry on trade for her sole and separate use does not necessarily import that she may involve herself in the complex transactions, responsibilities, and duties of a partnership. Story, Partn. § 12. In cases where the law treats the marriage as suspended, and allows the wife to act as a *feme sole* (as in cases of the civil death of the husband by exile, banishment, abjuration, or transportation), there may be ground to presume that, as she is thereby generally restored to her rights as a feme sole, she may enter into a partnership in trade. Collyer, Partn. § 12. See 2 Serg. & R. Penn. 189; 2 Nott & M'C. So. C. 242; 1 Bay, So. C. 162, 333. There is no general principle of law which prevents a corporation from being a partner with another corporation, or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution. 1 Lindley, Partn. 78.

Generally speaking, the common law imposes no restriction as to the number of persons who may carry on trade as part-

ners. Collyer, Partn. § 11; 1 Lindley, Partn. 71.

4. *Who are partners.* If persons suffer their names to be used in a business, or otherwise hold themselves out as partners, they are to be so considered, whatever may be the engagements between them and the other partners. 14 Vt. 540; 3 Kent, Comm. 32, 33; Collyer, Partn. § 86; 27 N. H. 252. In such cases they will be equally responsible with the other partners although they receive no profits; for the contract of one is the contract of all. 2 Campb. 802; 2 McLean, C. C. 347; 5 Mill. La. 406, 409; 5 Bingh. 776; 10 Barnew. & C. 140; 1 Mood. & R. 9; 19 Ves. Ch. 459; 17 Vt. 449. This rule of law arises not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without others, they would have lent nothing. 2 H. Blackst. 235; Dougl. Penn. 371; 2 W. Blackst. 998; 3 Kent, Comm. 32, 33; 6 Serg. & R. Penn. 259, 333; 16 Johns. N. Y. 40; 2 Des. So. C. 148; 2 Nott & M'C. So. C. 427; Collyer, Partn. § 86; Watson, Partn. 26. It has been held that it is not necessary for a person charging a nominal partner to have been aware of the partnership at the time of the contract, 2 H. Blackst. 242: 3 Watts, Penn. 39; and this doctrine has been vindicated on the ground that the object of the rule is to prevent the extension of unsound credit. Collyer, Partn. § 86. But the doctrine has been very much questioned. See 1 Smith, Lead. Cas. Engl. ed. 507: 10 Barnew. & C. 140; 2 McLean, C. C. 347; Mood. & R. 9; 1 Barnew. & Ald. 11; 8 Ala. N. S. 560; 7 B. Monr. Ky. 456. The term "holding one's self out as partner" imports, at least, the voluntary act of the party holding himself out, Collyer, Partn. § 97; 3 Conn. 324; 2 Campb. 617; but no particular mode of holding himself out is requisite to charge a party. The usual evidence to charge a party in such cases is that he has suffered the use of his name over the shop-door, in printed notices, bills of parcels, and advertisements, or that he has done other acts, or suffered his agents to do acts, 37 N. H. 9, no matter of what kind, sufficient to induce others to believe him to be a partner. Collyer, Partn. § 97; 3 McLean, C. C. 364, 549; 3 Campb. 310; 1 Ball & B. 9; 6 Bingh. 776; 4 Moore & P. 713; 20 N. H. 453, 454; 39 Me. 157. If there be a stipulation that a person appearing to be a partner shall be liable to no loss, he of course will not be liable as a partner to those who have absolute knowledge of such stipulation. 1 Campb. 404; 5 Brown, Parl. Cas. 489; Collyer, Partn. § 98. But see 2 Chitt. Bail, 120. How knowledge of the terms of the agreement under which parties are associated will affect third persons, see 6 Metc. Mass. 93, 94; 6 Pick. Mass. 372; 15 Mass. 339; 4 Johns. N. Y. 251; 5 Cow. N. Y. 489; 28 Vt. 108.

5. Dormant partners are, when discovered, equally liable with those who are held out to the world as partners, upon contracts made during the time they participate in the profits of the business. 5 Scott, 619, 635; 4 Esp. 89; 1 Crompt. & J. Exch. 316; 5 Mas. C. C. 176; 9 Pick. Mass. 272; 5 Pet. 529; 2 Harr. & G. Md. 159; Chitty, Contr. 1860 ed. 262; 5 Watts, Penn. 454; 1 Dougl. 371; 1 H. Blackst. 37; 3 Price, Exch. 538. The principle upon which dormant partners are liable is that, as they have the benefit of a share in the profits which are a part of the fund to which a creditor looks for payment, they shall be bound by the burdens. 1 Stor. C. C. 371, 376; 5 Mas. C. C. 187, 188; 5 Pet. 574; 10 Vt. 170; 16 Johns. N. Y. 40; 16 East, 174; 1 H. Blackst. 31; 2 *id.* 247; Collyer, Partn. § 18. Another reason given for holding them liable is that they might otherwise receive usurious interest without any risk. *Lord Mansfield*, 1 Dougl. 371; 4 East, 143; 4 Barnew. & Ald. 663; 3 C. B. 641, 650; 10 Johns. N. Y. 226.

6. The general result of the authorities seems to be that persons who share the profits of the concern are *primâ facie* liable as partners to third persons: if they have not held themselves out, or allowed themselves to be held out, as partners, they may repel the presumption of partnership by showing that the legal relation of partnership *inter se* does not exist. Collyer, Partn. § 85. This presumption may be repelled by showing that the persons who receive a share of the profits are mere servants, agents, factors, brokers, or other persons receiving such share of the profits in lieu of wages or commission for their labor, trouble, or services. Collyer, Partn. §§ 25, 39; Story, Partn. §§ 33, 34, 49, 55; 4 Sandf. N. Y. 311; 14 Pick. Mass. 195; 6 Metc. Mass. 91; 12 Conn. 69; 2 M'Cord, So. C. 421; 3 Wils. 40. But see 38 N. H. 287. The officers and crews of whaling and other fishing vessels, who are to receive certain proportions of the produce of the voyage in lieu of wages, 4 Esp. 182; 17 Mass. 206; 3 Pick. Mass. 435; 4 *id.* 234; 14 *id.* 195; 23 *id.* 495; 3 Stor. C. C. 112; 2 Younge & C. Exch. 61; captains of merchant-ships who, instead of wages, receive shares in the profits of the adventures on which they sail, 4 Maule & S. 240, or who take vessels under an agreement with the owners to pay certain charges and receive a share of the earnings, 6 Pick. Mass. 335; 16 Mass. 336; 7 Me. 261, persons making shipments on half-profits, and the like, 17 Mass. 206; 14 Pick. Mass. 195, have generally been held not to be partners with the owners.

7. A distinction has sometimes been made between sharing the *gross* profits or earnings and the net profits; but it is far from being treated as decisive on the question of partnership. See 1 Campb. 330; 6 Vt. 119; 10 *id.* 170; 6 Pick. Mass. 335; 14 *id.* 193; 6 Metc. Mass. 91; 4 Me. 264; 12 Conn. 69; 38 N. H. 287, 304; Collyer, Partn. § 35, and note; *Abbott*, C. J., 4 Barnew & Ald. 663.

The law merchant in reference to dormant partners has been held to be confined to trade and commerce, and not to extend to speculations in the purchase and sale of lands. 4 Mass. 424, 426; 3 Kent, Comm. 31, note; 3 Sumn. C. C. 435, 470; 11 Me. 337. It has, however, been frequently held that there may be a partnership in the business of purchasing and selling real estate. 21 Me. 418; Story, Partn. §§ 82, 83; Dav. Dist. Ct. 320; 7 Penn. St. 165; 10 Cush. Mass. 468, 469; 4 Ohio St. 1.

The contract must be voluntary among the members: therefore no stranger can be introduced into the firm without a concurrence of the whole firm. 7 Pick. Mass. 235, 238; 11 Me. 488; 1 Hill, N. Y. 234; 8 Watts & S. Penn. 63; 16 Ohio, 166; Collyer, Partn. §§ 8, 192; Pothier, Partn. ch. 5, § ii. art. 91; 2 Rose, Bank. 254. The *delectus personæ*, as it is called, is so essentially necessary to the constitution of a partnership that even the executors or other representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners. Collyer, Partn. § 9; 7 Pick. Mass. 237, 238; 3 Kent, Comm. 55, 56. The civilians carried this doctrine so far as not to permit it to be *stipulated* that the heirs or executors of partners should themselves be partners. Domat, lib. 1, tit. 8, s. 2; Pothier, Partn. n. 145. But in this respect the common law is otherwise. 2 Ves. Sen. Ch. 34; Collyer, Partn. §§ 9, 228 *et seq.*; 3 Kent, Comm. 56, 57; 1 Swanst. Ch. 510, n.; 9 Ves. Ch. 500; 7 Conn. 307. And Pothier thinks such a stipulation is binding. Pothier, Partn. n. 145. Clauses providing for the admission into the firm of a deceased partner's representatives will, in general, be construed as giving them an option to become partners, and not as constituting them partners absolutely. 7 Jarman, Conv. 120; 1 M'Clel. & Y. Exch. 569; 2 Russ. Ch. 62; Bisset, Partn. 169, 170; Collyer, Partn. § 230.

8. Although the *delectus personæ*, which is inherent in the nature of partnership, precludes the introduction of a stranger into the concern against the will of any of the partners, yet no partner is precluded from entering into a *sub-partnership* with a stranger: *nam socii mei socius, meus socius non est.* Dig. lib. 17, tit. 2, s. 20; Pothier, Partn. ch. 5, § ii. n. 91. In such case the stranger may share the profits of the particular partner with whom he contracts; and although it has been decided that it is not true as a general proposition that such stranger will not be liable for the debts of the general partnership, 13 Gray, Mass. 468, still, it is quite evident that a *mere* participation in profits renders one responsible only for the debts and liabilities of those with whom he participates; and, inasmuch as such stranger shares the profits only of and with *one* of the partners, he can be held only as the partner of that partner; he cannot be held as a partner in the general partnership, because he does not share or participate with the other persons who compose it. See Rose, Bank. 255; 1 Jac. Ch. 284; 3 Kent, Comm. 52; 2 Sim. & S. Ch. 124; 1 Bos. & P. 546; Collyer, Partn. § 194; Mont. & M'A. 445; 2 Bell, Comm. 636; 1 Lindley, Partn. 52, 53; 3 Ross, Comm. Law, 697. Besides, a sub-partner does not receive a certain share of the whole profits of the firm, but only a part of a share thereof; and he does not receive this part of a share, nor is he entitled to interfere with it at all, to say whether it shall be more or less in amount, until it has actually been set out and the time has come for a division between himself and the partner with whom he contracted. He does not draw out of the general concern any of its profits: he only draws from the profits of one who has previously drawn them from the general partnership. See 6 Madd. Ch. 5; 4 Russ. Ch. 285; Pothier, Partn. c. 5, § 11, n. 91; Starkie, Partn. 155; 3 Ross, Comm. Law, 697. If this stranger has caused damage to the partnership by his default, the party who has taken him into the partnership will be liable to the other partners the same as if he had done the damage himself. Pothier, Partn. n. 93.

9. *Power of partners.* It may be stated as a general principle, which governs all partnerships in *trade*, that each individual partner constitutes the others his *agents* for the purpose of entering into all contracts for him within the scope of the partnership concern, and, consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself. 6 Bingh. 792; Story, Partn. 1; 20 Miss. 122; 10 N. H. 16; Collyer, Partn. § 195; Pothier, Partn. c. 5, n. 90; 4 Exch. 623, 630. In truth, the law of partnership is a branch of the law of principal and agent. If two agree that they should carry on a trade and share the profits of it, each is a principal and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. 23 Bost. Law Rep. 498. If an act is done by one partner on behalf of the firm, and it can be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *primâ facie* be liable although in point of fact the act was not authorized by the other partners; but if the act cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *primâ facie* not be liable. 10 Barnew. & C. 128; 14 Mees. & W. Exch. 11; 4 Exch. 630; 1 Lindley, Partn. 192–195.

10. Each partner has the power to manage the ordinary business of the firm, whatever

it may be, and, consequently, to bind his partners, whether they be ostensible, dormant, actual, or nominal, 7 East, 210; 2 Barnew. & Ald. 673; 1 Crompt. & J. Exch. 316, by whatever he may do, in the course of such management, as entirely as himself. A partner may, for instance, borrow money, 1 Esp. 406; Collyer, Partn. §§ 390, 391; 4 Metc. Mass. 577, purchase goods, Comb. 383; 2 Carr. & K. 828; 5 Watts & S. Penn. 564, and sell, Godb. 244; Cowp. 445; 3 Kent, Comm. 44, the whole of the partnership effects at a single sale. 24 Pick. Mass. 89; Collyer, Partn. § 394; 1 Brock, Va. 456; 5 Watts, Penn. 22; 4 Wash. C. C. 234; 1 Harr. Ch. Mich. 2. So he may pledge the partnership goods, Barn. 343; 3 Kent, Comm. 46; Collyer, Partn. § 396; 10 Hare, Ch. 453; 5 Exch. 489; 7 Mann. & G. 607, even in the case of a particular adventure. Gow. 132, 135, note; 1 Rose, Bank. 297; 4 Barnew. & C. 867. This principle does not extend to the case of a joint-purchase or sub-purchase. 5 Barnew. & Ald. 395. The right of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts, as well as for debts thereafter to be contracted on account of the firm. Story, Partn. § 101; 5 Cranch, 298; 1 Brock, Va. 456; 17 Vt. 394. The assignment may be for the benefit of one creditor or of several, or of all the joint creditors, where all are admitted to an equal participation. Story, Partn. § 101; 4 Day, Conn. 428; 6 Pick. Mass. 360; 4 M'Cord, So. C. 519; 4 Mas. C. C. 206; 5 Watts, Penn. 22; 1 Hoff. Ch. N. Y. 511. Whether one partner may, without the express consent of his copartner, assign all the property of the firm to pay the debts of the firm, is a question on which the authorities differ. Collyer, Partn. § 395 and notes; Chitty, Contr. (ed. 1860) 278; 4 Wash. C. C. 282; 17 Vt. 390; 1 Brock, Va. 456; 5 Paige, Ch. N. Y. 30, 31; 1 Metc. Mass. 515; 2 Pick. Mass. 89; 5 Watts, Penn. 22; 8 Leigh, Va. 416; 1 Des. So. C. 537, 540; 3 Sandf. N. Y. 292, 296.

11. It has been held that one partner may, without the consent or knowledge of his copartners, mortgage all the goods of the firm to secure a particular creditor of the firm. 1 Metc. Mass. 518, 519; 7 *id.* 248. The right of one partner to dispose of the partnership property is, however, confined strictly to personal effects, and does not extend to real estate held by the partnership. 1 Metc. Mass. 518, 519; Story, Partn. § 101; 1 Brock, Va. 456, 463.

A partner may draw, accept, and indorse bills, notes, and checks in the name and for the use of the firm, Salk. 126; 7 Term, 210; 2 Peake, 150; 3 Dow. 219; Buller, Nisi P. 279; 20 Miss. 226; 4 Johns. N. Y. 265; Story, Partn. 102; 5 Blackf. Ind. 210; 4 Md. 288; and a note or bill executed by one partner in the name of the firm is *primâ facie* evidence that it was executed for partnership purposes. Collyer, Partn. § 401, note; 6 Wend. N. Y. 615; 16 Me. 419; 5 Mas. C. C. 176; 7 Ala. N. s. 19. But if a partnership be carried on under a single name, it has been held that the legal presumption in regard to a note signed by that name is that it was a personal and not a partnership note. See 26 Barb. N. Y. 610; 38 Me. 506; 5 Pick. Mass. 11. One partner may effect insurance, 4 Campb. 66; Collyer, Partn. § 438; Story Partn. § 102, and receive money for the firm, Holt, 434; Cowp. 814; may compromise with its debtors or creditors, Story, Partn. § 115; 7 Gill, Md. 49; Rice, So. C. 291, and release debts due to it, 3 Kent, Comm. 48; Chitty, Contr. 1860 ed. 274; Collyer, Partn. § 468 and note; Bacon, Abr. *Release* (D); 3 Bingh. 103; 17 Johns. N. Y. 58; 7 N. H. 567; 4 Mas. C. C. 232; 4 Gill & J. Md. 310; 3 Wash. C. C. 511; 3 C. B. 742, 745; Story, Partn. § 115; and such acts and dealings, if they fall within the ordinary business of the firm, 6 Beav. Rolls, 324; 2 Phill. 354, will bind all the other partners. A warranty of a horse, upon sale thereof by one of several horse-dealers, partners, would bind the others. 2 Barnew. & Ald. 679.

12. Upon the principle that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners, the acknowledgment, promise, or undertaking of one partner with reference to the contracts of the partnership is held to be the acknowledgment, promise, or undertaking of all. 1 Taunt. 104; Story, Partn. § 107; 1 Esp. 135; 1 Russ. & M. 199; 4 Barnew. & Ald. 663; 4 Dowl. & R. 7; 1 Salk. 291; Collyer, Partn. § 422. How far an acknowledgment or admission made by one partner after the dissolution of the firm binds the other partners in regard to partnership transactions, see Collyer, Partn. § 423 *et seq.* and notes, 430 and notes.

One partner will be bound by the fraud of his copartner in contracts relating to the affairs of the partnership, made with innocent third persons. Collyer, Partn. § 445; 2 Barnew. & Ald. 795; Cowp. 114; 1 Metc. Mass. 563; 6 Cow. N. Y. 497; 1 Ry. & M. 364; 6 Barnew. & C. 561; 2 Clark & F. Hou. L. 250; 7 T. B. Monr. Ky. 617; 1 Campb. 185; 7 Ired. No. C. 4; 15 Mass. 75, 81, 331; 17 *id.* 182; Bisset, Partn. 76. This doctrine proceeds upon the ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence and credit reposed in such third person. Story, Partn. § 108; 1 Metc. Mass. 562, 563. The liability, therefore, does not arise when there is collusion between the fraudulent partners and the party with whom he deals, Bisset, Partn. 80, 81; 1 East, 48, 53, or the latter have reason to suppose that the partner is acting on his own account. Peake, 80, 81; Chitty, Contr. 1860 ed. 280, 284; 2 C. B. 821; 10 Barnew. & C. 298.

13. A partner may be made liable for other wrongs committed in reference to the partnership business by his copartners: as, where a partner injures a third person by negligence in driving a coach, the property

of the firm and employed on their business. Chitty, Contr. 1860 ed. 280, note; Collyer, Partn. § 458; 12 N. H. 276. A joint conversion may be raised in point of law by the assent of the partner to the acts of his copartner. Collyer, Partn. § 458; 1 Maule & S. 588, Story, Partn. § 166. Demand of, and a refusal by, one partner to deliver up property is evidence of a conversion by both. 4 Hill, N. Y. 13; 24 Wend. N. Y. 169; 4 Rawle, Penn. 120. But the wilful tort of one partner seems not, in general, to be imputable to the firm. 3 Dowl. 160; 10 Exch. 352.

As a general rule, the act or admission of one partner in legal proceedings, as also notice to or by one partner, is held to be binding on the firm. Collyer, Partn. §§ 441, 442, 443; 15 Mass. 44; 2 Wash. C. C. 388; 4 Conn. 326; 3 Litt. Ky. 250; Story, Partn. § 107; 1 Maule & S. 259; 5 *id.* 49; 1 Carr. & P. 550; 1 Campb. 82; 2 Crompt. & M. 318. In an action against partners, one may enter an appearance for the rest, 7 Term, 207; 17 Vt. 531; see 2 M'Cord, So. C. 310; but not to bind them personally and individually when not within the jurisdiction and not served with process. 9 Cush. Mass. 360; 11 How. 165. Where one partner released an action after the firm had instructed their attorney to proceed to trial, the court refused to interfere, 7 J. B. Moore, 356; and it seems that one partner has also the power of suspending proceedings in an action. Bisset, Partn. 75; Gow, Partn. 65, note.

14. One partner may give notice of abandonment, under a policy of insurance, for all. 5 Maule & S. 47. Notice of dishonor to one of several partners, joint indorsers of a bill or note, is notice to all. Chitty, Bills, 339; 6 La. 684; 20 Johns. N. Y. 176. One partner may act for the others in proceedings under bankrupt laws, Collyer, Partn. § 444; 4 Ves. Ch. 597; 19 *id.* 291; 1 Rose, Bank. 2; 2 *id.* 174; Bisset, Partn. Eng. ed. 76; except in the case of a petition for a fiat. Bisset, Partn. 76.

A partner derives no authority from the mere relation of partnership to bind the firm as the guarantor of the debt of another, 5 Q. B. 833; 4 Exch. 623; Collyer, Partn. § 421; Chitty, Contr. 1860 ed. 276, 277, and notes; Story, Partn. § 127; 3 Kent, Comm. 46, 47; 3 Ired. No. C. 241; 2 Harr. N. J. 24; 2 Ala. N. S. 502; 2 Cush. Mass. 309; or as a party to a bill or note for the accommodation of, or as a mere and avowed surety for, another. 2 Cush. Mass. 309; Collyer, Partn. § 421; 19 Johns. N. Y. 154; 1 Wend. N. Y. 531; 5 Conn. 574; 21 Miss. 122; 31 Me. 452; 3 Humphr. Tenn. 597; 14 Wend. N. Y. 133, 138; 4 Hill, N. Y. 161. In neither of these cases can the act of one partner bind the firm, unless there be a special authority for the purpose, or one to be implied from the common course of business or the previous course and habit of dealing, with the knowledge and consent of the firm, or unless the transaction is subsequently adopted by the firm. Collyer, Partn. § 421 and note; 3 Kent, Comm. 46, 47; Chitty, Contr. 1860 ed. 276, 277; 3 Humphr. Tenn. 597; 4 Hill, N. Y. 261. Whether it appears upon the instrument or in some other way that the contract is one of guaranty, suretyship, or accommodation, the burden of proof is upon the party holding it, if he took it knowing such to be the character of the contract, to show the facts necessary to render it available against the firm. 19 Johns. N. Y. 154; 7 Wend. N. Y. 309; 2 Cush. Mass. 314, 315; 2 Penn. St. 177; 21 Miss. 122; 22 Me. 188, 189; 31 *id.* 454. Direct or positive proof is not necessary: the authority or ratification may be inferred from circumstances. 2 Cush. Mass. 309; 22 Me. 188, 189; 14 Wend. N. Y. 133; 2 Litt. Ky. 41; 10 Vt. 268.

15. One partner, without authority, express or implied from circumstances, cannot bind the firm by a contract to convey real estate of the partnership unless there be a subsequent ratification or adoption of the contract. 5 Hill, N. Y. 107. One partner has no implied authority to bind his copartners by deed, 3 Kent, Comm. 47, 48; Story, Partn. § 117 *et seq.*; Collyer, Partn. 463; but a deed made by one partner in the name and for the use of the members of the firm will bind the other partners, if they assent to it or subsequently adopt it; and this consent or adoption may be by parol. 11 Pick. Mass. 400; 4 Metc. Mass. 548; 11 Ohio, 223; Chitty, Contr. 1860 ed. 278, note; Collyer, Partn. § 462 *et seq.*, § 469 *et seq.* So one partner may bind the firm to a conveyance by deed of the effects of the firm which he might have conveyed without deed. The mere circumstance of annexing a seal to the instrument in such a case does not annul a transfer so consummated. 1 Brock, Va. 456; 1 Metc. Mass. 515; 7 *id.* 244; 5 Hill, N. Y. 107; 8 Leigh, Va. 415. A deed of assignment of the partnership property, executed by one partner as his deed only, passes his interest in the property. 11 Mees. & W. Exch. 128. But see 17 Ves. Ch. 193, 200; 5 Mo. 466.

One partner cannot bind the firm by submitting any of the affairs of the firm to arbitration, whether by deed or parol. 3 Kent, Comm. 49; Story, Partn. §§ 114, 115; 3 Bingh. 101; 3 Hurlst. & N. Exch. 500; 1 Crompt. M. & R. Exch. 681; 3 C. B. 742, 745; 19 Johns. N. Y. 137; 1 Pet. 221; Collyer, Partn. §§ 439, 470. The principle is that there is no implied authority, excepting so far as it is necessary to carry on the business of the firm. 1 Crompt. M. & R. Exch. 581; 3 Bingh. 101. It might also affect the rights of the other partners to resort to the ordinary course of justice. Collyer, Partn. § 439. In some states, however, one partner may submit partnership matters to arbitration. Wright, Ohio, 420; 12 Serg. & R. Penn. 243; 3 T. B. Monr. Ky. 433.

16. The rule that one partner cannot bind his copartners by deed does not extend to *releases*. Collyer, Partn. § 468; 2 Coke, 68; 4 Term, 519; 3 Bingh. 101; 3 Johns. N. Y. 68; 4 Gill & J. Md. 310; 3 Kent, Comm. 48. As a release by one partner is a release by all, so a release to one partner is a release to all.

March. 202; 8 Coke, 136; 23 Pick. Mass. 444; 3 Penn. 57; 5 Gill & J. Md. 314; 22 Pick. Mass. 305; Chitty, Contr. 1860 ed. 275, note.

The power of a partner to dispose of the property of the firm does not extend to real estate held by the partnership: one partner cannot convey away the real estate of the firm without special authority. 1 Metc. Mass. 518, 519; Story, Partn. § 101; 1 Brock, Va. 456, 468; 3 McLean, C. C. 27; Collyer, Partn. § 394.

One partner cannot by confessing a voluntary judgment bind his copartners, unless actually brought into court by regular service of process against him and his partner. A judgment so confessed will bind the partners who did it only. 1 Wend. N. Y. 311; 1 Blackf. Ind. 252; 1 Watts & S. Penn. 340, 519; 7 *id.* 172; 3 C. B. 742; Collyer, Partn. § 464, note; 4 Moore & P. 57. Nor can one partner, by entering an appearance for another, bind him personally and individually where the latter is not within the jurisdiction and has not been served with process. 9 Cush. Mass. 360; 1 How. 165.

17. The act of a partner wholly unconnected with the business of the partnership does not bind the firm. 4 Exch. 623; Collyer, Partn. §§ 437, 484; 2 Barnew. & Ald. 678; 4 Johns. N. Y. 265; 8 Me. 820; 15 Pick. Mass. 290; 3 Conn. 198; 3 Johns. Ch. N. Y. 23; Story, Partn. §§ 112, 113; Chitty, Contr. 1860 ed. 275; 3 Q. B. 316; 4 Dan. Ky. 378; 2 Ell. & B. 61. Still, a partner may bind the firm in matters out of the usual course of the business of the firm, if those matters arise out of, and are connected with, the regular transactions of the firm. Collyer, Partn. § 484; 2 Barnew. & Ald. 673. If one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is doing so is not imputable to the firm. 1 Lindley, Partn. 231; 1 Brock, Va. 386.

No arrangement between the partners themselves can limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arrangement. Collyer, Partn. § 386; 2 Barnew. & Ald. 679; 3 Kent, Comm. 41; 5 Mas. C. C. 187, 188; 5 Pet. 129; 3 Barnew. & C. 427. But where the creditor has express notice of a private arrangement between the partners, by which either the power of one to bind the firm or his liability on partnership contracts is qualified or defeated, such creditor will be bound by the arrangement. Collyer, Partn. § 387; 12 N. H. 275; 4 Ired. No. C. 129; 38 N. H. 287; 6 Pick. Mass. 372; 4 Johns. N. Y. 251; 5 Conn. 597, 598; 1 Campb. 404; 5 Brown, Parl. Cas. 489; 1 Lindl. Partn. 260 *et seq.*, 267–269. The act or contract of one partner, even in a transaction purely of a partnership nature, does not bind the firm if the creditor has express notice from the other partners that they will not consider themselves responsible. 1 Salk. 202; 10 East, 264; 1 Stark. 164; 1 Younge & J. Exch. 227; for the authority of one partner to bind the firm is only implied; and no one can become the creditor of another against his express and declared will. Chitty, Contr. 1860 ed. 284; Collyer, Partn. § 387.

18. One partner may interfere, and, by his dissent from future contracts by his copartner or from the closing of contracts with him which have not become binding upon the firm, he may, upon express notice thereof, avoid any liability subsequently arising upon such contracts if entered into, unless the dissenting partner afterwards assents to and ratifies the transaction. 1 Stark. 164; 3 Kent, Comm. 45; 3 Conn. 124; 1 Campb. 403; 16 Viner, Abr. 244; 15 Me. 198; Collyer, Partn. §§ 388, 389; Pothier, Partn. n. 90. But it seems that the dissenting partner would not be liable merely on the ground that the goods purchased, or the fruits of the contract, came to the use of the firm, 15 Me. 178, 181; 3 Conn. 124; 10 East, 204; 1 Younge & J. 227, 230, unless they were of some benefit to the firm. 1 Stark. 104; 15 Me. 181. It has, however, been questioned whether the dissent of one partner, where the partnership consists of more than two, will affect the validity of partnership contracts made by the majority of the firm in the usual course of business and within the scope of the concern. 3 Kent, Comm. 45; Collyer, Partn. §§ 147, 389 and note; Story, Partn. § 123; 1 Johns. Ch. N. Y. 400; 4 *id.* 573, 597; 1 Turn. & R. Ch. 496, 517, 525. It is said by a learned writer that, in the absence of an express stipulation, a majority must decide as to the disposal of the partnership property, 3 Chitty, Comm. Law, 234; but the power of the majority must be confined to the ordinary business of the partnership, Collyer, Partn. § 197; 9 Hare, Ch. 326; 3 DeGex & J. 123; 4 Kay & J. 733; 2 Phill. 740; 14 Beav. Rolls, 367; 2 DeGex, M. & G. 49; 3 Smale & G. 176: it does not extend to the right to change any of the articles thereof. Collyer, Partn. § 198; Story, Partn. § 125; 4 Johns. Ch. N. Y. 573; 32 N. H. 9, nor to engage the partnership in transactions for which it was never intended. Gow, Partn. 3d ed. 398, App.; 3 Maule & S. 488; 1 Taunt. 241; 1 Sim. & S. Ch. 31. Where a majority is authorized to act, it must be fairly constituted and must proceed with the most entire good faith. Turn. & R. Ch. 525; 10 Hare, Ch. 493; 5 DeGex & S. 310.

19. Each partner is liable to pay the whole partnership debts. In what proportion the partners shall contribute is a matter merely among themselves. *Lord Mansfield*, 5 Burr. 2613. Universally, whatever agreement may exist among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of, the partnership, each individual member is liable for the joint debt to the whole extent of his property. Bisset, Partn. 9; 5 Burr. 2611; 2 W. Blackst. 947; 9 East, 516; 5 Term, 601; 1 Ves. & B. Ch. Ir. 157; 2 Deas. So. C. 148; 6 Serg. & R. Penn. 333; 1 Lindley, Partn. 300. In Louisiana, ordinary partners are bound *in solido* for the debts of the partner-

ship, La. Civ. Code, art. 2843; each partner is bound for his share of the partnership debts, calculating such share in proportion to the number of partners, without attention to the proportion of the stock or profits each is entitled to. *Id.* art. 2844.

Partners are said to be joint tenants of the partnership property without benefit of survivorship *inter se*. Bisset, Partn. 44, 45; 7 Jarman, Conv. 67; Comyns, Dig. *Merchants* (D); Collyer, Partn. § 123; Story, Partn. §§ 89, 90. But, in addition to the ordinary right of joint tenants, each partner has also a power, singly, to dispose of the entire right of all the partners in the partnership effects, for the purposes of partnership and in the name of the firm. Bisset, Partn. 45; Story, Partn. § 90; Cowp. 445.

20. Partnership also differs from a tenancy in common in reference to the power of disposal, and because, *inter se*, each partner has a claim, not to any specific share or interest in the property *in specie*, as a tenant in common has, but to the proportion of the residue which shall be found to be due to him upon the final balance of their accounts, after the conversion of the assets and the liquidation thereout of all claims upon the partnership; and therefore each partner has a right to have the same applied to the discharge and payment of all such claims before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto. Story, Partn. § 97; 7 Jarman, Conv. 68; Cowp. 469; 1 Ves. Sen. Ch. 239; 4 Ves. Ch. 396; 6 *id.* 119; 17 *id.* 193.

Each partner has also a specific lien on the present and future property of the partnership, the stock brought in, and every thing coming in lien, during the continuance and after the determination of the partnership, not only for the payment of debts due to third persons, but also for the amount of his own share of the partnership stock, and for all moneys advanced by him beyond that amount for the use of the partnership, as also for moneys abstracted by his copartners beyond the amount of his share. Story, Partn. §§ 97, 326, 441; Collyer, Partn. § 125; 3 Kent, Comm. 65, 66; 8 Dana, 278; 10 Gill & J. Md. 253; 20 Vt. 479; 9 Cush. Mass. 558; 1 Lindley, Partn. 576; 1 Ves. Sen. 239; 9 Beav. Rolls, 239; 20 *id.* 20; 25 *id.* 280; 3 Mont. D. & D. 198. This lien attaches on real estate held by the partnership for partnership purposes, as well as upon the personal estate, 5 Metc. Mass. 562, 577–579, 585, and is coextensive with the transactions on joint account. 1 Dan. Ky. 58; 11 Ala. N. s. 412.

21. If a partner has taken the whole or any part of his share out of the partnership stock, the stock so taken, if identified, is applicable to the payment of what, upon an account taken, shall be found to be due from him to the partnership, before it can be applied to the payment of his separate creditors. 3 P. Will. 180; Collyer, Partn. § 126; Story, Partn. § 97. The same rule will apply to any other property into which the partnership property may have been converted, so far and so long as its original character and identity can be distinctly traced, 4 Harr. & M'H. Md. 167; Story, Partn. § 97; and hence no separate creditor of any partner can, merely as such creditor, take any portion of the partnership effects, by process or otherwise, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied. Story, Partn. § 97; 9 Me. 28; Collyer, Partn. § 822 and notes; 5 Johns. Ch. N. Y. 417.

Upon the decease of one of several partners, his personal representatives become, both at law and in equity, tenants in common with the surviving partners. Collyer, Partn. § 346; 3 Kent, Comm. 37; Story, Partn. § 346; 35 N. H. 403. Still, as the surviving partner stands chargeable with the whole of the partnership debts, he takes the partnership property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid. 3 Kent, Comm. 37; Story, Partn. § 346; Collyer, Partn. § 129; 5 Metc. Mass. 576, 585; 10 Gill & J. Md. 404; 30 Me. 386; 6 Cow. N. Y. 441; 3 Paige, Ch. N. Y. 527; 13 Miss. 44; 18 Conn. 294. See 1 Exch. 164; Year B. 38 Edw. III. f. 7, t. *Accompt.* The debts of the partnership must be collected in the name of the surviving partner. 6 Cow. N. Y. 441; Story, Partn. § 346; 3 Kent, Comm. 37; 4 Metc. Mass. 540. In Louisiana the surviving partner does not possess the right until he is authorized by the court of probate to sue alone for or receive partnership debts. 6 La. 194; 16 *id.* 30.

22. The partnership property consists of the original stock and the additions made to it in the course of trade. All real estate purchased for the partnership, paid for out of the funds thereof, and devoted to partnership uses and trusts, whether the legal title is in one or all of the partners, is treated in equity in the same manner as other partnership property until the partnership account is settled and the partnership debts are paid. Bisset, Partn. 47–56, 60; Story, Partn. § 98; 5 Ves. Ch. 189; 3 Swanst. Ch. 489; Collyer, Partn. § 135; 10 Cush. Mass. 458; 4 Metc. Mass. 527; 5 *id.* 562; 3 Kent, Comm. 37; 27 N. H. 37. Leases of real estate taken by one partner for partnership purposes, mines, and trade-marks are held to be partnership property. 17 Ves. Ch. 298; Bisset, Partn. 60, 61; 1 Taunt. 250; 10 Jur. 106; 5 Ves. Ch. 308; Story, Partn. § 98.

A peculiar species of interest, called the good will of the trade or business, is often treated as in some sort a part of the partnership property. But Chancellor Kent says "the good will of a trade is not partnership stock." 3 Kent, Comm. 64. Still, the good-will of a business is often recognized as a valuable interest. 3 Mer. Ch. 452, 455; 1 Hoff. Ch. N. Y. 68; 5 Ves. Ch. 539. It is considered to enhance the value of the effects on which it is attendant, and will, therefore,

be included in a decree for the sale of those effects. Collyer, Partn. §§ 161, 322; Story, Partn. §§ 99, 100; Bisset, Partn. 62. The good will of a professional partnership belongs, in the absence of express stipulations, exclusively to the survivors. Bisset, Partn. 64; 3 Madd. Ch. 64; Collyer, Partn. § 163.

23. *Distribution of interest.* As between the partners, they may by agreement stipulate for equal or unequal shares in the profit and loss of the partnership, Story, Partn. § 23; but in the absence of any express agreement or stipulation between them, and of all controlling evidence and circumstances, the presumption has been held to be that they are interested in equal shares. Story, Partn. § 24; Bisset, Partn. 56, 57; Collyer, Partn. § 167; 1 Mood. & R. 527; 6 Wend. N. Y. 263; 9 Ala. N. S. 372; 13 *id.* 752; 2 Murph. No. C. 70; 5 Dan. Ky. 211; 8 *id* 214; 1 Ired. Eq. No. C. 332; 1 J. J. Marsh. Ky. 506; 1 Lindley, Partn. 573; 20 Beav. Rolls, 98; 7 De Gex, M. & G. 239; 17 Ves. Ch. 49; 7 Hare, 159; 1 Mood. & R. 527. And the circumstance that each partner has brought an unequal amount of capital into the common stock, or that one or more have brought in the whole capital and the others have only brought industry, skill, and experience, would not seem to furnish any substantial ground of difference as to the distribution. Story, Partn. § 24; 3 Kent, Comm. 28, 29; 21 Me. 117.

24. It has sometimes been asserted, however, that it is a matter of fact, to be settled by a jury or by a court, according to all the circumstances, what would be a reasonable apportionment, uncontrolled by any natural presumption of equality in the distribution. Story, Partn. § 24; 2 Campb. 45; 7 Bligh, 432; 5 Mills & S. 16. The opinion in England seems divided; but in America the authorities seem decidedly to favor the doctrine of a presumed equality of interest. See American cases cited above; Story, Partn. §§ 24–26.

Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties. 21 Me. 120; Collyer, Partn. §§ 169–171. See 5 Taunt. 74; 4 Barnew. & C. 867; Story, Partn. § 26.

A *bonâ fide* sale, for a valuable consideration, by one partner to another, of all the partnership effects, is valid, and the property so conveyed becomes the separate estate of the purchaser although the firm and both partners are at the time insolvent. 9 Cush. Mass. 553; Collyer, Partn. §§ 174, 894, 903; 21 Conn. 130, 137; 21 N. H. 462, 469.

25. *Mutual rights and personal obligations of partners.* Good faith, reasonable diligence and skill, and the exercise of a sound judgment and discretion, lie at the very foundation of the relation of partnership. The same rules and tests are to be applied to the conduct of partners as are ordinarily applied to that of trustees. Indeed, the functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents. Collyer, Partn. §§ 178, 182; Story, Partn. § 169; 3 Stor. C. C. 93, 101; 3 Ves. & B. Ch. Ir. 36; 1 Johns. Ch. N. Y. 470; 10 Hare, Ch. 522, 536; 14 Beav. Rolls, 250; 1 Macn. & G. 294; 3 Smale & G. 419; 1 Lindley, Partn. 492, 493. If the partnership suffers loss from the gross negligence, unskilfulness, fraud, or other wanton misconduct of a partner in the partnership business, or from a known deviation from the partnership articles, he is ordinarily responsible over to the other partners for all losses and damages sustained thereby. 1 Sim. Ch. 89; Pothier, Partn. n. 133; 3 Kent, Comm. 52, note; Story, Partn. § 173 and note. A partner withdrawing the funds of the concern, thereby diminishing the stock, and applying it to his own use, shall account to the others for the injury. 1 J. J. Marsh. Ky. 507; 3 Stor. C. C. 101. But if one partner, acting fairly and for the best according to his judgment, causes a loss, he is not answerable to the others. 3 Wash. C. C. 224. Not only gross frauds, but intrigues for private benefit, are clearly offences against the partnership at large, and, as such, are relievable in a court of equity. Collyer, Partn. § 179; 15 Ves. Ch. 227; 3 Kent, Comm. 51, 52; 1 Sim. Ch. 52, 89; 17 Ves. Ch. 298.

26. As it is the duty of the partners to devote themselves to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit of the partnership, it follows that they must do it without any reward or compensation, although the services performed by the partners are very unequal in amount and value, unless there is an express stipulation for remuneration. 7 Paige, Ch. N. Y. 483; 1 Anstr. 94; 1 Johns. Ch. N. Y. 157, 165; 8 Dan. Ky. 219; 4 Gill, Md. 338; 2 Dev. & B. Eq. No. C. 123; 3 Johns. Ch. N. Y. 431; Story, Partn. § 182; Collyer, Partn. § 183. So no partner has a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital, 3 Kent, Comm. 51, 52; Collyer, Partn. § 184; Story, Partn. § 177; 1 Johns. Ch. N. Y. 305; 1 Sim. & S. Ch. 133, nor to place himself in a position which gives him a bias against the discharge of his duty, Collyer, Partn. § 186; 1 Madd. & G. Ch. 367; Story, Partn. § 175; 1 Sim. & S. Ch. 124; 9 Sim. Ch. 607; 11 Serg. & R. Penn. 41, 48; 3 Kent, Comm. 61, nor to make use of the partnership stock for his own private benefit, Mosely, 3; Collyer, Partn. § 196; 6 Madd. Ch. 367; 4 Beav. Rolls, 534; 16 *id.* 485; 17 Ves. Ch. 298; 1 Macn. & G. 294; 1 Sim. Ch. 52, nor to introduce a stranger into the concern. Collyer, Partn. §§ 8, 192; 7 Pick. Mass. 238; 8 Watts & S. Penn. 63; 16 Ohio, 166. Each partner should keep precise accounts, and have them always ready for inspection. Collyer, Partn. § 189; 2 Jac. & W. Ch. 558; Story, Partn. § 181; 16 Ves. Ch. 51; 1 Lindley, Partn. 665, 666; 3 Beav. Rolls, 388, note; 1 DeGex & S. 692; 12 Sim. Ch. 460; 2 Phill. 222; 3 Younge & C. 655; 20 Beav. Rolls, 219.

27. In all ordinary matters relating to the

partnership, the powers of the partners are coextensive, and neither has a right to exclude another from an equal share in the management of the concern or from the possession of the partnership effects. Collyer, Partn. § 190; 2 Paige, Ch. N. Y. 310; 16 Ves. Ch. 61; 2 Jac. & W. Ch. 558; 1 Lindley, Partn. 464. A partner ought not to transcend the ordinary privileges of a partner by incurring extravagant and unnecessary expense in the management of the concern, though for partnership purposes. Collyer, Partn. § 191.

The weight of authority, it is said by Mr. Chancellor Kent, is in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership and when all have been consulted. 3 Kent, Comm. 45 and note. See, also, Story, Partn. § 123 and notes; 3 Chitty, Comm. Law, 234; 6 Ves. Ch. 777; 5 Brown, Parl. Cas. 476, 489; Turn. & R. Ch. 516, 525; 3 Johns. Ch. N. Y. 400, 405, 406; 4 *id.* 473; 1 Vern. Ch. 465.

It is the duty of those upon whom, by appointment or otherwise, it devolves, after the dissolution of a firm, to wind up the affairs of the partnership, to act for the best advantage of the concern, to make no inconsistent use of the property, and to seek no private advantage in the composition of debts or in any other transaction in the performance of this business. 1 Taunt. 104; 1 Swanst. Ch. 507; 2 *id.* 627. Nor, in this case, can any partner claim any commission for getting in the debts, or, in any other particular, reward or compensation for his trouble. 1 Knapp, Priv. Counc. 312; 3 Kent. Comm, 64, note; Story, Partn. § 331 and note; 17 Pick. Mass. 519; 4 Gratt. Va. 138; Collyer, Partn. § 199 and note. But in 16 Vt. 613, a partner who performed services in settling up the affairs of a firm after dissolution was allowed compensation for them. See, also, 15 Mass. 120.

PARTNERSHIP. In Contracts. A voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, in some lawful commerce or business, under an understanding, express, or implied from the nature of the enterprise, that there shall be a communion of profit and loss between them, will constitute a partnership. Collyer, Partn. § 2; 10 Me. 489; 3 Harr. N. J. 485; 5 Ark. 278.

2. The law of partnership, as administered in England and in the United States, rests on a foundation composed of three materials,—the common law, the law of merchants, and the Roman law. Collyer, Partn. § 1.

An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. See 1 Lindley, Partn. 1, 6, where many definitions are collected.

But every association of persons engaged in trade with a view to share the profits arising therefrom is not necessarily a partnership: it may be a *corporation*. There are, however, important differences between a corporation and an ordinary partnership. A corporation is a fictitious person, created by special authority, and endowed by that authority with a capacity to acquire rights and to incur obligations as a single individual. It consists of a number of persons; but they transact business only collectively, as one fictitious whole, and that whole is treated as different from the persons composing it; whereas the rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. 6 Ves. Ch. 773; 3 Ves. & B. Ch. Ir. 180.

3. In order, then, to constitute a partnership, properly so called, it is requisite—*first*, that there shall be two or more persons who have agreed that some business shall be carried on for their common profit; and, *secondly*, that the profits shall be shared amongst them, not as members of a body corporate, but merely as individuals who have entered into an agreement to that effect. Although the usual characteristics of an ordinary partnership are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in, still, perhaps, nothing can be said to be absolutely essential to the existence of a partnership except a community of interest in profits.

It is not essential to the existence of a partnership that there should be any joint capital or stock. 2 Bingh. 170. Sometimes a partnership exists between parties merely as the managers and disposers of the goods of others. Collyer, Partn. § 17; 4 Barnew. & Ald. 663; 15 Johns. N. Y. 409, 422. So, it seems, two persons may be owners in common of property, and also partners in the working and management of it for their common benefit. *Cockburn*, C. J., 2 C. B. N. S. 357, 363; 8 Carr. & P. 345; 3 Kay & J. Ch. 271; 16 Mees. & W. Exch. 503; 2 Stark. 107; 3 Ross, Lead. Cas. 529.

A partnership may exist in a single transaction as well as in a series. Dav. Dist. Ct. 323; 3 Kent, Comm. 30; Story, Partn. § 81; 2 Ga. 18; 3 C. B. 641, 651; 9 *id.* 458.

4. Partnerships are sometimes divided into partnerships between the parties, which only are properly so called, and partnerships as to third persons, which are not, in fact, partnerships at all. What is called a partnership as to third persons (*quasi*-partnership) is nothing more than the relation existing between a number of persons, who, in consequence of certain acts done by them, are held liable for each other's conduct, as if they had actually entered into a contract of partnership amongst themselves.

There can be no doubt whatever that persons engaged in any trade, business, or adventure, upon the terms of sharing the profits *and* losses arising therefrom, are partners in that trade, business, or adventure. This is a true partnership, both between the parties and *quoad* third persons. 2 Bingh. N. C. 108; 3 Jur. N. S. 31, in the Rolls; Bisset, Partn. Eng. ed. 7.

An agreement to share profits, nothing being said about the losses, amounts *primâ facie* to an agreement to share losses also: so that an agreement to share profits is *primâ facie* an agreement for a partnership; and, accordingly, it is held that, unless an agreement to the contrary is shown, persons engaged in any business or adventure, and sharing the profits derived from it, are partners as regards that business or adventure. Still, it cannot be said that persons who share profits are necessarily and inevitably partners in the proper sense of the word. 1 Campb. 330; 9 C. B. 440. But see 38 N. H. 287.

The doctrine that where there is a community of profit there is a partnership is, however, so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless sub-

sist. 1 H. Blackst. 49; 3 Mees. & W. Exch. 357; 6 *id.* 119; 2 Bligh, 270; 3 C. B. 32, 39; Chitty, Contr. 1860 ed. 260, 261.

Whether persons are partners or not *inter se* is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn upon a consideration of only a part of its provisions. 1 Huds. & B. Ch. Ir. 83; 15 Mees. & W. Exch. 292; Chitty, Contr. 1860 ed. 257; 2 Barnew. & C. 401; 1 Stor. C. C. 371; 3 Kent, Comm. 27; 3 C. B. 250; 2 Bligh, 270.

5. A *quasi*-partnership, or, as it is usually called, a partnership as to third persons, arises by operation of law acting upon the conduct of the parties, under which persons who are not partners incur liabilities as if they were, without any intention to do so. 1 Stor. C. C. 371; Collyer, Partn. §§ 74, 83; Bisset, Partn. Eng. ed. 9. This may result from sharing profits, or from persons holding themselves out as partners. The doctrines by which a *quasi*-partnership results from merely sharing profits seem to find their root in decisions of a comparatively modern date. They are certainly not very clearly defined, and sometimes lead to great apparent injustice. 1 Lindl. Partn. 34 *et seq.*; 2 W. Blackst. 998; 2 H. Blackst. 235; 18 C. B. 617; 3 N. H. 287, 307. See PARTNERS.

It has been held that a *quasi*-partnership subsists between merchants who divide the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other. 4 Barnew. & Ald. 663. So between persons who agree to share the profits of a single isolated adventure, 9 C. B. 431; 1 Rose, Bank. 297; 4 East, 144; and between persons one of whom is in the position of a servant to the others, but is paid a share of the profits instead of a salary, 1 Deac. Bank. 341; 1 Rose, Bank. 92; and between persons one of whom is paid an annuity out of the profits made by the others, 17 Ves. Ch. 412; 8 Bingh. 469, or an annuity in lieu of any share in those profits. 2 W. Blackst. 999. So between the vendor and purchaser of a business, if the former guarantees a clear profit of so much a year, and is to have all profits beyond the amount guaranteed. 3 C. B. 641. The character in which a portion of the profits is received does not affect the result. See 1 Maule & S. 412; 10 Ves. Ch. 119; 21 Beav. Rolls, 164; 5 Ad. & E. 28; 11 C. B. 406. Persons who share profits are *quasi*-partners although their community of interest may be confined to the profits. 2 Barnew. & C. 401; 5 Jur. 650.

6. The other mode in which persons not partners become liable as if they were is by so conducting themselves as to lead other people to suppose that they are willing to be regarded by them as if they were partners in point of fact. This is nothing more than an application of the general principle of *estoppel* by conduct acted on. 6 Ad. & E. 469; 2 Exch. 654; 19 Ves. Ch. 461; 2 H. Blackst. 235; 2 Chitty, Bail, 120. A person is not relieved from liability though he was induced by the *fraud* of others to hold himself out as a partner with them. See 5 Bingh. 521; 1 Rose, Bank. 69. The holding out must have been before the contract with the third person was entered into, and must have been the inducement to it. 7 Barnew. & C. 409; 10 *id.* 140; 1 Fost. & F. 344; 6 Bingh. 776; 3 C. B. 32; 2 Campb. 617.

A person does not become liable as partner because he represents that he is willing or intends to become one. 9 Barnew. & C. 632; 15 Mees. & W. Exch. 517. The question whether one has so held himself out as to become liable as partner is one of fact, to be determined by a jury. 6 Mann. & G. 928; 6 Q. B. 477.

A sub-partnership is as it were a partnership within a partnership. If several persons are partners, and one of them agrees to share the profits derived by him with a stranger, this will constitute what is called a *sub-partnership:* that is to say, it makes the parties to it partners *inter se;* but it in no way affects the other members of the principal firm, nor is there any authority for saying that because the stranger shares the profits of that one partner he can be made liable to persons dealing with the firm as if he were a partner therein. 1 Lindl. Partn. 52, 53; Collyer, Partn. § 194. See PARTNERS.

7. The proposition being admitted that a participation in profits will render the participator liable as a partner to third persons, the most difficult question, and one that requires further consideration, remains, viz.: what kind or degree of participation will produce that effect? Bisset, Partn. 10.

It seems to be no longer true, as a general proposition, that receiving a certain proportion of the profits, whether gross or net, Collyer, Partn. § 35 and note, arising from a union in business of the capital of one man and the labor, services, or skill of another, necessarily creates a partnership. 5 Gray, Mass. 59, 60; 6 Metc. Mass. 92; 10 *id.* 303; 12 Conn. 69; 13 N. H. 185; Collyer, Partn. § 44, note; 15 Me. 294; 30 *id.* 386; 3 C. B. N. S. 562, 563. See 18 Johns. N. Y. 34; 18 Wend. N. Y. 175; 6 Conn. 347; Collyer, Partn. § 38. Although a presumption of partnership would seem to arise in such a case, Collyer, Partn. § 85, still, the particular circumstances of the case may be such as to repel this presumption. It may appear that the share of the profits taken was merely a compensation to one party for labor and service, or for furnishing the raw materials, or a mill-privilege, or a factory, or the like, from which the other is to earn profits. Story, Partn. § 36; 5 Gray, Mass. 60; Collyer, Partn. § 85; 8 Cush. Mass. 556, 562; 3 Kent, Comm. 33; 6 Halst. N. J. 181.

Subtle distinctions have been taken between a payment out of profits and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits not as profits but as something else. It has been held that in order to render a man liable because he participates in the profits he must have a specific interest in the profits themselves, *as profits.* 17 Ves. Ch. 404, 419; 1 Rose, Bank. 89; 18 Ves. Ch. 300; Bisset, Partn. 13; Collyer, Partn. §§ 40, 41; 4 Paige, Ch. N. Y. 148; 12 Conn. 69; 6 Metc. Mass. 82; 5 Den. N. Y. 180; 3 Kent, Comm. 34. The distinction is between payments out of profits as such and payments not out of them as such. This distinction must be considered as settled in point of law. See 1 Lindl. Partn. 39; 3 C. B. 32.

In other cases, it is held that in order to render a man liable as partner he must have a specific interest in the profits as a *principal trader.* Collyer, Partn. § 25; 12 Conn. 77, 78; 1 Den. N. Y. 337; 15 Conn. 73; 10 Metc. Mass. 303. But in reference to these positions the questions arise, When may a party be said to have a specific interest in the profits, *as profits?* when, as a principal trader?—questions in themselves very nice, and difficult to determine. See 6 Metc. Mass. 82; 12 Conn. 77. These subtleties are attributable, on the one hand, to the establishment of the rule that persons who share profits shall be answerable for the losses, and, on the other, to a disinclination to apply that principle to cases in which it is clear that those who share the profits never intended to become partners *inter se.*

8. There are other cases in which considerable stress is laid on the right to an account of profits, as furnishing a rule of liability. Bisset, Partn. 14, 15; 3 Kent, Comm. 25, note; 1 Rose, Bank. 91; Casey, Partn. 11, note (1); 18 Wend. N. Y. 184, 185; 3 C. B. N. S. 544, 561; Story, Partn. § 49. But, although it is true that every partner must have a right to an account, it seems not to be equally true that every party who has a right to an account is a partner. 5 Gray, Mass. 58; Bisset, Partn. 14; 7 Jarman, Conv. Sweet ed. 11, n. (a).

There are still other cases, which rely upon a distinction between receiving a share of the gross profits or returns and a share of the net profits, in which it is held that sharing the net profits makes one liable as a partner, but sharing the gross profits or returns does not. But the decisions are neither clear nor uniform upon this distinction. Collyer, Partn. § 35, note; 1 Campb. 329; Story, Partn. § 34; 3 Kent, Comm. 25, note; 3 Mees. & W. Exch. 357, 360, 361; 3 C. B. N. S. 544, 562; 9 C. B. 432; 2 H. Blackst. 590; 4 Maule & S. 240.

It has frequently been held that a partnership does not result from an agreement to share gross returns. If several persons make advances for a common object, and agree to share the gross returns in proportion to their advances, this does not create such a community of interest in profits or losses as to make such persons partners. 9 Bingh. 297; Sel. Cas. in Ch. 9; 2 C. B. N. S. 357; 4 Maule & S. 240.

9. The truth is, the doctrines upon which men are held liable as partners often tend so strongly to work injustice that many refinements have been ingrafted upon them, and the decisions have frequently been made to turn upon their own peculiar circumstances: so that no clear and intelligible principle running through and governing all the cases can easily be extracted from them. Without a careful examination of the disturbing causes, it would certainly be difficult to see why receiving a certain share of the profits for labor and services, or for furnishing raw materials, etc., should *not be*, while receiving a certain share of the profits for a loan of money *should be*, held to render a man liable as a partner.

A loan of money to be repaid with interest, however exorbitant, and however much it may drain the resources of the borrower, does not constitute a *quasi*-partnership between him and the lender; but it is otherwise if profits are pointed at as a form for payment. 2 W. Blackst. 999; 5 Barnew. & Ald. 954; 1 Jac. Ch. 144; Bisset, Partn. 24, 25; 1 Lindl. Partn. 40; 6 Pick. Mass. 372.

The principal distinction between a partnership and a mere agency is that a partner has a community of interest with the other partners in the business and responsibilities of the partnership,—sometimes both in the stock and profits, and sometimes only in the profits,—whereas an agent, as such, has no interest in either. Story, Partn. § 1; Bisset, Partn. 35; 16 Ves. Ch. 49; 17 *id.* 404; 4 Barnew. & C. 67; 1 Deac. Bank. 341. "The authority of a partner is much more extensive than that of a mere agent." 10 N. H. 16.

10. The *formation* of a contract of partnership does not require any particular formality. It is, in general, sufficient that it is formed by the voluntary consent of the parties, whether that be express or implied, whether it be by written articles, tacit approbation, or by parol contract, or even by mere acts. Story, Partn. § 86; 3 Kent, Comm. 27; Dav. Dist. Ct. 320; 4 Conn. 568. There are but few cases in which a writing is necessary. Under the Statute of Frauds, where there is an agreement that a partnership shall commence at some time more than a year from the making of the agreement, a writing is necessary. 5 Barnew. & C. 108. With respect to that part of the Statute of Frauds relating to lands, it has been held that a partnership may be constituted without writing. 20 Beav. Rolls, 449, and that if a partnership is proved to exist it may be shown that its property consists of land, although there is no signed agreement between the parties. 5 Ves. Ch. 309; 10 Cush. Mass. 458. So it has been held that an agreement to form a partnership for the purpose of buying and selling land may be proved by parol. 5 Hare, Ch. 369; 2 Phill. 266; 2 Hall & T. 224. But this latter proposition is not generally conceded. The contrary doctrine has the weight of learned opinions. See Dav. Dist. Ct. 320; Story, Partn. § 83; 3 Sumn. C. C. 458–471; 2 DeGex & J. 52.

11. Whether a partnership exists or not in a particular case is not a mere question of fact, but one mixed of law and fact. It is, nevertheless, generally to be decided by a jury. See 3 Harr. N. J. 358; 4 *id.* 190; 6 Conn. 347; 1 Nott & M'C. So. C. 20; 1 Caines, N. Y. 184; 2 Fla. 541; 9 C. B. 457; 3 C. B. N. S. 562, 563; 9 Bingh. 117.

The existence of a partnership may be proved by showing—*first*, a distinct agreement for a partnership: or, *second*, an agreement to share profit *and* loss; either of these will be conclusive: or, *third*, an agreement to share profits,—which will be strong evidence of a partnership: or, *fourth*, circumstances sufficient to establish a *quasi*-partnership, which, being proved, is held to be *primâ facie* evidence of a real partnership.

Where there is no written agreement, the evidence generally relied upon to prove a partnership is the conduct of the parties, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other persons. This can be shown by the books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes in which facts can be established. As to the presumption arising from the joint retainer of solicitors, see 20 Beav. Rolls, 98; 7 DeGex, M. & G. 239; 7 Hare, Ch. 159, 164. For cases in which partnership has been inferred from various circumstances, see 4 Russ. Ch. 247; 2 Bligh, N. S. 215; 3 Brown, Parl. Cas. 548; 5 *id.* 482; 1 Stark. 81; 2 Campb. 45.

12. It is said by Mr. Collyer that "perhaps it may be laid down generally that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced." Collyer, Partn. § 56.

There may be a partnership to trade in land. 21 Me. 421, 422; Dav. Dist. Ct. 320; 7 Penn. St. 165; 10 Cush. Mass. 458; 4 Conn. 568; Story, Partn. §§ 82, 83. A ship, as well as any other chattel, may be held in strict partnership. 3 Kent, Comm. 154; Collyer, Partn. § 1185; 12 Mass. 54; 6 Me. 77; 15 *id.* 427. But ships are generally owned by parties as tenants in common; and they are not in consequence of such ownership to be considered as partners. Collyer, Partn. § 1185; 6 Me. 77; 6 Pick. Mass. 120; 24 *id.* 19; Abbott, Shipp. 97; 14 Conn. 404; 14 Penn. St. 34, 38; T. Raym. 15; 8 Gill, Md. 92. The same is true of any other species of property in which the parties have only a community of interest. Pothier, Partn. n. 2; Story, Partn. § 3; 1 Lindley, Partn. 30 *et seq.*; 8 Exch. 825; 21 Beav. Rolls, 536; 24 *id.* 283, 2 C. B. N. S. 357.

13. Partnerships, in regard to their extent, are divided by writers on partnership law into *universal*, *general*, and *particular*, *special* or *limited*. There were two kinds of universal partnerships under the Roman law: one, by which the parties agreed to put in common all their property, both present and future; the other, by which they put in common all they might acquire, during its continuance, from every kind of commerce. The former they were not presumed to have entered into except by express contract: the latter they were considered to enter into when they contracted together a partnership without any further explanation. Pothier, Partn. nn. 29, 43. Such contracts are said to be within the scope of the common law; but they are of very rare existence. Story, Partn. § 72; 5 Mas. C. C. 183. *General* partnerships are properly such where parties carry on all their trade and business, whatever it may be, for their joint benefit or profit, whether the capital stock be limited or not, or the contributions of the partners be equal or unequal. Cowp. 814, 816. But where the parties are engaged in one branch of trade or business only, they would be usually spoken of as engaged in a general partnership. Story, Partn. § 74.

14. *Special* partnerships, in the sense of the common law, are those which are formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. Cowp. 814, 816; Story, Partn. § 75. These seem to embrace what are called by Pothier, Partn. c. 2, s. 2, particular partnerships, under which head he includes partnerships in particular things or in one thing alone, partnerships for the exercise of a profession, and partnerships for commerce or trade, Pothier, Partn. nn. 54, 55, 56; these latter he again divides into partnerships *en nom collectif*, into which two or more traders enter to carry on in common a certain commerce in the name of all the partners; partnerships *en commandite*, into which a trader enters with a private person (a person not in trade) for a trade to be carried on in the name of the trader only, and to which the other contracting party contributes only a certain sum of money, which he brings into the capital of the partnership, under an agreement that he is to have a certain share of the profits, if there are any, and to bear, in the contrary event, the same share of the losses, in which, nevertheless, he will only be bound to the extent of the capital he has brought into the partnership, Pothier, Partn. n. 60; the *anonymous or unknown* partnership, which is also called *compte en participation*; this is that by which two or more persons agree to take a share in a certain business, which shall be carried on by one or the other of them in his own name alone. Pothier, Partn. n. 61.

15. The above classification is of very little practical importance, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally, from those in which they are partners in some particular transaction or adventure only. If persons who are not partners at all agree to share the profits and losses, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to any thing else. See 1 Esp. 29; 9 C. B. 431; 2 Barnew. & C. 401; 20 Beav. Rolls, 98; 7 DeGex, M. & G. Exch. 239; 7 Hare, 164; 2 Younge & C. Exch. 481.

There is another class of partnerships, allowed by charter in England, and by statute in most of the American states, generally called "limited partnerships," in which it is provided that there shall be one or more partners, called general partners, with unrestricted liability, and one or more, called special partners, who shall be liable only to the extent of the capital furnished by them. Collyer, Partn. b. 1, c. 1, s. 3, § 99 *et seq.*; 3 Kent, Comm. 34. These have the general characteristics of partnerships *en commandite*.

16. There is still another class of partnerships, called "joint-stock companies." These generally embrace a large number of persons, but, except under express statute provisions, the members are liable to the same extent as in ordinary partnerships. Collyer, Partn. § 1078; Story, Partn. § 164; 4 Metc. Mass. 535; 2 Carr. & P. 408, n.; 1 Ves. & B. Ch. Ir. 157.

Partnerships, in regard to their duration, may be distinguished by the terms of partnerships at will, or unlimited, and partnerships for a term, or limited.

A partnership at will is presumed to continue so long as the parties are in life and of capacity to continue it. 1 Greenleaf, Ev. § 42; Story, Partn. § 271; 9 Humphr. Tenn. 750. A partnership for a term is presumed to continue during the term, provided the parties are in life and of legal capacity to continue it. See 7 Mo. 29; Collyer, Partn. § 105. But in no case will the law presume a partnership to exist beyond the life of the parties. 1 Swanst. Ch. 521; 1 Wils. Ch. 181; Story, Partn. § 84.

17. *Dissolution of.* A partnership may be dissolved—*first, by the act of the parties;* as, by their mutual consent, Story, Partn. § 268; 3 Kent, Comm. 54; Pothier, Partn. n. 149; and where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time. 4 Russ. Ch. 260; 1 Swanst. Ch. 508; 3 Kent, Comm. 53, 54; Gow. Partn. 3d ed. 109; Story, Partn. §§ 84, 272, 273. See 5 Ark. 280. Whether a partnership for a certain time can be dissolved by one partner at his mere will and pleasure before the term has expired, seems not to be absolutely and definitively settled. Story, Partn. § 275. In favor of the right of one partner in such cases, see 3 Kent, Comm. 55; 17 Johns. N. Y. 525; 19 *id.* 538; 1 Hoffm. Ch. N. Y. 534; 3 Bland, Ch. Md. 674. Against it, see Story, Partn. §§ 275, 276; 5 Ark. 281; 4 Wash. C. C. 234; Pothier, Partn. 152. See, also, 15 Me. 180; Gow. Partn. 3d ed. 218, 219, 225, 226; 1 Swanst. Ch. 495; 16

Ves. Ch. 56; Bisset, Partn. 84. As against third persons, a partner may certainly withdraw from a partnership at his pleasure. 3 C. B. N. S. 561.

Second, by the act of God: as, by the death of one of the partners; and this operates from the time of the death, 3 Mer. Ch. 610; 6 Cow. N. Y. 441; Pothier, Partn. n. 144; 6 Conn. 184; 2 How. 560; 7 Ala. N. S. 19; Collyer, Partn. § 113; 3 Kent, Comm. 55, 56; Story, Partn. §§ 317, 319; 7 Pet. 594; 5 Metc. Mass. 575; 1 Pick. Mass. 519; 5 Gill, Md. 1; unless there be an express stipulation to the contrary. 3 Madd. Ch. 251; 2 How. 560.

Third, by the act of the law: as, by the bankruptcy of one of the partners. 4 Burr. 2174; Cowp. 448; 6 Ves. Ch. 126; 5 Maule & S. 340.

Fourth, by a valid assignment of all the partnership effects for the benefit of creditors, either under insolvent acts, Collyer, Partn, § 112, or otherwise, 41 Me. 373, and by a sale of the partnership effects under a separate execution against one partner. Collyer, Partn. § 112; Cowp. 445; 2 Ves. & B. Ch. Ir. 300; 3 Kent, Comm. 59. But the mere insolvency of one or all of the members of a partnership does not of itself operate a dissolution. 24 Pick. Mass. 89. See 1 Bland, Ch. Md. 408; 2 Ashm. Penn. 305; Pothier, Partn. n. 148.

18. It may be dissolved—*fifth, by the civil death* of one of the partners. Collyer, Partn. § 114; Pothier, Partn. n. 147. But the absconding of a party from the state does not of itself operate a dissolution. 24 Pick. Mass. 89. See Story, Partn. § 298.

Sixth, by the breaking out of a war between two states in which the partners are domiciled and carrying on trade. 16 Johns. N. Y. 438; 3 Kent, Comm. 62; Story, Partn. §§ 315, 316; 3 Bland, Ch. Md. 674.

Seventh, by the marriage of a feme sole partner. 4 Russ. Ch. 260; 3 Kent, Comm. 55; Story, Partn. § 306; Collyer, Partn. § 115.

Eighth, by the extinction of the subject-matter of the joint business or undertaking, 16 Johns. N. Y. 401, 402; Pothier, Partn. nn. 5, 140–143; Collyer, Partn. § 115, and by the completion of the business or adventure for which the partnership was formed. Pothier, Partn. n. 143; Story, Partn. § 280.

Ninth, by the termination of the period for which a partnership for a certain time was formed. Collyer, Partn. § 119; Pothier, Partn. n. 139. If the partnership be continued, by express or tacit consent, after that period, it will be presumed to continue on the old terms, 17 Serg. & R. Penn. 165; Chitty, Contr. 1860 ed. 285, note, but as a partnership at will.

Tenth, by the assignment of the whole of one partner's interest either to his copartner or to a stranger, Collyer, Partn. § 110, note; 3 Kent, Comm. 59; Story, Partn. §§ 307, 308; 4 Barnew. & Ad. 175; 17 Johns. N. Y. 525; 1 Freem. Ch. Miss. 231; 8 Watts & S. Penn. 262; where it does not appear that the assignee acts in the concern after the assignment. 17 Johns. N. Y. 525; 8 Wend. N. Y. 442; 5 Dan. Ky. 213; 1 Whart. Penn. 381; 2 Dev. No. C. Eq. 481. But see 14 Pick. Mass. 322, where it was held that this would not *ipso facto* work a dissolution.

Eleventh, by the award of arbitrators appointed under a clause in the partnership articles to that effect. See Bisset, Partn. 87; 1 W. Blackst. 475; 4 Barnew. & Ad. 172.

19. A partnership for a term may be dissolved before the expiration of the term, by the decree of a court of equity founded on the wilful fraud or other gross misconduct of one of the partners, Collyer, Partn. § 296; Chitty, Contr. 1860 ed. 285; 4 Beav. Rolls, 502; 21 *id.* 482; 2 Ves. & B. Ch. Ir. 299; so on his gross carelessness and waste in the administration of the partnership, and his exclusion of the other partners from their just share of the management, Collyer, Partn. § 227; 1 Jac. & W. Ch. 592; 2 *id.* 206; 5 Ark. 278; 2 Ashm. Penn. 309, 310; 3 Ves. Ch. 74; so on the existence of violent and lasting dissensions between the partners, 1 Jarman, Conv. 26; Gow, Partn. 3d ed. 227; 1 Iowa, 537; Collyer, Partn. § 297; see 4 Sim. Ch. 11; Story, Partn. § 288; 4 Beav. Rolls, 503; 14 Ohio, 315, where these are of such a character as to prevent the business from being conducted upon the stipulated terms, 3 Kent, Comm. 60, 61; Collyer, Partn. § 297, and to destroy the mutual confidence of the partners in each other. 4 Beav. Rolls, 502; 21 *id.* 482; 1 Lindley, Partn. 184, 185. But a partner cannot, by misconducting himself and rendering it impossible for his copartners to act in harmony with him, obtain a dissolution on the ground of the impossibility so created by himself. 21 Beav. Rolls, 493, 494; 3 Hare, Ch. 387. A partnership may be dissolved by decree when its business is in a hopeless state, its continuance impracticable, and its property liable to be wasted and lost. Collyer, Partn. § 291; 3 Kent, Comm. 60; 1 Cox, 212; 2 Ves. & B. Ch. Ir. 290; 16 Johns. N. Y. 491; Gow, Partn. 3d ed. 226, 227; 1 Lindley, Partn. 180, 181; 3 Kay & J. 78; 13 Sim. Ch. 495.

20. The confirmed lunacy of an active partner is sufficient to induce a court of equity to decree a dissolution, not only for the purpose of protecting the lunatic, but also to relieve his copartners from the difficult position in which the lunacy places them. See 1 Cox, Ch. 107; 1 Swanst. Ch. 514, note; 2 Mylne & K. 125; 6 Beav. Rolls, 324; 1 De Gex, M. & G. Exch. 171; 2 Kay & J. Ch. 441; Collyer, Partn. § 292; 3 Kent, Comm. 58; Watson, Partn. 382; 3 Younge & C. 184; Bisset, Partn. 83. The same may be said of every other inveterate infirmity, such as palsy, or the like, which has seized upon one of the partners and rendered him incompetent to act where his personal labor and skill were contracted for. Pothier, Partn. n. 152; 3 Kent, Comm. 62; Collyer, Partn. § 295.

But lunacy does not itself dissolve the firm, nor do other infirmities. 3 Kent, Comm. 58; Story, Partn. § 295; 3 Jur. 358; Bisset, Partn. 85. It is, however, contended by Mr.

Justice Story and by Parker, C. J., that a clear case of insanity ought to effect that result. Story, Partn. § 295; 10 N. H. 101. The court does not decree a dissolution on the ground of lunacy except upon clear evidence that the malady exists and is incurable. 3 Younge & C. 184; 2 Kay & J. 441. A temporary illness is not sufficient. 2 Ves. Sen. Ch. 34; 1 Cox, 107; 1 Lindley, Partn. 182, 183. A dissolution by the court on the ground of insanity dates from the decree and not from a prior day. 1 Phill. 172; 2 Coll. 276; 1 Kay & J. 765; 1 Lindley, Partn. 183.

21. A partnership dissolved by the death of one of the partners is dissolved as *to the whole firm*, 7 Peters, 586, 594; Chitty, Contr. 1860 ed. 285, note; and the reason given for this rule is applicable not only to dissolution by death, but to every species of dissolution. Collyer, Partn. §§ 113, 116, 117, 118; Pothier, Partn. n. 146; Story, Partn. §§ 317, 318.

The partnership *quoad* third persons—in other words, the liability of partners *quoad* third persons—cannot be dissolved without notice to them that the partnership no longer exists. Actual notice must be brought home to persons who have been in the habit of dealing with the firm; but as to all persons who have had no previous dealings with the firm, notice fairly given in the public newspapers is deemed sufficient. Collyer, Partn. §§ 532–534. This notice is necessary to terminate the agency of each partner, and, consequently, his power to bind the firm. 1 Lindley, Partn. 261, 324; 1 Younge & J. 227; 1 Stark. 164; 7 Price, Exch. 193; 1 Campb. 402; 10 East, 264.

It is not necessary to give notice of the retirement of a dormant partner from the firm, if the fact of his being a partner be unknown to all the creditors of the firm: if it be known to some, notice to those must be given, but that will be sufficient. Collyer, Partn. §§ 120, 536; 4 Esp. 89; 1 Carr. & K. 580; 1 Metc. Mass. 19; 1 Barnew. & Ad. 11; 4 *id.* 179; 5 B. Monr. Ky. 170; Chitty, Contr. 1860 ed. 287 and note; 5 Cow. N. Y. 534; 1 Lindley, Partn. 326.

22. Notice of the dissolution is not necessary, in case of the death of one of the partners, to free the estate of the deceased partner from further liability, Collyer, Partn. § 120; Story, Partn. §§ 162, 336, 343; 3 Kent, Comm. 63; 3 Mer. Ch. 614; 17 Pick. Mass. 519; Bisset, Partn. 103, 104; nor is notice, in fact, necessary in any case where the dissolution takes place by operation of law. Collyer, Partn. § 538; 3 Kent. Comm. 63, 67; 15 Johns. N. Y. 57; 16 *id.* 494.

Effect of dissolution. The effect of dissolution, as between the partners, is to terminate all transactions between them as partners, except for the purpose of taking a general account and winding up the concern. 1 Penn. St. 274; 3 Kent, Comm. 62 *et seq.* As to third persons, the effect of a dissolution is to absolve the partners from all liability for future transactions, but not for past transactions of the firm. Collyer, Partn. § 121; Story, Partn. ch. 15; 3 Kent, Comm. 62 *et seq.*; 2 Cush. Mass. 175; Pothier, Partn. n. 155; 3 M'Cord, So. C. 378; 4 Munf. Va. 215; 5 Mas. C. C. 56; Harp. So. C. 470; 4 Johns. N. Y. 224; 6 Cow. N. Y. 701; 41 Me. 376.

23. It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business. 11 Ves. Ch. 5; 15 *id.* 227; 16 *id.* 57; 2 Russ. Ch. 242. The power of the partners subsists for many purposes after dissolution: among these are—*first*, the completion of all the unfinished engagements of the partnership; *second*, the conversion of all the property, means, and assets of the partnership existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares; *third*, the application of the partnership funds to the payment of the partnership debts. Story, Partn. § 326; Chitty, Contr. 1860 ed. 288; 3 Kent, Comm. 57; 17 Pick. Mass. 519. But although, for the purposes of winding up the concern and fulfilling engagements that could not be fulfilled during its existence, the power of the partners certainly subsists even after dissolution, yet, legally and strictly speaking, it subsists for those purposes only. Collyer, Partn. § 119; 15 Ves. Ch. 227; 5 Mann. & G. 504; 1 H. Blackst. 156; 3 Esp. 108; 4 Mees. & W. Exch. 461, 462; 10 Hare, Ch. 453; 4 DeGex, M. & G. Exch. 542.

Whether a dissolution of a partnership is *per se* a breach of a contract by the firm to employ a person in their service is questionable. 3 Hurlst. & N. Exch. 931. See FIRM; PARTNERS; PROFIT.

PARTURITION. The act of giving birth to a child. See BIRTH.

PARTUS (Lat.). The child just before it is born, or immediately after its birth.

Offspring. See MAXIMS, *Partus sequitur, etc.*

PARTY. See PARTIES.

PARTY-JURY. A jury *de medietate linguæ*, which title see.

PARTY-WALL. A wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates. 2 Bouvier, Inst. n. 1615.

2. Party-walls are generally regulated by acts of the local legislatures. The principles of these acts generally are that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall it is built at his expense, and when the other wishes to make use of it he pays one-half of its value. Each owner has a right to place his joists in it and use it for the support of his roof. See 4 Sandf. N. Y. 480; 24 Mo. 69; 12 La. Ann. 785. When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbour; and, having done so, he is not answerable for any consequential damages which may

ensue. 17 Johns. N. Y. 92; 12 Mass. 220; 2 N. H. 534. See 1 Dall. Penn. 346; 5 Serg. & R. Penn. 1.

3. When such a wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time and with the least inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall. 3 Kent, Comm. 436; 6 Den. N. Y. 717. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor to prevent it from falling. If, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie. 1 Mood. & M. 362; 15 N. Y. 601. Consult Washburn, Easements; 2 Washburn, Real Prop.; 4 Carr. & P. 161; 9 Barnew. & C. 725; 3 Barnew. & Ad. 874; 2 Ad. & E. 493; 1 Crompt. & J. Exch. 20; 4 Paige, Ch. N. Y. 169; 1 Pick. Mass. 434; 12 Mass. 220; 2 Rolle, Abr. 564.

PARVUM CAPE. See PETIT CAPE.

PASS. A certificate given to a slave, by his master or mistress, in which it is stated that he is permitted to leave his home with their authority. The paper on which such certificate is written.

In Practice. To be given or entered: as, let the judgment pass for the plaintiff.

To become transferred: thus, the title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement. 1 Bouvier, Inst. n. 939.

To decide upon. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

PASS-BOOK. In Mercantile Law. A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

Among English bankers, the term pass-book is given to a small book made up from time to time from the banker's ledger and forwarded to the customer: this is not considered as a statement of account between the parties: yet when the customer neglects for a long time to make any objection to the correctness of the entries, he will be bound by them. 2 Atk. Ch. 252; 2 Deac. & C. Bank. 534; 2 Mees. & W. Exch. 2.

PASSAGE. A way over water. A voyage made over the sea or a great river: as, the Sea-Gull had a quick passage. The money paid for the transportation of a person over the sea: as, my passage to Europe was one hundred and fifty dollars.

PASSAGE-MONEY. The sum claimable for the conveyance of a person, with or without luggage, on the water.

The difference between *freight* and *passage-money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage-money. 3 Chitty, Comm. Law, 424; 1 Pet. Adm. 126; 3 Johns. N. Y. 335. See COMMON CARRIERS OF PASSENGERS.

PASSENGER. One who has taken a place in a public conveyance for the purpose of being transported from one place to another. One who is so conveyed from one place to another.

Such persons are entitled to be carried in safety to the place of destination. See COMMON CARRIERS OF PASSENGERS. Full provisions for the health and safety of passengers by sea have been made by the United States laws. See Act of Congr. May 17, 1848, 11 U. S. Stat. at Large, 127; March 2, 1847, 11 *id.* 149; January 31, 1848, 11 *id.* 210. See Gilp. Dist. Ct. 334.

PASSIVE. All the sums of which one is a debtor.

It is used in contradistinction to active. By active debts are understood those which may be employed in furnishing assets to a merchant to pay those which he owes, which are called passive debts.

PASSPORT (Fr. *passer*, to pass, *port*, harbor or gate). **In Maritime Law.** A paper containing a permission from the neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed. It usually contains his name and residence, the name, property, description, tonnage, and destination of the ship, the nature and quantity of the cargo, the place from whence it comes, and its destination, with such other matters as the practice of the place requires.

It is also called a *sea-brief*, or *sea-letter*. But Marshall distinguishes sea-letter from passport, which latter, he says, is intended to protect the ship, while the former relates to the cargo, destination, etc. See Jacobs. Sea-Laws, 66, note.

This document is indispensably necessary in time of war for the safety of every neutral vessel. Marshall, Ins. b. 1, c. 9, s. 6, 317, 406 *b*.

A Mediterranean pass, or protection against the Barbary powers. Jacobs. Sea-Laws, 66, note; Act of Congr. 1796.

A document granted in time of war to protect persons or property from the general operation of hostilities. Wheaton, Int. Law, 475; 1 Kent, Comm. 161; 6 Wheat. 3.

In most countries of continental Europe, passports are given to travellers. These are intended to protect them on their journey from all molestation while they are obedient to the laws. Passports are also granted by the secretary of state to persons travelling abroad, certifying that they are citizens of the United States. 9 Pet. 692. See 1 Kent, Comm. 162, 182; Merlin, Répert. Sweden has recently set the example of abolishing the vexatious system of passports.

PASTURES. Lands upon which beasts feed themselves. By a grant of pastures the land itself passes. 1 Thomas, Coke, Litt. 202.

PATENT. A grant of some privilege, property, or authority, made by the govern-

ment or sovereign of a country to one or more individuals. Phillips, Pat. 1.

As the term was originally used in England, it signified certain written instruments emanating from the king and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises; they were called letters patent, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed.

In the United States, the word patent is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands. But in its more usual acceptation it is understood as referring to those instruments by which the United States secures to inventors for a limited time the exclusive use of their own inventions.

2. The granting of exclusive privileges by means of letters patent was a power which for a long time was greatly abused by the sovereigns of England. The sole right of dealing in certain commodities was in that manner conferred upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. These exclusive privileges, which were termed monopolies, became extremely odious, and, at an early day, met with the most determined resistance. One of the provisions of Magna Charta was intended to prevent the granting of monopolies of this character; and subsequent prohibitions and restrictions were enacted by parliament even under the most energetic and absolute of their monarchs. See Hallam, Const. Hist., Harp. ed. 153, 205; 7 Lingard, Hist. Eng. Dolman's ed. 247, 380; 9 *id.* 182.

Still, the unregulated and despotic power of the crown proved, in many instances, superior to the law, until the reign of James I., when an act was passed, in the twenty-first year of his reign, known as the Statute of Monopolies, which entirely prohibited all grants of that nature, so far as the traffic in commodities already known was concerned. But the king was permitted to secure by letters patent, to the inventor of any new manufacture, the sole right to make and vend the same for a term not exceeding fourteen years. Since that time the power of the monarch has been so far controlled by the law that the prohibition contained in the Statute of Monopolies has been fully observed, and under that statute has grown up the present system of British patent law, from which ours has to a great extent been derived.

3. The constitution of the United States confers upon congress the power to pass laws "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right of their respective writings or discoveries." U. S. Const. art. i. s. 6, cl. 8. This right can, accordingly, be conferred only upon the *authors* and *inventors* themselves; but it rests in the sound discretion of congress to determine the length of time during which it shall continue. Congress at an early day availed itself of the power.

The first act passed was that which established the patent office, on the 10th of April, 1790. There were several supplements and modifications to this law, namely, the acts passed February 7, 1793, June 7, 1794, April 17, 1800, July 3, 1832, July 13, 1832. These were all repealed, by an act passed July 4, 1836, and a new system was established, which, with some modifications of a secondary character, has ever since remained in force. The existing laws on the subject are the act of July 4, 1836, already mentioned, the acts of March 3, 1837, March 3, 1839, August 29, 1842, May 27, 1848, February 18, 1861, March 2, 1861, and March 3, 1863.

4. This new system differs from the old, in part, by being more full and complete in all its details; but the distinguishing difference consists in the provision it contains, by which all applications for patents are subjected to a thorough and rigid examination, with a view of preventing, as far as possible, the granting of any patent which will not afterwards be sustained by the courts as valid. In this respect it is believed to differ from all laws of this kind that have ever existed; for, although in other countries patents are sometimes refused, it is for other reasons than the mere fact that the title of the patentee would be invalid: that is a matter which is left entirely at the risk of the applicant.

The present law does not, indeed, furnish any guarantee of the validity of the title conferred upon the patentee. The patent is, nevertheless, *primâ facie* evidence of its own validity, 1 Stor. C. C. 336; 3 *id.* 172; 1 Mas. C. C. 153; 14 Pet. 458; 2 Blatchf. C. C. 229; 1 McAll. C. C. 171, as well for a defendant in an action as for a plaintiff. 15 How. 252. No provision is made by law for setting it aside directly, however invalid it may prove, except in the special case of interference between two patents or an application and a patent. But, throughout its whole term of existence, whenever an action is brought against any one for having infringed it he is permitted to show its original invalidity in his defence. The exclusive right of the patentee did not exist at common law; it is created by acts of congress; and no rights can be acquired unless authorized by the statute and in the manner it prescribes. 10 How. 494; 19 *id.* 195; 3 N. Y. 9; 8 Pet. 658. The power granted by the patent is domestic in its character, and confined within the limits of the United States: consequently it does not extend to a foreign vessel lawfully entering one of our ports, where the patented improvement was placed upon her in a foreign port and authorized by the laws of the country to which she belongs. 19 How. 183.

We will now proceed to treat of some of the details of our present law on this subject.

5. *Of the subject-matter of a patent.* The act of July 4, 1836, provides for the granting of a patent to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or of any new and useful improvement thereon. The distinction between a process and a machine is discussed in 15 How. 252. There are with us, according to the phraseology of the statute, four classes of inventions which may be the subjects of patents: *first*, an art; *second*, a machine; *third*, a manufacture; and, *fourth*, a composition of matter. In Great Britain, as we have seen, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture." But the courts, in defining the meaning of the term, have construed the word "manufacture" to be coextensive in signification with the whole of the four classes of inventions thus recognized by our law. An art or process, a machine, and a composition of matter are all regarded there as manufactures. The field of invention in Great Britain is, therefore, coincident with that provided by our law, and the legal subject-matter of patents is the same in each country. 2 Barnew. & Ald. 349; 8 Term, 99: 2 H. Blackst. 492 2 Mees. & W. Exch. 544; Webster, Pat. Cas. 237, 393, 459.

6. But, inasmuch as we have three other classes of inventions, the term "manufacture" has a more limited signification here than it receives in Great Britain. In this country it is understood to mean a new article of merchandise which has required the exercise of something more than ordinary mechanical skill and ingenuity in its contrivance: no new principle or combination of parts is necessary to render a patent of this kind valid. All that is requisite is that a substantially new commodity shall have been produced for the public use and convenience. A mere change in the form of a well-known article may sometimes justify the granting of a patent for the same, where such change adapts it to an essentially new use, and where something beyond the range of ordinary skill and ingenuity must have been called into exercise in its contrivance. See 11 How. 248.

The general rule, then, is that wherever *invention* has been exercised there will be found the subject-matter of a patent. 1 McAll. C. C. 48. And as the law looks to the fact, and not to the result by which it was accomplished, it is immaterial what amount of thought was involved in making the invention. 4 Mas. C. C. 6.

7. Although the word "discovery" is used in our statute as entitling the discoverer to a patent, still, every discovery is not a patentable invention. The discovery of a mere philosophical principle, or abstract theory, or elementary truth of science, cannot obtain a patent for the same, unless he applies it to some directly useful purpose. The patent can only be for such a principle, theory, or truth reduced to practice and embodied in a particular structure or combination of parts. 1 Stor. C. C. 285; 1 Mas. C. C. 187; 4 *id.* 1; 1 Pet. C. C. 342. Nor can there be a patent for a function or for an effect only, but for an effect produced in a given manner or by a peculiar operation. 1 Gall. C. C. 480; 1 Mas. C. C. 476; 1 Stor. C. C. 270; 2 *id.* 164; 1 Pet. C. C. 394; 5 McLean, C. C. 76; 15 How. 62.

An invention, to be patentable, must not only be *new*, but must also be *useful*. But by this it is not meant that it must be more useful than any thing of the kind previously known, but that it is capable of use for a beneficial purpose. The word "useful" is also to be understood in contradistinction to "pernicious." or "frivolous." A contrivance directly and mainly calculated to aid the counterfeiter, the pickpocket, or the assassin, or which would in any way be directly calculated to be injurious to the morals, the health, or the good order of society, would not be patentable. Neither would a new contrivance which was of too trivial a character to be worthy of serious consideration. 1 Mas. C. C. 186, 303; 4 Wash. C. C. 9; 1 Paine, C. C. 203; 1 Blatchf. C. C. 372, 488; 2 *id.* 132; 1 Woodb. & M. C. C. 290; 2 McLean, C. C. 35; 5 Ill. 44; 1 Baldw. C. C. 303; 13 N. H. 311; 14 Pick. Mass. 217; 16 Vt. 226. But it has been said that a court cannot pronounce a patent worthless, merely from the specification, without evidence of any experiments. 1 N. H. 347. In the trial of an action for infringement, evidence of the comparative utility of the plaintiff's machine and the defendant's is inadmissible, except for the purpose of showing a substantial difference between the two machines. 1 Stor. C. C. 336.

8. A mere application of an old device or process to the manufacture of an article is held to constitute only a double use, and not to be patentable. There must be some new process or machinery used to produce the effect. 2 Stor. C. C. 190, 408; Gilp. Dist. Ct. 489; 3 Wash. C. C. 443; 1 Woodb. & M. C. C. 290; 2 McLean, C. C. 35; 4 *id.* 456; 2 Curt. C. C. 340. But where the new use is not analogous to the old and would not be suggested by it,—where invention is necessary in order to conceive of the new application, and experiment is required to test its success, and the result is a new or superior result,—there a patent may be obtained.

No patent can be granted in the United States for the mere importation of an invention brought from abroad; although it is otherwise in England. The constitution, as we have seen, only authorizes congress to grant these exclusive privileges to the inventors themselves. The mere fact of having obtained a patent for the same thing in a foreign country will not prevent the obtaining of a patent here at any time within seventeen years after the date of the foreign patent. But if an invention has been introduced into public and common use in the United States, and if it has also been patented abroad more than six months prior to the date of the application here, the patent will be denied. See Act of 1839, § 6.

9. *Of caveats.* The twelfth section of the act of 1836 authorizes the inventor of any thing patentable—provided he be a citizen, or an alien who has resided within the United States for one year next preceding his application and has made oath of his intention to become a citizen—to file a caveat in the patent office for his own security. This caveat consists in a simple statement of his invention, in any language which will render it intelligible. It is always well to attach a drawing to the description, in order that it may be more easily and thoroughly understood; but this is not indispensable. A fee of ten dollars must be paid to the office at the same time.

The right acquired by the caveator in this manner is that of preventing the grant of any interfering patent, on any application filed within one year from the day when the caveat was lodged in the patent office, without his being notified of the same and having an opportunity of contesting the priority of invention of the applicant, by means of an "interference," which will be treated of hereafter. In this way an inventor can obtain a year to perfect his invention, without

the risk of having the patent to which he is entitled granted to another in the mean time. He can also, at any time before the expiration of the year, renew the caveat for another year, by paying another fee of ten dollars, and so on from year to year, as long as he feels disposed so to do. The caveat is filed in the confidential archives of the office, and preserved in secrecy.

10. *Of the application for a patent.* When the invention is complete, and the inventor desires to apply for a patent, he causes a specification to be prepared, setting forth in clear and intelligible terms the exact nature of his invention, describing its different parts and the principle and mode in which they operate, and stating precisely what he claims as new, in contradistinction from those parts and combinations which were previously in use. This should be accompanied by a petition to the commissioner of patents, stating the general nature of his invention and the object of his application. Duplicate drawings should be attached to the specification, where the nature of the case admits of drawings; and, where the invention is for a composition of matter, specimens of the ingredients and of the composition of matter should be furnished. The specification, as well as the drawings, must be signed by the applicant and attested by two witnesses; and appended to the specification must be an affidavit of the applicant, stating that he verily believes himself to be the original and first inventor of that for which he asks a patent, and, also, of what country he is a citizen. The whole is then filed in the patent office. A model must also be furnished to the office, in all cases which admit of a representation by model. This, by the rules of the office, should not exceed one foot in any of its dimensions, where it can practically be brought within that limit.

11. By the old law, a citizen of a foreign country was required to pay a higher patent fee than an American citizen, or an alien who had resided a year in the United States and had made oath of his intention of becoming such citizen. But the act of March 2, 1861, has done away with this difference, except as against the citizens of those countries which discriminate against our own citizens who apply for patents there. This discrimination is believed to be limited to the inhabitants of some of the British North American provinces which still refuse patents to the people of the United States on the same terms on which they are granted to their own citizens. The patent fee required of the inhabitants of such British province is five hundred dollars, instead of thirty-five dollars, which is all that is required of any other applicant.

12. *Of the examination.* As has been already observed, our law provides for an examination whenever an application is completed in the prescribed manner. And if on such examination it appears that the claim of the applicant is invalid and would not be sustained by the courts, the application is rejected. In cases of doubt, however, the approved practice of the patent office is to grant the patent, and thus give the party an opportunity to sustain it in the courts if he can. Formerly, about two-thirds of all the applications for patents were rejected; but within the last few years a more liberal practice prevails, and the number of patents now issued is more than one-half of that of all the applications.

As a general rule, an invention is patentable whenever the applicant is shown to be the original and first inventor; and his own affidavit appended to the application is sufficient to raise a presumption that he is the first inventor, until the contrary is shown. But if it is ascertained by the office that the same thing had been invented by any other person in this country, or that it had been patented or described in any printed publication in this or any foreign country, prior to its invention by the applicant, a patent will be denied him. But a mere prior invention of the same thing in a foreign country, if not patented or described in some printed publication, will not affect his right to a patent here.

13. The rule that the applicant is entitled to a patent whenever he is shown to be the original and first inventor is subject to one important exception. If he has, either actually or constructively, abandoned his invention to the public, he can never afterwards recall it and resume his right of ownership. 4 Mas. C. C. 111; 4 Wash. C. C. 544; 2 Pet. 16; 6 *id.* 248; 7 *id.* 313; 1 How. 202.

By the seventh section of the act of 1836, the commissioner is directed to reject the application whenever it shall appear that the invention had been in public use or on sale, with the consent and allowance of the applicant, prior to the date of the application. But by the seventh section of the act of 1839, such sale or public use will not of itself prejudice the rights of the inventor, provided the application is made within two years from the time when such sale or public use first occurred.

If the application for a patent is rejected, the specification may be amended and a second examination requested. If again rejected, an appeal may be taken to the examiners-in-chief. If rejected by them, an appeal lies to the commissioner in person, on payment of a fee of twenty dollars; and if rejected by him, an appeal may be taken to one of the judges of the supreme court of the District of Columbia, on payment of a fee of twenty-five dollars. If all this proves ineffectual, the applicant may still file a bill in equity to compel the allowance of his patent. See § 16 of the Act of July 4, 1836, and § 10 of the Act of March 3, 1839.

All the proceedings before the patent office connected with the application for a patent are *ex parte*, and are kept secret, except in cases of conflicting claims, which will next be referred to.

14. *Of the date of the patent.* The patent usually takes date on the day it issues; but the applicant may, at his option, cause it to be dated as of the day on which his specification and drawings were filed,—not, however, exceeding six months prior to the actual issuing of the patent. See § 8 of the Act of July 4, 1836. This is a privilege of which inventors rarely avail themselves. Or the patent may be dated as of a day not later than six months after its allowance. See § 3 of the Act of March 3, 1863.

The obtaining of foreign letters patent does not prevent the granting of a patent here. But in that case the American patent will expire at the end of fourteen years from the date of the foreign patent. See § 6 of the Act of March 3, 1839. This limit was thus fixed when the American patent was of only fourteen years' duration: its extension to seventeen years does not seem to enlarge this limitation. If the American patent purports to continue more than fourteen years from the date of the foreign patent, it will be void. 5 McLean, C. C. 76.

15. *Of interferences.* The eighth section of the act of 1836 provides that when an application is made which interferes with another pending application or with an unexpired patent, a trial shall be allowed for the purpose of determining who was the prior inventor, and a patent is directed to be issued accordingly. An appeal to one of the judges of the supreme court of the District of Columbia is allowed from the decision of the patent office in these cases, in the same manner as in those of rejected applications.

16. *Of the specification.* The specification is required, by the Act of 1836, § 6, to describe the invention in such full, clear, and exact terms as to enable any person skilled in the art or science to which it relates to make, construct, or use it. In the trial of an action for infringement, it is a question of fact for the jury whether this requirement has been complied with. 2 Brock, Va. 298; 1 Mas. C. C. 182; 2 Stor. C. C. 432; 3 *id.* 122; 1 Woodb. & M. C. C. 53. At the same time, the interpretation of the specification, and the ascertainment of the subject-matter of the invention from the language of the specification and from the drawings, is, as appears from the authorities just referred to, as well as from others, a matter of law exclusively for the court. 5 How. 1; 3 McLean, C. C. 250, 432. The specification will be liberally construed by the court, in order to sustain the invention, 1 Sumn. C. C. 482; 3 *id.* 514, 535; 1 Stor. C. C. 270; 5 McLean, C. C. 44; but it must, nevertheless, identify with reasonable clearness and accuracy the invention claimed, and describe the manner of its construction and use so that the public from the specification alone may be enabled to practise it; and if the court cannot satisfactorily ascertain the meaning of the patent from its face, it will be void for ambiguity. 2 Blatchf. C. C. 1; 2 Brock, Va. 303; 1 Sumn. C. C. 482; 1 Mas. C. C. 182, 447.

It is required to distinguish between what is new and what is old, and not mix them up together without disclosing distinctly that for which the patent is granted. 4 Wash. C. C. 68; 2 Brock, Va. 298; 1 Stor. C. C. 273; 1 Mas. C. C. 188, 475; 1 Gall. C. C. 438, 478; 2 *id.* 51; 1 Sumn. C. C. 482; 3 Wheat. 534; 7 *id.* 356. If the invention consists of an improvement, the patent should be confined thereto, and should clearly distinguish the improvement from the prior machine, so as to show that the former only is claimed. 1 Gall. C. C. 438, 478; 2 *id.* 51; 1 Mas. C. C. 447; 3 McLean, C. C. 250. Ambiguous terms should be avoided; nothing material to the use of the invention should be omitted; and the necessity of trials and experiments should not be thrown upon the public.

17. *Of re-issues.* It often happens that errors, defects, and mistakes occur in the specification of a patent, by which it is rendered wholly or partially inoperative and perhaps invalid. To provide a remedy in such cases, the thirteenth section of the act of 1836 declares that when such errors or defects are the result of inadvertency, accident, or mistake, without any fraudulent or deceptive intention, the patent may be surrendered by the patentee, his executors, administrators, or assigns, and a new patent issued in proper shape to secure the real invention intended to be patented originally. The identity between the invention described in the re-issued and that in the original patent is a question of fact for the jury. 4 How. 380. But see Burr *vs.* Duryea, 1 Wallace, 531.

A re-issued patent is to have the same effect and operation in law, on the trial of all actions *for causes subsequently accruing*, as though the patent had been originally issued in such corrected form. See Act of 1836, § 13. From this it appears that after a re-issue no action can be brought for a past infringement of the patent, unless the act would have been an infringement of the patent as it stood previous to the re-issue. But, as the bare use of a patented machine is (if unauthorized) an infringement of the rights of the patentee, a machine constructed and lawfully used prior to the re-issue may be an infringement of the patent if used afterwards. The re-issued patent will expire when the original patent would have expired. The patent fee in cases of re-issue is thirty dollars.

For the principles applicable to a surrender and re-issue, and the extent to which the action of the commissioner of patents is conclusive, see 2 McLean, C. C. 35; 2 Stor. C. C. 432; 3 *id.* 749; 4 How. 380, 646; 15 *id.* 112; 17 *id.* 74; 6 Pet. 218; 7 *id.* 202; 1 Woodb. & M. C. C. 248; 2 *id.* 121. The re-issued patent is not a new patent; and an existing contract concerning the patent before its surrender applies equally to it after the surrender and re-issue. 11 Cush. Mass. 569.

18. *Of patents for designs.* The act of 1861 permits any citizen, or any alien who has resided one year in the United States and

has taken his oath of intention to become a citizen, to obtain a patent for a design, which shall continue in force for three and a half, seven, or fourteen years, at the option of the applicant, upon the payment of a fee of ten, fifteen, or thirty dollars, according to the length of the patent obtained. These patents are granted wherever the applicant, by his own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, any original design for a bust, statue, or bas-relief, or composition in alto or basso relievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed, on any article of manufacture, or any new and original shape or configuration of any article of manufacture, not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor.

The general method of making the application is the same as has been hereinbefore described, and the patent issues in a similar form.

19. *Of disclaimers.* The seventh section of the act of 1837 provides "that whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor,—some material and substantial part of the thing patented being truly and justly his own,—any such patentee, his administrators, executors, and assigns, whether of the whole or of a sectional interest therein, may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; which disclaimer shall be in writing, attested by one or more witnesses, and recorded in the patent office, on payment by the person disclaiming, in manner as other patent duties are required by law to be paid, of the sum of ten dollars. And such disclaimer shall thereafter be taken and considered as part of the original specification, to the extent of the interest which shall be possessed in the patent or right secured thereby by the disclaimant and by those claiming by or under him subsequent to the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same."

20. To understand the object and purpose of some of these provisions, it must be known that by the fifteenth section of the act of 1836 it was provided that it should be a good defence to an action for infringement that the specification was too broad; and although this was modified by the ninth section of the act of 1837 so as to permit a patentee who, by mistake, accident, or inadvertence, and without any wilful intent, had claimed some things of which he was not the first inventor, to recover damages for the infringement of what was really his invention, where the parts invented could be clearly separated from the parts improperly claimed, yet in such cases the plaintiff was not entitled to recover costs unless previous to the commencement of the suit he had entered a disclaimer for that which was not his invention. But no person can avail himself of the benefits of this provision who has unreasonably neglected or delayed to enter his disclaimer. The provisions authorizing disclaimers, and their effect upon the question of costs, are discussed in 1 Stor. C. C. 590; 1 Blatchf. C. C. 244, 445; 2 *id.* 194; 15 How. 121; 19 *id.* 96; 20 *id.* 378; 3 N. Y. 9; 5 Den. N. Y. 314.

Not only the patentee, but his executors, administrators, and assigns, whether of a whole or sectional interest, may enter a disclaimer; but a disclaimer by one owner will not affect the interest of any other owner.

21. *Of the extension of a patent.* Patents were formerly granted for fourteen years, the commissioner of patents being authorized in special cases to extend the same for seven years longer. But by the act of 1861 the length of time for the patent to run was extended to seventeen years, and the right to an extension on such patents was denied. The only extensions hereafter granted will, therefore, be of patents issued before March 2, 1861.

The extension cannot be made after the patent expires; but it may be granted to an administrator as well as to the patentee. 3 Stor. C. C. 171; 4 How. 646; 3 McLean, C. C. 250.

Sixty days' notice of the application must be given through newspapers. The applicant must apply to the commissioner in proper time, which is about three months prior to the expiration of the patent. After paying a fee of fifty dollars, he must, in accordance with the act of congress and the rules of the office, file a sworn statement of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. See Act of 1836, § 18; Act of 1848, § 1; and Act of 1861, § 10.

22. Any person may appear and show cause against the extension of the patent. But if, after all is done, the commissioner is fully satisfied that, having due regard to the public interest, it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, it is rendered his duty to grant the extension as prayed for. And thereupon the patent has the same effect

in law as though it had been originally granted for the term of twenty-one years. The extension enures only to the benefit of the patentee, and not of his assignees, unless he has contracted to convey to them an interest or right therein. But the assignee has a right to continue the use by himself of the patented machine which he is using at the time of the renewal, 4 How. 646, 709, 712; 19 *id.* 211; 3 McLean, C. C. 250; 4 *id.* 526; 1 Blatchf. C. C. 167, 258; 2 *id.* 471; 3 Stor. C. C. 122, 171; and a purchaser may repair his own machine, when necessary, though the repair consist in the replacement of an essential part of the combination patented. 9 How. 109. Upon the granting of an extension, an additional fee of fifty dollars is required. Act of 1861, § 10.

The act of the commissioner in granting the extension is conclusive, in the absence of fraud or excess of jurisdiction. 2 Curt. C. C. 506.

23. *Of the assignment of patents.* The eleventh section of the act of 1836 authorizes the assignment of a patent, either in whole or in part, by any instrument in writing,—which assignment must be recorded in the patent office within three months from the execution thereof. But it has been held that this provision for recording is directory merely, for the protection of *bonâ fide* purchasers without notice, and not an absolute prerequisite to the validity of the assignment. 2 Stor. C. C. 526; 2 Blatchf. C. C. 144; 3 McLean, C. C. 427; 4 *id.* 527; 6 Ind. 428; 28 Mo. 539; 2 N. H. 61; 18 Conn. 377. It has been, accordingly, determined that the recording might take place not only after the expiration of three months, but even after suit brought. 2 Stor. C. C. 609.

24. Strictly speaking, the word "assignment" applies to the transfer of the entire interest of the inventor, or to a fraction of that entire interest running throughout the whole United States. A conveyance of an exclusive interest within and throughout any specified part or portion of the United States is more properly denominated a grant. A mere authority or permission to use, sell, or manufacture the thing patented, either in the whole United States or in any specific portion thereof, is known as a license. But all three are sometimes included under the general term of an assignment. Where the assignment, however, is not of the patent itself, or of any undivided part thereof, or of any right therein limited to a particular locality, but constitutes merely a license or authority from the patentee, not exclusive and not transferring any interest in the patent itself, it has been held that it need not be recorded. 2 Stor. C. C. 541. Acts *in pais* will sometimes justify the presumption of a license. 1 How. 202; 17 Pet. 228; 3 Stor. C. C. 402. As to the distinction between a license and assignment, see 10 How. 477.

An assignment may be made prior to the granting of a patent. And when duly made and recorded, the patent may be issued to the assignees. See Act of 1836, § 6. This, however, only applies to cases of assignments proper, as contradistinguished from grants or licenses. The application must, however, in such cases be made and the specification sworn to by the inventor. See 5 McLean, C. C. 131; 4 Wash. C. C. 71; 4 Mas. C. C. 15; 1 Blatchf. C. C. 506. The assignment transfers the right to the assignee although the patent should be afterwards issued to the assignor. 10 How. 477. See 1 Wash. C. C. 168; 4 Mas. C. C. 15; 7 Ham. 249.

It has also been held by the attorney-general of the United States that, if the inventor desires the patent to issue to himself and another person jointly, it is not enough for him to convey an interest to the other party, retaining the remainder himself; but he must make a joint conveyance to himself and the other party.

The fee for recording an assignment, if it does not contain more than three hundred words, is one dollar; if more than three hundred and not more than one thousand, it is two dollars; and if more than one thousand, it is three dollars.

25. *Of joint inventors.* The patent must in all cases issue to the inventor, if alive and if he has not assigned his interest. And if the invention is made jointly by two inventors, the patent must issue to them both. This is equally the case where one makes a portion of the invention at one time and another at another time. A failure to observe this rule may prove fatal to the validity of the patent. See 1 Mas. C. C. 447.

Of executors and administrators. The tenth section of the act of 1836 provides that, where an inventor dies before obtaining a patent, his executor or administrator may apply for and obtain such patent, holding it in trust for the heirs at law or devisees, accordingly as the inventor died intestate or testate. Nothing is said as to its being appropriated to the payment of debts; but, having once gone into the hands of the executors or administrators, it would perhaps become assets, and be used like other personal property. In England, a patent will pass as assets to assignees in bankruptcy. 3 Bos. & P. 565.

The right to make a surrender and receive a re-issue of a patent also vests by law in the executor or administrator. See Act of 1836, § 13. The law further provides that the executor or administrator may make the oath necessary to obtain the patent,—differing in this respect from the case of an assignment, where, although the patent issues to the assignee, the inventor must make the oath.

26. *The liability of a patent to be levied upon for debt.* The better opinion is that letters patent cannot be levied upon and sold by a common-law execution. The grant of privilege to the patentee would, from its incorporeal nature, seem to be incapable of manual seizure and of sale. Even if such a sale were made, there does not appear to be

any provision in the acts of congress which contemplates the recording of a sheriff's deed; and without a valid record the patentee might nevertheless make a subsequent transfer to a *bonâ fide* purchaser without notice, which would be valid.

But this peculiar species of property may, perhaps, be subjected to the payment of debts through the instrumentality of a bill in equity. The chancellor can act upon the person. He can direct the patent to be sold, and by attachment can compel the patentee to execute a conveyance to the purchaser. The assignment thus executed will be recovered, and the transfer will thus become complete.

These seem to be the views deducible from the decisions in 1 Gall. C. C. 458; 14 How. 528; 17 *id.* 448.

27. *How far a patent is retroactive.* By the earlier law on this subject in the United States, a patent, when granted, operated retroactively: so that a machine covered by the terms of the patent, though constructed previously to the date of that instrument, could not be used after the issuing of the patent without subjecting the party so using it to an action for infringement. Of course the use of the machine previous to the date of the patent was not unlawful.

The seventh section of the act of 1839 provides "that every person or corporation who has or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter prior to the application by the inventor or discoverer for a patent shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor or any other person interested in such invention."

At present, therefore, property rightfully acquired in a specific machine cannot be affected by a patent subsequently applied for by the patentee. It has been held, however, that, under the general grant contained in the constitution, congress has power to pass a special act which shall operate retrospectively so as to give a patent for an invention already in public use. 3 Wheat. 454; 2 Stor. C. C. 164; 3 Sumn. C. C. 535. The infringement must be subsequent to the date of the patent; but on the question of novelty the patent will be considered as relating back to the original discovery. 4 Wash. C. C. 68, 703.

28. *Of foreign inventors.* An alien who has resided one year in the United States, and who has taken an oath of his intention to become a citizen, stands, so far as the patent laws are concerned, in the same position as a native-born citizen; but other foreigners have not in all respects the same rights and advantages.

There is still a discrimination in the rate of fees to be paid by the inhabitants of those countries which discriminate against our citizens. See Act of 1861, § 10. Nor are aliens permitted to file a caveat or to apply for a patent for a design. In these latter respects the disability may have been unintentional, but it is nevertheless real. There is also another marked difference made by law between a domestic and a foreign patentee. The former is under no legal obligation to bring his invention into use. He may not only fail to use it himself, but may utterly refuse to allow it to be used by any one else upon any terms whatever. In this way he may prevent the public from enjoying any benefit from the invention for the whole term of fourteen years, without in any respect affecting the rights conferred by his patent.

But if the foreign patentee fails and neglects for the space of eighteen months from the date of his patent to put and continue his invention on sale to the public on reasonable terms, his patent is rendered wholly invalid. Act of 1836, § 15. An American assignee of an alien inventor is not, however, within the provisions of the act; and even the alien patentee is not bound to prove that he hawked the invention to obtain a market for it; but it rests on those who seek to defeat the patent to prove that the patentee neglected or refused to sell the patented invention for reasonable prices when application was made to him to purchase. 2 Blatchf. C. C. 49.

29. *Penalties provided in certain cases.* The fifth section of the act of 1842 provides "that if any person or persons shall paint, or print, or mould, cast, carve, or engrave, or stamp, upon any thing made, used, or sold by him, for the sole making or selling of which he hath not or shall not have obtained letters patent, the name or any imitation of the name of any other person who hath or shall have obtained letters patent for the sole making and vending of such thing, without consent of such patentee or his assigns or legal representatives; or if any person upon any such thing, not having been purchased from the patentee or some person who purchased it from or under such patentee, or not having the license or consent of such patentee or his assigns or legal representatives, shall write, paint, print, mould, cast, carve, engrave, stamp, or otherwise make or affix, the word 'patent,' or the words 'letters patent,' or the word 'patentee,' or any word or words of like kind, meaning or import, with the view or intent of imitating or counterfeiting the stamp, mark, or other device of the patentee; or shall affix the same, or any word, stamp, or device of like import, on any unpatented article, for the purpose of deceiving the public, he, she, or they so offending shall be liable for such offence to a penalty of not less than one hundred dollars, with costs, to be recovered by action in any of the circuit courts of the United States, or in any of the district courts of the United States having the powers and jurisdiction of a circuit court. One-half of such penalty so recovered shall be paid to the

patent fund, and the other half to any person who shall sue for the same."

30. The thirteenth section of the act of 1861 declares that in all cases where an article is made or vended by any person under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label, on which the notice, with the date, is printed; on failure of which, in any suit for the infringement of letters patent by the party failing so to mark the article the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice to make or vend the article patented.

The act of congress of Feb. 28, 1839, 5 U. S. Stat. at Large, 322, establishes a five-years limitation of suits or prosecutions for a penalty under the laws of the United States. The penalty of not less than one hundred dollars, imposed by the act, is a penalty of one hundred dollars and no more. 2 Curt. C. C. 502.

A similar statute—that of 5 & 6 Will. IV. c. 83—exists in England, for observations upon which see Hindmarch, Patents, 366. It has been decided under that statute that where there has been an unauthorized use of the word "patent" it must be proved that the word was used with a view of imitating or counterfeiting the stamp of the patentee, and that it is no defence that the patented article imitated was not a new manufacture, the grant of the patent being conclusive on the defendant. 3 Hurlst. & N. Exch. 802.

31. *Of infringements.* The criterion of infringement is substantial identity of construction or operation. Mere changes of form, proportion, or position, or substitution of mechanical equivalents, will be infringements, unless they involve a substantial difference of construction, operation, or effect. 3 McLean, C. C. 250, 432; 1 Wash. C. C. 108; 15 How. 62; 1 Curt. C. C. 279; 1 McAll. C. C. 48. As a general rule, whenever the defendant has incorporated in his structure the substance of what the plaintiff has invented and properly claimed, he is responsible to the latter. Burr *vs.* Duryea, 1 Wallace, 531.

Where the patent is for a new combination of machines to produce certain effects, it is no infringement to use any of the machines separately, if the whole combination is not used. 1 Mas. C. C. 447; 2 *id.* 112; 1 Pet. C. C. 322; 1 Stor. C. C. 568; 2 *id.* 190; 16 Pet. 336; 3 McLean, C. C. 427; 4 *id.* 70; 6 *id.* 539; 14 How. 219; 24 Vt. 66; 1 Black, 427; 1 Wallace, 78. But it is an infringement to use one of several improvements claimed, or to use a substantial part of the invention, although with some modification or even improvement of form or apparatus. 2 Mas. C. C. 112; 1 Stor. C. C. 273. Where the patent describes and claims a machine, it cannot be construed to be for a process or function, so as to make all other machines infringements which perform the same function; and no infringement will in such case take place where the practical manner of giving effect to the principle is by a different mechanical structure and mechanical action. 15 How. 252. If the patentee is the inventor of a device, he may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed is itself but an improvement on a known machine, by a mere change of form or combination of parts, it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions The doctrine of equivalents does not in such case apply, unless the subsequent improvements are mere colorable invasions of the first. 20 How. 405.

A sale of the thing patented to an agent of the patentee, employed by him to make the purchase on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of infringement. 1 Curt. C. C. 260.

The making of a patented machine for philosophical experiment only, and not for use or sale, has been held to be no infringement, 1 Gall. C. C. 429, 485; but a use with a view to an experiment to test its value is an infringement. 4 Wash. C. C. 580. The sale of the articles produced by a patented machine or process is not an infringement, 3 McLean, C. C. 295; 4 How. 709; nor is the *bonâ fide* purchase of patented articles from an infringing manufacturer. 10 Wheat. 359. As to infringement by a railroad corporation, where its road was worked and its stock owned by a connecting road, see 17 How. 30. Ignorance by the infringer of the existence of the patent infringed is no defence, but may mitigate damages. 11 How. 587.

32. *Of damages for infringements.* The act of 1836, § 14, provides "that whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment of any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs. And such damages may be recovered by action on the case in any court of competent jurisdiction, to be brought in the name or names of the

person or persons interested, whether as patentee, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States."

The actual damage is all that can be allowed by a jury, as contradistinguished from exemplary, vindictive, and punitive damages. The amount of defendant's profits from the unlawful user is, in general, the measure of the plaintiff's damages; and this may be determined by the plaintiff's price for a license. 11 How. 607; 15 *id.* 546; 16 *id.* 480; 20 *id.* 198; 1 Gall. C. C. 476; 1 Blatchf. C. C. 244, 405; 2 *id.* 132, 194, 229, 476. The rule of damages is different where a patent is only for an improvement on a machine and where it is for an entire machine. 16 How. 480. If there be a mere making and no user proved, the damages should be nominal. 1 Gall. C. C. 476.

33. *Jurisdiction of cases under the patent laws.* The act of 1836, § 17, gives original jurisdiction to the circuit courts of the United States in all cases arising under the laws of the United States granting exclusive privileges to inventors. This jurisdiction extends both to law and equity, and is irrespective of the citizenship of the parties or the amount in controversy. The prevailing opinion is that the jurisdiction of the federal courts is exclusive of that of the state courts. 3 N. Y. 9; 8 Paige, Ch. N. Y. 132; 40 Me. 430. But this is to be understood of cases arising directly under the acts of congress, and not of those where the patent comes collaterally in question: as, for instance, where it is the subject-matter of a contract or the consideration of a promissory note. 3 McLean, C. C. 525; 1 Woodb. & M. C. C. 34; 16 Conn. 409. Hence, a bill to enforce the specific performance of a contract for the sale of a patent-right is not such a case arising under the patent laws as gives jurisdiction to the federal courts. 10 How. 477. By the act of February 18, 1861, a writ of error or appeal lies to the supreme court of the United States from all judgments or decrees of any circuit court in any suit under the patent law, without respect to the sum or value in controversy in the action.

The principal authors of works upon the general subject are—Curtis, Phillips, and Fessenden, in this country; Webster, Hindmarch, Carpmael, Godson, Coryton, Lund, Norman, and Turner, in England; and Renouard and Perpigna, in France.

See ABANDONMENT OF INVENTION; CAVEAT; COMMISSIONER OF PATENTS; EXTENSION OF PATENTS; INFRINGEMENT; INTERFERENCE; INVENTION; MACHINE; MANUFACTURE; MODELS; PATENT OFFICE; PATENT OFFICE, EXAMINERS IN; PROCESS; UTILITY; WITHDRAWAL.

PATENT OFFICE. The office through which applications for patents are made, and from which those patents emanate.

Some provision for the purpose of issuing patents is, of course, found in every country where the system of granting patents for inventions prevails; but nowhere else is there an establishment which is organized in all respects on the same scale as the United States Patent Office.

By the act of 1790, the duty of transacting this business was devolved upon the secretary of state, the secretary of war, and the attorney-general. In the provision for a board for this purpose found in the act of 1793, the secretary of war is omitted. From that time during a period of more than forty years all the business connected with the granting of patents was transacted by a clerk in the office of the secretary of state,—the duties of the secretary in this respect being little more than nominal, and the attorney-general acting only as a legal adviser.

The act of July 4, 1836, reorganized the office and gave it a new and higher position. A commissioner of patents was constituted. Provision was made for a library, which has since become one of the finest of the kind in the country. The law authorized the appointment of four clerks, together with a draughtsman, machinist, and messenger. One of these clerks was to be an examiner; but so rapidly has the business of the office increased since that date that there are now nearly thirty examiners and assistants constantly employed, and nearly one hundred persons in all who are attached to the patent office.

The patent office, from being a mere clerkship in the state department, became almost a department of itself. It was, after its reorganization in 1836, attached as a bureau to the state department, and afterwards to that of the interior; but still it occupied a station of little more than nominal dependence upon either. The commissioner had the sole appointment of many of his subordinates, and the remainder were appointed by him subject to the approval of the secretary. All the funds of the office were placed under his exclusive control. His decisions in relation to the granting, re-issue, or extension of patents were not subject to the review of the secretary. He made his report not through the head of the department, but directly to congress. The agricultural division of the office was constituted a species of subordinate bureau, and the appropriations and management were placed by law under his entire control.

The patent office is an office of record, in which assignments of patents are recordable, and the record is notice to all the world of the facts to be found on record. Under section four of the act of 1793, an assignment was not valid unless recorded in the office of the secretary of state, 4 Blackf. Ind. 183; and this was held in the case of a suit upon a note given to an assignee whose assignment was not recorded, where the note was ruled void as being without consideration. In other cases, however, it was held that the assignee's rights were capable of being completed by recording, though until that took place the assignee was not substituted to the rights of the assignor 1 Stor. C. C. 296. The better opinion seems to be that, under section eleven of the act of 1836, recording is not necessary for completing the assignment as between the parties to the conveyance, that the provisions of the act are directory merely, and that the effect of the record is merely to give notice to bind subsequent purchasers. Thus, it was said by Judge Story that "the provision of the statute is merely *directory*, and, except as to intermediate *bonâ fide* purchasers without notice, any subsequent recording of the assignment will be sufficient to pass the title to the as-

signee." 2 Stor. C. C. 542, 615, 618. And it has also been held that the record may be made even after suit brought; and it is said to be like the case of a deed required to be registered. 2 Stor. 618. Other cases hold more strongly that recording is not necessary, but that the title passes as between the parties by the assignment, though subsequent *bonâ fide* purchasers without notice are not bound without record. 2 N. H. 63; 3 McLean, C. C. 429; 4 *id.* 527; 18 Conn. 388; 2 Am. Law Jour. 319. Three cases only are said to be provided for by statute: *first*, an assignment of the whole patent; *second*, an assignment of an undivided part thereof; and, *third*, a grant or conveyance of an exclusive right under the patent within a specified part or portion of the United States. 2 Stor. C. C. 542; 2 Blatchf. C. C. 148; 9 Vt. 177. A question may arise whether the act of 1860, in prescribing a tariff of fees for recording other papers, as agreements, etc., has not recognized the usage of the office in recording them as within the meaning of the acts of congress, and rendered them recordable.

PATENT OFFICE, EXAMINERS IN. Upon the reorganization of the patent office, in 1836, under the act of July 4 of that year, a new and important principle was introduced. Prior to that date, any one was at liberty to take out his patent for almost any contrivance, if he was willing to pay the fees. At least, this was the practical operation of the system; for although a patent was not granted until it was allowed by certain heads of departments, still, as the examination in such cases went no further than merely to ascertain whether the contrivance was of sufficient importance to be worthy of a patent, without any inquiry as to who was the first inventor thereof, the allowance of the patent was rather a matter of course in almost every case. The applicant, at his own peril, decided for himself whether the subject-matter of the patent was new. If it was not so, the patent would be of no value, as it could never be enforced. The question of novelty could be raised whenever an action for infringement was brought; or a proceeding might be directly instituted to test the validity of the patent, and to annul it if the patentee was found not to be the original and first inventor. The law in these respects was like that of England and most other European countries.

But the act of 1836 provided for a thorough examination of every application, with a view of ascertaining whether the contrivance thus shown was novel as well as useful: so that no patent should issue which would not be sustained by the courts. In theory, this was to be done by the commissioner of patents; but the amount of business on his hands was such, even then, as to render it impossible for him to perform all that labor in person; and provision was accordingly made by law for an examining clerk to assist him in these examinations. At present, so greatly has the amount of this labor become augmented that nearly thirty of these assistants are kept constantly and industriously employed, all of whom are known as examiners in the patent office.

The duty of these examiners is to determine whether the subject-matter of the respective patents which are applied for had been invented or discovered by any other person in this country, or had been patented or described in any printed publication in this or any foreign country, prior to the alleged invention thereof by the applicant. If not, and the invention is deemed useful within the meaning of the patent law, a patent is allowed, unless it clearly appears that the invention has been abandoned to the public. If the invention has been in public use more than two years with the consent and allowance of the inventor, that single circumstance amounts to a statutory abandonment of the invention; although it may be abandoned in various other methods. But, unless the fact of abandonment is very clear, the office does not assume to decide against the applicant, but leaves the matter to a court and jury. See PATENTS, and PATENT OFFICE.

PATENT ROLLS. Registers in which are recorded all letters patent granted since 1516. 2 Sharswood, Blackst. Comm. 346; App. to First Rep. of Select Commit. on Pub. Rec. pp. 53, 84.

PATENT WRIT. A writ not closed or sealed up. Jacob, Law Dict.; Coke, Litt. 289; 2 *id.* 39; 7 Coke, 20.

PATENTEE. He to whom a patent has been granted. The term is usually applied to one who has obtained letters patent for a new invention.

PATER (Lat.). Father. The Latin term is considerably used in genealogical tables.

PATER-FAMILIAS (Lat.). **In Civil Law.** One who was *sui juris*, and not subject to the paternal power.

2. In order to give a correct idea of what was understood in the Roman law by this term, it is proper to refer briefly to the artificial organization of the Roman family,—the greatest moral phenomenon in the history of the human race. The comprehensive term *familia* embraced both persons and property: money, lands, houses, slaves, children, all constituted part of this artificial family, this juridical entity, this legal patrimony, the title to which was exclusively vested in the chief or *pater-familias*, who alone was *capax dominii*, and who belonged to himself, *sui juris*.

The word *pater-familias* is by no means equivalent to the modern expression father of a family, but means proprietor in the strongest sense of that term; it is he *qui in domo dominium habet*, in whom were centred all property, all power, all authority: he was, in a word, the lord and master, whose authority was unlimited. No one but he who was *sui juris*, who was *pater-familias*, was capable of exercising any right of property, or wielding any superiority or power over any thing; for nothing could belong to him who was himself *alieni juris*. Hence the children of the *filii-familias*, as well as those of slaves, belonged to the *pater-familias*. In the same manner, every thing that was acquired by the sons or slaves formed a part of the *familia*,

and, consequently, belonged to its chief. This absolute property and power of the *pater-familias* only ceased with his life, unless he voluntarily parted with them by a sale; for the alienation by sale is invariably the symbol resorted to for the purpose of dissolving the stern dominion of the *pater-familias* over those belonging to the *familia*. Thus, both emancipation and adoption are the results of imaginary sales,—*per imaginarias venditiones*. As the daughter remained in the family of her father, grandfather, or great-grandfather, as the case might be, notwithstanding her marriage, it followed as a necessary consequence that the child never belonged to the same family as its mother: there is no civil relationship between them; they are natural relations,—*cognati*,—but they are not legally related to each other,—*agnati*; and therefore the child never inherits from its mother, nor the mother from her child. There was, however, a means by which the wife might enter into the family and subject herself to the power of her husband, *in manu mariti*, and thereby establish a legal relationship between herself and her husband. This marital power of the husband over the wife was generally acquired either *coemptione*, by the purchase of the wife by the husband from the *pater-familias*, or *usu*, by the prescription based on the possession of one year,—the same by which the title to movable property was acquired according to the principles governing the *usucapio* (*usu capere*, to obtain by use). Another mode of obtaining the same end was the *confarreatio*, a sacred ceremony performed by the breaking and eating of a small cake, *farreum*, by the married couple. It was supposed that by an observance of this ceremony the marital power was produced by the intervention of the gods. This solemn mode of celebrating marriages was peculiar to the patrician families. By means of these fictions and ceremonies the wife became in the eye of the law the daughter of her husband, and the sister of the children to whom she gave birth, who would otherwise have been strangers to her. Well might Gaius say, *Fere nulli alii sunt homines qui talem in liberos habeant potestatem, qualem nos habemus*.

3. There is some similarity between the *agnatio*, or civil relationship, of the Romans, and the transmission of the name of the father, under the modern law, to all his descendants in the male line. The Roman law says of the children, *patris, non matris, familiam sequuntur;* we say, *patris, non matris, nomen sequuntur*. All the members of the family who, with us, bear the same name, were under that law *agnates*, or constituted the *agnatio*, or civil family. Those children only belonged to the family, and were subject to the paternal power, who had been conceived in *justis nuptiis*, or been adopted. *Nuptiæ*, or *matrimonium*, was a marriage celebrated in conformity with the peculiar rules of the civil law. There existed a second kind of marriage, called *concubinatus*,—a valid union and a real marriage,—which has been often improperly confounded, even by high authority, with concubinage. This confusion of ideas is attributable to a superficial examination of the subject; for the illicit intercourse between a man and a woman which we call concubinage was stigmatized by the opprobrious term *stuprum* by the Romans, and is spoken of in the strongest terms of reprobation. The *concubinatus* was the natural marriage, and the only one which those who did not enjoy the *jus connubii* were permitted to contract. The Roman law recognized two species of marriage, the one civil, and the other natural, in the same manner as there were two kinds of relationship, the *agnatio* and *cognatio*. The *justæ nuptiæ* or *justum matrimonium*, or civil marriage, could only be contracted by Roman citizens and by those to whom the *jus connubii* had been conceded: this kind of marriage alone produced the paternal power, the right of inheritance, etc.

4. But the rapid rise and extraordinary greatness of the city attracted immense crowds of strangers, who, not possessing the *jus connubii*, could form no other union than that of the *concubinatus*, which, though authorized by law, did not give rise to those legal effects which flowed from the *justæ nuptiæ*. By adoption, the person adopted was transferred from one family to another; he passed from the paternal power of one *pater-familias* to that of another: consequently, no one who was *sui juris* could be adopted in the strict sense of that word. But there was another species of adoption, called *adrogatio*, by which a person *sui juris* entered into another family, and subjected himself to the paternal power of its chief. The effect of the adrogation was not confined to the person adrogated alone, but extended over his family and property. 1 Marcadé, 75 *et seq.*

This extraordinary organization of the Roman family, and the unlimited powers and authority vested in the *pater-familias*, continued until the reign of Justinian, who, by his 118th Novel, enacted on the 9th of August, 544, abolished the distinction between the *agnatio* and *cognatio*, and established the order of inheritance which, with some modifications, continues to exist at the present day in all countries whose jurisprudence is based on the civil law. See PATRIA POTESTAS.

PATERNA PATERNIS (Lat. the father's to the father's). **In French Law.** An expression used to signify that, in a succession, the property coming from the father of the deceased descends to his paternal relations.

PATERNAL. That which belongs to the father or comes from him: as, paternal power, paternal relation, paternal estate, paternal line. See LINE.

PATERNAL POWER. The authority lawfully exercised by parents over their children. See FATHER.

PATERNAL PROPERTY. That which descends or comes from the father and other ascendants or collaterals of the paternal stock. Domat, Liv. Prél. tit. 3, s. 2, n. 11.

PATERNITY. The state or condition of a father.

2. The husband is *primâ facie* presumed to be the father of his wife's children born during coverture or within a competent time afterwards: *pater is est quem nuptiæ demonstrant*. 7 Mart. La. N. S. 553. So if the child is *en ventre sa mère* at time of marriage, Coke, Litt. 123; 8 East, 192. In civil law the presumption holds in case of a child born before marriage as well as after. 1 Sharswood, Blackst. Comm. 446, 454; Fleta, lib. 1, c. 6. In cases of marriage of a widow within ten months after decease of husband, the paternity is to be decided by circumstances. Hargrave, note to Coke, Litt. § 188, n. 190. Marriage within ten months after decease of husband was forbidden by Roman, Danish, and Saxon law, and English law before the Conquest. 1 Beck, Med. Jur. 481; Brooke, Abr. *Bastardy*, pl. 18; Palm. 10; 1 Sharswood, Blackst. Comm. 456.

3. The presumption of paternity may always be rebutted by showing circumstances which render it impossible that the husband

can be the father. 6 Binn. Penn. 283; 1 P. A. Browne, Penn. Appx. xlvii.; Hard. Ky. 479; 8 East, 193; Strange, 51, 940; 4 Term, 356; 2 Mylne & K. 349; 3 Paige, Ch. N. Y. 139; 1 Sim. & S. Ch. 150; Turn. & R. Ch. 138; 1 Bouvier, Inst. n. 302 *et seq.*

The declarations of one or both of the spouses, however, cannot affect the condition of a child born during the marriage. 7 Mart. La. N. S. 553; 3 Paige, Ch. N. Y. 139. See BASTARD; BASTARDY; LEGITIMACY; MATERNITY; PREGNANCY.

PATHOLOGY. In Medical Jurisprudence. The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted in some degree with pathology. 2 Chitty, Pract. 42, n.

PATRIA (Lat.). The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*, which see.

PATRIA POTESTAS (Lat.). **In Civil Law.** The paternal power; the authority which the law vests in the father over the persons and property of his legitimate children.

2. One of the effects of marriage is the paternal authority over the children born in wedlock. In the early period of the Roman history the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death. They could acquire nothing except for the benefit of the *pater-familias* (which see); and they were even liable to be sold and reduced to slavery by the author of their existence. But in the progress of civilization this stern rule was gradually relaxed; the voice of nature and humanity was listened to on behalf of the oppressed children of a cruel and heartless father. A passage in the 37th book, t. 12, § 5, of the Pandects informs us that, in the year 870 of Rome, the emperor Trajan compelled a father to release his son from the paternal authority, on account of cruel treatment. The same emperor sentenced a father to transportation because he had killed his son in a hunting-party, although the son had been guilty of adultery with his stepmother; for, says Marcianus, who reports the case, *patria potestas in pietate debet, non in atrocitate, consistere.* Ulpianus says that a father is not permitted to kill his son without a judgment from the prefect or the president of the province. In the year 981 of Rome, the emperor Alexander Severus addressed a constitution to a father, which is found in the 8th book, t. 47, § 3, of the Justinian Code, in which he says, "Your paternal authority authorizes you to chastise your son; and, if he persists in his misconduct, you may bring him before the president of the province, who will sentence him to such punishment as you may desire." In the same book and title of the Code we find a constitution of the emperor Constantine, dated in the year of Rome 1065, which inflicts the punishment denounced against parricide on the father who shall be convicted of having killed his son. The power of selling the child, which at first was unlimited, was also much restricted, and finally altogether abolished, by subsequent legislation, especially during the empire. Paulus, who wrote about the middle of the tenth century of Rome, informs us that the father could only sell his child in case of extreme poverty: *contemplatione extremæ necessitatis aut alimenturum gratia.* In 1039 of Rome, Diocletian and Maximian declare in a rescript that it is beyond doubt (*manifestissimi juris*) that a father can neither sell nor pledge nor donate his children. Constantine, in 1059, permitted the sale by the father of his child, at its birth and when forced to do so by abject poverty: *propter nimiam paupertatem egestatemque victus;* and the same law is re-enacted in the Code of Justinian. C. 4. 43, t. 2, 3.

3. The father, being bound to indemnify the party who had been injured by the offences of his child, could release himself from this responsibility by an abandonment of the offender, in the same manner as the master could abandon his slave for a similar purpose,—*noxali causa mancipare.* This power of abandonment continued to exist, with regard to male children, up to the time of Gaius, in the year 925 of Rome. But by the Institutes of Justinian it is forbidden. Inst. 4. 8. 7.

With regard to the rights of the father to the property the child might acquire, it was originally as extensive and absolute as if it had been acquired by a slave: the child could possess nothing nor acquire any thing that did not belong to the father. It is true, the child might possess a *peculium;* but of this he had only a precarious enjoyment, subject to the will and pleasure of the father. Under the first emperors a distinction was made in favor of the son as to such property as had been acquired by him in the army, which was called *castrense peculium,* to which the son acquired a title in himself. Constantine extended this rule by applying it to such property as the child had acquired by services in offices held in the state or by following a liberal profession: this was denominated *quasi-castrense peculium.* He also created the *peculium adventitium,* which was composed of all property inherited by the son from his mother, whether by will or *ab intestat;* but the father had the usufruct of this *peculium.* Arcadius and Honorius extended it to every thing the son acquired by succession or donations from his grandfather or mother or other ascendants in the maternal line. Theodosius and Valentinian embraced in it whatever was given by one of the spouses to the other; and Justinian included in it every thing acquired by the son, except such as was produced by property belonging to the father himself. It is thus seen that, by the legislation of Justinian and his predecessors, the paternal power with regard to property was almost entirely destroyed.

The *pater-familias* had not only under his paternal power his own children, but also the children of his sons and grandsons,—in fact, all his descendants in the male line; and this authority continued in full force and vigor no matter what might be the age of those subject to it. The highest offices in the government did not release the incumbent from the paternal authority. The victorious general or consul to whom the honors of a triumph were decreed by the senate was subject to the paternal power in the same manner and to the same extent as the humblest citizen. It is to be observed, however, that the domestic subjection did not interfere with the capacity of exercising the highest public functions in the state. The children of the daughter were not subject to the paternal authority of her father: they entered into the family of her husband. Women could never exercise the paternal power. And even when a woman was herself *sui juris,* she could not exercise the paternal power. It is for this reason, Ulpian observes, that the family of which a woman, *sui juris,* was the head, *mater-familias,* commenced and ended with her: *mulier autem familiæ suæ et caput et finis est.* 1 Ortolan, 191 *et seq.*

4. The modern civil law has hardly preserved any features of the old Roman jurisprudence concerning the paternal power. Article 233 of the

Louisiana Code provides, it is true, that a child, whatever be its age, owes honor and respect to its father and mother; and the next article adds that the child remains under the authority of the father and mother until his majority or emancipation, and that in case of a difference of opinion between the parents the authority of the father shall prevail. In the succeeding article obedience is enjoined on the child to the orders of the parents as long as he remains subject to the paternal authority. But article 236 renders the foregoing rules in a great measure nugatory, by declaring that "a child under the age of puberty cannot quit the paternal house without the permission of his father and mother, who have a right to correct him, provided it be done in a reasonable manner." So that the power of correction ceases with the age of fourteen for boys and twelve for girls: nay, at these ages the children may leave the paternal roof in opposition to the will of their parents. It is seen that, by the modern law, the paternal authority is vested in both parents, but practically it is generally exercised by the father alone; for wherever there is a difference of opinion his will prevails. The great object to be attained by the exercise of the paternal power is the education of the children to prepare them for the battle of life, to make them useful citizens and respectable members of society. During the marriage, the parents are entitled to the enjoyment of the property of their minor children, subject to the obligation of supporting and educating them, and of paying the taxes, making the necessary repairs, etc. Donations made to minors are accepted by their parents or other ascendants. The father has under his control all actions which it may be necessary to bring for his minor children during the marriage. When the marriage is dissolved by the death of one of the spouses, the paternal power ceases, and the tutorship is opened; but the surviving parent is the natural tutor, and can at his death appoint a testamentary tutor to his minor children. See PATER-FAMILIAS.

PATRICIDE. One guilty of killing his father. See PARRICIDE.

PATRIMONIAL. A thing which comes from the father, and, by extension, from the mother or other ancestor.

PATRIMONIUM. In Civil Law. That which is capable of being inherited.

Things capable of being possessed by a single person exclusively of all others are, in the Roman or civil law, said to be *in patrimonio;* when incapable of being so possessed, they are *extra patrimonium.*

Most things may be inherited; but there are some which are said to be *extra patrimonium,* or which are not in commerce. These are such as are *common,* as the light of heaven, the air, the sea, and the like; things *public,* as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like; things *which belong to cities and municipal corporations,* as public squares, streets, market-houses, and the like. See 1 Bouvier, Inst. nn. 421–446.

PATRIMONY. Any kind of property. Such estate as has descended in the same family; estates which have descended or been devised in a direct line from the father, and, by extension, from the mother or other ancestor.

The father's duty to take care of his children. Swinburne, Wills, pt. 3, § 18, n. 31, p. 235.

PATRINUS (Lat.). A godfather.

PATRON. In Ecclesiastical Law. He who has the disposition and gift of an ecclesiastical benefice.

In Roman Law. The former master of a freedman. Dig. 2. 4. 8. 1.

PATRONAGE. The right of appointing to office: as, the patronage of the president of the United States, if abused, may endanger the liberties of the people.

In Ecclesiastical Law. The right of presentation to a church or ecclesiastical benefice. 2 Sharswood, Blackst. Comm. 21.

PATRONUS (Lat.). **In Roman Law.** A modification of the Latin word *pater,* father. A denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore.

Romulus at first appointed a hundred of them. Seven years afterwards, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium,* and the others were called *patres minorum gentium.* These and their descendants constituted the nobility of Rome. The rest of the people were called plebeians, every one of whom was obliged to choose one of these fathers as his *patron.* The relation thus constituted involved important consequences. The plebeian, who was called *client* (a client), was obliged to furnish the means of maintenance to his chosen patron, to furnish a portion for his patron's daughters, to ransom him and his sons if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse or bear testimony against the other, or give contrary votes, etc. The contract was of a sacred nature: the violation of it was a sort of treason, and punishable as such. According to Cicero (De Repub. ii. 9), this relation formed an integral part of the governmental system, *Et habuit plebem in clientelas principum descriptam,* which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rising state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Dumazeau, Barreau Romain, § iii. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate. *Id.* iv.

PATROON. In New York. The lord of a manor.

PATRUELIS (Lat.). **In Civil Law.** A cousin-german by the father's side; the son or daughter of a father's brother. Dig. 38. 10. 1.

PATRUUS (Lat.). **In Civil Law.** An uncle by the father's side; a father's brother. Dig. 38. 10. 10. *Patruus magnus* is a grandfather's brother, grand-uncle. *Patruus major* is a great-grandfather's brother. *Patruus maximus* is a great-grandfather's father's brother.

PAUPER (Lat. poor). One so poor that he must be supported at the public expense.

The statutes of the several states make ample provisions for the support of the poor. It is not within the plan of this work even to give an abstract of such extensive legislation. See 16 Viner, Abr. 259; Botts, Poor-Laws; Woodfall, Landl. & T. 201.

PAUPERIES (Lat.). **In Civil Law.** Poverty. In a technical sense, *damnum absque injuriâ: i.e.* a damage done without wrong on the part of the doer: *e.g.* damage done by an irrational being, as an animal. L. 1, § 3, D. *si quod paup. fec.;* Vicat, Voc. Jur.; Calvinus, Lex.

PAVIAGE. A contribution or tax for paving streets or highways.

PAWN. A pledge. A pledge includes, in Louisiana, a *pawn* and an *antichresis;* but sometimes pawn is used as the general word, including pledge and antichresis. La. Civ. Code, art. 3101; Hennen, Dig. *Pledge.*

PAWNBROKER. One whose business it is to lend money, usually in small sums, upon pawn or pledge.

PAWNEE. He who receives a pawn or pledge.

PAWNOR. One who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability.

PAX REGIS (Lat.). The peace of the king. That peace or security for life and goods which the king promises to all persons under his protection. Bracton, lib. 3, c. 11; 6 Ric. II. stat. 1, c. 13.

In ancient times there were certain limits which were known by this name. The *pax regis,* or verge of the court, as it was afterwards called, extended from the palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barleycorns, Crabb, C. L. 41; or from the four sides of the king's residence, four miles, three furlongs, nine acres in breadth, nine feet, nine barleycorns, etc. LL. Edw. Conf. c. 12, et LL. Hen. I.

PAYEE. The person in whose favor a bill of exchange is made payable. See BILLS OF EXCHANGE.

PAYMENT. The fulfilment of a promise, or the performance of an agreement.

The discharge in money of a sum due.

2. The word payment is not a technical term: it has been imported into law proceedings from the exchange, and not from law treatises. When payment is pleaded as a defence, the defendant must prove the payment of money, or something accepted in its stead, made to the plaintiff or to some person authorized in his behalf to receive it. 2 Greenleaf, Ev. 509.

Payment, in its most general acceptation, is the accomplishment of every obligation, whether it consists in giving or in doing: *Solutio est præstatio ejus quod in obligatione est.*

It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do. *Solvere dicitur cum qui fecit quod facere promisit.*

However, practically, the name of payment is often given to methods of release which are not accompanied by the performance of the thing promised. *Restrinximus solutiones ad compensationem, ad novationem, ad delegationem, et ad numerationem.*

3. In a more restricted sense, payment is the discharge in money of a sum due. *Numeratio est nummariæ solutio.* 5 Massé, Droit commerciel, 229. That a payment may extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time.

In the civil law, it is said, where payment is something to be done, it must be done by the debtor himself. If I hire a skilful mechanic to build a steam-engine for me, he cannot against my will substitute in his stead another workman. Where it is something to be given, the general rule is that it can be paid by any one, whether a co-obliger, or surety, or even a third person who has no interest; except that in this last case subrogation will prevent the extinction of the debt as to the debtor, unless the payer at the time of payment act in the name of the debtor, or in his own name to release the debtor. See SUBROGATION.

What constitutes payment.

4. According to Comyns, payment by merchants must be made in money or by bill. Comyns, Dig. *Merchant* (F).

It is now the law for all classes of citizens that payment must be made by money, unless the obligation is, by the terms of the instrument creating it, to be discharged by other means. In the United States, congress has, by the constitution, power to decide what shall be legal tender; that is, in what form the creditor may demand his payment or must receive it if offered; and congress has determined this by statutes. The same power is exercised by the governments of all civilized countries. Payment in the United States must be made in coined money (or treasury notes made legal tender), if the creditor insists upon having it, 3 Halst. N. J. 172; 4 N. H. 296; 4 Dev. & B. No. C. 435; and copper cents are not legal tender under the United States constitution. 2 Nott & M'C. So. C. 519.

In England, Bank-of-England notes are legal tender. See LEGAL TENDER. But the creditor may waive this right, and any thing which he has accepted as satisfaction for the debt will be considered as payment.

5. Upon a plea of payment, the defendant may prove a discharge in bank-notes, negotiable notes of individuals, or a debt already due from the payee, delivered and accepted or discounted as payment. Phillipps, Ev. Cowen & H. ed. n. 387. Bank-notes, in conformity to usage and common understanding, are regarded as cash, 1 Burr. 452; 3 *id.* 1516; 9 Johns. N. Y. 120; 6 Md. 37; unless objected to. 1 Metc. Mass. 356; 8 Ohio, 169; 10 Me. 475; 2 Crompt. & J. Exch. 16, n.; 5 Yerg. Tenn. 199; 4 Esp. 267; 3 Humphr. Tenn. 162; 6 Ala. N. s. 226. Treasury notes are not cash. 3 Conn. 534. Giving a check is not considered as payment; but the holder may treat it as a nullity if he derives no benefit from it, provided he has not been guilty of negligence so as to cause injury to the drawer. 2 Parsons, Contr. 136; 2 Campb 515; 8 Term, 451; 2 Bos. & P. 518; 4 Ad.

& E. 952; 4 Johns. N. Y. 296; 1 Hall, N. Y. 56; 30 N. H. 256. But see 14 How. 240.

6. Payment in forged bills is generally a nullity, both in England and this country. 10 Wheat. 333; 2 Johns. N. Y. 455; 6 Hill, N. Y. 340; 7 Leigh. Va. 617; 3 Hawks, No. C. 568; 2 Harr. & J. Md. 368; 4 Gill & J. Md. 463; 4 Ill. 392; 11 *id.* 137; 3 Penn. St. 330; 5 Conn. 71. So also of counterfeit coin; but an agreement to sell goods and accept specific money is good, and payment in these coins is valid even though they be counterfeit. 1 Term, 225; 14 Serg. & R. Penn. 51. And the forged notes must be returned in a reasonable time, to throw the loss upon the debtor. 7 Leigh. Va. 617; 11 Ill. 137. Payment to a bank in its own notes which are received and afterwards discovered to be forged is a good payment. 1 Parsons, Contr. 220. A forged check received as cash and passed to the credit of the customer is good payment. 4 Dall. Penn. 234: s. c., 1 Binn. Penn. 27; 10 Vt. 141. Payment in bills of an insolvent bank, where both parties were innocent, has been held no payment. 7 Term, 64; 13 Wend. N. Y. 101; 11 Vt. 576; 9 N. H. 365; 22 Me. 85. On the other hand, it has been held good payment, in 1 Watts & S. Penn. 92; 6 Mass. 185; 12 Ala. 280; 8 Yerg. Tenn. 175. The point is still unsettled, and it is said to be a question of intention rather than of law. Story, Prom. Notes, 125*, 477*, 641.

7. If a bill of exchange or promissory note be given to a creditor and accepted as payment, it shall be a good payment. Comyns, Dig. *Merchant* (F); 30 N. H. 540; 27 Ala. N. s. 254; 16 Ill. 161; 2 Du. N. Y. 133; 14 Ark. 267; 4 Rich. So. C. 600; 34 Me. 324. But regularly a bill of exchange or note given to a creditor shall not be a discharge of the debt till payment of the bill, unless so accepted. Skinn. 410; 1 Salk. 124.

If the debtor gives his own promissory note, it is held in England and the United States generally not to be payment, unless it be shown that it was so intended. 10 Pet. 567; 4 Mas. C. C. 336; 27 N. H. 244; 15 Johns. N. Y. 247; 3 Wend. N. Y. 66; 9 Conn. 23; 2 N. H. 525; 26 Eng. L. & Eq. 56.

And if payment be made in the note of a factor or agent employed to purchase goods, or intrusted with the money to be paid for them, if the note be received as payment it will be good in favor of the principal, 1 Barnew. & Ald. 14; 7 Barnew. & C. 17; but not if received conditionally; and this is a question of fact for the jury. 6 Cow. N. Y. 181; 9 Johns. N. Y. 310; 10 Wend. N. Y. 271.

8. It is said that an agreement to receive the debtor's own note in payment must be expressed, 1 Cow. N. Y. 359; 1 Wash. C. C. 328: and when so expressed it extinguishes the debt. 5 Wend. N. Y. 85. Whether there was such an agreement is a question for the jury. 9 Johns. N. Y. 310.

A bill of exchange drawn on a third person and accepted discharges the debt as to the drawer, 10 Mod. 37; and in an action to recover the price of goods, in England, payment by a bill not dishonored has been held a good defence. 4 Esp. Cas. 46; 3 Campb. 411; 1 Mood. & M. 28; 4 Bingh. 454; 5 Maule & S. 62.

Retaining a draft on a third party an unreasonable length of time will operate as payment if loss be occasioned thereby. 3 Wils. 553; 2 Dall. Penn. 100; 13 Serg. & R. Penn. 318; 2 Wash. C. C. 191.

In the sale of a chattel, if the note of a third person be accepted for the price, it is good payment. 3 Cow. N. Y. 272; 1 Dev. & B. No. C. 291. Not so, however, if the note be the promise of one of the partners in payment of a partnership debt. 4 Dev. No. C. 91, 460.

9. In Maine and Massachusetts, the presumption where a negotiable note is taken, whether it be the debtor's promise or that of a third person, is that it is intended as payment. 6 Mass. 143; 12 Pick. Mass. 268; 2 Metc. Mass. 168; 8 Me. 298; 18 *id.* 249; 34 *id.* 324; 37 *id.* 419. The fact that a note was usurious and void was allowed to overcome this presumption. 11 Mass. 361.

Generally, the question will depend upon the fact whether the payment was to have been made in notes or the receiving them was a mere accommodation to the purchaser. 17 Mass. 1.

And the presumption never attaches where non-negotiable notes are given. 11 Me. 381; 15 *id.* 340.

10. Payment may be made through the intervention of a third party who acts as the agent of both parties: as, for example, a stake-holder. If the money be deposited with him to abide the event of a legal wager, neither party can claim it until the wager is determined, and then he is bound to pay it to the winner. 4 Campb. 37. If the wager is illegal, the depositor may reclaim the money at any time before it is paid over. 4 Taunt. 474; 5 Term, 405; 8 Barnew. & C. 221; 29 Eng. L. & Eq. 424; 31 *id.* 452. And at any time after notice given in such case he may hold the stake-holder responsible, even though he may have paid it over. See 2 Parsons, Contr. 138.

An auctioneer is often a stake-holder, as in case of money deposited to be made over to the vendor if a good title is made out. In such case the purchaser cannot reclaim except on default in giving a clear title. But if the contract has been rescinded by the parties there need be no notice to the stake-holder in case of a failure to perform the condition. 2 Mees. & W. Exch. 244; 1 Mann. & R. 614.

11. A transfer of funds, called by the civil-law phrase a payment by delegation, is payment only when completely effected, 2 Parsons, Contr. 137; and an actual transfer of claim or credit assented to by all the parties is a good payment. 4 Bingh. 112; 2 Barnew. & Ald. 39; 5 *id.* 228; 7 N. H. 345, 397; 17 Mass. 400. This seems to be very similar to

payment by drawing and acceptance of a bill of exchange.

Foreclosure of a mortgage given to secure a debt operates as payment made when the foreclosure is complete; but if the property mortgaged is not equal in value to the amount of the debt then due, it is payment *pro tanto* only. 2 Greenleaf, Ev. § 324; 3 Mass. 562; 2 Gall. C. C. 152; 3 Mas. C. C. 474; 10 Pick. Mass. 396; 11 Wend. N. Y. 106. A *legacy* also is payment, if the intention of the testator that it should be so considered can be shown, and if the debt was liquidated at the death of the testator. 1 Esp. 187; 12 Mass. 391; 5 Cow. N. Y. 368. See LEGACY.

12. When money is sent by letter, even though the money is lost, it is good payment, and the debtor is discharged, if he was expressly authorized or directed by the creditor so to send it, or if such authority can be presumed from the course of trade. Peake, 67; 11 Mees. & W. Exch. 233. But, even if the authority be given or inferred, at least ordinary diligence must be used by the debtor to have the money safely conveyed. See 3 Mass. 249; Ry. & M. 149; 1 Exch. 477; Peake, 186. Payment must be of the whole sum; and even where a receipt in full has been given for a payment of part of an ascertained sum, it has been held not to be an extinction of the debt. 5 Coke, 117; 2 Barnew. & C. 477; 5 East, 230; 3 N. H. 518; 11 Vt. 60; 26 Me. 88; 37 *id.* 361; 10 Ad. & E. 121; 4 Gill & J. Md. 305; 9 Johns. N. Y. 333; 17 *id.* 169; 11 How. 100.

13. But payment of part may be left to the jury as evidence that the whole has been paid, 5 Cranch, 11; 3 N. H. 518; and payment of a part at a different time, 2 Metc. Mass. 283, or place, 3 Hawks, No. C. 580, or in any way more beneficial to the creditor than that prescribed by the contract, is good. 15 Mees. & W. Exch. 23. Giving a chattel, though of less value than the debt, is a discharge, Dy. 75 *a*; 2 Litt. Ky. 49; 3 Barb. Ch. N. Y. 621, or rendering certain services, with the consent of the creditor, 5 Day, Conn, 359, or assigning certain property. 5 Johns. N. Y. 386; 13 Mass. 424. So if a stranger pay a part, or give his note for a part, and this is accepted, it is a good payment of the debt. 11 East, 390; 4 Barnew. & C. 500; 13 Ala. N. S. 353; 14 Wend. N. Y. 116; 2 Metc. Mass. 283. And where a creditor by process of law compels the payment of a part of his claim, this is generally a discharge of the whole. 11 Serg. & R. Penn. 78; 16 Johns. N. Y. 121; 2 Seld. N. Y. 179; 6 Cush. Mass. 28; 2 Parsons, Contr. 232.

14. The payment must have been accepted knowingly. Many instances are given in the old writers to illustrate acceptance: thus, if the money is counted out, and the payee takes a part and puts it in a bag, this is a good payment, and if any be lost it is the payee's loss. 5 Mod. 398. Where A paid B £100 in redemption of a mortgage, and B bade C put it in his closet, and C did so, and A demanded his papers, which B refused to deliver, and A demanded back his money, and B directed C to give it to him, and C did, it was held to be a payment of the mortgage. Viner, Abr. *Payment* (E).

Generally, there can be but little doubt as to acceptance or non-acceptance, and the question is one of fact for the jury to determine under the circumstances of each particular case.

Of course, where notes or bank-bills are given in payment of a debt, the evidence that they were so given is to be the same as evidence of any other fact relating to payment.

15. *Evidence of payment.* Evidence that any thing has been done and accepted as payment is evidence of payment.

A *receipt* is *primâ facie* evidence of payment; but a receipt acknowledging the reception of ten dollars and acquitting and releasing from all obligations would be a receipt for ten dollars only. 2 Ves. Ch. 310; 5 Barnew. & Ald. 606; 18 Pick. Mass. 325; 1 Edw. Ch. N. Y. 341. And a receipt is only *primâ facie* evidence of payment. 2 Taunt. 241; 7 Cow. N. Y. 334; 4 Ohio, 346. For cases explaining this rule, see, also, 2 Mas. C. C. 141; 11 Mass. 27; 9 Johns. N. Y. 310; 4 Harr. & M'H. Md. 219; 3 Caines, N. Y. 14. And it may be shown that the particular sum stated in the receipt was not paid, and, also, that no payment has been made. 2 Term, 366; 26 N. H. 12; 9 Conn. 401; 2 N. J. 59; 10 Humphr. Tenn. 188; 13 Penn. St. 46.

Payment may be presumed by the jury in the absence of direct evidence: thus, possession by the debtor of a security after the day of payment, which security is usually given up on payment of the debt, is *primâ facie* evidence of payment by the debtor. 1 Stark. 374; 9 Serg. & R. Penn. 385.

16. If an acceptor produce a bill of exchange, this is said to afford in England no presumption of payment unless it is shown to have been in circulation after he accepted it. 2 Camph. 439. See, also, 14 Mees. & W. Exch. 379. But in the United States such possession is *primâ facie* evidence of payment. 7 Serg. & R. Penn. 116; 4 Johns. N. Y. 296; 2 Pick. Mass. 204. Payment is also conclusively presumed from lapse of time. After twenty years' non-demand, unexplained, the court will presume a payment without the aid of a jury. 1 Campb. 27; 14 Serg. & R. Penn. 15; 6 Cow. N. Y. 401; 2 Cranch, 180. Facts which destroy the reason of this rule may rebut the presumption. 1 Pick. Mass. 60; 2 La. 481. And a jury may infer payment from a shorter lapse of time, especially if there be attendant circumstances favoring the presumption. 7 Serg. & R. Penn. 410. As to presumptions against the existence of the debt, see 5 Barb. N. Y. 63.

17. A presumption may arise from the course of dealing between the parties, or the regular course of trade: thus, after two years it was presumed that a workman had been paid, as it was shown that the employer paid his workmen every Saturday night, and this man

had been seen waiting among others. 1 Esp. 296. See, also, 3 Campb. 10.

A receipt for the last year's or quarter's rent is *primâ facie* evidence of the payment of all the rents previously due. 2 Pick. Mass. 204. If the last instalment on a bond is paid in due form, it is evidence that the others have been paid; if paid in a different form, that the parties are acting under a new agreement.

Where receipts had been regularly given for the same amount, but for a sum smaller than was due by the agreement, it was held evidence of full payment. 4 Mart. La. 698.

18. *Who may make payment.* Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it.

An agent may make payment for his principal.

An attorney may discharge the debt against his client. 5 Bingh. 506. One of any number of joint and several obligors, or one of several joint obligors, may discharge the debt. Viner, Abr. *Payment* (B). Payment may be made by a third person, a stranger to the contract.

It may be stated, generally, that any act done by any person in discharge of the debt, if accepted by the creditor, will operate as payment. In the civil law there are many exceptions to this rule, introduced by the operation of the principle of subrogation. Most of these have no application in the common law, but have been adopted, in some instances, as a part of the law merchant. See SUBROGATION; CONTRIBUTION.

19. *To whom payment may be made.* Payment is to be made to the creditor. But it may be made to an authorized agent. And if made in the ordinary course of business, without notice requiring the payment to be made to himself, it is binding upon the principal. 11 East, 36; 6 Mann. & G. 166; Cowp. 257; 4 Barnew. & Ald. 395; 3 Stark. Cas. 16; 1 Campb. 477. Payment to a third person by appointment of the principal will be substantially payment to the principal. 1 Phillipps, Ev. 200. Payment to an agent who made the contract with the payee (without prohibition) is payment to the principal. 1 Campb. 339; 16 Johns. N. Y. 86; 2 Gall. C. C. 565; 10 Barnew. & C. 755. But payment may be made to the principal after authority given to an agent to receive. 6 Maule & S. 156. Payment to a broker or factor who sells for a principal not named is good. 11 East, 36. Payment to an agent when he is known to be such will be good if made upon the terms authorized, 11 East, 36, if there be no notice not to pay to him, 3 Bos. & P. 485; 15 East, 65; and even after notice, if the factor had a lien on the money when paid. 5 Barnew. & Ald. 27. If the broker sell goods as his own, payment is good though the mode varies from that agreed on. 11 East, 36; 1 Maule & S. 147; 2 Carr. & P. 49.

20. Payment to an attorney is as effectual as payment to the principal himself. 1 W. Blackst. 8; 1 Wash. C. C. 9; 1 Call, Va. 147. So, also, to a solicitor in chancery after a decree. 2 Chanc. Cas. 38. The attorney of record may give a receipt and discharge the judgment, 1 Call, Va. 147; 1 Coxe, N. J. 214; 1 Pick. Mass. 347; 10 Johns. N. Y. 220; 2 Bibb, Ky. 382, if made within one year. 1 Me. 257. Not so of an agent appointed by the attorney to collect the debt. 2 Dougl. 623. Payment by an officer to an attorney whose power had been revoked before he received the execution did not discharge the officer. 13 Mass. 465; 3 Yeates, Penn. 7. See, also, 1 Des. Ch. So. C. 461. Payment to one of two copartners discharges the debt, 8 Wend. N. Y. 542; 15 Ves. Ch. 198; 2 Blackf. Ind. 371; 1 Ill. 107; 6 Maule & S. 156; 1 Wash. C. C. 77, even after dissolution. 4 Carr. & P. 108. And see 7 N. H. 568. So payment to one of two joint creditors is good, though they are not partners. 4 J. J. Marsh. Ky. 367. But payment by a banker to one of several joint depositors without the assent of the others was held a void payment. 1 Mood. & R. 145; Ry. & M. 364; 4 Eng. L. & Eq. 342.

21. Payment to the wife of the creditor is not a discharge of the debt, unless she is expressly or impliedly his agent. 2 Scott, N. R. 372; 1 Add. Penn. 316; 2 Freem. 178; 22 Me. 335. An auctioneer employed to sell real estate has no authority to receive the purchase-money by virtue of that appointment merely. 1 Mood. & R. 326. Usually, the terms of sale authorize him to receive the purchase-money. 5 Mees. & W. Exch. 645. Payment was made to a person sitting in the creditor's counting-room and apparently doing his business, and it was held good, 1 Mood. & M. 200; 5 Taunt. 307; but payment to an apprentice so situated was held not to be good. 2 Crompt. & M. Exch. 304. Generally, payment to the agent must be made in money, to bind the principal. 11 Mod. 71; 10 Barnew. & C. 760. Power to receive money does not authorize an agent to commute, 1 Wash. C. C. 454; 1 Pick. Mass. 347, nor to submit to arbitration. 5 How. 891. See, also, Story, Ag. § 99.

22. An agent authorized to receive money cannot bind his principal by receiving goods, 4 Carr. & P. 501, or a note, 1 Salk. 442; 2 Ld. Raym. 928; 5 Mees. & W. Exch. 645; but a subsequent ratification would remedy any such departure from authority; and it is said that slight acts of acquiescence will be deemed ratification. Payment to one of several joint creditors of his part will not alter the nature of the debt so as to enable the others to sue separately. 4 Tyrwh. Exch. 488. Payment to one of several executors has been held sufficient. 3 Atk. Ch. 695. Payment to a trustee generally concludes the *cestui que trust* in law. 5 Barnew. & Ad. 96. Payment of a debt to a marshal or sheriff having custody of the person of the debtor does not satisfy the plaintiff. 2 Show. 129; 14 East, 418; 4 Barnew. & C. 32. Interest may be paid to a scrivener holding the mortgage-deed or bond, and also the principal, if he deliver up the bond; otherwise of a mortgage-deed as to the prin-

cipal, for there must be a re-conveyance. 1 Salk. 157. It would seem, then, that in those states where no re-conveyance is needed, a payment of the principal to a person holding the security would be good, at least *primâ facie*.

Subsequent ratification of the agent's acts is equivalent to precedent authority to receive money. Pothier, Obl. n. 528.

23. *When to be made.* Payment must be made at the exact time agreed upon. This rule is held very strictly in law; but in equity payment will be allowed at a time subsequent, generally when damages can be estimated and allowed by way of interest. 8 East, 208; 3 Pick. Mass. 414; 5 *id.* 106, 187. Where payment is to be made at a future day, of course nothing can be demanded till the time of payment, and, if there be a condition precedent to the liability, not until the condition has been performed. And where goods had been sold "at six or nine months' credit," the debtor was allowed the option. 5 Taunt. 338.

Where no time of payment is specified, the money is to be paid immediately on demand. Viner, Abr. *Payment* (II); 1 Pet. 455; 4 Rand. Va. 346. When payment is to be made at a certain time, it may be made at a different time if the plaintiff will accept, Viner, Abr. *Payment* (II); and it seems that the debtor cannot compel the creditor to receive payment before the debt is due.

24. *Where to be made.* Payment must be made at the place agreed upon, unless both the parties consent to a change. If no place of payment is mentioned, the payer must seek out the payee. J. B. Moore, Priv. Counc. 274; Sheppard, Touchst. 378; 2 Brod. & B. 165; 2 Maule & S. 120; 2 Mees. & W. Exch. 223; 20 Eng. L. & Eq. 498.

So, too, the creditor is entitled to call for payment of the whole of his claim at one time, unless the parties have stipulated for payment in parcels.

Questions often arise in regard to the payment of debts and legacies by executors and administrators. These questions are generally settled by statute regulations. See DISTRIBUTIONS; EXECUTOR; ADMINISTRATOR.

As a general rule, debts are to be paid first, then specific legacies. The personal property is made liable for the testator's debts, and, after that is exhausted, the real estate, under restrictions varying in the different states.

In the payment of mortgages, if the mortgage was made by the deceased, the personal estate is liable to discharge the mortgage debts. 2 Cruise, Dig. 147. But where the deceased acquired the land subject to the mortgage, his real estate must pay the debt. 2 Cruise, Dig. 164–168; 3 Johns. Ch. N. Y. 252; 2 P. Will. Ch. 664, n. 1; 2 Brown. Ch. 57; 5 Ves. Ch. 534; 14 *id.* 417. See MORTGAGE.

25. *Effect of payment.* The effect of payment is—*first*, to discharge the obligation; and it may happen that one payment will discharge several obligations by means of a transfer of the evidences of obligation. Pothier, Obl. 554, n. *Second*, payment does not prevent a recovery when made under a mistake of fact. The general rule is that mistake or ignorance of law furnishes no ground to reclaim money paid voluntarily under a claim of right. 2 Kent, Comm. 491; 2 Greenleaf, Ev. § 123. But acts done under a mistake or ignorance of an essential fact are voidable and relievable both in law and equity. Laws of a foreign country are matters of fact, Story, Const. §§ 407, 411; 9 Pick. Mass. 112; and the several United States are foreign to each other in this respect. See CONFLICT OF LAWS; FOREIGN LAWS. In Kentucky and Connecticut there is a power of recovery equally in cases of mistake of law and of fact. 19 Conn. 548; 3 B. Monr. Ky. 510; 4 *id.* 190. In Ohio it may be remedied in equity. 11 Ohio, 223. In New York a distinction is taken between ignorance of law and mistake of law, giving relief in the latter case. 18 Wend. N. Y. 422; 2 Barb. Ch. N. Y. 508. In England, money paid under a mistake of law cannot be recovered back. 4 Ad. & E. 858.

26. *Third*, part payment of a note will have the effect of waiver of notice as to the whole sum. *Fourth*, payment of part of the debt will bar the application of the Statute of Limitations as to the residue, 22 N. H. 219; 6 Md. 201; 8 Mass. 134; 28 Eng. L. &. Eq. 454, even though made in goods and chattels. 2 Crompt. M. & R. Exch. 337; 4 Ad. & E. 71; 4 Scott, N. R. 119. But it must be shown conclusively that the payment was made as part of a larger debt. 1 Crompt. M. & R. Exch. 252; 2 Bingh. N. C. 241; 6 Mees. & W. Exch. 824; 20 Miss. 663; 24 *id.* 92; 9 Ark. 455; 11 Barb. N. Y. 554; 24 Vt. 216. See, also, 2 Parsons, Contr. 353–359.

In Pleading. The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration: this plea must conclude to the country. See Chitty, Plead.

See, also, generally, Parsons, Story, and Chitty, on Contracts; Greenleaf, Phillipps, and Starkie, on Evidence; Story, Parsons, and Byles, on Bills and Notes; Greenleaf's Cruise, on Real Property; Kent, vol. iii.; Massé, Droit commerciel, vol. v. p. 229 *et seq.*; Domat, Civil Law; Pothier, on Obligation; Guyot, Répertoire Universelle, *Payment*; Comyns; Viner, Burn, and Dane, Abridgement, *Payment*.

PAYMENT INTO COURT. In Practice. Depositing a sum of money with the proper officer of the court by the defendant in a suit, for the benefit of the plaintiff and in answer to his claim.

It may be made in some states under statutory provisions, 18 Ala. 293; 7 Ill. 671; 1 Barb. N. Y. 21; 5 Harr. Del. 17; 24 Ga. 211; 16 Tex. 461; 11 Ind. 532; and see 3 Eng. L. & Eq. 185; 7 *id.* 152; and in most by a rule of court granted for the purpose, 2 Bail. So. C. 28; 7 Ired. No. C. 201; 1 Swan, Tenn. 92, in which case notice of an intention to apply must, in general, have been previously given.

The *effect* is to divest the plaintiff of all right to withdraw the money, 1 Wend. N. Y. 191; 1 E. D. Smith, N. Y. 398; 3 Watts, Penn. 248, except by leave of court, 1 Coxe, N. J. 238, and to admit conclusively every fact which the plaintiff would be obliged to prove in order to recover the money, 1 Barnew. & C. 3; 6 Mees. & W. Exch. 9; 2 Scott, N. S. 56; 9 Dowl. 21; 1 Dougl. Mich. 330; 24 Vt. 140; and see 7 Cush. Mass. 556; as, that the amount tendered is *due*, 1 Campb. 558; 2 *id.* 341; 5 Mass. 365; 2 Wend. N. Y. 431; 7 Johns. N. Y. 315, for the cause laid in the declaration, 5 Bingh. 28, 32; 2 Bos. & P. 550; 5 Pick. Mass. 285; 6 *id.* 340, to the plaintiff in the character in which he sues, 2 Campb. 441; the jurisdiction of the court, 5 Esp. 19; that the *contract* was made, 3 Campb. 52; 3 Taunt. 95, and broken as alleged, 1 Barnew. & C. 3, but only in reference to the amount paid in, 7 Johns. N. Y. 315; 3 Eng. L. & Eq. 548; and nothing beyond such facts. 1 Greenleaf, Ev. § 205. And see 2 Mann. & G. 208, 233; 5 Carr. & P. 247.

Generally, it relieves the defendant from the payment of costs until judgment is recovered for a sum larger than that paid in. 1 Wash. Va. 10; 3 Cow. N. Y. 36; 3 Wend. N. Y. 326; 2 Miles, Penn. 65; 2 Rich. So. C. 64; 24 Vt. 140. As to the capacity in which the officer receiving the money acts, see 1 Coxe, N. J. 238; 2 Bail. So. C. 28; 17 Ala. 293.

PAYS. Country. Trial *per pays*, trial by jury (the country). See PAIS.

PEACE. The concord or final agreement in a fine of lands. 18 Edw. I. *modus levandi finis.*

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, and externally by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security as opposed to one of violence or warfare, but likewise a state of public order and decorum. Hammond, Nisi P. 139; 12 Mod. 566. See, generally, Bacon, Abr. *Prerogative* (D 4); Hale, Hist. Comm. Pleas, 160; 3 Taunt. 14; 1 Barnew. & Ald. 227; Peake, 89; 1 Esp. 294; Harrison, Dig. *Officer* (V 4); 2 Bentham, Ev. 319, note; GOOD BEHAVIOR; SURETY OF THE PEACE.

PEACE OF GOD AND THE CHURCH. The freedom from suits at law between the terms. Spelman, Gloss.; Jacob, Law Dict.

PECK. A measure of capacity, equal to two gallons. See MEASURE.

PECULATION. In Civil Law. The unlawful appropriation by a depositary of public funds, of the property of the government intrusted to his care, to his own use or that of others. Domat, Suppl. au Droit Public, l. 3, tit. 5.

PECULIAR. In Ecclesiastical Law. A parish or church in England which has jurisdiction of ecclesiastical matters within itself and independent of the ordinary.

They may be either—

Royal, which include the sovereign's free chapels;

Of the archbishops, excluding the jurisdiction of the bishops and archdeacons;

Of the bishops, excluding the jurisdiction of the bishop of the diocese in which they are situated;

Of the bishops in their own diocese, excluding archdiaconal jurisdiction;

Of deans, deans and chapters, prebendaries, and the like, excluding the bishop's jurisdiction in consequence of ancient compositions.

The court of peculiars has jurisdiction of causes arising in such of these peculiars as are subject to the metropolitan of Canterbury. In other peculiars the jurisdiction is exercised by commissaries. 1 Phill. Eccl. 202, n., 245; Skinn. 589; 3 Sharswood, Blackst. Comm. 65.

PECULIUM (Lat.). **In Civil Law.** The most ancient kind of *peculium* was the *peculium profectitium* of the Roman law, which signified that portion of the property acquired by a son or slave which the father or master allowed him, to be managed as he saw fit. In modern civil law there are other kinds of *peculium*, viz.: *peculium castrense*, which includes all movables given to a son by relatives and friends on his going on a campaign, all the presents of comrades, and his military pay and the things bought with it; *peculium quasi-castrense*, which includes all acquired by a son by performing the duties of a public or spiritual office or of an advocate, and also gifts from the reigning prince; *peculium adventitium*, which includes the property of son's mother and relatives on that side of the house, and all which comes to him on a second marriage of his parents, and, in general, all his acquisitions which do not come from his father's property and do not come under *castrense* or *quasi-castrense peculium.*

The *peculium profectitium* remains the property of the father. The *peculium castrense* and *quasi-castrense* are entirely the property of the son. The *peculium adventitium* belongs to the son; but he cannot alien it nor dispose of it by will; nor can the father, unless under peculiar circumstances, alien it without consent of son. Mackeldy, Civ. Law. §§ 557–559; Vicat, Voc. Jur.; Inst. 2. 9. 1; Dig. 15. 1. 5. 3; Pothier, ad Pand. lib. 50, tit. 17, c. 2, art. 3.

A master is not entitled to the extraordinary earnings of his apprentices which do not interfere with his services so as to affect the master's profits. An apprentice was therefore decreed to be entitled to salvage, in opposition to his master's claim for it. 2 Cranch, 270.

PECUNIA (Lat.). **In Civil Law.** Property, real or personal, corporeal or incorporeal. Things in general (*omnes res*). So the law of the Twelve Tables said, *uti quisque pater*

familias legasset super pecuniâ tutelare rei suæ, ita jus esto: in whatever manner a father of a family may have disposed of his *property* or of the tutorship of his things, let this disposition be law. 1 Leçons Elém. du Dr. Civ. Rom. 288. But Paulus, in l. 5, D. *de verb. signif.*, gives it a narrower sense than *res*, which he says means what is not included within patrimony, *pecunia* what is. Vicat, Voc. Jur. In a still narrower sense, it means those things only which have measure, weight, and number, and most usually strictly money. *Id.* The general sense of property occurs, also, in the old English law. Leg. Edw. Confess. c. 10.

Flocks were the first riches of the ancients; and it is from *pecus* that the words *pecunia, peculium, peculatus*, are derived. In old English law *pecunia* often retains the force of *pecus*. So often in Domesday: *pastura ibidem pecuniæ villæ, i.e.* pasture for *cattle* of the village. So *vivæ pecuniæ*, live stock. Leg. Edw. Confess. c. 10; Emendat. Willielmi Primi ad Leges Edw. Confess.; Cowel.

PECUNIA NUMERATA (Lat.). Money given in payment of a debt. Properly used of the creditor, who is properly said to *number, i.e.* count out, the money to the debtor which he must pay, and improperly of the debtor, who is said to number or count out the money to the creditor, *i.e.* to pay it. Vicat, Voc. Jur.; Calvinus, Lex.

PECUNIA NON-NUMERATA (Lat.). Money not paid or numbered. The *exceptio non-numeratæ pecuniæ* (plea of money not paid) is allowed to the principal or surety by the creditor. Calvinus, Lex.

PECUNIA TRAJECTITIA (Lat.). A loan of money which, either itself or in the shape of goods bought with it, is to be carried over the sea, the lender to take the risk from the commencement of voyage till arrival at port of destination, and on that account to have higher interest; which interest is not essential to the contract, but, if reserved, is called *fœnus nauticum*. Mackeldy, Civ. Law, § 398 *b*. The term *fœnus nauticum* is sometimes applied to the transaction as well as the interest, making it coextensive with *pecunia trajectitia*.

PECUNIARY. That which relates to money.

PECUNIARY CAUSES. Causes in ecclesiastical courts where satisfaction is sought for withholding ecclesiastical dues or the doing or neglecting some act connected with the church. 3 Sharswood, Blackst. Comm. 88. For what causes are ecclesiastical, see 2 Burn, Eccl. Law, 39.

PEDAGIUM (Lat. *pes*, foot). Money paid for passing by foot or horse through any forest or country. *Pupilla oculi*, p. 9, c. 7; Cassan de Coutum. Burgund. p. 118; Rot. Vasc. 22 Edw. III. m. 34.

PEDAULUS (Lat. *pes*, foot). **In Civil Law.** A judge who sat at the foot of the tribunal, *i.e.* on the lowest seats, ready to try matters of little moment at command of prætor. Calvinus, Lex.; Vicat, Voc. Jur.

PEDIGREE. A succession of degrees from the origin: it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent.

On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, *hearsay evidence* has been admitted to prove a pedigree. See DECLARATION; HEARSAY.

PEDIS POSITIO (Lat. a planting or placing of the foot). A term used to denote an actual corporal possession. *Possessio est quasi pedis positio:* possession is as it were a planting of the foot. 3 Coke, 42; 8 Johns. N. Y., per *Kent*, C. J.; 5 Penn. St. 303; 2 Nev. & M. 343. See PEDIS POSSESSIO.

PEDIS POSSESSIO (Lat.). A foothold; an actual possession. To constitute adverse possession, there must be *pedis possessio*, or a substantial inclosure. 2 Bouvier, Inst. n. 2193; 2 Nott. & M'C. So. C. 343.

PEDLARS. Persons who travel about the country with merchandise for the purpose of selling it.

Persons, except those peddling newspapers, Bibles, or religious tracts, who sell, or offer to sell, at retail, goods, wares, or other commodities, travelling from place to place, in the street, or through different parts of the country. Act of Congr. July 1, 1862.

They are obliged, under the laws of perhaps all the states, and of the United States, to take out licenses, and to conform to the regulations which those laws establish.

PEERS (Lat. *pares*). The vassals of a lord; the freeholders of a neighborhood, before whom livery of seisin was to be made, and before whom, as the jury of the county, trials were had. 2 Sharswood, Blackst. Comm. 316. Trial by a man's peers or equals is one of the rights reserved by Magna Charta. 4 Sharswood, Blackst. Comm. 349. These vassals were called *pares curiæ*, which title see. 1 Washburn, Real Prop. 23.

The nobility of England, who, though of different ranks, viz. dukes, marquises, earls, viscounts, and barons, yet are equal in their privilege of sitting and voting in the house of lords: hence they are called peers of the realm.

They are created by writ summoning them to attend the house of lords by the title intended to be given, or by letters patent directly conferring the dignity. The former is the more ancient way; but the grant by patent is more certain. See Sullivan, Lect. 19 *a*; 1 Wooddeson, Lect. 37.

Peers are tried by their peers in cases of treason, felony, and misprision of the same. In cases of treason, felony, and breach of the peace, they have no privilege from arrest. 1 Sharswood, Blackst. Comm. 401*, n. 11.

Bishops who sit in parliament are peers; but the word spiritual is generally added: *e.g.* "lords temporal and spiritual." 1 Sharswood, Blackst. Comm. 401*, n. 12.

Peerage may be for life, which does not make the peer a lord of parliament, *i.e.* entitle him to a seat in the house of lords. 1 Sharswood, Blackst. Comm. 401*, n. 10. A peerage is not transferable, except with consent of parliament. *Id.* A peerage is lost by attainder. 1 Sharswood, Blackst. Comm. 412*.

PEINE FORTE ET DURE (L. Fr.). **In English Law.** A punishment formerly inflicted in England on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute. He was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords, and as much weight of iron or stone as he could bear placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died. This punishment was vulgarly called *pressing to death*. 2 Reeve, Hist. Eng. Law, 134; 4 Sharswood, Blackst. Comm. 324; Cowel; Britton, c. 4. fol. 11*. This punishment was introduced between 31 Edw. III. and 8 Hen. IV. 4 Sharswood, Blackst. Comm. 324; Year B. 8 Hen. IV. 1. Standing mute is now, by statute, in England, equivalent to a confession or verdict of guilty. 12 Geo. III. c. 20. See MUTE.

The only instance in which this punishment has ever been inflicted in this country is that of Giles Cory, of Salem, who refused to plead when arraigned as a witch. Washburn, Jud. Hist. 142; 1 Chandler, Crim. Trials, 122.

PELT WOOL. The wool pulled off the skin or pelt of a dead ram.

PENAL ACTION. An action for recovery of statute penalty. 3 Stephen, Comm. 535. See Hawkins, Pl. Cr. *Informatio*. It is distinguished from a popular or *qui tam* action, in which the action is brought by the informer, to whom part of the penalty goes. A penal action or information is brought by an officer, and the penalty goes to the king. 1 Chitty. Gen. Pract. 25, note; 2 Archbold, Pract. 188.

PENAL BILL. The old name for a bond with condition, by which a person is bound to pay a certain sum of money or do a certain act, or, in default thereof, pay a certain sum of money by way of penalty. Jacob, Law Dict. *Bill*.

PENAL STATUTES. Those which inflict a penalty for the violation of some of their provisions.

It is a rule of law that such statutes must be construed strictly. 1 Blackstone, Comm. 88; Espinasse, Pen. Actions, 1; Boscawen, Conv.; Croke Jac. 415; 1 Comyns, Dig. 444; 5 *id.* 360; 1 Kent, Comm. 467. They cannot, therefore, be extended by their spirit or equity to other offences than those clearly described and provided for. 1 Paine, C. C. 32; 6 Cranch, 171.

PENALTY. A clause in an agreement, by which the obligor agrees to pay a certain sum of money if he shall fail to fulfil the contract contained in another clause of the same agreement.

A penal obligation differs from an alternative obligation, for this is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligor has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. *Obligation avec Clause pénale*.

A distinction is made in courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation. Eden, Inj. 22; 3 Ves. Ch. 692; 16 *id.* 403; 18 *id.* 58; 4 Bouvier, Inst. n. 3915.

For the distinction between a penalty and liquidated damages, see LIQUIDATED DAMAGES.

The penalty remains unaffected although the condition may have been partially performed: as, in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years, the penalty was still valid. 5 Vt. 355.

The punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment. See 6 Pet. 404; 7 Wheat. 13; 10 *id.* 246; 1 Wash. C. C. 1; 2 *id.* 323; 1 Paine, C. C. 661; 1 Gall. C. C. 26; 2 *id.* 515; 1 Mas. C. C. 243; 3 Johns. Cas. N. Y. 297; 7 Johns. N. Y. 72; 1 Pick. Mass. 451; 4 Mass. 433; 8 *id.* 232; 15 *id.* 488; 8 Comyns, Dig. 846; 16 Viner, Abr. 301; 1 Vern. Ch. 83, n.; 1 Saund. 58, n.: 1 Swanst. Ch. 318. See, generally, Bouvier, Inst. Index.

PENANCE. In Ecclesiastical Law. An ecclesiastical punishment inflicted by an ecclesiastical court for some spiritual offence. Ayliffe, Parerg. 420.

PENCIL. An instrument made of plumbago, red chalk, or other suitable substance, for writing without ink.

It has been holden that a will written with a pencil could not on this account be annulled. 1 Phill. Eccl. 1; 2 *id.* 173.

PENDENTE LITE (Lat.). Pending the continuance of an action while litigation continues.

An administrator is appointed *pendente lite*, when a will is contested. 2 Bouvier, Inst. n. 1557. See ADMINISTRATOR; LIS PENDENS.

PENDENTES (Lat.). **In Civil Law** The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. Erskine, Inst. b. 2, lit. 2, s. 4.

PENETRATION. The act of inserting the penis into the female organs of generation. 9 Carr. & P. 118. See 5 Carr. & P. 321; 8 *id.* 614; 9 *id.* 31. It was once held that in order to commit the crime of rape it is requisite that the penetration should be

such as to rupture the hymen. 5 Carr. & P. 321. But this case has since been expressly overruled. 2 Mood. Cr. Cas. 90; 9 Carr. & P. 752.

This has been denied to be sufficient to constitute a rape without emission. The statute 9 Geo. IV. c. 31, § 18, enacts that the carnal knowledge shall be deemed complete upon proof of penetration only. Statutes to the same effect have been passed in some of the United States; but these statutes have been thought to be merely declaratory of the common law. 3 Greenleaf, Ev. § 210. See, on this subject, 1 Hale, Pl. Cr. 628; 1 East, Pl. Cr. 437; 1 Chitty, Med. Jur. 386-395; 1 Russell, Crim. Law, 860; RAPE.

PENITENTIARY. A prison for the punishment of convicts.

There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partisans,—the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well-lighted, and well-ventilated cells, where they are required to work during stated hours. During the whole time of their confinement they are never permitted to see or speak with each other. Their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject are the privation of food for short periods, and confinement *without labor* in dark but well-aired cells: this discipline has been found sufficient to keep perfect order; the whip and all other corporeal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and, in order to retain it, use, generally, their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow-prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow-prisoners when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were that the prisoners would be unhealthy; experience has proved the contrary: that they would become insane; this has also been found to be otherwise: that solitude is incompatible with the performance of business: that obedience to the discipline of the prison could not be enforced. These, and all other objections to this system, are by its friends believed to be without force.

The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called La Maison de Force, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working-hours in the daytime they labor together in workshops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, wood-sawyers, etc. The discipline of the prison is enforced by stripes, inflicted by the assistant keepers, on the backs of the prisoners; though this punishment is rarely exercised. The advantages of this plan are that the convicts are in solitary confinement during the night; that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity for mental and moral improvements. Among the objections made to it are that the prisoners have opportunities of communicating with each other and of forming plans of escape, and, when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

See, generally, on the subject of penitentiaries, Report of the Commissioners (Messrs King, Shaler, and Wharton) on the Penal Code of Pennsylvania; De Beaumont and De Tocqueville, on the Penitentiary System of the United States; Mease on the Penitentiary System of Pennsylvania; Carey on ditto; Reports of the Boston Prison Discipline Society; Livingston's excellent Introductory Report to the Code of Reform and Prison Discipline, prepared for the state of Louisiana; Encycl. Americ. *Prison Discipline*; De l'Etat actuel des Prisons en France, par L. M. Moreau Christophe; Dallos, Dict. *Peine*, § 1, n. 3, and Supplem. *Prisons et Bagnes*.

PENNSYLVANIA. One of the thirteen original states of the United States of America.

It received its name from a royal charter, granted by Charles II. to William Penn on the 4th of March, 1681. By that charter William Penn was constituted the proprietary and governor of the territory. The first frame of government was adopted on the 20th of April, 1682. This was amended in 1683, again in 1696, and again in 1701. The organic law, as adopted in 1701, continued the supreme law of the province during the residue of the proprietary government. In 1776, after the declaration of American independence, a constitution was formed adapted to the altered circumstances of the country, which continued in force until 1790, when a new one was substituted. This was amended in 1838 by the introduction of some very radical changes. Other amendments were made in 1850, in 1857, and in 1864.

The form of government established by the constitution is republican. Legislative, executive, and judicial powers are committed to three distinct departments, neither of which can exercise the powers of any other department.

The legislative power is vested in a general assembly, consisting of a senate and house of representatives.

The supreme executive power is vested in a governor.

All judicial power is vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, register's court, and court of quarter sessions of the peace, for each county, in justices of the peace, and in such other courts as the legislature may from time to time establish.

The members of the senate and house of representatives, the governor, and all judicial officers, are elected by the people, and they hold their offices during limited periods. All elections are by ballot, except those made by persons acting in a representative character. Every white freeman, a citizen of the United States, of the age of twenty-one years, having resided in the state one year and in the election district where he offers to vote ten days immediately preceding the election, and having within

two years paid a state or county tax assessed at least ten days before the election, is entitled to the rights of an elector; and a citizen of the United States, who had previously been a qualified voter of the state, and removed therefrom and returned, is entitled to vote after a new residence within the state for six months, if he has resided in the election district and paid taxes as aforesaid. White freemen, citizens of the United States, between the ages of twenty-one and twenty-two, are entitled to vote without the payment of taxes, subject to the restrictions respecting residence already mentioned. Qualified electors in actual military service of the United States or of the state, under a requisition from the president of the United States or under authority of the commonwealth, are also entitled to vote, under regulations prescribed by law, without being present at their usual place of election.

The general election is held on the second Tuesday of October in each year.

The house of representatives consists of one hundred members, chosen annually. They are apportioned and distributed every seventh year throughout the state, by districts, in proportion to the number of taxable inhabitants therein. No person is eligible to the house of representatives who has not attained to the age of twenty-one years, and been a citizen and inhabitant of the state three years next preceding the election, and the last of the three years an inhabitant of the district in and for which he shall be chosen a representative, unless he shall have been absent on the public business of the United States or of the state.

The number of the senators is fixed by the legislature at the several periods of making the septennial enumeration of taxables. It can never be less than one-fourth nor greater than one-third of the number of the members of the house of representatives. It is at present thirty-three. The senators are chosen in districts formed by the legislature. No county can be divided in forming a district; and no district can be entitled to more than two senators, unless the number of taxables in any city or county is such as to entitle it to elect more than two. No city or county, however, is entitled to elect more than four. The city of Philadelphia is divided into single senatorial districts. Senators hold their offices three years, and one-third of the members of the senate are elected each year. No person is eligible as a senator who has not attained the age of twenty-five years, and been a citizen and inhabitant of the state four years next before his election, and the last year thereof an inhabitant of the district for which he shall be chosen, unless he shall have been absent on the public business of the United States or of the state. No person can hold the office of senator after his removal from the district for which he was chosen.

The powers and privileges of the legislature do not differ materially from those which belong to the legislatures of the other states of the United States. There are numerous restrictions imposed by the constitution upon general power to legislate, and most of the essential provisions of Magna Charta have been incorporated into it.

The supreme executive power of the state is vested in a governor, who is chosen by the electors qualified to elect members of the legislature. His term of office is three years from the third Tuesday of January next ensuing his election, and he is incapable of holding it more than six years in any term of nine years. He must be at least thirty years of age; and he must have been a citizen and an inhabitant of the state seven years next before his election, unless he shall have been absent on the public business of the United States or of the state. No member of congress or person holding any office under the United States or of the state can exercise the office of governor.

The governor is ex officio commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they are called into the actual service of the United States. It is his duty to see that the laws of the commonwealth are executed. He appoints a secretary of the commonwealth during pleasure. He appoints also an attorney-general. He has power to fill all vacancies in judicial offices in courts of record, and his appointees continue in office until the first Monday of December succeeding the next general election. All commissions must be in the name and by authority of the commonwealth, and be sealed with the state seal and signed by the governor. He has also power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment. He may convene the legislature on extraordinary occasions, and, in case of disagreement between the two houses with respect to the time of adjournment, he may adjourn them to such time as he may think proper, not more remote than four months. It is made his duty to communicate to the legislature from time to time information of the state of the commonwealth, and recommend to their consideration such measures as he may deem expedient. He has a veto power over every bill passed by the legislature; but if, notwithstanding his objection, two-thirds of both houses agree to the bill after reconsideration, it becomes a law.

In case of the death or resignation of the governor, or his removal from office, the office devolves upon the speaker of the senate until another governor is duly qualified; but in such a case, another governor is to be chosen at the next annual election occurring more than three months after such death, resignation, or removal. In case of a contested election, if the trial continue longer than until the third Tuesday of January next ensuing the day of the general election, the governor of the last year or the speaker of the senate who may then be in the exercise of the executive authority, continues therein until the determination of such contested election, and until a governor shall be qualified.

The supreme court is the highest judicial tribunal of the state. It is composed of five judges, who hold their offices for the term of fifteen years, if they so long behave themselves well. The judge whose commission will first expire is the chief justice; but if two or more commissions expire on the same day, the judges holding such commissions decide by lot which shall be chief justice. The jurisdiction of the court extends over the state, and the judges are, ex officio, justices of oyer and terminer and general jail delivery in the several counties. The court is principally a court of errors and appeals, and its writs run to all other courts in the state. It has also a limited original jurisdiction within the city and county of Philadelphia, and original jurisdiction in equity extending over the commonwealth. It holds its sessions once in each year at least, in Philadelphia, Pittsburg, Harrisburg, and Sunbury, for the adjudication of writs of error and appeals.

For the courts of common pleas, the state is divided into twenty-six districts; these districts are subject to change by the legislature, but no more than five counties can at any time be included in one judicial district. The president judges of these courts, and all other judges thereof that are required to be learned in the law, as well as such judges of other courts of record as may from time to time be established by the legislature, hold their offices for the term of ten years if they so long behave themselves well. In each county they are, ex officio, justices of oyer and terminer and general jail delivery for the trial of capital and other offenders therein; but they have no power to hold a court of oyer and terminer out of their proper districts, nor can they hold such a court in

any county when the judges of the supreme court, or any of them, are sitting in the same county.

The orphans' court and the court of quarter sessions of the peace for each county are composed of the judges of the court of common pleas for the county, or any two of them; and the register of wills, together with the said judges, or two of them, compose the register's court.

Associate judges of the court of common pleas are elected in each county. They are not generally required to be learned in the law: when not so required, they hold their offices for the term of five years, if they so long behave themselves well.

The legislature has also established two district courts, one for the city and county of Philadelphia and one for the county of Alleghany.

Most civil issues are tried by the courts of common pleas and by the district courts, and the decisions of those courts are reviewable in the supreme court. A register's office for the probate of wills and granting letters of administration, and, also, an office for recording deeds, are maintained in each county. Appeals may be taken from decrees of the register to the register's court. The orphans' courts have general jurisdiction over the settlement of decedents' estates and the accounts of executors, administrators, and guardians, subject, however, to an appellate jurisdiction in the supreme court.

Civil writs issue, generally, from the offices of the clerks of the courts in each county; and the style of all process is required to be "The Commonwealth of Pennsylvania."

PENNY. The name of an English coin, of the value of one-twelfth part of a shilling.

While the United States were colonies, each adopted a monetary system composed of pounds, shillings, and pence. The penny varied in value in the different colonies.

PENNYWEIGHT. A troy weight which weighs twenty-four grains, or one-twentieth part of an ounce. See WEIGHTS.

PENSION. A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country. The government of the United States has, by general laws, granted pensions to revolutionary soldiers, see 1 Story, U. S. Laws, 68, 101, 224, 304, 363, 371, 451; 2 *id.* 903, 915, 983, 1008, 1240; 3 *id.* 1662, 1747, 1778, 1794, 1825, 1927; 4 *id.* 2112, 2270, 2329, 2336, 2366; to naval officers and sailors, 1 Story, U. S. Laws, 474, 677, 769; 2 *id.* 1284; 3 *id.* 1565; to the army generally, 1 *id.* 360, 412, 448; 2 *id.* 833; 3 *id.* 1573; to the militia generally, 1 *id.* 255, 360, 412, 488; 2 *id.* 1382; 3 *id.* 1873; in the Seminole war. 3 *id.* 1706. See Act of Congr. July 14, 1862, 12 U. S. Stat. at Large, 566; July 4, 1864, 13 U. S. Stat. at Large, 387.

PENSIONER. One who is supported by an allowance at the will of another. It is more usually applied to him who receives an annuity or pension from the government.

PEONIA. In Spanish Law. A portion of land which was formerly given to a simple soldier on the conquest of a country. It is now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep. 2 White, Coll. 49; 12 Pet. 444, notes.

PEOPLE. A state: as, the people of the state of New York. A nation in its collective and political capacity. 4 Term, 783. See 6 Pet. 467.

The word people occurs in a policy of insurance. The insurer insures against "detainments of all kings, princes, and people." He is not by this understood to insure against any promiscuous or lawless rabble which may be guilty of attacking or detaining a ship. 2 Marshall, Ins. 508. See BODY POLITIC; NATION.

PER. By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but *by* the original wrong-doer. 3 Blackstone, Comm. 181. See ENTRY, WRIT OF.

PER ÆS ET LIBRAM (Lat. *æs*, brass, *libram*, scale). **In Civil Law.** A sale was said to be made *per æs et libram* when one called *libripens* held a scale (*libra*), which the one buying struck with a brazen coin (*æs*), and said, "I say, by the right of a Roman, this thing is mine," and gave the coin to the vendor, in presence of at least three witnesses. This kind of sale was used in the emancipation of a son or slave, and in making a will. Calvinus, Lex. *Mancipatio;* Vicat, Voc. Jur. *Mancipatio.*

PER ALLUVIONEM (Lat.). **In Civil Law.** By alluvion, or the gradual and imperceptible increase arising from deposit by water. Vocab. Jur. Utr. *Alluvio;* Angell & A. Waterc. 53–57.

PER ANNULUM ET BACULUM (Lat.). **In Ecclesiastical Law.** The symbolical investiture of an ecclesiastical dignity was *per annulum et baculum, i.e.* by staff and crosier. 1 Sharswood, Blackst. Comm. 378, 379; 1 Burn, Eccl. Law, 209.

PER AVERSIONEM (Lat.). **In Civil Law.** By turning away. Applied to a sale not by measure or weight, but for a single price for the whole in gross: *e.g.* a sale of all the wine of a vineyard for a certain price. Vocab. Jur. Utr. *Aversio.* Some derive the meaning of the phrase from a *turning away* of the risk of a deficiency in the quantity from the seller to the buyer; others, from *turning away* the head, *i.e.* negligence in the sale; others think *aversio* is for *adversio.* Calvinus, Lex.; 2 Kent, Comm. 640; 4 *id.* 517.

PER CAPITA (Lat. by the head or polls). When descendants take as individuals, and not by right of representation (*per stirpes*), they are said to take *per capita.* For example, if a legacy be given to the issue of A B, and A B at the time of his death shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them. 3 Ves. Ch. 257; 13 *id.* 344; 2 Sharswood, Blackst. Comm. 218; 6 Cush. Mass. 158, 162; 2 Jarman, Wills, Per-

kins' Notes, 47; 3 Beav. Rolls, 451; 4 *id.* 239; 2 Stephen, Comm. 253; 3 *id.* 197; 2 Wooddeson, Lect. 114.

PER AND CUI. When a writ of entry is brought against a second alienee or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior alienee, *to* whom the intruder himself demised it. 2 Blackstone, Comm. 181. See ENTRY, WRIT OF.

PER CURIAM (Lat. by the court). A phrase which occurs in all the reports. It is sometimes translated. See 3 Barb. N. Y. 353.

PER FORMAM DONI (Lat. by the form of the gift). According to the line of descent prescribed in the conveyance of the ancestor or donor of estate-tail. 2 Sharswood, Blackst. Comm. 113*; 3 Harr. & J. Md. 323; 1 Washburn, Real Prop. 74, 81.

PER FRAUDEM (Lat.). A replication to a plea where something has been pleaded which would be a discharge if it had been honestly pleaded that such a thing has been obtained by fraud: for example, where, on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud the plaintiff may reply *per fraudem*. 2 Chitty, Plead. *675.

PER INFORTUNIUM (Lat. by misadventure). **In Criminal Law.** Homicide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another. Hawkins, Pl. Cr. b. 1, c. 11; Foster, Crim. Law, 258, 259; Coke, 3d Inst. 56.

PER MINAS (Lat. by threats). When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life or mayhem, he may avoid it afterwards. 1 Sharswood, Blackst. Comm. 131; Bacon, Abr. *Duress*, *Murder* (A). See DURESS.

PER MY ET PER TOUT (Law Fr. by the moiety, or half, and by the whole). The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal. 1 Washburn, Real Prop. 406; 2 Sharswood, Blackst. Comm. 182.

PER QUOD CONSORTIUM AMISIT (Lat. by which he lost her company). If a man's wife is so badly beaten or ill used that thereby he loses her company and assistance for any time, he has a separate remedy by an action of trespass (in the nature of an action on the case) *per quod consortium amisit*, in which he shall recover satisfaction in damages. 3 Sharswood, Blackst. Comm. 140; Croke Jac. 501, 538; 1 Chitty, Gen. Pract. 59.

PER QUOD SERVITIUM AMISIT (Lat. by which he lost her or his service). Where a servant has been so beaten or injured that his or her services are lost to the master, the master has an action of trespass *vi et armis*, *per quod servitium amisit*, in which he must allege and prove the special damage he has sustained. 3 Sharswood, Blackst. Comm. 142. This action is commonly brought by the father for the seduction of his daughter, in which case very slight evidence of the relation of master and servant is necessary; but still some loss of service, or some expense, must be shown. 5 East, 45; 6 *id.* 391; 11 *id.* 23; T. Raym. 459; 3 Wils. 18; 2 Term, 4; 5 Bos. & P. 466; Peake, 253; 1 Stark. 287; 2 *id.* 493; 3 Esp. 119; 5 Price, Exch. 641; 11 Ga. 603; 15 Barb. N. Y. 279; 18 *id.* 212; 8 N. Y. 191; 11 *id.* 343; 14 *id.* 413; 20 Penn. St. 354; 5 Md. 211; 1 Wisc. 209; 3 Sneed, Tenn. 29.

PER STIRPES (Lat. *stirps*, trunk or root of a tree or race). By or according to stocks or roots; by right of representation. Mass. Gen. Stat. 1860, c. 9, § 12; 6 Cush. Mass. 158, 162; 2 Sharswood, Blackst. Comm. 217, 218; 2 Stephen, Comm. 253; 2 Wooddeson, Lect. 114, 115; 2 Kent, Comm. 425.

PER UNIVERSITATEM (Lat. by the whole). Used of the acquisition of any property as a whole, in opposition to an acquisition by parts: *e.g.* the acquisition of an inheritance, or of the separate property of the son (*peculium*), etc. Calvinus, Lex. *Universitas*.

PERAMBULATIONE FACIENDA, WRIT DE. In English Law. The name of a writ which is sued by consent of *both* parties when they are in doubt as to the bounds of their respective estates: it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. Fitzherbert, Nat. Brev. 309.

"The writ *de perambulatione faciendâ* is not known to have been adopted in practice in the United States," says Professor Greenleaf, Ev. § 146, n.; "but in several of the states remedies somewhat similar in principle have been provided by statutes."

PERCEPTION (From *per* and *capere*). The taking possession of. For example, a lessee or tenant before perception of the crops, *i.e.* before harvesting them, has a right to offset any loss which may happen to them, against the rent; but after the perception they are entirely at his risk. Mackeldy, Civil Law, § 378. Used of money, it means the counting out and payment of a debt. Also used for food due to soldiers. Vicat, Voc. Jur.

PERCH. The length of sixteen feet and a half; a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

PERDONATIO UTLAGARIÆ (Lat.). **In English Law.** A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

PERDUELLIO (Lat.). **In Civil Law.** At first, an honorable enmity to the republic;

afterwards, a traitorous enmity of a citizen; consisting in being of a hostile disposition towards the republic, *e.g.* treason aiming at the supreme power, violating the privileges of a Roman citizen by beating him, etc., attempting any thing against the person of the emperor, and, in general, any open hostility to the republic. Sometimes used for the enemy or traitor himself. *Perduellio* was distinguished from *crimen imminutæ majestatis*, as being an attempt against the whole republic, punishable in *comitia centuriata*, by crucifixion and by infamy after death. Calvinus, Lex.; Vicat, Voc. Jur.

PEREGRINI (Lat.). **In Civil Law.** Under the denomination of *peregrini* were comprehended all who did not enjoy any capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Savigny, Dr. Rom. § 66.

PEREMPTORIUS (Lat. from *perimere*, to destroy). **In Civil Law.** That which takes away or destroys forever: hence, *exceptio peremptoria*, a plea which is a perpetual bar. See PEREMPTORY. Bracton, lib. 4, c. 20; Fleta, lib. 6, c. 36, § 3; Calvinus, Lex.

PEREMPTORY. Absolute; positive. A final determination to act, without hope of renewing or altering. Joined to a substantive, this word is frequently used in law: as, peremptory action, Fitzherbert, Nat. Brev. 35, 38, 104, 108; peremptory nonsuit, *id.* 5, 11; peremptory exception, Bracton, lib. 4, c. 20; peremptory undertaking, 3 Chitty. Pract. 112, 793; peremptory challenge of jurors. Inst. 4. 13. 9; Code, 7. 50. 2; 8. 36. 8; Dig. 5. 1. 70. 73.

PEREMPTORY CHALLENGE. A challenge without cause given, allowed to prisoner's counsel in criminal cases, up to a certain number of jurors. 11 Chitty, Stat. 59, 689; 2 Hargrave, St. Tr. 808; 4 *id.* 1; Foster, Crim. Law, 42; 4 Sharswood, Blackst. Comm. 353*.

PEREMPTORY DEFENCE. A defence which insists that the plaintiff never had the right to institute the suit, or that, if he had, the original right is extinguished or determined. 4 Bouvier, Inst. n. 4206.

PEREMPTORY EXCEPTION. Any defence which denies entirely the ground of action. 1 White, New Recop. 283. So of a demurrer. 1 Tex. 364.

PEREMPTORY MANDAMUS. A mandamus requiring a thing to be done absolutely. It is usually granted after failure to show satisfactory cause on an alternative mandamus. No other return will be permitted but absolute obedience. 3 Sharswood, Blackst. Comm. 110*; Tapping, Mand. 400 *et seq.* See MANDAMUS.

PEREMPTORY PLEA. A plea which goes to destroy the right of action itself; a plea in bar or to the action. 3 Stephen, Comm. 576; 3 Wooddeson, Lect. 57; 2 Saunders, Plead. & Ev. 645; 3 Bouvier, Inst. n. 2891.

PERFECT. Complete.

This term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, from those which cannot be so enforced, which are said to be *imperfect*.

PERFIDY. The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff, § 390.

PERFORMANCE. The act of doing something. The thing done is also called a performance: as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the Statute of Frauds and Perjuries could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it, 14 Johns. N. Y. 15; 1 Johns. Ch. N. Y. 273; and such part performance will enable the other party to prove it *aliunde*. 1 Pet. C. C. 380; 1 Rand. Va. 165; 1 Blackf. Ind. 58; 2 Day, Conn. 255; 5 *id.* 67; 1 Des. So. C. 350; 1 Binn. Penn. 218; 1 Johns. Ch. N. Y. 131, 146; 3 Paige, Ch. N. Y. 545.

PERIL. The accident by which a thing is lost. Leçons Elém. Dr. Rom. § 911.

In Insurance. The risk, contingency, or cause of loss insured against, in a policy of insurance. See RISK; INSURANCE.

PERILS OF THE SEA. A phrase contained in bills of lading, and a class of dangers to goods carried, the effects of which the carriers do not undertake to insure against in virtue of their general undertaking.

2. Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words perils of the sea denote the natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural causes. For instance, they have been held to include a capture by pirates on the high sea, and a case of loss by collision of two ships, where no blame is imputable to the injured ship. Abbott, Shipp. pt. 3, c. 4, §§ 1–6; Park, Ins. c. 3; Marshall, Ins. b. 1, c. 7, p. 214; 1 Bell, Comm. 579; 3 Kent, Comm. 299–307; 3 Esp. 67.

It has indeed been said that by perils of the sea are properly meant no other than inevitable perils or accidents upon the sea, and that by such perils or accidents common carriers are *primâ facie* excused, whether there be a bill of lading containing the expression of "peril of the sea" or not. 1 Conn. 487.

3. It seems that the phrase *perils of the sea*, on the western waters of the United States, signifies and includes *perils of the river*. 8 Ala. 176.

If the law be so, then the decisions upon the meaning of these words become important in a practical view in all cases of maritime or water carriage.

4. It seems that a loss occasioned by leakage which is caused by rats gnawing a hole

in the bottom of the vessel is not, in the English law, deemed a loss by peril of the sea or by inevitable casualty. 1 Wils. 281; 4 Campb. 203. But if the master had used all reasonable precautions to prevent such loss, as by having a cat on board, it seems agreed it would be a peril of the sea or inevitable accident. Abbott, Shipp. pt. 3, c. 3, § 9. But see 3 Kent, Comm. 299–301. In conformity to this rule, the destruction of goods at sea by rats has, in Pennsylvania, been held a peril of the sea, where there has been no default in the carrier. 1 Binn. Penn. 592. But see 6 Cow. N. Y. 266; 3 Kent. Comm. 248, n. *c*. On the other hand, the destruction of a ship's bottom by worms in the course of a voyage has, both in America and England, been deemed not to be a peril of the sea, upon the ground, it would seem, that it is a loss by ordinary wear and decay. Park, Ins. c. 3; 1 Esp. 444; 2 Mass. 429. But see 2 Caines, N. Y. 85. See, generally, ACT OF GOD; FORTUITOUS EVENT; Marshall, Ins. ch. 7, ch. 12, § 1; Phillips, Ins.; Parsons, Marit. Law.

PERIPHRASIS. Circumlocution; the use of other words to express the sense of one.

Some words are so technical in their meaning that in charging offences in indictments they must be used or the indictment will not be sustained: for example, an indictment for treason must contain the word *traitorously;* an indictment for burglary, *burglariously;* and *feloniously* must be introduced into every indictment for felony. 1 Chitty, Crim. Law, 242; Coke, 3d Inst. 15; Carth. 319; 2 Hale, Pl. Cr. 172, 184; 4 Sharswood, Blackst. Comm. 307; Hawkins, Pl. Cr. b. 2, c. 25, s. 55; 1 East, Pl. Cr. 115; Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Croke Car. c. 37.

PERISH. To come to an end; to cease to be; to die.

What has never existed cannot be said to have perished.

When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other.

PERISHABLE GOODS. Goods which are lessened in value and become worse by being kept.

PERJURY. In Criminal Law. A wilful false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question, whether he be believed or not.

The wilful giving, under oath in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bishop, Crim. Law, § 860.

2. *The intention must be wilful.* The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise, or mistake of the import of the question, there was no corrupt motive. Hawkins, Pl. Cr. b. 1, c. 69, s. 2; Croke Eliz. 492; 2 Show. 165; 4 McLean, C. C. 113; 3 Dev. No. C. 114; 7 Dowl. & R. 665; 5 Barnew. & C. 346; 7 Carr. & P. 17; 11 Q. B. 1028; 1 Rob. Va. 729; 3 Ala. N. S. 602. But one who swears wilfully and deliberately to a matter which he rashly believes, which is false, and which he had no probable cause for believing, is guilty of perjury. 6 Binn. Penn. 249. See 1 Baldw. C. C. 370; 1 Bail. So. C. 50; 4 McLean, C. C. 113.

3. *The oath must be false.* The party must believe that what he is swearing is fictitious; and if, intending to deceive, he asserts that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him. Coke, 3d Inst. 166; Hawkins, Pl. Cr. b. 1, c. 69, s. 6. See 4 Mo. 47; 4 Zabr. N. J. 455; 9 Barb. N. Y. 467; 1 Carr. & K. 519. As, if a man swears that C D revoked his will in his presence, if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury. Hetl. 97.

4. *The party must be lawfully sworn.* The person by whom the oath is administered must have competent authority to receive it: an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury. "For where the court hath no authority to hold plea of the cause, but it is *coram non judice*, there perjury cannot be committed." 1 Ind. 232; 1 Johns. N. Y. 498; 9 Cow. N. Y. 30; 3 M'Cord, So. C. 308; 4 *id.* 165; 3 Carr. & P. 419; 4 Hawks, No. C. 182; 1 Nott & M'C. So. C. 546; 3 M'Cord, So. C. 308; 2 Hayw. No. C. 56; 8 Pick. Mass. 453; 12 Q. B. 1026; Dearsl. Cr. Cas. 251; 2 Russell, Crimes, 520; Coke, 3d Inst. 166.

5. *The proceedings must be judicial.* 5 Mo. 21; 1 Bail. So. C. 595; 11 Metc. Mass. 406; 5 Humphr. Tenn. 83; 1 Johns. N. Y. 49; Wright, Ohio, 173; Russ. & R. 459. Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose. 2 Russell, Crimes, 518; Hawkins, Pl. Cr. b. 1, c. 69, s. 3. See 3 Yeates, Penn. 414; 9 Pet. 238; 2 Conn. 40; 11 *id.* 408; 4 M'Cord, So. C. 165. Perjury cannot be committed where the matter is not regularly before the court. 4 Hawks, No. C. 182; 2 Hayw. No. C. 56; 3 M'Cord, So. C. 308; 8 Pick. Mass. 453; 1 Nott & M'C. So. C. 546; 9 Mo. 824; 18 Barb. N. Y. 407; 10 Johns. N. Y. 167; 26 Me. 33; 7 Blackf. Ind. 25; 5 Barnew. & Ald. 634; 1 Carr. & P. 258; 9 *id.* 513.

6. *The assertion must be absolute.* If a man, however, swears that he *believes* that to be true which he knows to be false, it will be perjury. 10 Q. B. 670; 3 Wils. 427; 2 W. Blackst. 881; 1 Leach, 242; 6 Binn. Penn. 249; Gilbert, Ev. Lofft ed. 662. It is immaterial whether the testimony is given in answer to a question or voluntarily. 3 Zabr. N. J. 49; 12 Metc. Mass. 225. Perjury cannot be assigned upon the valuation, under oath, of a jewel or other thing the value of which consists in estimation. Sid. 146; 1 Kebl. 510. But in some cases a false statement of opinion may become perjury. 10 Q. B. 670; 15 Ill

357; 3 Ala. N. s. 602; 3 Strobh. So. C. 147; 6 Blackf. Ind. 62; 1 Leach, Cr. Cas. 4th ed. 325.

7. *The oath must be material to the question depending.* 1 Term, 63; 12 Mass. 274; 3 Murph. No. C. 123; 4 Mo. 47; 2 Ill. 80; 9 Miss. 149; 6 Penn. St. 170; 2 Cush. Mass. 212. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to a legal perjury. 2 Russell, Crimes, 521; Coke, 3d Inst. 167; 8 Ves. Ch. 35; 2 Rolle, 41, 42, 369; 1 Hawkins, Pl. Cr. b. 1, c. 69, s. 8; Bacon, Abr. *Perjury* (A); 2 Nott & M'C. So. C. 18; 2 Mo. 158. But every question in cross-examination which goes to the credit of a witness, as, whether he has been before convicted of felony, is material. 3 Carr. & K. 26; 2 Mood. Cr. Cas. 263; 1 Carr. & M. 655. And see 1 Ld. Raym. 257; 10 Mod. 195; 8 Rich. So. C. 456; 9 Mo. 824; 12 Metc. Mass. 225. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, even though the latter evidence is afterwards withdrawn by counsel, or though it was not legally receivable, is indictable as perjury. 2 Den. Cr. Cas. 302; 3 Carr. & K. 302.

8. It is not within the plan of this work to cite all the statutes passed by the general government or the several states on the subject of perjury. It is proper, however, here to transcribe a part of the thirteenth section of the act of congress of March 3, 1825, which provides as follows: "If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence." See 4 Blackf. Ind. 146; 15 N. H. 83; 9 Pet. 238; 2 McLean, C. C. 135; 1 Wash. C. C. 84; 2 Mas. C. C. 69.

In general, it may be observed that a perjury is committed as well by making a false affirmation as a false oath. See, generally, 16 Viner, Abr. 307; Bacon, Abr.; Comyns, Dig. *Justices of the Peace* (B 102–106); 4 Sharswood, Blackst. Comm. 137–139; Coke, 3d Inst. 163–168; Hawkins, Pl. Cr. b. 1, c. 69; Russell, Crimes, b. 5, c. 1; 2 Chitty, Crim. Law, c. 9; Roscoe, Crim. Ev.; Burn, Just.; Williams, Just.

PERMANENT TRESPASS. A trespass consisting of trespasses of one and the same kind, committed on several days, which are in their nature capable of renewal or continuation, and are actually renewed or continued from day to day, so that the particular injury done on each particular day cannot be distinguished from what was done on another day. In declaring for such trespasses, they may be laid with a continuando. 3 Blackstone, Comm. 212; Bacon, Abr. *Trespass* (B 2, I 2); 1 Saund. 24, n. 1. See CONTINUANDO; TRESPASS.

PERMISSION. A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law: it is a check upon the operations of the law.

Express permissions derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time.

Implied permissions are those which arise from the fact that the law has not forbidden the act to be done.

PERMISSIVE. Allowed; that which may be done: as, permissive waste, which is the permitting real estate to go to waste. When a tenant is bound to repair, he is punishable for permissive waste. 2 Bouvier, Inst. n. 2400. See WASTE.

PERMIT. A license or warrant to do something not forbidden by law: as, to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Congr. March 2, 1799, s. 49, cl. 2. See form of such a permit, Gordon, Dig. App. II. 46.

PERMUTATION. In Civil Law. Exchange; barter.

This contract is formed by the consent of the parties; but delivery is indispensable, for without it it is a mere agreement. Dig. 31. 77. 4; Code, 4. 64. 3.

Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: that he to whom the delivery is made acquires the right or faculty of prescribing, Dig. 41. 3. 4. 17; that the contracting parties are bound to guarantee to each other the title of the things delivered, Code, 4. 64. 1; and that they are bound to take back the things delivered when they have latent defects which they have concealed. Dig. 21. 1. 63. See Aso & M. Inst. b. 2, t. 16, c. 1; MUTATION; TRANSFER.

PERNANCY (from Fr. *prendre*, to take). A taking or receiving.

PERNOR OF PROFITS. He who receives the profits of lands, etc. A *cestui que use*, who is legally entitled and actually does receive the profits, is the pernor of profits.

PERPETUAL. That which is to last without limitation as to time: as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

PERPETUAL CURACY. The office

of a curate, in a parish where there is no spiritual rector or vicar, but where the curate is appointed to officiate for the time by the impropriator. 2 Burn, Eccl. Law, 55.

The church of which the curate is perpetual. 2 Ves. Sen. Ch. 425, 429. See 2 Stephen, Comm. 76; 2 Burn, Eccl. Law, 55; 9 Ad. & E. 556. As to whether such curate may be removed, see 2 Burn, Eccl. Law, 55.

PERPETUATING TESTIMONY. The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted.

The origin of this practice may be traced to the canon law, cap. 5, X *ut lite non contestata*, etc. Bockmer, n. 4; 8 Toullier, n. 22. Statutes exist in most of the states for this purpose. Equity also furnishes means, to a limited extent, for the same purpose.

PERPETUITY. Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Randell, Perp. 48. Such a limitation of property as renders it unalienable beyond the period allowed by law. Gilbert, Uses, Sugd. ed. 260, n.

Mr. Justice Powell, in Scattergood *vs.* Edge, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct, and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject; for whether an estate be so limited that it cannot take effect until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity, and the limitation is therefore void; for it is not sufficient that an estate may vest within the time allowed, but the rule requires that it must. Randell, Perp. 49. See Cruise, Dig. tit. 32, c. 23; 1 Belt, Suppl. to Ves. Jr. 406; 2 Ves. Ch. 357; 3 Saund. 388; Comyns, Dig. *Chancery* (4 G 1); 3 Chanc. Cas. 1; 2 Bouvier, Inst. n. 1890.

PERQUISITES. In its most extensive sense, perquisites signifies any thing gotten by industry or purchased with money, different from that which descends from a father or ancestor. Bracton, l. 2, c. 30, n. 3; l. 4, c. 22. In a more limited sense, it means something gained by a place or office beyond the regular salary or fee.

PERSON. A man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes. 1 Bouvier, Inst. n. 137.

A corporation, which is an artificial person. 1 Sharswood, Blackst. Comm. 123; 4 Bingh. 669; Wooddeson, Lect. 116; 1 Mod. 164.

2. The term, as is seen, is more extensive than man,—including artificial beings, as corporations, as well as natural beings. But when the word "persons" is spoken of in legislative acts, natural persons will be intended, unless something appear in the context to show that it applies to artificial persons. 2 Ill. 178.

Natural persons are divided into males, or men, and females, or women. Men are capable of all kinds of engagements and functions, unless by reasons applying to particular individuals. Women cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising. La. Civ. Code, art. 25.

3. They are also sometimes divided into free persons and slaves. Freemen are those who have preserved their natural liberty, that is to say, who have the right of doing what is not forbidden by the law. A slave is one who is in the power of a master to whom he belongs. Slaves are sometimes ranked not with persons, but things. But sometimes they are considered as persons: for example, a negro is in contemplation of law a person, so as to be capable of committing a riot in conjunction with white men. 1 Bay, So. C. 358. See MAN.

Persons are also divided into citizens and aliens, when viewed with regard to their political rights. When they are considered in relation to their civil rights, they are living or civilly dead, see CIVIL DEATH; outlaws; and infamous persons.

Persons are divided into legitimates and bastards, when examined as to their rights by birth.

When viewed in their domestic relations, they are divided into parents and children; husbands and wives; guardians and wards; and masters and servants.

For the derivation of the word person, as it is understood in law, see 1 Toullier, n. 168; 1 Bouvier, Inst. n. 1890, note.

PERSONA (Lat.). **In Civil Law.** Character, in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters (*personæ*): as, for example, the characters of father and son, of master and servant. Mackeldy, Civ. Law, § 117.

In its original signification, a mask; afterwards, a man in reference to his condition or character (*status*). Vicat, Voc. Jur. It is used metaphorically of things, among which are counted slaves. It is often opposed to *res*: as, *actio in personam* and *actio in rem*.

Power and right belonging to a person in a certain character (*pro jure et potestate personæ competentæ*). Vicat, Voc. Jur. Its use is not confined to the living, but is extended to the dead and to angels. *Id.* A statue in a fountain whence water gushes.

PERSONAL. Belonging to the person.

This adjective is frequently employed in connection with substantives, things, goods, chattels, actions, right, duties, and the like: as, personal estate, put in opposition to real estate; personal actions, in contradistinction to real actions. Personal rights are those which belong to the person; personal duties are those which are to be performed in person.

PERSONAL ACTION. In Practice.

IN THE CIVIL LAW.

An action in which one person (the *actor*) sues another (the *reus*) in respect of some obligation which he is under to the actor either *ex contractu* or *ex delicto*. It will be seen that this includes all actions against a person, without reference to the nature of the

property involved. In a limited sense of the word action in the civil law, it includes only personal actions, all others being called petitions. See REAL ACTION.

AT THE COMMON LAW.

An action brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. Such arise either upon contracts, as account, assumpsit, covenant, debt, and detinue (see these words), or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover. (See these words.) Other divisions of personal actions are made in the various states; and in Vermont and Connecticut an action is in use called the action of book debt. See BOOK DEBT.

PERSONAL CHATTELS. Strictly and properly speaking, things movable, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. 2 Sharswood, Blackst. Comm. 388*.

PERSONAL CONTRACT. A contract as to personal property. A covenant (or contract) personal relates only to matters personal as distinguished from real, and is binding on the covenantor (contractor) during his life, and on his personal representatives after his decease, in respect of assets. Angell & A. Waterc. 305; Coke, Litt. 22.

PERSONAL COVENANT. A covenant which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee.

A covenant which must be performed by the covenantor in person. Fitzherbert, Nat. Brev. 340.

All covenants are either personal or real; but some confusion exists in regard to the division between them. Thus, a covenant may be personal as regards the covenantor, and real as regards the covenantee; and different definitions have been given, according to whether the rights and liabilities of the covenantor or the covenantee have been in consideration. It is apprehended, however, that the prevalent modern usage is to hold a covenant real, if it is real,—that is, runs with the land so as to apply to an assignee, either as regards the covenantor or the covenantee. See Platt, Cov. 61; 4 Sharswood, Blackst. Comm. 304, n., 305, n.; 3 N. J. 260; 7 Gray, Mass. 83.

All covenants which relate to personalty merely are of this class. 30 Miss. 145.

PERSONAL LIBERTY. See LIBERTY.

PERSONAL PROPERTY. The right or interest which a man has in things personal.

The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.

Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property. The essential idea of personal property is that of property in a thing movable or separable from the realty, or of perishability or possibility of brief duration of interest as compared with the owner's life in a thing real, without any action on the part of the owner. See 2 Sharswood, Blackst. Comm. 14 and notes, 384 and notes.

2. A crop growing in the ground is personal property so far as not to be considered an interest in land, under the Statute of Frauds. 11 East, 362; 12 Me. 337; 5 Barnew. & C. 829; 9 *id.* 561; 10 Ad. & E. 753.

It is a general principle of American law that stock held in corporations is to be considered as personal property, Walker, Am. Law, 211; 4 Dane, Abr. 670; Sullivan, Land Tit. 71; 1 Hilliard, Real Prop. 18; though it was held that such stock was real estate, 2 Conn. 567; but, this being found inconvenient, the law was changed by the legislature.

3. Title to personal property is acquired—*first*, by original acquisition by occupancy: as, by capture in war, by finding a lost thing; *second*, by original acquisition by accession; *third*, by original acquisition by intellectual labor: as, copyrights and patents for inventions; *fourth*, by transfer, which is by act of law, by forfeiture, by judgment, by insolvency, by intestacy; *fifth*, by transfer by act of the party, by gift, by sale. See, generally, 16 Viner, Abr. 335; 8 Comyns, Dig. 474, 562; 1 Belt, Suppl. Ves. Ch. 49, 121, 160, 198, 255, 368, 369, 399, 412, 478; 2 *id.* 10, 40. 129, 290, 291, 341; 1 Vern. Ch. 3, 170, 412; 2 Salk. 449; 2 Ves. Ch. 59, 176, 261, 271, 336, 683; 7 *id.* 453. See PEW; PROPERTY; REAL PROPERTY.

PERSONAL REPRESENTATIVES. The *executors* or *administrators* of the person deceased. 6 Mod. 155; 5 Ves. Ch. 402; 1 Madd. Ch. 108.

In wills, these words are sometimes construed to mean *next of kin*. 2 Jarman, Wills, 28; 1 Beav. Rolls, 46; 1 Russ. & M. Ch. 587.

PERSONAL SECURITY. The legal and uninterrupted enjoyment by a man of his life, his body, his health, and his reputation. 1 Bouvier, Inst. n. 202.

PERSONAL STATUTE. A law whose principal, direct, and immediate object is to regulate the condition of persons.

The term is not properly in use in the common law, although Lord Mansfield, in 2 W. Blackst. 234, applied it to those legislative acts which respect personal transitory contracts, but is occasionally used in the sense given to it in civil law and which is adopted as its definition. It is a law, ordinance, regulation, or custom, the disposition of which affects the person and clothes him with a capacity or incapacity which he does not change with his abode. See 2 Kent, Comm. 10th ed. 613.

PERSONALTY. That which is movable; that which is the subject of personal property and not of a real property.

PERSONATE. In Criminal Law. To assume the character of another without lawful authority, and, in such character, do something to his prejudice, or to the prejudice of another, without his will or consent.

The bare fact of personating another for the purpose of fraud is no more than a cheat

or misdemeanor at common law, and punishable as such. 2 East, Pl. Cr. 1010; 2 Russell, Crimes, 479.

By the act of congress of the 30th April 1790, s. 15, 1 Story, U. S. Laws, 86, it is enacted that "if any person shall acknowledge, or procure to be acknowledged, in any court of the United States, any recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. Provided, nevertheless, that this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted, for any person or persons against whom any such judgment or judgments shall be had or given." See, generally, 2 Johns. Cas. N. Y. 293; 16 Viner, Abr. 336; Comyns, Dig. *Action on the Case for a Deceit* (A 3).

PERSUADE, PERSUADING. To persuade is to induce to act. Persuading is inducing others to act. Inst. 4. 6. 23; Dig. 11. 3. 1. 5.

In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by *persuading* others to enlist for that purpose, etc., he shall be adjudged guilty of high treason," the word persuading thus used means to succeed; and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause. 1 Dall. Penn. 39; 4 Carr. & P. 369; 9 *id.* 79; ADMINISTERING. See 2 Ld. Raym. 889. It may be fairly argued, however, that the attempt to persuade without success would be a misdemeanor. 1 Russell, Crimes, 44.

In England it has been decided that to incite and procure a person to commit suicide is not a crime for which the party could be tried. 9 Carr. & P. 79. See ATTEMPT; SOLICITATION.

PERSUASION. The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor. But if such persuasion should so far operate on the mind of the testator that he would be deprived of a perfectly free will, it would vitiate the instrument. 3 Serg. & R. Penn. 269; 5 *id.* 207; 13 *id.* 323.

PERTINENT (from Lat. *pertineo*, belonging to). Which tends to prove or disprove the allegations of the parties. Willes, 319. Matters which have no such tendency are called impertinent. 8 Toullier, n. 22.

PERTURBATION. This is a technical word which signifies disturbance or infringement of a right. It is usually applied to the disturbance of pews or seats in a church. In the ecclesiastical courts, actions for these disturbances are technically called "suits for perturbation of seat." 1 Phill. Eccl. 328. See PEW.

PERVISE, PARVISE. The palace yard at Westminster.

A place where counsel used to advise with their clients.

An afternoon exercise or moot for the instruction of students. Cowel; Blount.

PESAGE. In England, a toll charged for weighing avoirdupois goods other than wool. 2 Chitty, Com. Law, 16.

PETIT (sometimes corrupted into *petty*). A French word signifying little, small. It is frequently used: as, petit larceny, petit jury, petit treason.

PETIT CAPE. When the tenant is summoned on a plea of land, and comes on the summons and his appearance is recorded, if at the day given him he prays the view, and, having it given him, makes default, then shall this writ issue from the king. Old Nat. Brev. 162; Reg. Jud. fol. 2; Fleta, lib. 2, c. 44. See GRAND CAPE.

PETIT, PETTY JURY. The ordinary jury of twelve, as opposed to the grand jury, which was of a larger number and whose duty it was to find bills for the petit jury to try. 3 Sharswood, Blackst. Comm. 351*.

PETIT, PETTY LARCENY. Larceny to the amount of twelve pence or less. 4 Sharswood, Blackst. Comm. 229*. See 1 Bishop, Crim. Law, §§ 378, 379. See LARCENY

PETIT SERJEANTY. A tenure by which lands are held of the crown by the service of rendering yearly some small implement of war, as a lance, an arrow, etc. 2 Sharswood, Blackst. Comm. 82. Though the stat. 12 Car. II. took away the incidents of *livery* and *primer seisin*, this tenure still remains a dignified branch of socage tenure, from which it only differs in name on account of its reference to war. Such is the tenure of the grants to the dukes of Marlborough and Wellington.

PETIT TREASON. In English Law. The killing of a master by his servant, a husband by his wife, a superior by a secular or religious man. In the United States this is like any other murder. See HIGH TREASON; TREASON.

PETITE ASSIZE. Used in contradistinction from the *grand assize*, which was a jury to decide on questions of property. *Petite assize*, a jury to decide on questions of possession. Britton, c. 42; Glanville, lib. 2, c. 6, 7; *Horne*, Mirror, lib. 2, c. *de Novel Disseisin*.

PETITION. An instrument of writing or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented for the redress of some wrong or the grant of some favor which the latter has the right to give.

By the constitution of the United States, the right "to petition the government for a redress of grievances" is secured to the people Amend. art. 1.

Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule in such cases that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states as knowing from others he believes to be true.

PETITION OF RIGHT. In English Law. A proceeding in chancery by which a subject may recover property in the possession of the king.

This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right because the king is bound of right to answer it and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it with these words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Coke, 4th Inst. 419, 422 *b*; Mitford, Eq. Plead. 30, 31; Cooper, Eq. Plead. 22, 23.

PETITORY. That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

A petitory suit or action is understood to be one in which the mere title to property is to be enforced by means of a demand, petition, or other legal proceeding, as distinguished from a suit where only the right of possession and not the mere right of property is in controversy. 1 Kent, Comm. 371; 7 How. 846; 10 *id.* 257. Admiralty suits touching property in ships are either *petitory*, in which the mere title to the property is litigated, or *possessory*, to restore the possession to the party entitled thereto.

The American courts of admiralty exercised unquestioned jurisdiction in petitory as well as possessory actions; but in England the courts of law, some time after the restoration in 1660, claimed exclusive cognizance of mere questions of title, until the statute of 3 & 4 Vict. c. 65. By that statute the court of admiralty was authorized to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession, salvage, damage, wages, or bottomry, instituted in such court after the passing of that act. Ware, Dist. Ct. 232; 18 How. 267; 2 Curt. C. C. 426.

In Scotch Law. Actions in which damages are sought.

This class embraces such actions as assumpsit, debt, covenant, and detinue, at common law. See Patterson, Comp. 1058, n.

PETTY AVERAGE (called, also, customary average). Several petty charges which are borne partly by the ship and partly by the cargo, such as the expense of tonnage, beaconage, etc. Abbott, Shipp. 7th ed. 404; 2 Parsons, Mar. Law, 312; 1 Bell, Comm. 567; 2 Magens, 277.

PETTY BAG OFFICE. In English Law. An office in the court of chancery, appropriated for suits against attorneys and officers of the court, and for process and proceedings by extent on statutes, recognizances *ad quod damnum*, and the like. Termes de la Ley.

PETTY CONSTABLE. The ordinary constable, as distinguished from the high constable of the hundred. 1 Sharswood, Blackst. Comm. 355; Bacon, Law Tr. 181, *Office of Constable;* Willcock, Cons. c. 1, § 1. For duties of constable in America, see NEW ENGLAND SHERIFF.

PETTIFOGGER. One who pretends to be a lawyer, but possesses neither knowledge of the law nor conscience.

An unprincipled practitioner of law, whose business is confined to petty cases.

PEW. A seat in a church, separated from all others, with a convenient place to stand therein.

2. It is an incorporeal interest in the real property. And although a man has the exclusive right to it, yet it seems he cannot maintain trespass against a person entering it, 1 Term, 430; but case is the proper remedy. 3 Barnew. & Ald. 361; 8 Barnew. & C. 294.

The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church. 4 Ohio, 541; 5 Cow. N. Y. 496; 17 Mass. 435; 1 Pick. Mass. 102; 3 *id.* 344; 6 Serg. & R. Penn. 508; 9 Wheat. 445; 9 Cranch, 52; 6 Johns. N. Y. 41; 4 Johns. Ch. N. Y. 596; 6 Term, 396. See Powell, Mortgages, Index; 2 Sharswood, Blackst. Comm. 429; 1 Chitty, Pract. 208, 210; 1 Powell, Mortg. 17, n.

3. In Connecticut and Maine, pews are considered real estate. In Massachusetts and New Hampshire, they are personal property. Mass. Gen. Stat. c. 30, § 38; 1 Smith, St. 145. The precise nature of such property does not appear to be well settled in New York. 15 Wend. N. Y. 218; 16 *id.* 28; 5 Cow. N. Y. 494. See Conn. L. 432; 10 Mass. 323; 17 *id.* 438; 7 Pick. Mass. 138; 4 N. H. 180; 4 Ohio, 515; 4 Harr. & M'H. Md. 279; Best, Pres. 111; Crabb, Real Prop. §§ 481–497; Washburn, Easements.

PHAROS. A light-house or beacon. It is derived from *Pharos*, the name of a small island at the mouth of the Nile, on which was built a watch-tower.

PHYSICIAN. A person who has received the degree of doctor of medicine from an incorporated institution.

One lawfully engaged in the practice of medicine.

2. Although the physician is civilly and criminally responsible for his conduct while discharging the duties of his profession, he is in no sense a warrantor or insurer of a favorable result, without an express contract to that effect. Elwell, Malp. 20; 7 Carr. & P. 81.

Every person who offers his services to the public generally impliedly contracts with the employer that he is in possession of the necessary ordinary skill and experience which are possessed by those who practise or profess to understand the art or science, and which are generally regarded by those most conversant with the profession as necessary to qualify one to engage in such business successfully. This ordinary skill may differ according to locality and the means of information. Elwell, Malp. 22–24, 201; Story, Bailm. 433; 3 Carr. & P. 629; 8 *id.* 475.

3. The physician's responsibility is the same when he is negligent as when he lacks ordinary skill, although the measure of indemnity and punishment may be different. Elwell, Malp. 27; Archbold, Crim. Pl. 2d ed. 411; 2 Ld. Raym. 1583; 3 Maule & S. 14, 15; 5 *id.* 198; 1 Lew. Cr. Cas. 169; 2 Starkie, Ev. 526; Broom, Leg. Max, 1st ed. 168, 169; 4 Den. N. Y. 464; 19 Wend. N. Y. 345, 346.

In *England*, a physician cannot maintain an action for his fees for any thing done as physician either while attending to or prescribing for a patient; but a distinction is taken when he acts as a surgeon or in any other capacity than that of physician, and in such cases an action for fees will be sustained. All acts of a physician as such are considered strictly honorary, and therefore without compensation except when there exists an express contract. Without this express agreement the physician cannot even recover his travelling expenses while going to attend his patient and returning,—such expense being incidental to the attendance, and regarded as money paid to the physician's own use in the ordinary exercise of his profession, and not money paid to the use of the patient. 1 Carr. & M. 227, 370; 3 Gale & D. 198.

4. In this country, the various states have statutory enactments regulating the collection of fees and the practice of medicine. In *Georgia*, a physician cannot recover for his services unless he shows that he is licensed as required by the act of 1839, or unless he is within the proviso in favor of physicians who were in practice before its passage. 8 Ga. 74. In *New York*, prior to the act repealing all former acts prohibiting unlicensed physicians from recovering a compensation for their services (Stat. of 1844, p. 406), an unlicensed physician could not maintain an action for medical attendance and medicines. 4 Den. N. Y. 60. Under the *Maine* statute of 1838, c. 53, a person who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner cannot recover compensation for such services unless previous to their performance he obtained a certificate of good moral character in manner prescribed by that statute, nor can he recover payment for such services under the provision of the Revised Statute, c. 22, by having obtained a medical degree, in manner prescribed by that statute, after the performance of the service, though prior to the suit. 25 Me. 104.

5. In *Alabama* and *Missouri*, a non-licensed physician cannot recover for professional services. Hallowell *vs.* Adams, 21 Ala. N. s. 680; 15 Mo. 407. When A, the plantation physician of a planter, found a surgical operation necessary on one of the negroes, and requested the overseer to send for B, another physician, who came and performed the operation without any assistance from A, it was held that B could not maintain an action against A to recover for his services. 1 Strobh. So. C. 171. In *Vermont*, the employment of a physician, and a promise to pay him for his services, made on the Sabbath-day, is not prohibited by statute. 14 Vt. 332. In *Massachusetts*, an unlicensed physician or surgeon may maintain an action for professional service. 1 Metc. Mass. 154.

6. Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment, it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant. 19 Pick. Mass. 333. In assumpsit by a physician for his services, the defendant cannot prove the professional character of the plaintiff. 3 Hawks, No. C. 105. Physicians can recover for the services of their students in attendance upon their patients. 4 Wend. N. Y. 200. Partners in the practice of physic are within the law merchant, which excludes the *jus accrescendi* between traders. 9 Cow. N. Y. 631. If a physician carries contagious disease into a family, on a suit for services this may be shown to reduce such claim. 12 B. Monr. Ky. 465.

PICKERY. In Scotch Law. Stealing of trifles, punishable arbitrarily. Bell, Dict.; Tait, Inst. *Theft.*

PICKPOCKET. A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

PIGNORATIO (Lat. from *pignorare*, to pledge). **In Civil Law.** The obligation of a pledge. L. 9. D. *de pignor.* Sealing up (*obsignatio*). A shutting up of an animal caught in one's field and keeping it till the expenses and damage have been paid by its master. New Decis. 1. 34. 13.

PIGNORATIVE CONTRACT. In Civil Law. A contract by which the owner of an estate engages it to another for a sum

of money and grants to him and his successors the right to enjoy it until he shall be reimbursed, voluntarily, that sum of money. Pothier, Obl.

PIGNORIS CAPTIO (Lat.). **In Roman Law.** The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was, in fact, a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes, duties, rents, etc., and is comparable in some respects to distresses at common law. The proceeding took place in the presence of a prætor.

PIGNUS (Lat.). **In Civil Law.** Pledge, or pawn. The contract of pledge. The right in the thing pledged.

"It is derived," says Gaius, "from *pugnum*, the fist, because what is delivered in pledge is delivered in hand." Dig. 50. 16. 238. 2. This is one of several instances of the failure of the Roman jurists when they attempted etymological explanations of words. The elements of *pignus* (*pig*) are contained in the word *pan*(*g*)-*o* and its cognate forms. See Smith, Dict. Gr. & Rom. Antiq.

Though pledge is distinguished from mortgage (*hypotheca*), as being something delivered in hand, while mortgage is good without possession, yet a pledge (*pignus*) may also be good without possession. Domat, Civ. Law, b. iii. tit. 1, § 5; Calvinus, Lex. *Pignus* is properly applied to movables, *hypotheca* to immovables; but the distinction is not always preserved. *Id.*

PILLAGE. The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This in modern times is seldom allowed, and then only when authorized by the commanding or chief officer at the place where the pillage is committed. The property thus violently taken belongs, in general, to the common soldiers. See Dalloz, Dict. *Propriété*, art. 3, § 5; Wolff, § 1201; Booty; Prize.

PILLORY. A wooden machine, in which the neck of the culprit is inserted.

2. This punishment has in most of the states been superseded by the adoption of the penitentiary system. See 1 Chitty, Crim. Law, 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, s. 5. See Barrington, Stat. 48, note.

PILOT. An officer serving on board of a ship during the course of a voyage and having the charge of the helm and of the ship's route. An officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into port.

Pilots of the second description are established by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions. Abbott, Shipp. 180; 1 Johns. N. Y. 305; 4 Dall. Penn. 205; 5 Bos. & P. 82; 5 Rob. Adm. 308; 6 *id.* 316; Laws of Oleron, art. 23; Molloy, b. 2, c. 9, ss. 3, 7; Weskett, Ins. 395; Act of Congr. of August 7, 1789, s. 4; Merlin, Répert.; Pardessus, n. 637.

PILOTAGE. The compensation given to a pilot for conducting a vessel in or out of port. Pothier, *Des Avaries*, n. 147.

Pilotage is a lien on the ship, when the contract has been made by the master or quasi-master of the ship or some other person lawfully authorized to make it, 1 Mas. C. C. 508; and the admiralty court has jurisdiction when services have been performed at sea. *Id.*; 10 Wheat. 428; 6 Pet. 682; 10 *id.* 108. And see 1 Pet. Adm. Dec. 227.

PIN-MONEY. Money allowed by a man to his wife to spend for her own personal comforts.

It has been conjectured that the term *pin-money* has been applied to signify the provision for a married woman, because anciently there was a tax laid for providing the English queen with pins. Barrington, Stat. 181.

When pin-money is given to but not spent by the wife, on the husband's death it belongs to his estate. 4 Viner, Abr. 133, *Baron & Feme* (E a. 8); 2 Eq. Cas. Abr. 156; 2 P. Will. 341; 3 *id.* 353; 1 Ves. Ch. 267; 2 *id.* 190; 1 Madd. Ch. 489, 490.

In England it was once adjudged that a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands he would give her ten pounds, was valid, and might be enforced by an action of assumpsit instituted by husband and wife. Rolle, Abr. 21, 22.

In the French law, the term *épingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. Dict. de Jur. *Epingles*.

PINT. A liquid measure, containing half a quart or the eighth part of a gallon.

PIPE. In English Law. The name of a roll in the exchequer, otherwise called the *Great Roll*. A measure, containing two hogsheads: one hundred and twenty-six gallons is also called a pipe.

PIRACY. In Criminal Law. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 3 Wheat. 610; 5 *id.* 153, 163; 3 Wash. C. C. 209. This is the definition of this offence by the law of nations. 1 Kent, Comm. 183.

The word is derived from πεῖρα, deceptio, deceit or deception, or from πειράω, wandering up and down, and resting in no place, but coasting hither and thither to do mischief. Ridley, View, part 2, c. 1, s. 3.

2. Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations. Const. U. S. art. 1, s. 7, n. 10; 3 Wheat. 336; 5 *id.* 76, 153, 184. In pursuance of the authority thus given by the constitution, it was declared by the act of congress of April 30, 1790, s. 8, 1 Story, U. S. Laws, 84, that murder or robbery committed on the high seas, or in any river, haven, or bay out of the jurisdiction of any particular state, or any offence which if committed within the body of a county would by the laws of the United States be punishable with death, should be adjudged to be piracy and felony, and punishable with death. It was further declared that if any captain or mariner should piratically and feloniously run away with a vessel, or any goods or merchandise of the value of fifty dollars, or should yield up such vessel voluntarily to pirates, or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make revolt in the ship every such offender should be adjudged a pirate and felon, and be punishable with death. Accessaries before the fact are punishable as the principal; those after the fact, with fine and imprisonment.

3. By a subsequent act, passed March 3, 1819, 3 Story, U. S. Laws, 1739, made perpetual by the act of May 15, 1820, 1 Story, U. S. Laws, 1798, congress declared that if any person upon the high seas should commit the crime of piracy as defined by the law of nations, he should, on conviction, suffer death.

And again, by the act of May 15, 1820, s. 3, 1 Story, U. S. Laws, 1798, congress declared that if any person should upon the high seas, or in any open roadstead, or in any harbor, haven, basin, or bay, or in any river where the tide ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person should be adjudged to be a pirate, and suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, should land from such ship or vessel, and, on shore, should commit robbery, such person should be adjudged a pirate, and suffer death. Provided that the state in which the offence may have been committed should not be deprived of its jurisdiction over the same, when committed within the body of a county, and that the courts of the United States should have no jurisdiction to try such offenders after conviction or acquittal, for the same offence, in a state court. The fourth and fifth sections of the last-mentioned act declare persons engaged in the slave-trade, or in forcibly detaining a free negro or mulatto and carrying him in any ship or vessel into slavery, piracy, punishable with death. See 1 Kent, Comm. 183; Beaussant, Code Maritime, t. 1, p. 244; Dalloz, Dict. Supp.; Dougl. 613; Park, Ins. Index; Bacon, Abr.; 16 Viner, Abr. 346; Ayliffe, Pand. 42; 11 Wheat. 39; 1 Gall. C. C. 247, 524; 3 Wash. C. C. 209, 240; 1 Pet. C. C. 118, 121.

In Torts. By piracy is understood the plagiarisms of a book, engraving, or other work for which a copyright has been taken out.

When a piracy has been made of such a work, an injunction will be granted. 4 Ves. Ch. 681; 5 *id.* 709; 12 *id.* 270. See COPYRIGHT.

PIRATE. A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships. Ridley, View, pt. 2, c. 1, s. 3. One guilty of the crime of piracy. Merlin, Répert. See, for the etymology of this word, Bacon, Abr. *Piracy*.

PIRATICALLY. In Pleading. This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word or any circumlocution. Hawkins, Pl. Cr. b. 1, c. 37, s. 15; Coke, 3d Inst. 112; 1 Chitty, Crim. Law, *244.

PISCARY. The right of fishing in the waters of another. Bacon, Abr.; 5 Comyns, Dig. 366. See FISHERY.

PISTAREEN. A small Spanish coin. It is not made current by the laws of the United States. 10 Pet. 618.

PIT. A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

PIT AND GALLOWS (Law Lat. *fossa et furca*). **In Scotch Law.** A privilege of inflicting capital punishment for theft, given by king Malcolm, by which a woman could be drowned in a pit (*fossa*) or a man hanged on a gallows (*furca*). Bell, Dict.; Stair, Inst. 277, § 62.

PLACE. See VENUE.

PLACE OF BUSINESS. The place where a man usually transacts his affairs or business.

2. When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually transacts his business at the counting-house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a post-office,

and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there. 1 Pet. 582; 2 *id.* 121; 10 Johns. N. Y. 501; 11 *id.* 231; 16 Pick. Mass. 392.

3. It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicil or place of business of the person to be affected by such notice; and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners. Story, Prom. Notes, § 312.

PLACITA COMMUNIA (Lat.). Common pleas. All civil actions between subject and subject. 3 Sharswood, Blackst. Comm. 38, 40*; Cowel, *Plea*. See PLACITUM.

PLACITA CORONÆ (Lat.). Pleas of the crown. All trials for crimes and misdemeanors, wherein the king is plaintiff, on behalf of the people. 3 Sharswood, Blackst. Comm. 40*; Cowel, *Plea*.

PLACITA JURIS (Lat.). Arbitrary rules of law. Bacon, Law Tr. 73; Bacon, Max. Reg. 12.

PLACITUM (Lat. from *placere*). **In Civil Law.** Any agreement or bargain. A law; a constitution or rescript of the emperor; the decision of a judge or award of arbitrators. Vicat, Voc. Jur.; Calvinus, Lex.; Dupin, Notions sur le Droit.

In Old English Law (Ger. *plats*, Lat. *plateis*, *i.e.* fields or streets). An assembly of all degrees of men, where the king presided and they consulted about the great affairs of the kingdom: first held, as the name would show, in the fields or street. Cowel.

So on the continent. Hinc. *de Ordine Palatii*, c. 29; Bertinian, Annals of France in the year 767; Const. Car. Mag. cap. ix.; Hinc. *Epist.* 197, 227; Laws of the Longobards, *passim*.

A lord's court. Cowel.

An ordinary court. *Placita* is the style of the English courts at the beginning of the record at nisi prius: in this sense, *placita* are divided into pleas of the crown and common pleas, which see. Cowel.

A trial or suit in court. Cowel; Jacobs.

A fine. Black Book of Exchequer, lib. 2, tit. 13; 1 Hen. I. cc. 12, 13.

A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 Saund. 388, n. 6; Skinn. 554; Carth. 334; Yelv. 65. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down separately, and, generally, numbered. In citing, it is abbreviated as follows: Viner, Abr. *Abatement*, pl. 3.

Placitum nominatum is the day appointed for a criminal to appear and plead.

Placitum fractum. A day past or lost to the defendant. 1 Hen. I. c. 59.

PLAGIARISM. The act of appropriating the ideas and language of another and passing them for one's own.

When this amounts to piracy, the party who has been guilty of it will be enjoined when the original author has a copyright. See COPYRIGHT; PIRACY; QUOTATION; Pardessus, Dr. Com. n. 169.

PLAGIARIUS (Lat.). **In Civil Law.** He who fraudulently concealed a freeman or slave who belonged to another.

The offence itself was called *plagium*.

It differed from larceny or theft in this, that larceny always implies that the guilty party intended to make a profit, whereas the *plagiarius* did not intend to make any profit. Dig. 48. 15. 6; Code, 9. 20. 9, 15.

PLAGIUM (Lat.). Man-stealing; kidnapping. This offence is the *crimen plagii* of the Romans. Alison, Crim. Law, 280, 281.

PLAINT. In English Law. The exhibiting of any action, real or personal, in writing. The party making his plaint is called the plaintiff.

PLAINTIFF (Fr. *pleyntife*). He who complains. He who, in a personal action, seeks a remedy for an injury to his rights. 3 Sharswood, Blackst. Comm. 25; Hammond, Part.; 1 Chitty, Plead.; Chitty, Pract.; 1 Comyns, Dig. 36, 205, 308.

The legal plaintiff is he in whom the legal title or cause of action is vested.

The *equitable* plaintiff is he who, not having the legal title, yet is in equity entitled to the thing sued for. For example: when a suit is brought by Benjamin Franklin for the use of Robert Morris, Benjamin Franklin is the legal, and Robert Morris the equitable, plaintiff. This is the usual manner of bringing suits when the cause of action is not assignable at law but is so in equity. See Bouvier, Inst. Index, *Parties*.

The word plaintiff occurring alone means the plaintiff on record, not the real or equitable plaintiff. After once naming the plaintiff in pleading, he may be simply called the plaintiff. 1 Chitty, Plead. Green ed. 266; 9 Paige, Ch. N. Y. 226; 4 Hill, N. Y. 468 5 *id.* 523, 548; 7 Term, 50.

PLAINTIFF IN ERROR. A party who sues out a writ of error; and this, whether in the court below he was plaintiff or defendant.

PLAN. The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance, representing the position and the relative proportions of the different parts.

2. When houses are built by one person agreeably to a plan, and one of them is sold to a person, with windows and doors in it, the owner of the others cannot shut up those windows, nor has his grantee any greater right. 1 Price, Exch. 27; 2 Ry. & M. 24; 1 Lev. 122; 2 Saund. 114, n. 4; 1 Mood. & M. 396; 9 Bingh. 305; 1 Leigh, Nisi P. 559. See 12 Mass. 159; Hammond, Nisi P. 202; 2 Hilliard, Real Prop. c. 12, n. 6–12; Comyns,

Dig. *Action on the Case for a Nuisance* (A); ANCIENT LIGHTS; WINDOWS.

PLANTATIONS. Colonies; dependencies. 1 Blackstone, Comm. 107.

In England, this word, as it is used in stat. 12 Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America. 1 Marshall, Ins. b. 1, c. 3, § 2, p. 64.

PLAT. A map of a piece of land, on which are marked the courses and distances of the different lines, and the quantity of land it contains.

Such a plat may be given in evidence in ascertaining the position of the land and what is included, and may serve to settle the figure of a survey and correct mistakes. 5 T. B. Monr. Ky. 160. See 17 Mass. 211; 5 Me. 219; 7 *id.* 61; 4 Wheat. 444; 14 Mass. 149.

PLEA. In Equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. Mitford, Eq. Plead. Jeremy ed. 219; Cooper, Eq. Plead. 223; Story, Eq. Plead. § 649.

2. The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which, resting on the foundation of new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question. Mitford, Eq. Plead. Jeremy ed. 13; 2 Stor. C. C. 59; Story, Eq. Plead. § 437. Pleas are said to be *pure* which rely upon foreign matter to discharge or stay the suit, and *anomalous* or *negative* which consist mainly of denials of the substantial matters set forth in the bill. Story, Eq. Plead. §§ 651, 667; 2 Daniell, Chanc. Pract. 97, 110; Beames, Eq. Pl. 123; Adams, Eq. 236.

Pleas to the jurisdiction assert that the court before which the cause is brought is not the proper court to take cognizance of the matter.

3. Pleas to the person may be to the person of the plaintiff or defendant. Those of the former class are mainly *outlawry, excommunication, popish recusant convict*, which are never pleaded in America and very rarely now in England; *attainder*, which is now seldom pleaded, 2 Atk. Ch. 399; *alienage*, which is not a disability unless the matter respect lands, when the alien may not hold them, or he be an alien enemy not under license, 2 Ves. & B. Ch. Ir. 323; *infancy, coverture*, and *idiocy*, which are pleadable as at law (see ABATEMENT); *bankruptcy* and *insolvency*, in which case all the facts necessary to establish the plaintiff as a legally declared bankrupt must be set forth, 3 Mer. Ch. 667, though not necessarily as of the defendant's own knowledge, Younge, Ch. 331; 4 Beav. Rolls, 554; 1 Younge & C. Ch. 39; *want of character in which he sues*, as that he is not an administrator, 2 Dick, Ch. 510; 1 Cox, Ch. 198; is not heir, 2 Ves. & B. Ch. Ir. 159; 2 Brown, Ch. 143; 3 *id.* 489; is not a creditor, 2 Sim. & S. Ch. 274; is not a partner, 6 Madd. Ch. 61, as he pretends to be; that the plaintiff named is a fictitious person, or was dead at the commencement of the suit. Story, Eq. Plead. § 727. Those to the person of the defendant may show that the defendant is not the person he is alleged to be, or does not sustain the character given by the bill, 6 Madd. Ch. 61; Rep. *temp.* Finch, 334, or that he is bankrupt, to require the assignees to be joined. Story, Eq. Plead. § 732. These pleas to the person are pleas in abatement, or, at least, in the nature of pleas in abatement.

4. Pleas to the bill or the frame of the bill object to the suit as framed, or contend that it is unnecessary. These may be—the *pendency of another suit*, which is analogous to the same plea at law and is governed in most respects by the same principles, Story, Eq. Plead. § 736; 2 Mylne & C. 602; 1 Phill. Ch. 82; 1 Ves. Ch. 544; 4 *id.* 357; 1 Sim. & S. Ch. 491; Mitford, Eq. Plead. Jeremy ed. 248; see LIS PENDENS; and the other suit must be in equity, and not at law, Beames, Eq. Plead. 146–148; *want of proper parties*, which goes to both discovery and relief, where both are prayed for, Story, Eq. Plead. § 745; see 3 Younge & C. Ch. 447, but not to a bill of discovery merely, 2 Paige, Ch. N. Y. 280; 3 *id.* 222; 3 Cranch, 220; a *multiplicity of suits*, 1 P. Will. Ch. 428; 2 Mas. C. C. 190; *multifariousness*, which should be taken by way of demurrer, when the joining or confession of the distinct matters appears from the face of the bill, as it usually does. Story, Eq. Plead. § 271.

Pleas in bar rely upon *a bar created by statute:* as, the Statute of Limitations, 1 Sim. & S. Ch. 4; 2 Sim. Ch. 45; 3 Sumn. C. C. 152; which is a good plea in equity as well as at law, and with similar exceptions, Cooper, Eq. Plead. 253; see LIMITATIONS, STATUTE OF; the Statute of Frauds, where its provisions apply, 1 Johns. Ch. N. Y. 425; 2 *id.* 275; 4 Ves. Ch. 24, 720; 2 Brown, Ch. 559; or some other public or private statute, 2 Story, Eq. Jur. § 768; *matter of record or as of record in some court*, as, a common recovery, 1 P. Will. 754; 2 Freem. Ch. 180; 1 Vern. Ch. 13; a judgment at law, 1 Keen, 456; 2 Mylne & C. Ch. 602; Story, Eq. Plead. § 781, n.; the sentence or judgment of a foreign court or a court not of record, 12 Clark & F. Hou. L. 368; 14 Sim. Ch. 265; 3 Hare, Ch. 100; 1 Younge & C. Ch. 464, especially where its jurisdiction is of a peculiar or exclusive nature, 12 Ves. Ch. 307; Ambl. Ch. 756; 2 How. 619, with limitations in case of fraud, 1 Ves. Ch. 284; Story, Eq. Plead. § 788, or a decree of the same or another court of equity, Cas. *temp.* Talb. 217; 7 Johns. Ch. N. Y. 1; 2 Sim. & S. Ch. 464; 2 Younge & C. Ch. 43; *matters purely in pais*, in which case the pleas may go to discovery, relief, or either, both, or a part of either, of

which the principal (though not the only) pleas are: account, stated or settled, 2 Atk. Ch. 1; 13 Price, Exch. 767; 7 Paige, Ch. N. Y. 573; 1 Mylne & K. 231; accord and satisfaction, 1 Hale, Ch. 564; award, 2 Ves. & B. Ch. Ir. 764; purchase for valuable consideration, 2 Sumn. C. C. 507; 2 Younge & C. Ch. 457; release, 3 P. Will. 315; lapse of time, analogous to the Statute of Limitations, 1 Ves. Ch. 264; 10 *id.* 466; 1 Younge & C. Ch. 432, 453; 2 Jac. & W. Ch. 1; 1 Hare, Ch. 594; 1 Russ. & M. Ch. 453; 2 Younge & C. Ch. 58; 1 Johns. Ch. N. Y. 46; 10 Wheat. 152; 1 Schoales & L. Ir. Ch. 721; 6 Madd. Ch. 61; 3 Paige, Ch. N. Y. 273; 5 *id.* 26; 7 *id.* 62; title in the defendant. Story, Eq. Plead. § 812.

5. The same pleas may be made to bills seeking discovery as to those seeking relief; but matter which constitutes a good plea to a bill for relief does not necessarily to a bill for discovery merely. See Story, Eq. Plead. § 816; Mitford, Eq. Plead. Jeremy ed. 281, 282. The same kind of pleas may be made to bills not original as to original bills, in many cases, according to their respective natures. Peculiar defences to each may, however, be sometimes urged by plea. Story, Eq. Plead. § 826; Mitford, Eq. Plead. Jeremy ed. 288.

Effect of a plea. A plea may extend to the whole or a part, and if to a part only must express which part, and an answer overrules a plea if the two conflict. 3 Younge & C. Ch. 683; 3 Cranch, 220. The plea may be accompanied by an answer fortifying it with a protest against waiver of the plea thereby. Story, Eq. Plead. § 695. A plea or argument may be allowed, in which case it is a full bar to so much of the bill as it covers, if true, Mitford, Eq. Plead. Jeremy ed. 301; or the benefit of it may be saved to the hearing, which decides it valid so far as then appears, but allows matter to be disclosed in evidence to invalidate it, or it may be ordered to stand for an answer, which decides that it may be a part of a defence, 4 Paige, Ch. N. Y. 124, but is not a full defence, that the matter has been improperly offered as a plea, or is not sufficiently fortified by answer, so that the truth is apparent. 3 Paige, Ch. N. Y. 459. See, generally, Story, Eq. Plead.; Mitford, Eq. Plead. by Jeremy; Beames, Eq. Plead.; Cooper, Eq. Plead.; Blake, Chanc. Pract.; Daniell, Chanc. Pract.; Barbour, Chanc. Pract.; Bouvier, Inst.

At Law. The defendant's answer by matter of *fact* to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of *law*.

6. It includes as well the denial of the truth of the allegations on which the plaintiff relies, as the statement of facts on which the defendant relies. In an ancient use it denoted action, and is still used sometimes in that sense: as, "summoned to answer in a plea of trespass." Stephen, Plead. 38, 39, n.; Warren, Law Stud. 272, note w; Oliver, Prec. 97. In a popular, and not legal, sense, the word is used to denote a forensic argument. It was strictly applicable in a kindred sense when the pleadings were conducted orally by the counsel. Stephen, Plead. App. n. 1.

Pleas are either *dilatory*, which tend to defeat the particular action to which they apply on account of its being brought before the wrong court by or against the wrong person or in an improper form, or *peremptory*, which impugn the right of action altogether, which answer the plaintiff's allegations of right conclusively. Pleas are also said to be to the jurisdiction of the court, in suspension of the action, in abatement of the writ, in bar of the action. The first three classes are dilatory, the last peremptory. Stephen, Plead. 63; 1 Chitty, Plead. 425; Lawes, Plead. 36.

Pleas are of various kinds. *In abatement.* See ABATEMENT. *In avoidance*, called, also, *confession and avoidance*, which admits, in words or in effect, the truth of the matters contained in the declaration, and alleges some new matter to avoid the effect of it and show that the plaintiff is, notwithstanding, not entitled to his action. 1 Chitty, Plead. 540; Lawes, Plead. 122. Every allegation made in the pleadings subsequent to the declaration which does not go in denial of what is before alleged on the other side is an allegation of new matter. Gould, Plead. ch. iii. § 195.

7. *Pleas in bar* deny that the plaintiff has any cause of action. 1 Chitty, Plead. 407; Coke, Litt. 303 *b*. They either conclude the plaintiff by matter of estoppel, show that he never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. 1 Chitty, Plead. 407; Stephen, Plead. 70; Britt. 92. They either deny all or some essential part of the averments in the declaration, in which case they are said to traverse it, or, admitting them to be true, allege new facts which obviate and repel their legal effect, in which case they are said to confess and avoid. Stephen, Plead. 70. The term is often used in a restricted sense to denote what are with propriety called special pleas in bar. These pleas are of two kinds: the general issue, and special pleas in bar. The general issue denies or takes issue upon all the material allegations of the declaration, thus compelling the plaintiff to prove all of them that are essential to support his action. There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*. Lawes, Plead. 110, 112, 113, 145; Coke, Litt. 126 *a*; Gould, Plead. ch. ii. § 38, ch. vi. § 8. The matter which ought to be so pleaded is now very generally given in evidence under the general issue. 1 Chitty, Plead. 415.

8. Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter, which the plaintiff would not be bound to prove or dispute in the first instance on the general issue. 1 Chitty, Plead. 442; Ld. Raym. 88. They are very various, according to the circumstances of the defendant's case: as, in personal action the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real actions, the tenant may plead any matter which destroys and bars the demandant's title: as, a general release. Stephen, Plead. 115, 116.

The general qualities of a plea in bar are—*first*, that it be adapted to the nature and form of the action, and also conformable to the count. Coke, Litt. 303 *a*; 285 *b*; Bacon, Abr. *Pleas* (I); 1 Rolle, 216. *Second*, that it answers all it assumes to answer, and no more. Coke, Litt. 303 *a*; Comyns, Dig. *Pleader* (E 1, 36); 1 Saund. 28, nn. 1, 2, 3; 2 Bos. & P. 427; 3 *id.* 174. *Third*, in the case of a special plea, that it confess and admit the fact. 3 Term, 298; 1 Salk. 394; Carth. 380; 1 Saund. 28, n., 14, n. 3; 10 Johns. N. Y. 289. *Fourth*, that it be single. Coke, Litt. 307; Bacon, Abr. *Pleas* (K 1, 2); 2 Saund. 49, 50; Plowd. 150 *d*. *Fifth*, that it be certain. Comyns, Dig. *Pleader* (E 5–11, C 41). See CERTAINTY; PLEADING. *Sixth*, it must be direct, positive, and not argumentative. See 6 Cranch, 126; 9 Johns. N. Y. 313. *Seventh*, it must be capable of trial. *Eighth*, it must be true and capable of proof.

9. The parts of a plea are—*first*, the title of the court. *Second*, the title of the term. *Third*, the names of the parties in the margin. These, however, do not constitute any substantial part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's: as, "Roe *vs.* Doe." *Fourth*, the commencement, which includes the statement of the name of the defendant, the appearance, the defence, see DEFENCE, the actio non, see ACTIO NON. *Fifth*, the body, which may contain the inducement, the protestation, see PROTESTATION, ground of defence, *quæ est eadem*, the traverse. *Sixth*, the conclusion.

Dilatory pleas go to destroy the particular action, but do not affect the right of action in the plaintiff, and hence delay the decision of the cause upon its merits. Gould, Plead. ch. ii. § 33. This class includes pleas to the jurisdiction, to the disability of the parties, and all pleas in abatement. All dilatory pleas must be pleaded with the greatest certainty, must contain a distinct, clear, and positive averment of all material facts, and must, in general, enable the plaintiff to correct the deficiency or error pleaded to. 1 Chitty, Plead. 365. See ABATEMENT; JURISDICTION.

Pleas in discharge admit the demand of the plaintiff, and show that it has been discharged by some matter of fact. Such are pleas of judgment, release, and the like.

10. *Pleas in excuse* admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all in his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne* an instance of the latter.

Foreign pleas go to the jurisdiction; and their effect is to remove the action from the county in which the venue is originally laid. Carth. 402. Previous to the statute of Anne, an affidavit was required. 5 Mod. 335; Carth. 402; 1 Saund. Plead. 98, n. 1; Viner, Abr. *Foreign Pleas;* 1 Chitty, Plead. 382; Bacon, Abr. *Abatement* (R).

Pleas of justification, which assert that the defendant has purposely done the act of which the plaintiff complains, and in the exercise of his legal rights. 8 Term, 78; 3 Wils. 71; Com. 274. No person is bound to justify who is not *primâ facie* a wrongdoer. 1 Leon. 301; 2 *id.* 83; Cowp. 478; 4 Pick. Mass. 126; 13 Johns. N. Y. 443, 579; 1 Chitty, Plead. 436.

11. *Pleas puis darrein continuance*, which introduce new matter of defence, which has arisen or come to the plaintiff's knowledge since the last continuance. In most of the states, the actual *continuance* of a cause from one term to another, or from one particular day in term to another day in the same term, is practically done away with, and the prescribed times for pleading are fixed without any reference to terms of court. Still, this right of a defendant to change his plea so as to avail himself of facts arising during the course of the litigation remains unimpaired; and though there be no *continuance*, the plea is still called a plea *puis darrein continuance*,—meaning, now, a plea upon facts arising since the *last stage of the suit*. They are either in bar or in abatement. Matter which arises after purchase or issue of the writ, and before issue joined, is properly pleaded in bar of the further maintenance of the suit, 4 East, 502; 3 Term, 186; 5 Pet. 224; 4 Me. 582; 12 Gill & J. Md. 358; see 7 Mass. 325; while matter subsequent to issue joined must be pleaded *puis darrein continuance*. 1 Chitty, Plead. 569; 30 Ala. N. s. 253; 1 Hempst. Ark. 16; 40 Me. 582; 7 Gill, Md. 415; 10 Ohio, 300. Their object is to present matter which has arisen since issue joined, and which the defendant cannot introduce under his pleadings as they exist, for the rights of the parties were at common law to be tried as they existed at the time of bringing the suit, and matters subsequently arising come in

as it were by exception and favor. See 7 Johns. N. Y. 194.

12. Among other matters, it may be pleaded that the plaintiff has become an alien enemy, 3 Campb. 152; that an award has been made after issue joined, 2 Esp. 504; 29 Ala. N. s. 619; that there has been accord and satisfaction, 5 Johns. N. Y. 392; that the plaintiff has become bankrupt, Tidd, Pract. 8th ed. 800; 1 Dougl. Mich. 267; that the defendant has obtained a bankrupt-certificate, even though obtained before issue joined, 9 East, 82; see 2 H. Blackst. 553; 3 Barnew. & C. 23; 3 Den. N. Y. 269; that a feme plaintiff has taken a husband, Buller, Nisi P. 310; 1 Blackf. Ind. 288; that judgment has been obtained for the same cause of action, 9 Johns. N. Y. 221; 5 Dowl. & R. 175; that letters testamentary or of administration have been granted, 2 Strange, 1106; 1 Saund. 265, n. 2, or revoked, Comyns, Dig. *Abatement* (I 4); that the plaintiff has released the defendant. 4 Cal. 331; 3 Sneed, Tenn. 52; 17 Mo. 267. See 33 N. H. 179. But the defendant in ejectment cannot plead release from the lessor of the plaintiff, 4 Maule & S. 300; 7 Taunt. 9; and the release will be avoided in case of fraud. 7 Taunt. 48; 4 Barnew. & Ad. 419; 4 J. B. Moore, Priv. Counc. 192; 23 N. H. 535.

13. As a general rule, such matters must be pleaded at the first continuance after they happen or come to the plaintiff's knowledge, 11 Johns. N. Y. 424; 1 Serg. & R. Penn. 146; though a discharge in insolvency or bankruptcy of the defendant, 2 E. D. Smith, N. Y. 396; 2 Johns. N. Y. 294; 9 *id.* 255, 392, and coverture of the plaintiff existing at the purchase of the suit, are exceptions, Buller, Nisi P. 310, in the discretion of the court. 10 Johns. N. Y. 161; 4 Serg. & R. Penn. 239; 5 Dowl. & R. 521; 1 Watts, Penn. 271; 2 Mo. 100. *Great certainty* is required in pleas of this description. Yelv. 141; Freem. 112; Croke Jac. 261; 2 Wils. 130; 2 Watts, Penn. 451. They must state the day of the last continuance, and of the happening of the new matter, Buller, Nisi P. 309; 1 Chitty, Plead. 572; 7 Ill. 252; cannot be awarded after assizes are over, 2 M'Clell. & Y. 350; Freem. 252; must be verified on oath before they are allowed, 1 Strange, 493; 1 Const. So. C. 455, and must then be received. 5 Taunt. 333; 3 Term, 554; 1 Stark. 52; 1 Marsh. 70, 280; 15 N. H. 410. They stand as a substitute for former pleas, 1 Salk. 178; Hob. 81; Buller, Nisi P. 309; 1 Hempst. Ark. 16; 4 Wisc. 159; 1 Strobh. So. C. 17, and demurrers, 32 Eng. L. & Eq. 280; may be pleaded after a plea in bar, 1 Wheat. 215; Al. 67; Freem. 252; and if decided against the defendant, the plaintiff has judgment in chief. 1 Wheat. 215; Al. 67; Freem. 252.

14. *Sham pleas* are those which are known to the pleader to be false, and are entered for the purpose of delay. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed: as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff for the same cause of action. Stephen, Plead. 444, 445; 1 Chitty, Plead. 505, 506. See 14 Barb. N. Y. 393; 2 Den. N. Y. 195. The later practice of courts in regard to sham pleas is to strike them out on motion, and give final judgment for the plaintiff, or impose terms (in the discretion of the court) on the defendant, as a condition of his being let in to plead anew The motion is made on the plea itself, or on affidavits in connection with the plea.

Pleas in suspension of the action show some ground for not proceeding in the suit at the present period, and pray that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed parol demurrer. Stephen, Plead. 64.

See, generally, Bacon, Abr. *Pleas* (Q); Comyns, Dig. *Abatement* (I 24, 34); Doctrina Plac. 297; Buller, Nisi P. 309; Lawes, Civ. Plead. 173; 1 Chitty, Plead. 634; Stephen, Plead. 81; Gould, Plead.; Bouvier, Inst. Index.

In ecclesiastical courts, a plea is called an allegation. See ALLEGATION.

PLEAD, TO. To answer the indictment, or, in a civil action, the declaration of the plaintiff, in a formal manner. To enter the defendant's defence upon record. In a popular use, to make a forensic argument. The word is not so used by the profession. Stephen, Plead. App. n. I; Story, Eq. Plead. § 4, n.

PLEADING. In Chancery Practice. Consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments to the court. Story, Eq. Plead. § 4, n. The substantial object of pleading is the same, but the forms and rules of pleading are very different, at law and in equity.

In Civil Practice. The stating in a logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging that on the record which constitutes the support or the defence of the party in evidence. 3 Term, 159; Dougl. 278; Comyns, Dig. *Pleader* (A); Bacon, Abr. *Pleas and Pleading;* Cowp. 682. Pleading is used to denote the act of making the pleadings.

2. The object of pleading is to secure a clear and distinct statement of the claims of each party, so that the controverted points may be exactly known, examined, and decided, and the appropriate remedy or punishment administered. See Cowp. 682; Dougl. 159. Good pleading consists in good matter

pleaded in good form, in apt time and due order. Coke, Litt. 303. *Good matter* includes all facts and circumstances necessary to constitute the cause of complaint or ground of defence, and no more. It does not include arguments or matters of law. But some matters of fact need not be stated, though it be necessary to establish them as facts. Such are, among others, *facts of which the courts take notice* by virtue of their office: as, the time of accession of the sovereign, 2 Ld. Raym. 794; time and place of holding parliament, 1 Saund. 131; public statutes and the facts they ascertain, 1 Term, 45, including ecclesiastical, civil, and marine laws, Ld. Raym. 338, but not private, 2 Dougl. 97, or foreign laws, 2 Carth. 273; 4 R. I. 523; common-law rights, duties, and general customs, Ld. Raym. 1542; Coke, Litt. 175; Croke Car. 561; the almanac, days of the week, public holidays, etc., Salk. 269; 6 Mod. 81; 4 Dowl. 48; 4 Fla. 158; political divisions, Marsh. 124; Coke, 2d Inst. 557; 4 Barnew. & Ald. 242; 6 Ill. 73; the meaning of English words and terms of art in ordinary acceptation, 1 Rolle, Abr. 86, 525; their own course of proceedings, 1 Term, 118; 2 Lev. 176; 10 Pick. Mass. 470; see 16 East, 39, and that of courts of general jurisdiction, 1 Saund. 73; 5 McLean, C. C. 167; 10 Pick. Mass. 470; 3 Bos. & P. 183; 1 Greenleaf, Ev. §§ 4–6; *facts which the law presumes:* as, the innocence of a party, illegality of an act, etc., 4 Maule & S. 105; 1 Barnew. & Ald. 463; 2 Wils. 147; 6 Johns. N. Y. 105; 16 East, 343; 16 Tex. 335; 6 Conn. 130; *matters which the other party* should plead, as being more within his knowledge, 1 Sharswood, Blackst. Comm. 293, n.; 8 Term, 167; 2 H. Blackst. 530; 2 Johns. N. Y. 415; 9 Cal. 286; 1 Sandf. N. Y. 89; 3 Cow. N. Y. 96; *mere matters of evidence of facts*, 9 Coke, 96; Willes. 130; 25 Barb. N. Y. 457; 7 Tex. 603; 6 Blackf. Ind. 173; 1 N. Chipm. Vt. 293; *unnecessary matter:* as, a second breach of condition, where one is sufficient, 2 Johns. N. Y. 443; 1 Saund. 58, n. 1; 33 Miss. 474; 4 Ind. 409; 23 N. H. 415; 12 Barb. N. Y. 27; 2 Green, N. J. 577; see DUPLICITY, or intent to defraud, when the facts alleged constitute fraud, 16 Tex. 335; see 3 Maule & S. 182; *irrelevant matter*, 1 Chitty, Plead. 209. Such matter may be rejected without damage to the plea, if wholly foreign to the case, or repugnant, 7 Johns. N. Y. 462; 3 Day, Conn. 472; 2 Mass. 283; 8 Serg. & R. Penn. 124; 11 Ala. 145; 16 Tex. 656; 7 Cal. 348; 23 Conn. 134; 1 Du. N. Y. 242; 6 Ark. 468; 8 Ala. N. S. 320; but in many cases the matter must be proved as stated, if stated. 7 Johns. N. Y. 321; 3 Day, Conn. 283; Phillipps, Ev. 160. The matter must be true and susceptible of proof; but legal fictions may be stated as facts. 2 Burr. 667; 4 Bos. & P. 140.

3. *The form of statement* should be according to the established forms. Coke, Litt. 303; 6 East, 351; 8 Coke, 48 *b*. This is to be considered as, in general, merely a rule of caution, though it is said the courts disapprove a departure from the well-established forms of pleading. 1 Chitty, Plead. 212. In most of the states of the United States, and in England since 1852, many radical changes have been introduced into the law of pleading: still, it is apprehended that a reasonable regard to the old forms will be profitable, although the names of things may be changed. See 3 Sharswood, Blackst. Comm. 301, n.; 3 Cal. 196; 28 Miss. 766; 14 B. Monr. Ky. 83. In general, it may be said that the facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, so that the party who is to answer, the court, and the jury may readily understand what is meant, Cowp. 682; 2 Bos. & P. 267; Coke, Litt. 303; 13 East, 107; 33 Miss. 669; 1 Hempst. Ark. 238, with precision, 13 Johns. N. Y. 437; 19 Ark. 695; 5 Du. N. Y. 689, and with brevity. 36 N. H. 458; 1 Chitty, Plead. 212. The facts stated must not be insensible or repugnant, 1 Salk. 324; 7 Coke, 25; 25 Conn. 431; 5 Blackf. Ind. 339, nor ambiguous or doubtful in meaning, 5 Maule & S. 38; Yelv. 36, nor argumentative, Coke, Litt. 303; 5 Blackf. Ind. 557, nor by way of recital, 2 Bulstr. 214; Ld. Raym. 1413, and should be stated according to their legal effect and operation. Stephen, Plead. 378–392; 16 Mass. 443; 12 Pick. Mass. 251; 3 Stew. 319.

4. *The time* within which pleas must be filed is a matter of local regulation, depending upon the court in which the action is brought. *The order* of pleading different matters is of importance as affecting the defendant, who may oppose the plaintiff's suit in various ways. The order is as follows:—

First, to the jurisdiction of the court.

Second, to the disability, etc. of the person: *first*, of the plaintiff; *second*, of the defendant.

Third, to the count or declaration.

Fourth, to the writ: *first*, to the form of the writ,—first, matter apparent on the face of it, secondly, matter dehors; *second*, to the action of the writ.

Fifth, to the action itself in bar.

This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former. 13 La. Ann. 147; 41 Me. 102; 7 Gray, Mass. 38; 5 R. I. 235; 2 Bosw. N. Y. 267; 1 Grant, Cas. Penn. 359; 4 Jones, No. C. 241; 3 Miss. 704; 20 *id.* 656; 1 Chitty, Plead. 425. See 16 Tex. 114; 4 Iowa, 158. An exception exists where matter is pleaded *puis darein continuance*, see PLEA; and where the subject-matter is one over which the court has no jurisdiction, a failure to plead to the puis cannot confer jurisdiction. 10 Serg. & R. Penn. 229; 17 Tex. 52.

The science of pleading, as it existed at common law, has been much modified by statutory changes; but, under whatever names it is done,—whether under rules of court, or of the legislative power, by the parties, the court, or the jury,—it is evident that, in the nature of things, the end of pleading

must be attained, namely, the production of one or more points of issue, where a single fact is affirmed by one party and denied by the other. 4 Gower, 464. By pleading at the common law, this was done by the parties; in the civil law, by the court.

In Criminal Practice, the rules of pleading are the same as in civil practice. There is, however, less liberty of amendment of the indictment. The order of the defendant's pleading is as follows:—*first*, to the jurisdiction; *second*, in abatement; *third*, special pleas in bar: as, autrefois acquit, autrefois attaint, autrefois convict, pardon; *fourth*, the general issue.

See, generally, Lawes, Chitty, Stephen, Gould, Pleading; 3 Sharswood, Blackst. Comm. 301 *et seq.* and notes; Coke, Litt. 303; Comyns, Dig. *Pleader;* Bacon, Abr. *Plea and Pleading.*

PLEADING, SPECIAL. By special pleading is meant the allegation of special or new matter, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Plead. c. 1, s. 18. See SPECIAL PLEADING.

PLEADINGS. In Chancery Practice. The written allegations of the respective parties in the suit. The pleadings in equity are less formal than those at common law.

2. The parts of the pleadings are—the *bill*, which contains the plaintiff's statement of his case, or *information*, where the suit is brought by a public officer in behalf of the sovereign; the *demurrer*, by which the defendant demands judgment of the court, whether he shall be compelled to answer the bill or not; the *plea*, whereby he shows some cause why the suit should be dismissed or barred; the *answer*, which, controverting the case stated by the bill, confesses and avoids it, or traverses and denies the material allegations in the bill, or, admitting the case made by the bill, submits to the judgment of the court upon it, or relies upon a new case or upon new matter stated in the answer, or upon both; *disclaimer*, which seeks at once a termination of the suit by the defendants, disclaiming all right and interest in the matter sought by the bill. Story, Eq. Plead. § 546; Mitford, Eq. Plead. by Jeremy, 13, 106; Cooper, Eq. Plead. 108; 2 Story, 59.

In Civil Practice. The statements of the parties, in legal and proper manner, of the causes of action and grounds of defence. The result of pleading. They were formerly made by the parties or their counsel, orally, in open court, under the control of the judge. They were then called the parole. 3 Sharswood, Blackst. Comm. 293; 2 Reeves, Hist. Eng. Law, 267.

3. The parts of the pleadings may be arranged under two heads: the regular, which occur in the ordinary course of a suit; and the irregular or collateral, which are occasioned by errors in the pleadings on the other side.

The regular parts are—the *declaration* or count; the *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance; the *replication*, and, in case of an evasive plea, a *new assignment*, or, in replevin, the *plea in bar* to the avowry or cognizance; the *rejoinder*, or, in replevin, the replication to the plea in bar; the *sur-rejoinder*, being in replevin the rejoinder; the *rebutter;* the *sur-rebutter*, Viner, Abr. *Pleas and Pleading* (C); Bacon, Abr. *Pleas and Pleadings* (A); pleas *puis darrein continuance*, when the matter of defence arises pending the suit.

4. The irregular or collateral parts of pleading are stated to be—*demurrers* to any part of the pleadings above mentioned; *demurrers to evidence* given at trials; *bills of exceptions; pleas* in *scire facias;* and *pleas in error*. Viner, Abr. *Pleas and Pleadings* (C); Bouvier, Inst. Index.

In Criminal Practice, the pleadings are—*first*, the *indictment; second*, the *plea;* and the other pleadings as in civil practice.

PLEAS OF THE CROWN. In English Law. A phrase now employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors.

These were left to be tried in the courts of the barons; whereas the greater offences, or royal causes, were to be tried in the king's courts, under the appellation of pleas of the crown. 1 Robertson, Hist. Charles V. 48.

PLEAS ROLL. In English Practice. A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. Eunom. Dial. 2, § 29, p 111.

PLEBEIAN. One who is classed among the common people, as distinguished from the nobles.

PLEBISCITUM (Lat.). **In Roman Law.** A law established by the people (*plebs*), on the proposal of a popular magistrate, as a tribune. Vicat, Voc. Jur.; Calvinus, Lex.; Mackeldy, Civ. Law, §§ 27, 37.

PLEDGE, PAWN. A bailment of personal property as security for some debt or engagement.

A pledge or pawn (Lat. *pignus*), according to Story, is a bailment of personal property as security for some debt or engagement. Story, Bailm. § 286, which see for the less comprehensive definitions of Sir Wm. Jones, Lord Holt, Pothier, etc. Domat broadly defines it as an appropriation of the thing given for the security of an engagement. But the term is commonly used as Sir Wm. Jones defines it: to wit, as a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. Jones, Bailm. 117; 2 Ld. Raym. 909; Pothier, de Naut. art. prelim. 1; Code, Civ. 2071; Domat, b. 3, tit. 1, § 1, n. 1; La. Civ. Code, 3100; 6 Ired. No. C. 309. The pledgee secures his debt by the bailment, and the pledgeor obtains credit or other advantage. See 1 Parsons, Contr. 591 *et seq.*

2. *Delivery.* The first essential thing to be done is a delivery to the pledgee. Without

his possession of the thing, the transaction is not a pledge. 37 Me. 543. But a constructive possession is all that is required of the pledgee. Hence, goods at sea or in a warehouse pass by transfer of the muniments of title, or by symbolic delivery. Stocks and equitable interests may be pledged; and it will be sufficient if, by proper transfer, the property be put within the power and control of the pledgee. 12 Mass. 300; 20 Pick. Mass. 405; 22 N. H. 196; 2 N. Y. 403; 7 Hill, N. Y. 497. Stocks are usually pledged by delivery of the company's certificate, leaving the actual transfer to be made subsequently. But here, as in England, the joint-stock company must be notified of the transfer.

Primâ facie, if the pledgee redeliver the pledge to the pledgeor, third parties without notice might regard the debt as paid. Still, this presumption can be rebutted, in most states. In some states, courts in effect hold that even in case of sale, as well as in case of pledge, possession of the vendor is fraud *per se*, and refuse to admit explanatory evidence. In such states, therefore, a vendee may always take the pledge if found in the vendor's possession. 5 N. H. 345; 14 Pick. Mass. 509; 4 Jones, No. C. 40, 43. The prevailing rule is, however, that a temporary redelivery to the pledgeor makes him only the agent or bailee of the pledgee, and the latter does not lose his special property or even his constructive possession. 5 Bingh. N. C. 136; 11 Eng. L. & Eq. 584; 3 Whart. Penn. 531; 5 Humphr. Tenn. 308; 32 Me. 211; 1 Sandf. N. Y. 248.

3. *Subject of pledge.* Any tangible property may be pledged. Hence, not only goods and chattels and money, but, also, negotiable paper, may be put in pledge. So may choses in action, patent-rights, coupon bonds, and manuscripts of various sorts. 1 Ves. Ch. 278; 2 Taunt. 268; 15 Mass. 389, 534; 2 Blackf. Ind. 198; 7 Me. 28; 4 Den. N. Y. 227; 2 N. Y. 443; 1 Stockt. N. J. 667; Story, Bailm. § 290. Incorporeal things could be pledged immediately, probably, under the civil law, and so in the Scotch law, or, at all events, by assignment. 1 Domat, b. 3, tit. 1, § 1; Pothier, de Naut. n. 6; 2 Bell, Comm. 23. The laws of France and Louisiana require a written act of pledge, duly registered and made known, in order to be made good against third parties. In the civil law, property of which the pledgeor had neither present possession nor title could be pledged,—though this was rather a contract for pledge, called a hypothecation. The pledge became complete when the property was acquired by the pledgeor. The same rule holds in our law, where a hypothecary contract gives a lien which attaches when the property is vested. 1 Hare, Ch. 549; 13 Pick. Mass. 175; 14 *id.* 497; 21 Me. 86; 16 Conn. 276; Dav. Dist. Ct. 199. And it has been held that a pledge may be made to secure an obligation not yet risen into existence. 12 La. Ann. 529. In an agreement to pledge a vessel not then completed, the intent of the parties governs in determining when the property passes. 8 Pick. Mass. 236; 24 Eng. L. & Eq. 220.

A life-policy of insurance may be pledged, or a wife's life-policy. The common law does not permit the pay and emoluments of officers and soldiers to be pledged, from public policy. 1 H. Blackst. 627; 4 Term, 248. Hence, probably, a fishing-bounty could not be pledged, on the ground that government pensions and bounties to soldiers, sailors, etc., for their personal benefit, cannot be pledged. A bank can pledge the notes left with it for discount, if it is apparent on the face of the notes that the bank is their owner.

4. *Ordinary care.* The pawnee is bound to take ordinary care of his pawn, and is liable only for ordinary neglect, because the bailment is for the mutual benefit of both parties. Hence, if the pledge is lost and the pledgee has taken ordinary care, he may still recover his debt. Such losses often result from casualty, superior force, or intrinsic defect, against which a man of ordinary prudence would not have effectually guarded himself. If a pledgeor find it necessary to employ an agent, and he exercise ordinary caution in his selection of the agent, he will not be liable for the latter's neglect or misconduct. 1 La. Ann. 344; 10 B. Monr. Ky. 239; 4 Ind. 425; 8 N. H. 66; 14 *id.* 567; 6 Cal. 643.

Loss by *theft* is *primâ facie* evidence of a want of ordinary care, and the bailee must rebut the presumption. The facts in each case regulate the liability. Theft is only evidence, in short, and not absolute presumption, of negligence. Perhaps the only safe rule is that, where the pledgee pleads loss by theft as ground for not performing his duty, to excuse himself he must show that the theft could not have been prevented by ordinary care on his part. If the bailor should assert in his declaration that the pledge was lost by the bailee's fault, he would be compelled to prove the charge as laid.

5. *Use.* The reasonable use of a pledge is allowed to a pledgee, according to Lord Holt, Sir Wm. Jones, and Story, provided it be of no injury or peril to the bailment. The reason given by Story is precise, namely, that where use of the pledge is beneficial to it, or cannot depreciate it, the consent of the pledgeor to such use may fairly be presumed; but not otherwise. Still, the word peril is somewhat broad. If the pawn be in its nature a charge upon the pawnee,—as a horse or cow,—he may use it, moderately, by way of recompense. For any unusual care he may get compensation from the owner, if it were not contemplated by the parties or implied in the nature of the bailment. Ld. Raym. 909; 2 Salk. 522; 1 Parsons, Contr. 593. The pawnee is answerable in damages for an injury happening while he is using the pawn. Still, though he use it tortiously, he is only answerable by action. His pledgee's lien is not thereby forfeited. 4 Watts, Penn. 414. A

pledgee can exercise a horse, but not loan it for hire. The rule is, that if he derive any profits from the pledge they must be applied to the debt. 2 Murph. No. C. 111. Hence, if a slave be pledged as security for a debt, the creditor must account for the profits of the slave, and apply them to extinguish the debt. Wythe, Va. 55; 15 Ala. N. s. 558.

6. *Property.* The pledgee has at common law a special property in the pledge, and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If a wrong-doer take the pledge from him, he is not thereby ousted from his right. His special property is enough for him to support replevin or trover against the wrong-doer. He has, moreover, a right to action, because he is responsible to his pledgeor for proper custody of the bailment. The pledgeor, also, may have his action against the wrong-doer, resting it on the ground of his general property. A judgment for either pledgeor or pledgee is a bar against a similar action by the other. 2 Blackstone, Comm. 395; 6 Bligh, N. s. 127; 1 Barnew. & Ald. 59; 5 Binn. Penn. 457; 16 Wend. N. Y. 335; 9 Gill, Md. 7; 13 Me. 436; 13 Vt. 504.

The bailee, having a special property, recovers only the value of his special property as against the owner, but the value of the whole property as against a stranger, and the balance beyond the special property he holds for the owner. 15 Conn. 302. So if the owner brings the action and recovers the whole damages, including those for deprivation of possession, it must be with the consent of the pledgee.

A pledgee may bring replevin or trover against the pledgeor if the latter remove his pledge before paying the debt and thus injure the pledgee's rights, on the ground that the owner has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge. 2 Taunt. 268; 1 Sandf. N. Y. 208; 22 N. H. 196; 11 N. Y. 150; 2 M'Cord, So. C. 126. Yet in trover the damages recovered cannot be greater than the amount of the debt, if the defendant derives title under the pledgeor. 4 Barb. N. Y. 491; 13 Ill. 465.

7. *Sale.* If the pledgeor fail to pay the debt, the pledgee may sell the pledge. Formerly a decree of court was necessary to make the sale valid, and under the civil law it is still so in many continental countries. It is safer in a large pledge to proceed by bill in equity to foreclose; but this course is ordinarily too expensive. A demand of payment, however, must be made before sale; and if the pledgee mentions no time of sale he may demand at once, and may sell in a reasonable time after demand. Glanville, lib. x. c. 6; 5 Bligh, N. s. 136; 9 Mod. 275; 2 Johns. Ch. N. Y. 100; 1 Sandf. N. Y. 351; 8 Ill. 423; 4 Den. N. Y. 227; 3 Tex. 119; 1 Browne, Penn. 176; 22 Pick. Mass. 40; 2 N. Y. 443. The pledge must be sold at public auction, and, if it be divisible, only enough must be sold to pay the debt. In general, also, the pledgee must not buy the pledge when put up at auction. He must not bid *bonâ fide* and bring up the price of the pawn. Still, the purchase of the pledgee is probably not void *per se*, but voidable at the election of the pledgeor; and the latter may ratify the purchase by receiving the surplus over the debt, or avoid it by refusing to do so. The pledgee may charge the pledge with expenses rightfully incurred, as the costs of sale, etc. If the pledge when sold *bonâ fide* does not bring enough to pay the debt, the pledgee has still left a good claim against the pledgeor for the balance.

8. In those states where strict foreclosure is allowed, an absolute transfer of title is made to a mortgagee, and hence there is never any inquiry into the matter of surplus after sale, because there is no right to reclaim. But in such states the mortgage law does not apply to pawns; for in pawns the surplus over the amount of debt after sale must be given back to the pledgeor. This last is also the law of mortgages in some states; but still, everywhere, pawns and mortgages of personal property are separate in law. In order to authorize any sale of a pledge without judicial proceedings, not only personal notice of the intent to redeem must be given, but also of the time, place, and manner of the intended sale. 12 Barb. N. Y. 103; 4 Den. N. Y. 226; 14 N. Y. 392.

9. *Negotiable paper.* The law of pledge applies, probably, to promissory notes on demand, held in pledge. But it does not apply, in general, to other promissory notes and commercial paper pledged as collateral security. The holder of negotiable paper, even though it be accommodation paper, may pledge it for an antecedent debt, the rule governing pledges not being applicable to commercial property of this description. 3 Penn. St. 381; 13 Mass. 105; 3 Cal. 151; 5 *id.* 260. But in New York it has been held that pledgees of negotiable paper have no right to sell it, but must wait until its maturity and then collect it. 3 Du. N. Y. 660; 16 N. Y. 392. See, also, upon the law of pledges in mercantile property, 28 N. H. 561; 26 Vt. 686; 13 B. Monr. Ky. 432; 1 Stockt. Ch. N. J. 667; 17 Barb. N. Y. 492; 5 Du. N. Y. 29; 14 Ala. N. s. 65; 10 Md. 373; 1 N. Y. Leg. Obs. 25; 5 Tex. 318.

In most states, a pledgee cannot sell his pledge unless it be negotiable paper. And hence any pledgee who has stock put into his hands cannot sell it or operate with it as his own. If he do sell it, the pledgeor can recover of him the highest price the stock has reached at any time previous to adjudication. 2 Caines, Cas. N. Y. 200; 5 Johns. N. Y. 260; 1 Sandf. N. Y. 351; 4 *id.* 74; 2 N. Y. 443; 3 Hill, N. Y. 593; 7 *id.* 497. A pledgeor may bring trover upon the sale of a pledge, or upon a tortious repledging of it.

10. *Other debts.* A pledge cannot, in general, be held for any other debt than that which it was given to secure, except on the

special agreement and consent of the parties. 7 East, 224; 6 Term, 258; 2 Ves. Ch. 372; 6 *id.* 226; 7 Port. Ala. 466; 15 Mass. 389; 2 Leigh, Va. 493; 14 Barb. N. Y. 536. The civil law and Scotch law are otherwise. 2 Bell, Comm. 22.

Pledgeor's transfer. The pledgeor may sell or transfer his right to a third party, who can bring trover against the pledgee if the latter, after tender of the amount of his debt, refuse to deliver the pawn. 9 Cow. N. Y. 52; 13 Mees. & W. Exch. 480. A creditor of the pledgeor can only take his interest, and must pay the debt before getting the pawn. And now it is settled that the pledgeor's general property in the pawn may be sold at any time on execution, and the purchaser or assignee of the pledgeor succeeds to the pledgeor's rights, and may himself redeem. At common law, a pledge could not be taken at all in execution. 1 Ves. Ch. 278; 3 Watts, Penn. 258; 17 Pick. Mass. 85; 1 Const. 20; 1 Gray, 254. The king takes a pawn on paying the pawnee's debt. 2 Chit. Prerog. 285.

11. *Factor.* A factor cannot, at common law, pledge his principal's goods; and the principal may recover them from the pledgee's hands. 2 Strange, 1178; 6 Maule & S. 1; 3 Bingh. 139, 603; 2 Brod. & B. 639; 4 Barnew. & C. 5; 1 M'Cord, So. C. 1; 6 Metc. Mass. 68; 20 Johns. N. Y. 421; 4 Hen. & M. Va. 432; 18 Mo. 147, 191; 11 How. 209, 226. The question is very fully discussed in Parsons, Marit. Law, 363. But statutes in England and in various states, as Maine, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio, etc., give the factor a power of pledging, with various modifications. 7 Barnew. & C. 517; 6 Mees. & W. Exch. 572; 2 Mood. & R. 22; 3 Den. N. Y. 472; 4 *id.* 323; 2 Sandf. N. Y. 68.

Co pledgees. A pledgee may hold a pledge for another pledgee also, and it will be a good pledge to both. If the pledge be not large enough for both debts after sale, and no other arrangement be made, the prior pledgee will have the whole of his debt paid before any part of the proceeds is applied to the subsequent pledgee. If there is no priority of time, they will divide ratably. But an agreement between the parties will always determine the rights of two or more pledgees. 12 Mass. 321. Where possession is given to one of three pledgees, to hold for all three, the other two have a constructive possession, which is equally good, for the purpose of sharing, with an actual possession. Hence the mere manual possession of one pledge will not give a right to discharge the whole debt of the holder and a part only of that of his co-pledgees. So, by the rule of constructive possession, if the holder should lose the pledge by his own negligence, he would be liable to his co-bailees out of actual possession, as well as to his bailor.

There is a clear distinction between mortgages and pledges. In a pledge, the legal title remains in the pledgeor. In a mortgage, it passes to the mortgagee. In a mortgage, the mortgagee need not have possession. In a pledge, the pledgee must have possession, though it be only constructive. In a mortgage, at common law, the property on non-payment of the debt passes wholly to the mortgagee. In a pledge, the property is sold, and only so much of the proceeds as will pay his debt passes to the pledgee. A mortgage is a conditional conveyance of property, which becomes absolute unless redeemed at a specified time. A pledge is not strictly a conveyance at all, nor need any day of redemption be appointed for it. A mortgagee can sell and deliver the thing mortgaged, subject only to the right of redemption. A pledgee cannot sell and deliver his pawn until the debt is due and payment denied.

The civil law *pignus* was our pledge, and the *hypotheca* was our mortgage of chattels. In the former, possession was in the bailor; in the latter, in the bailee.

Pledge and mortgage, therefore, are diverse in law. Each of the following authorities recognises one or another of the preceding distinctions: 3 Brown, Ch. 21; Yelv. 178; Prec. in Chanc. 419; 1 Ves. Ch. 358; 2 *id.* 372; 1 Bulstr. 29; Comyns, Dig. *Mortgage;* Ow. 123; 5 Johns. N. Y. 260; 8 *id.* 97; 2 Pick. Mass. 607; 5 *id.* 60; 3 Penn. St. 208; 6 Mass. 425; 22 Me. 248; 6 Pet. 449; 2 Barb. N. Y. 538; 4 Wash. C. C. 418; 2 Ala. N. s. 555; 9 Me. 82; 5 N. H. 545; 4 Den. N. Y. 489; 5 Blackf. Ind. 320; 3 Mo. 516; 4 Barb. N. Y. 491; 3 Tex. 119; 1 Parsons, Contr. 591 *et seq.*

The distinction between mortgages and pawns is often observed strictly. Hence an instrument giving security upon a chattel for the future payment of a debt was held to be a mortgage and not a pledge, because it provided for the continuance of the possession of the debtor until payment, or on non-payment at the appointed day authorized the creditor to take possession; and this was held although instead of the ordinary terms of conveyance the words used were, "I hereby pledge and give a lien on," etc. 9 Wend. N. Y. 80. If a pledge is given with the understanding that if the debt be not paid within the stipulated time the pledgee shall have the pledge, the pledge does not pass to the pledgee on non-payment, unless the transaction be proved a mortgage and not a pledge. 3 Tex. 119; 2 Cow. N. Y. 324. These decisions coincide, apparently, with the doctrines of the civil law and the French Code.

12. It has been seen that when no definite day is appointed the pledge may be redeemed at any time. Hence, if the pledgee himself do not give notice to the pledgeor to redeem, the latter has his whole lifetime in which to do so; and his right of redemption survives and goes to his representatives. 3 Mo. 316; 1 Call, Va. 290. But for further discussion of pledge and hypothecation see 2 Ld. Raym. 982; 1 Atk. Ch. 165; 5 C. Rob. Adm. 218; 2 Curt. C. C. 404; 1 Parsons, Marit. Law, 118.

In Louisiana there are two kinds of pledges,—the pawn and the antichresis. The former relates to movable securities, and the latter to immovables. If a creditor have not a right to enter on the land and reap the fruits, the security is not an antichresis. 3 La. 157. A pledge of negotiable paper is not valid against third parties without transfer from debtor to creditor. 2 La. 387. See, in general, 13 Pet. 351; 5 Mart. La. N. s. 618; 18 La. 543; 1 La. Ann. 340; 2 *id.* 872.

Additional cases on special rules of the law of pledge are—1 Hoffm. Ch. N. Y. 487; 1 Hayw. No. C. 10; 2 *id.* 405; Wright, Ohio, 370; 8 N. H. 325; 14 *id.* 567; 21 *id.* 77; Gilbert, Eq. 104; 1 Harr. & G. Md. 11; 2 Aik. Vt. 150; 6 Vt. 536; 22 *id.* 274; 4 Mas. C. C. 515; 2 Hale, Pl. Cr. 63; 13 Ala. N. s. 776, 790; 1 La. Ann. 31, 379; 11 Penn. St. 120; 22 *id.* 471; 3 Ohio St. 270; 4 Eng. L. & Eq. 438; 13 *id.* 261.

PLEDGEE. He to whom a thing is pledged.

PLEDGEOR. The party who makes a pledge.

PLEDGES. In Pleading. Those persons who became sureties for the plaintiff's prosecution of the suit. Their names were anciently appended at the foot of the declaration. In time it became purely a formal matter, because the plaintiff was no longer liable to be amerced for a false claim, and the fictitious persons John Doe and Richard Roe became the universal pledges, or they might be omitted altogether, 1 Tidd, Pract. 455; Archbold, Civ. Plead. 171, or inserted at any time before judgment, 4 Johns. N. Y. 90, and are now omitted.

PLEGIIS ACQUIETANDIS, WRIT DE. The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day: after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. Fitzherbert, Nat. Brev. 321.

PLENA PROBATIO. In Civil Law. A term used to signify full proof, in contradistinction to *semi-plena probatio*, which is only a presumption. Code, 4. 19. 5. etc.; 1 Greenleaf, Ev. § 119.

PLENARTY. In Ecclesiastical Law. Signifies that a benefice is full. See AVOIDANCE.

PLENARY. Full; complete.

In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceedings in each are termed plenary or summary. Plenary, or full and formal, suits are those in which the proceedings must be full and formal; the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty, Pract. 481.

PLENE ADMINISTRAVIT (Lat. he has fully administered). **In Pleading.** A plea in bar entered by an executor or administrator, by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had at any time since, any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, etc. in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. See 15 Johns. N. Y. 323; 6 Term, 10; 1 Barnew. & Ald. 254; 11 Viner, Abr. 349; 12 *id.* 185; 2 Phillipps, Ev. 295; 3 Saund. (a) 315, n. 1; 6 Comyns, Dig. 311.

PLENE ADMINISTRAVIT PRÆTER (Lat. he has fully administered except). **In Pleading.** A plea by which a defendant executor or administrator admits that there is a balance remaining in his hands unadministered.

PLENE COMPUTAVIT (Lat. he has fully accounted). **In Pleading.** A plea in an action of account render, by which the defendant avers that he has fully accounted. Bacon, Abr. *Accompt* (E). This plea does not admit the liability of the defendant to account. 15 Serg. & R. Penn. 153.

PLENIPOTENTIARY. Possessing full powers: as, a minister plenipotentiary is one authorized fully to settle the matters connected with his mission, subject, however, to the ratification of the government by which he is authorized. See MINISTER.

PLENUM DOMINIUM (Lat.). The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

PLIGHT. An old English word, used sometimes for the estate with the habit and quality of the land. Coke, Litt. 221. It extends to a rent-charge and to a possibility of dower. *Id.*; 1 Rolle, Abr. 447; Littleton, § 289.

PLOUGH-BOTE. An allowance made to a rural tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND. In Old English Law. An uncertain quantity of land. According to some opinions, it contains one hundred and twenty acres. Coke, Litt. 69 *a*.

PLUNDER. The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See BOOTY; PRIZE.

PLUNDERAGE. In Maritime Law. The embezzlement of goods on board of a ship is known by the name of plunderage.

The rule of the maritime law in such cases is that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator. Abbott, Shipp. 457; 3 Johns. N. Y. 17; 1 Pet. Adm. 200, 239, 243; 4 Bos. & P. 347.

PLURAL. A term used in grammar, which signifies more than one.

Sometimes, however, it may be so used that it means only one: as, if a man were to devise to another all he was worth if he, the testator, died without children, and he died leaving one child, the devise would not take effect. See Dig. 50. 16. 148; Shelford, Lun. 504, 518.

PLURALITY. The greatest number of votes given for any one person.

Plurality has the meaning, as used in governmental law, given above. Thus, if there are three

candidates, for whom four hundred, three hundred and fifty, and two hundred and fifty votes are respectively given, the one receiving four hundred has a plurality, while five hundred would be a majority of the votes cast. See MAJORITY.

PLURIES (Lat. many times). A writ issued subsequently to a first and second (alias) of the same kind, which have proved ineffectual. The name is given to it from the word *pluries* in the Latin form of the writ: "we command you, as we have often (*pluries*) commanded you before," which distinguishes it from those which have gone before. *Pluries* is variously translated, in the modern forms of writs, by "formerly," "more than once," "often." The next writ to the pluries is called the second pluries; and so on. 3 Sharswood, Blackst. Comm. 283, App. 15; Natura Brev. 33.

POACHING. Unlawful entering land, in night-time, armed, with intent to destroy game. 1 Russell, Crimes, 469; 2 Stephen, Comm. 82; 2 Chitty, Stat. 221–245.

POCKET SHERIFF. In English Law. A sheriff appointed by sole authority of the crown, not being one of the three nominated by the judges in the exchequer. 1 Sharswood, Blackst. Comm. 342*.

POINDING. In Scotch Law. That diligence affecting movable subjects by which their property is carried directly to the creditor. Poinding is real or personal. Erskine, Inst. 3. 6. 11.

POINDING, PERSONAL. Poinding of the goods belonging to the debtor, and of those goods only.

It may have for its warrant either letters of horning, containing a clause for poinding, and then it is executed by messengers; or precepts of poinding, granted by sheriffs, commissaries, etc., which are executed by their proper officers. No cattle pertaining to the plough, nor instruments of tillage, can be poinded in the time of laboring or tilling the ground, unless where the debtor has no other goods that may be poinded. Erskine, Inst. 3. 6. 11. This process is somewhat similar to distress.

POINDING, REAL. POINDING OF THE GROUND. Though it be properly a diligence, this is generally considered by lawyers as a species of real action, and is so called to distinguish it from personal poinding, which is founded merely on an obligation to pay.

Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is, therefore, competent to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened; but goods brought upon the ground by strangers are not subject to this diligence. Even the goods of a tenant cannot be poinded for more than his term's rent. Erskine, Inst. 4. 1. 3.

POINT. In Practice. A proposition or question arising in a case.

It is the duty of a judge to give an opinion on every point of law properly arising out of the issue which is propounded to him.

POINT RESERVED. A point or question of law which the court, not being fully satisfied how to decide, in the hurried trial of a cause, rules in favor of the party offering it, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside.

POINTS. Marks in writing and in print, to denote the stops that ought to be made in reading, and to point out the sense.

Points are not usually put in legislative acts or in deeds, Eunom. Dial. 2, § 33, p. 239: yet, in construing such acts or instruments, the courts must read them with such stops as will give effect to the whole. 4 Term, 65.

The points are—the comma, the semicolon, the colon, the full point, the point of interrogation and the point of exclamation. Barrington, Stat. 294, n. See PUNCTUATION.

POISON. In Medical Jurisprudence. A substance having an inherent deleterious property which renders it, when taken into the system, capable of destroying life. Wharton & Stillé, Med. Jur. § 493; Taylor, Poisons, 2d Am. ed. 18.

2. The history of poisoning, and many remarkable early instances of a wide-spread use of poisons, are recorded in works on medical jurisprudence. See these, and also, especially, Taylor, Poisons; Archbold, Crim. Pract. Waterman's ed. 940; Wharton & Stillé, Med. Jur.; 1 Beekman, Hist. Jur. 74 *et seq.* The classification proposed by Mr. Taylor is as follows:—

- IRRITANTS
  - MINERAL
    - NON-METALLIC: Acids, Alkalies and their Salts, Metalloids.
    - METALLIC (*Arsenic*).
  - VEGETABLE (*Savin*).
  - ANIMAL (*Cantharides*).
- NARCOTICS
  - CEREBRAL (*Morphia*).
  - SPINAL (*Strychnia*).
  - CEREBRO-SPINAL (*Conia, Aconitina*).
- GASEOUS.

Irritant poisons, when taken in ordinary doses, occasion speedily violent vomiting and purging, preceded, accompanied, or followed by intense pain in the abdomen, commencing in the region of the stomach. The corrosive poisons, as distinguished from those in a more limited sense termed irritant, generally produce their result more speedily, and give chemical indications; but every corrosive poison acts as an irritant in the sense here adopted.

Narcotic poisons act chiefly on the brain or spinal marrow. Either immediately or some time after the poison has been swallowed, the patient suffers from headache, giddiness, paralysis, stupor, delirium, insensibility, and, in some instances, convulsions.

3. The effects of one class are, however, sometimes produced by the other,—more commonly as secondary, but sometimes even as primary, symptoms.

The evidence of poisoning, as derived from *symptoms*, is to be looked for chiefly in *the suddenness of their occurrence;* this is perhaps the most reliable of all evidence derived from symptoms in cases of criminal poisoning, see Taylor, Pois. 107; Christison, Pois. 42; though none of this class of evidence can be considered as furnishing any thing better than a high degree of probability; *the regularity of their increase;* this feature is not universal, and exists in many diseases; *uniformity in their nature;* this is true in the case of compara-

tively few poisons; *the symptoms begin soon after a meal;* but sleep, the manner of administration, or certain diseases, may affect this rule in the case of some poisons; *when several partake at the same time of the same poisoned food, all suffer from similar symptoms,* 2 Park. Cr. Cas. N. Y. 235; Taylor, Poisons, 118; *the symptoms first appearing while the body is in a state of perfect health.* Archbold, Crim. Plead. Waterman ed. 948.

Appearances which present themselves on post-mortem examinations are of importance in regard to some classes of irritant poisons, see The Hersey Case, Mass. 1861; Palmer's case, Taylor, Poisons, 697; but many poisons leave no traces which can be so discovered.

Chemical analysis often results in important evidence, by discovering the presence of poisons, which must then be accounted for; but a failure to detect it by no means proves that it has not been given. Christison, Poisons, 61, 62.

The evidence derived from *circumstances* differs in nothing in principle from that in case of commission of other crimes.

4. Homicide by poisoning is, of course, generally either accidental, so as not to amount to murder, or deliberate: yet it has been held that there may be a verdict of murder in the second degree under an indictment for poisoning. 19 Conn. 388. The doctrine of principal and accessary is also modified to some extent in its application to cases of poisoning. 2 Mood. Cr. Cas. 120; 9 Carr. & P. 356; 9 Coke, 81. As to what constitutes an administration of poison, see 4 Carr. & P. 369; 6 *id.* 161; 2 Mood. & R. 213.

Intent to kill need not be specifically alleged in an indictment for murder by poison. 2 Starkie, Crim. Plead. prec. 18; 1 East, Pl. Cr. 346; 3 Cox, Cr. Cas. 300; 8 Carr. & P. 418; 2 All. Mass. 173.

Many of the states have statutes inflicting severe penalties upon the administering of poisons with a malicious intent. See Archbold, Crim. Pract. Waterman's ed. 942; 3 N. Y. Rev. Stat. 5th ed. 941, 944, 969, 975; Mich. Rev. Stat. c. 153, § 13; Mass. Gen. Stat. c. 160, § 32; Vt. Rev. Stat. 543; Wisc. Rev. Stat. c. 133, § 44, c. 144, § 39; Iowa Code, § 2728; N. J. Rev. Stat. 268; Ohio Stat. 1854 ed. c. 33, § 34.

Consult Christison, Taylor, on Poisons; Beck, Taylor, Wharton & Stillé, Med. Jur.; Archbold, Crim. Pract. Waterman's ed.; Russell, Crimes; Wharton, Homicide.

POLE. A measure of length, equal to five yards and a half. See MEASURE.

POLICE. That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police.

The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution, and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

Police has also been divided into *administrative police,* which has for its object to maintain constantly public order in every part of the general administration; and *judiciary police,* which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

POLICE JURY. **In Louisiana.** A name given to certain officers who collectively exercise jurisdiction in certain cases of police: as, levying taxes, regulating roads, etc.

POLICY. **In Insurance.** The instrument whereby insurance is made by an underwriter in favor of an assured, expressed, implied, or intended, against some risk, peril, or contingency in reference to some subject. It is usually either marine, or against fire, or on a life.

It must show expressly, or by implication, in whose favor it is made. It may be upon a valuable property, interest, or contingency, or be a gaming or wagering policy on a subject in which the assured has no interest, or against risks in respect to which the assured has no interest except what arises from the contract itself. A wagering policy is valid or not, according as a wager is or is not recognized as a valid contract by the *lex loci.*

An *interest* policy is one where the insured has a real, substantial, assignable interest in the thing insured.

An *open policy* is one on which the value is to be proved by the assured. 1 Phillips, Ins. §§ 4, 6, 7, 27, 439, 948, 1178. By an "open policy" is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time. 12 La. Ann. 259; 19 N. Y. 305; 6 Gray, Mass. 214.

A *valued* policy is one where a value has been set on the ship or goods insured, and this value inserted in the policy in the nature of liquidated damages. In such a policy the value of the subject is expressly agreed, or is, as between the parties, the amount insured

A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are strongly reprobated. 3 Kent, Comm. 225.

2. Records and documents expressly referred to in the policy are in effect, for the purpose of the reference, a part of the contract. 1 Phillips, Ins. §§ 70–74; 22 Conn. 235; 37 Me. 137; 20 Barb. N. Y. 468; 23 Penn. St. 50; 23 Eng. L. & Eq. 514; 2 N. H. 551; 33 *id.* 203; 10 Cush. Mass. 337. A policy may take effect on actual or constructive delivery, and may be retrospective where neither party knows the prior circumstances. 1 Phillips, Ins. ch. xi. sect. i.; 1 Ind. 196; 27 Penn. St. 268; 42 Me. 259; 25 Conn. 207; 17 N. Y. 415; 2 Dutch. N. J. 268; 5 Gray, Mass. 52.

Every policy, whether marine, against fire, or on life, specifies or imports parties, and specifies the subject or interest intended to be insured, the premium or other consideration, the amount insured, the risks and perils for which indemnity is stipulated, and the period of the risk or the terminus *a quo* and *ad quem*.

3. The duration of the risk, under a marine insurance or one on inland navigation, is either from one geographical terminus to another, or for a specified time; that of a fire-policy is for a specified time; one on life is either for life or a term of years, months, etc. It is a leading principle, as to the construction of a policy of insurance, that its distinguishing character as a contract of indemnity is to be favored; which is in conformity with the common maxim, *ut res valeat magis quam pereat*. 1 Phillips, Ins. ch. i. sect. xiii.; 8 N. Y. 351; 18 *id.* 385; 8 Cush. Mass. 393; 9 *id.* 479; 10 *id.* 356; 17 Penn. St. 253; 19 *id.* 45; 23 *id.* 262; 32 *id.* 381; 29 Eng. L. & Eq. 111, 215; 33 *id.* 514; 2 Du. N. Y. 419, 554; 3 *id.* 435; 5 *id.* 517, 594; 14 Barb. N. Y. 383; 20 *id.* 635; 16 Mo. 98; 22 *id.* 82; 22 Conn. 235; 13 B. Monr. Ky. 311; 16 *id.* 242; 3 Ind. 23; 11 *id.* 171; 28 N. H. 234; 29 *id.* 182; 2 Curt. C. C. 322, 610; 37 Me. 137; 4 Zabr. N. J. 447; 18 Ill. 553; 4 R. I. 159; 5 *id.* 426; 6 Gray, Mass. 214, 257; 7 *id.* 261; 8 Ohio, 458.

4. In marine insurance the contract has necessarily more implied reference to customs and usages than most other contracts; or, in other words, a larger proportion of the stipulations are not specifically expressed in the instrument, 1 Phillips, Ins. § 119; whence it has been thought to be an imperfect, obscure, confused instrument. 1 Phillips, Ins. § 6, n. 3; 1 East, 579; 5 Cranch, 342; 1 Burr. 347. But the difficulty in giving it a practical construction seems to arise more from the complication of the circumstances necessarily involved, than from any remediable defects in its provisions and phraseology. New provisions are, however, needed, from time to time, to adapt the contract to new circumstances. A mistake in filling up a policy may be corrected by order of a court of equity. 1 Phillips, Ins. § 117; 5 Bos. & P. 322; 2 Caines, N. Y. 339; 1 Wash. C. C. 415; 1 Ves. Sen. Ch. 317, 456; 2 Cranch, 441; 2 Johns. N. Y. 330; 1 Ark. 545; 1 Paige, Ch. N. Y. 278; 2 Curt. C. C. 277.

See ABANDONMENT; AVERAGE; INSURABLE INTEREST; INSURANCE; SALVAGE; LOSS; TOTAL LOSS.

POLITICAL. Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation or administration of the government: they are distinguished from civil rights, which are the rights which a man enjoys as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. 1 Bouvier, Inst. nn. 182, 197, 198.

POLL. A head. Hence poll-tax is the name of a tax imposed upon the people at so much a head.

To *poll* a jury is to require that each juror shall himself declare what is his verdict. This may be done, at the instance of either party, at any time before the verdict is recorded, according to the practice in some states. See 3 Cow. N. Y. 23; 18 Johns. N. Y. 188; 1 Ill. 109; 7 *id.* 342; 9 *id.* 336. In some states it lies in the discretion of the judge. 1 M'Cord, So. C. 24, 525; 22 Ga. 431.

In Conveyancing. A deed-poll, or single deed, is one made by a single party, whose edges are *polled*, or shaved even, in distinction from an *indenture*, whose sides are indented, and which is executed by more than one party. 2 Sharswood, Blackst. Comm. 296. See DEED-POLL.

POLL-TAX. A capitation tax; a tax assessed on every head, *i.e.* on every male of a certain age, etc., according to statute. Mass. Gen. Stat. 74, 75; Webster, Dict.; Wharton, Dict. 2d Lond. ed.

POLLICITATION. In Civil Law. A promise not yet accepted by the person to whom it is made.

It differs from a contract, inasmuch as the latter includes a concurrence of intention in two parties, one of whom promises something to the other, who accepts, on his part, of such promise. Grotius, l. 2, c. 2; Pothier, Obl. pt. 1, c. 1, s. 1, art. 1, § 2.

POLLS. The place where electors cast in their votes.

POLYANDRY. The state of a woman who has several husbands.

Polyandry is legalized only in Thibet. It is inconsistent with the law of nature. See LAW OF NATURE.

POLYGAMY. The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another.

It differs from bigamy, which see. Comyns, Dig. *Justices* (S 5); Dict. de Jur.; Coke, 3d Inst. 88.

But bigamy is now commonly used even where polygamy would be strictly correct. 1 Russell, Crimes, 186, n. On the other hand, polygamy is used where bigamy would be strictly correct. Mass. Gen. Stat. 1860, p. 817.

POLYGARCHY. A term used to express a government which is shared by several persons: as, when two brothers succeed to the throne and reign jointly.

POND. A body of stagnant water; a pool.

Any one has a right to erect a fish-pond; the fish in it are considered as real estate, and pass to the heir, and not to the executor. Ow. 20.

PONE (Lat. *ponere*, to put). **In English Practice.** An original writ issuing out of chancery, for the purpose of removing a plaint from an inferior court into the superior courts at Westminster. The word signifies "put:" put by gages, etc. The writ is called from the words it contained when in Latin, *Pone per vadium et salvos plegios*, etc.: put

by gage and safe pledges, etc. See Fitzherbert, Nat. Brev. 69, 70 *a*; Wilkinson, Repl. Index.

PONERE (Lat.). To put. The word is used in the old law in various connections, in all of which it can be translated by the English verb "put." See Glanville, lib. 2, c. 3.

PONIT SE (Lat. puts himself). **In English Criminal Practice.** When the defendant pleads "not guilty," his plea is recorded by the officer of the court, either by writing the words "po. se," an abbreviation of the words *ponit se super patriam* (puts himself upon his country), or, as at the central criminal court, *non cul.* 2 Den. Cr. Cas. 392. See ARRAIGNMENT.

PONTAGE. A contribution towards the maintenance, rebuilding, or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete.

POOL. A small lake of standing water. By the grant of a pool, it is said, both the land and water will pass. Coke, Litt. 5. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant. 2 N. H. 259; Angell, Waterc. C. 47; Coke, Litt. 5; Bacon, Abr. *Grants* (H 3); Comyns, Dig. *Grant* (E 5); 5 Cow. N. Y. 216; Croke Jac. 150; 1 Lev. 44; Plowd. 161; Vaugh. 103.

POOR DEBTORS. By the laws which exist in some states for the relief of poor debtors, it is generally provided that any one arrested or imprisoned for debt or upon mesne process in an action of contract, to procure his discharge from arrest may summon his creditor before a magistrate, and there take oath that he has no property with which to pay the debt on which he is detained.

2. The debtor, to procure his discharge, is usually obliged to swear that he has not property to a certain amount (usually ten or twenty dollars) over, above, and besides certain articles exempted as necessary to the support of the debtor or his family. These articles are usually those which are also exempted from attachment on mesne process or execution. In many states, poor debtors are protected by the insolvent laws. The following states seem to have made special provisions for the relief of poor debtors. In the *District of Columbia*, and *Indiana*, any one who is arrested may free himself by delivering to the marshal or officer all his property, and taking oath before a magistrate. Notice is given the creditor, who may put questions. The marshal or officer disposes of the property as if it were taken upon execution. Rev. Code Dist. of Columbia, 1857, § 62; Rev. Stat. (1852) Ind.; 2 Blackstone, Comm. 394. In *Georgia*, a woman cannot be arrested for debt. Act Feb. 2, 1854. In *Illinois*, a debtor is freed from prison upon taking the poor debtor's oath, and, if he has no property, the creditor is obliged to pay the fees of the jail. Ill. Stat. p. ii. 583. In *Maine*, *Massachusetts*, and *Rhode Island*, the poor debtor is released upon making oath that he has not property to the value of twenty dollars above the articles exempted by statute. These exempted articles are somewhat different in the different states mentioned. In Maine, also, the debtor makes certain disclosures of his property which is set off to satisfy his debts. Me. Rev. Stat. ch. 113, p. 634, March 19, 1860; Acts March 13, 1861, Feb. 21 and 29, 1860; Mass. Gen. Stat. (1860) ch. 124, p. 633; R. I. Rev. Stat. (1857) 481. In *New Hampshire*, any one arrested or imprisoned for debt may petition two justices of the peace, setting forth property less than twenty dollars. Fraud on the debtor's part prevents discharge, and malice or wilful act being the cause of arrest makes the discharge discretionary with the magistrates. N. H. Stat. ch. 213, p. 508. In *New York*, any one imprisoned for above five hundred dollars more than three months may make a petition and oath, on which the proceedings are the same as in insolvency. Arrest is allowed only in fraud. In *North Carolina* and *Virginia*, a debtor after lying in jail twenty days may be discharged. He petitions the court of common pleas, quarter sessions, two justices of the peace of the county, or a judge of the superior or supreme court. Ten days' notice is given the creditor, or to the clerk of the court, in case of bastardy. The oath taken is that the debtor has less than ten dollars in property. He may still be arrested by any other creditor. 5 Jones, No. C. 145; No. C. Rev. Code (1854), c. 59, § 1; Va. Rev. Code (1854). In *Oregon*, execution debtors after ten days may give notice that they will apply and be examined before a judge of the district court, or two justices of the peace of the county. An oath is taken that the debtor has not above twenty dollars. A certificate is then granted; and an application may be made every ten days. 5th & 6th Sess. Laws of Oregon. In *Pennsylvania*, after thirty days' imprisonment for a debt of less than one hundred and fifty-one dollars, a discharge is granted. In *South Carolina*, a person imprisoned, making oath that he is not worth forty dollars, is discharged the debt and costs. 3 So. C. Stat. 173. In *Vermont*, a poor debtor may be discharged from imprisonment, Vt. Stat. 1850, 251–253, §§ 70–79, and by the jail commissioners. *Id.* 577–581, §§ 34–60. In *Wisconsin*, the prisoner in execution for a tort may free himself from arrest by taking the poor debtor's oath, his property remaining subject to attachment. Wisc. Rev. Stat. (1858) ch. 161, p. 920. In *Upper Canada*, there is an "Indigent Debtor's Act." U. C. Cons. Stat. 296, c. 26. The debtor is relieved when in close custody on mesne process. He makes oath that he has not property to the amount of five pounds, or that he believes the claim unjust, and submits to examination.

POPE. The head of the Roman Catholic church. He is a temporal prince. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley, Civ. & Eccl. Law, pt. 1, c. 3, § 10.

The pope has no political authority in the United States.

POPE'S FOLLY. The name of a small island situated in the bay of Passamaquoddy, which, it has been decided, is within the jurisdiction of the United States. 1 Ware, Dist. Ct. 26.

POPULAR ACTION. An action given by statute to any one who will sue for the penalty. A qui tam action. Dig. 47. 23. 1.

POPULISCITUM (Lat.). An act of the commons: same as *plebiscitum*. Ainsworth, Dict.

A law passed by the whole people assembled in *comitia centuriata*, and at the proposal of one of the senate, instead of a tribune, as was the case with a *plebiscitum*. Taylor, Civ. Law, 178; Mackeldy, Civ. Law, §§ 26, 37.

PORT. A place to which the officers of the customs are appropriated, and which includes the privileges and guidance of all members and creeks which are allotted to them. 1 Chitty, Com. Law, 726; Postlewaith, Com. Dict. According to Dalloz, a port is a place within land, protected against the waves and winds and affording to vessels a place of safety. By the Roman law a port is defined to be *locus conclusus, quo importantur merces et unde exportantur*. Dig. 50. 16. 59. See 7 Mart. La. N. s. 81.

A port differs from a haven, and includes something more. *First*, it is a place at which vessels may arrive and discharge or take in their cargoes. *Second*, it comprehends a ville, city, or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods and bringing them to market, and for victualling the ships. *Third*, it is impressed with its legal character by the civil authority. Hale, de Portibus Mar. c. 2; 1 Hargrave, Tracts, 46, 73; Bacon, Abr. *Prerogative* (D 5); Comyns, Dig. *Navigation* (E); Coke, 4th Inst. 148; Callis, Sewers, 56; 2 Chitty, Com. Law, 2; Dig. 50. 16. 59; 43. 12. 1. 13; 47. 10. 15. 7; 39. 4. 15.

PORT TOLL. The toll paid for bringing goods into a port.

PORTATICA (L. Lat.). **In English Law.** The generic name for port duties charged to ships. Hargrave, Law Tracts, 74.

PORTER. The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

One who is employed as a common carrier to carry goods from one place to another in the same town is also called a porter. Such person is, in general, answerable as a common carrier. Story, Bailm. § 496.

PORTGREVE (from Sax. *gerefa*, reeve or bailiff, and port). A chief magistrate in certain maritime towns. The chief magistrate of London was anciently so called, as appears from a charter of king William I. Instead of this portgreve of London, the succeeding kings appointed two bailiffs, and afterwards a mayor. Camden, Hist. 325.

PORTION. That part of a parent's estate, or the estate of one standing *in loco parentis*, which is given to a child. 1 Vern. 204. See 8 Comyns, Dig. 539; 16 Viner, Abr. 432; 1 Belt, Suppl. Ves. Ch. 34, 58, 303, 308; 2 *id.* 46, 370, 404.

PORTORIA (Lat.). **In Civil Law.** Duties paid in ports on merchandise. Code, 4. 61. 3. Taxes levied in old times at city gates. Tolls for passing over bridges. Vicat, Voc. Jur.; Spelman, Gloss.

PORTSALES. Auctions were anciently so called, because they took place in ports.

POSITIVE. Express; absolute; not doubtful. This word is frequently used in composition.

POSITIVE CONDITION. One in which the thing which is the subject of it *must* happen: as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen: as, if I do not marry.

POSITIVE EVIDENCE is that which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 3 Bouvier, Inst. n. 3057.

POSITIVE FRAUD is the intentional and successful employment of any cunning, deception, or artifice, to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. 186; Dig. 4. 3. 1. 2; Dig. 2. 14. 7. 9. It is cited in opposition to constructive fraud.

POSITIVE LAW. Law actually ordained or established, under human sanctions, as distinguished from the law of nature or natural law, which comprises those considerations of justice, right, and universal expediency that are announced by the voice of reason or of revelation. Municipal law is chiefly, if not essentially, positive; while the law of nations has been deemed by many of the earlier writers as merely an application of the law of nature. That part of the law of nations which rests on positive law may be considered in a threefold point of view:—*first*, the *universal voluntary law*, or those rules which become law by the uniform practice of nations in general, and by the manifest utility of the rules themselves; *second*, the *customary* law, or that which, from motives of convenience, has, by tacit but implied agreement, prevailed, not necessarily among all nations, nor with so perma-

nent a utility as to become a portion of the *universal* voluntary law, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it, 1 Taunt. 241; *third*, the *conventional* law, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chitty, Com. Law, 28.

POSSE. This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be. When the thing is in being, the phrase to express it is, *in esse*.

POSSE COMITATUS (Lat.). The power of the county.

2. The sheriff, or other peace officer, has authority by the common law, while acting under the authority of the writ of the United States, commonwealth, or people, as the case may be, and for the purpose of preserving the public peace, to call to his aid the *posse comitatus*.

But with respect to writs which issue in the first instance to arrest in civil suits, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on forcible resistance to the execution of the process. Coke, 2d Inst. 193; Coke, 3d Inst. 161.

3. Having the authority to call in the assistance of all, he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who want understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are, therefore, not considered as a part of the power of the county. Viner, Abr. *Sheriff*, B.

A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable. 1 Carr. & M. 314. In this case will be found the form of an indictment for this offence.

4. Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected.

Whether an individual not enjoined by the sheriff to lend his aid would be protected in his interference, seems questionable. In a case where the defendant assisted sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing. 2 Mod. 244. See Bacon, Abr. *Sheriff* (N); Hammond, Nisi P. 63; 5 Whart. Penn. 437, 440.

POSSESSED. This word is applied to the right and enjoyment of a termor, or a person having a term, who is said to be possessed, and not seised. Bac. Tr. 335; Poph. 76; Dy. 369.

POSSESSIO (Lat.). **In Civil Law.** The detention of a thing: divided into—*first*, natural, or the naked detention of a thing, without intention to acquire ownership; *second*, civil, or the detention of a thing to which one has a right, or with intention of acquiring ownership. Heineccius, Elem. Jur. Civ. § 1288; Mackeldy, Civ. Law, §§ 210, 213.

In Old English Law. Possession; seisin. Law Fr. & Lat. Dict.; 2 Sharswood, Blackst. Comm. 227; Bracton, lib. 2, c. 17; Cowel, *Possession*. But *seisina* cannot be of an estate less than freehold; *possessio* can. New England Sheriff, 141; 1 Metc. Mass. 450; 6 *id.* 439.

POSSESSIO FRATRIS (Lat. the brother's possession). A technical phrase applied in the English law relating to descents, to denote the possession by one in such privity with a person as to be considered the person's own possession.

2. By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seisin of the lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratris*. The possession of a tenant for years, guardian, or brother, is equivalent to that of the party himself, and is termed in law *possessio fratris*. Littleton, sect. 8; Coke, Litt. 15 *a*; 3 Wils. 516; 7 Term, 386.

3. In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other states, the real and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seisin of the ancestor. Reeve, Desc. 377–379; 4 Mas. C. C. 467; 3 Day, Conn. 166; 2 Pet. 59. In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possessio fratris*, it seems, still exists. 2 Pet. 625; Reeve, Desc. 377; 4 Kent, Comm. 384, 385.

POSSESSION. The detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.

By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

Actual possession exists where the thing is in the immediate occupancy of the party. 3 Dev. No. C. 34.

Constructive possession is that which exists in contemplation of law, without actual personal occupation. 11 Vt. 129. And see 1 McLean, C. C. 214, 265; 2 Blackstone, Comm. 116.

2. In order to complete a possession, two things are required: that there be an occupancy, *apprehension*, or taking; that the taking be with an intent to possess (*animus possidendi*): hence persons who have no

legal wills, as children and idiots, cannot possess or acquire possession. Pothier; Etienne. See 1 Mer. Ch. 358; Abbott, Shipp. 9 *et seq.* But an infant of sufficient understanding may lawfully acquire the possession of a thing.

The failure to take possession is considered a badge of fraud, in the transfer of personal property. See SALE; MORTGAGE.

3. As to the effects of the purchaser's taking possession, see Sugden, Vend. 8, 9; 3 P. Will. 193; 1 Ves. Ch. 226; 11 *id.* 464; 12 *id.* 27. See, generally, 1 Harr. & J. Md. 18; 5 *id.* 230, 263; 6 *id.* 336; 1 Me. 109; 1 Harr. & McH. Md. 210; 2 *id.* 60, 254, 260; 3 Bibb, Ky. 209; 4 *id.* 412; 6 Cow. N. Y. 632; 9 *id.* 241; 5 Wheat. 116, 124; Cowp. 217; Code Nap. art. 2228; Code of the Two Sicilies, art. 2134; Bavarian Code, b. 2, c. 4, n. 5; Pruss. Code, art. 579; Domat, Lois Civ. liv. 3, t. 7, s. 1; Viner, Abr.; Wolff, Inst. § 200, and the note in the French translation; 2 Greenleaf, Ev. §§ 614, 615; Coke, Litt. 57 *a;* Croke Eliz. 777; 5 Coke, 13; 7 Johns. N. Y. 1.

In Louisiana. *Civil* possession exists when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing by virtue of a just title and under the conviction of possessing as owner. La. Civ. Code, art. 3392, 3394.

Natural possession is that by which a man detains a thing corporeal: as, by occupying a house, cultivating ground, or retaining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. La. Civ. Code, art. 3391, 3393.

4. Possession applies properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi-possession, and is exercised by a species of possession of which these rights are susceptible. *Id.* art. 3395.

Possession may be enjoyed by the proprietor of the thing or by another for him: thus, the proprietor of a house possesses it by his tenant or farmer.

To acquire possession of a property, two things are requisite: the intention of possessing as owner; the corporeal possession of the thing. *Id.* art. 3399.

5. Possession is lost with or without the consent of the possessor. It is lost *with* his consent—when he transfers this possession to another with the intention to divest himself of it; when he does some act which manifests his intention of abandoning possession: as, when a man throws into the street furniture or clothes of which he no longer chooses to make use. *Id.* art. 3411. A possessor of an estate loses the possession *against* his consent—when another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering; when the possessor of an estate allows it to be usurped and held for a year, without during that time having done any act of possession or interfered with the usurper's possession. *Id.* art. 3412.

POSSESSION MONEY. An allowance to one put in possession of goods taken under writ of *fieri facias.* Holthouse, Dict.

POSSESSOR. He who holds, detains, or enjoys a thing, either by himself or his agent, which he claims as his own.

In general, the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits until a title adverse to his possession has been established, leaving him subject to an action for the mesne profits.

POSSESSORY ACTION. In Old English Law. A real action, in which the plaintiff, called the demandant, sought to recover the *possession* of land, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. Finch, Laws, 257; 2 Bouvier, Inst. n. 2640.

In Louisiana. An action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted. 2 La. 227, 254.

In Scotch Law. An action by which the possession of heritable or movable property may be recovered and tried. An action of molestation is one of them. Paterson, Comp. § 1058, n.

POSSIBILITY. An uncertain thing which may happen, Lilly, Reg.; or it is a contingent interest in real or personal estate. 1 Madd. Ch. 549.

2. Possibilities are near, as when an estate is limited to one after the death of another, or remote, as that one man shall be married to a woman, and then that she shall die and he be married to another. 1 Fonblanque, Eq. 212, n. *e;* Viner, Abr.; 2 Coke, 51 *a.*

Possibilities are also divided into—a possibility coupled with an interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises, and in contingent, springing, or executory uses.

3. A *bare* possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release.

A possibility or mere contingent interest: as, a devise to Paul if he survive Peter. Dane, Abr. c. 1, a 5, § 2, and the cases there cited.

POST (Lat.). After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless *after* the ouster of the original intruder. 3 Sharswood, Blackst. Comm. 182. See ENTRY, WRIT OF.

POST-DATE. To date an instrument a time after that on which it is made. See DATE.

POST DIEM (Lat.). After the day: as, a plea of payment *post diem*, after the day when the money became due. Comyns, Dig. *Pleader* (2 W 29).

POST DISSEISIN. In English Law. The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob, Law Dict.

POST ENTRY. In Maritime Law. An entry made by a merchant upon the importation of goods, after the goods have been weighed, measured, or gauged, to make up the deficiency of the original or prime entry. The custom of making such entries has arisen from the fact that a merchant in making the entry at the time of importation is not or may not be able to calculate exactly the duties which he is liable to pay: he therefore makes an approximately correct entry, which he subsequently corrects by the *post entry*. See Chitty, Com. Law, 746.

POST FACTO (Lat.). After the fact. See EX POST FACTO.

POST LIMINIUM (Lat. from *post*, after, and *limen*, threshold). A fiction of civil law, by which persons or things taken by the enemy were restored to their former state on coming again under the power of the nation to which they formerly belonged. Calvinus, Lex.; 1 Kent, Comm. 108*. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule, by strict law of nations, unless promptly recaptured. The rule does not affect property which is brought into a neutral territory. 1 Kent, Comm. 108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken.

POST LITEM MOTAM (Lat.). After the commencement of the suit.

Declarations or acts of the parties made *post litem motam* are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree is to be proved, may be considered as evidence. 4 Campb. 401.

POST-MARK. A stamp or mark put on letters in the post-office.

Post-marks are evidence of a letter's having passed through the post-office. 2 Campb. 620; 2 Bos. & P. 316; 15 East, 416; 1 Maule & S. 201; 15 Conn. 206.

POST MORTEM (Lat.). After death: as, an examination *post mortem* is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem* is one made by the coroner.

POST-NATUS (Lat.). Literally, afterborn: it is used by the old law writers to designate the second son. See PUISNE; POST-NATI.

POST NOTES. A species of bank-notes payable at a distant period, and not on demand. 2 Watts & S. Penn. 463. A kind of bank-notes intended to be transmitted at a distance by post. See 24 Me. 36.

POST-NUPTIAL. Something which takes place after marriage: as, a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

A post-nuptial settlement is either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud. 4 Mas. C. C. 443; 2 Bail. So. C. 477. The latter, or when made without consideration, if *bonâ fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts and situation into consideration, is valid. 4 Mas. C. C. 443. See 4 Dall. 304; SETTLEMENT; VOLUNTARY CONVEYANCE.

POST OBIT (Lat.). An agreement by which the obliger borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person from whom he has some expectation, if the obliger be then living. 7 Mass. 119; 6 Madd. Ch. 111; 5 Ves. Ch. 57; 19 *id.* 628.

Equity will, in general, relieve a party from these unequal contracts, as they are fraudulent on the ancestor. See 1 Story, Eq. Jur. § 342; 2 P. Will. 182; 2 Sim. Ch. 183, 192; 5 *id.* 524. But relief will be granted only on equitable terms; for he who seeks equity must do equity. 1 Fonblanque, Eq. b. 1, c. 2, § 13, note p; 1 Story, Eq. Jur. § 344. See CATCHING BARGAIN; MACEDONIAN DECREE.

POST-OFFICE. An office for the receipt and delivery of the mail.

The constitution has vested in congress the power to establish post-offices and post-roads. Art. 1, § 8, n. 7. By virtue of this authority, several acts have been passed, the more important of which are those of March 3, 1825, 4 U. S. Stat. at Large, 102; July 2, 1836, 5 U. S. Stat. at Large, 84; March 3, 1851, 9 U. S. Stat. at Large, 593; March 3, 1853, 11 U. S. Stat. at Large, 255; March 3, 1863. Such existing roads as are adapted for the purpose are selected by congress as post-roads; and new ones are seldom constructed, though they have been made by express authority. Story, Const. § 1133.

POSTAGE. The money charged by law for carrying letters, packets, and documents by mail.

2. The rates of postage between places in the United States are fixed expressly by law; the rates of postage upon foreign letters are fixed by arrangements entered into by the postmaster-general, in pursuance of authority vested in him by congress for that purpose.

All mailable matter is divided into three classes: *letters*, embracing all correspondence wholly or partly in writing, except that mentioned in the third class; *regular printed matter*, embracing all mailable matter exclusively in print and regularly issued at stated periods, without addition by writing, mark, or sign, see 12 How. 284; 4 Opin. Atty.-Genl. 10; *miscellaneous matter*, embracing all other matter which is or may hereafter be by law declared mailable, including pamphlets, occasional publications, books, book-manuscripts, and proof-sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, phonographic paper, letter envelopes, postal envelopes or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions.

3. The rate of postage on all domestic mailable matter, wholly or partially in writing, or so marked as to convey any other or further intelligence or information than is conveyed in the original print, in the case of printed matter, or which is sent in violation of law or regulations of the department touching the inclosure of matter which may be sent at less than letter rates, and on all matter introduced into the mails not otherwise provided for, excepting manuscript and corrected proof passing between authors and publishers, and memorandums of the expiration of subscriptions, receipts and bills for subscription, inclosed with or printed on regular publications by the publishers, is three cents for a half-ounce or less avoirdupois, and three cents additional for each additional half-ounce or fraction.

The postage on all letters not transmitted through the mails but delivered through the post-office or by its carriers is two cents for a half-ounce or less, and an additional rate for each additional half-ounce or fraction thereof.

4. The postage on all transient mailable matter of the second class, and on all miscellaneous mailable matter of the third class, except circulars and books, is two cents for each four ounces or fraction thereof contained in any one package to one address. Double these rates are to be charged for books. Unsealed circulars, three in number, pass for two cents, and a proportionate rate for a greater number, adding one rate for every three or fraction thereof.

The postage on all mailable matter of the second class is, upon newspapers and periodicals issued weekly, five cents a quarter, if weighing four ounces or less, and five cents for each additional four ounces; and an additional five cents for each issue in a week. If issued less frequently than once a week, one cent for each paper or periodical weighing four ounces or less, and an additional rate for each additional four ounces or fraction.

5. Authority to frank mail-matter is conferred on the president of the United States, by himself or private secretary; the vice-president of the United States; the chiefs of the several executive departments; such principal officers, being heads of bureaus or chief clerks of each executive department, to be used only for official communications, as the postmaster-general shall by regulation designate; senators and representatives in congress, including delegates from the territories, the secretary of the senate, and clerk of the house of representatives, to cover correspondence to and from them, all matter printed by authority of congress, speeches, proceedings, and debates in congress, and all printed matter sent to them, commencing with the term for which they are elected, and expiring on the first Monday of December following such term; all official communications addressed to either of the executive departments by an officer responsible to that department, bearing on the outside the term "official" and the signature of the officer; postmasters, for their official communications to other postmasters; petitions to either branch of congress.

POSTAGE-STAMPS. The act of congress approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster-general be authorized to prepare postage-stamps, which when attached to any letter or packet shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any postage-stamp, with the intent to defraud the post-office department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage-stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence; to be recovered, in the name of the United States, in any court of competent jurisdiction. See, also, Act of Mar. 3, 1851, 9 U. S. Stat. at Large, 589; Act of Aug. 31, 1852, 10 U. S. Stat. at Large, 141. It is made penal to sell stamps or stamped envelopes for a larger sum than that indicated on the stamp or than is charged by the department. Act of Mar. 3, 1855, 10 U. S. Stat. at Large, 642.

POSTEA (Lat. afterwards). **In Practice.** The indorsement, on the *nisi prius* record purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record.

2. It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it

also states the appearance of the parties by their respective attorneys, or their defaults, and the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers-by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages, with the occasion thereof, together with the costs.

3. These are the usual matters of fact contained in the *postea;* but it varies with the description of the action. See Lee, Dict. *Postea;* 2 Lilly, Abr. 337; 16 Viner, Abr. 465; Bacon, Law Tr. 127.

When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the postea is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given there is just cause to question its validity: in such case the postea remains in the custody of the court. Eunomus, Dial. 2, § 33, p. 116.

POSTERIORES (Lat.). This term was used by the Romans to denote the descendants in a direct line beyond the sixth degree. It is still used in making genealogical tables.

POSTERIORITY. Being or coming after. It is a word of comparison, the correlative of which is *priority:* as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. Coke, 2d Inst. 392.

These terms, priority and posteriority, are also used in cases of liens: the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

POSTERITY. All the descendants of a person in a direct line.

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother.

Posthumous children are considered as living after the death of the parent, in *Delaware,* Rev. Code (1852), c. 85, § 2; *Illinois,* 2 Comp. Stat. (1858) 1200; *Indiana,* 1 Rev. Stat. c. 52, p. 248; *Kentucky,* Rev. Stat. (1852) 280; *Maryland,* 1 Dorsey, Laws, 747; *Massachusetts,* Gen. Stat. c. 81, § 12; *Minnesota,* Comp. Stat. (1858) 413; *New Jersey,* Nixon, Dig. (1855) 196; *New York,* 2 Rev. Stat. 160, § 18; *North Carolina,* Rev. Code (1854), 249; 8 Ired. No. C. 374; *Ohio,* Rev. Stat. (1854) c. 36, § 19; *Pennsylvania,* Purdon, Dig. (1857) 454; *Tennessee,* Code (1858), p. 478, § 2424; *Virginia,* Code (1849), p. 23; *Wisconsin,* Rev. Stat. (1858) c. 92, § 12. The provision is limited to children of the intestate, in *Alabama,* Code (1852), § 1577; *Arkansas,* Dig. Stat. (1858) c. 56, § 2; *Missouri,* 1 Rev. Stat. (1855) c. 54, § 2; *Texas,* Oldham & W. Dig. (1858) p. 99.

The issue of marriages deemed null in law, or dissolved by a court, are nevertheless declared legitimate in *Arkansas,* Dig. Stat. (1858) c. 56, § 5; *California,* Wood, Dig. (1858) 424; *Missouri,* 1 Rev. Stat. (1855) c. 54, § 11; *Ohio,* Rev. Stat. (1854) c. 36, § 16; *Virginia,* Code (1849), 523. See 2 Washburn, Real Prop. 413, 439; 4 Kent, Comm. 412; 7 Ga. 535; 12 Miss. 99.

When a father makes a will without providing for a posthumous child, the will is generally considered as revoked *pro tanto.* 2 Washburn, Real Prop. 699; 4 Kent, Comm. 412, 521, n., 525.

POSTMAN. A senior barrister in court of exchequer, who has precedence in motions: so called from place where he sits. 2 Sharswood, Blackst. Comm. 28; Wharton, Dict. A letter-carrier. Webster, Dict.

POSTMASTER. An officer who keeps a post-office, attending to the receipt, forwarding, and delivery of letters and other matter passing through the mail.

2. Postmasters must reside within the delivery for which they are appointed. For those offices where the salary or compensation is less than a thousand dollars a year, the postmaster-general appoints; where it is more, the president. They must give bond to the United States of America, see 19 How. 73; Gilp. Dist. Ct. 54; which remains in force, for suit upon violation during the term, 1 Woodb. & M. C. C. 150, for two years after the expiration of the term of office. 7 How. 681.

Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed, to receive the mails, and deliver, at all reasonable hours, all letters, papers, and packets to the persons entitled thereto.

3. Although not subject to all the responsibilities of a common carrier, yet a postmaster is liable for all losses and injuries occasioned by his own default in office. 3 Wils. 443; Cowp. 754; 5 Burr. 2709; 1 Bell, Comm. 468; 2 Kent, Comm. 474; Story, Bailm. § 463.

Whether a postmaster is liable for the acts of his clerks or servants seems not to be settled. 1 Bell, Comm. 468. In Pennsylvania it has been decided that he is not responsible for their secret delinquencies; though perhaps he is answerable for want of attention to the official conduct of his subordinates. 8 Watts, Penn. 453.

POSTMASTER-GENERAL. The chief officer of the post-office department of the executive branch of the government of the United States.

His duties, in brief, are, among other things, to establish post-offices and appoint postmasters, see POSTMASTER, at convenient places upon the post-roads established by law; to give instructions for conducting the business of the department; to provide for the carriage of the mails; to obtain from

the postmasters balances due, with accounts and vouchers of expenses; to pay the expenses of the department, see 15 Pet. 377; to prosecute offences, and, generally, to superintend the business of the department in all the duties assigned to it. He is assisted by three assistants and a large corps of clerks,—the three assistants being appointed by the president. He must make five several reports annually to congress, relating chiefly to the financial management of the department, with estimates of the expenses of the department for the ensuing year. He is a member of the cabinet.

POSTNATI (Lat.). Those born after. Applied to American and British subjects born after the separation of England and the United States; also to the subjects of Scotland born after the union of England and Scotland. Those born after an event, as opposed to *antenati*, those born before. 2 Kent, Comm. 56–59; 2 Pick. Mass. 394; 5 Day, Conn. 169*. See ANTENATI.

POSTULATIO (Lat.). **In Roman Law.** The name of the first act in a criminal proceeding.

2. A person who wished to accuse another of a crime appeared before the prætor and requested his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant (*calumnium jurabat*) made oath that he was not influenced by a spirit of calumny, but acted in good faith with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

3. Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem*, and were denominated *subscriptores*. Cic. in Cæcil. Divin. 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only one accuser, however, was allowed to act; and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. i. 6. The preliminary proceeding was called *divinatio*, and is well explained in the oration of Cicero entitled Divinatio. See Aulus Gellius, Att. Noct. lib. ii. cap. 4.

4. The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribebant*. This proceeding corresponds to the indictment of the common law.

5. If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied it, the *inscriptio* contained his answer, and he was then *in reatu* (indicted, as we should say), and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs; although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

6. At the day appointed for the trial, the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case was erased from the roll. If the accused made default, he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex quæstionis*. The jury was called *jurati homines*, and the drawing of them *sortitio*, and they were taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn; and then there was a second drawing, called *subsortitio*, to complete the number.

7. In some tribunals *quæstiones* (the jury) were *editi* (produced) in equal number by the accuser and the accused, and sometimes by the accuser alone, and were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to the tribunal (*quæstio*): they were sworn before the trial began. Hence they were called *jurati*.

The accusers, and often the *subscriptores*, were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several. The witnesses, who swore by Jupiter, gave their testimony after the discussions or during the progress of the pleadings of the accuser. In some cases it was necessary to plead the cause on the third day following the first hearing, which was called *comperendinatio*.

8. After the pleadings were concluded, the prætor or the *judex quæstionis* distributed tablets to the jury, upon which each wrote, secretly, either the letter A (*absolvo*), or the letter C (*condemno*), or N. L. (*non liquet*). These tablets were deposited in an urn. The president assorted and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *amplies*. Such, in brief, was the course of proceedings before the *quæstiones perpetuæ*.

The forms observed in the *comitia cen-*

turiata and *comitia tributa* were nearly the same, except the composition of the tribunal and the mode of declaring the vote.

POSTULATIO ACTIONIS (Lat.). **In Civil Law.** Demand of an action (*actio*) from the prætor, which some explain to be a demand of a *formula*, or form of the suit; others, a demand of leave to bring the cause before the judge. Taylor, Civ. Law, 80; Calvinus, Lex. *Actio*.

POT-DE-VIN. In French Law. A sum of money frequently paid, at the moment of entering into a contract, beyond the price agreed upon.

It differs from *arrha* in this, that it is no part of the price of the thing sold, and that the person who has received it cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract. 18 Toullier, n. 52.

POTENTATE. One who has a great power over an extended country; a sovereign.

By the naturalization laws of the United States, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

POTESTAS (Lat.). **In Civil Law.** Power; authority; domination; empire. *Imperium*, or the jurisdiction of magistrates. The power of the father over his children, *patria potestas*. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1. 9. 12; Dig. 2. 1. 13. 1; 14. 1; 14. 4. 1. 4.

POUND. A place, enclosed by public authority, for the temporary detention of stray animals. 4 Pick. Mass. 258; 5 *id.* 514; 9 *id.* 14.

Weights. There are two kinds of weights, namely, the troy and the avoirdupois. The pound avoirdupois is greater than the troy pound in the proportion of seven thousand to five thousand seven hundred and sixty. The troy pound contains twelve ounces, that of avoirdupois sixteen ounces.

Money. The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money: it was of different value in the several states.

Pound sterling is a denomination of money of Great Britain. It is of the value of a *sovereign* (q. v.). In calculating the rates of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty cents. Act of March 3, 1833.

The pound sterling of *Ireland* is to be computed, in calculating said duties, at four dollars and ten cents. *Id.*

The pound of the *British provinces of Nova Scotia, New Brunswick, Newfoundland, and Canada* is to be so computed at four dollars. Act of May 22, 1846.

POUND-BREACH. The offence of breaking a pound in order to take out the cattle impounded. 3 Sharswood, Blackst. Comm. 146 The writ *de parco fracto*, or pound-breach, lies for recovering damages for this offence; also case. *Id.* It is also indictable.

POUNDAGE. In Practice. The amount allowed to the sheriff, or other officer, for commissions on the money made by virtue of an execution. This allowance varies in different states and to different officers.

POURPARLER. In French Law. The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pardessus, Dr. Com. 142.

POURSUIVANT. A follower; a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council-table, exchequer, in his court, etc., to be sent as a messenger. A poursuivant was, therefore, a messenger of the king.

POWER. The right, ability, or faculty of doing something.

Technically, an authority by which one person enables another to do some act for him. 2 Lilly, Abr. 339.

DERIVATIVE POWERS are those which are received from another. This division includes all the powers technically so called. They are of the following classes:

Coupled with an interest, being a right or authority to do some act, together with an interest in the subject on which the power is to be exercised. *Marshall*, C. J., 8 Wheat. 203.

A power of this class survives the person creating it, and, in case of an excess in execution, renders the act valid so far as the authority extends, leaving it void as to the remainder only. It includes powers of sale conferred on a mortgagee.

Naked, being a right of authority disconnected from any interest of the donee in the subject-matter. 3 Hill, N. Y. 365.

INHERENT POWERS. Those which are enjoyed by the possessors of natural right, without having been received from another. Such are the powers of a people to establish a form of government, of a father to control his children. Some of these are regulated and restricted in their exercise by law, but are not technically considered in the law as powers.

The person bestowing a power is called the *donor;* the person on whom it is bestowed is called the *donee*. See CONTRACT; AGENT; AGENCY.

Powers under the Statute of Uses. An authority enabling a person, through the medium of the Statute of Uses, to dispose of an interest in real property, vested either in himself or another person.

Methods of causing a use, with its accompanying estate, to spring up at the will of a given person. Williams, Real Prop. 245; 2 Washburn, Real Prop. 300.

The right to designate the person who is to take a use. Coke, Litt. 271 *b*, Butler's note, 231, § 3, pl. 4.

A right to limit a use. 4 Kent, Comm. 334.

An authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. N. Y. Rev. Stat.

They are distinguished as—

Appendant. Those which the donee is authorized to exercise out of the estate limited to him, and which depend for their validity upon the estate which is in him. 2 Washburn, Real Prop. 304. A life-estate limited to a man, with a power to grant leases in possession, is an example. Hardr. 416; 1 Caines, Cas. N. Y. 15; Sugden, Pow. ed. 1856, 107; Burton, Real Prop. § 179.

Of appointment. Those which are to create new estates. Distinguished from powers of revocation.

Collateral. Those in which the donee has no estate in the land. 2 Washburn, Real Prop. 305.

General. Those by which the donee is at liberty to appoint to whom he pleases.

In gross. Those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. 2 Cow. N. Y. 236; Tudor, Lead. Cas. 293; Watkins, Conv. 260.

Of revocation. Those which are to divest or abridge an existing estate. Distinguished from those of appointment; but the distinction is of doubtful exactness, as every new appointment must divest or revoke a former use. Sanders, Uses, 154.

As to the effect of the insertion of a power of revocation, either single or in connection with one of appointment, see Styles, 389; 2 Washburn, Real Prop. 307.

Special. Those in which the donee is restricted to an appointment to or among particular objects only. 2 Washburn, Real Prop. 307.

The person who receives the estate by appointment is called the appointee; the donee of the power is sometimes called the appointor.

2. *The creation* of a power may be by *deed* or *will*, 2 Washburn, Real Prop. 314; by *grant* to a grantee, or *reservation* to the grantor, 4 Kent, Comm. 319; and the reservation need not be in the same instrument, if made at the same time, 1 Sugden, Pow. ed. 1856, 158; by *any form of words* indicating an intention. 2 Washburn, Real Prop. 315. The doubt whether a power is created or an estate conveyed can, in general, exist only in cases of wills, 2 Washburn, Real Prop. 316, and in any case is determined by the intention of the grantor or devisor, as expressed in or to be gathered from the whole will or deed, 10 Pet. 532; 8 How. 10; 3 Cow. N. Y. 651; 7 *id.* 187; 6 Johns. N. Y. 73; 6 Watts, Penn. 87; 4 Bibb, Ky. 307. It must be limited to be executed, and must be executed within the period fixed by the rules against perpetuities. 2 Ves. Sen. Ch. 61, s. c.; 1 Ed. 404, s. c.; 5 Brown, Parl. Cas. 592; 2 Ves. Ch. 368; 13 Sim. Ch. 393; Lewis, Perpet. 483–485.

The interest of the donee is not an estate, Watkins, Conv. 271; 2 Preston, Abstr. 275; N. Y. Rev. Stat. art. 2, § 68; but is sufficient to enable the donee to act, if the intention of the donor be clear, without words of inheritance, 3 Ves. Ch. 467; 1 Mod. 190; 1 P. Will. Ch. 171; 7 Johns. Ch. N. Y. 34; see Coke, Litt. 271 *b*, Butler's note, 231; and may coexist with the absolute fee in the donee. 10 Ves. Ch. 255–257; 4 Greenleaf, Cruise, Dig. 241, n. A power to sell does not include a power to mortgage, 3 Hill, N. Y. 361; and sale generally means a cash sale. 4 Kent, Comm. 331; 3 Hill, N. Y. 373.

As to exercising the power: if it be simply one in which no person is interested but the donee, it is a matter of election on his part whether to exercise it or not, 1 Sugden, Pow. ed. 1856, 158; see § **3**, beyond; but if coupled with a trust in which other persons are interested, equity will compel an execution. Story, Eq. Jur. § 1062; 2 Mas. C. C. 244, 251.

3. *The execution* must be in the manner prescribed, by the proper person, see Appointment, and cannot be by an assignee, 2 Washburn, Real Prop. 321, unless authorized by the limitation, 4 Cruise, Dig. 211, or unless an interest be coupled with the power, 2 Cow. N. Y. 236; 8 Wheat. 203; nor by a successor, as on the death of an executor. 12 Metc. Mass. 220. See 1 Bail. Eq. So. C. 392; 6 Rand. Va. 593. As to whether a sale by a donee who has also an estate in the land is held to be an execution of the power, see 2 Washburn, Real Prop. 325; Tudor, Lead. Cas. 306; 1 Atk. 440; 5 Barnew. & C. 720; 6 Coke, 18; 8 Watts, Penn. 203; 16 Penn. St. 25.

Where an exact execution is impossible under authority of court, it may be executed as near as may be (*cy-près*) to carrying out the donor's intention. 2 Term, 241; 4 Ves. Ch. 681; 5 Sim. Ch. 632; 3 Wash. C. C. 12.

It must be made at a proper time, and, where several powers are given over different parts of the same estate, in proper succession. 1 Coke, 174; 1 W. Blackst. 281.

Equity will compel the donee to execute a power where it is coupled with a trust in which other persons are interested, Story, Eq. Jur. § 1062, and to correct a formal defect in the manner of execution. Ambl. 687; 2 P. Will. 489, 622; 2 Mas. C. C. 251; 3 Edw. Ch. N. Y. 175.

4. *The suspension or destruction* of a power may sometimes happen by a release by the donee, by an alienation of his estate, by his death, and by other circumstances.

An appendant power may be suspended by a conveyance of his interest by the donee, 4 Cruise, Dig. 221; Dougl. 477; Croke Car. 472; 4 Bingh. N. C. 734; 2 Cow. N. Y. 237; and may be extinguished by such conveyance, 2 Barnew. & Ald. 93; 10 Ves. Ch. 246, or by a release. 1 Russ. & M. 431, 436, n.; 1 Coke, 102 *b*; 2 Washburn, Real Prop. 308.

A power in gross may be released to one having the freehold in possession, reversion, or remainder, and not by any other act of

the donee. Tudor, Lead. Cas. 294; Burton, Real Prop. § 176; Chance, Pow. § 3172; Hardr. 416; 1 P. Will. Ch. 777.

A collateral power cannot be suspended or destroyed by act of the donee. F. Moore, 605; 5 Mod. 457. And see 1 Russ. & M. Ch. 431; 13 Metc. Mass. 220.

Impossibility of immediate vesting in interest or possession does not suspend or extinguish a power. 2 Bingh. 144.

Consult Burton, Labor, Flintoff, Washburn, Williams, Real Property; Chance, Sugden, Powers; Fearne, Contingent Remainders; Tudor, Leading Cases; Cruise, Digest, Greenleaf's ed.; Gilbert, Sugden's ed.; Sanders, Uses; Kent, Commentaries; Watkins, Conveyancing.

POWER OF ATTORNEY. An instrument authorising a person to act as the agent or attorney of the person granting it.

A *general* power authorizes the agent to act generally in behalf of the principal.

A *special* power is one limited to particular acts.

It may be parol or under seal. 1 Parsons, Contr. 94. The attorney cannot, in general, execute a sealed instrument so as to bind his principal, unless the power be under seal. 7 Term, 259; 2 Bos. & P. 338; 5 Barnew. & C. 355; 2 Me. 358. See 7 Mees. & W. Exch. 322, 331; 7 Cranch, 299; 4 Wash. C. C. 471; 19 Johns. N. Y. 60; 2 Pick. Mass. 345.

Powers of attorney are strictly construed. 6 Cush. Mass. 117; 5 Wheat. 326; 3 Mees. & W. Exch. 402; 8 *id.* 806; 5 Bingh. 442. General terms used with reference to a particular subject-matter are presumed to be used in subordination to that matter. 1 Taunt. 349; 7 Barnew. & C. 278; 1 Younge & C. Exch. 394; 7 Mees. & W. Exch. 595; 5 Den. N. Y. 49; 7 Gray, Mass. 287. See, as to a power to collect a debt, 1 Blackf. Ind. 252; to settle a claim, 5 Mees. & W. Exch. 645; 8 Blackf. Ind. 291; to make an adjustment of all claims, 8 Wend. N. Y. 494; 7 Watts, Penn. 716; 14 Cal. 399; 7 Ala. N. s. 800; to accept bills, 7 Barnew. & C. 278.

PRACTICE. The form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts. In a popular sense, the business which an attorney or counsellor does: as, A B has a good practice.

2. The books on practice are very numerous: among the most popular are those of Tidd, Chitty, Archbold, Sellon, Graham, Dunlap, Caines, Troubat & Haly, Blake, Impey, Daniell, Benedict, Colby, Curtis, Hall, Law.

A settled, uniform, and long-continued practice, without objection, is evidence of what the law is; and such practice is based on principles which are founded in justice and convenience. 2 Russ. 19, 570; 2 Jac. 232; 5 Term, 380; 1 Younge & J. Exch. 167, 168; 2 Crompt. & M. Exch. 55; Ram, Judgm. c. 7.

3. With respect to criminal practice, it was forcibly remarked by a learned judge, in a recent case, that even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament. Per *Maule*, J., 8 Scott, N. C. 599, 600.

PRACTICE COURT. In English Law. A court attached to the court of king's bench, which hears and determines common matters of business and ordinary motions for writs of mandamus, prohibition, etc.

It was formerly called the bail court. It is held by one of the puisne justices of the king's bench.

PRACTICES. A succession of acts of a similar kind or in a like employment. Webst.

PRÆCEPTORES (Lat.). Heretofore masters in chancery were so called, as having the direction of making out remedial writs. Fleta, 76; 2 Reeve, Hist. Eng. Law, 251. A species of benefice, so called from being possessed by the principal templars (*præceptores templi*), whom the chief master by his authority created. 2 Mon. Ang. 543.

PRÆCIPE, PRECIPE (Lat.). A slip of paper upon which the particulars of a writ are written. It is lodged in the office out of which the required writ is to issue. Wharton, Dict. 2d Lond. ed.

PRÆCIPE QUOD REDDAT (Lat.). Command him to return. An original writ, of which *præcipe* is the first word, commanding the person to whom it is directed to do a thing or to show cause why he has not done it. 3 Sharswood, Blackst. Comm. 274; Old Nat. Brev. 13. It is as well applied to a writ of right as to other writs of entry and possession.

PRÆDA BELLICA (Lat.). Booty. Property seized in war.

PRÆDIA (Lat.). **In Civil Law.** Lands.

Prædia urbana, those lands which have buildings upon them and are in the city.

Prædia rustica, those lands which are without buildings or in the country. Voc. Jur. Utr.

It indicates a more extensive domain than *fundus*. Calvinus, Lex.

PRÆDIAL. That which arises immediately from the ground: as, grain of all sorts, hay, wood, fruits, herbs, and the like.

PRÆDIUM DOMINANS (Lat. the ruling estate). **In Civil Law.** The name given to an estate to which a servitude is due: it is called the ruling estate.

PRÆDIUM RUSTICUM (Lat. a country estate). **In Civil Law.** By this is understood all heritages which are not destined for the use of man's habitation: such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

PRÆDIUM SERVIENS (Lat.). **In Civil Law.** The name of an estate which suffers or yields a service to another estate.

PRÆDIUM URBANUM (Lat.). **In Civil Law.** By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities or whether they be constructed in the country.

PRÆFECTUS VIGILIUM (Lat.). **In Roman Law.** The chief officer of the night-watch. His jurisdiction extended to certain offences affecting the public peace, and even to larcenies. But he could inflict only slight punishments.

PRÆMUNIRE (Lat.). In order to prevent the pope from assuming the supremacy in granting ecclesiastical livings, a number of statutes were made in England, during the reigns of Edward I. and his successors, punishing certain acts of submission to the papal authority therein mentioned. In the writ for the execution of these statutes, the words *præmunire facias*, being used to command a citation of the party, gave not only to the writ, but to the offence itself of maintaining the papal power, the name of *præmunire*. Coke, Litt. 129; Jacob, Law Dict.

PRÆSUMPTIO JURIS (Lat.). **In Roman Law.** A deduction from the existence of one fact as to the existence of another which admits of proof to the contrary. A rebuttable presumption. An intendment of law which holds good until it is weakened by proof or a stronger presumption. Best, Presump. 29.

PRÆSUMPTIO JURIS ET DE JURE (Lat.). **In Roman Law.** A deduction drawn, by reason of some rule of law, from the existence of one fact as to the existence of another, so conclusively that no proof can be admitted to the contrary. A conclusive presumption.

PRÆTOR. In Roman Law. A municipal officer of Rome, so called because (*præiret populo*) he went before or took precedence of the people.

2. The consuls were at first called *prætors*. Liv. Hist. iii. 55. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to the forms or formalities of legal proceedings. Ordinarily, he did not decide causes as a judge, but prepared the grounds of decision for the judge, and sent to him the questions to be decided between the parties. The judge was always chosen by the parties, either directly, or by rejecting, under certain rules and limitations, the persons proposed to them by the *prætor*. Hence the saying of Cicero (*pro Cluentio*, 43) that no one could be judged except by a judge of his own choice. There were several kinds of officers called prætors. See Vicat, Voc.

3. Before entering on his functions, he published an edict announcing the system adopted by him for the application and interpretation of the laws during his magistracy. His authority extended over all jurisdictions, and was summarily expressed by the words *do, dico, addico*, i.e. *do* I give the action, *dico* I declare the law, I promulgate the edict, *addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assisted by a council chosen by himself,—perhaps the *decemviri*. But the greater part of causes brought before him he sent either to a judge, an arbitrator, or to recuperators (*recuperatores*), or to the centumvirs, as before stated. Under the empire, the powers of the prætor passed by degrees to the prefect of the *prætorium* or the prefect of the city: so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

Till lately, there were officers in certain cities of Germany denominated prætors. See 1 Kent, Comm. 528.

PRAGMATIC SANCTION. In French Law. An expression used to designate those ordinances which concern the most important object of the civil or ecclesiastical administration. Merlin, Répert; 1 Fournel, Hist. des Avocats, 24, 38, 39.

In Civil Law. The answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province or of a municipality, was called a pragmatic sanction. Leçons Él. du Dr. Civ. Rom. § 53. This differed from a rescript.

PRAYER. In Equity Practice. The request in a bill that the court will grant the aid which the petitioner desires. That part of the bill which asks for relief. The word denotes, strictly, the request, but is very commonly applied to that part of the bill which contains the request.

2. Of Process. That part of the bill which asks that the defendant may be compelled to appear and answer the bill, and abide the determination of the court upon the subject.

It must contain the names of all the parties, 1 P. Will. 593; 2 Dick. Ch. 707; 2 Johns. Ch. N. Y. 245; Cooper, Eq. Plead. 16, although they are out of the jurisdiction, 1 Beav. Rolls, 106; Smith, Chanc. Pract. 45; Mitford, Eq. Plead. Jeremy ed. 164. The ordinary process asked for is a writ of subpœna, Story, Eq. Plead. § 44; and in case a distringas against a corporation, Cooper, Eq. Plead. 16, or an injunction, 2 Sim. & S. Ch. 219; 1 Sim. Ch. 50, is sought for, it should be included in the prayer.

3. For Relief, is *general*, which asks for such relief as the court may grant; or *special*, which states the particular form of relief desired. A special prayer is generally inserted, followed by a general prayer. 4 Madd. Ch. 408; 5 Ves. Ch. 495; 13 *id.* 119; 2 Pet. 595; 16 *id.* 195; 23 Vt. 247; 6 Gill, Md. 105; 25 Mo. 153; 10 Rich. Eq. 53; 7 Ind. 661; 15 Ark. 555. Unless the general prayer is added, if the defendant fails in his special prayer he will not be entitled to any relief, 2 Atk. Ch. 2; 1 Ves. Ch. 426; 12 *id.* 62; 3 Wooddeson, Lect. 55; 2 R. I. 129; 4 *id.* 173; 15 Ala. 9, except in case of charities and bills in behalf of infants. 1 Atk. Ch. 6, 355; 1 Ves. Ch. 418; 18 *id.* 325; 1 Russ. Ch. 235; 2 Paige, Ch. N. Y. 396.

4. A general prayer is sufficient for most purposes; and the special relief desired may be prayed for at the bar, 4 Madd. Ch. 408;

2 Atk. Ch. 3, 141; 1 Edw. Ch. 26; Story, Eq. Plead. § 41; 31 N. H. 193; 2 Paine, C. C. 11; 3 Md. Ch. Dec. 140, 466; 9 How. 390; 9 Mo. 201; 9 Gill & J. Md. 80; see 13 Penn. St. 67; but where a special order and provisional process are required, founded on peculiar circumstances, a special prayer therefor is generally inserted. 6 Madd. Ch. 218; Hinde, Chanc. Pract. 17; 3 Ind. 419.

5. Such relief, and such only, will be granted, either under a special prayer, whether at bar, 3 Swanst. Ch. 208; 2 Ves. Ch. 299; 3 *id.* 416; 4 Paige, Ch. N. Y. 229; 25 Me. 153; 30 Ala. N. s. 416; 32 *id.* 508, or in the bill, 16 Tex. 399; 18 Ga. 492; 21 Penn. St. 131, or under a general prayer, as the case as stated will justify, 7 Ired. Eq. No. C. 80; 4 Sneed, Tenn. 623; 18 Ill. 142; 5 Wisc. 117, 424; 24 Mo. 31; 7 Ala. N. s. 193; 16 *id.* 793; 13 Ark. 183; 3 Barb. Ch. N. Y. 613; 3 Gratt. Va. 518; 9 How. 390; and a bill framed apparently for one purpose will not be allowed to accomplish another, to the injury of the defendant. 16 Tex. 399; 21 Penn. St. 131; 6 Wend. N. Y. 63. See 13 Gratt. Va. 653.

6. And, generally, the decree must conform to the allegations and proof. 7 Wheat. 522; 10 *id.* 181; 19 Johns. N. Y. 496; 2 Harr. Ch. Mich. 401; 1 Harr. & G. Md. 11; 12 Leigh, Va. 69; 1 Ired. Eq. No. C. 83; 5 Ala. 243; 8 *id.* 211; 14 *id.* 470; 6 Ala. N. s. 518; 4 Bibb, Ky. 376; 5 Day, Conn. 223; 13 Conn. 146. But a special prayer may be disregarded, as the allegations warrant under the general prayer, 15 Ark. 555; 4 Tex. 20; 2 Cal. 269; 22 Ala. N. s. 646; 8 Humphr. Tenn. 230; 1 Blackf. Ind. 305, that the relief granted must be consistent with the special prayer. 27 Ala. 507; 21 Penn. St. 131; 1 Jones, Eq. No. C. 100; 2 Ga. 413; 14 *id.* 52; 1 Edw. Ch. N. Y. 654; 9 Gill & J. Md. 80; 4 Des. Eq. So. C. 530; 9 Yerg. Tenn. 301; 1 Johns. Ch. N. Y. 111; 15 Ala. 9.

PREAMBLE. An introduction prefixed to a statute, reciting the intention of the legislature in framing it, or the evils which led to its enactment.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. Coke, 4th Inst. 330; 6 Pet. 301. In modern legislative practice, preambles are much less used than formerly, and in some of the United States are rarely, if ever, now inserted in statutes. In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute. Dwarris, Stat. 504–508. Nor can it by implication enlarge what is expressly fixed. 1 Story, Const. b. 3, c. 6; 3 M'Cord, So. C. 298; 15 Johns. N. Y. 89; Busb. No. C. 131; Dav. Dist. Ct. 38.

A recital inserted in a contract for the purpose of declaring the intention of the parties.

How far a preamble is evidence of the facts it recites, see 4 Maule & S. 532; 1 Phillipps, Ev. 239; 2 Russell, Crimes, 720. And see, generally, Erskine, Inst. 1. 1. 18; Toullier, l. 3, n. 318; 2 Belt, Suppl. Ves. Ch. 239; 4 La. 55; Barrington, Stat. 353, 370.

PREBEND. In Ecclesiastical Law. The stipend granted to an ecclesiastic, in consideration of officiating in the church. It is in this distinguished from a canonicate, which is a mere title and may exist without stipend. The prebend may be a simple stipend, or a stipend with a dignity attached to it, in which case it has some jurisdiction belonging to it. 2 Burn, Eccl. Law, 88; Strange, 1082; 1 Term, 401; 2 *id.* 630; 1 Wils. 206; Dy. 273 *a*; 7 Barnew. & C. 113; 8 Bingh. 490; 5 Taunt. 2.

PRECARIOUS RIGHT. The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

If there is a time fixed during which the right may be used, it is then vested for that time, and cannot be revoked until after its expiration. Wolff, Inst. § 333.

PRECARIUM (Lat.). The name of a contract among civilians, by which the owner of a thing, at the request of another person, gives him a thing to use as long as the owner shall please. Pothier, n. 87. See Yelv. 172; Croke Jac. 236; 9 Cow. N. Y. 687; Rolle, 128; Bacon, Abr. *Bailment* (C); Erskine, Inst. 3. 1. 9; Wolff, Ins. Nat. § 333.

A tenancy at will is a right of this kind.

PRECATORY WORDS. Expressions in a will praying or requesting that a thing shall be done.

2. Although recommendatory words used by a testator, of themselves, seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish, or desire, that the devisee shall do certain things for the benefit of another person, yet courts of equity have construed such precatory expressions as creating a trust. 8 Ves. Ch. 380; 18 *id.* 41; Bacon, Abr. *Legacies* (B).

3. But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach is not sufficiently defined. 1 Brown, Ch. 142; 1 Sim. Ch. 542, 556. See 2 Story, Eq. Jur. § 1070; Lewin, Trusts, 77; 4 Bouvier, Inst. n. 3953.

PRECEDENCE. The right of being first placed in a certain order,—the first rank being supposed the most honorable.

In this country no precedence is given by law to men.

Nations, in their intercourse with each other, do not admit any precedence: hence, in their treaties, in one copy one is named first, and the other in the other. In some cases of officers when one must of necessity act as the chief, the oldest in commission

will have precedence: as, when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

In the army and navy there is an order of precedence which regulates the officers in their command.

PRECEDENTS. In Practice. Legal acts or instruments which are deemed worthy to serve as rules or models for subsequent cases.

2. The word is similarly applied in respect to political and legislative action. In the former use, precedent is the appropriate word to designate an adjudged case which is actually followed or sanctioned by *a court* in subsequent cases. An adjudged case may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption; and one which is in fact disregarded is said never to have become a precedent. In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application. Hob. 270. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law. It is always safe to rely upon principles. See 16 Viner, Abr. 499; Weskett, Inst.; 2 Swanst. Ch. 163; 2 Jac. & W. Ch. 318; 3 Ves. Ch. 527; 2 Atk. Ch. 559; 2 P. Will. Ch. 258; 2 Brown, Ch. 86; 1 Ves. Ch. 11; 2 Evans, Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. See, also, 1 Kent, Comm. 475–477; Livermore, Syst. 104, 105; Gresley, Eq. Ev. 300; 16 Johns. N. Y. 402; 20 *id.* 722; Croke Jac. 527; 33 Hen. VII. 41; Jones, Bailm. 46; PRINCIPLE; REASON; STARE DECISIS.

3. According to Lord Talbot, it is "much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us." Cas. *temp.* Talb. 26. Blackstone, 1 Comm. 70, says that a former decision is, in general, to be followed, unless "manifestly absurd or unjust;" and in the latter case it is declared, when overruled, not that the former sentence was *bad law*, but that it was *not* law. If an adjudication is questioned in these respects, the degree of consideration and deliberation upon which it was made, 4 Coke, 94, the rank of the court, as of inferior or superior jurisdiction, which established it, and the length of time during which it has been acted on as a rule of property, are to be considered. The length of time which a decision has stood unquestioned is an important element; since, where a rule declared to be law, even by an inferior tribunal, has been habitually adopted and acted upon by the community, and becomes thus imbedded in the actual affairs of men, it is frequently better to enforce it as it is, instead of allowing it to be reexamined and unsettled. It is said that in order to give precedents binding effect there must be a current of decisions, Croke Car. 528; Croke Jac. 386; 8 Coke, 163; and even then, injustice in the rule often prevails over the antiquity and frequency of its adoption, and induces the court to overrule it. But this is to be very cautiously done where it is a rule of property, so that a departure from it would unjustly affect vested rights.

Written forms of procedure which have been sanctioned by the courts or by long professional usage, and are commonly to be followed, are designated precedents. Stephen, Plead. 392. And this term, when used as the title of a law-book, usually denotes a collection of such forms.

PRECEPT (Lat. *precipio*, to command). A writ directed to the sheriff, or other officer, commanding him to do something.

PRECINCT. The district for which a high or petty constable is appointed is, in England, called a precinct. Willcox, Const. xii.

In daytime, all persons are bound to recognize a constable acting within his own precinct; after night, the constable is required to make himself known; and it is, indeed, proper he should do so at all times, *Id.* n. 265, p. 93.

PRECIPUT. In French Law. An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common, by one having a right, before a partition takes place.

The preciput is an advantage or a principal part to which some one is entitled *præcipium jus*, which is the origin of the word preciput. Dalloz, Dict.; Pothier, Obl. By preciput is also understood the right to sue out the preciput.

PRECLUDI NON (Lat.). **In Pleading.** A technical allegation contained in a replication which denies or confesses and avoids the plea.

It is usually in the following form:—"And the said A B, as to the plea of the said C D, by him secondly above pleaded, says that he, the said A B, by reason of any thing by the said C D in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said C D, because he says that," etc. 2 Wils. 42; 1 Chitty, Plead. 573.

PRECOGNITION. In Scotch Law. The examination of witnesses who were present at the commission of a criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve for direction to the prosecutor. But the persons examined may insist on having their declaration cancelled before they give testimony at the trial. Erskine, Inst. 4. 4. n. 49.

PRECONTRACT. An engagement entered into by a person which renders him unable to enter into another: as, a promise or covenant of marriage to be had afterwards. When made *per verba de presenti*, it is in fact a marriage, and in that case the party making it cannot marry another person.

PREDECESSOR. One who has preceded another.

This term is applied in particular to corporators who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor that the ancestor does to the heir.

One who has filled an office or station before the present incumbent.

PRE-EMPTION. **In International Law.** The right of pre-emption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chitty, Com. Law, 103; 2 Sharswood, Blackst. Comm. 287.

This right is sometimes regulated by treaty. In that which was made between the United States and Great Britain, bearing date the 19th day of November, 1794, ratified in 1795, it was agreed, art. 18, after mentioning that the usual munitions of war, and also naval materials, should be confiscated as contraband, that "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so being contraband according to the existing laws of nations shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention." See Manning, Comm. b. 3, c. 8.

PRE-EMPTION-RIGHT. The right given to settlers upon the public lands of the United States to purchase them at a limited price in preference to others.

It gives a right to the actual settler who has entered and occupied without title, to obtain a title to a quarter-section at the minimum price fixed by law, upon entry in the proper office and payment, to the exclusion of all other persons. It is an equitable title, 15 Miss. 780; 9 Mo. 683; 15 Pet. 407; and does not become a title at law to the land till entry and payment. 2 Sandf. Ch. N. Y. 78; 11 Ill. 529; 15 *id.* 131. It may be transferred by deed, 9 Ill. 454; 15 *id.* 131, and descends to the heirs of an intestate. 2 Pet. 201; 12 Ala. N. s. 322. See 2 Washburn, Real Prop. 532.

PREFECT. **In French Law.** A chief officer invested with the superintendence of the administration of the laws in each department. Merlin, Répert.

PREFERENCE. The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. The right which a creditor has acquired over others to be paid first out of the assets of his debtor: as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

Voluntary preferences are forbidden by the insolvent-laws of some of the states, and are void when made in a general assignment for the benefit of creditors. See INSOLVENT; PRIORITY.

PREGNANCY. **In Medical Jurisprudence.** The state of a female who has within her ovary, or womb, a fecundated germ, which gradually becomes developed in the latter receptacle. Dunglison, Med. Dict. *Pregnancy.*

2. *The signs of pregnancy.* These acquire a great importance from their connection with the subject of *concealed*, and also of *pretended*, pregnancy. The first may occur in order to avoid disgrace, and to accomplish in a secret manner the destruction of offspring. The second may be attempted to gratify the wishes of a husband or relations, to deprive the legal successor of his just claims, to gratify avarice by extorting money, and to avoid or delay execution.

These signs and indications have a twofold division. *First*, those developed through the general system, and hence termed constitutional; *second*, those developed through the uterine system, termed local or sensible.

3. The first, or constitutional, indications regard—*first*, the mental phenomena, or change wrought in the temperament of the mother, evidenced by depression, despondency, rendering her peevish, irritable, capricious, and wayward; sometimes drowsiness and occasionally strange appetites and antipathies are present.

Second, the countenance exhibits languor, and what the French writers term decomposition of features,—the nose becoming sharper and more elongated, the mouth larger, the eyes sunk and surrounded with a brownish or livid areola, and having a languid expression.

Third, the vital action is increased; a feverish heat prevails, especially in those of full habit and sanguine temperament. The body, except the breasts and abdomen, sometimes exhibits emaciation. There are frequently pains in the teeth and face, heartburn, increased discharge of saliva, and costiveness.

4. *Fourth*, the mammary sympathies give enlargement and firmness to the breasts; but this may be caused by other disturbances of the uterine system. A more certain indication is found in the areola, which is the dark-colored circular disk surrounding the nipple. This, by its gradual enlargement, its constantly deepening color, its increasing organic action evidenced by its raised appearance, turgescence, and glandular follicles, is justly regarded as furnishing a very high degree of evidence.

Fifth, irritability of stomach, evidenced by sickness at the stomach, usually in the early part of the day.

Sixth, suppression of the menses, or monthly discharge arising from a secretion from the internal surface of the uterus. This suppression, however, may occur from diseases or from a vitiated action of the uterine system.

5. The *second*, termed *local* or *sensible* signs and indications, arise mainly from the development of the uterine system consequent upon impregnation. This has reference—

First, to the change in the uterus itself. The new principle introduced causes a determination of blood to that organ, which developes it first at its fundus, second in its body, and lastly in its cervix or neck. The latter constantly diminishes until it has become almost wholly absorbed in the body of the uterus. The os uteri in its unimpregnated state feels firm, with well-defined lips or margins. After impregnation the latter becomes tumid, softer, and more elastic, the orifice feeling circular instead of transverse.

Second, to the state of the umbilicus, which is first depressed, then pushed out to a level with the surrounding integuments, and at last, towards the close of the period, protruded considerably above the surface.

Third, to the enlargement of the abdomen. This commences usually by the end of the third month, and goes on increasing during the period of pregnancy. This, however, may result from morbid conditions not affecting the uterus, such as disease of the liver, spleen, ovarian tumor, or ascites.

6. *Fourth*, to quickening, as rendered evident by the fœtal motions. By the former we understand the feeling by the mother of the self-induced motion of the fœtus in utero, which occurs about the middle of the period of pregnancy. But as the testimony of the mother cannot be always relied upon, her interest being sometimes to conceal it, it is important to inquire what other means there may be of ascertaining it. These movements of the fœtus may sometimes be excited by a sudden application of the hand, having been previously rendered cold by immersion in water, on to the front of the abdomen. Another method is to apply one hand against the side of the uterine tumor, and at the same time to impress the opposite side quickly with the fingers of the other hand.

7. But the most reliable means consists in the application of auscultation, or the use of the stethoscope. This is resorted to for the purpose of discovering—

First, the souffle, or placental sound.

Second, the pulsations of the fœtal heart. The first is a low, murmuring or cooing sound, accompanied by a slight rushing noise, but without any sensation of impulse. It is synchronous with the pulse of the mother, and varies not in its situation during the course of the same pregnancy. Its seat in the abdomen does vary in proportion to the progressive advance of the pregnancy, and it is liable to intermissions.

The second is quite different in its characteristics. It is marked by double pulsations, and hence very rapid, numbering from one hundred and twenty to one hundred and sixty in a minute. These pulsations are not heard until the end of the fifth month, and become more distinct as pregnancy advances. Their source being the fœtal heart, their seat will vary with the varying position of the fœtus. Auscultation, if successful, not only reveals the fact of pregnancy, but also the life of the fœtus.

8. There is still another indication of pregnancy; and that is a bluish tint of the vagina, extending from the os externum to the os uteri. It is a violet color, like lees of wine, and is caused by the increased vascularity of the genital system consequent upon conception. But any similar cause other than conception may produce the same appearance.

Independent of what may be found on this subject in works on medical jurisprudence and midwifery, that of Dr. Montgomery on the Signs and Indications of Pregnancy is the fullest and most reliable.

The laws relating to pregnancy concern the circumstances under and the manner in which the fact is ascertained. There are two cases where the fact whether a woman is or has been pregnant is important to ascertain. The one is when it is supposed she pretends pregnancy, and the other when she is charged with concealing it.

9. Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child in order to produce a suppositious heir to the estate. The presumptive heir may in such case have a writ *de ventre inspiciendo*, by which the sheriff is commanded to have such made, and the fact determined whether pregnancy exists or not, by twelve matrons, in the presence of twelve knights. If the result determine the fact of pregnancy, then she is to be kept under proper guard until she is delivered. If the pregnancy be negatived, the presumptive heir is admitted to the inheritance. 1 Sharswood, Blackst. Comm. 456; Croke Eliz. 566; 4 Brown, Ch. 90; 2 P. Will. Ch. 591; Cox, Cr. Cas. 297. A practice quite similar prevailed in the civil law.

The second cause of pretended pregnancy occurs when a woman is under sentence of death for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed, generally till the next session of the court, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all. 4 Sharswood, Blackst. Comm. 394, 395; 1 Bay, So. C. 487.

10. In Scotland, all that is necessary to be proved, to have execution delayed, is the fact of pregnancy, no difference being made whether she be quick with child or not. This is also the provision of the French penal code upon this subject. In this country, there is little doubt that clear proof that the woman was pregnant, though not

quick with child, would at common law be sufficient to obtain a respite of execution until after delivery. The difficulty lies in making the proof sufficiently clear, the signs and indications being all somewhat uncertain, some of them wanting, all liable to variation, and conviction of the fact only fastening upon the mind when a number of them, inexplicable upon any other hypothesis, concur in that one result.

In New York there is a statute regulation, see 3 Rev. Stat. ch. 37, §§ 20–22, of the 5th edition, by which the sheriff is authorized to summon a jury of six physicians when a pregnant female convict is under sentence of death, and, if the inquisition by them executed find that such convict is quick with child, execution shall be suspended, and the inquisition transmitted to the governor; and whenever he shall become satisfied that she is no longer quick with child, he shall issue his warrant for her execution.

11. Pregnancy is seldom concealed except for the criminal purpose of destroying the life of the fœtus in utero, or of the child immediately upon its birth. Infant life is easily extinguished; while proof of the unnatural crime is hard to be furnished. This has led to the passage of laws, both in England and in this country, calculated to facilitate the proof and also to punish the very act of concealment of pregnancy and death of the child when if born alive it would have been illegitimate. In England, the very stringent act of 21 Jac. I. c. 27, required that any mother of such child who had endeavored to conceal its birth should prove by at least one witness that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother had murdered it. This cruel law was essentially modified, in 1803, by the passage of an act declaring that women indicted for the murder of bastard children should be tried by the same rules of evidence and presumption as are allowed to take place in other trials of murder.

12. The early legislation of Pennsylvania was characterized by the same severity. The Act of May 31, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder. This was repealed by the Act of 5th April, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed was therefore murdered by the mother shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the Act of 22d April, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted for the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such a child. The act also punishes the concealment of the death of a bastard child by fine and imprisonment. The states of New York, Massachusetts, Vermont, Connecticut, New Jersey, New Hampshire, Georgia, Illinois, and Michigan all have enactments on this subject,—the punishment prescribed being, generally, fine and imprisonment. For duration of pregnancy, see GESTATION.

PREGNANT. See AFFIRMATIVE PREGNANT; NEGATIVE PREGNANT.

PREJUDICE (Lat. *præ*, before, *judicare*, to judge).

A forejudgment. A leaning towards one side of a cause for some reason other than its justice.

PRELATE. The name of an ecclesiastical officer. There are two orders of prelates: the first is composed of bishops, and the second, of abbots, generals of orders, deans, etc.

PRELEVEMENT. In French Law. The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets between the partners.

The partner who is entitled to a prélèvement is not a creditor of the partnership: on the contrary, he is a part-owner; for, if the assets should be deficient, a creditor has a preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled to no part of it, but he has a right to charge interest when he is in other respects entitled to it.

PRELIMINARY. Something which precedes: as, *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

PRELIMINARY PROOF. In Insurance. Marine policies in the United States generally have a provision that a loss shall be payable in a certain time, usually sixty days, "after proof," meaning "preliminary proof," which is not particularly specified. Fire policies usually specify the preliminary proof. Life policies, like marine, usually make the loss payable sixty days after notice and proof. 2 Phillipps, Ins. ch. xx.; 11 Johns. N. Y. 241; 16 Barb. N. Y. 171; 31 Me. 325; 4 Mass. 88; 6 Gray, Mass. 396; 6 Cush. Mass. 342; 6 Harr. & J. Md. 408; 3 Gill. Md. 276; 2 Wash. Va. 61; 23 Wend. N. Y. 43; 1 La. 216; 11 Miss. 278; Stew. Low. Can. 354; 14 Mo. 220; 10 Pet. 507; 6 Ill. 434; 13 *id.* 676; 5 Sneed, Tenn. 139; 2 Ohio, 452; 6 Ind. 137; 30 Vt. 659.

PREMEDITATION. A design formed to commit a crime or to do some other thing before it is done.

Premeditation differs essentially from *will*, which constitutes the crime; because it supposes, besides an *actual* will, a *deliberation* and a *continued persistence* which indicate more perversity. The pre-

paration of arms or other instruments required for the execution of the crime are indications of a premeditation, but are not absolute proof of it; as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation.

PREMISES (Lat. *præ*, before, *mittere*, to put, to send).

That which is put before. The introduction. Statements previously made. See 1 East, 456.

In Conveyancing. That part of a deed which precedes the *habendum*, in which are set forth the names of the parties, with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the contract then entered into is founded; and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted. 2 Sharswood, Blackst. Comm. 298; 8 Mass. 174; 6 Conn. 289.

In Equity Pleading. The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Cooper, Eq. Plead. 9; Barton, Suit in Eq. 27; Mitford, Eq. Plead. Jerem. ed. 43; Story, Eq. Plead. § 27.

Every material fact to which the plaintiff intends to offer evidence must be stated in the premises; otherwise, he will not be permitted to offer or require evidence of such fact. 1 Brown, Ch. 94; 3 Swanst. Ch. 472; 3 P. Will. Ch. 276; 2 Atk. Ch. 96; 1 Vern. Ch. 483; 11 Ves. Ch. 240; 2 Hare, Ch. 264; 6 Johns. N. Y. 565; 9 Ga. 148.

In Estates. Lands and tenements. 1 East, 453; 3 Maule & S. 169.

PREMIUM. In Insurance. The consideration for a contract of insurance.

A policy of insurance always expresses the consideration, called the *premium*, which is a certain amount or a certain rate upon the value at risk, paid wholly in cash, or partly so and partly by promissory note or otherwise. 2 Parsons, Marit. Law, 182. By the charters of mutual fire insurance companies, the insured building is usually subject to a lien for the premium. 1 Phillips, Ins. ch. vi.; 19 Miss. 53; 21 How. 35. The premium may be payable by service rendered. 5 Ind. 96.

In life insurance, the premium is usually payable periodically, 18 Barb. 541; and the continuance of the risk is usually made to depend upon the due payment of a periodical premium. 2 Dutch. N. J. 268. So far as the agreed risk is not run in amount or time under a marine policy, the whole or a proportional stipulated or customary part of the premium is either not payable, or, if paid, is to be returned unless otherwise agreed. 2 Phillips, Ins. c. xxii.; 2 Parsons, Marit. Law, 185; 16 Barb. N. Y. 280; 7 Gray, Mass. 246.

PREMIUM NOTE. In Insurance. A note given in place of payment of the whole or a part of the premium.

The premium, or a part of it, is not unfrequently paid wholly or in part by a promissory note, with a stipulation in the policy that the unpaid amount shall be set off and deducted in settling for a loss. 1 Phillips, Ins. § 51. It is also usually collaterally secured by a stipulation in the policy for its being forfeited by non-payment of the premium note, or any amount due thereon by assessment or otherwise. 19 Barb. N. Y. 440; 21 *id.* 605; 25 *id.* 109; 12 N. Y. 477; 2 Ind. 65; 3 Gray, 215; 6 *id.* 288; 36 *id.* 252; 19 Miss. 135; 35 N. H. 328; 29 Vt. 23; 2 N. H. 198; 32 Penn. St. 75; 34 Me. 451.

PREMIUM PUDICITIÆ (Lat. the price of chastity). The consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money.

When the contract is made as the payment of *past* cohabitation, as between the parties, it is good, and will be enforced against the obligor, his heirs, executors, and administrators; but it cannot be paid, on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void. Chitty, Contr. 215; 1 Story, Eq. Jur. § 296; 5 Ves. Ch. 286; 7 *id.* 470; 11 *id.* 535; 2 P. Will. 432; 1 W. Blackst. 517; 3 Burr. 1568; 1 Fonblanque, Eq. b. 1, c. 4, § 4, and notes *s* and *y*; 1 Ball & B. Ir. Ch. 360; Roberts, Fraud. Conv. 428; Cas. *temp.* Talb. 153, and the cases there cited; 6 Ohio, 21; 5 Cow. N. Y. 253; Harp. So. C. 201; 3 T. B. Monr. Ky. 35; 2 Rev. Const. Ct. 279; 11 Mass. 368; 2 Nott & M'C. So. C. 251.

PRENDER, PRENDRE (L. Fr.). To take. This word is used to signify the right of taking a thing before it is offered: hence the phrase of law, it lies in render, but not in prender. See A PRENDRE; Gale & W. Easem.; Washburn, Easem.

PRENOMEN (Lat.). The first or Christian name of a person. Benjamin is the prenomen of Benjamin Franklin. See Cas. *temp.* Hardw. 286; 1 Tayl. No. C. 148.

PREPENSE. Aforethought. See 2 Chitty, Crim. Law, *784.

PREROGATIVE. In Civil Law. The privilege, pre-eminence, or advantage which one person has over another: thus, a person vested with an office is entitled to all the rights, privileges, *prerogatives*, etc. which belong to it.

In English Law. The royal prerogative is an arbitrary power vested in the executive to do good and not evil. Rutherforth, Inst. 279; Coke, Litt. 90; Chitty, Prerog.; Bacon, Abr.

PREROGATIVE COURT. In English Law. An ecclesiastical court held in each of the two provinces of York and

Canterbury before a judge appointed by the archbishop of the province.

Formerly in this court testaments were proved, and administrations granted where a decedent left chattels to the value of five pounds (*bona notabilia*) in two distinct dioceses or jurisdictions within the province, and all causes relating to the wills, administrations, or legacies of such persons were originally cognizable. This jurisdiction was transferred to the court of probate by 20 & 21 Vict. c. 77, § 4, and 21 & 22 Vict. c. 95.

An appeal lay formerly from this court to the king in chancery, by stat. 25 Hen. VIII. c. 19, but lies now to the privy council, by stat. 2 & 3 Will. IV. c. 92. 2 Stephen, Comm. 237, 238; 3 Sharswood, Blackst. Comm. 65, 66.

In American Law. A court having a jurisdiction of probate matters, in the state of New Jersey.

PRESCRIBABLE. To which a right may be acquired by prescription.

PRESCRIPTION. A mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment.

The distinction between a *prescription* and a *custom* is that a custom is a local usage and not annexed to a person; a prescription is a personal usage confined to the claimant and his ancestors or grantors. The theory of prescription was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time, in England, went back to the time of Richard I. To avoid the necessity of proof of such long duration, a custom arose of allowing a presumption of a grant on proof of usage for a long term of years.

2. The length of time necessary to raise a strict prescription was limited by statute 32 Hen. VIII. at sixty years. 8 Pick. Mass. 308; 7 Wheat. 59; 4 Mas. C. C. 402; 2 Greenleaf, Ev. § 539. See 9 Cush. Mass. 171; 29 Vt. 43; 24 Ala. N. s. 130; 29 Penn. St. 22. Grants of incorporeal hereditaments are presumed upon proof of enjoyment of the requisite character for a period of years equal to that fixed by statute as the period of limitation in respect of real actions. 3 Kent, Comm. 442; 12 Wend. N. Y. 330; 19 *id.* 365; 27 Vt. 265; 2 Bail. So. C. 101; 4 Md. Ch. Dec. 386; 13 N. H. 360; 4 Day, Conn. 244; 10 Serg. & R. Penn. 63; 9 Pick. Mass. 251. See 14 Barb. N. Y. 511; 3 Me. 120; 1 Bos. & P. 400; 5 Barnew. & Ald. 232.

Prescription properly applies only to incorporeal hereditaments, 3 Barb. N. Y. 105; Finch, Law, 132, such as *easements* of water, light and air, way, etc., 4 Mas. C. C. 397; 4 Rich. So. C. 536; 20 Penn. St. 331; 1 Crompt. M. & R. Exch. 217; 1 Gale & D. 205, 210, n.; Tudor, Lead. Cas. 114; Washburn, Easements; a class of *franchises*. Coke, Litt. 114; 10 Mass. 70; 10 Serg. & R. Penn. 401. See FERRY. As to the character of the use necessary to create a prescriptive right, see ADVERSE ENJOYMENT.

PRESENCE. The being in a particular place.

In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid: for example, a party to a deed, when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

Actual presence is being bodily in the precise spot indicated.

Constructive presence is being so near to or in such relation with the parties actually in a designated place as to be considered in law as being in the place.

2. It is a rule in the civil law that he who is incapable of giving his consent to an act is not to be considered present although he be actually in the place. A lunatic, or a man sleeping, would not, therefore, be considered present. Dig. 41. 2. 1. 3. And so if insensible, 1 Dougl. 241; 4 Brown, Parl. Cas. 71; 3 Russ. Ch. 441; or if the act were done secretly so that he knew nothing of it. 1 P. Will. Ch. 740.

3. The English Statute of Frauds, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of said devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient: as, where the testatrix executed the will in her carriage standing in the street before the office of her solicitor, the witness retired into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will, through the window of the office. Brown, Ch. 98. See 2 Curt. Eccl. 320, 331; 2 Salk. 688; 3 Russ. Ch. 441; 1 Maule & S. 294; 2 Carr. & P. 491.

PRESENT. A gift, or, more properly, the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title of any kind whatever, from any king, prince, or foreign state."

PRESENTS. This word signifies the writing then actually made and spoken of: as, *these presents;* know all men by *these presents;* to all to whom *these presents* shall come.

PRESENTATION. In Ecclesiastical Law. The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

PRESENTEE. In Ecclesiastical Law. A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

PRESENTMENT. In Criminal Practice. The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment

laid before them at the suit of the government. 4 Sharswood, Blackst. Comm. 301.

Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense, presentments include not only what are properly so called, but also inquisitions of office and indictments found by a grand jury. 2 Hawkins, Pl. Cr. c. 25, s. 1.

The difference between a presentment and an inquisition is this: that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawkins, Pl. Cr. c. 25, s. 6. See, generally, Comyns, Dig. *Indictment* (B); Bacon, Abr. *Indictment* (A); 1 Chitty, Crim. Law, 163; 7 East, 387; 1 Meigs, Tenn. 112; 11 Humphr. Tenn. 12.

The writing which contains the accusation so presented by a grand jury. 1 Brock. C. C. 156.

In Contracts. The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

2. The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable. 2 Pet. 170; 4 Mas. C. C. 336; 5 *id.* 118; 12 Pick. Mass. 399; 7 Gray, Mass. 217; 20 Wend. N. Y. 321; 12 Vt. 401; 13 La. 357; 7 B. Monr. Ky. 17; 8 Mo. 268; 7 Blackf. Ind. 367; 1 M'Cord, So. C. 322; 7 Leigh, Va. 179. And when a bill or note becomes payable, it must be presented for payment.

In general, the presentment for payment should be made to the maker of a note, or the drawee of a bill, for acceptance, or to the acceptor, for payment, 2 Esp. 509; but a presentment made at a particular place, when payable there, is, in general, sufficient. A personal demand on the drawee or acceptor is not necessary: a demand at his usual place of residence, 17 Ohio, 78, of his wife, or other agent, is sufficient. 17 Ala. N. s. 42; 1 Const. So. C. 367; 2 Esp. 509; 5 *id.* 265; 12 Mod. 241; Holt, 313.

When a bill or note is made payable at a particular place, a presentment, as we have seen, may be made there, 8 N. Y. 266; but when the acceptance is general it must be presented at the house, 2 Taunt. 206; 1 Mann. & G. 83; 3 B. Monr. Ky. 461, or place of business, of the acceptor. 3 Kent, Comm. 64, 65; 4 Mo. 52; 11 Gratt. Va. 260; 2 Campb. 596. See 14 Mart. La. 511.

3. The presentment for acceptance must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case. 7 Taunt. 197; 9 Bingh. 416; 9 Moore, Parl. Cas. 66; 2 H. Blackst. 565; 4 Mas. C. C. 336; 1 M'Cord, So. C. 322; 7 Gray, Mass. 217; 7 Cow. 205; 9 Mart. La. 326; 7 Blackf. Ind. 367. The presentment of a note or bill for payment ought to be made on the day it becomes due, 4 Term, 148; 8 Mass. 453; 3 N. H. 14; 12 La. 386; 22 Conn. 213; 20 Me. 109; 7 Gill & J. Md. 78; 8 Iowa, 394; 1 Blackf. Ind. 81; 10 Ohio, 496, and notice of non-payment given (otherwise the holder will lose the security of the drawer and indorsers of a bill and indorsers of a promissory note); and in case the note or bill be payable at a particular place, at that place, 1 Wheat. 171; 1 Harr. Del. 10; 5 Leigh, Va. 522; 5 Blackf. Ind. 215; 2 Jones, No. C. 23; 13 Pick. Mass. 465; 19 Johns. N. Y. 391; 8 Vt. 191; 1 Ala. N. s. 375; 8 Mo. 336, and the money lodged there for its payment, the holder would probably have no recourse against the maker or acceptor if he did not present them on the day and the money should be lost. 5 Barnew. & Ald. 244; 3 Me. 147; 27 *id.* 149.

4. The excuses for not making a presentment are general, and applicable to all persons who are indorsers; or they are special, and applicable to the particular indorser only.

Among the former are—*inevitable accident* or overwhelming calamity. Story, Bills, § 308; 3 Wend. N. Y. 488; 2 Ind. 224. *The prevalence of a malignant disease*, by which the ordinary operations of business are suspended. 2 Johns. Cas. N. Y. 1; 3 Maule & S. 267. The *breaking out of war* between the country of the maker and that of the holder. 1 Paine, C. C. 156. *The occupation of the country* where the note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse. 8 Cranch, 155; 15 Johns. N. Y. 57; 16 *id.* 438; 7 Pet. 586; 2 Brock. C. C. 20. *The obstruction of the ordinary* negotiations of trade by the *vis major*. *Positive interdictions* and public regulations of the state which suspend commerce and intercourse. *The utter impracticability of finding* the maker or ascertaining his place of residence. Story, Prom. Notes, §§ 205, 230, 238, 241, 264; 4 Serg. & R. Penn. 480; 6 La. 727; 14 La. Ann. 484; 3 M'Cord, So. C. 494; 1 Dev. No. C. 247; 2 Caines, N. Y. 121.

5. Among the latter, or special excuses for not making a presentment, may be enumerated the following. *The receiving the note by the holder* from the payee, or other antecedent party, too *late* to make a due presentment: this will be an excuse as to such party. 16 East, 248; 7 Mass. 483; Story, Prom. Notes, §§ 201, 265; 2 Wheat. 373; 11 *id.* 431. *The note being an accommodation note* of the maker for the benefit of the indorser. Story, Bills, § 370. See 2 Brock. C. C. 20; 7 Harr. & J. Md. 381; 1 Harr. & G. Md. 468; 7 Mass. 452; 1 Wash. C. C. 461; 2 *id.* 514; 1 Hayw. No. C. 271; 4 Mas. C. C. 113; 1 Caines, N. Y. 157; 1 Stew. Ala. 175; 5 Pick. Mass. 88; 21 *id.* 327. A *special agreement* by which the indorser waives the presentment. 8 Me. 213; 6 Wheat. 572; 11 *id.* 629; Story, Bills, §§ 371, 373. *The receiving security or money by an indorser* to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no

presentment is requisite. Story, Bills, § 374; Story, Prom. Notes, § 281; 4 Watts, Penn. 328; 9 Gill & J. Md. 47; 7 Wend. N. Y. 165; 2 Me. 207; 5 Mass. 170; 5 Conn. 175. *The receiving the note by the holder* from the indorser as a collateral security for another debt. Story, Prom. Notes, § 284; Story, Bills, § 372; 2 How. 427, 457.

A want of presentment may be waived by the party to be affected, after a full knowledge of the fact. 8 Serg. & R. Penn. 438. See 6 Wend. N. Y. 658; 3 Bibb, Ky. 102; 5 Johns. N. Y. 385; 4 Mass. 347; 7 *id.* 452; 8 Cush. Mass. 157; Wash. C. C. 506; Bacon, Abr. *Merchant, etc.* (M). See, generally, 1 Hare & W. Sel. Dec. 214, 224; Story, Prom. Notes; Byles, Bills; Parsons, Bills.

PRESERVATION. Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See AVERAGE; JETTISON.

PRESIDENT. An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

PRESIDENT OF THE UNITED STATES OF AMERICA. The title of the chief executive officer of the United States.

The constitution directs that the executive power shall be vested in a president of the United States of America. Art 2, s. 1.

2. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years a resident within the United States. Art. 2, s. 1, n. 5. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the congress may by law provide for the removal, death, resignation, or inability both of the president and vice-president, declaring what officer shall then act as president; and such officer shall act accordingly until the disability be removed or a president shall be elected. Art. 2, s. 1, n. 6.

3. He is chosen by electors of president (*q. v.*). See U. S. Const. art. 2, s. 1, n. 2, 3, 4; 1 Kent, Comm. 273; Story, Const. § 1447 *et seq.* After his election, and before he enters on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States." Article 2, s. 1, n. 8, 9.

He holds his office for the term of four years, art. 2, s. 1, n. 1; and is re-eligible for successive terms; but no one has ventured, contrary to public opinion, to be a candidate for a third term.

4. The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them. Art. 2, s. 1, n. 7 The act of the 24th September, 1789, ch. 19, fixed the salary of the president at twenty-five thousand dollars. This is his salary now.

The powers of the president are to be exercised by him alone, or by him with the concurrence of the senate.

5. The constitution has vested in him *alone* the following powers: he is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officers of each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Art. 2, s. 2, n. 2. He may appoint all officers of the United States, whose appointments are not otherwise provided for in the constitution, and which shall be established by law, when congress shall vest the appointment of such officers in the president alone. Art. 2, s. 2, n. 2. He shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session. Art. 2, s. 2, n. 3. He shall from time to time give congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all officers of the United States.

6. His power, with the concurrence of the senate, is as follows:—to make treaties, provided two-thirds of the senators present concur; nominate, and, by and with the advice and consent of the senate, appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not provided for in the constitution, and which have been established by law; but the congress may by law vest the appointment of such inferior officers as they shall think proper in the president alone, in the courts of law, or in the heads of departments. Art. 2, s. 2, n. 2. See 1 Kent, Comm. Lect. 13; Story, Const. b. 3, c. 36; Rawle, Const. Index; Serg. Const. L. Index.

PRESS. By a figure, this word signifies the art of printing: the press is free.

All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights (*q. v.*), when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. See U. S. Const. Amendm. art. 1; LIBERTY OF THE PRESS.

PRESUMPTION. An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best, Presump. 4.

An inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable

reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Best, Presump. 20. They are called, also, *absolute* and *irrebuttable* presumptions.

Disputable presumptions are inferences of law which hold good until they are invalidated by proof or a stronger presumption. Best, Presump. 29; 2 Harr. & M'H. Md. 77; 4 Johns. Ch. N. Y. 287.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. 1 Phillipps, Ev. 4th Am. ed. 599; 3 Barnew. & Ad. 890; 3 Hawks, No. C. 122; 1 Wash. C. C. 372.

Presumptions of law are rules which, in certain cases, either forbid or dispense with any ulterior inquiry. 1 Greenleaf, Ev. § 14. Inferences or positions established, for the most part, by the common, but occasionally by the statute, law, which are obligatory alike on judges and juries. Best, Presump. 17. They are either conclusive or disputable.

The distinctions between presumptions of law and presumptions of fact are—*first*, that in regard to presumptions of law a certain inference must be made whenever the facts appear which furnish the basis of the inference; while in case of other presumptions a discretion more or less extensive is vested in the tribunal as to drawing the inference. See 9 Barnew. & C. 643. *Second*, in case of presumptions of law, the court may draw the inference whenever the requisite facts are developed in pleading, Stephen, Plead. 4th ed. 382; while all other presumptions can be made only by the intervention of a jury. Presumptions of law are reduced to fixed rules, and form a part of the system of jurisprudence to which they belong; presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. See 2 Starkie, Ev. 684; 6 Am. Law Mag. 370; 35 Penn. St. 440.

2. In giving effect to presumptions of fact, it is said that the presumption stands until proof is given of the contrary. 1 Crompt. M. & R. Exch. 895; 2 Harr. & M'H. Md. 77; 2 Dall. Penn. 22; 4 Johns. Ch. N. Y. 287. See BURDEN OF PROOF; ONUS PROBANDI. This contrary proof may be a conflicting presumption; and Mr. Best lays down the following rules for application in such cases: —*first*, special presumptions take the place of general ones, see 8 Barnew. & C. 737; 9 *id.* 643; 5 Taunt. 326; 1 Marsh. 68; *second*, presumptions derived from the ordinary course of nature are stronger than casual presumptions, 1 Carr. & K. 134; 4 Barnew. & C. 71; Coke, Litt. 373 *a*; *third*, presumptions are favored which tend to give validity to acts, 1 Leach, Cr. Cas. 412; 5 Esp. 230; 1 Mann. & R. 668; 3 Campb. 432; 2 Barnew. & C. 814; 7 *id.* 573; 2 Wheat. 70; 1 South. N. J. 148; 3 T. B. Monr. Ky. 54; 7 *id.* 344; 2 Gill & J. Md. 114; 10 Pick. Mass. 359; 1 Rawle, Penn. 386; MAXIMS, *Omnia præsumuntur*, etc.; *fourth*, the presumption of innocence is favored in law. 4 Carr. & P. 116; Russ. & R. Cr. Cas. 61; 10 Mees. & W. Exch. 15.

3. Among conclusive presumptions may be reckoned *estoppels* by deed, see ESTOPPELS; *solemn admissions* of parties, and *unsolemn admissions* which have been acted on, 1 Campb. 139; 1 Taunt. 398; 2 Term, 275; 15 Mass. 82; see ADMISSIONS; 1 Greenleaf, Ev. § 205; *that a sheriff's return is correct* as to facts stated therein as between the parties, 15 Mass. 82; *that an infant under the age of seven years* is incapable of committing a felony, 4 Blackstone, Comm. 23; *that a boy under fourteen* is incapable of committing a rape, 7 Carr. & P. 582; 8 *id.* 736; 9 *id.* 118; *that the issue of a wife* with whom her husband cohabits is legitimate, though her infidelity be proved, 3 Carr. & P. 215; 1 Sim. & S. Ch. 153; 5 Clark & F. Hou. L. 163; 2 All. Mass. 453; 3 *id.* 151; *that despatches of an enemy* carried in a neutral vessel between two hostile ports are hostile, 6 C. Rob. Adm. 440; *that all persons subject to any law* which has been duly promulgated, or which derives its validity from general or immemorial custom, are acquainted with its provisions. 4 Blackstone, Comm. 27; 1 Coke, 177; 2 *id.* 3 *b*; 6 *id.* 54 *a*. See, also, LIMITATION; PRESCRIPTION.

4. Among rebuttable presumptions may be reckoned the presumptions that a man is innocent of the commission of a crime, 2 Lew. Cr. Cas. 227; see 3 Gray, Mass. 465; 19 Bost. Law Rep. 615; 3 East, 192; 10 *id.* 211; 4 Barnew. & C. 247; 5 *id.* 758; 2 Barnew. & Ald. 385; that the possessor of property is its owner, 1 Strange, 505; 9 Cush. Mass. 150; 21 Barb. N. Y. 333; 35 Me. 139, 150; that possession of the fruits of crime is guilty possession, 2 Carr. & P. 359; 7 *id.* 551; Russ. & R. 308; 1 Den. Cr. Cas. 596; 3 Dev. & B. No. C. 122; 7 Vt. 122; 9 Conn. 527; 19 Me. 398; that things usually done in the course of trade have been done, 1 Stark. 225; 1 Mann. & G. 46; 8 C. B. 827; 7 Q. B. 846; 7 Wend. N. Y. 198; 9 *id.* 323; 9 Serg. & R. Penn. 385; 9 N. H. 519; 10 Mass. 205; 19 Pick. Mass. 112; 7 Gill, Md. 34; 45 Me. 516, 550; 15 Conn. 206; that solemn instruments are duly executed, 1 Rob. Eccl. 10; 9 Carr. & P. 570; 15 Me. 470; 1 Metc. Mass. 349; 15 Conn. 206; that a person, relation, or state of things once shown to exist continues to exist, as, *life*, 2 Rolle, 461; 2 East, 313; 1 Pet. 452; 3 McLean, C. C. 390; see 2 Campb. 113; 14 Sim. Ch. 28, 277; 2 Phill. Ch. 199; 2 Mees. & W. Exch. 894; 19 Pick. Mass. 112; 1 Metc. Mass. 204; 1 Ga. 538; 11 N. H. 191; 4 Whart. Penn. 150, 173; 23 Penn. St. 114; 36 Me. 176; 13 Ired. No. C. 333; 7 Tex. 178; 1 Penn. N. J. 167; see DEATH; a *partnership*, 1 Stark. 405; *insanity*, 3 Brown, Ch. 443; 3 Metc. Mass. 164; 4 *id.* 545; 39 N. H. 163, 4 Wash. C. C. 262; 5 Johns. N. Y. 144; 1 Pet. C. C. 163; 2 Va. Cas. 132; 4 M'Cord,

So. C. 189; that official acts have been properly performed. 1 J. J. Marsh. Ky. 447; 14 Johns. N. Y. 182; 19 *id.* 345; 3 N. H. 310; 3 Gill & J. Md. 359; 12 Wheat. 70; 7 Conn. 350.

Consult Greenleaf, Starkie, Phillipps, on Evidence; Best, Matthews, on Presumptive Evidence; Russell on Crimes.

PRESUMPTIVE EVIDENCE. Any evidence which is not direct and positive. 1 Starkie, Ev. 3d ed. 558. The proof of facts from which with more or less certainty, according to the experience of mankind of their more or less universal connection, the existence of other facts can be deduced. 2 Saunders, Plead. 673. The evidence afforded by circumstances, from which, if unexplained, the jury may or may not infer or presume other circumstances or facts. 1 Greenleaf, Ev. § 13. See Peake, Ev. Norris ed. 45; Best, Pres. 4, § 3.

PRESUMPTIVE HEIR. One who if the ancestor should die immediately would, under existing circumstances of things, be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as, a brother, who is the presumptive heir, may be defeated by the birth of a child to the ancestor. 2 Sharswood, Blackst. Comm. 208.

PRET A USAGE (Fr. loan for use). A phrase used in the French law instead of *commodatum*.

PRETENSION. In French Law. The claim made to a thing which a party believes himself entitled to demand, but which is not admitted or adjudged to be his.

The words *rights*, *actions*, and *pretensions* are usually joined; not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *pretension* is sometimes not even accompanied by a demand.

PRETERITION (Lat. *præter* and *eo*, to go by). **In Civil Law.** The omission by a testator of some one of his heirs who is entitled to a legitime (*q. v.*) in the succession.

Among the Romans, the preterition of children when made by the mother was presumed to have been made with design; the preterition of sons by any other testator was considered as a wrong, and avoided the will, except the will of a soldier in service, which was not subject to so much form.

PRETEXT (Lat. *prætextum*, woven before). The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation, or which, if true, are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

PRETIUM AFFECTIONIS (Lat.). An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it. Bell, Dict.

2. When an injury has been done to an article, it has been questioned whether in estimating the damage there is any just ground, in any case, for admitting the *pretium affectionis*. It seems that when the injury has been done accidentally by culpable negligence, such an estimation of damages would be unjust, but when the mischief has been intentional it ought to be so admitted. Kames, Eq. 74, 75.

PREVARICATION. In Civil Law. The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47. 15. 6.

PREVENTION (Lat. *preveniato*, to come before). **In Civil Law.** The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. 2 Dall. Penn. 77, 114.

PRICE. The consideration in money given for the purchase of a thing.

2. There are three requisites to the quality of a price in order to make a sale.

It must be *serious* and such as may be demanded: if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Pothier, Vente, n. 18.

It must be *certain* and *determinate;* but what may be rendered certain is considered as certain: if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price. Pothier, Vente, n. 23, 24; 2 Sumn. C. C. 539; 4 Pick. Mass. 179; 13 Me. 400; 2 Ired. No. C. 36; 3 Penn. St. 50; 2 Kent, Comm. 477. When the parties have not expressed any price in their contract, the presumption of law is that the thing is sold for the price it generally brings at the time and place where the agreement was made. 3 T. B. Monr. Ky. 133; 6 Harr. & J. Md. 273; Coxe, N. J. 261; 10 Bingh. 376; 4 Mann. & S. 217; 6 Taunt. 108.

3. The third quality of a price is that it consists in money, to be paid down, or at a future time; for if it be of any thing else it will no longer be a price, nor the contract a sale, but exchange or barter. Pothier, Vente, n. 30; 16 Toullier, n. 147; 12 N. H. 390; 10 Vt. 457; 21 *id.* 147.

The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property, or in the place where exposed to sale, if personal. Pothier, Vente, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap. Marshall, Ins. 620 *et seq.;* Ayliffe, Parerg. 447; Merlin, Répert.; 4 Pick. Mass. 179; 8 *id.* 252; 16 *id.* 227.

In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value

8 Wentworth, Plead. 372, n.; 2 Lilly, Abr. 629. See Bouvier, Inst. Index.

PRIMA FACIE (Lat.). At first view or appearance of the business: as, the holder of a bill of exchange, indorsed in blank, is *primâ facie* its owner.

Primâ facie evidence of fact is in law sufficient to establish the fact, unless rebutted. 6 Pet. 622, 632; 14 *id.* 334. See, generally, 7 J. J. Marsh. Ky. 425; 3 N. H. 484; 7 Ala. 267; 5 Rand. Va. 701; 1 Pick. Mass. 332; 1 South. N. J. 77; 1 Yeates, Penn. 347; 2 Nott & M'C. So. C. 320; 1 Mo. 334; 11 Conn. 95; 2 Root, Conn. 286; 16 Johns. N. Y. 66, 136; 1 Bail. So. C. 174; 2 A. K. Marsh. Ky. 244. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it is *primâ facie* evidence of negligence on the part of those who have the charge of it. 3 C. B. 229.

PRIMA TONSURA (Lat.). A grant of a right to have the first crop of grass. 1 Chitty, Pract. 181.

PRIMAGE. In Mercantile Law. A duty payable to the master and mariners of a ship or vessel,—to the master for the use of his cables and ropes to discharge the goods of the merchant, to the mariners for lading and unlading in any port or haven. Abbott, Shipp. 270.

This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. It is sometimes called the master's hat-money. 3 Chitty, Com. Law, 431.

PRIMARY. That which is first or principal: as, *primary evidence*, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

PRIMARY EVIDENCE. The best evidence of which the case in its nature is susceptible. 3 Bouvier, Inst. n. 3053. See EVIDENCE.

PRIMARY OBLIGATION. An obligation which is the principal object of the contract: for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouvier, Inst. n. 702.

PRIMARY POWERS. The principal authority given by a principal to his agent: it differs from *mediate powers*. Story, Ag. § 58.

PRIMATE. In Ecclesiastical Law. An archbishop who has jurisdiction over one or several other metropolitans.

PRIMER ELECTION. A term used to signify first choice.

In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the purparts: this part is called the *enitia pars*. Sometimes the oldest sister makes the partition; and in that case, to prevent partiality, she takes the last choice. Hob. 107; Littleton, §§ 243, 244, 245; Bacon, Abr. *Coparceners* (U).

PRIMER SEISIN. In English Law. The right which the king had, when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Sharswood, Blackst. Comm. 66.

PRIMOGENITURE. The state of being first born; the eldest.

Formerly primogeniture gave a title in cases of descent to the oldest son in preference to the other children. This unjust distinction has been generally abolished in the United States.

PRIMOGENITUS (Lat.). The first-born. 1 Ves. 290. And see 3 Maule & S. 25; 8 Taunt. 468; 3 Vern. Ch. 660.

PRIMUM DECRETUM (Lat.). In the courts of admiralty, this name is given to a provisional decree. Bacon, Abr. *The Court of Admiralty* (E).

PRINCE. In *a general sense*, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family: as, princes of the blood. The chief of any body of men.

By a clause inserted in policies of insurance, the insurer is liable for all losses occasioned by "arrest or detainment of all kings, *princes*, and people, of what nation, condition, or quality soever." 1 Bouvier, Inst. n. 1218.

PRINCIPAL. Leading; chief; more important.

This word has several meanings. It is used in opposition to *accessary*, to show the degree of crime committed by two persons. Thus, we say, the principal is more guilty than the accessary after the fact.

In estates, principal is used as opposed to *incident* or *accessory*: as in the following rule: "The incident shall pass by the grant of the principal, but not the principal by the grant of the incident: *accessorium non ducit, sed sequitur suum principale.*" Coke, Litt. 152 *a*.

It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover.

It is used in opposition to *interest*: as, the principal being secured, the interest will follow.

It is used also in opposition to *surety*: thus, we say, the principal is answerable before the surety.

Principal is used also to denote the more important: as, the principal person.

In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things: as, the principal bed, the principal table, and the like.

In Contracts. One who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him. 1 Domat, b. 1, tit. 15, Introd.; Story, Ag. § 3.

2. Every one of full age, and not other-

wise disabled, is capable of being a principal; for it is a rule that whenever a person has power, as owner, or in his own right, to do a thing, he may do it by another. Comyns, Dig. *Attorney* (C 1); Heineccius, ad Pand. p. 1, l. 3, tit. 1, § 424; 9 Coke, 75 *b*; Story, Ag. § 6. Infants are generally incapable of appointing an agent; but under special circumstances they may make such appointments. For instance, an infant may authorize another to do any act which is beneficial to him, but not to do an act which is to his prejudice. 2 Kent, Comm. 233–243; 9 Coke, 75, 76; 3 Burr. 1804; 6 Cow. N. Y. 393; 10 Ohio, 37; 10 Pet. 58, 69; 14 Mass. 463. A married woman cannot, in general, appoint an agent or attorney; and when it is requisite that one should be appointed, the husband usually appoints for both. She may, perhaps, dispose of or incumber her separate property, through an agent or attorney, Croke Car. 165; 2 Leon. 200; 2 Bulstr. 13; but this seems to be doubted. Croke Jac. 617; Yelv. 1; 1 Brownl. 134; 2 *id.* 248; Adams, Ej. 174. Idiots, lunatics, and other persons not *sui juris* are wholly incapable of appointing an agent. Story, Ag. § 6.

3. The rights to which principals are entitled arise from obligations due to them by their agents or by third persons.

The rights of principals in relation to their agents are—*first*, to call them to an account at all times in relation to the business of the agency. 2 Bouvier, Inst. 28. *Second*, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity. 1 Livermore, Ag. 398; Paley, Ag. 7, 71, 74; Story, Ag. § 217 c; 12 Pick. Mass. 328; 20 *id.* 167; 6 Hare, Ch. 366; 7 Beav. Rolls, 176. But the loss or damage must be actual, and not merely probable or possible. Story, Ag. § 222; Paley, Ag. 7, 8, 74, 75. But see *id.* 74, *note* 2. *Third*, where both the principal and agent may maintain a suit against a third person for any matter relating to the agency, the principal has a right to supersede the agent, by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract. Story, Ag. § 403; 4 Campb. 194; 3 Hill, N. Y. 72, 73; 6 Serg. & R. Penn. 27; 2 Wash. C. C. 283; 7 Taunt. 237, 243; 1 Maule & S. 576. But, as we shall presently see, an exception to this rule arises in favor of the agent, to the extent of any lien, or other interest, or superior right, he may have in the property. Story, Ag. §§ 393, 397, 407, 408, 424.

4. In general, the principal, *as against third persons*, has a right to all the advantages and benefits of the acts and contracts of his agent, and is entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally. Story, Ag. §§ 418, 420; Paley, Ag. 323; 8 La. 296; 2 Stark. 443. But to this rule there are the following exceptions. *First*, when the instrument is under seal, and it has been exclusively made between the agent and the third person, as, for example, a charter-party or bottomry bond made by the master of a ship in the course of his employment, in this case the principal cannot sue or be sued on it. Story, Ag. § 422; Abbott, Shipp. pt. 3, ch. 1, § 2; 4 Wend. N. Y. 285; 1 Paine, C. C. 252; 3 Wash. C. C. 560. *Second*, when an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it and be entitled to all the benefits arising from it. The case of a foreign factor buying or selling goods is an example of this kind: he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to, for the safety and convenience of foreign commerce. Story, Ag. § 423; Smith, Merc. Law. 66; 15 East, 62; 9 Barnew. & C. 87; 4 Taunt. 574. *Third*, when the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount of its value, the principal cannot sue without the consent of the agent. Story, Ag. §§ 403. 407, 408, 424.

5. But contracts are not unfrequently made without mentioning the name of the principal: in such case he may avail himself of the agreement; for the contract will be treated as that of the principal as well as of the agent. If, however, the person with whom the contract was made *bonâ fide* dealt with the agent as owner, he will be entitled to set off any claim he may have against the agent, in answer to the demand of the principal; and the principal's right to enforce contracts entered into by his agent is affected by every species of fraud, misrepresentation, or concealment of the agent which would defeat it if proceeding from himself. Story, Ag. §§ 420, 421, 440; 2 Kent, Comm. 632; Paley, Ag. 324, 325; 3 Bos. & P. 490; 7 Term, 359, 360, *note*; 2 Caines, N. Y. 299; 24 Wend. N. Y. 458; 3 Hill, N. Y. 72.

6. Where the principal gives notice to the debtor not to pay money to the agent, unless the agent has a superior right, from a lien or otherwise, the amount of any payment afterwards made to the agent may be recovered by the principal from the debtor. Story, Ag. § 429; 15 East, 65; 4 Campb. 60; 6 Cow. N. Y. 181, 186. Money paid by an agent may also be recovered by the principal under any of the following circumstances: *first*, where the consideration fails; *second*, where money is paid by an agent through mistake; *third*, where money is illegally extorted from an agent in the course of his employment; *fourth*, where the money of the principal has been fraudulently applied by the agent to an il-

legal and prohibited purpose. Paley, Ag. 335–337. When goods are intrusted to an agent for a specific purpose, a delivery by him for a different purpose, or in a manner not authorized by the commission, passes no property in them, and they may, therefore, be reclaimed by the owner. Paley, Ag. 340, 341; 3 Pick. Mass. 495. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency. If both the agent and third person have been parties to the tort or injury, they are jointly as well as severally liable to the principal, and he may maintain an action against both or either of them. Story, Ag. § 436; 3 Maule & S. 562.

7. The liabilities of the principal are either to his agent or to third persons. The liabilities of the principal to his agent are—to reimburse him all his advances, expenses, and disbursements lawfully incurred about the agency, and also to pay him interest upon such advances and disbursements whenever interest may fairly be presumed to have been stipulated for or to be due to the agent, Story, Ag. §§ 335, 336, 338; Story, Bailm. 196, 197; Paley, Ag. 107, 108; *second*, to pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency, Story, Ag. § 324; Paley, Ag. 100–107; *third*, to indemnify the agent when, without his own default, he has sustained damages in following the directions of his principal: for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal. Story, Ag. § 339; 9 Metc. Mass. 212.

8. The principal is bound to fulfil all the engagements made by the agent for or in the name of the principal, and which come within the scope of his usual employment, although the agent in the particular instance has in fact exceeded or violated his private instructions. Story, Ag. 443; Smith, Merc. Law, 56–59; 4 Watts, Penn. 222; 21 Vt. 129; 26 Me. 84; 1 Wash. C. C. 174. And where an exclusive credit is not given to the agent, the principal is liable to third persons upon contracts made by his agent within the scope of his authority, although the agent contracts in his own name and does not disclose his agency. Story, Ag. § 446. But if the principal and agent are both known, and exclusive credit be given to the latter, the principal will not be liable though the agent should subsequently become insolvent. Story, Ag. § 447. Where money is paid by a third person to the agent, by mistake or upon a consideration that has failed, the principal will be liable to repay it although he may never have received it from his agent. Story, Ag. § 451; Paley, Ag. 293; 2 Esp. 509.

9. The principal is not, in general, liable to a criminal prosecution for the acts or misdeeds of his agent, unless he has authorized or co-operated in such acts or misdeeds. Story, Ag. § 452; Paley, Ag. 303; 1 Mood & M. 433. He is, however, civilly liable to third persons for the misfeasance, negligence, or omission of duty of his agent in the course of the agency, although he did not authorize or know of such misconduct, or even although he forbade it, Story, Ag. § 452; Paley, Ag. 294–307; Smith, Merc. Law, 70, 71; 26 Vt. 112, 123; 6 Gill & J. Md. 291; 20 Barb. N. Y. 507; 7 Cush. Mass. 385; and he is liable for the injuries and wrongs of sub-agents who are retained by his direction, either express or implied. Story, Ag. § 454; Paley, Ag. 296; 1 Bos. & P. 409. But the responsibility of the principal for the negligence or unlawful acts of his agent is limited to cases properly within the scope of the agency. Nor is he liable for the *wilful* acts of his agent whereby damage is occasioned to another, unless he originally commanded or subsequently assented to the act. Paley, Ag. 298, 299; Story, Ag. § 456; 9 Wend. N. Y. 268; 23 Pick. Mass. 25; 20 Conn. 284.

In Criminal Law. The actor in the commission of a crime.

10. Principals are of two kinds, namely, principals in the first degree, and principals in the second degree.

A *principal in the first degree* is one who is the actual perpetrator of the fact. 1 Hale, Pl. Cr. 233, 615; 15 Ga. 346. But to constitute him such it is not necessary that he should be actually present when the offence is consummated. 3 Den. N. Y. 190. For if one lay poison purposely for another, who takes it and is killed, the offender, though absent when it was taken, is a principal in the first degree. Fost. 349; 1 Hawkins, Pl. Cr. c. 31, § 7; 4 Sharswood, Blackst. Comm. 34; 1 Chitty, Crim. Law, 257. And the offence may be committed in his absence, through the medium of an innocent agent: as, if a person incites a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, to the commission of crime, the inciter, though absent when the fact was committed, is *ex necessitate* liable for the act of his agent and a principal in the first degree. 1 Hale, Pl. Cr. 514; 2 Leach, Cr. Cas. 978. But if the instrument be aware of the consequences of his act, he is a principal in the first degree: the employer, in such case, if present when the fact is committed, is a principal in the second degree, and, if absent, an accessary before the fact. Russ. & R. 163; 1 Carr. & K. 589; 1 Archbold, Crim. Law, Waterman's 7th Am. ed. 58–60.

11. *Principals in the second degree* are those who are present aiding and abetting the commission of the fact. 2 Va. Cas. 356. They are generally termed aiders and abettors, and sometimes, improperly, accomplices; for the latter term includes all the *participes criminis*, whether principals in the first or second degree or mere accessaries. A person to be a principal in the second degree need not be actually present an ear- or eye-witness of the

transaction. The presence may be constructive. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. If, for instance, he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. Foster, Crim. Law, 347, 350; 1 Russell, Crim. Law, 27; 1 Hale, 555; Wright, Ohio, 75; 9 Pick. Mass. 496; 9 Carr. & P. 437; 15 Ill. 511. There must, however, be a participation in the act; for although a person be present when a felony is committed, yet if he does not consent to the felonious purpose or contribute to its execution he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon. 1 Russell, Crimes, 27; 1 Hale, Pl. Cr. 439; Foster, Crim. Law, 350; 9 Ired. No. C. 440; 3 Wash. C. C. 223; 1 Wisc. 159; 1 Archbold, Crim. Law, 7th Am. ed. 61, 62.

12. The law recognizes no difference between the offence of principals in the first and principals in the second degree. And so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment; and if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. So, when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence. 1 Archbold, Crim. Law, Waterman's 7th Am. ed. 66, 67.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation, or specially as aiders and abettors. Archbold, Crim. Plead. 14th ed. 7; 11 Cush. Mass. 422; 1 Carr. & M. 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors. Archbold, Crim. Plead. 14th ed. 7. If indicted as aiders and abettors, an indictment charging that A gave the mortal blow, and that B, C, and D were present aiding and abetting, will be sustained by evidence that B gave the blow, and that A, C, and D were present aiding and abetting; and even if it appears that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted. Dougl. 207; 1 East, Pl. Cr. 350. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. 1 Den. Cr. Cas. 52; 2 Carr. & K. 382.

PRINCIPAL CONTRACT. One entered into by both parties on their own accounts or in the several qualities they assume.

PRINCIPAL OBLIGATION. That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Pothier, Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself, and not for the benefit of another. Pothier, Obl. n. 186.

PRINCIPLES. By this term is understood truths or propositions so clear that they cannot be proved nor contradicted unless by propositions which are still clearer.

That which constitutes the essence of a body or its constituent parts. 8 Term, 107. See PATENTS.

2. They are of two kinds: one when the principle is universal, and these are known as axioms or maxims: as, *no one can transmit rights which he has not; the accessory follows the principal*, etc. The other class are simply called first principles. These principles have known marks, by which they may always be recognized. These are—*first*, that they are so clear that they cannot be proved by anterior and more manifest truths; *second*, that they are almost universally received; *third*, that they are so strongly impressed on our minds that we conform ourselves to them whatever may be our avowed opinions.

First principles have their source in the sentiment of our own existence, and that which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, Lois Civiles, liv. prél. t. 1, s. 2; Toullier, tit. prél. n. 17. *The right to defend one's self continues as long as an unjust attack*, was a principle before it was ever decided by a court: so that a court does not *establish* but *recognize* principles of law.

PRINTING. The art of impressing letters; the art of making books or papers by impressing legible characters.

The right to print is guaranteed by law, and the abuse of the right renders the guilty person liable to punishment. See LIBEL; LIBERTY OF THE PRESS; PRESS.

PRIORITY. Precedence; going before.

2. He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because, the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards. 1 Fonblanque, Eq. 320.

In the payment of debts, the United States is entitled to priority when the debtor is insolvent or dies and leaves an insolvent

estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed. 1 Kent, Comm. 243; 1 Phil. Law Int. 219, 251, and the cases there cited.

3. Among common creditors, he who has the oldest lien has the preference,—it being a maxim both of law and equity, *qui prior est tempore, potior est jure.* 2 Johns. Ch. N. Y. 608. See INSOLVENCY.

But in respect to privileged debts existing against a ship or vessel under the general admiralty law, the order of priority is most generally that of the inverse order of their creation,—thus reversing the order of priority generally adopted in the courts of common law. See MARITIME LIENS; MARSHALLING ASSETS. 16 Bost. Law Rep. 1, 264; 17 *id.* 421.

PRISON. A public building for confining persons, either to insure their production in court, as accused persons and witnesses, or to punish, as criminals.

The root is French, as is shown by the Norman *prisons*, prisoners, Kelham, Norm. Fr. Dict., and Fr. *prisons*, prisons. Britton, c. 11, *de Prisons*. Originally it was distinguished from gaol, which was a place for confinement, not for punishment. See Jacob, Dict. *Gaol*. But at present there is no such distinction.

PRISON-BREAKING. The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law.

To constitute this offence, there must be—a *lawful commitment* of the prisoner on criminal process, Coke, 2d Inst. 589; 1 Carr & M. 295; 2 Ashm. Penn. 61; 1 Ld. Raym. 424; an *actual breach* with force and violence of the prison, by the prisoner himself, or by others with his privity and procurement, Russ. & R. 458; 1 Russell, Crimes, 380; *the prisoner must escape.* 2 Hawkins, Pl. Cr. c. 18, s. 12. See 1 Hale, Pl. Cr. 607; 4 Sharswood, Blackst. Comm. 130; Coke, 2d Inst. 500; 1 Gabbett, Crim. Law, 305; Alison, Scotch Law, 555; Dalloz, Dict. *Effraction;* 3 Johns. N. Y. 449; 5 Metc. Mass. 559.

PRISONER. One held in confinement against his will.

2. *Lawful prisoners* are either prisoners charged with crimes or for a civil liability. Those charged with crimes are either persons accused and not tried; and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases, when the proof is great; or those who have been convicted of crimes, whose imprisonment, and the mode of treatment they experience, is intended as a punishment: these are to be treated agreeably to the requisitions of the law, and, in the United States, always with humanity. See PENITENTIARY. Prisoners in civil cases are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged except under the insolvent laws.

3. Persons unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus.* For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toullier, 82.

Prisoners charged with the commission of crimes under the United States laws are to be confined in the prisons of the states, or in proper places of confinement provided by the marshals. 9 Cranch, 80.

PRISONER OF WAR. One who has been captured while fighting under the banner of some state. He is a prisoner although never confined in a prison.

In modern times, prisoners are treated with more humanity than formerly: the individual captor has now no personal right to his prisoner. Prisoners are under the superintendence of the government, and they are now frequently exchanged. See 1 Kent, Comm. 14.

It is a general rule that a prisoner is out of the protection of the laws of the state so far that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. Bacon, Abr. *Abatement* (B 3), *Aliens* (D).

PRIVATE. Affecting or belonging to individuals, as distinct from the public generally. Not clothed with office.

PRIVATE ACT. An act operating only upon particular persons and private concerns, and rather an exception than a rule. Opposed to public act. 1 Sharswood, Blackst. Comm. 86; 1 Term, 125; Plowd. 28; Dy. 75, 119; 4 Coke, Rep. 76. Private acts ought not to be noticed by courts unless pleaded.

PRIVATEER. A vessel owned by one or more private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it. 1 Kent, Comm. 96; Pothier, du Dr. de Propr. n. 90 *et seq.* See 2 Dall. Penn. 36; 3 *id.* 334; 4 Cranch, 2; 1 Wheat. 46; 3 *id.* 546; 5 *id.* 338; 2 Gall. C. C. 19, 56, 526; 1 Mas. C. C. 365; 3 Wash. C. C. 209. Most of the great maritime powers have agreed that privateers shall not be allowed in war.

PRIVEMENT ENCEINTE (L. Fr.). A term used to signify that a woman is

pregnant, but not *quick with child*. See Wood, Inst. 662; ENCEINTE; FŒTUS; PREGNANCY.

PRIVIES. Persons who are partakers or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; Coke, Litt. 271 *a*.

There are several kinds of privies: namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Preston, Conv. 327–345. Privies have also been divided into privies in fact and privies in law. 8 Coke, 42 *b*. See Viner, Abr. *Privity;* 5 Comyns, Dig. 347; Hammond, Part. 131; Woodfall, Landl. & Ten. 279; 1 Dane, Abr. c. 1, art. 6.

PRIVIGNUS (Lat.). **In Civil Law.** Son of a husband or wife by a former marriage; a stepson. Calvinus, Lex.; Vicat, Voc. Jur.

PRIVILEGE. In Civil Law. A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. La. Code, art. 3153; Dalloz, Dict. *Privilège;* Domat, Lois Civ. liv. 2, t. 1, s. 4, n. 1.

2. Creditors of the same rank of privileges are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables or immovables, or in both at once. They are general or special, on certain movables. The debts which are privileged on *all the movables in general* are the following, which are paid in this order. *Funeral charges. Law charges*, which are such as are occasioned by the prosecution of a suit before the courts. But this name applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. Charges, of whatever nature, occasioned by *the last sickness*, concurrently among those to whom they are due. See LAST SICKNESS. The *wages of servants* for the year past, and so much as is due for the current year. *Supplies of provisions* made to the debtor or his family during the last six months by retail dealers, such as bakers, butchers, grocers, and during the last year by keepers of boarding-houses and taverns. The *salaries of clerks, secretaries*, and other persons of that kind. *Dotal rights*, due to wives by their husbands.

3. The debts which are privileged on *particular movables* are—the debt of a workman or artisan, for the price of his labor, on the movable which he has repaired or made, if the thing continues still in his possession; that debt on the pledge which is in the creditor's possession; the carrier's charges and accessory expenses on the thing carried; the price due on movable effects, if they are yet in the possession of the purchaser; and the like. See LIEN.

Creditors have a privilege on immovables or real estate in some cases, of which the following are instances:— the vendor, on the estate by him sold, for the payment of the price, or so much of it as is due, whether it be sold on or without a credit; architects and contractors, bricklayers, and other workmen, employed in constructing, rebuilding, or repairing houses, buildings, or making other works on such houses, buildings, or works by them constructed, rebuilt, or repaired; those who have supplied the owner with materials for the construction or repair of an edifice or other work, which he has erected or repaired out of these materials, on the edifice or other work constructed or repaired. La. Code, art. 3216.

See, generally, as to privilege, La. Code. tit. 21; Code Civ. tit. 18; Dalloz, Dict. *Privilège;* LIEN; LAST SICKNESS; PREFERENCE.

In Maritime Law. An allowance to the master of a ship of the general nature with primage, being compensation, or rather a gratuity, customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties.

PRIVILEGE FROM ARREST. Privilege from arrest on civil process.

It is either permanent, as in case of ambassadors, public ministers and their servants, the royal family and servants, peers and peeresses, etc., or temporary, as in case of members of congress, who are privileged *eundo, manendo, et redeundo*, 1 Kent, Comm. 243; practising barristers, while actually engaged in the business of the court, 2 Dowl. 51; 5 *id.* 86; 1 H. Blackst. 636; 1 Mees. & W. Exch. 488; 6 Ad. & E. 623; a clergyman whilst going to church, performing service, and returning, 7 Bingh. 320; witnesses and parties to a suit and bail, *eundo, manendo, et redeundo*, 5 Barnew. & Ad. 1078; 6 Dowl. 632; 1 Stark. 470; 1 Maule & S. 638; 1 Mees. & W. Exch. 488; 6 Ad. & E. 623; and other persons who are privileged by law. See ARREST.

PRIVILEGED COMMUNICATIONS. A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable.

2. Duty, in this canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation. 5 Ell. & B. 347. The proper meaning of a privileged communication, said Mr. Baron Parke, is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the

character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendent was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made. 2 Crompt. M. & R. Exch. 573.

3. The law recognizes two classes of cases in which the occasion either supplies an absolute defence, or a defence subject to the condition that the party acted *bonâ fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice. The former depend in no respect for their protection upon the *bonâ fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. Heard, Libel & S. § 89.

4. As to communications which are thus absolutely privileged, it may be stated as the result of the authorities that no person is liable, either civilly or criminally, in respect of any thing published by him as a member of a legislative body, in the course of his legislative duty, nor in respect of any thing published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation. A fair report of any judicial proceeding or inquiry is also privileged. Heard, Libel & S. §§ 90, 103, 110.

PRIVILEGED COPYHOLDS. Those copyholds which are held according to the *custom of the manor*, and not according to the *will of the lord*. They include ancient demesne and customary freehold. See CUSTOMARY COPYHOLD. 2 Wooddeson, Lect. 33–49; Lee, Real Prop. 63; 1 Crabb, Real Prop. 709, 919; 2 Sharswood, Blackst. Comm. 100.

PRIVILEGED DEED. In Scotch Law. An instrument, for example, a testament, in the execution of which certain statutory formalities usually required are dispensed with, either from necessity or expediency. Erskine, Inst. 3. 2. 22; Bell, Dict.

PRIVILEGIUM (*priva lex*, i.e. *de uno homine*). **In Civil Law.** A private law inflicting a punishment or conferring a reward. Calvinus, Lex.; Cicero, *de Lege*, 3, 19, *pro Domo*, 17; Vicat, Voc. Jur. Every peculiar right by which one creditor or class of creditors is preferred to another in personal actions. Vicat, Voc. Jur. Every privilege granted by law in derogation of common right. Mackeldy, §§ 188, 189. A claim or lien on a thing, which once attaching continued till waiver or satisfaction, and which existed apart from possession. So at the present day in maritime law: *e.g.* the lien of seamen on ship for wages. 2 Parsons, Marit. Law, 561–563.

PRIVILEGIUM CLERICALE (Lat.). The same as benefit of clergy.

PRIVITY. The mutual or successive relationship to the same rights of property. 1 Greenleaf, Ev. § 189; 6 How. 60.

PRIVITY OF CONTRACT. The relation which subsists between two contracting parties.

From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment. Dougl. 458, 764; Viner, Abr.; 6 How. 60.

PRIVITY OF ESTATE. Identity of title to an estate.

The relation which subsists between a landlord and his tenant.

2. It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord without the latter's consent: an assignee who comes in only in privity of estate is liable only while he continues to be legal assignee; that is, while in possession under the assignment. Bacon, Abr. *Covenant* (I 4); Woodfall, Landl. & T. 279; Viner, Abr.; Washburn, Real Prop.

PRIVY. One who is a partaker or has any part or interest in any action, matter, or thing.

PRIVY COUNCIL. The chief council of the sovereign, called, by pre-eminence, "the Council," composed of those whom the king appoints. 1 Sharswood, Blackst. Comm. 229–232.

By statute of Charles II., in 1679 the number was limited to thirty,—fifteen the chief officers of the state *ex virtute officii*, the other fifteen at the king's pleasure; but the number is now indefinite. A committee of the privy council is a court of ultimate appeal in admiralty causes and causes of lunacy and idiocy, 3 P. Will. Ch. 108, and from all dominions of the crown except Great Britain and Ireland. 1 Wooddeson, Lect. 157 *b*; 2 Stephen, Comm. 479; 3 *id.* 425, 432.

PRIVY SEAL. In English Law. A seal which the king uses to such grants or things as pass the great seal. Coke, 2d Inst. 554.

PRIVY SIGNET. The seal which is first used in making grants, etc. of the crown. It is always in custody of the secretary of state. 2 Sharswood, Blackst. Comm. 347; 1 Wooddeson, Lect. 250; 1 Stephen, Comm. 571.

PRIVY VERDICT. One which is delivered privily to a judge out of court.

PRIZE. In Maritime Law. The apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 C. Rob. Adm. 228.

The vessel or goods thus taken.

Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

2. In order to vest the title of the prize in the captors, it must ordinarily be brought with due care into some convenient port for adjudication by a competent court. But circumstances may render such a step improper; and of these the captor must be the judge. In making up his decision, good faith and reasonable discretion are required. 18 How. 110; 1 Kent, Comm. 101. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor or his ally: the prize court of an ally cannot condemn.

3. Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over and the *spes recuperandi* was gone. But by the modern usage of nations this is not sufficient to change the property. A judicial tribunal must pass upon the case; and the property is not charged in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation. 1 Kent, Comm. 102. See Phillimore, Int. Law, Index, *Prize;* 1 Kent, Comm. 101; Abbott, Shipp.; 13 Viner, Abr. 51; 2 Brown, Civ. Law, 444; Merlin, Répert.; Bouvier, Inst. Index; INFRA PRÆSIDIA.

In Contracts. A reward which is offered to one of several persons who shall accomplish a certain condition: as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace.

In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay. Wolff, Dr. de la Nat. § 675.

A thing which is won by putting into a lottery.

PRIZE COURT. In English Law. That branch of admiralty which adjudicates upon cases of maritime captures made in time of war. A special commission issues in England, in time of war, to the judge of the admiralty court, to enable him to hold such court. See ADMIRALTY.

Some question has been raised whether the prize court is or is not a separate court from the admiralty court. Inasmuch as the commission is always issued to the judge of that court, and the forms of proceeding are substantially those of admiralty, while the law applicable is derived from the same sources, the fact that the commission of prize is only issued occasionally would hardly seem to render the distinction a valid one.

In the United States, the admiralty courts discharge the duties both of a prize and an instance court.

PRO (Lat.). For. This preposition is of frequent use in composition.

PRO AMITA (Lat.). A great-grandfather's sister; a great-aunt. Ainsworth, Dict.

PRO CONFESSO (Lat. as confessed). **In Equity Practice.** A decree taken where the defendant has either never appeared in the suit, or, after having appeared, has neglected to answer. 1 Daniell, Chanc. Pract. 479; Adams, Eq. 327, 374; 1 Smith, Chanc. Pract. 254.

PRO EO QUOD (Lat.). **In Pleading.** For this that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; 2 Chitty, Plead. 369–393; Gould, Plead. c. 3, § 34.

PRO INDIVISO (Lat.). For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and where, consequently, neither knows his several portion till divided. Bract. l. 5.

PRO INTERESSE SUO (Lat.). According to his interest.

PRO QUERENTE (Lat.). For the plaintiff: usually abbreviated *pro quer.*

PRO RATA (Lat.). According to the rate, proportion, or allowance. A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

PRO RE NATA (Lat.). For the occasion as it may arise.

PRO TANTO (Lat.). For so much. See 17 Serg. & R. Penn. 400.

PROAVIA (Lat.). A great-grandmother. Ainsworth, Dict.

PROAVUNCULUS (Lat.). A great-grandmother's brother. Ainsworth, Dict.

PROAVUS (Lat.). Great-grandfather. This term is employed in making genealogical tables.

PROBABILITY. Likelihood; consonance to reason: for example, there is a strong probability that a man of good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury will not, under the same circumstances, tell the truth: the former will, therefore, be entitled to credit, while the latter will not.

PROBABLE. Having the appearance of truth; appearing to be founded in reason.

PROBABLE CAUSE. Such a state of facts as to make it a reasonable presumption that their supposed existence was the cause of action.

2. When there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a *probable cause* for making a charge against the accused, however malicious the intention of the accuser may have been. Croke Eliz. 70; 2 Term. 231; 1 Wend. N. Y. 140, 345; 5 Humphr. Tenn. 357; 3 B. Monr. Ky. 4. See 1 Penn. St. 234; 6 Watts & S. Penn. 236;

1 Meigs, Tenn. 84; 3 Brev. No. C. 94. And probable cause will be presumed till the contrary appears.

3. In an action, then, for a malicious prosecution, the plaintiff is bound to show total absence of probable cause, whether the original proceedings were civil or criminal. 5 Taunt. 580; 1 Campb. 199; 2 Wils. 307; 1 Chitty, Pract. 48; Hammond, Nisi P. 273. See MALICIOUS PROSECUTION; 7 Cranch, 339; 1 Mas. C. C. 24; Stew. Adm. 115; 11 Ad. & E. 483; 1 Pick. Mass. 524; 24 *id.* 81; 8 Watts, Penn. 240; 3 Wash. C. C. 31; 6 Watts & S. Penn. 336; 2 Wend. N. Y. 424; 1 Hill, So. C. 82; 3 Gill & J. Md. 377; 9 Conn. 309; 3 Blackf. Ind. 445; Bouvier, Inst. Index.

In cases of municipal seizure for the breach of revenue, navigation, and other laws, if the property seized is not condemned, the party seizing is exempted from liability for such seizure if the court before which the cause is tried grants a certificate that there was *probable cause* for the seizure. If the seizure was without probable cause, the party injured has his remedy at common law. See 7 Cranch, 339; 2 Wheat. 118; 9 *id.* 362; 16 Pet. 342; 3 How. 197; 4 *id.* 251; 13 *id.* 498.

PROBATE OF A WILL. The proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.

2. *Jurisdiction.* In England, the ecclesiastical courts were the only tribunals in which, except by special prescription, the validity of wills of personal estate could be established or disputed. Hence, in all courts, the seal of the ecclesiastical court is conclusive evidence of the factum of a will of personalty; from which it follows that an executor cannot assert or rely on his authority in any other court, without showing that he has previously established it in the spiritual court,—the usual proof of which is the production of a copy of the will by which he is appointed, certified under the seal of the ordinary. This is usually called the probate.

The ecclesiastical courts have no jurisdiction of devises of lands; and in a trial at common law or in equity the probate of a will is not admissible as evidence, but the original will must be produced, and proved the same as any other disputed instrument. This rule has been modified by statute in some of the United States. In New York, the record, when the will is proved by the subscribing witnesses, is *primâ facie* evidence, and provision is made for perpetuating the evidence. See 12 Johns. N. Y. 192; 14 *id.* 407. In Massachusetts, Connecticut, North Carolina, and Michigan, the probate is conclusive of its validity, and a will cannot be used in evidence till proved. 1 Pick. Mass. 114; 1 Gall. C. C. 622; 1 Mich. Rev. Stat. 275. In Pennsylvania, the probate is not conclusive as to lands, and, although not allowed by the register's court, it may be read in evidence. 5 Rawle, Penn. 80. In North Carolina, the will must be proved *de novo* in the court of common pleas, though allowed by the ordinary. 1 Nott & M'C. So. C. 326. In New Jersey, probate is necessary, but it is not conclusive. 1 Penn. N. J. 42. See LETTERS TESTAMENTARY.

3. *The effect* of the probate in this country, and the rules in regard to jurisdiction, are generally the same as in England; but, as no ecclesiastical courts exist in the United States, probate is granted by some judicial officer, who performs the part of the ordinary in England, but generally with more ample powers in relation to the administration of the estate. See SURROGATE; LETTERS TESTAMENTARY.

The proof of the will is a judicial proceeding, and the probate a judicial act. The party propounding the instrument is termed the proponent, and the party disputing, the contestant. In England, proof *ex parte* was called probate in common form, and proof on notice to the next of kin, proof in solemn form. In the United States, generally speaking, proofs are not taken until citation or notice has been issued by the judge to all the parties interested to attend. On the return of the citation, the witnesses are examined, and the trial proceeds before the court. If the judge, when both parties have been heard, decides in favor of the will, he admits it to probate; if against the will, he rejects it, and pronounces sentence of intestacy.

4. More than one instrument may be proved; and where the contents of two or more instruments are not wholly inconsistent with each other, they may all be admitted as together constituting the last will and testament of the deceased. Williams, Exec. 281.

On the probate the alleged will may be contested on any ground tending to impeach its validity: as, that it was not executed in due form of law and according to the requisite statutory solemnities; that it was forged, or was revoked, or was procured by force, fraud, misrepresentation, or undue influence over a weak mind, or that the testator was incompetent by reason of idiocy or lunacy.

PROBATION. The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. It also signifies the time of a novitiate; a trial. Nov. 5.

PROBATOR. In Old English Law. Strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessary, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another. Jacob, Law Dict.

PROBATORY TERM. In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned. This is called a probatory term.

This term is common to both parties, and either party may examine his witnesses. When good cause is shown, the term will be enlarged. 2 Brown, Civ. Law, 418; Dunlop, Adm. Pract. 217.

PROBI ET LEGALES HOMINES (Lat.). Good and lawful men; persons competent in point of law to serve on juries. Croke Eliz. 654, 751; Croke Jac. 635; Mart. & Y. Tenn. 147; Hard. Ky. 63; Bacon, Abr. *Juries* (A).

PROBITY. Justice; honesty. A man of probity is one who loves justice and honesty, and who dislikes the contrary. Wolff, Dr. de la Nat. § 772.

PROCEDENDO (Lat.). **In Practice.** A writ which issues where an action is removed from an inferior to a superior jurisdiction by habeas corpus, certiorari, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to *proceed* to the final hearing and determination of the same. See 1 Chitty, Bail, 575; 2 W. Blackst. 1060; 1 Strange, 527; 6 Term, 365; 4 Barnew. & Ald. 535; 16 East, 387.

PROCEEDING. In its general acceptation, this word means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing.

Ordinary proceedings intends the regular and usual mode of carrying on a suit by due course at common law.

Summary proceedings are those where the matter in dispute is decided without the intervention of a jury: these must be authorized by the legislature, except perhaps in cases of contempt, for such proceedings are unknown to the common law.

In Louisiana there is a third kind of proceeding, known by the name of executory proceeding, which is resorted to in the following cases: When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor; or 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. La. Code, art. 732.

In New York the code of practice divides remedies into actions and special proceedings. An action is a regular judicial proceeding, in which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding. N. Y. Code, § 2.

PROCEEDS. Money or articles of value arising or obtained from the sale of property. Goods purchased with money arising from the sale of other goods, or obtained on their credit, are *proceeds* of such goods. 2 Parsons, Marit. Law, 201, 202. The sum, amount, or value of goods sold, or converted into money. Wharton, Dict. 2d Lond. ed.

PROCERES (Lat.). The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

PROCES-VERBAL. In French Law. A true relation in writing, in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

The *procès-verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place,—in a word, every thing calculated to ascertain the truth. It must be signed by the officer. Dalloz, Dict.

PROCESS. In Practice. The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.

The method taken by law to compel a compliance with the original writ or commands of the court.

In civil causes, in all real actions and for injuries not committed against the peace, the first step was a summons, which was served in personal actions by two persons called summoners, in real actions by erecting a white stick or wand on the defendant's grounds. If this summons was disregarded, the next step was an attachment of the goods of the defendant, and in case of trespasses the attachment issued at once without a summons. If the attachment failed, a distringas issued, which was continued till he appeared. Here process ended in injuries not committed with force. In case of such injuries, an arrest of the person was provided for. See ARREST. In modern practice some of these steps are omitted; but the practice of the different states is too various to admit tracing here the differences which have resulted from retaining different steps of the process.

In the English law, process in civil causes is called *original* process, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne* process is also sometimes put in contradistinction to *final* process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Sharswood, Blackst. Comm. 279.

In Patent Law. The art or method by which any particular result is produced.

A process, *eo nomine*, is not made the subject of a patent in our act of congress. It is included under the general term "useful art." Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes,

methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing india-rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines. But the term process is often employed more vaguely in a secondary sense, in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine, and does not constitute a patentable subject-matter, because there cannot be a valid patent for the function or abstract effect of a machine, but only for the machine which produces it. 15 How. 267, 268. See 2 Barnew. & Ald. 349.

PROCESS OF GARNISHMENT. See GARNISHMENT.

PROCESS OF INTERPLEADER. A means of determining the right to property claimed by each of two or more persons, which is in the possession of a third.

Formerly, when two parties concurred in bailment to a third person of things which were to be delivered to one of them on the performance of a covenant or other thing, and the parties brought several actions of detinue against the bailee, the latter might plead the facts of the case and pray that the plaintiffs in the several actions might interplead with each other: this was called process of interpleader. 3 Reeve, Hist. Eng. Law, ch. 23; Mitford, Eq. Plead. Jeremy ed. 141; 2 Story, Eq. Jur. § 802.

PROCESS OF LAW. See DUE PROCESS OF LAW.

PROCESSIONING. In Tennessee. A term used to denote the manner of ascertaining the boundaries of land, as provided for by the laws of that state. Tenn. Comp. Stat. 348. The term is also used in North Carolina. 3 Murph. No. C. 504; 3 Dev. No. C. 268.

PROCHEIN (L. Fr.). Next. A term somewhat used in modern law, and more frequently in the old law: as, *prochein ami*, *prochein cousin*. Coke, Litt. 10.

PROCHEIN AMI (L. Fr.; spelled, also, *prochein amy* and *prochain amy*). Next friend. He who, without being appointed guardian, sues in the name of an infant for the recovery of the rights of the latter, or does such other acts as are authorized by law: as, in Pennsylvania, to bind the infant apprentice. 3 Serg. & R. Penn. 172; 1 Ashm. Penn. 27. For some of the rules with respect to the liability or protection of a prochein ami, see 3 Madd. Ch. 468; 4 *id.* 461; 2 Strange, 709; 1 Dick. Ch. 346; 1 Atk. Ch. 570; Mosel. 47, 85; 1 Ves. Ch. 409; 7 *id.* 425; 10 *id.* 184; Edwards, Parties, 182–204.

PROCLAMATION. The act of causing some state matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority: as, the president's proclamation, the governor's, the mayor's proclamation. The word proclamation is also used to express the public nomination made of any one to a high office: as, such a prince was *proclaimed* emperor.

2. The president's proclamation may give force to a law, when authorized by congress: as, if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted. How far a proclamation is evidence of facts, see Bacon, Abr. *Evidence* (F); Dougl. 594, n.; Buller, Nisi P. 226; 12 Mod. 216; 8 State Tr. 212; 4 Maule & S. 546; 2 Campb. 44; Dane, Abr. ch. 96, a. 2, 3, 4; 6 Ill. 577; Brooke, Abr.

In Practice. The declaration made by the cryer, by authority of the court, that something is about to be done.

3. It usually commences with the French word *Oyez, do you hear*, in order to attract attention: it is particularly used on the meeting or opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

PROCLAMATION OF EXIGENTS. In Old English Practice. On awarding an *exigent*, in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party dwelt, to make three proclamations for the defendant to yield himself or be outlawed.

PROCLAMATION OF REBELLION. In Old English Practice. When a party neglected to appear upon a *subpœna*, or an attachment in the chancery, a writ bearing this name issued; and, if he did not surrender himself by the day assigned, he was reputed and declared a rebel.

PROCREATION. The generation of children: it is an act authorized by the law of nature. One of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

PROCTOR. One appointed to represent in judgment the party who empowers him, by writing under his hand, called a *proxy*. The term is used chiefly in the courts of civil and ecclesiastical law. The proctor is somewhat similar to the attorney. Ayliffe, Parerg. 421.

PROCURATION. In Civil Law. The act by which one person gives power to another

to act in his place, as he could do himself. A letter of attorney.

An *express* procuration is one made by the express consent of the parties. An *implied* or *tacit* procuration takes place when an individual sees another managing his affairs and does not interfere to prevent it. Dig. 17. 1. 6. 2; 50. 17. 60; Code, 7. 32. 2.

Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3. 3. 58; 17. 1. 60. 4. Procurations are ended in three ways: *first*, by the revocation of the authority; *second*, by the death of one of the parties; *third*, by the renunciation of the mandatory, when it is made in proper time and place and it can be done without injury to the person who gave it. Inst. 3. 27; Dig. 17. 1; Code, 4. 35. See AUTHORITY; LETTER OF ATTORNEY; MANDATE.

PROCURATIONS. In Ecclesiastical Law. Certain sums of money which parish priests pay yearly to the bishops or archdeacons *ratione visitationis*. Dig. 3. 39. 25; Ayliffe, Parerg. 429; 17 Viner, Abr. 544.

PROCURATOR. In Civil Law. A proctor; a person who acts for another by virtue of a procuration. *Procurator est, qui aliena negotia mandata Domini administrat.* Dig. 3. 3. 1. See ATTORNEY; AUTHORITY.

PROCURATOR, FISCAL. In Scotch Law. A public prosecutor. Bell, Dict.

PROCURATOR LITIS (Lat.). **In Civil Law.** One who by command of another institutes and carries on for him a suit. Vicat, Voc. Jur. *Procurator* is properly used of the attorney of *actor* (the plaintiff), *defensor* of the attorney of *reus* (the defendant). It is distinguished from *advocatus*, who was one who undertook the defence of persons, not things, and who was generally the patron of the person whose defence he prepared, the person himself speaking it. It is also distinguished from *cognitor*, who conducted the cause in the presence of his principal, and generally in cases of citizenship; whereas the procurator conducted the cause in the absence of his principal. Calvinus, Lex.

PROCURATOR IN REM SUAM. In Scotch Law. A term which imports that one is acting as attorney as to his own property. When an assignment of a thing is made, as a debt, and a procuration or power of attorney is given to the assignee to receive the same, he is in such case procurator *in rem suam*. 3 Stair, Inst. 1. 2. 3, etc.; 3 Erskine, Inst. 3. 5. 2; 1 Bell, Dict. b. 5, c. 2, s. 1, § 2.

PROCURATORIUM (Lat.). The proxy or instrument by which a proctor is constituted and appointed.

PRODIGAL. In Civil Law. A person who, though of full age, is incapable of managing his affairs, and of the obligations which attend them, in consequence of his bad conduct, and for whom a curator is therefore appointed.

PRODITORIE (Lat.). Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin.

PRODUCENT. In Ecclesiastical Law. He who produces a witness to be examined.

PRODUCTION OF SUIT (*productio sectæ*). The concluding clause of all declarations is, "and thereupon he brings his suit." In old pleading this referred to the production by the plaintiff of his *secta* or suit, *i.e.* persons prepared to confirm what he had stated in the declaration.

The phrase has remained; but the practice from which it arose is obsolete. 3 Sharswood, Blackst. Comm. 295; Stephen, Plead. 428.

PROFANE. That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11. 7. 2. 4.

PROFANELY. In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely. 11 Serg. & R. Penn. 394.

PROFANENESS, PROFANITY. In Criminal Law. A disrespect to the name of God or his divine providence. This is variously punished by statute in the several states.

PROFECTITUS (Lat.). **In Civil Law.** That which descends to us from our ascendants. Dig. 23. 3. 5.

PROFERT IN CURIA (Lat. he produces in court: sometimes written *profert in curiam* with the same meaning). **In Pleading.** A declaration on the record that a party produces the deed under which he makes title in court. In ancient practice, the deed itself was actually produced; in modern times, the allegation only is made in the declaration, and the deed is then constructively in possession of the court. 3 Salk. 119; 6 Mann. & G. 277; 11 Md. 322.

Profert is, in general, necessary when either party pleads a deed and claims rights under it, whether plaintiff, 2 Dutch. N. J. 293, or defendant, 17 Ark. 279, to enable the court to inspect and construe the instrument pleaded, and to entitle the adverse party to oyer thereof, 10 Coke, 92 *b*; 1 Chitty, Plead, 414; 1 Archbold, Pract. 164, and is not necessary when the party pleads it without making title under it. Gould, Plead. c. 7, p. 2, § 47. But a party who is actually or presumptively unable to produce a deed may plead it without profert, as in suit by a stranger, Comyns, Dig. *Pleader*, O 8; Croke Jac. 217; Croke Car. 441; Carth. 316, or one claiming title by operation of law, Coke, Litt. 225; Bacon, Abr. *Pleas* (I 12); 5 Coke, 75; or where the deed is in the possession of the adverse party or is lost. In all these cases the special facts must be shown, to excuse the want of profert. See Gould, Plead. c. 8, p. 2; Lawes,

Plead. 96; 1 Saund. 9 *a*, note. Profert and oyer are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76; and a provision exists, 14 & 15 Vict. c. 99, for allowing inspection of all documents in the possession or under the control of the party against whom the inspection is asked. See 25 Eng. L. & Eq. 304. In many of the states of the United States profert has been abolished, and in some instances the instrument must be set forth in the pleading of the party relying upon it. The operation of profert and oyer, where allowed, is to make the deed a part of the pleadings of the party producing it. 11 Md. 322; 3 Cranch, 234. See 7 Cranch, 176.

PROFESSION. A public declaration respecting something. Code, 10. 41. 6. A state, art, or mystery: as, the legal profession. Dig. 1. 18. 6. 4; Domat, Dr. Pub. l. 1, t. 9, s. 1, n. 7.

In Ecclesiastical Law. The act of entering into a religious order. See 17 Viner, Abr. 545.

PROFITS. The advance in the price of goods sold beyond the cost of purchase.

The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.

An excess of the value of returns over the value of advances.

2. This is a word of very extended signification. In *commerce*, it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital or stock. Adam Smith, Wealth of Nat. b. i. c. 6, and M Culloch's Notes; Mill, Polit. Econ. c. 15. After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, Polit. Econ. c. 15. The word profit is generally used by writers on political economy to denote the difference between the value of advances and the value of returns made by their employment.

3. The profit of the farmer and the manufacturer is the gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed,—whether land, buildings, machinery, instruments, or money. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. The income or the net income of an estate means only the profit it will yield after deducting the charges of management. 5 Me. 202, 203; 35 *id.* 420, 421.

Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface: as, herbage, wood, turf, coals, minerals, stones; also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the proprietor himself, and *profits à vendre*, namely, such as are received at the hands of and rendered by another. Hammond, Nisi P. 172.

4. Profits are divided by writers on political economy into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name; but it represents the profits attributable to industry, skill, and enterprise. See Malthus, Def. in Polit. Econ.; M'Culloch, Polit. Econ. 4th ed. 563. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances.

5. Using profit in this more limited and popular sense, persons who share profits do not necessarily share losses; for they may stipulate for a division of gain, if any, and yet some one or more of them may, by agreement, be entitled to be indemnified against losses by the others: so that whilst all share profits some only bear losses. Persons who share gross returns share profits in the sense of gain; but they do not by sharing the returns share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits if there are any, it is so only incidentally, and because such profits are included in what is divided: it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither. 1 Lindley, Partn. Engl. ed. 10. These considerations have led to the distinction between agreements to share profits and agreements to share gross returns, and to the doctrine that, whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not. 1 Lindley, Partn. Engl. ed. 11. See 10 Vt. 170; 12 Conn. 69; 1 Campb. 329; 2 Curt. C. C. 609; 38 N. H. 287, 304.

6. Commissions may be considered as profits, for some purposes. A participation in commissions has been held such a participation in profits as to constitute the participants partners. 2 H. Blackst. 235; 4 Barnew. & Ald. 663. So, commissions received from the sales of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright. 2 Curt. C. C. 608. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted profits of the firm. Story, Partn. § 174; 2 Curt. C. C. 608, 609.

7. A direction or power given in a will to raise money out of the rents and profits of an estate for the payment of debts and legacies, or to raise a portion within a definite period, within which it could not be raised out of the annual rents and profits, authorizes a sale. 2 Ch. Cas. 205; 1 Vern. Ch. 104; 2 *id.* 26, 310, 420, 424; 1 Ves. Sen. Ch. 491; 1 Atk. Ch. 550. And judges in latter times, looking to the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even

at an indefinite period, as authorizing a sale or mortgage. 2 Jarman, Wills, 4th Am. ed. 382, 383; 1 Ves. Ch. 234; 1 Atk. Ch. 505; 1 Ves. Sen. Ch. 42. But, as a general rule, the question whether the money is to be raised by a sale or mortgage or out of the annual rents and profits will depend upon the nature of the purpose for which the money is to be raised, and the general tenor of the will. 2 Jarman, Wills, 4th Am. ed. 383, 384; 3 Brown, Parl. Cas. 66; 3 Younge & J. Exch. 360; 1 Atk. Ch. 550; 1 Russ. & M. Ch. 590; 3 *id.* 97; 2 P. Will. Ch. 63. The circumstances that have chiefly influenced the decisions are—the appointment of a time within which the charge cannot be raised by annual profits; the situation of the estate, where a sale or mortgage would be very prejudicial, as in the case of a reversion, especially if it would occasion any danger that the charge would not be answered in its full extent; the nature of the charge, as where it is for debts or portions, and, in the latter instance, the age or death of the child. 2 Ves. Ch. 480, n. 1; 1 Chanc. Cas. 170; 2 *id.* 205; 1 Vern. Ch. 256; 2 *id.* 26, 72, 420; 2 P. Will. Ch. 13, 650; 1 Fonblanque, Eq. 440, n. (o); 1 Atk. Ch. 506, 550; 2 *id.* 358. But in no case where there are subsequent restraining words has the word profit been extended. Prec. Ch. 586, note, and the cases cited there; 1 Atk. Ch. 506; 2 *id.* 105.

8. A devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein. 1 Ves. Sen. Ch. 171; 2 Barnew. & Ald. 42; Plowd. 540; 9 Mass. 372; 1 Cush. Mass. 93; 1 Ashm. Penn. 131; 1 Spenc. N. J. 142; 17 Wend. N. Y. 393; 5 Me. 119; 35 *id.* 414; 1 Atk. Ch. 506; 2 *id.* 358; 1 Brown, Ch. 310. A direction by the testator that a certain person *shall receive for his support the net profits of the land* is a devise of the land itself, for such period of time as the profits were devised. 35 Me. 419.

An assignment of the profits of an estate amounts to an equitable lien, and would entitle the assignee in equity to insist upon a mortgage. Thus, if a tenant for life of the real estate should, by covenant, agree to set apart and pay the whole or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him. 2 Cox, Ch. 253: s. c., 1 Ves. Ch. 477; 3 Brown, Ch. 531, 538.

9. Profits expected to arise from merchandise employed in maritime commerce are a proper subject of insurance in England and in the United States. 1 Arnould, Ins. 204; Marshall, Ins. b. 1, ch. 3, § 8; 3 Kent, Comm. 271; 16 Pick. Mass. 399; 5 Metc. Mass. 391; 1 Sumn. C. C. 451. So in Italy, Targa, cap. xliii. no. 5; Portugal, Santerna, part iii. no. 40; and the Hanse Towns. 2 Magnus, 213; Benecke, Ass. chap. 1, sect. 10, vol. 1, p. 170. But in France, Code de Comm. art. 347, Holland, Bynkershoeck, Quæst. Priv. Jur. lib. iv. c. 5, and in Spain, except to certain distant parts, Ordinanzas de Bilboa, ch. xxii. art. 7, 8, 11, it is illegal to insure expected profits. Such insurance is required by the course and interest of trade, and has been found to be greatly conducive to its prosperity. 3 Kent, Comm. 271; *Lawrence*, J., 2 East, 544; 1 Arnould, Ins. 204, 205. Sometimes the profits are included in a valuation of the goods from which they are expected to arise; sometimes they are insured as profits. 1 Johns. N. Y. 433; 3 Pet. 222; 1 Sumn. C. C. 451; 6 Ell. & B. 312; 2 East, 544; 6 *id.* 316. They may be insured equally by valued and by open policies. 1 Arnould, Ins. 205; 3 Campb. 267. But it is more judicious to make the valuation. 1 Johns. N. Y. 433; 3 Kent, Comm. 273. The insured must have a real interest in the goods from which the profits are expected, 3 Kent, Comm. 271; but he need not have the absolute property in them. 16 Pick. Mass. 397, 400; 13 Mass. 61.

10. A trustee, executor, or guardian, or other person standing in a like relation to another, may be made to account for and pay all the profits made by him in any of the concerns of his trust, as by embarking the trust funds in trade. 1 Story, Eq. Jur. § 465; 2 Mylne & K. Ch. 66, 672, note; 1 Ves. Ch. 32, 41, 42, 43, in note; 11 *id.* 61; 2 Ves. & B. Ch. 315; 1 Jac. & W. Ch. 122, 131; 1 Turn. & R. Ch. 379; 2 Williams, Exec. 1311; 1 Serg. & R. Penn. 245; 1 Term, 295; 1 Maule & S. 412; 2 Brown, Ch. 400; 10 Pick. Mass. 77.

The expected profits of a special contract may be reckoned as a part of the damages for a failure to fulfil it, where it appears that such profits would have accrued from the contract itself as the direct and immediate consequence of its fulfilment. 13 How. 307, 344; 7 Cush. Mass. 516, 522, 523; 8 Exch. 401; 16 N. Y. 489; 7 Hill, N. Y. 61; Maine, Damages, 15, 16; 2 C. B. N. S. 592. But where the profits are such only as were expected to result from other independent bargains actually entered into on the faith of such special contract, or for the purposes of fulfilling it, or are contingent upon future bargains or speculations or states of the market, they are too remote and uncertain to be relied upon as a proper basis of damages, 13 How. 307, 344; 38 Me. 361; 7 Cush. Mass. 516, 522, 523; 7 Hill, N. Y. 61; 13 C. B. 353; Chitty, Contr. ed. 1860, 980, 981, notes. See, also, 21 Pick. Mass. 378, 381; 3 Cush. Mass. 201, 205; 1 Pet. C. C. 85, 94; 3 Wash. C. C. 184; 1 Pet. 172; 1 Yeates, Penn. 36; 11 Serg. & R. Penn. 445.

11. A purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate. 2 Sugden, Vend. 7th Am. ed. ch. 16, sect. 1, art. 1; 6 Dan. Ky. 298; 3 Gill, Md. 82. See 6 Ves. Ch. 143, 352; 12 Mees. & W. Exch. 761.

Under what circumstances a participation or sharing in profits will make one a partner in

a trade or adventure, see PARTNERS; PARTNERSHIP.

PROGRESSION (Lat. *progressio;* from *pro* and *gredior*, to go forward). That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. See CONSUMMATION; INCEPTION.

PROHIBITION (Lat. *prohibition;* from *pro* and *habeo*, to hold back). **In Practice.** The name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Sharswood, Blackst. Comm. 112; Comyns, Dig.; Bacon, Abr.; Saund. Index; Viner, Abr.; 2 Sellon, Pract. 308; Ayliffe, Parerg. 434; 2 H. Blackst. 533.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed, Buller, Nisi P. 219, or when, by the exercise of its jurisdiction, the inferior court would defeat a legal right. 2 Chitty, Pract. 355.

PROHIBITIVE IMPEDIMENTS. Those impediments to a marriage which are only followed by a punishment, but do not render the marriage null. Bowyer, Mod. Civ. Law, 44.

PROJET. In International Law. The draft of a proposed treaty or convention.

PROLES (Lat.). Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

PROLETARIUS. In Civil Law. One who had no property to be taxed, and paid a tax only on account of his children (*proles*); a person of mean or common extraction. The word has become Frenchified, *prolétaire* signifying one of the common people.

PROLICIDE (Lat. *proles*, offspring, *cedere*, to kill). **In Medical Jurisprudence.** A word used to designate the destruction of the human offspring. Jurists divide the subject into *fœticide*, or the destruction of the fœtus in utero, and *infanticide*, or the destruction of the new-born infant. Ryan, Med. Jur. 137.

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price, Exch. 278, n.

PROLOCUTOR (Lat. *pro* and *loquor*, to speak before). **In Ecclesiastical Law.** The president or chairman of a convocation.

PROLONGATION. Time added to the duration of something.

When the time is lengthened during which a party is to perform a contract, the sureties of such a party are, in general, discharged, unless the sureties consent to such prolongation. See GIVING TIME.

In the civil law the prolongation of time to the principal did not discharge the surety. Dig. 2. 14. 27; 12. 1. 40.

PROLYTÆ (Lat.). **In Roman Law.** The term used to denominate students of law during the fifth and last year of their studies. They were left during this year very much to their own direction, and took the name (*προλυτοι*) prolytæ *omnino soluti*. They studied chiefly the Code and the imperial constitutions. See Dig. Pref. Prim. Const. 2; Calvinus, Lex.

PROMATERTERA (Lat.). Great maternal aunt; the sister of one's grandmother. Inst. 3. 6. 3; Dig. 38. 10. 10. 14 *et seq.*

PROMISE (Lat. *promitto*, to put forward) An engagement by which the promisor contracts towards another to perform or do something to the advantage of the latter.

When a promise is made, all that is said at the time in relation to it must be considered: if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes any thing, no action will lie to enforce such a promise. 15 Wend. N. Y. 187.

And when the promise is conditional, the condition must be performed before it becomes of binding force. 7 Johns. N. Y. 36. See CONDITION; CONTRACTS; 5 East, 17; 2 Leon. 224; 4 Barnew. & Ald. 595.

PROMISE OF MARRIAGE. A contract mutually entered into by a man and a woman that they will marry each other. Every marriage is necessarily preceded by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant. Addison, Contr. 4th ed. 676.

2. A promise of marriage is not to be likened to an actual marriage. The latter, as has been seen in the article on marriage, is not a contract, but a legal relation; while the former is an executory contract in the strict sense of the term, and governed in general by the ordinary law of contracts, though it has certain peculiarities of its own. As in other contracts, the parties must be *sui juris*. If, therefore, the man or the woman be an infant, or labor under any other legal disability, he or she will not be bound by a promise of marriage; but if one of the parties be an infant and the other an adult, the promise will be binding upon the latter. Strange, 937; 5 Cow. N. Y. 475; 7 *id.* 22; 5 Sneed, Tenn. 659; 1 D. Chipm. Vt. 252. Neither does it follow, as we shall see presently, that a promise of marriage is not binding because the parties to the promise cannot form a valid marriage: they may be competent to *contract*, though not competent to *marry*.

3. There must be a legal and valid consideration; but as there are always mutual promises, they are a sufficient consideration for each other. There must be a meeting of the minds of the parties, *i.e.* a request or proposition on the one side, and an assent or

the other. If the communications between the parties are verbal, the only questions which usually arise relate to evidence and proof. The very words or time or manner of the promise need not be proved, but it may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry: as, visiting, the understanding of friends and relations, preparations for marriage, and the reception of the man by the woman's family as a suitor. 3 Salk. 16; 15 Mass. 1; 2 Dow & C. 282; 2 Penn. St. 80; 13 *id.* 331; 1 Ohio St. 26; 2 Carr. & P. 553; 1 Stark. 82; 6 Cow. N. Y. 254; 26 Conn. 398; 4 Zabr. N. J. 291; 1 Parsons, Contr. 4th ed. 545. When the parties are at a distance from each other, and the offer is made by letter, it will be presumed to continue for a reasonable time for the consideration of the party addressed; and if accepted within a reasonable time, and before it is expressly revoked, the contract is then complete. 1 Parsons, Contr. b. 2, c. 2.

4. A promise of marriage is not within the third clause of the fourth section of the Statute of Frauds, relating to agreements made upon consideration of marriage; but if not to be performed within a year, it is within the fifth clause, and must, therefore, be in writing in order to be binding. 1 Strange, 34; 1 Ld. Raym. 387; 2 N. H. 515.

If no time be fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request, and either party may call upon the other to fulfil the engagement, and in case of default may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as continuing, it will be deemed to be abandoned by mutual consent. If the parties are somewhat advanced in years, and the marriage is appointed to take place at a remote period of time, the contract would be voidable at the option of either party, as in restraint of marriage. Addison, Contr. 4th ed. 678.

5. The defences which may be made to an action for a breach of promise of marriage are, of course, various; but it is only necessary to notice in this place such as are in some degree peculiar. Thus, if either party has been convicted of an infamous crime, or has sustained a bad character generally, and the other was ignorant of it at the time of the engagement, or if the woman has committed fornication, and this was unknown at the time to the man who promised to marry her, or if the woman is deeply involved in debt at the time of the engagement, and the fact is kept secret from her intended husband, Addison, Contr. 4th ed. 680; but see 1 Ell. B. & E. 7, 96, or if false representations are made by the woman, or by her friends in collusion with her, as to her circumstances and situation in life and the amount of her fortune and marriage portion, either of these will constitute a good defence. 1 Carr. & P. 350, 529; 3 Esp. 236; 44 Me. 164; 1 Carr & K. 463; 3 Bingh. N. c. 54; Holt, Nisi P. 151; 5 La. Ann. 316; 18 Ill. 44. But it has been held not to be a defence that the plaintiff at the time of the engagement was under an engagement to marry another person, unless the prior engagement was fraudulently concealed. 1 Ell. B. & E. 796. But see 1 Parsons, Contr. 550.

6. If after the engagement either party is guilty of gross misconduct, inconsistent with the character which he or she was fairly presumed to possess, the other party will be released. 4 Esp. 256. If the engagement is made without any agreement respecting the woman's property, and she afterwards disposes of any considerable portion of it without her intended husband's knowledge and consent, or if she insists upon having her property settled to her own separate use, it is said that this will justify him in breaking off the engagement. Addison, Contr. 4th ed. 680. So, if the situation and position of either of the parties as regards his or her fitness for the marriage relation is materially and permanently altered for the worse (whether with or without the fault of such party) after the engagement, this will release the other party. Thus, if one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated permanently to impair and weaken the constitution, this will dispense with the performance of the contract on the part of the other party. Addison, Contr. 4th ed. 681; Pothier, Tr. du Mar. no. 1, 60, 61, 63. Whether it will also constitute a defence for the party afflicted, is a question of much difficulty. In a recent English case, where it appeared that the defendant since the engagement had become afflicted with consumption, whereby he was rendered incapable of marriage without great danger of his life, it was held, by six judges against five, that this constituted no defence; though it seemed to be agreed that it would have been a good defence for the other party. 1 Ell. B. & E. 746, 765.

7. The common opinion that an agreement to marry between persons incapable of forming a valid marriage is necessarily void, is erroneous. If the disability pertains only to one of the parties, and the other party was ignorant of it at the time of the engagement, it will constitute no defence for the former. Thus, if a man who already has a wife living makes a promise of marriage to another woman who is ignorant of the former marriage, he will be liable in damages for a breach of his promise, although a performance is impossible. 2 Carr. & P. 553; 7 C. B. 999; 5 Exch. 775; 29 Barb. N. Y. 22.

In an action for breach of promise of marriage, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by improper motives. 1 C. B. N. s. 660; 1 Younge & J. Exch. 477; 26 Conn. 398. And

if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character or the criminal conduct of the plaintiff, and fails altogether in the proof, the jury may take this into consideration as enhancing the damages. 6 Cow. N. Y. 254; 27 Mo. 600. Where such an action is brought by a woman, it seems that she may prove, in aggravation of damages, that the defendant, under color of a promise of marriage, has seduced her. 8 Barb. N. Y. 323; 2 Ind. 402; 3 Mass. 73. But see, *contra*, 2 Penn. St. 80, commented on in 11 *id.* 316; 1 R. I. 493.

PROMISEE. A person to whom a promise has been made.

In general, a promisee can maintain an action on a promise made to him; but when the consideration moves not from the promisee, but some other person, the latter, and not the promisee, has a cause of action, because he is the person for whose use the contract was made. Latch, 272; Poph. 81; Croke Jac. 77; 1 T. Raym. 271, 368; 4 Barnew. & Ad. 435; 1 Nev. & M. 303; Cowp. 437; Dougl. 142. But see Carth. 5; 2 Ventr. 307; 9 Mees. & W. Exch. 92, 96.

PROMISES. When a defendant has been arrested, he is frequently induced to make confessions in consequence of promises made to him that if he will tell the truth he will be either discharged or favored: in such a case, evidence of the confession cannot be received, because, being obtained by the flattery of hope, it comes in so questionable a shape, when it is to be considered evidence of guilt, that no credit ought to be given to it. 1 Leach, Cr. Cas. 263. This is the principle; but what amounts to a promise is not so easily defined. See CONFESSION.

PROMISOR. One who makes a promise.

The promisor is bound to fulfil his promise, unless when it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee; when the promise has been made without a sufficient consideration; and perhaps in some other cases.

PROMISSORY NOTE. A written promise to pay a certain sum of money, at a future time, unconditionally. 7 Watts & S. Penn. 264; 2 Humphr. Tenn. 143; 10 Wend. N. Y. 675; 1 Ala. 263; 7 Mo. 42; 2 Cow. N. Y. 536; 6 N. H. 364; 7 Vern. Ch. 22.

2. A promissory note differs from a mere acknowledgment of debt without any promise to pay, as when the debtor gives his creditor an I O U. See 2 Yerg. Tenn. 50; 15 Mees. & W. Exch. 23. But see 2 Humphr. Tenn. 143; 6 Ala. N. s. 373. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a certain person therein named, or to his order, for value received. It is dated and signed by the maker. It is never under seal.

He who makes this promise is called the *maker*, and he to whom it is made is the payee. Bayley, Bills, 1; 3 Kent, Comm. 46.

3. Although a promissory note, in its original shape, bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee. 4 Burr. 669; 4 Term, 148; 3 Burr. 1224.

Most of the rules applicable to bills of exchange equally affect promissory notes. No particular form is requisite to these instruments: a promise to deliver the money, or to be accountable for it, or that the payee shall have it, is sufficient. Chitty, Bills, 53, 54.

4. There are two principal qualities essential to the validity of a note: *first*, that it be payable at all events, not dependent on any contingency, 20 Pick. Mass. 132; 22 *id.* 132, nor payable out of any particular fund. 3 J. J. Marsh. Ky. 170, 542; 5 Ark. 441; 2 Blackf. Ind. 48; 1 Bibb, Ky. 503; 9 Miss. 393; 3 Pick. Mass. 541; 4 Hawks, No. C. 102; 5 How. 382. *Second*, it is required that it be for the payment of money only, 10 Serg. & R. Penn. 94; 4 Watts, Penn. 400; 11 Vt. 268, and not in bank-notes; though it has been held differently in the state of New York. 9 Johns. N. Y. 120; 19 *id.* 144.

5. A promissory note payable to order or bearer passes by indorsement, and, although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. See 5 Comyns, Dig. 133, n., 151, 472; Smith, Merc. Law, b. 3, c. 1; 4 Barnew. & C. 235; 1 Carr. & M. 16. See BILL OF EXCHANGE; INDORSEMENT; NOTICE.

PROMOTERS. In English Law. Those who, in popular or penal actions, prosecute in their own names and the king's, having part of the fines and penalties.

PROMULGATION. The order given to cause a law to be executed, and to make it public: it differs from publication. 1 Sharswood, Blackst. Comm. 45; Stat. 6 Hen. VI. c. 4.

With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. Paine, C. C. 32. See Paine, C. C. 23.

PROMUTUUM (Lat.). **In Civil Law.** A quasi contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning

him as much. Pothier, de l'Usure, pt. 3, s. 1, a. 1.

This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. This resemblance consists in this: *first*, that in both a sum of money or some fungible things are required; *second*, that in both there must be a transfer of the property in the thing; *third*, that in both there must be returned the same amount or quantity of the thing received. But, though there is this general resemblance between the two, the *mutuum* differs essentially from the *promutuum*. The former is the actual contract of the parties, made expressly, but the latter is a quasi contract, which is the effect of an error or mistake. 1 Bouvier, Inst. n. 1125, 1126.

PRONEPOS (Lat.). Great-grandson.

PRONEPTIS (Lat.). A niece's daughter. A great-granddaughter. Ainsworth, Dict.

PRONURUS (Lat.). The wife of a great-grandson.

PROOF. In Practice. The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of the reality of a fact alleged. Thus, *to prove* is to determine or persuade that a thing does or does not exist. 8 Toullier, n. 2; Ayliffe, Parerg. 442; 2 Phillipps, Ev. 44, n. a. Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof: for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be *evidence* to show that the latter was the murderer, but, standing alone, will be very far from *proof* of it.

Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods: first, by proper arguments, such as conjectures, presumptions, indicia, and other adminicular ways and means; secondly, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayliffe, Parerg. 442; Aso & M. Inst. b. 3, t. 7.

PROPER. That which is essential, suitable, adapted, and correct.

Congress is authorized, by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and *proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof."

PROPERTY. The right and interest which a man has in lands and chattels to the exclusion of others. 6 Binn. Penn. 98; 4 Pet. 511; 17 Johns. N. Y. 283; 11 East, 290, 518; 14 *id.* 370.

2. All things are not the subject of property: the sea, the air, and the like cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases: so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prél. tit. 3; Pothier, des Choses; 18 Viner, Abr. 63; Comyns, Dig. *Biens*. See, also, 2 Barnew. & C. 281; 9 *id.* 396; 3 Dowl. & R. 394; 1 Carr. & M. 39; 4 Call, Va. 472; 18 Ves. Ch. 193; 6 Bingh. 630.

3. Property is said to be real and personal property. See those titles.

It is also said to be, when it relates to goods and chattels, *absolute* or *qualified*. Absolute property is that which is our own without any qualification whatever: as, when a man is the owner of a watch, a book, or other inanimate thing, or of a horse, a sheep, or other animal which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power: as, a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost his property is gone, unless the animals go *animo revertendi*. 2 Sharswood, Blackst. Comm. 396; 3 Binn. Penn. 546.

4. But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. See BAILEE; BAILMENT.

Personal property is further divided into property in possession, and property or choses in action. See CHOSE IN ACTION.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like.

5. Property is lost by the act of man by—*first, alienation;* but in order to do this the owner must have a legal capacity to make a contract; *second*, by the voluntary abandonment of the thing; but unless the abandonment be purely voluntary the title to the property is not lost: as, if things be thrown into the sea to save the ship, the right is not lost. Pothier, n. 270; 3 Toullier, n. 346. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned at any time before another takes possession of it.

It is lost *by operation of law—first*, by the

forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations; *second*, by confiscation, or sentence of a criminal court; *third*, by prescription; *fourth*, by civil death; *fifth*, by capture of a public enemy. It is lost *by the act of God*, as in the case of the death of slaves or animals, or in the total destruction of a thing: for example, if a house be swallowed up by an opening in the earth during an earthquake.

6. It is proper to observe that, in some cases, the moment that the owner loses his possession he also loses his property or right in the thing: animals *feræ naturæ*, as mentioned above, belong to the owner only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. See, generally, Bouvier, Inst. Index.

PROPINQUITY (Lat.). Kindred; parentage. See AFFINITY; CONSANGUINITY; NEXT OF KIN.

PROPIOR SOBRINA, PROPIOR SOBRINO (Lat.). The son or daughter of a great-uncle or great-aunt on the father's or mother's side. Calvinus, Lex.

PROPIOS, PROPRIOS. In Spanish Law. Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the unalienable property of the town, for the purpose of erecting public buildings, markets, etc., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. 12 Pet. 442, note.

PROPONENT. In Ecclesiastical Law. One who propounds a thing: as, "the party proponent doth allege and propound." 6 Eccl. 356, n.

PROPOSAL. An offer. A formal offer to perform some undertaking, stating the time and manner of performance and price demanded, or one or more of these particulars, either directly or by implied or direct reference to some announcement requesting such an offer. See 35 Ala. N. S. 33. A proposal of this character is not to be considered as subject to different rules from any other offer. Pierce, Am. Railw. Law, 364. See OFFER.

PROPOSITION. An offer to do something. Until it has been accepted, a proposition may be withdrawn by the party who makes it; and to be binding, the acceptance must be in the same terms, without any variation. See ACCEPTANCE; OFFER; 1 La. 190; 4 *id.* 80.

PROPOSITUS (Lat.). The person proposed. In making genealogical tables, the person whose relations it is desired to find out is called the *propositus*.

PROPOUND. To offer; to propose: as, the *onus probandi* in every case lies upon the party who propounds a will. 1 Curt. Eccl. 537; 6 Eccl. 417.

PROPRES. In French Law. The term *propres* or *biens propres* is used to denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquêts*. Pothier, Des Propres; 2 Burge, Confl. of Laws, 61.

PROPRIA PERSONA (Lat. in his own person). It is a rule in pleading that pleas to the jurisdiction of the court must be pleaded *in propriâ personâ*, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. Lawes, Plead. 91.

An appearance may be *in propriâ personâ*, and need not be by attorney.

PROPRIETARY. In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government of Pennsylvania, William Penn was called the proprietary.

The domain which William Penn and his family had in the state was, during the revolutionary war, divested by the act of June 28, 1779, from that family, and vested in the commonwealth for the sum which the latter paid to them of one hundred and thirty thousand pounds sterling.

PROPRIETATE PROBANDA. The name of a writ. See DE PROPRIETATE PROBANDA.

PROPRIETOR. The owner.

PROPRIO VIGORE (Lat.). By its own force or vigor: an expression frequently used in construction. A phrase is said to have a certain meaning *proprio vigore*.

PROPTER AFFECTUM (Lat.). For or on account of some affection or prejudice. A juryman may be challenged *propter affectum*: as, because he is related to the party, has eaten at his expense, and the like. See CHALLENGE.

PROPTER DEFECTUM (Lat.). On account of or for some defect. This phrase is frequently used in relation to challenges. A juryman may be challenged *propter defectum*: as, that he is a minor, an alien, and the like. See CHALLENGE.

PROPTER DELICTUM (Lat.). For or on account of crime. A juror may be challenged *propter delictum* when he has been convicted of an infamous crime. See CHALLENGE.

PROROGATED JURISDICTION. In Scotch Law. That jurisdiction which, by the consent of the parties, is conferred upon a judge who, without such consent, would be incompetent. Erksine, Inst. 1. 2. 15

At common law, when a party is entitled to some privilege or exemption from jurisdic-

tion, he may waive it, and then the jurisdiction is complete; but the consent cannot give jurisdiction.

PROROGATION (Lat.). Puttting off to another time. It is generally applied to the English parliament, and means the continuance of it from one day to another: it differs from adjournment, which is a continuance of it from one day to another in the same session. 1 Sharswood, Blackst. Comm. 186.

In Civil Law. The giving time to do a thing beyond the term prefixed. Dig. 2. 14. 27. 1. See PROLONGATION.

PROSCRIBED (Lat. *proscribo*, to write before). **In Civil Law.** Among the Romans, a man was said to be proscribed when a reward was offered for his head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. Code, 9. 49.

PROSECUTION (Lat. *prosequor*, to follow after). **In Criminal Law.** The means adopted to bring a supposed offender to justice and punishment by due course of law.

Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. Hawkins, Pl. Cr. b. 2, c. 25, s. 3; Bacon, Abr. *Indictment* (A 3).

In England, the modes most usually employed to carry them on are—by indictment, 1 Chitty, Crim. Law, 132; presentment of a grand jury, *id.* 133; coroner's inquest, *id.* 134; and by an information. In this country, the modes are—by indictment, by presentment, by information, and by complaint.

PROSECUTOR. In Practice. He who prosecutes another for a crime in the name of the government.

The *public* prosecutor is an officer appointed by the government to prosecute all offences: he is the attorney-general or his deputy.

A *private* prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

2. Every man may become a prosecutor; but no man is bound, except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony he will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution.

3. In Pennsylvania, a defendant is not bound to plead to an indictment, where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. See 1 Chitty, Crim. Law, 1–10; 1 Phillipps, Ev.; 2 Va. Cas. 3, 20; 1 Dall. Penn. 5; 2 Bibb, Ky. 210; 6 Call, Va. 245; 5 Rand. Va. 669; INFORMER.

PROSOCER (Lat.). A father-in-law's father; grandfather of wife. Vicat, Voc. Jur.

PROSOCERUS (Lat.). A wife's grandmother.

PROSPECTIVE (Lat. *prospicio*, to look forward). That which is applicable to the future: it is used in opposition to retrospective. To be just, a law ought always to be prospective. 1 Bouvier, Inst. n. 116.

PROSTITUTION. The common lewdness of a woman for gain. The act of permitting a common and indiscriminate sexual intercourse for hire. 12 Metc. Mass. 97.

In all well-regulated communities this has been considered a heinous offence, for which the woman may be punished; and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

So much does the law abhor this offence that a landlord cannot recover for the use and occupation of a house let for the purpose of prostitution. 1 Esp. Cas. 13; 1 Bos. & P. 340, n.

In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest: as, the prostitution of the law, the prostitution of justice.

PROTECTION. In Mercantile Law. The name of a document generally given by notaries public to sailors and other persons going abroad, in which is certified that the bearer therein named is a citizen of the United States.

In Governmental Law. That benefit or safety which the government affords to the citizens.

In English Law. A privilege granted by the king to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. Fitzherbert, Nat. Brev. 65.

PROTEST. In Contracts. A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchange, etc.

2. There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. There is also a species of protest common in England, which is called protest for better security. Protest for non-acceptance or non-payment, when duly made and accompanied by notice to all the parties to the bill or note, has the effect of making all of them responsible to the holder for the amount of the bill or note, together with damages, etc. 3 Kent, Comm. 63; Chitty, Bills, 278; 3 Pardessus, nn. 418–441; Merlin, Répert.; Comyns, Dig. *Merchant* (F 8, 9,

10); Bacon, Abr. *Merchant, etc.* (M 7). Protest for better security may be made when the acceptor of a bill fails, becomes insolvent, or in any other way gives the holder just reason to suppose it will not be paid. It seems to be of doubtful utility, except that it gives the drawer of a bill on a foreign country an opportunity of availing himself of any attachment law there in force. 1 Ld. Raym. 745.

3. The protest is a formal paper wherein the notary certifies that on the day of its date he presented the original bill attached thereunto, or a copy of which is above written, to the acceptor, or the original note to the maker, thereof, and demanded payment, or acceptance, which was refused, and that thereupon he protests against the drawer and indorsers thereof, for exchange, re-exchange, damages, costs, and interest. It is usual, also, for the notary to serve notices of the protest on all the parties to the bill. The notice contains a description of the bill, including its date and amount, the fact of demand and refusal, and that the holder looks to the person notified for payment. Protest of foreign bills is proof of demand and refusal to pay or accept, 2 Harr. & J. Md. 399; 4 *id.* 54; 8 Wheat. 333; 2 Pet. 179, 688. Protest is said to be part of the constitution of a foreign bill; and the form is governed by the *lex loci contractus*. 2 Hill, N. Y. 227; 11 La. 14; 2 Pet. 179, 180; Story, Bills, 176. See ACCEPTANCE; BILLS OF EXCHANGE.

In Legislation. A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body: it is usual to add the reasons which the protestants have for such a dissent.

In Maritime Law. A writing, attested by a justice of the peace, a notary public, or a consul, made and verified by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing that it was not owing to the neglect or misconduct of the master. See Marshall, Ins. 715, 716; 1 Wash. C. C. 145, 238, 408, n.; 1 Pet. C. C. 119; 1 Dall. Penn. 6, 10, 317; 2 *id.* 195; 3 Watts & S. Penn. 144.

The protest is not, in general, evidence for the master of the vessel or his owners in the English or American courts: yet it is often proper evidence against them. Abbott, Shipp. 465, 466; Flanders, Shipp. § 285.

PROTESTANDO. See PROTESTATION.

PROTESTATION. In Pleading. The indirect affirmation or denial, by means of the word protesting (in the Latin form of pleadings, *protestando*), of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. See 3 Sharswood, Blackst. Comm. 311.

The exclusion of a conclusion. Coke, Litt. 124.

2. Its object was to secure to the party making it the benefit of a positive affirmation or denial in case of success in the action, so far as to prevent the conclusion that the fact was admitted to be true as stated by the opposite party, and at the same time to avoid the objection of duplicity to which a direct affirmation or denial would expose the pleading. 19 Johns. N. Y. 96; 2 Saund. 103; Comyns, Dig. *Pleader* (N); Plowd. 276; Lawes, Plead. 171. Matter which is the ground of the suit upon which issue could be taken could not be protested. Plowd. 276; 3 Wils. 109; 2 Johns. N. Y. 227. But see 2 Wms. Saund. 103, n. Protestations are no longer allowed, 3 Sharswood, Blackst. Comm. 312, and were generally an unnecessary form. 3 Lev. 125.

3. The common form of making protestations is as follows: "because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or, if it be against the legal sufficiency of his pleading, "because protesting that the plea by him above pleaded in bar" (or by way of reply, or rejoinder, *etc.*, as the case may be) "is wholly insufficient in law." See, generally, 1 Chitty, Plead. 534; Archbold, Civ. Plead. 245; Comyns, Dig. *Pleader* (N); Stephen, Plead. 235.

In Practice. An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolffius, Inst. § 375.

PROTHONOTARY. The title given to an officer who officiates as principal clerk of some courts. Viner, Abr.

In the ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome. He is so called because he is the *first notary*,—the Greek word πρωτος signifying *primus*, or first. These notaries have pre-eminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dalloz, Dict. de Jur.

PROTOCOL. A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. Nov. 44.

In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 6, s. 1, n. 413.

By the German law it signifies the minutes of any transaction. Encyc. Amer. *Protocol.* In the latter sense the word has of late been received into international law. *Id.*

PROTUTOR (Lat.). **In Civil Law.** He who, not being the tutor of a pupil or minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not.

He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible as the tutor.

PROUT PATET PER RECORDUM (Lat.). As appears by the record. This phrase is frequently used in pleading: as,

for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite, after showing the matter of record, to refer to it by the *prout patet per recordum*. 1 Chitty, Plead. *356; 10 Me. 127.

PROVER. In Old English Law. One who undertakes to prove a crime against another. 28 Edw. I.; 5 Hen. IV. One who, being indicted and arraigned for treason or felony, confesses before plea pleaded, and accuses his accomplices to obtain pardon; state's evidence. 4 Sharswood, Blackst. Comm. 329, 330*. To prove. Law Fr. & Lat. Dict.; Britton, c. 22.

PROVINCE. Sometimes this signifies the district into which a country has been divided: as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony: as, the province of New Brunswick. It is sometimes used figuratively to signify power or authority: as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

PROVISION. In Common Law. The property which a drawer of a bill of exchange places in the hands of a drawee: as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See Code de Comm. art. 115–117.

In French Law. An allowance granted by a judge to a party for his support,—which is to be paid before there is a definitive judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband. Dalloz, Dict.

PROVISIONAL SEIZURE. In Louisiana. A term which signifies nearly the same as attachment of property.

It is regulated by the Code of Practice as follows, namely:

The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege, in order to secure a payment of his claim. La. Code, art. 284.

Provisional seizure may be ordered in the following cases: *first*, in executory proceedings, when the plaintiff sues on a title importing confession of judgment; *second*, when a lessor prays for the seizure of furniture or property used in the house, or attached to the real estate which he has leased; *third*, when a seaman, or other person, employed on board of a ship or water craft, navigating within the state, or person having furnished materials for or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim; *fourth*, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. La. Code, art. 285. See 6 Mart. La. N. s. 168; 7 *id.* 153, 8 *id.* 320; 1 Mart. La. 168; 12 *id.* 32.

PROVISIONS. Food for man; victuals.

As good provisions contribute so much to the health and comfort of man, the law requires that they shall be wholesome: he who sells unwholesome provisions may, therefore, be punished for a misdemeanor. 2 East, Pl. Cr. 822; 6 East, 133–141; 3 Maule & S. 10; 4 *id.* 214; 4 Campb. 10.

And in the sale of provisions the rule is that the seller impliedly warrants that they are wholesome. 3 Sharswood, Blackst. Comm. 166.

PROVISO. The name of a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

It always implies a condition, unless subsequent words change it to a covenant; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant. 2 Coke, 72; Croke Eliz. 242; Moore, 707.

A proviso differs from an exception. 1 Barnew. & Ald. 99. An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse. 8 Am. Jur. 242; Plowd. 361; Carth. 99; 1 Saund. 234 *a*, note; Lilly, Reg., and the cases there cited. See, generally, Am. Jur. no. 16, art. 1; Bacon, Abr. *Conditions* (A); Comyns, Dig. *Condition* (A 1), (A 2); Dwarris, Stat. 660.

PROVISOR. He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision. Jacobs; 25 Edw. III. One nominated by the pope to a benefice before it became void, in prejudice of right of true patron. 4 Sharswood, Blackst. Comm. 111*.

PROVOCATION (Lat. *provoco*, to call out). The act of inciting another to do something.

2. Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide it may reduce the offence from murder to manslaughter. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification. 2 Gilbert, Ev. by Lofft, 753.

3. The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will not entitle her to a divorce on the ground of cruelty: her remedy, in such cases, is to change her manners. 2 Lee, 172; 1 Hagg. Cons. 155. See CRUELTY; PERSUADE; 1 Russell, Crim. 434, 486; 1 East, Pl. Cr. 232–241.

PROVOST. A title given to the chief of some corporations or societies. In France, this title was formerly given to some presiding judges. The word is derived from the Latin *præpositus*.

PROXENETÆ (Lat.). **In Civil Law.** Among the Romans, these were persons whose functions somewhat resembled those of the brokers of modern commercial nations. Dig. 50. 14. 3; Domat, l. 1, t. 17, § 1, art. 1.

PROXIMITY (Lat.). Kindred between two persons. Dig. 38. 16. 8.

PROXY. A person appointed in the place of another, to represent him.

The instrument by which a person is appointed so to act.

The right of voting at an election of an incorporated company by proxy is not a general right, and the party claiming it must show a special authority for that purpose. Angell, Corp. 67–69; 1 Paige, Ch. N. Y. 590; 5 Day, Conn. 329; 5 Cow. N. Y. 426.

In Ecclesiastical Law. A judicial proctor, or one who is appointed to manage another man's law concerns, is called a proxy. Ayliffe, Parerg.

An annual payment made by the parochial clergy to the bishop, etc., on visitations. Tomlin, Law Dict. See Rutherforth, Inst. 253; Hall, Pract. 14.

PUBERTY. In Civil Law. The age in boys of fourteen, and in girls of twelve years. Ayliffe, Pand. 63; Hall, Pract. 14; Toullier, Dr. Civ. Fr. tom. 5, p. 100; Inst. 1. 22; Dig. 1. 7. 40. 1; Code, 5. 60. 3; 1 Sharswood, Blackst. Comm. 436.

PUBLIC. The whole body politic, or all the citizens of the state. The inhabitants of a particular place: as, the New York public.

This term is sometimes joined to other terms, to designate those things which have a relation to the public: as, a public officer, a public road, a public passage, a public house.

A distinction has been made between the terms *public* and *general:* they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. Greenleaf, Ev. § 128.

When the public interests and its rights conflict with those of an individual, the latter must yield. Coke, Litt. 181. If, for example, a road is required for public convenience, and in its course it passes on the ground occupied by a house, the latter must be torn down, however valuable it may be to the owner. In such a case both law and justice require that the owner shall be fully indemnified, See Eminent Domain.

PUBLIC DEBT. That which is due or owing by the government.

The constitution of the United States provides, art. 6, s. 1, that "all debts contracted or engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation." It has invariably been the policy, since the Revolution, to do justice to the creditors of the government. The public debt has sometimes been swelled to a large amount, and at other times it has been reduced to almost nothing.

PUBLIC ENEMY. This word, used in the singular number, designates a nation at war with the United States, and includes every member of such nation. Vattel, b. 3, c. 5, § 70.

To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy. 2 Marshall, Ins. 508; 3 Esp. 131, 132.

A common carrier is exempt from responsibility whenever a loss has been occasioned to the goods in his charge by the act of a public enemy; but the burden of proof lies on him to show that the loss was so occasioned. 3 Munf. Va. 239; 4 Binn. Penn. 127; 2 Bail. So. C. 157. See Common Carrier.

PUBLIC PASSAGE. A right to pass over a body of water. This term is synonymous with public highway, with this difference: by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hammond, Nisi P. 195. See Passage.

PUBLICAN. In Civil Law. A farmer of the public revenue; one who held a lease of some property from the public treasury. Dig. 39. 4. 1. 1; 39. 4. 12. 3; 39. 4. 13.

PUBLICATION. The act by which a thing is made public.

It differs from promulgation, which see; and see, also, Toullier, Dr. Civ. Fr. titre *Préliminaire*, n. 59, for the difference in the meaning of these two words.

2. Publication has different meanings. When applied to a law, it signifies the rendering public the existence of the law; when it relates to the opening the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them. Pract. Reg. 297; Blake, Chanc. Pract. 143. And when spoken of a will, it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will. Cruise, Dig. tit. 38, c. 5, s. 47; 3 Atk. Ch. 161; 4 Me. 220; 3 Rawle, Penn. 15; Comyns, Dig. *Estates by Devise* (E 2). See Comyns, Dig. *Chancery* (Q). As to the publication of an award, see 6 N. H. 36.

3. A *libel* may be published either by speaking or singing, as where it is maliciously repeated or sung in the presence of others, or by delivery, as when a libel, or a copy of it, is delivered to another. A libel may also be published by pictures or signs, as by painting another in an ignominious manner, or making the sign of a gallows, or other reproachful and ignominious sign, upon his door or before his house. If the libel is contained in a letter addressed to the plaintiff, this is not evidence of a publication sufficient to support a civil action; although it would be otherwise in an indictment for

libel. But if the letter, though addressed to the plaintiff, was forwarded during his known absence, and with intent that it should be opened and read by his family, clerks, or confidential agents, and it is read by them, it is a sufficient publication. If it was not opened by others, even though it were not sealed, it is no publication. Heard, Lib. & Sland. §§ 264, 265. In a recent case the publication relied on was a sale of a copy of a newspaper to a person sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff. It was held that this was a sufficient publication to the agent to sustain an action. 14 Q. B. 185. A sealed letter or other communication delivered to the wife of the plaintiff is a publication within the meaning of the law. 13 C. B. 836; Spenc. N. J. 209. If the libel be published in a *newspaper*, proof that copies were distributed, and that the clerk of the printer received payment for them, is evidence of publication. 3 Yeates, Penn. 128. In criminal cases, the publication must be proved to have been made within the county where the trial is had. If it was contained in a newspaper printed in another state, yet it will be sufficient to prove that it was circulated and read within the county. 3 Pick. Mass. 304. If it was written in one county and sent by post to a person in another, or if its publication in another county be otherwise consented to, this is evidence of a publication in the latter county. 7 East, 65; 12 How. St. Tr. 331, 332. If a libel is written in one county with intent to publish it in another, and it is accordingly so published, this is evidence sufficient to charge the party in the county in which it was written. 4 Barnew. & Ald. 95.

4. Uttering slanderous words in the presence of the person slandered only is not a publication. It is immaterial that the words were spoken in a public place. The question for the jury is whether they were so spoken as to have been heard by third persons. 13 Gray, Mass. 304. It must also be shown that the words were spoken in the presence of some one who understood them. Words in a foreign language, whether spoken or written, must be proved to have been understood by those who heard or read them; otherwise there is no publication which is prejudicial to the plaintiff. Heard, Lib. & Sland. § 263.

PUBLICIANA (Lat.). **In Civil Law.** The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4. 6. 4; Dig. 6. 2. 1. 16 et 17. Its effects were similar to those of our action of trover.

PUBLICITY. The doing of a thing in the view of all persons who choose to be present.

The law requires that courts should be open to the public: there can therefore be no secret tribunal, except the grand jury (*q. v.*); and all judgments are required to be given in public.

Publicity must be given to the acts of the legislature before they can be in force; but in general their being recorded in a certain public office is evidence of their publicity.

PUBLISHER. One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

2. The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not, 9 Coke, 59; Hawkins, Pl. Cr. c. 73, § 10; 4 Mas. C. C. 115; and it is no justification to him that the name of the author accompanies the libel. 10 Johns. N. Y. 447; 2 Mood. & R. 312.

3. When the publication is made by writing or printing, if the matter be libellous, the publisher may be indicted for a misdemeanor, provided it was made by his direction or consent; but if he was the owner of a newspaper merely, and the publication was made by his servants or agents, without any consent or knowledge on his part, he will not be liable to a criminal prosecution. In either case he will be liable to an action for damages sustained by the party aggrieved. 7 Johns. N. Y. 260. But see 11 Metc. Mass. 367.

4. In order to render the publisher amenable to the law, the publication must be maliciously made; but malice will be presumed if the matter be libellous. This presumption, however, will be rebutted if the publication be made for some lawful purpose, as, drawing up a bill of indictment, in which the libellous words are embodied for the purpose of prosecuting the libeller; or if it evidently appear that the publisher did not, at the time of publication, know that the matter was libellous: as, when a person reads a libel alone in the presence of others, without beforehand knowing it to be such. 9 Coke, 59. See LIBEL; LIBELLER; PUBLICATION.

PUDICITY. Chastity; the abstaining from all unlawful carnal commerce or connection. A married woman or a widow may defend her pudicity as a maid may her virginity. See CHASTITY; RAPE.

PUDZELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Coke, Litt. 233 *a*. The same as *Woodgeld*.

PUER (Lat. a boy; a child). In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer;* and it was decided by two judges against one that she was entitled. Dy. 337 *b*. In another case, it was ruled the other way. Hob. 33.

PUERILITY. In Civil Law. A condition which commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty,—that is, in females till the accomplishment of twelve

years, and in males till the age of fourteen years fully accomplished. Ayliffe, Pand. 63.

The ancient Roman lawyers divided puerility into *proximus infantiæ*, as it approached infancy, and into *proximus pubertati*, as it became nearer to puberty. 6 Toullier, n. 100.

PUERITIA (Lat.). **In Civil Law.** Age from seven to fourteen. 4 Sharswood, Blackst. Comm. 22; Wharton, Dict. 2d Lond. ed. The age from birth to fourteen years in the male, or twelve in the female. Calvinus, Lex. The age from birth to seventeen. Vicat, Voc. Jur.

PUFFER. A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon *bonâ fide* bidders.

This is a fraud, which, at the choice of the purchaser, invalidates the sale. 3 Madd. Ch. 112; 5 *id.* 37, 440; 12 Ves. Ch. 483; 1 Fonblanque, Eq. 227, n.; 2 Kent, Comm. 423; Cowp. 395; 3 Ves. Ch. 628; 3 Term, 93; 6 *id.* 642; 2 Brown, Ch. 326; 1 P. A. Browne, Penn. 346; 11 Serg. & R. Penn. 89; 2 Hayw. No. C. 328; 4 Harr. & McH. Md. 282; 2 Dev. No. C. 126; 2 Const. So. C. 821. See AUCTION; BIDDER; BY BIDDER.

PUIS DARREIN CONTINUANCE (L. Fr. since last continuance). **In Pleading.** A plea which is put in after issue joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequently to such joinder. See CONTINUANCE; PLEA.

PUISNE (L. Fr.). Younger; junior. Associate.

PULSATION. Beating without pain, as distinguished from verberation, or beating with pain. 3 Sharswood Blackst. Comm. 120*; Calvinus, Lex. *Pulsare.*

PUNCTUATION. The division of a written or printed instrument by means of points, such as the comma, semicolon, and the like.

Punctuation is not to be regarded in the construction of an instrument.

PUNISHMENT. In Criminal Law. Some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

The right of society to punish is derived, by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society: to defend this right, society may exert this principle, in order to support itself; and this it may do whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society would be destroyed. But, if the social compact has ever existed, says Livingston, its end must have been the preservation of the natural rights of the members; and therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered, is that which assures to each member of the state the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the others.

2. To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

3. Punishments are either corporal or not corporal. The former are—death, which is usually denominated capital punishment; imprisonment, which is either with or without labor, see PENITENTIARY; whipping, in some states; and banishment.

The punishments which are not corporal are—fines; forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

4. The object of punishment is to reform the offender, to deter him and others from committing like offences, and to protect society. See 4 Sharswood, Blackst. Comm. 7; Rutherforth, Inst. b. 1, c. 18.

The constitution of the United States, Amendments, art. 8, forbids the infliction of cruel and unusual punishments. See INFAMOUS PUNISHMENTS; PARDON.

PUPIL. In Civil Law. One who is in his or her minority. See Dig. 1. 7; 26. 7. 1. 2; 50. 16. 239; Code, 6. 30. 18. One who is in ward or guardianship.

PUPILLARIS SUBSTITUTIO (Lat.). **In Civil Law.** The nomination of another besides his son pupil to succeed, if the son should not be able or inclined to accept the inheritance, or should die before he came of age to make a testament.

If the child survived the age of puberty, though he made no testament, the substitute had no right of succession. See Bell, Dict. *Substitution;* Dig. 28. 6.

PUPILLARITY. In Civil Law. That age of a person's life which included infancy and puerility.

PUR. A corruption of the French word *par*, by or for. It is frequently used in old French law phrases: as, *pur autre vie.* It is also used in the composition of words: as, purparty, purlieu, purview.

PUR AUTRE VIE (old French, *for an other's life*). An estate is said to be *pur autre vie* when a lease is made of lands or

tenements to a man to hold for the life of another person. 2 Sharswood, Blackst. Comm. 259; 10 Viner, Abr. 296; 2 Belt, Suppl. Ves. Jr. 41.

PURCHASE. A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washburn, Real Prop. 401.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration. Cruise, Dig. tit. 30, §§ 1–4; 1 Dall. Penn. 20. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

PURCHASER. A buyer; a vendee. See SALE; PARTIES; CONTRACTS.

PURCHASE-MONEY. The consideration which is agreed to be paid by the purchaser of a thing in money.

It is the duty of the purchaser to pay the purchase-money as agreed upon in making the contract; and in case of the conveyance of an estate before it is paid, the vendor is entitled, according to the laws of England, which have been adopted in several of the states, to a lien on the estate sold for the purchase-money so remaining unpaid. This is called an equitable lien. This doctrine is derived from the civil law. Dig. 18. 1. 19. The case of Chapman *vs.* Tanner, 1 Vern. Ch. 267, decided in 1684, is the first where this doctrine was adopted. 7 Serg. & R. Penn. 73. It was strongly opposed, but is now firmly established in England and in the United States. 6 Yerg. Tenn. 50; 1 Johns. Ch. N. Y. 308; 7 Wheat. 46, 50; 5 Monr. 287; 1 Harr. & J. Md. 106; 4 *id.* 522; 1 Call, Va. 414; 5 Munf. Va. 342; 1 Dev. Eq. No. C. 163; 4 Hawks, No. C. 256; 5 Conn. 468; 2 J. J. Marsh. Ky. 330; 1 Bibb, Ky. 590; 4 *id.* 239.

But the lien of the seller exists only between the parties and those having notice that the purchase-money has not been paid. 3 J. J. Marsh. Ky. 557; 3 Gill & J. Md. 425. See LIEN.

PURE DEBT. In Scotch Law. A debt actually due, in contradistinction to one which is to become due at a future day certain, which is called a future debt, and one due provisionally, in a certain event, which is called a contingent debt. 1 Bell, Comm. 5th ed. 315.

PURE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been performed. Pothier, Obl. n. 176.

PURE PLEA. In Equity Pleading. One which relies wholly on some matter dehors the bill: as, for example, a plea of a release on a settled account.

Pleas not pure are so called in contradistinction to pure pleas: they are sometimes also denominated negative pleas. 4 Bouvier, Inst. n. 4275.

PURGATION (Lat. *purgo;* from *purum* and *ago*, to make clean). The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

Canonical purgation was the act of justifying one's self, when accused of some offence, in the presence of a number of persons worthy of credit, generally twelve, who would swear they believed the accused. See COMPURGATOR; LAW OF WAGER.

Vulgar purgation consisted in superstitious trials by hot and cold water, by fire, by hot irons, by batell, by corsned, etc.

In modern times a man may purge himself of an offence in some cases where the facts are within his own knowledge: for example, when a man is charged with a contempt of court, he may purge himself of such contempt by swearing that in doing the act charged he did not intend to commit a contempt.

PURGED OF PARTIAL COUNSEL. In Scotland, every witness, before making oath or affirmation, is *purged of partial counsel, i.e.* cleared by examination on oath of having instigated the plea, of having been present with the party for whom he testifies at consultations of lawyers, where it might be shown what was necessary to be proved, or of having acted as his agent in any of the proceedings. So, in a criminal case, he who is agent of prosecutor or who tampers with the panel cannot be heard to testify, because of *partial counsel.* Stair, Inst. p. 768, § 9; Bell, Dict. *Partial Counsel.*

PURLIEU. In English Law. A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

The history of purlieus is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates which had no outlet to the public roads; and things increased in this way until the reign of king John, when the public reclamations were so great that much of this land was disforested, —that is, no longer had the privileges of the forests; and the land thus separated bore the name of purlieu.

PURPARTY. That part of an estate which, having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old Nat. Brev. 11.

PURPORT. In Pleading. The substance of a writing as it appears on the face of it to the eye that reads it. It differs from tenor. 2 Russell, Crimes, 365; 1 East, 179.

PURPRESTURE. An enclosure by a private individual of a part of a common or public domain.

According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many: as, if an individual were to build between high and low water mark on the side of a public river. In England this is a nuisance, and in cases of this kind an injunction will be granted, on ex-parte affidavits, to restrain such a purpresture and nuisance. 2 Bouvier, Inst. n. 2382; 4 *id.* n. 3798; Coke, 2d Inst. 28. And see Skene, *Pourpresture;* Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purpresture;* Hale, de Port. Mar.; Hargrave, Law Tracts, 84; 2 Anstr. 606; Callis, Sew. 174.

PURSE. In Turkey, the sum of five hundred dollars. Merch. Dict.

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which every thing on board is inserted, as well the names of mariners as the articles of merchandise shipped. Roccius, Ins. note.

2. The act of congress concerning the naval establishment, passed March 30, 1812, provides, § 6, that the pursers in the navy of the United States shall be appointed by the president of the United States, by and with the advice and consent of the senate; and that from and after the first day of May next no person shall act in the character of purser who shall not have been thus first nominated and appointed, excepting pursers on distant service, who shall not remain in service after the first day of July next, unless nominated and appointed as aforesaid. And every purser, before entering upon the duties of his office, shall give bond, with two or more sufficient sureties, in the penalty of ten thousand dollars, conditioned faithfully to perform all the duties of purser in the navy of the United States.

3. And by the supplementary act to this act concerning the naval establishment, passed March 1, 1817, it is enacted, § 1, that every purser now in service, or who may hereafter be appointed, shall, instead of the bond required by the act to which this is a supplement, enter into bond, with two or more sufficient sureties, in the penalty of twenty-five thousand dollars, conditioned for the faithful discharge of all his duties as purser in the navy of the United States, which said sureties shall be approved by the judge or attorney of the United States for the district in which such purser shall reside. By act of congress June 22, 1860, pursers are to be called henceforth *paymasters*.

PURSUER. The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eccl. 350.

PURVEYOR. One employed in procuring provisions. See Code, 1. 34.

PURVIEW. That part of an act of the legislature which begins with the words, "Be it enacted," etc., and ends before the repealing clause. Cooke, Tenn. 330; 3 Bibb, Ky. 181. According to Cowel, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It always implies a condition. Interpreter.

PUT. In Pleading. To select; to demand: as, "the said C D puts himself upon the country;" that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Plead. c. 6, part 1, § 19.

PUTATIVE. Reputed to be that which is not. The word is frequently used: as, putative father, putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *propriétaire putatif*. Lord Kames uses the same expression. Princ. of Eq. 391.

PUTATIVE FATHER. The reputed father.

This term is most usually applied to the father of a bastard child.

The putative father is bound to support his children, and is entitled to the guardianship and care of them in preference to all persons but the mother. 1 Ashm. Penn. 55. And see 7 East, 11; 5 Esp. 131; 1 Barnew. & Ald. 491; Bott, Poor Law, 499; 1 Carr. & P. 268; 3 *id.* 36; 1 Ball & B. Ch. Ir. 1; 3 Moore, 211.

PUTATIVE MARRIAGE. A marriage which is forbidden but which has been contracted in good faith and ignorance of the impediment on the part of at least one of the contracting parties.

2. Three circumstances must concur to constitute this species of marriage. *There must be a bonâ fides.* One of the parties at least must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because if he became aware of it he was bound to separate himself from his wife. *The marriage must be duly solemnized. The marriage must have been considered lawful* in the estimation of the parties or of that party who alleges the *bonâ fides*.

3. A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

This species of marriage was not recognized by the civil law: it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland the question has not been settled. Burge, Conf. of Laws, 151, 152.

PUTTING IN FEAR. These words are used in the definition of a robbery from the person: the offence must have been committed by *putting in fear* the person robbed. Coke, 3d Inst. 68; 4 Sharswood, Blackst. Comm. 243.

2. This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used or what kind of fears excited are questions very proper for discussion. The goods must be taken *against the will* of the possessor.

3. There must either be a putting in fear or actual violence, though both need not be positively shown, for the former will be in-

ferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet, in consequence of the violence, it is presumed. 2 East, Pl. Cr. 711; 4 Binn. Penn. 379; 3 Wash. C. C. 209; 2 Chitty, Crim. Law 803.

In an indictment for robbery, at common law, it is not necessary to allege a putting in fear in addition to the allegation of force and violence. 7 Mass. 242; 8 Cush. Mass. 217.

Q.

QUACK. One who, without sufficient knowledge, study, or previous preparation, undertakes to practise medicine or surgery, under the pretence that he possesses secrets in those arts.

The origin of the word quack is not clearly ascertained. Johnson derives it from the word *to quack*, or gabble like a goose. Butler uses this verb as descriptive of the encomiums empirics heap upon their nostrums. Thus, in Hudibras,

> "Believe mechanic virtuosi
> Can raise them mountains in Potosi,
> Seek out for plants with signatures
> To *quack* of universal cures."

The Egyptian hieroglyphic for a doctor was a duck; and it has been a question whether this may not form a clue to the derivation of the word quack. The English quack—or quacksalber, as it was originally written—is from the German *quacksalber*, or rather the Dutch *kwaksalver*, which Bilderdyk states should be more properly *kwabsalver*, from *kwab*, a wen, and *zalver*, to salve or anoint. 5 Notes & Queries.

To call a regular physician a quack is actionable. A quack is criminally answerable for his unskilful practice, and also civilly to his patient in certain cases. See MALPRACTICE; PHYSICIAN.

QUADRANS (Lat.). **In Civil Law.** The fourth part of the whole. Hence the heir *ex quadrante;* that is to say, of the fourth part of the whole.

QUADRANT. In angular measures, a quadrant is equal to ninety degrees. See MEASURE.

QUADRIENNIUM UTILE (Lat.). **In Scotch Law.** The four years of a minor between his age of twenty-one and twenty-five years are so called.

During this period he is permitted to impeach contracts made against his interest previous to his arriving at the age of twenty-one years. Erskine, Inst. 1. 7. 19. 35; 1 Bell, Comm. 135, 5th ed.

QUADRIPARTITE (Lat.). Having four parts, or divided into four parts: as, this indenture quadripartite, made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

QUADROON. A person who is descended from a white person and another person who has an equal mixture of the European and African blood. 2 Bail. So. C. 558. See MULATTO

QUADRUPLICATION. In Pleading. Formerly this word was used instead of surrebutter. 1 Brown, Civ. Law, 469, n.

QUÆ EST EADEM (Lat. which is the same). **In Pleading.** A clause containing a statement that the trespass, or other fact mentioned in the plea, is the same as that laid in the declaration, where from the circumstances there is an apparent difference between the two. 1 Chitty, Plead. 473; Gould, Plead. c. 3, §§ 79, 80; 29 Vt. 455.

The form is as follows: "which are the same assaulting, beating, and ill-treating, the said John, in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James." See 1 Saund. 14, 208, n. 2; 2 *id.* 5 a, n. 3; Archbold, Civ. Plead. 217; Comyns, Dig. *Pleader* (E 3Γ); Croke Jac. 372; 1 Chitty, Plead. 473.

QUÆRE (Lat.). **In Practice.** A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lilly, Abr. 406.

QUÆRENS NON INVENIT PLEGIUM (Lat.). **In Practice.** The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A facerit B securum de clamore suo prosequando*, when the plaintiff has neglected to find sufficient security. Fitzherbert, Nat. Brev. 38.

QUÆSTIO (Lat.). **In Roman Law.** A sort of commission (*ad quærendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quæsitor* or *quæstor*, who made report thereon to the senate or the people, as the one or the other appointed him. In progress of time he was empowered (with the assistance of a counsel) to adjudge the case; and the tribunal thus constituted was called *quæstio*.

2. This special tribunal continued in use until the end of the Roman republic, although it was resorted to, during the last times of the republic, only in extraordinary cases.

The manner in which they were constituted was this. If the matter to be inquired of was within the jurisdiction of the comitia, the senate, on the demand of the consul, or of a tribune, or of one of its members, declared by a decree that there was cause to prosecute a citizen. Then the consul *ex auctoritate senatus* asked the people in comitia

(*rogabat rogatio*) to enact this decree into a law. The comitia adopted it, either simply or with amendment, or they rejected it.

3. The increase of population and of crimes rendered this method, which was tardy at best, onerous, and even impracticable. In the year A.U.C. 604, or 149 B.C., under the consulship of Censorinus and Manilius, the tribune Calpurnius Piso procured the passage of a law establishing a *quæstio perpetua*, to take cognizance of the crime of extortion committed by Roman magistrates against strangers *de pecuniis repetundis*. Cicero, Brut. 27; de Off. ii. 21; in Verr. iv. 25.

4. Many such tribunals were afterwards established, such as Quæstiones de majestate, de ambitu, de peculatu, de vi, de sodalitiis, etc. Each was composed of a certain number of judges taken from the senators, and presided over by a prætor, although he might delegate his authority to a public officer, who was called *judex quæstionis*. These tribunals continued a year only; for the meaning of the word *perpetuus* is (*non interruptus*), not interrupted during the term of its appointed duration.

5. The establishment of these *quæstiones* deprived the comitia of their criminal jurisdiction, except the crime of treason: they were, in fact, the depositories of the judicial power during the sixth and seventh centuries of the Roman republic, the last of which was remarkable for civil dissensions and replete with great public transactions. Without some knowledge of the constitution of the *Quæstio perpetua*, it is impossible to understand the forensic speeches of Cicero, or even the political history of that age. But when Julius Cæsar, as dictator, sat for the trial of Ligarius, the ancient constitution of the republic was, in fact, destroyed, and the criminal tribunals, which had existed in more or less vigor and purity until then, existed no longer but in name. Under Augustus, the concentration of the triple power of the consuls, proconsuls, and tribunes in his person transferred to him, as of course, all judicial powers and authorities.

QUÆSTOR (Lat.). The name of a magistrate of ancient Rome.

QUAKERS. A sect of Christians.

Formerly they were much persecuted on account of their peaceable principles, which forbade them to bear arms, and they were denied many rights because they refused to make corporal oath. They are relieved in a great degree in the states of the United States from the penalties for refusing to bear arms; and their affirmations are everywhere in the United States, it is believed, taken instead of their oaths.

QUALIFICATION. Having the requisite qualities for a thing: as, to be president of the United States, the candidate must possess certain qualifications.

QUALIFIED 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; 2 Bouvier, Inst. n. 1695.

QUALIFIED INDORSEMENT. A transfer of a bill of exchange or promissory note to an indorsee, without any liability to the indorser: the words usually employed for this purpose are *sans recours*, without recourse. 1 Bouvier, Inst. n. 1138.

QUALIFIED PROPERTY. Property not in its nature permanent, but which may sometimes subsist and at other times not subsist. A defeasible and precarious ownership, which lasts as long as the thing is in actual use and occupation: *e.g.*, *first*, property in animals *feræ naturæ*, or in light, or air, where the qualified property arises from the nature of the thing; *second*, property in a thing held by any one as a bailee, where the qualified property arises not from the nature of the thing, but from the peculiar circumstances under which it is held. 2 Sharswood, Blackst. Comm. 391, 395*; 2 Kent, Comm. 347; 2 Wooddeson, Lect. 385.

Any ownership not absolute.

QUALITY. Persons. The state or condition of a person.

Two contrary qualities cannot be in the same person at the same time. Dig. 41. 10. 4. Every one is presumed to know the quality of the person with whom he is contracting. In the United States the people happily are all upon an equality in their civil rights.

In Pleading. That which distinguishes one thing from another of the same kind.

2. It is, in general, necessary, when the declaration alleges an injury to the goods and chattels, or any contract relating to them, that the quality should be stated; and it is also essential, in an action for the recovery of real estate, that its quality should be shown: as, whether it consists of houses, lands, or other hereditaments, whether the lands are meadow, pasture, or arable, etc. The same rule requires that, in an action for an injury to real property, the quality should be shown. Stephen, Plead. 214, 215. See, as to the various qualities, Ayliffe, Pand. [60].

3. It is often allowable to omit from the indictment, and it is seldom necessary to prove with precision, allegations of quality, or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, if the charge is of a felonious assault with a staff, and the proof is of such an assault with a stone, or if a wound, alleged to have been given with a sword, is proved to have been inflicted by an axe, or if a pistol is stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material, the charge is substantially proved, and no variance occurs. 1 East, Pl. Cr. 341; 5 Carr. & P. 128; 9 *id.* 525, 548.

QUAMDIU SE BENE GESSERIT (Lat. as long as he shall behave himself well). A clause inserted in commissions, when such instruments were written in Latin, to signify the tenure by which the officer held his office.

QUANDO ACCIDERINT (Lat. when they fall in).

In Practice. When a defendant, executor or administrator, pleads *plene administravit*, the plaintiff may pray to have judgment of assets *quando acciderint*. Buller, Nisi P. 169; Bacon, Abr. *Executor* (M).

By taking a judgment in this form the

plaintiff admits that the defendant has fully administered to that time. 1 Pet. C. C. 442, n. See 11 Viner, Abr. 379; Comyns. Dig. *Pleader* (2 D 9).

QUANTI MINORIS (Lat.). The name of a particular action in Louisiana. An action *quanti minoris* is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale.

Such action must be commenced within twelve months from the date of the sale, or from the time within which the defect became known to the purchaser. 3 Mart. La. N. S. 287; 11 Mart. La. 11.

QUANTITY. In Pleading. That which is susceptible of measure.

It is a general rule that, when the declaration alleges an injury to goods and chattels, or any contract relating to them, their quantity should be stated. Gould, Plead. c. 4, § 35. And in actions for the recovery of real estate the quantity of the land should be specified. Bracton, 431 *a;* 11 Coke, 25 *b*, 55 *a;* Doctrina Plac. 85, 86; 1 East, 441; 8 *id.* 357; 13 *id.* 102; Stephen, Plead. 314, 315.

QUANTUM DAMNIFICATUS (Lat.). **In Equity Practice.** An issue directed by a court of equity to be tried in a court of law, to ascertain by a trial before a jury the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained, the court will grant relief upon their payment. 4 Bouvier, Inst. n. 3913.

QUANTUM MERUIT (Lat.). **In Pleading.** As much as he has deserved.

2. When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit*. 2 Blackstone, Comm. 162, 163; 1 Viner, Abr. 346; 2 Phillipps, Ev. 82.

3. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit. 14 Johns. N. Y. 326; 18 *id.* 169; 10 Serg. & R. Penn. 236. But see 7 Cranch, 299; Stark. 277; Holt, Nisi P. 236; 10 Johns. 36; 12 *id.* 374; 13 *id.* 56, 94, 359; 14 *id.* 326; 5 Mees. & W. Exch. 114; 4 Carr. & P. 93; 4 Scott, N. S. 374; 4 Taunt. 475 1 Ad. & E. 333; Addison, Contr. 214.

QUANTUM VALEBAT (Lat. as much as it was worth). **In Pleading.** When goods are sold without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth.

The plaintiff may, in such case, suggest in this declaration that the defendant promised to pay him as much as the said goods were worth, and then aver that they were worth so much, which the defendant has refused to pay. See the authorities cited under the article QUANTUM MERUIT.

QUARANTINE. In Maritime Law. The space of forty days, or less, during which the crew of a ship or vessel coming from a port or place infected or supposed to be infected with disease are required to remain on board after their arrival, before they can be permitted to land.

2. The object of the quarantine is to ascertain whether the crew are infected or not.

To break the quarantine without legal authority is a misdemeanor. 1 Russell, Crimes, 133.

In cases of insurance of ships, the insurer is responsible when the insurance extends to her being moored in port twenty-four hours in safety, although she may have arrived, if before the twenty-four hours are expired she is ordered to perform quarantine, if any accident contemplated by the policy occur. 1 Marshall, Ins. 264.

In Real Property. The space of forty days during which a widow has a right to remain in her late husband's principal mansion immediately after his death. The right of the widow is also called her quarantine.

3. In some, perhaps all, of the states of the United States, provision has been expressly made by statute securing to the widow this right for a greater or lesser space of time. In Massachusetts, Mass. Gen. Stat. c. 90, § 18, and New York, 4 Kent, Comm. 62, the widow is entitled to the mansion-house for forty days; in Ohio and North Carolina, for one year. Walker, Am. Law, 231, 324. In Alabama, Indiana, Illinois, Kentucky, Missouri, New Jersey, Rhode Island, and Virginia, she may occupy till dower is assigned; in Indiana, Illinois, Kentucky, Missouri, New Jersey, and Virginia, she may also occupy the plantation or messuage. In Pennsylvania the statute of 9 Hen. III. c. 7, is in force, Rob. Dig. 176, by which it is declared that "a widow shall tarry in the chief house of her husband forty days after his death, within which her dower shall be assigned her." In Massachusetts the widow is entitled to support and supplies for the house for forty days; in North Carolina, for one year.

4. Quarantine is a personal right, forfeited, by implication of law, by a second marriage. Coke, Litt. 32. See Ind. Rev. L. 209; 1 Va. Rev. Code, 170; Ala. Laws, 260, Mo. St. 229; Ill. Rev. Laws, 237; N. J. Rev. Code, 397; 1 Ky. Rev. Laws, 573. See Bacon, Abr. *Dower* (B); Coke, Litt. 32 *b*, 34 *b*; Coke, 2d Inst. 16, 17.

QUARE (Lat.). **In Pleading.** Wherefore.

This word is sometimes used in the writ in certain actions, but is inadmissible in a material averment in the pleadings, for it is merely interrogatory; and, therefore, when a declaration began with complaining of the defendant, "wherefore with force, etc. he broke and entered" the plaintiff's close, it was considered ill. Bacon, Abr. *Pleas* (B 5, 4); Gould, Plead. c. 3, § 34.

QUARE CLAUSUM FREGIT. See TRESPASS.

QUARE EJECIT INFRA TERMINUM. See EJECTMENT.

QUARE IMPEDIT (Lat. why he hinders). **In English Law.** A real possessory action which can be brought only in the court of common pleas, and lies to recover a presentation when the patron's right is disturbed, or to try a disputed title to an advowson. See DISTURBANCE; Mirehouse, Advow. 265; 2 Saund. 336 *a*.

QUARE OBSTRUXIT (Lat. why he obstructs). The name of a writ formerly used in favor of one who, having a right to pass through his neighbor's grounds, was prevented enjoying such right, because the owner of the grounds had obstructed the way.

QUARREL. A dispute; a difference. In law, particularly in releases, which are taken most strongly against the releasor, when a man releases all quarrel he is said to release all actions, real and personal. 8 Coke, 153.

QUARRY. A place whence stones are dug for the purpose of being employed in building, making roads, and the like.

When a farm is let with an open quarry, the tenant may, when not restrained by his contract, take out the stone; but he has no right to *open* new quarries. See MINES; WASTE.

QUART. A liquid measure, containing one-fourth part of a gallon.

QUARTER. A measure of length, equal to four inches. See MEASURE.

QUARTER-DAYS. The four days of the year on which rent payable quarterly becomes due.

QUARTER-DOLLAR. A silver coin of the United States, of the value of twenty-five cents.

Previous to the act of Feb. 21, 1853, c. 79, 10 U. S. Stat. at Large, 160, the weight of the quarter-dollar was one hundred and three and one-eighth grains; but the coins struck since the passage of that act are of the weight of ninety-six grains. The fineness was not altered by the act cited: of one thousand parts, nine hundred are pure silver and one hundred alloy. Quarter-dollars issued before February, 1853, are a legal tender to any amount; those coined since that period are a legal tender in payment of debts for sums not exceeding five dollars.

See HALF-DOLLAR,—in which the change in the weight of silver coins is more fully noticed.

QUARTER-EAGLE. A gold coin of the United States, of the value of two and a half dollars. See MONEY; COIN.

QUARTER-SALES. In New York, a certain fraction of the purchase-money is often conditioned to be paid back on alienation of the estate; and this fine on alienation is expressed as a tenth-sales, a quarter-sales, etc. 7 Cow. N. Y. 285; 7 Hill, N. Y. 253; 7 N. Y. 490.

QUARTER SEAL. In Scotch Law. The seal kept by the director of the chancery in Scotland is so called. It is in the shape and impression of the fourth part of the great seal. Bell, Dict.

QUARTER SESSIONS. A court bearing this name, mostly invested with the trial of criminals. It takes its name from sitting quarterly, or once in three months.

The English courts of quarter sessions were erected during the reign of Edward III. See stat. 36 Edw. III.; Crabb, Eng. Law, 278.

QUARTER-YEAR. In the computation of time, a quarter-year consists of ninety-one days. Coke, Litt. 135 *b*; 2 Rolle, Abr. 521, l. 40; N. Y. Rev. Stat. pt. 1, c. 19, t. 1, § 3.

QUARTERING. A barbarous punishment formerly inflicted on criminals by tearing them to pieces by means of four horses, one attached to each limb.

QUARTERING OF SOLDIERS. Furnishing soldiers with board or lodging or both. The constitution of the United States, Amendm. art. 3, provides that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

QUARTEROON. One who has had one of his grandparents of the black or African race.

QUARTO DIE POST (Lat. fourth day after). Appearance-day, which is the fourth day inclusive from the return of the writ; and if the person summoned appears on that day, it is sufficient. On this day, also, the court begins to sit for despatch of business. These three days were originally given as an indulgence. 3 Sharswood, Blackst. Comm. 278*; Tidd, New Pract. 134. But this practice is now altered. 15 & 16 Vict. c. 76.

QUASH. In Practice. To overthrow or annul.

2. When proceedings are clearly irregular and void, the courts will quash them, both in civil and criminal cases: for example, when the array is clearly irregular, as, if the jurors have been selected by persons not authorized by law, it will be quashed. 3 Bouvier, Inst. n. 3342.

In criminal cases, when an indictment is so defective that no judgment can be given upon it, should the defendant be convicted, the court, upon application, will, in general, quash it: as, if it have no jurisdiction of the offence charged, or when the matter charged is not indictable. 1 Burr. 516, 543; Andr. 226. It is in the discretion of the court to quash an indictment or to leave the defendant to a motion in arrest of judgment. 1 Cush. Mass. 189. When the application to

quash is made on the part of the defendant, in English practice, the court generally refuses to quash the indictment when it appears some enormous crime has been committed. Comyns, Dig. *Indictment* (H); Wils. 325; 1 Salk. 372; 3 Term, 621; 5 Mod. 13; 6 *id.* 42; 3 Burr. 1841; Bacon, Abr. *Indictment* (K).

3. When the application is made on the part of the prosecution, the indictment will be quashed whenever it is defective so that the defendant cannot be convicted, and the prosecution appears to be *bonâ fide*. If the prosecution be instituted by the attorney-general, he may, in some states, enter a *nolle prosequi*, which has the same effect. 1 Dougl. 239, 240. The application should be made before plea pleaded, Leach, 11; 4 State Tr. 232; 1 Hale, 35; Fost. 231, and before the defendant's recognizance has been forfeited. 1 Salk. 380. See CASSETUR BREVE.

QUASI (Lat. as if, almost). A term used to mark a resemblance, and which supposes a little difference between two objects. Dig. 11. 7. 1. 8. 1. Civilians use the expressions *quasi-contractus*, *quasi-delictum*, *quasi-possessio*, *quasi-traditio*, etc.

QUASI-AFFINITY. **In Civil Law.** The affinity which exists between two persons, one of whom has been betrothed to the kindred of the other, but who have never been married.

For example: my brother is betrothed to Maria, and afterwards, before marriage, he dies, there then exists between Maria and me a quasi-affinity.

The history of England furnishes an example of this kind. Catherine of Arragon was betrothed to the brother of Henry VIII. Afterwards, Henry married her, and under the pretence of this quasi-affinity he repudiated her, because the marriage was incestuous.

QUASI-CONTRACTUS (Lat.). **In Civil Law.** The act of a person, permitted by law, by which he obligates himself towards another, or by which another binds himself to him, without any agreement between them.

By article 2272 of the Civil Code of Louisiana, which is translated from article 1371 of the Code Civil, quasi-contracts are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." In contracts, it is the consent of the contracting parties which produces the obligation; in quasi-contracts no consent is required, and the obligation arises from the law or natural equity, on the facts of the case. These acts are called quasi-contracts because, without being contracts, they bind the parties as contracts do.

There is no term in the common law which answers to that of quasi-contract; many quasi-contracts may doubtless be classed among implied contracts: there is, however, a difference to be noticed. For example: in case money should be paid by mistake to a minor, it may be recovered from him by the civil law, because his consent is not necessary to a quasi-contract; but by the common law, if it can be recovered, it must be upon an agreement to which the law presumes he has consented, and it is doubtful, upon principle, whether such recovery could be had.

2. Quasi-contracts may be multiplied almost to infinity. They are, however, divided into five classes: such as relate to the voluntary and spontaneous management of the affairs of another, without authority (*negotiorum gestio*); the administration of tutorship; the management of common property (*communio bonorum*); the acquisition of an inheritance; and the payment of a sum of money or other thing by mistake, when nothing was due (*indebiti solutio*).

Each of these quasi-contracts has an affinity with some contract: thus, the management of the affairs of another without authority, and tutorship, are compared to a mandate; the community of property, to a partnership; the acquisition of an inheritance, to a stipulation; and the payment of a thing which is not due, to a loan.

3. All persons, even infants and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi-contract which results from the act of another, and may also oblige others in their favor; for it is not consent which forms these obligations: they are contracted by the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms the quasi-contract, but it is not required in the person by whom or in whose favor the obligations which result from it are contracted. For instance, if a person undertakes the business of an infant or a lunatic, this is a quasi-contract, which obliges the infant or the lunatic to the person undertaking his affairs, for what he has beneficially expended, and reciprocally obliges the person to give an account of his administration or management.

See, generally, Justinian, Inst. 3. 28; Dig. 3. 5; Ayliffe, Pand. b. 4, tit. 31; 1 Brown, Civil Law, 386; Erskine, Inst. 3. 3. 16; Pardessus, Dr. Com. n. 192 *et seq.*; Pothier, Obl. n. 113 *et seq.*; Merlin, Répert. *Quasi-Contract*; Menestrier, Leçons Elem. du Droit Civil Romain, liv. 3, tit. 28; La. Civ. Code, b. 3, tit. 5; Code Civil, liv. 3, tit. 4, c. 1.

QUASI-CORPORATIONS. A term applied to those bodies or municipal societies which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law. They may be considered *quasi*-corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law.

Among *quasi*-corporations may be ranked towns, townships, parishes, hundreds, and other political divisions of counties, which are established without an express charter of incorporation; commissioners of a county, supervisors of highways, overseers of the poor, loan officers of a county, and the like, who are invested with corporate powers *sub modo* and for a few specified purposes only;

but not such a body as the general assembly of the Presbyterian church, which has not the capacity to sue and be sued. 4 Whart. Penn. 531. See 2 Kent, Comm. 224; Angell & A. Corp. 16; 18 Johns. N. Y. 422; 1 Cow. N. Y. 258, and note, 680; 2 Wend. N. Y. 109; 2 Johns. Ch. N. Y. 325; 2 Pick. Mass. 352; 7 Mass. 187; 9 *id.* 250; 13 *id.* 192; 1 Me. 363.

QUASI-DELICT. In Civil Law. An act whereby a person, without malice, but by fault, negligence, or imprudence not legally excusable, causes injury to another.

A quasi-delict may be public or private: the neglect of the affairs of a community, when it is our duty to attend to them, may be a crime; the neglect of a private matter, under similar circumstances, may be the ground of a civil action. Bowyer, Mod. Civ. Law, c. 43, p. 265.

QUASI-DEPOSIT. A kind of involuntary bailment, which takes place where a person acquires possession of property lawfully, by finding. Story, Bailm. § 85.

QUASI-OFFENCES. Offences for which some person other than the actual perpetrator is responsible, the perpetrator being presumed to act by command of the responsible party.

Injuries which have been unintentionally caused. See MASTER AND SERVANT.

QUASI-PARTNERS. Partners of lands, goods, or chattels, who are not actual partners, are sometimes so called. Pothier, de Société, App. n. 184. See PART-OWNERS.

QUASI-POSTHUMOUS CHILD. In Civil Law. One who, born during the life of his grandfather or other male ascendant, was not his heir at the time he made his testament, but who by the death of his father became his heir in his lifetime. Inst. 2. 13. 2; Dig. 28. 3. 13.

QUASI-PURCHASE. This term is used in the civil law to denote that a thing is to be considered as purchased from the presumed consent of the owner of a thing: as, if a man should consume a cheese, which is in his possession and belonging to another, with an intent to pay the price of it to the owner, the consent of the latter will be presumed, as the cheese would have been spoiled by keeping it longer. Wolff, Dr. de la Nat. § 691.

QUASI-TRADITIO (Lat.). **In Civil Law.** A term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. Leç. Elem. § 396. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it: as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me to be again delivered to him: there is a quasi tradition or delivery.

QUATUORVIRI (Lat. four men). **In Roman Law.** Magistrates who had the care and inspection of roads. Dig. 1. 2. 3. 30.

QUAY. A wharf at which to load or land goods. (Sometimes spelled *key*.)

In its enlarged sense the word *quay* means the whole space between the first row of houses of a city, and the sea or river. 5 La. 152, 215. So much of the quay as is requisite for the public use of loading and unloading vessels is public property, and cannot be appropriated to private use, but the rest may be private property.

QUE EST MESME (L. Fr.). Which is the same. See QUÆ EST EADEM.

QUE ESTATE (*quem statum*, or *which estate*). A plea by which a man prescribes in himself and those whose estate he holds. 2 Sharswood, Blackst. Comm. 270; 18 Viner, Abr. 133–140; Coke, Litt. 121 *a*; Hardr. 459; 2 Bouvier, Inst. n. 499.

QUEAN. A worthless woman; a strumpet. The meaning of this word, which is now seldom used, is said not to be well ascertained. 2 Rolle, Abr. 296; Bacon, Abr. *Slander* (U 3).

QUEEN. A female sovereign.

QUEEN ANNE'S BOUNTY. By stat. 2 Anne, c. 11, all the revenue of first fruit and tenths was vested in trustees forever, to form a perpetual fund for the augmentation of poor livings. 1 Sharswood, Blackst. Comm. 286; 2 Burn, Eccl. Law, 260–268.

QUEEN CONSORT. The wife of a reigning king. 1 Sharswood, Blackst. Comm. 218. She is looked upon by the law as a feme sole, as to her power of contracting, suing, etc. *Id.*

QUEEN DOWAGER. The widow of the king. She has most of the privileges belonging to a queen consort. 1 Sharswood, Blackst. Comm. 229.

QUEEN-GOLD. A royal revenue belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary fine or offer to the king of ten marks or upwards, in consideration of any grant or privilege conferred by the crown. It is due of record on the recording of the fine. It was last exacted in the reign of Charles I. It is now quite obsolete. 1 Sharswood, Blackst. Comm. 220–222; Fortescue, de Laud. 398; Jacob, Law Dict.

QUEEN REGNANT. She who holds the crown in her own right. She has the same duties and prerogatives, etc. as a king. Stat. 1 Mar. I. st. 3, c. 1; 1 Sharswood, Blackst. Comm. 218; 1 Wooddeson, Lect. 94.

QUERELA (Lat.). An action preferred in any court of justice. The plaintiff was called *querens*. or complainant, and his brief, complaint, or declaration was called *querela*. Jacob, Law Dict.

QUERELA INOFFICIOSI TESTAMENTI (Lat. complaint of an undutiful or

unkind will). **In Civil Law.** A species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind. Calvinus, Lex.; 2 Kent, Comm. 327; Bell, Dict.

QUESTION. In Criminal Law. A means sometimes employed, in some countries, by torture, to compel supposed great criminals to disclose their accomplices or to acknowledge their crimes.

This torture is called *question* because, as the unfortunate person accused is made to suffer pain, he is *asked questions* as to his supposed crime or accomplices. This is unknown in the United States. See Pothier, Procédure Criminelle, sect. 5, art. 2, § 3.

In Evidence. An interrogation put to a witness, requesting him to declare the truth of certain facts as far as he knows them.

Questions are either *general* or *leading*. By a *general* question is meant such a one as requires the witness to state all he knows, without any suggestion being made to him: as, *Who gave the blow?* A leading question is one which leads the mind of the witness to the answer, or suggests it to him: as, *Did A B give the blow?*

The Romans called a question by which the fact or supposed fact which the interrogator expected or wished to find asserted in and by the answer was made known to the proposed respondent, a *suggestive* interrogation: as, *Is not your name A B?* See Leading Question.

In Practice. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.

When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a *legal question*; and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a *question of fact*, and is to be decided by the jury.

QUÆSTORES CLASSICI (Lat.). **In Roman Law.** Officers intrusted with the care of the public money.

Their duties consisted in making the necessary payments from the *ærarium*, and receiving the public revenues. Of both they had to keep correct accounts in their *tabulæ publicæ*. Demands which any one might have on the ærarium, and outstanding debts, were likewise registered by them. Fines to be paid to the public treasury were registered and exacted by them. They were likewise to provide proper accommodations for foreign ambassadors and such persons as were connected with the republic by ties of public hospitality. Lastly, they were charged with the care of the burials and monuments of distinguished men, the expenses for which had been decreed by the senate to be paid by the treasury. Their number at first was confined to two; but this was afterwards increased as the empire became extended. There were questors of cities and of provinces, and questors of the army: the latter were in fact paymasters.

QUÆSTORES PARRICIDII (Lat.). **In Roman Law.** Public accusers, two in number, who conducted the accusation of persons guilty of murder or any other capital offence, and carried the sentence into execution. They ceased to be appointed at an early period. Smith, Dict. Gr. & Rom. Antiq.

QUI TAM (Lat. who as well). An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whosoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth, for example, as for himself. Espinasse, Pen. Act. 5, 6; 1 Viner, Abr. 197; 1 Salk. 129, n.; Bacon, Abr.

QUIA (Lat.). **In Pleading.** Because. This word is considered a term of affirmation. It is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; Comyns, Dig. *Pleader* (C 77).

QUIA EMPTORES (Lat.). A name sometimes given to the English Statute of Westminster 3, 13 Edw. I. c. 1, from its initial words. 2 Sharswood, Blackst. Comm. 91.

QUIA TIMET (Lat. because he fears). A term applied to preventive or anticipatory remedies. According to Lord Coke, "there be six writs of law that may be maintained *quia timet*, before any molestation, distress, or impleading: as, *First*, a man may have his writ or mesne before he be distrained. *Second*, a *warrantia chartæ*, before he be impleaded. *Third*, a *monstraverunt*, before any distress or vexation. *Fourth*, an *audita querela*, before any execution sued. *Fifth*, a *curia claudenda*, before any default of enclosure. *Sixth*, a *ne injuste vexes*, before any distress or molestation. And these are called *brevia anticipantia*, writs of prevention." Coke, Litt. 100. And see 7 Brown, Parl. Cas. 125.

2. These writs are generally obsolete. In chancery, when it is contemplated to prevent an expected injury, a bill *quia timet* is filed. See Bill Quia Timet.

QUIBBLE. A slight difficulty raised without necessity or propriety; a cavil.

No justly eminent member of the bar will resort to a quibble in his argument. It is contrary to his oath, which is to be true to the court as well as to the client; and bad policy, because by resorting to it he will lose his character as a man of probity.

QUICKENING. In Medical Jurisprudence. The sensation a mother has of the motion of the child she has conceived.

2. The period when quickening is first experienced varies from the tenth to the twenty-fifth, but is usually about the sixteenth, week from conception. Denman, Midw. p. 129.

It was formerly supposed that either the child was not alive until the time of quickening, or that it had acquired some new kind of existence that it did not possess before: hence the presumption of law that dates the life of the child from that time.

The child is, in truth, alive from the first

moment of conception, and, according to its age and state of development, has different modes of manifesting its life, and, during a portion of the period of gestation, by its motion. By the growth of the embryo, the womb is enlarged until it becomes of too great a size to be contained in the pelvis; it then rises into the abdomen, when the motion of the fœtus is for the first time felt.

3. Quickening, as indicating a distinct point in the existence of the fœtus, has no foundation in physiology; for it arises merely from the relation which the organs of gestation bear to the parts that surround them: it may take place early or late, according to the condition of these different parts, but not from any inherent vitality for the first time manifested by the fœtus.

As life, by law, is said to commence when a woman first becomes quick with child, so procuring an abortion after that period is a misdemeanor. Before this time, formerly the law did not interfere to prevent a pregnant woman convicted of a capital offence from being executed. 2 Hale, Pl. Cr. 413. If, however, the humanity of the law of the present day would not allow a woman to be executed who is, as Blackstone terms it, *privément enceinte*, Comm. 129, *i.e.* pregnant, although not quick, it would be but carrying out the same desire to interfere with long-established rules, to hold that the penalty for procuring abortion should also extend to the whole period of pregnancy.

QUID PRO QUO (Lat. what for what). A term denoting the consideration of a contract. See Coke, Litt. 47 *b*; 7 Mann. & G. 998.

QUIDAM (Lat. some one; somebody). **In French Law.** A term used to express an unknown person, or one who cannot be named.

A *quidam* is usually described by the features of his face, the color of his hair, his height, his clothing, and the like, in any process which may be issued against him. Merlin, *Répert.*; Encyclopédie.

QUIET ENJOYMENT. The name of a covenant in a lease, by which the lessor agrees that the lessee shall peaceably enjoy the premises leased. This covenant goes to the possession, and not to the title. 3 Johns. N. Y. 471; 5 *id.* 120; 2 Dev. No. C. 388; 3 *id.* 200. A covenant for quiet enjoyment does not extend as far as a covenant of warranty. 1 Aik. Vt. 233.

The covenant for quiet enjoyment is broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession. 3 Johns. N. Y. 471; 8 *id.* 198; 15 *id.* 483; 7 Wend. N. Y. 281; 2 Hill, N. Y. 105; 9 Metc. Mass. 63; 4 Whart. Penn. 86; 4 Cow. N. Y. 340. But the tortious entry of the covenantor, without title, is a breach of the covenant for quiet enjoyment. 7 Johns. N. Y. 376.

QUIETUS (Lat. freed or acquitted). **In English Law.** A discharge; an acquittance

An instrument by the clerk of the pipe and auditors in the exchequer, as proof of their acquittance or discharge of accountants. Cowel.

Discharge of a judge or attorney-general. 3 Mod. 99*.

In American Law. The discharge of an executor by the probate court. 4 Mas. C. C. 131.

QUINTAL. A weight of one hundred pounds.

QUINTO EXACTUS (Lat.). **In Old English Law.** The fifth call or last requisition of a defendant sued to outlawry.

QUIT-CLAIM. In Conveyancing. A form of deed of the nature of a release containing words of grant as well as release 2 Washburn, Real Prop. 606.

The term is in constant and general use in American law to denote a deed substantially the same as a release in English law. It presupposes a previous or precedent conveyance or a subsisting estate and possession. Thornton, Conv. 44. It is a conveyance at common law, but differs from a release in that it is regarded as an original conveyance in American law, at least in some states. 6 Pick. Mass. 499; 14 *id.* 374; 3 Conn. 398; 9 Ohio, 96; 5 Ill. 117; Me. Rev. Stat. c. 73, § 14; Miss. Code 1857, p. 309, art. 17. The operative words are remise, release, and forever quit-claim. Thornton, Conv. 44. Covenants of warranty against incumbrances by the grantor are usually added.

QUIT-RENT. A rent paid by the tenant of the freehold, by which he goes quit and free,—that is, discharged from any other rent. 2 Sharswood, Blackst. Comm. 42.

In England, quit-rents were rents reserved to the king or a proprietor, on an absolute grant of waste land, for which a price in gross was at first paid, and a mere nominal rent reserved as a feudal acknowledgment of tenure. Inasmuch as no rent of this description can exist in the United States, when a quit-rent is spoken of some other interest must be intended. 5 Call, Va. 364. A perpetual rent reserved on a conveyance in fee-simple is sometimes known by the name of quit-rent in Massachusetts. See GROUND-RENT; RENT.

QUO ANIMO (Lat. with what intention). The intent; the mind with which a thing has been done: as, the *quo animo* with which the words were spoken may be shown by the proof of conversations of the defendant relating to the original defamation. 19 Wend. N. Y. 296.

QUO JURE, WRIT OF. In English Law. The name of a writ commanding the defendant to show *by what right* he demands common of pasture in the land of the complainant who claims to have a fee in the same. Fitzherbert, Nat. Brev. 299.

QUO MINUS (Lat.). The name of a writ. In England, when the king's debtor is sued in the court of the exchequer, he may

sue out a writ of *quo minus*, in which he suggests that he is the king's debtor, and that the defendant has done him the injury or damage complained of, *quo minus sufficiens existit*, by which *he is less able* to pay the king's debt. This was originally requisite in order to give jurisdiction to the court of exchequer; but now this suggestion is a mere form. 3 Sharswood, Blackst. Comm. 46.

QUO WARRANTO (Lat. by what authority). **In Practice.** The name of a writ (and also of the whole pleading) by which the government commences an action to recover an office or franchise from the person or corporation in possession of it.

The writ commands the sheriff to summon the defendant to appear before the court to which it is returnable, to show (*quo warranto*) *by what authority* he claims the office or franchise. It was a writ of right, a civil remedy to try the mere right to the franchise or office, where the person in possession never had a right to it or has forfeited it by neglect or abuse. 3 Sharswood, Blackst. Comm. 262, 263.

The action of *quo warranto* was prescribed by the Statute of Gloster, 6 Edw. I., and is a limitation upon the royal prerogative. Before this statute, the king, by virtue of his prerogative, sent commissions over the kingdom to inquire into the right to all franchises, *quo jure et quore nomine illi retinent*, etc.; and, as they were grants from the crown, if those in possession of them could not show a charter, the franchises were seized into the king's hands without any judicial proceeding. Like all other original civil writs, the writ of *quo warranto* issued out of chancery, and was returnable alternatively before the king's bench or justices in eyre. Coke, 2d Inst. 277–283, 494–499; 2 Term, 549. See 4 Term, 381; 2 Strange, 819, 1196.

The writ of *quo warranto* has given place to an *information in the nature of quo warranto*. This, though in *form* a criminal, is in *substance* a civil, proceeding, to try the mere right to the franchise or office. 3 Sharswood, Blackst. Comm. 263; 1 Serg. & R. Penn. 382; Angell & A. Corp. 469; 2 Kent, Comm. 312; 3 Term, 199; 23 Wend. N. Y. 537, 591–594.

2. *Pleadings* in *quo warranto* are anomalous. In ordinary legal proceedings, the plaintiff, whether he be the state or a person, is bound to show a case against the defendant. But in an information of *quo warranto*, as well as in the writ for which it is substituted, the order is reversed. The state is not bound to show any thing, but the defendant is bound to show that he has a right to the franchise or office in question; and if he fail to show authority, judgment must be given against him. 4 Burr. 2146, 2147; Angell & A. Corp. 636. To the writ of *quo warranto* the defendant simply pleaded his charter, which was a full answer to the writ; just as before the statute of Edward I. the production of the charter to the king's commissioners was full authority for the possession of the franchise or office. But to an information of *quo warranto* the plea of the defendant consists of his charter, with an *absque hoc* denying that he usurped the franchise, and concludes with a verification. The plea is in *form* a special traverse, but in *substance* it is not such. The information was originally a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise: therefore the information charged usurpation, and the defendant was compelled to deny the usurpation, as well as to show his charter, which he did in the form of an *absque hoc* to his plea. But when the proceeding ceased to be criminal, and, like the writ of *quo warranto*, was applied to the mere purpose of trying the civil right to the franchise, the *absque hoc* denying the usurpation became immaterial, though it is still retained in the forms. 5 Jacob, Law Dict. 374; 4 Cow. N. Y. 106, note. In Coke's Entries, 351, there is a plea to an information of *quo warranto* without the *absque hoc*. The *absque hoc*, being immaterial, should not be answered by the replication, as it must always be in a special traverse; but the charter, the first part of the plea, though occupying the place of an inducement, must be denied by the replication, its existence and character being the sole question in controversy upon which the legality of the acts of the corporation turns. Gilbert, Ev. 6–8, 145–160; 10 Mod. 111, 112, 296–300.

3. Until the statute 32 Geo. III. c. 58, the defendant could not plead double in an information of *quo warranto* to forfeit an office or franchise. 1 P. Will. Ch. 220–222; 4 Burr. 2146, note; 1 Chitty, Plead. 479; Tidd, Pract. 610; 8 Term, 467; 5 Bacon, Abr. 449; Willes, 533; 4 Cow. N. Y. 113, note; 2 Dutch. N. J. 215; Angell & A. Corp. 637.

In informations of *quo warranto* there are two forms of judgment. When it is against an officer or against individuals, the judgment is *ouster;* but when it is against a corporation by its corporate name, the judgment is *ouster* and *seizure*. In the first case, there being no franchise forfeited, there is none to seize; in the last case, there is; consequently the franchise is seized. 2 Kent, Comm. 312, and note; 2 Term, 521, 522, 550, 551. By such judgment of ouster and seizure the franchises are not destroyed, but exist in the hands of the state; but the corporation is destroyed, and ceases to be the owner or possessor of lands or goods, or rights or credits. The lands revert to the grantor and his heirs, and the goods escheat to the state. The judgment must be confined to seizure of the franchises: if it be extended to seizure of the property, so far it is erroneous. 1 Blackf. Ind. 267. See SCIRE FACIAS; 30 Barb. N. Y. 588.

4. The principle of forfeiture is that the franchise is a trust; and all the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated it will work a forfeiture of the charter. And the corporate powers must be construed strictly, and must be exercised in the manner and in the forms and by the agents prescribed in the charter. 2 Kent, Comm. 298, 299; 1 Sharswood, Blackst. Comm. 485; 13 Viner, Abr. 511; 13 Pet. 587; 5 Wend. N. Y. 211; 2 Term, 546; 3 *id.* 220–223; 8 Mod. 129; 12 *id.* 271; 4 Gill & J. Md. 121; 3 Hargrave, State Tr. 546, 630.

Cases of forfeiture may be divided into two great classes. *Cases of perversion:* as, where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases, unless the perversion is such as to amount to an *injury to the public* who are interested in the franchise, 34 Penn. St. 283, it will not work a forfeiture. *Cases of usurpation:* as, where a corporation exercises a power which it has no right to exercise. In such cases the cause of forfeiture is not determined by any question of *injury to the public*, but the abuse which will work a forfeiture need not be of any particular measure or extent. 3 Term, 216, 246; 23 Wend. N. Y. 242, 243; 34 Miss. 688; 21 Ill. 65. See 30 Ala. N. s. 66. In case of usurpation of an office or franchise by an individual, it must be of a public nature to be reached by this writ. 21 Ill. 65; 28 Vt. 594, 714; 9 Cush. Mass. 596.

5. In England, corporations are the creatures of the crown, and on dissolution their franchises revert to the crown; and they may be re-granted by the crown either to the old, or to new, or to the old and new, corporators; and such grant restores the old rights, even to sue on a bond given to the old corporation, and the corporation is in of its ancient liberties; and if it were a corporation by prescription it would still be so. 2 Term, 524, 543; 3 *id.* 241–249. In the United States, corporations are the creatures of the legislature, and on dissolution their franchises revert to the state; and the legislature can exercise the same powers by legislation over the franchises, and with the same effects, as the crown can in England. Angell & A. Corp. 652–654.

By the statute of Anne, c. 20, an information in the nature of *quo warranto* may by leave of court be applied to disputes between party and party about the right to a corporate office or franchise. 4 Zabr. N. J. 529; 1 Dutch. N. J. 354; 32 Penn. St. 478; 33 Miss. 508; 7 Cal. 393, 432. And the person at whose instance the proceeding is instituted is called the *relator*. 3 Sharswood, Blackst. Comm. 264. The suit must be at the instance of the government, see 12 N. Y. 433; 1 Wisc. 317; 4 *id.* 420, 567; and the consent of the parties cannot give jurisdiction in such a case. 5 Wheat. 291; 5 R. I. 1; 1 Iowa, 70; 2 *id.* 96. See 25 Mo. 555. The court will not give leave to private informers to use the king's name and suit to call in question the validity of a franchise, when such persons apply under very unfavorable circumstances. 4 Burr. 2123, 2124. As to where the burden falls of showing the lawful or unlawful character of a franchise or right, see 28 Penn. St. 383; 5 Mich. 146. The information, it is said, may be filed after the expiration of the term of office. 2 Jones, No. C. 124. See 19 Ga. 559.

QUOAD HOC (Lat. as to this; with respect to this). A term frequently used to signify, *as to the thing named*, the law is so and so.

QUOD COMPUTET (Lat. that he account). The name of an interlocutory judgment in an action of account-render; also, the name of a decree in the case of creditors' bills against executors or administrators. Such a decree directs the master to take the accounts between the deceased and all his creditors, to cause the creditors, upon due and public notice, to come before him to prove their debts, at a certain place and within a limited period, and also directs the master to take an account of all personal estate of the deceased in the hands of the executor or administrator. Story, Eq. Jur. § 548. See JUDGMENT QUOD COMPUTET; ACCOUNT.

QUOD CUM (Lat.). **In Pleading.** For that whereas. A form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim: as, assumpsit and case. Hardr. 1; 2 Show. 180.

This form is not allowable to introduce the matter which constitutes the gravamen of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely. Hence, in those actions, as trespass *vi et armis*, in which the complaint is stated without matter of inducement, *quod cum* cannot be properly used. 2 Bulstr. 214. But its improper use is cured by verdict. 1 Browne, Penn. 68; Comyns, Dig. *Pleader* (C 86).

QUOD EI DEFORCEAT (Lat.). **In English Law.** The name of a writ given by stat. Westm. 2, 13 Edw. I. c. 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, who are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action; by which the right was restored to him who had been thus unwarily deforced by his own default. 3 Sharswood, Blackst. Comm. 193.

QUOD PERMITTAT (Lat.). **In English Law.** That he permit. The name of a writ which lies for the heir of him who is disseised of his common of pasture, against the heir of the disseisor, he being dead. Termes de la Ley.

QUOD PERMITTAT PROSTERNERE (Lat. that he give leave to demolish). **In English Law.** The name of a writ which commands the defendant to permit the plaintiff to abate the nuisance of which complaint is made, or otherwise to appear in court and to show cause why he will not. On proof of the facts, the plaintiff is entitled to have judgment to abate the nuisance and to recover damages. This proceeding, on account of its tediousness and expense, has given way to a special action on the case.

QUOD PROSTRAVIT (Lat.). The name of a judgment upon an indictment for a nuisance, that the defendant abate such nuisance.

QUOD RECUPERET (Lat. that he recover). The form of a judgment that the plaintiff do recover. See JUDGMENT QUOD RECUPERET.

QUORUM. Used substantively, quorum signifies the number of persons belonging to a legislative assembly, a corporation, society, or other body, required to transact business. There is a difference between an act done by a definite number of persons, and one performed by an indefinite number: in the first case a majority is required to constitute a quorum, unless the law expressly directs that another number may make one; in the latter case any number who may be present may act, the majority of those present having, as in other cases, the right to act. 7 Cow. N. Y. 402; 9 Barnew. & C. 648; Angell & A. Corp. 281.

Sometimes the law requires a greater number than a bare majority to form a quorum: in such case no quorum is present until such a number convene.

When an authority is confided to several persons for a private purpose, all must join in the act, unless otherwise authorized. 6 Johns. N. Y. 38. See AUTHORITY; MAJORITY; PLURALITY.

QUOT. In Scotch Law. The twentieth part of the movables, computed without computation of debts, was so called.

Formerly the bishop was entitled, in all confirmations, to the quot of the testament. Erskine, Inst. 3. 9. 11.

QUOTA. That part which each one is to bear of some expense: as, his quota of this debt; that is, his proportion of such debt.

QUOTATION. In Practice. The allegation of some authority or case, or passage of some law, in support of a position which it is desired to establish.

Quotations, when properly made, assist the reader, but when misplaced they are inconvenient. As to the manner of quoting or citing authorities, see CITATION OF AUTHORITIES.

The transcript of a part of a book or writing from a book or paper into another.

2. If the quotation is fair, and not so extensive as to extract the whole value or the most valuable part of an author, it will not be a violation of the copyright. It is mostly difficult to define what is a fair quotation. When the quotation is unfair, an injunction will lie to restrain the publication. See 17 Ves. Ch. 424; 1 Bell, Comm. 5th ed. 121.

3. "That part of a work of one author found in another," observed Lord Ellenborough, "is not of itself piracy, or sufficient to support an action; a man may adopt part of the work of another; he may so make use of another's labors for the promotion of science and the benefit of the public." 5 Esp. 170; 1 Campb. 94. See Curtis, Copyr. 242; 3 Mylne & C. Ch. 737, 738; 17 Ves. Ch. 422; 1 Campb. 94; 2 Stor. C. C. 100; 2 Beav. Rolls, 6, 7; ABRIDGMENT; COPYRIGHT.

QUOUSQUE. A Latin adverb, which signifies how long, how far, until.

In old conveyances it is used as a word of limitation. 10 Coke, 41.

In practice, it is the name of an execution which is to have force until the defendant shall do a certain thing. Of this kind is the *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken into execution, and he is imprisoned until he shall satisfy the execution. 3 Bouvier, Inst. n. 3371.

R.

RACHETUM (Fr. *racheter*, to redeem). **In Scotch Law.** Ransom: corresponding to Saxon *weregild*, a pecuniary composition for an offence. Skene; Jacob, Law Dict.

RACK. An engine with which to torture a supposed criminal, in order to extort a confession of his supposed crime and the names of his supposed accomplices.

It is unknown in the United States, but, known by the nickname of the Duke of Exeter's daughter, was in use in England. Barrington, Stat. 366; 12 Serg. & R. Penn. 227.

RACK RENT. In English Law. The full extended value of land left by lease, payable by a tenant for life or years. Wood, Inst. 192.

RADOUR. In French Law. A term including the repairs made to a ship, and a fresh supply of furniture and victuals, munitions, and other provisions required for the voyage. Pardessus, n. 602.

RAILWAY. A road graded and having rails of iron or other material for the wheels of carriages to run upon.

Railways in their present form first began to be extensively constructed after the successful experiments in the use of locomotives in 1829. They had been in use in a rude form as early as 1676. These earlier railways were of limited extent, built by private persons on their own land or upon the land of others, by special license, called way-leave. In their modern form, railways are usually (though not necessarily) owned by a corporation, which is authorized to exercise some important privileges, such as a right of eminent domain, etc. Within a few years, another class of railways, namely, those laid in the streets of towns and cities, have become very numerous, and many very interesting questions have arisen and are still arising in regard to them, most of which remain unsettled at the date of writing. See

14 Gray, Mass. 69; 4 Cush. Mass. 63; 9 Ind. 433, 467; 7 Port. Ind. 38, 459; 23 N. H. 83; 26 *id.* 266; 25 Vt. 49; 2 R. I. 154; 18 Penn. St. 187; 27 *id.* 339; 21 Conn. 294; 2 Stockt. Ch. N. J. 352; 20 Bost. Law Rep. 449. It is proper to say that most of the authorities cited above are cases of steam railroads, between which and the common street railroads important differences exist.

2. The *charter* of a public railway requires the grant of the supreme legislative authority of the state. 3 Engl. Railw. Cas. 65; 2 Railw. Cas. 177; 3 N. Y. 430. It is usually conferred upon a private corporation, but sometimes upon a public one, where the stock is owned and the company controlled by the state. Redfield, Railw. § 17; 1 Ohio St. 657; 21 Conn. 304; 10 Leigh, Va. 454; 4 Wheat. 668; 9 *id.* 904; 1 Greene, Iowa, 553; 8 Watts, Penn. 316. Such charter, when conferred upon a private company or a natural person, as it may be, is irrevocable, and only subject to general legislative control, the same as other persons natural or artificial. 4 Wheat. 668; 2 Kent, Comm. 275, and notes; Redfield, Railw. § 231; 27 Vt. 140; 11 La. Ann. 253; 2 Gray, Mass. 1; 3 Sneed, Tenn. 609; 26 Penn. St. 287; 32 N. H. 215. See § **11.**

The right of way is generally obtained by the exercise of the right of eminent domain. This can only be done in strict conformity to the charter or grant. 4 Engl. Railw. Cas. 235, 513, 524; 6 Gill, Md. 363. The company may enter upon lands for the purpose of making preliminary surveys, by legislative permission, without becoming trespassers, and without compensation. 34 Me. 247; 9 Barb. N. Y. 449; Wright, Ohio, 132, and cases cited.

3. The company acquire only a right of way, the fee remaining in the former owner. The company can take nothing from the soil, except for the purpose of construction. 2 Hill, N. Y. 342; 6 Mass. 90; 7 Metc. Mass. 297; 2 Gray, Mass. 574; 2 Iowa, 288; 25 Vt. 151; 2 Dev. & B. No. C. 457; 20 Barb. N. Y. 644; 34 N. H. 282; 16 Ill. 198; 1 Sumn. C. C. 21. See 26 Penn. St. 287; 11 N. Y. 308.

The mode of estimating compensation to the land-owners varies in different states. The more general mode is to award such a sum as will fairly compensate the actual loss, *i.e.* to give a sum of money which being added to the land remaining will make it as valuable as the whole would have been if none of it had been taken. 13 Barb. N. Y. 171; Redfield, Railw. § 71, and cases cited.

The company may lay their road across a highway, but not without making compensation to the owner of the fee for the additional servitude thus imposed upon the land. 3 Hill, N. Y. 567; 25 Wend. N. Y. 462; 1 Exch. 723; 16 N. Y. 97; 21 Mo. 580; 27 Penn. St. 339; 9 Cush. Mass. 1; 29 Lond. Law Times, 7; Redfield, Railw. § 76.

4. *The construction of the road* must be within the prescribed limits of the charter. The right of deviation secured by the charter or general laws is lost when the road is once located. 1 Mylne & K. Ch. 154; 2 Ohio St. 235; Redfield, Railw. § 105. See 2 Rich. So. C. 434; 1 Clark & F. Hou. L. 252; 10 Conn. 157; 12 *id.* 364; 2 Swan, Tenn. 282; 9 La. Ann. 284; 1 Gray, Mass. 340. Distance, having reference either to the length of the line or to deviation, is to be measured in a straight line through a horizontal plane. Redfield, Railw. § 106; 9 Q. B. 76; 27 Vt. 766; 36 Eng. L. & Eq. 114. In crossing highways, public safety undoubtedly requires that it should not be at grade, or, if so, that the crossing should be protected by gates. 20 Law Jour. 428.

5. *Injuries to domestic animals.* The company are not liable for any injury to domestic animals straying upon their track, or while crossing it, in the highway, unless they have been guilty of some neglect in building fences or in the management of their trains. 21 N. H. 363; 29 Me. 307; 6 Penn. St. 472; 6 Ind. 141; 8 *id.* 402; 4 Ohio St. 424; 4 Exch. 580; 33 Eng. L. & Eq. 193; 25 Vt. 150.

Liability for the acts of contractors, sub-contractors, and agents. The company are not liable for the act of the contractor or sub-contractor, or their agents, except in doing precisely what is contemplated in the contract. 5 Barnew. & C. 547; 6 Mees. & W. Exch. 499; 12 Ad. & E. 737; 5 Exch. 721; 24 Barb. N. Y. 355; 4 Den. N. Y. 311; 3 Gray, Mass. 349; Redfield, Railw. § 168. Railway companies are liable for the acts of their agents and sub-agents within the range of their employment; and it has been the purpose of the courts to give such agents a large discretion, and hold the companies liable for all acts of their agents within the most extensive range of their charter-powers. 14 How. 483; 27 Vt. 110; 7 Cush. Mass. 385. But the company are not liable for the wilful acts of their agents, out of the range of their employment, unless directed by the company or subsequently adopted by them. 2 Harr. N. J. 514; 1 Fla. 136. See this subject further discussed in Redfield, Railw. § 169, and notes. The company are not liable for injuries to servants through the neglect of their fellow-servants or defects in machinery, unless they were themselves in fault in employing incompetent servants or purchasing imperfect machinery for the road. 3 Mees. & W. Exch. 1; 4 Metc. Mass. 49; 6 Hill, N. Y. 592; 9 N. Y. 175.

6. Railway companies are liable for any injury accruing to the person or property of another through any want of reasonable care and prudence on the part of their agents or employees. This occurs from the omission of the requisite signals at road-crossings, and from want of care in other respects in crossing highways. 2 Cush. Mass. 539; 10 *id.* 562. See, also, 28 Vt. 185; 18 Ga. 679; 8 Gray, Mass. The conduct of railway trains is so far matter of science and skill that it is proper to receive the testimony of experts in regard to it. 23 Vt. 394, 395; 17 Ill. 509, 580. Railway companies, like other corpo-

rations, cannot be bound by any contract of their agents beyond their charter-power, or, as it is called, *ultra vires*, although assumed by their express direction or consent. 7 Eng. L. & Eq. 505; 16 *id.* 180; 30 *id.* 120.

7. *Railway investments.* The large amount of capital invested in railway stock and bonds, or notes and mortgages, in this country, renders this subject one of very considerable importance. The forms of such investments are—stock, preferred stock, and notes with coupons attached for the payment of the interest at stated times (generally once in six months), these being secured by mortgage of the road and all its appurtenances. The practice adopted by some of the railways in this country of issuing preferred stock, or preference stock, as it is called in England, and of issuing stock at reduced prices after all has been sold at par which can be disposed of in the market, or of mortgaging the entire road two or three times over, giving successive priorities, has generally been regarded as impolitic, if not positively fraudulent. 27 Vt. 673, 692; Redfield, Railw. 563, § 234, and cases cited in notes.

The rights and remedies of bondholders and mortgagees, as well as the holders of preferred stock, depend very much upon the forms of the contracts and the powers granted by the legislature to the company. The holders of preferred stock may, in a court of equity, compel the company to apply all their net earnings first to the payment of the stipulated dividend upon such stock. 30 Lond. Law Times, 141. See, also, 2 Stockt. Ch. N. J. 171. And it is the familiar practice of the courts of equity in this country to allow the successive mortgagees foreclosures upon all rights posterior to their own. How the property is to be controlled and managed thereafter is not yet well defined. The subject is a good deal discussed in an important case recently determined by the supreme court of Vermont. 31 Vt.

8. It has been held that a trustee of money is not justified in investing the same in railway securities, it being of too precarious a character. 10 Eng. L. & Eq. 123; 21 N. H. 352. In Ellis *vs.* Eden, 30 Lond. Law Times, 601, it was held that "stock in the foreign funds" included the American state stocks of Virginia, Massachusetts, etc., but not Boston water-scrip or bonds of the Pennsylvania Railway.

Railway bonds, with coupons attached made payable to bearer, pass by delivery, the same as bills of exchange or bank-bills, and have thus become a quasi-currency. 1 Stockt. Ch. N. J. 667; 13 N. Y. 599. See, also, 11 Paige, Ch. N. Y. 634; 2 Hill, N. Y. 159; 3 Barnew. & C. 45; 4 Barnew. & Ald. 1; 7 Bingh. 284; 27 Penn. St. 413; Redfield, Railw. § 239.

Constitutional questions. These have reference chiefly to the inviolability of charter rights under the United States constitution, and rest mainly upon the doctrines and principles of the leading case of Dartmouth College *vs.* Woodward, 4 Wheat. 518. The provision in the United States constitution referred to is that prohibiting the several states from passing "any law impairing the obligation of contracts."

A corporate charter is regarded as a legislative grant of certain franchises and immunities involving pecuniary value, and, consequently, not revocable, or subject to legislative control in any other sense than as all rights of property are liable to be affected by general legislation. 4 Wheat. 518; 27 Vt. 140; Redfield, Railw. § 231.

The essential franchise of a private corporation, being private property, cannot be taken for public use without adequate compensation. 15 Vt. 745; 16 *id.* 476; 27 *id.* 140; 6 How. 507.

9. But to be thus inviolable it is essential that the franchises in question shall be such as are indispensable to the existence and just operation of the corporation, or else that they be expressly secured to the corporation in its charter. 11 Pet. 420.

These exclusive grants are to be strictly construed in favor of the corporation, and liberally expounded in favor of public rights and interests. Opinion of Taney, Ch. J., in 11 Pet. 420; 13 How. 71; 1 La. Ann. 253.

It makes no difference in regard to the rights of the corporation that it may have received large grants of land or other property from the state or sovereignty conferring the charter. Unless the stock is owned by the state, or the appointment and control of the principal officers are retained by the state, so as to create it a public corporation, its essential franchises are inviolable to the same extent as other private rights of a pecuniary character, and its functions are equally independent of legislative control as are those of any natural person. 14 Miss. 599; 6 Penn. St. 86; 13 *id.* 133; 13 Ired. No. C. 75; 9 Mo. 507; 27 Miss. 517; 13 B. Monr. Ky. 1; 9 Wend. N. Y. 351; 4 Barb. N. Y. 64. See, also, the late cases, in the United States supreme court, maintaining the same principle. 18 How. 331, 380, 384; Redfield, Railw. § 232.

RAIN-WATER. The water which naturally falls from the clouds.

2. No one has a right to build his house so as to cause the rain-water to fall over his neighbor's land, 1 Rolle, Abr. 107; 2 *id.* 565; 2 Leon. 94; 1 Strange, 643; Fortescue, 212; Bacon, Abr. *Action on the Case* (F); 5 Coke, 101; 1 Comyns, Dig. *Action on the Case for a Nuisance* (A), unless he has acquired a right by a grant or prescription.

3. When the land remains in a state of nature, says a learned writer, and by the natural descent the rain-water would descend from the superior estate over the lower, the latter is necessarily subject to receive such water. 1 Lois des Bâtimens, 15, 16. See 2 Rolle, 140; Dig. 39. 3; 2 Bouvier, Inst. n. 1608.

RAISE. To create. A use may be raised; *i.e.* a use may be created. 1 Spence, Eq. Jur. 449*.

RANGE. This word is used in the land-laws of the United States to designate the order of the location of such lands, and in patents from the United States to individuals they are described as being within a certain range.

RANGER. A sworn officer of the forest to inquire of trespasses, and to drive the beasts of the forest out of the deforested ground into the forest. Jacob, Law Dict.

RANK. The order or place in which certain officers are placed in the army and navy, in relation to others.

It is a maxim that officers of an inferior rank are bound to obey all the lawful commands of their superiors, and are justified for such obedience.

RANKING. In Scotch Law. Determining the order in which the debts of a bankrupt ought to be paid.

RANSOM BILL. A contract for payment of ransom of a captured vessel, with stipulations of safe-conduct if she pursue a certain course and arrive in a certain time. If found out of time or course, the safe-conduct is void. Wheaton, Int. Law, 107*. The payment cannot be enforced in England, during the war, by an action on the contract, but can in this country. 1 Kent, Comm. 104, 105; 4 Wash. C. C. 141; 2 Gall. C. C. 325.

RAPE (Lat. *rapere*, to snatch, to seize with violence). **In Criminal Law.** The carnal knowledge of a woman by a man forcibly and unlawfully against her will.

The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid, or other, *where she did not consent neither before nor after.*" And this statute definition has been adopted in several very recent cases. Addenda to 1 Den. Cr. Cas.; 1 Bell, Cr. Cas. 63, 71.

2. Much difficulty has arisen in defining the meaning of *carnal knowledge*, and different opinions have been entertained,—some judges having supposed that penetration alone is sufficient, while others deemed emission an essential ingredient in the crime. Hawkins, Pl. Cr. b. 1, c. 41, s. 3; 12 Coke, 37; 1 Hale, Pl. Cr. 628; 2 Chitty, Crim. Law, 810. But in modern times the better opinion seems to be that both penetration and emission are not necessary. 1 East, Pl. Cr. 439; 3 Greenleaf, Ev. § 410; 2 Bishop, Crim. Law, § 942. It is to be remarked, also, that very slight evidence may be sufficient to induce a jury to believe there was emission. Add. Penn. 143; 2 Const. So. C. 351; 1 Beck, Med. Jur. 140; 4 Chitty, Blackst. Comm. 213, note 8. In Scotland, emission is not requisite. Alison, Scotch Law, 209, 210. See EMISSION; PENETRATION.

3. By the term *man* in this definition is meant a male of the human species, of the age of fourteen years and upwards; for an infant under fourteen years is supposed by law incapable of committing this offence. 1 Hale, Pl. Cr. 631; 8 Carr. & P. 738. But not only can an infant under fourteen years, if of sufficient mischievous discretion, but even a woman may be guilty as principal in the second degree. And the husband of a woman may be a principal in the second degree of a rape committed upon his wife: as, where he held her while his servant committed the rape. 1 Hargrave, St. Tr. 388.

4. The knowledge of the woman's person must be *forcibly and against her will;* and if her consent has not been voluntarily and freely given (when she has the power to consent), the offence will be complete, nor will any subsequent acquiescence on her part do away the guilt of the ravisher. A consent obtained from a woman by actual violence, by duress or threats of murder, or by the administration of stupefying drugs, is not such a consent as will shield the offender or turn his crime into adultery or fornication; and if the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner, though the liquor was given only for the purpose of exciting her, it is a rape. 1 Den. Cr. Cas. 89; 1 Carr. & K. 746. Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, does not amount to a rape. Russ. & R. 487; 6 Cox, Cr. Cas. 412; Dearsl. Cr. Cas. 397; 8 Carr. & P. 265, 286; 1 Carr. & K. 415. But there can be no doubt that the party is liable in such case to be indicted for an assault.

5. The matrimonial consent of the wife cannot be retracted; and, therefore, her husband cannot be guilty of a rape on her, as his act is not *unlawful*. But, as already observed, he may be guilty as principal in the second degree.

As a child under ten years of age is incapable in law to give her consent, it follows that the offence may be committed on such a child whether she consent or not. See stat. 18 Eliz. c. 7, s. 4.

It has been questioned whether rape was a felony at common law, or was made one by a statute in the reign of Edward I. The benefit of clergy was first taken away by a statute of Elizabeth. By a statute of Victoria, the offence is no longer punishable with death, but, at most, with transportation for life; previous to that statute, the capital punishment was almost invariably enforced.

See, as to the possibility of committing a rape, and as to the signs which indicate it, 1 Beck, Med. Jur. c. 12; Merlin, Repert. *Viol.;* 1 Briand, Méd. Leg. 1ère partie, c. 1, p. 66; Biessy, Manuel Médico-Légal, etc., p. 149; Parent Duchatellet, De la Prostitution dans la Ville de Paris, c. 3, § 5; Barrington, Stat. 123; 9 Carr. & P. 752; 2 Pick. Mass. 380; 12 Serg. & R. Penn. 69; 7 Conn. 54; 1 Const. So. C. 354; 2 Va. Cas. 235.

In English Law. A division of a county similar to a hundred, but oftentimes containing in it more hundreds than one.

RAPINE. In Criminal Law. The felonious taking of another man's personal property, openly and by violence, against his will. The civilians define rapine to be the taking with violence the movable property of another, with the fraudulent intent to appropriate it to one's own use. Leç. El. Dr. Rom. § 1071.

RAPPORT A SUCCESSION (Fr.; similar to *hotchpot*). **In Louisiana.** The reunion to the mass of the succession of the things given by the deceased ancestor to his heir, in order that the whole may be divided among the co-heirs.

The obligation to make the rapport has a triple foundation. *First*, it is to be presumed that the deceased intended, in making an advancement, to give only a portion of the inheritance. *Second*, it establishes the equality of a division, at least, with regard to the children of the same parent, who all have an equal right to the succession. *Third*, it preserves in families that harmony which is always disturbed by unjust favors to one who has only an equal right. Dalloz, Dict. See ADVANCEMENT; COLLATION; HOTCHPOT.

RASCAL. An opprobrious term, applied to persons of bad character. The law does not presume that a damage has arisen because the defendant has been called a rascal, and therefore no general damages can be recovered for it: if the party has received special damages in consequence of being so called, he can recover a recompense to indemnify him for his loss.

RASURE. The scratching or scraping a writing, so as to prevent some part of it from being read. The word writing here is intended to include printing.

RATE. A public valuation or assessment of every man's estate; or the ascertaining how much tax every one shall pay. See Powell, Mortg. Index; 1 Hopk. Ch. N. Y. 37.

RATE OF EXCHANGE. In Commercial Law. The price at which a bill drawn in one country upon another may be sold in the former.

RATIFICATION. An agreement to adopt an act performed by another for us.

Express ratifications are those made in express and direct terms of assent. *Implied* ratifications are such as the law presumes from the acts of the principal: as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use.

2. By ratifying a contract a man adopts the agency altogether, as well what is detrimental as that which is for his benefit. 2 Strange, 859; 1 Atk. Ch. 128; 4 Term, 211; 7 East, 164; 16 Mart. La. 105; 1 Ves. Ch. 509; Smith, Merc. Law, 60; Story, Ag. § 250; 9 Barnew. & C. 59.

As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act. Story, Ag. § 250; Paley, Ag. Lloyd ed. 171; 3 Chitty, Com. Law, 197.

3. The ratification of a lawful contract has a retrospective effect, and binds the principal from its date, and not only from the time of the ratification, for the ratification is equivalent to an original authority, according to the maxim that *omnis ratihabitio mandato æquiparatur*. Pothier, Obl. n. 75; 2 Ld. Raym. 930; Comb. 450; 5 Burr. 2727; 2 H. Blackst. 623; 1 Bos. & P. 316; 13 Johns. N. Y. 367, 2 Johns. Cas. N. Y. 424; 2 Mass. 106.

Such ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable. 2 Brod. & B. 452. See 16 Mass. 461; 8 Wend. N. Y. 494; 10 *id.* 399; Story, Ag. § 251. See ASSENT; Ayliffe, Pand. *386; 18 Viner, Abr. 156; 1 Livermore, Ag. c. 2, § 4, pp. 44, 47; Story, Ag. § 239; 3 Chitty, Com. Law, 197; Paley, Ag. Lloyd ed. 324; Smith, Merc. Law, 47, 60; 2 Johns. Cas. N. Y. 424; 13 Mass. 178, 391, 379; 6 Pick. Mass. 198; 1 Brown, Ch. 101, note; 1 Pet. C. C. 72; Bouvier, Inst. Index.

4. An infant is not, in general, liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full age. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it he would not be bound. 11 Serg. & R. Penn. 305, 311; 3 Penn. St. 428. See 12 Conn. 551, 556; 10 Mass. 137, 140; 14 *id.* 457; 4 Wend. N. Y. 403, 405. But a confirmation or ratification of a contract may be implied from acts of the infant after he becomes of age, as, by enjoying or claiming a benefit under a contract he might have wholly rescinded, 1 Pick. Mass. 221, 223; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership by transacting business of the firm, receiving profits, and the like. 2 Hill. So. C. 479; 1 J. B. Moore, 289.

RATIFICATION OF TREATIES. See TREATY.

RATIHABITION. Confirmation; approbation of a contract; ratification.

RATIO (Lat.). A reason; a cause; a reckoning of an account.

RATIONALIBUS DIVISIS, WRIT DE. The name of a writ which lies properly when two men have lands in several towns or hamlets, so that the one is seised of the land in one town or hamlet, and the other of the other town or hamlet by himself, and they do not know the bounds of the town or hamlet, nor of their respective lands. This writ lies by one against the other, and the object of it is to fix the boundaries. Fitzherbert, Nat. Brev.

RAVISHED. In Pleading. A technical word necessary in an indictment for rape.

No other word or circumlocution will answer. The defendant should be charged with having "*feloniously ravished*" the prosecutrix, or woman mentioned in the indictment. Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Hawkins, Pl. Cr. 2, c. 25, s. 56; Croke Cas. 37; 1 Hale, Pl. Cr. 628; 2 *id.* 184; Coke, Litt. 184, n. p; Coke, 2d Inst. 180; 1 East, Pl. Cr. 447. The words "feloniously did ravish and carnally know" imply that the act was done forcibly and against the will of the woman. 12 Serg. & R. Penn. 70. See 3 Chitty, Crim. Law, 812.

RAVISHMENT. In Criminal Law. An unlawful taking of a woman, or of an heir in ward. Rape.

RAVISHMENT OF WARD. In English Law. The marriage of an infant ward without the consent of the guardian. It is punishable by statute Westminster 2, c. 35.

READING. The act of pronouncing aloud, or of acquiring by actual inspection a knowledge of, the contents of a writing or of a printed document.

In order to enable a party to a contract, or a devisor, to know what a paper contains, it must be read, either by the party himself or by some other person to him. When a person signs or executes a paper, it will be presumed that it has been read to him; but this presumption may be rebutted.

In the case of a blind testator, if it can be proved that the will was not read to him, it cannot be sustained. 3 Wash. C. C. 580. See 2 Bouvier, Inst. n. 2012.

REAL. At Common Law. A term which is applied to land in its most enlarged signification. *Real security*, therefore, means the security of mortgages or other incumbrances affecting lands. 2 Atk. Ch. 806: s. c., 2 Ves. Sen. Ch. 547.

In Civil Law. That which relates to a *thing*, whether it be movable or immovable, lands or goods: thus, a real injury is one which is done to a thing, as a trespass to property, whether it be real or personal in the common-law sense. A real statute is one which relates to a thing, in contradistinction to such as relate to a person.

REAL ACTION. In Practice. IN THE CIVIL LAW. One by which a person seeks to recover his property which is in the possession of another. Dig. 50. 16. 16. It is to be brought against the person who has possession.

AT THE COMMON LAW. One brought for the specific recovery of lands, tenements, or hereditaments. Stephen, Plead. 3.

They are *droitural* when they are based upon the right of property, and *possessory* when based upon the right of possession. Real Act. 84. They are either writs of right; writs of entry, which lie in the per, the per et cui, or the post, upon disseisin, intrusion, or alienation; writs ancestral possessory, as mort d'ancestor, aiel, besaiel, cosinage, or nuper obiit. Comyns, Dig. *Actions* (D 2).

These actions were always local, and were to be brought in the county where the land lay. Bracton, 189, 414. They are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process,—a much more expeditious method of trying titles being since introduced by other actions, personal and mixed. See Stearns, Real Act.; Booth, Real Act.; Bacon, Abr. *Actions;* Comyns, Dig. *Actions;* 3 Sharswood, Blackst. Comm. 118.

REAL CONTRACT. At Common Law. A contract respecting real property. 3 Rawle, Penn. 225.

In Civil Law. Those contracts which require the interposition of a thing (*rei*) as the subject of them: for instance, the loan for goods to be *specifically returned.*

Contracts are divided into those which are formed by the mere consent of the parties, and therefore are called consensual, such as sale, hiring and mandate; and those in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit or pledge, which, from their nature, require the delivery of the *thing;* whence they are called real. Pothier, Obl. p. 1, c. 1, s. 1, art. 2.

REAL COVENANT. A covenant connected with a conveyance of realty, whereby an obligation to pass something real is created, or which is so connected with the realty that he who has the latter is entitled to the benefit of, or is bound to perform, the former. Fitzherbert, Nat. Brev. 145; Sheppard, Touchst. 161.

A covenant which is so connected with the realty as to apply to the owner thereof, either in reference to benefit or obligation, whether he be a party to the instrument creating the covenant or not.

A covenant by which the obligor undertakes to pass something real. Coke, Litt. 384 *b;* Stearns, Real Act. 134. See 4 Kent, Comm. 472.

A covenant by which the covenantor binds his heirs. 2 Sharswood, Blackst. Comm 304.

Very considerable confusion exists among the authorities in the use of the term real covenants. The definition of Blackstone, which determines the character of covenants from the insertion or non-insertion of the word "heir" by the covenantor, is pretty generally rejected. See Platt, Cov. 61; 2 Sharswood, Blackst. Comm. 304, n., 305, n. Of the other definitions, that which makes a real covenant an obligation to pass realty is the most ancient. Upon such a covenant the remedy was by voucher or *warrantia chartæ*, and not by the action of covenant.

Together with the disuse of real actions, these covenants gave place to the more modern covenants which furnish the basis of a personal action for damages, and the term real covenants lost its ancient

signification and acquired its modern one, as given in the latter part of the first and in the second definition. The covenant to stand seised approaches perhaps more nearly than any covenant still in use to the ancient real covenant.

Covenants are real only when they have entered into the consideration for which land, or some interest therein to which the covenant is annexed, passed between the covenantor and covenantee. See COVENANT, **13**; 2 Washburn, Real Prop. 662, 663.

In England, all covenants for title are held to be real covenants; in the United States, those only which are future in their operation come under this description. 10 Ga. 311.

The object of these covenants is, usually, either *to preserve the inheritance*, as to keep in repair, 3 Lev. 92; 9 Barnew. & C. 505; 8 Cow. N. Y. 206; 17 Wend. N. Y. 148; 1 Dall. C. C. 210; 6 Yerg. Tenn. 512; 6 Vt. 276; 25 Penn. St. 257; 38 Eng. L. & Eq. 462; to keep buildings insured, and reinstate them if burned, Platt, Cov. 185; 5 Barnew. & Ad. 1; 6 Gill & J. Md. 372; *to continue the relation of landlord and tenant*, as to pay rent, 5 East, 575; 1 Dougl. 183; 1 Wash. C. C. 375; do suit to the lessor's mill, 5 Coke, 18; 1 Barnew. & C. 410; grind the tenant's corn, 2 Yeates, So. C. 74; 9 Vt. 91; for the renewal of leases, 12 East, 469; or *to protect the tenant in his enjoyment of the premises*, as to warrant and defend, Sheppard, Touchst. 161; 2 Mass. 433; 5 Cow. N. Y. 137; 1 Paige, Ch. N. Y. 455; to make further assurance, Croke Car. 503; for quiet enjoyment, Croke Eliz. 373; 3 Barnew. & Ald. 392; 1 C. B. 402; 1 Dev. & B. No. C. 94; 23 Me. 383; never to claim or assert title, 7 Me. 97; 3 Metc. Mass. 121; to remove incumbrances, 17 Mass. 586; to release suit and service, Coke, Litt. 384 *b*; to produce title-deeds in defence of the grantee's title, 4 Greenleaf, Cruise, Dig. 393; 10 Law Mag. 353–357; 1 Sim. & S. Ch. 449; to supply water to the premises, 4 Barnew. & Ald. 266; to draw water off from a mill-pond, 19 Pick. Mass. 449; not to establish another mill on the same stream, 17 Wend. N. Y. 136; not to erect buildings on adjacent land, 4 Paige, Ch. N. Y. 510; to use the land in a specified manner, 13 Sim. Ch. 228; generally to create or preserve easements for the benefit of the land granted. 4 E. D. Smith, N. Y. 122; 1 Bradf. N. Y. 40. See 2 Greenleaf, Ev. § 240; 2 Washburn, Real Prop. 648. See COVENANT; REAL.

REAL LAW. At Common Law. A popular term used to denote such parts of the system of common law as concern or relate to real property.

In Civil Law. A law which relates to specific property, whether movable or immovable.

If real law in any given case relate to immovable property, it is limited in its operation to the territory within which that is situate, real estate being, both by the common and continental laws, subject exclusively to the laws of the government within whose territory it is situate. Story, Confl. Laws, 426, 428. See REI SITÆ.

REAL PROPERTY. Something which may be held by tenure, or will pass to the heir of the possessor at his death, instead of his executor, including lands, tenements, and hereditaments, whether the latter be corporeal or incorporeal. 1 Atkinson, Conv.

In respect to property, *real* and *personal* correspond very nearly with *immovables* and *movables* of the civil law. By the latter, "biens" is a general term for property; and these are classified into movable and immovable, and the latter are subdivided into corporeal and incorporeal. Guyot, Repert. *Biens*.

By immovables the civil law intended property which could not be removed at all, or not without destroying the same, together with such movables as are fixed to the freehold, or have been so fixed and are intended to be again united with it, although at the time severed therefrom. Taylor, Civ. Law, 475.

The same distinction and rules of law as to the nature and divisions of property are adopted in Scotland, where, as by the Roman law, another epithet is applied to immovables. They are called *heritable*, and go to the heir, as distinguished from movables, which go to executors or administrators. So rights connected with or affecting heritable property, such as tithes, servitudes, and the like, are themselves heritable; and in this it coincides with the common law. Erskine, Inst. 192.

In another respect the Scotch coincides with the common law, in declaring growing crops of annual planting and culture not to be heritable, but to go to executors, etc., although so far a part of the real estate that they would pass by a conveyance of the land. Erskine, Inst. 193; Williams, Exec. 600.

Though the term *real*, as applied to property, in distinction from *personal*, is now so familiar, it is one of a somewhat recent introduction. While the feudal law prevailed, the terms in use in its stead were lands, tenements, or hereditaments; and these acquired the epithet of *real* from the nature of the remedy applied by law for the recovery of them, as distinguished from that provided in case of injuries, contracts-broken, and the like. In the one case the claimant or demandant recovered the *real thing* sued for,—the land itself,—while, ordinarily, in the other he could only recover recompense in the form of pecuniary damages.

The term, it is said, as a means of designation, did not come into general use until after the feudal system had lost its hold, nor till even as late as the commencement of the seventeenth century. One of the earliest cases in which the courts applied the distinctive terms of *real* and *personal* to estates, without any words of explanation, is said to have been that of Wind *vs.* Jekyl *et al.* A.D. 1719, 1 P. Will. Ch. 575; Williams, Real Prop. 6, 7.

2. Upon the question what is embraced under the term *real property* or *estate*, so as to have heritability and other incidents of lands, tenements, or hereditaments, it may be stated, in general terms, that it includes land and whatever is erected or growing upon the same, with whatever is beneath or above the surface: "usque ad orcum" as well as "usque ad cœlum." 2 Blackstone, Comm. 17–19; 1 Am. Law Mag. 271; Coke, Litt. 4 *a*.

This would, of course, include houses standing and trees growing upon the land, and would not embrace chattels like stock upon a farm or furniture in a house. But not only may houses or growing trees ac-

quire the character of *personal*, but various chattels, originally personal movables, may acquire that of *real*, property.

Thus, if one erect a dwelling-house upon the land of another by his assent, it is the personal estate of the builder. 6 N. H. 555; 6 Me. 452; 8 Pick. Mass. 404. So, if a nurseryman plant trees, for the purpose of growing them for the market, upon land hired by him, they would be personal estate. 1 Metc. Mass. 27; 4 Taunt. 316.

3. So crops, while growing, planted by the owner of the land, are a part of the real estate; but if sold by him when fit for harvesting, they become personal, 5 Barnew. & C. 829; and a sale of such crops, though not fit for harvest, as personal, has been held good. 4 Mees. & W. Exch. 343; 2 Dan. Ky. 206; 2 Rawle, Penn. 161.

So trees growing, though not in a nursery, may be changed into the category of personal estate, if sold to be cut without any right to have them stand to occupy the land. 4 Metc. Mass. 584; 9 Barnew. & C. 561; 7 N. H. 523. But if the owner of land in fee grant the trees growing thereon to another and his heirs, to be cut at his pleasure, the property in the trees would be *real*. 4 Mass. 266. The same rule would apply to property in fee in a dwelling-house, though the owner only have a right to have it stand upon the land of another. And one may own a chamber in a house as his separate real estate. 1 Term, 701; 1 Metc. Mass. 541; 10 Conn. 318.

4. So a large class of articles originally wholly movable, and which may be at the time even disconnected with the land, may be regarded as *real* property, from having been fitted for and actually applied to use in connection with real estate, such as keys to locks fastened upon doors, mill-stones and irons, though taken out of the mill for repairing, window-blinds, though temporarily removed from the house, and fragments of a dwelling-house destroyed by a tempest. Williams, Exec. 613–615; 11 Coke, 50; 10 Paige, Ch. N. Y. 162; 30 Penn. St. 185. And a conveyance of "a saw-mill" with the land was held to pass iron bars and chains then in it which had been fitted for and used in operating it. 6 Me. 154.

In case of corporations, the same property may assume the character both of *real* and *personal*. Thus, if the corporation hold real estate, such as a mill or banking-house, it would be in the hands of the body corporate real estate, but as constituting a part of the property owned and represented in the form of stock by the members constituting the body of the corporation, it is personal. 3 Mees. & W. Exch. 422; Angell & A. Corp. § 557. But the shares in corporate property may be real estate when declared to be so by the charter creating it, or when the corporation is merely constituted to hold and manage lands, like proprietors of common lands in the New England states. 2 P. Will. 127; 2 Conn. 567; 10 Mass. 150.

5. *Manure* made upon a farm in the usual manner, by consumption of its products, would be a part of the real estate; while if made from products purchased and brought on to the land by the tenant, as in case of a livery-stable, it would be personal, 21 Pick. Mass. 371; 3 N. H. 503; 6 Me. 222; 2 N. Chipm. Vt. 115; 11 Conn. 525; though in England the way-going tenant may claim compensation for manure left upon the farm under such circumstances. 1 Crompt. & M. Exch. 809.

There is a large class of articles known to the law as *fixtures*, which are real or personal according to circumstances. Whatever is fitted for and actually applied to real estate, if of a permanent nature, is real estate, and passes from the vendor to the vendee as such. 20 Wend. N. Y. 368; 2 Smith, Lead. Cas. Am. ed. 168. And the same rule applies between mortgagor and mortgagee. 19 Barb. N. Y. 317; 4 Metc. Mass. 311; 3 Edw. Ch. N. Y. 246. The same is the rule as between heir and executor upon the death of the ancestor, and between debtor and creditor upon a levy made by the latter upon the land of the former. 10 Paige, Ch. N. Y. 163; 7 Mass. 432. Whereas such fixtures as between a tenant and a landlord are personal estate, and may be removed as such, unless left attached to the realty by the tenant at the close of his term, in which case they become a part of the realty. 2 Pet. 143; 7 Cow. N. Y. 319; 1 Wheat. 91; 17 Pick. Mass. 192. See FIXTURES.

Heirlooms. See HEIRLOOMS.

6. *Pews* in churches are sometimes real and sometimes personal estate, depending, generally, upon local statutes; though in the absence of statute law it would seem they were clearly interests in real estate, and partake of the character of such estate. 1 Pick. Mass. 104; 16 Wend. N. Y. 28; 5 Metc. Mass. 132. See PEWS.

Even *money* often has the character of realty attached to it, so far as being heritable, and the like, by equity, where it is the proceeds of real estate wrongfully converted into money, or which ought to be converted into real estate. 3 Wheat. 577; 1 Brown, Ch. 6, 497; 13 Pick. Mass. 154.

Slaves, in some of the states, are so far regarded as real estate as to descend to heirs, instead of passing to personal representatives. 2 Dan. Ky. 43.

Mortgages. See MORTGAGE.

There is one class of interests in lands, etc. which, from relating to lands which are *real*, and from being governed as to succession by the rules which apply to *personal* property, or, as that is called, chattels, takes the name of *chattels real*. Of this class are terms for years in lands. Upon the death of the tenant of such a term it goes to his personal representatives, and not to his heirs. 2 Blackstone, Comm. 386.

REAL RIGHT. In Scotch Law. That which entitles him who is vested with it to possess the subject as his own, and if, in the possession of another, to demand from him its actual possession.

It is distinguished from a personal right, which is that of action against a debtor, but without any right in the subject which the debtor is obliged to transfer to him. *Real* rights affect the subject itself; *personal* are founded in obligation. Erskine, Int. 479.

By analogy, the right which a claimant in an action of replevin seeks to enforce at common law would be a *real* one, while the compensation which a plaintiff seeks in an action of assumpsit or of trover, being a pecuniary one, would be *personal*.

REALM. A kingdom; a country. 1 Taunt. 270; 4 Campb. 289; Rose, Bank. 387.

REALTY. A term sometimes used as a collective noun for real property or estate,—more generally to imply that that of which it is spoken is of the nature or character of real property or estate.

REASON. That power by which we distinguish truth from falsehood and right from wrong, and by which we are enabled to combine means for the attainment of particular ends. Encyclopédie; Shelford, Lun. Introd. xxvi. *Ratio in jure æquitas integra.*

A man deprived of reason is not, in many cases, criminally responsible for his acts, nor can he enter into any contract.

Reason is called the *soul of the law;* for when the reason ceases the law itself ceases. Coke, Litt. 97, 183; 1 Blackstone, Comm. 70; 7 Toullier, n. 566; Maxims, *Cessante ratione*, etc.

REASONABLE. Conformable or agreeable to reason; just; rational.

An award must be *reasonable;* for if it be of things nugatory in themselves, and offering no advantage to either of the parties, it cannot be enforced. 3 Bouvier, Inst. n. 2096. See Award.

REASONABLE ACT. This term signifies such an act as the law requires. When an act is unnecessary, a party will not be required to perform it as a reasonable act. 9 Price, Exch. 43; Yelv. 44; Platt, Cov. 342, 157.

REASONABLE TIME. The English law, which in this respect has been adopted by us, frequently requires things to be done within a reasonable time; but what a reasonable time is, it does not define: *quam longum debet esse* rationabile tempus, *non definitur in lege*, sed pendet ex discretione justiciariorum. Coke, Litt. 50.

The question of reasonable time is left to be fixed by circumstances and the usages of business. A bill of exchange must be presented within a reasonable time. Chitty, Bills, 197–202. An abandonment must be made within a reasonable time after advice received of the loss. Marshall, Ins. 589.

The commercial code of France fixes a time in both these cases, which varies in proportion to the distance. See Code de Com. l. 1, t. 8, s. 1, § 10, art. 160; *id.* l. 5, t. 10, s. 3, art. 373. See Notice of Dishonor; Protest.

REASSURANCE. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss, for the insurance he has made: this is called reassurance.

REBATE. In Mercantile Law. Discount; the abatement of interest in consequence of prompt payment.

REBEL. A citizen or subject who unjustly and unlawfully takes up arms against the constituted authorities of the nation, to deprive them of the supreme power, either by resisting their lawful and constitutional orders in some particular matter, or to impose on them conditions. Vattel, Droit des Gens, liv. 3, § 328. In another sense, it signifies a refusal to obey a superior or the commands of a court.

REBELLION. In Criminal Law. The taking up arms traitorously against the government. The forcible opposition and resistance to the laws and process lawfully issued.

If the rebellion amount to treason, it is punished by the laws of the United States with death. If it be a mere resistance of process, it is generally punished by fine and imprisonment. See Dalloz, Dict.; Code Penal, 209.

REBELLION, COMMISSION OF. In Old English Practice. A writ issuing out of chancery to compel the defendant to appear.

REBOUTER. To repel or bar. The action of the heir by the warranty of his ancestor is called to rebut or repel.

REBUT. To contradict; to do away. Thus, every homicide is presumed to be murder, unless the contrary appears from evidence which proves the death; and this presumption it lies on the defendant *to rebut*, by showing that it was justifiable or excusable. Alison, Scotch Law, 48.

REBUTTER. In Pleading. The name of the defendant's answer to the plaintiff's surrejoinder. It is governed by the same rules as the rejoinder. Comyns, Dig. *Pleader* (K). See Pleadings.

REBUTTING EVIDENCE. That evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant.

2. It is a general rule that any thing may be given as rebutting evidence which is a direct reply to that produced on the other side, 2 M'Cord, So. C. 161; and the proof of circumstances may be offered to rebut the most positive testimony. 1 Pet. C. C. 235.

But there are several rules which exclude all rebutting evidence. A party cannot impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified, 3 Litt. Ky. 465; nor can he rebut or contradict what a witness has sworn to which is immaterial to the issue. 16 Pick. Mass. 153; 2 Bail. So. C. 118.

3. Parties and privies are estopped from contradicting a written instrument by parol proof; but this rule does not apply to strangers. 10 Johns. N. Y. 229. But the parties may prove that before breach the agreement was abandoned, or annulled by a subsequent agreement not in writing. 4 N. H. 196. And when the writing was made by another, as where the log-book stated a desertion, the party affected by it may prove that the entry was false or made by mistake. 4 Mas. C. C. 541. See ESTOPPEL.

RECALL. In International Law. To deprive a minister of his functions; to supersede him.

RECALL A JUDGMENT. To reverse a judgment on a matter of fact. The judgment is then said to be recalled or revoked; and when it is reversed for an error of law it is said simply to be reversed, *quod judicium reversetur*.

RECAPTION. The act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes possession peaceably.

2. In each of these cases the law allows the recaption of the person or of the property, provided he can do so without occasioning a breach of the peace or an injury to a third person who has not been a party to the wrong. Coke, 3d Inst. 134; 2 Rolle, 55, 208; 2 Rolle, Abr. 565; 3 Blackstone, Comm. 5; 3 Bouvier, Inst. n. 2440 *et seq.*

The right of recaption of a person is confined to a husband, in retaking his wife; a parent, his child, of whom he has the custody; a master, his apprentice; and, according to Blackstone, a master, his servant,—but this must be limited to a servant who assents to the recaption: in these cases, the party injured may peaceably enter the house of the wrong-doer, without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also enter peaceably into the house of a person harboring, who was not concerned in the original abduction. 8 Bingh. 186.

3. The same principles extend to the right of recaption of personal property. In this sort of recaption too much care cannot be observed to avoid any personal injury or breach of the peace.

In the recaption of real estate, the owner may, in the absence of the occupier, break open the outer-door of a house and take possession; but if in regaining his possession the party be guilty of a forcible entry and breach of the peace, he may be indicted; but the wrong doer, or person who had no right to the possession, cannot sustain any action for such forcible regaining possession merely. 1 Chitty, Pract. 646.

RECAPTURE. The recovery from the enemy, by a friendly force, of a prize by him captured.

It seems incumbent on fellow-citizens, and it is of course equally the duty of allies, to rescue each other from the enemy when there is a reasonable prospect of success. 3 C. Rob. Adm. 224.

The recaptors are not entitled to the property captured, as if it were a new prize: the owner is entitled to it by the right of postliminium. Dalloz, Dict. *Prises Maritimes*.

RECEIPT (Lat. *receptum*, received; through Fr. *receit*). A written acknowledgment of payment of money or delivery of chattels.

2. It is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against himself. As an instrument of evidence, the receipt of one person is, in general, inoperative against another, although often useful as a voucher in the private settlement of accounts; and the statutes of some states make receipts for small payments made by executors, etc. evidence of the payment on a settlement of their accounts. And receipts of public officers are sometimes admissible *per se*. 1 Ill. 45. It is essential to a receipt that it acknowledge the payment or delivery referred to. Russ. & R. Cr. Cas. 227; 7 Carr. & P. 549. And under the stamp laws a *delivery* or *payment* must be stated. 1 Esp. 426; 1 Campb. 499. Also the receipt must, from the nature of the case, be in writing, and must be delivered to the debtor; for a memorandum of payment made by the creditor in his own books is no receipt. 3 Dowl. & R. 332; 2 Barnew. & Ald. 501, n.; 11 Lond. Jur. 806; 1 East, 460; 1 Speers, So. C. 53.

3. *Receipts, effect of.* The mere acknowledgment of payment made is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only, 1 Pet. C. C. 182; 1 Rich. So. C. 32; 1 Harr. Del. 5; 3 *id.* 317; 4 *id.* 206; 7 Cow. N. Y. 334; 16 Wend. N. Y. 460; 16 Me. 475; 5 Ark. 61; 11 Mass. 27, 363; 3 McLean, C. C. 265; 6 B. Monr. Ky. 199; 2 Johns. Cas. N. Y. 438; 1 Perr. & D. 437; 3 Barnew. & C. 421; 8 Gill, Md. 179; 3 Jones, No. C. 501, and is, in general, open to explanation, 2 Johns. N. Y. 378; 9 *id.* 310; 6 Ala. 811; 8 Ala. N. S. 59; 4 Vt. 308; 21 *id.* 222; 3 McLean, C. C. 387; 4 Barb. N. Y. 265; 5 Du. N. Y. 294; 5 J. J. Marsh. Ky. 79; 5 Mich. 171; being an exception to the general rule that parol evidence cannot be admitted to contradict or vary a written instrument. 5 Johns. N. Y. 68; 2 Metc. Mass. 283. Thus, a party may always show, in explanation of a receipt limited to such acknowledgment, the actual circumstances under which it was made, 8 Johns. N. Y. 389: *e.g.* that it was obtained by fraud, Wright, Ohio, 764; 4 Harr. & M'H. Md. 219, or given under a mistake, 6 Barb. N. Y. 58; 3 Dan. Ky. 427, or that, in point of fact, no money was actually

paid as stated in it. 2 Strobh. So. C. 390; 3 N. Y. 168; 10 Vt. 96. But see 1 J. J. Marsh. Ky. 583.

4. *Receipts "in full."* When, however, we find a receipt acknowledging payment "in full" of a specified debt, or "in full of all accounts" or of "all demands," the instrument is of a much higher and more conclusive character. It does not, indeed, like a release, operate upon the demand itself, extinguishing it by any force or virtue in the receipt, but it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers from such acknowledgment an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum as a final satisfaction. 10 Vt. 491; 2 Dev. No. C. 247; Wright, Ohio, 764; 21 N. H. 85. This compromise thus shown by the receipt will often operate to extinguish a demand, although the creditor may be able to show he did not receive all that he justly ought. See ACCORD AND SATISFACTION. If the rights of a party are doubtful, are honestly contested, and time is given to allow him to satisfy himself, a receipt in full, though given for less than his just rights, will not be set aside. Thus, in general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud. 5 Vt. 520; 1 Esp. 173; 1 Camph. 392; 2 Strobh. So. C. 203. But receipts of this character are not wholly exempt from explanation: fraud or misrepresentation may be proved, and so may such mistake as enters into and vitiates the compromise of the demand admitted. Brayt. Vt. 75; 1 Campb. 394; Coxe, N. J. 48; 2 Brev. No. C. 223; 4 Harr. & M'H. Md. 219; 4 Barb. N. Y. 265; 1 Edw. Ch. N. Y. 101, 427; 2 Harr. Del. 392; 2 Carr. & P. 44. The evidence in explanation must be clear and full, and addressed to the point that there was not in fact an intended and valid compromise of the demand. For if the compromise was not binding the receipt in full will not aid it. The receipt only operates as evidence of a compromise which extinguished the claim. 26 Me. 88; 4 Den. N. Y. 166; 2 M'Cord, So. C. 320; 4 Wash. C. C. 562.

5. *Receipts in deeds.* The effect to be given to a receipt for the consideration-money, so frequently inserted in a deed of real property, has been the subject of numerous and conflicting adjudications. The general principle settled by weight of authority is that for the purpose of sustaining the conveyance as against the vendor and his privies the receipt is conclusive: they are estopped to deny that a consideration was paid sufficient to sustain the conveyance. 1 Binn. Penn. 502; 26 Mo. 56; 4 Hill, N. Y. 643. But in a subsequent action for the purchase-money or upon any collateral demand, *e.g.* in an action to recover a debt which was in fact paid by the conveyance, or in an action for damages for breach of a covenant in the deed, and the like, the grantor may show that the consideration was not in fact paid,—that an additional consideration to that mentioned was agreed for, etc. 16 Wend. N. Y. 460; 4 Johns. N. Y. 23; 14 *id.* 210; 2 Hill, N. Y. 554; 10 Vt. 96; 12 *id.* 443; 3 N. H. 170; 4 *id.* 229, 397; 1 M'Cord, So. C. 514; 7 Pick. Mass. 533; 1 Rand. Va. 219; 4 Dev. No. C. 355; 3 Hawks, No. C. 82; 6 Me. 364; 5 Barnew. & Ald. 606; 5 Ala. 224; 5 Lond. Jur. 693; 2 Harr. Del. 354; 13 Miss. 238; 5 Conn. 113; 1 Harr. & G. Md. 139; 2 Humphr. Tenn. 584; 1 Gill, Md. 84; 1 J. J. Marsh. Ky. 387; 3 Md. Ch. Dec. 411; 3 Ind. 212; 15 Ill. 230; 1 Stockt. Ch. N. J. 492. But there are many contrary cases. See 1 Me. 2; 5 *id.* 232; 7 Johns. N. Y. 341; 3 M'Cord, So. C. 552; 1 Johns. Ch. N. Y. 390; 1 Harr. & J. Md. 252; 1 Hawks, No. C. 64; 4 Hen. & M. Va. 113; 2 Ohio, 182; 1 Barnew. & C. 704.

6. And when the deed is attacked for fraud, or is impeached by creditors as voluntary and therefore void, or when the object is to show the conveyance illegal, the receipt may be explained or contradicted. 3 Zabr. N. J. 465; 3 Md. Ch. Dec. 461; 21 Penn. St. 480; 20 Pick. Mass. 247; 12 N. H. 248. See ASSUMPSIT DEED.

With this exception of receipts inserted in a sealed instrument having some other purpose, to which the receipt is collateral, a receipt under seal works an absolute estoppel, on the same principles and to the same general extent as other specialties. Ware, Dist. Ct. 496; 4 Hawks, Tenn. 22. Thus, where an assignment of seamen's wages bore a sealed receipt for the consideration-money, even though the attesting witness testified that no money was paid at the execution of the papers, and defendant offered no evidence of any payment ever having been made, and refused to produce his account with the plaintiff (the assignor), on the trial, it was held that the receipt was conclusive. 2 Taunt. 141. See SEAL; SPECIALTY.

7. *Receipt embodying contract.* A receipt may embody a contract; and in this case it is not open to the explanation or contradiction permitted in the case of a simple receipt. 4 Gray, Mass. 186. The fact that it embodies an agreement brings it within the rule that all matters resting in parol are merged in the writing. See EVIDENCE. Thus, a receipt which contains a clause amounting to an agreement as to the application to be made of the money paid—as when it is advanced on account of future transactions—is not open to parol evidence inconsistent with it. 5 Ind. 109; 14 Wend. N. Y. 116; 12 Pick. Mass. 40, 562; 15 *id.* 437. A bill of parcels with prices affixed, rendered by a seller of goods to a purchaser, with a receipt of payment executed at the foot, was held in one case to amount to a contract of sale of the goods, and therefore not open to parol explanation; while in another case a similar bill was held merely a receipt, the bill at the head being deemed only a memorandum to

show to what the receipt applied. 3 Cranch, 311; 1 Bibb, Ky. 271. A bill of lading, which usually contains words of receipt stating the character, quantity, and condition of the goods as delivered to the carrier, is the subject of a somewhat peculiar rule. It is held that so far as the receipt is concerned it may be explained by parol. 6 Mass. 422; 7 *id.* 297; 3 N. Y. 321; 10 *id.* 529; 25 Barb. N. Y. 16; 5 Du. N. Y. 538; 1 Abb. Adm. 209, 397. But see 1 Bail. So. C. 174.

8. But as respects the agreement to carry and deliver, the bill is a contract, to be construed, like all other contracts, according to the legal import of its terms, and cannot be varied by parol. 25 Barb. N. Y. 16; 3 Sandf. N. Y. 7. In this connection may also be mentioned the receipt customarily given in the New England states, more particularly for goods on which an attachment has been levied. The officer taking the goods often, instead of retaining them in his own manual control, delivers them to some third person, termed the "receiptor," who gives his receipt for them, undertaking to redeliver upon demand. This receipt has in some respects a peculiar force. The receiptor having acknowledged that the goods have been attached cannot afterwards object that no attachment was actually made, or that it was insufficient or illegal. 11 Mass. 219, 317; 24 Pick. Mass. 196. Nor can he deny that the property was that of the debtor, except in mitigation of damages or after re-delivery. 12 Pick. Mass. 562; 13 *id.* 139; 15 *id.* 40. And, in the absence of fraud, the value of the chattels stated in the receipt is conclusive upon the receiptor. 12 Pick. Mass. 362.

9. Where the payment is made in some particular currency or medium, as doubtful bank-bills, a promissory note of another person, etc., clauses are often inserted in the receipts specifying the condition in which such mode of payment is accepted. The rule of law in most of our states is that negotiable paper given in payment is presumed to have been accepted on the condition that it shall not work a discharge of the demand unless the paper shall ultimately produce satisfaction; and if an intent to accept it absolutely does not affirmatively appear, the creditor is entitled, in case the paper turned out to him is dishonored, to return it and claim to be paid anew. See PAYMENT. If the receipt is silent on that subject, it is open to explanation, and the creditor may rebut it by proof that the payment admitted was in fact made by a note, bill, check, bank-notes afterwards ascertained to be counterfeit, or notes of a bank in fact insolvent though not known to be so to the parties, etc. 1 Wash. C. C. 338; 1 Watts & S. Penn. 521; 2 Johns. Cas. N. Y. 438; 2 Johns. N. Y. 455; 13 Wend. N. Y. 101; 3 McLean, C. C. 265; 5 J. J. Marsh. Ky. 78. But see 3 Caines, Cas. N. Y. 14; 1 Munf. Va. 460; 1 Metc. Mass. 156. But if the agreement of the parties is specified in the receipt, the clause which contains it will bind the parties, as being in the nature of a contract. 4 Vt. 555; 1 Rich. So. C. 111; 16 Johns. N. Y. 277; 23 Wend. N. Y. 345; 2 Gill & J. Md. 493; 3 B. Monr. Ky. 353. A receipt for a note taken in payment of an account will not, in general, constitute a defence to an action on the account, unless it appears by proof that the creditor agreed to receive the note as payment and take the risk of its being paid. 10 Md. 27.

10. *Receipts, uses of.* A receipt is often useful as evidence of facts collateral to those stated in it. It proves the payment; and whatever inference may be legally drawn from the fact of the payment described will be supported by the receipt. Thus, receipts for rent for a given term have been held *primâ facie* evidence of the payment of all rent previously accrued. 15 Johns. N. Y. 479; 1 Pick. Mass. 332; 2 E. D. Smith, N. Y. 58. And they have been admitted on trial of a writ of right, as showing acts of ownership on the part of him who gave them. 7 C. B. 21. A receipt given by A to B for the price of a horse, afterwards levied on as property of A but claimed by B, was once admitted as evidence of ownership against the attaching creditor. 2 Harr. N. J. 78. A receipt "in full of all accounts," the amount being less than that called for by the accounts of the party giving it, was held in his favor evidence of a mutual settlement of accounts on both sides, and of payment of the balance ascertained to be due after setting off one account against the other. 9 Wend. N. Y. 332. A receipt given by an attorney for securities he was to collect and account for has been held presumptive evidence of the genuineness and justness of the securities. 14 Ala. 500. And when a general receipt is given by an attorney for an evidence of debt then due, it will be presumed he received it in his capacity as attorney for collection; and it is incumbent on him to show he received it for some other purpose, if he would avoid an action for neglect in not collecting. 3 Johns. N. Y. 185.

11. *Receipts, larceny and forgery of.* A receipt may be the subject of larceny, 2 Abb. Pract. N. Y. 211; or of forgery, Russ. & R. 227; 7 Carr. & P. 459. And it is a sufficient "uttering" of a forged receipt to place it in the hands of a person for inspection with intent fraudulently to induce him to make an advance on the faith of the payment mentioned in the spurious receipt has been made. 14 Eng. L. & Eq. 556. See FORGERY.

RECEIPTOR. **In Massachusetts.** A name given to the person who, on a trustee process being issued and goods attached, becomes surety to the sheriff to have them forthcoming on demand, or in time to respond the judgment, when the execution shall be issued. Upon which the goods are bailed to him. Story, Bailm. § 124. ATTACHMENT.

RECEIVER. **In Practice.** One who receives money to the use of another to render an account. Story, Eq. Jur. § 446. They were at common law liable to the action of

account-render for failure in the latter portion of their duties.

IN EQUITY.

A person appointed by a court possessing chancery jurisdiction, to receive the rents and profits of land, or the profits or produce of other property in dispute.

2. He is a ministerial officer of the court itself, 1 Ball & B. Ch. Ir. 74; 2 *id.* 55; 2 Sim. & S. Ch. 98; 1 Cox, Ch. 422; 9 Ves. Ch. 335; 11 Ga. 413, with no powers but those conferred by his order of appointment and the practice of the court, 6 Barb. N. Y. 589; 2 Paige, Ch. N. Y. 452, and which do not extend beyond the jurisdiction of the court which appoints him, 17 How. 322; appointed on behalf of all parties who may establish rights in the cause, 1 Hog. Ir. 234; 3 Atk. Ch. 564; 2 Md. Ch. Dec. 278; 4 Madd. Ch. 80; 10 Paige, Ch. N. Y. 43; 4 Sandf. Ch. N. Y. 417; and after his appointment neither the owner nor any other party can exercise any acts of ownership over the property. 2 Sim. & S. Ch. 96.

A receiver is appointed only in those cases where in the exercise of a sound discretion it appears necessary that some indifferent person should have charge of the property, 1 Johns. Ch. N. Y. 57; 25 Ala. N. s. 81; 1 Hopk. Ch. N. Y. 435; 3 Abb. Pract. N. Y. 235; only during the pendency of a suit, 1 Atk. Ch. 578; 2 Du. N. Y. 632; except in extreme cases, 2 Atk. Ch. 315; Shelford, Lun. 147; 2 Dick. Ch. 580, and *ex parte*, 14 Beav. Rolls, 423; 8 Paige, Ch. N. Y. 373, or before answer, 13 Ves. Ch. 266; 16 *id.* 59; 4 Price, Exch. 346; 4 Paige, Ch. N. Y. 574; 2 Swanst. Ch. 146, in special cases only; and, generally, not till all the parties are before the court. 2 Russ. Ch. 145; 1 Hog. Ir. 93; 14 Bost. Law Jour. 79.

3. One will not be appointed, except under special circumstances making a strong case, *where a party is already in possession of the property under a legal title*, 19 Ves. Ch. 59; 1 Ambl. Ch. 311; 2 Younge & C. Ch. 351, as a trustee, 2 Brown, Ch. 158; 1 Ves. & B. Ch. Ir. 183; 1 Mylne & C. Ch. 163; 16 Ga. 406; 2 Jac. & W. Ch. 294; an executor, 13 Ves. Ch. 266; tenant in common, 2 Dick. Ch. 800; 4 Brown, Ch. 414; 2 Sim. & S. Ch. 142; a mortgagee, 4 Abb. Pract. N. Y. 235; 13 Ves. Ch. 377; 16 *id.* 469; 1 Jac. & W. Ch. 176, 627; 2 *id.* 553; 1 Hog. Ir. 179; or of mortgagor when the debt is not wholly due, 5 Paige, Ch. N. Y. 38; a director of a corporation in a suit by a stockholder, 2 Halst. Ch. N. J. 374; *where the property is or should be already in the possession of some court*, as during the contestation of a will in the proper court, 2 Atk. Ch. 378; 6 Ves. Ch. 172; 2 Ves. & B. Ch. Ir. 85, 95; 7 Sim. Ch. 512; 1 Mylne & C. 97; 2 *id.* 454; but see 3 Md. Ch. Dec. 278; when admiralty is the proper forum, 5 Barb. N. Y. 209, or where there is already a receiver, 1 Hog. Ir. 199; 10 Paige, Ch. N. Y. 43; 2 Ired. Eq. No. C. 210; 11 *id.* 607; nor, on somewhat similar grounds, where salaries of public officers are in question, 1 Swanst. Ch. 1; 2 Sim. Ch. 560; 4 *id.* 566; 10 Beav. Rolls, 602; 2 Paige, Ch. N. Y. 333, or where a public office is in litigation, 9 Paige, Ch. N. Y. 507; *where the equitable title of the party asking a receiver is incomplete as made out*, as where he has delayed asking for one, 1 Hog. Ir. 118; 1 Donn. Min. Cas. 71; *or where the necessity is is not very apparent*, as on account merely of the poverty of an executor, 12 Ves. Ch. 4; 1 Madd. Ch. 142; 18 Beav. Rolls, 161; see 4 Price, Exch. 346; pending removal of a trustee, 16 Ga. 406; where a trustee mixes trust-money with his own. 1 Hopk. Ch. N. Y. 429.

4. Generally, any stranger to the suit may be appointed receiver.

The court will not appoint attorneys and solicitors, 6 Ves. Ch. 137; 1 Turn. & R. Ch. 460; see 1 Hog. Ir. 322; masters in chancery, 6 Ves. Ch. 427; an officer of the corporation, 1 Paige, Ch. N. Y. 517; see 8 Paige, Ch. N. Y. 385; a mortgagee, 2 Term, 238; 9 Ves. Ch. 271; 10 *id.* 405; see 1 Vern. Ch. 316; 2 Atk. Ch. 120; 2 Schoales & L. Ir. Ch. 301; a trustee, 3 Ves. Ch. 516; 8 *id.* 72; 11 *id.* 363; see 3 Mer. Ch. 695; a party in the cause. 2 Swanst. Ch. 118; 2 Jac. & W. Ch. 255. See 6 Harr. Ch. 620.

He is responsible for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not as of course responsible because there has been an embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who receive compensation for their services. Story, Bailm. §§ 620, 621. See, generally, Edwards, Receivers, and Bouvier, Inst. *Index*.

RECEIVER OF STOLEN GOODS. **In Criminal Law.** By statutory provision, the receiver of stolen goods, knowing them to have been stolen, may be punished as the principal, in perhaps all the United States.

2. To make this offence complete, the goods received must have been stolen, they must have been received by the defendant, and the receiver must know that they had been stolen.

The goods received must have been stolen. A boy stole a chattel from his master, and after it had been taken from him in his master's presence it was, with the master's consent, restored to him again, in order that he might sell it to the defendant, to whom he had been in the habit of selling similar stolen articles. He accordingly sold it to the defendant, who, being indicted for feloniously receiving it of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, sentenced. Carr. & M. 217. But this case has since been held not to be law, and a defendant not to be liable to conviction under such circumstances, inasmuch as at the time of the receipt the

goods are not *stolen goods*. Dearsl. Cr. Cas. 463.

3. The goods stolen must have been received by the defendant. *Primâ facie*, if stolen goods are found in a man's house, he, not being the thief, is a receiver. Per *Coleridge*, J., 1 Den. Cr. Cas. 601. And though there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained. 2 Den. Cr. Cas. 37. So a principal in the first degree, *particeps criminis*, cannot at the same time be treated as a receiver. 2 Den. Cr. Cas. 459. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. Bell, Cr. Cas. 20. But a person having a *joint* possession with the thief may be convicted as a receiver. Dearsl. Cr. Cas. 494. The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving: it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it. Dearsl. Cr. Cas. 494. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found, also, that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband. Dearsl. & B. Cr. Cas. 329.

4. It is almost always difficult to prove guilty knowledge; and that must, in general, be collected from circumstances. If such circumstances are proved which to a person of common understanding and prudence, and situated as the prisoner was, must have satisfied him that they were stolen, this is sufficient. For example, the receipt of watches, jewelry, large quantities of money, bundles of clothes of various kinds, or personal property of any sort, to a considerable value, from boys or persons destitute of property and without any lawful means of acquiring them, and specially if bought at untimely hours, the mind can arrive at no other conclusion than that they were stolen. This is further confirmed if they have been bought at an under-value, concealed, the marks defaced, and falsehood resorted to in accounting for the possession of them. Alison, Crim. Law, 330; 2 Russell, Crimes, 253; 2 Chitty, Crim. Law, 951; 1 Fost & F. Cr. Cas. 51; 2 Den. Cr. Cas. 264.

5. At common law, receiving stolen goods, knowing them to have been stolen, is a misdemeanor. 2 Russell, Crimes, 253. But in Massachusetts it has been held to partake so far of the nature of felony that if a constable or other peace-officer has reasonable grounds to suspect one of the crime of receiving or aiding in the concealment of stolen goods, knowing them to be stolen, he may without warrant arrest the supposed offender, and detain him for a reasonable time, for the purpose of securing him to answer a complaint for such offence. 5 Cush. Mass. 281.

RECENT POSSESSION OF STOLEN PROPERTY. In Criminal Law. Possession of the fruits of crime recently after its commission is *primâ facie* evidence of guilty possession; and if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is usually regarded by the jury as conclusive. 1 Taylor, Ev. § 122. See 1 Greenleaf, Ev. § 34.

2. It is manifest that the force of this rule of presumption depends upon the *recency* of the possession as related to the crime, and upon the *exclusiveness* of such possession.

If the interval of time between the loss and the finding be considerable, the presumption, as it affects the party in possession of the stolen property, is much weakened, and the more especially so if the goods are of such a nature as, in the ordinary course of things, frequently to change hands. From the nature of the case, it is not possible to fix any precise period within which the effect of this rule of presumption can be limited: it must depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, Mr. Justice Patteson held that the prisoner should explain how he came by the property. 7 Carr. & P. 551. But where the only evidence against a prisoner was that certain tools had been traced to his possession three months after their loss, Mr. Justice Parke directed an acquittal. 3 Carr. & P. 600. And Mr. Justice Maule pursued a similar course on an indictment for horse-stealing, where it appeared that the horse was not discovered in the custody of the accused until after six months from the date of the robbery. 3 Carr. & K. 318. So where goods lost sixteen months before were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence. 2 Carr. & P. 459.

3. It is obviously essential to the just application of this rule of presumption that the house or other place in which the stolen property is found be in the exclusive possession of the prisoner. Where they are found in the apartments of a lodger, for instance, the presumption may be stronger or weaker according as the evidence does or does not show an exclusive possession. Indeed, the finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny, will of itself be insufficient to prove his pos-

session, however recently the theft may have been effected, though, if coupled with proof of other suspicious circumstances, it may fully warrant the prisoner's conviction even though the property is not found in his house until after his apprehension. 1 Taylor, Ev. § 122; 3 Dowl. & R. 572; 2 Stark. 139.

4. The force of this presumption is greatly increased if the fruits of a plurality or of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a multiplicity of miscellaneous articles, or be of an uncommon kind, or, from its value or other circumstances, be inconsistent with or unsuited to the station of the party.

The possession of stolen goods recently after their loss may be indicative not of the offence of larceny simply, but of any more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner was held to raise a probable presumption that he was present and concerned in the offence. 2 East, Pl. Cr. 1035. A like inference has been raised in the case of murder accompanied by robbery, Wills, Circ. Ev. 72, 241; in the cases of burglary and shopbreaking, 4 Barnew. & Ald. 122, per *Best*, J.; 9 Carr. & P. 364; 1 Mass. 106; and in the case of the possession of a quantity of counterfeit money. Russ. & R. Cr. Cas. 308; Dearsl. Cr. Cas. 552.

5. Upon the principle of this presumption, a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavorable to the supposition of innocence. 11 Metc. Mass. 534. See 1 Gray, Mass. 101, 102.

But this rule of presumption must be applied with caution and discrimination; for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt. Sir Matthew Hale lays it down that "if a horse be stolen from A, and the same day B be found upon him, it is a strong presumption that B stole him: yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B was condemned and executed at Oxford assizes, and yet, within two assizes after, C, being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and, being closely pursued, desired B, a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped; and B was apprehended with the horse, and died innocently." 2 Hale, Pl. Cr. 289.

6. The rule under discussion is occasionally attended with uncertainty in its application, from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied where there is reasonable ground to conclude that the witnesses may be mistaken, or where, from any other cause, identity is not satisfactorily established. But the rule is nevertheless fairly and properly applied in peculiar circumstances, where, though positive identification is impossible, the possession of the property cannot without violence to every reasonable hypothesis but be considered of a guilty character: as in the case of persons employed in carrying sugar and other articles from ships and wharves. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could not otherwise be proved.

7. It is seldom, however, that juries are required to determine upon the effect of evidence of the mere recent possession of stolen property: from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property; if he deny it is in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it, as that he had found it, or that it had been given or sold to him by a stranger or left at his house; if he has disposed of or attempted to dispose of it at an unreasonably low price; if he has absconded or endeavored to escape from justice; if other stolen property, or picklock keys, or other instruments of crime, be found in his possession; if he were seen near the spot at or about the time when the act was committed, or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offence; if the impression of his shoes or other articles of apparel correspond with marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice; these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referrible only to a criminal origin, and cannot otherwise be rationally accounted for. 1 Bennett & H. Lead. Crim. Cas. 371, 372, where this subject is fully considered.

RECEPTUS (Lat.). **In Civil Law.** The name sometimes given to an arbitrator, because he had been received or chosen to settle the differences between the parties. Dig. 4. 8; Code, 2. 56.

RECESSION. A re-grant; the act of returning the title of a country to a government which formerly held it, by one which has it at the time: as, the recession of Louisiana, which took place by the treaty between

France and Spain, of October 1, 1800. See 2 White, Coll. 516.

RECIDIVE. In French Law. The state of an individual who commits a crime or misdemeanor, after having once been condemned for a crime or misdemeanor; a relapse.

Many statutes provide that for a second offence punishment shall be increased: in those cases the indictment should set forth the crime or misdemeanor as a second offence.

The second offence must have been committed after the conviction for the first: a defendant could not be convicted of a second offence, as such, until after he had suffered a punishment for the first. Dallos, Dict.

RECIPROCAL CONTRACT. In Civil Law. One by which the parties enter into mutual engagements.

They are divided into perfect and imperfect. When they are perfectly reciprocal, the obligation of each of the parties is equally a principal part of the contract, such as sale, partnership, etc. Contracts imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract: as, mandate, deposit, loan for use, and the like. In all reciprocal contracts the consent of the parties must be expressed. Pothier, Obl. n. 9; La. Civ. Code, art. 1758, 1759.

RECIPROCITY. Mutuality; state, quality, or character of that which is reciprocal.

The states of the Union are bound to many acts of reciprocity. The constitution requires that they shall deliver to each other fugitives from justice; that the records of one state, properly authenticated, shall have full credit in the other states; that the citizens of one state shall be citizens of any state into which they may remove. In some of the states, as in Pennsylvania, the rules with regard to the effect of a discharge under the insolvent laws of another state are reciprocated; the discharges of those courts which respect the discharges of the courts of Pennsylvania are respected in that state.

RECITAL. The repetition of some former writing, or the statement of something which has been done. It is useful to explain matters of fact which are necessary to make the transaction intelligible. 2 Blackstone, Comm. 298.

2. In Contracts. The party who executes a deed is bound by the recitals of essential facts contained therein. Comyns, Dig. *Estoppel* (A 2); Metc. Yelv. 227, n.; 2 Coke, 33; 8 Mod. 311.

The amount of consideration received is held an essential averment, under this rule, in England, Willes, 9, 25; 2 Taunt. 141; 5 Barnew. & Ald. 606; 1 Barnew. & C. 704; 2 Barnew. & Ad. 544; otherwise in the United States. 17 Mass. 249; 20 Pick. Mass. 247; 5 Cush. Mass. 431; 6 Me. 364; 7 *id.* 175; 13 *id.* 233; 15 *id.* 118; 10 Vt. 96; 4 N. H. 229, 397; 8 Conn. 304; 14 Johns. N. Y. 210; 20 *id.* 388; 16 Wend. N. Y. 460; 7 Serg. & R. 311; 3 Watts, Penn. 151; 1 Harr. & G. Md. 139; 1 Bland, Ch. Md. 236; 4 Hen. & M. Va. 113; 1 Rand. Va. 219; 2 Hill, So. C. 404; 1 M'Cord, So. C. 514; 15 Ala. 498; 10 Yerg. Tenn. 160; 7 Monr. Ky. 291; 1 J. J. Marsh. Ky. 389. But see 1 Hawks, No. C. 64; 4 *id.* 22; 1 Dev. & B. No. C. 452; 11 La. 416; 2 Ohio, 350; 3 Mas. C. C. 347.

The recitals in a deed of a conveyance bind parties and privies thereto, whether in blood, estate, or law. 1 Greenleaf, Ev. § 23. And see 3 Ad. & E. 265; 7 Dowl. & R. 141; 4 Pet. 1; 6 *id.* 611. See Estoppel. A deed of defeasance which professes to recite the principal deed must do so truly. Cruise, Dig. tit. 32, c. 7, § 28. See 3 Penn. 324; 3 Chanc. Cas. 101; Coke, Litt. 352; Comyns, Dig. *Fait* (E 1).

In Pleading. In Equity.

3. The decree formerly contained a recital of the pleadings. This usage is now abolished. 4 Bouvier, Inst. n. 4443.

At Law.

Recitals of deeds or specialties bind the parties to prove them as recited. Comyns, Dig. *Pleader* (2 W 18); 4 East, 585; 3 Den. N. Y. 356; 9 Penn. St. 407; 1 Hempst. Ark. 294; 13 Md. 117; see 6 Gratt. Va. 130; and a variance in an essential matter will be fatal, 18 Conn. 395, even though the variance be trivial. 1 Hempst. Ark. 294; 1 Chitty, Plead. 424. The rule applies to all written instruments, 7 Penn. St. 401; 11 Ala. N. s. 529; 1 Ind. 209; 32 Me. 283; 6 Cush. Mass. 508; 4 Zabr. N. J. 218; 16 Ill. 495; 36 N. H. 252: not, it seems, where it is merely brought forward as evidence, and is not made the ground of action in any way. 11 Ill. 40; 13 *id.* 669. And see 31 Me. 290.

Recitals of public statutes need not be made in an indictment or information, Dy. 155 *a*, 346 *b*; 6 Mod. 140; Croke Eliz. 187; Hob. 310; 2 Hale, Pl. Cr. 172; 1 Wms. Saund. 135, n. 3; 1 Chitty, Plead. 218, nor in a civil action, 6 Ala. N. s. 289; 4 Blackf. Ind. 234; 16 Me. 69; 18 *id.* 58; 3 N. Y. 188; but, if made, a variance in a material point will be fatal. Plowd. 79; 1 Strange, 214; Dougl. 94; 4 Coke, 48; Croke Car. 135; W. Jones, 194; 2 Brev. No. C. 2; 5 Blackf. Ind. 548; Bacon, Abr. *Indictment* IX. See 1 Chitty, Crim. Law, 276.

4. *Recitals of private statutes* must be made, 10 Wend. N. Y. 75; 1 Mo. 593, and the statutes proved by an exemplified copy unless admitted by the opposite party, Stephen, Plead. 347; 10 Mass. 91; but not if a clause be inserted that it shall be taken notice of as a public act. 10 Bingh. 404; 1 Crompt. M. & R. Exch. 44, 47; 5 Blackf. Ind. 170: *contra*, 1 Mood. & M. 421. *Pleading a statute* is merely stating the facts which bring a case within it, without making any mention or taking any notice of the statute itself. 6 Ired. No. C. 352; 7 Blackf. Ind. 359. *Counting upon a statute* consists in making express reference to it, as by the words "against the form of the statute [or

"by force of the statute"] in such case made and provided." *Reciting a statute* is quoting or stating its contents. Stephen, Plead. 347; Gould, Plead. 4th ed. 46, n. 3.

Recital of a record on which the action is based must be correct, and a variance in a material point will be fatal, 9 Mo. 742; 12 *id.* 484; 2 Paine, C. C. 209; 29 Ala. N. S. 112; 30 Miss. 126; 17 Ark. 371; 19 Ill. 637; otherwise where it is offered in evidence merely. 12 Ark. 760, 766, 768.

RECLAIM. To demand again; to insist upon a right: as, when a defendant for a consideration received from the plaintiff has covenanted to do an act, and fails to do it, the plaintiff may bring covenant for the breach, or assumpsit to *reclaim* the consideration. 1 Caines, N. Y. 47.

RECLAIMING BILL. In Scotch Law. A petition for review of an interlocutor, pronounced in a sheriff's or other inferior court. It recites verbatim the interlocutor, and, after a written argument, ends with a prayer for the recall or alteration of the interlocutor, in whole or in part. Bell, Dict. *Reclaiming Petition;* Shaw, Dig. 394.

RECOGNITION. An acknowledgment that some thing which has been done by one man in the name of another was done by authority of the latter.

A recognition by the principal of the agency of another in the particular instance, or in similar instances, is evidence of the authority of the agent, so that the recognition may be either express or implied. As an instance of an implied recognition may be mentioned the case of one who subscribes policies in the name of another, and, upon a loss happening, the latter pays the amount. 1 Campb. 43, n. *a;* 4 *id.* 88; 1 Esp. Cas. 61.

RECOGNITORS. In English Law. The name by which the jurors impanelled on an assize are known. 17 Serg. & R. Penn. 174.

RECOGNIZANCE. An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified. 2 Blackstone, Comm. 341.

The liability of bail above in civil cases, and of the bail in all cases in criminal matters, must be evidenced by a recognizance, as the sheriff has no power to discharge upon a bail-bond being given to him in these cases. See 4 Sharswood, Blackst. Comm. 297.

The bail-bond may be considered as furnishing the sheriff with an excuse for not complying strictly with the requirements of the writ; its work is performed in securing the appearance at court of the defendant. The object of a recognizance is to secure the presence of the defendant to perform or suffer the judgment of the court. In some of the United States, however, this distinction is not observed, but bail in the form of a bail-bond is filed with the officer, which is at once bail below and above, being conditioned that the party shall appear and answer to the plaintiff in the suit, and abide the judgment of the court.

2. In civil cases they are entered into by bail, conditioned that they will pay the debt, interest, and costs recovered by the plaintiff under certain contingencies, and for other purposes under statutes.

In criminal cases they are either that the party shall appear before the proper court to answer to such charges as are or shall be made against him, that he shall keep the peace or be of good behavior. The presence of witnesses may also be secured in the same manner. 6 Hill, N. Y. 506.

Who may take. In *civil* cases recognizances are generally taken by the court, 1 N. Chipm. Vt. 224; 15 Vt. 9; 7 Blackf. Ind. 221, or by some judge of the court in chambers, though other magistrates may be authorized therefor by statute, and are in many of the states. 6 Wheat. Penn. 359; 4 Humphr. Tenn. 213. See 2 Dev. No. C. 555; 3 Gratt. Va. 82.

3. In *criminal* cases the judges of the various courts of criminal jurisdiction, justices of the peace may take recognizances, 6 Ohio, 251; 15 *id.* 579; 16 Mass. 423; 19 Pick. Mass. 127; 14 Conn. 206; 6 Blackf. Ind. 284, 315; 18 Miss. 626; 26 Ala. N. S. 81; 3 Mich. 42; see 2 Curt. C. C. 41; the sheriff, in some cases, 5 Ark. 265; 11 Ala. 676; but in case of capital crimes the power is restricted usually to the court of supreme jurisdiction. See BAIL, § 6.

In cases where a magistrate has the power to take recognizances it is his duty to do so, exercising a judicial discretion, however. 7 Blackf. Ind. 611. In form it is a short memorandum on the record, made by the court, judge, or magistrate having authority, which need not be signed by the party to be found. 1 Chitty, Crim. Law, 90; 2 Binn. Penn. 431; 5 Serg. & R. Penn. 147; 9 Mass. 520; 4 Vt. 488; 7 *id.* 529; 16 *id.* 240; 1 Dan. Ky. 523; 2 A. K. Marsh. Ky. 131; 6 Ala. 465; 2 Wash. C. C. 422; 6 Yerg. Tenn. 354. See 5 Mo. 557. It is to be returned to the court having jurisdiction of the offence charged, in all cases. 7 Leigh, Va. 371; 9 Conn. 350; 4 Wend. N. Y. 387; 14 Vt. 64. See 27 Me. 179.

4. *Discharge and excuse under.* A surrender of the defendant at any time anterior to a fixed period after the sheriff's return of *non est* to a *ca sa.*, or taking the defendant on a *ca sa.*, 1 Hawks, No. C. 51; 6 Johns. N. Y. 97, discharges the bail, see FIXING BAIL, as does the death of the defendant before the return of *non est*, 1 Nott & M'C. So. C. 251; 3 Conn. 84, or a loss of custody and control by act of government or of law without fault of the bail prior to being fixed, 3 Dev. No. C. 157; 18 Johns. N. Y. 335; 5 Metc. Mass. 380; 2 Ga. 33; 14 Gratt. Va. 698; see 8 Mass. 264; 6 Cow. N. Y. 599; 5 Sneed, Tenn. 623; 2 Wash. C. C. 464, including impeachment, but not voluntary enlistment, 11 Mass. 146, 234; 13 *id.* 93, or long delay in proceeding against bail, 2 Mass. 485; 8 *id.* 490; 1 Root, Conn. 428; see 4 Johns. N. Y. 478, or a discharge of the principal under the bankrupt or insolvent laws of the state, 2 Bail. So. C. 492; 1 Harr. & J. Md. 101, 156; 2 Johns. Cas. N. Y. 403; 21 Wend. N. Y. 670; 1 Mass. 292; 2 *id.* 481; 1 Harr. Del.

367, 466; 5 *id.* 169; 1 McLean, C. C. 226; 1 Gill, Md. 259; and see, also, 2 Penn. St. 492, and, of course, performance of the conditions of the recognizance by the defendant, discharge the bail. And see BAIL-BOND; FIXING BAIL.

5. The formal mode of noting a discharge is by entering an exoneration. 5 Binn. Penn. 332; 1 Johns. Cas. N. Y. 329; 2 *id.* 101, 220; 7 Conn. 439; 1 Gill, Md. 259; 2 Ga. 331.

The remedy upon a recognizance is by means of a scire facias against the bail, 1 Harr. & G. Md. 154; 1 Ala. 34; 4 *id.* 331; 16 *id.* 156; 7 T. B. Monr. Ky. 130; 7 J. J. Marsh. Ky. 505; 6 *id.* 91; 4 Bibb, Ky. 181; 7 Leigh, Va. 371; 4 Iowa, 289; 3 Blackf. Ind. 344; 6 Halst. N. J. 124; 19 Pick. Mass. 127; 2 Harr. N. J. 446; or by suit, in some cases. 13 Wend. N. Y. 33; 17 *id.* 316; 1 Den. N. Y. 632; 5 Ark. 691; 4 Blackf. Ind. 511; 4 Day, Conn. 98; 14 Conn. 329; 12 Mass. 1; 2 Ill. 487.

RECOGNIZE. To try; to examine in order to determine the truth of a matter. 3 Sharswood, Blackst. Comm. App. No. III. § 4; Bracton, 179.

To enter into a recognizance.

RECOGNIZEE. He for whose use a recognizance has been taken.

RECOGNIZOR. He who enters into a recognizance.

RECOLEMENT. In French Law. The reading and re-examination by a witness of a deposition, and his persistence in the same, or his making such alteration as his better *recollection* may enable him to do after having read his deposition. Without such re-examination the deposition is void. Pothier, Procéd. Cr. s. 4, art. 4.

RECOMMENDATION. The giving to a person a favorable character of another.

2. When the party giving the character has acted in good faith, he is not responsible for the injury which a third person, to whom such recommendation was given, may have sustained in consequence of it, although he was mistaken.

But when the recommendation is knowingly untrue, and an injury is sustained, the party recommending is civilly responsible for damages, 3 Term, 51; 7 Cranch, 69; 7 Wend. N. Y. 1; 14 *id.* 126; 6 Penn. St. 310; whether it was done merely for the purpose of benefiting the party recommended or the party who gives the recommendation.

3. And in case the party recommended was a debtor to the one recommending, and it was agreed, prior to the transaction, that the former should, out of the property to be obtained by the recommendation, be paid, or in case of any other species of collusion to cheat the person to whom the credit is given, they may both be criminally prosecuted for the conspiracy. See CHARACTER; Fell, Guar. c. 8; 6 Johns. N. Y. 181; 13 *id.* 224; 1 Day, Conn. 22 5 Mart. La. N. s. 443.

RECOMPENSATION. In Scotch Law. An allegation by the plaintiff of compensation on his part made in answer to a compensation or set-off pleaded by the defendant in answer to the plaintiff's demand.

RECOMPENSE. A reward for services; remuneration for goods or other property.

In maritime law there is a distinction between *recompense* and *restitution*. When goods have been lost by jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, the owner of the goods lost by jettison cannot claim restitution from the owners of the other goods; but in the case of expenses incurred with a view to the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship-owner himself.

RECOMPENSE OF RECOVERY IN VALUE. A phrase applied to the matter recovered in a common recovery, after the vouchee has disappeared and judgment is given for the demandant. 2 Bouvier, Inst. n. 2093.

RECONCILIATION. The act of bringing persons to agree together, who before had had some difference.

A renewal of cohabitation between husband and wife is proof of reconciliation; and such reconciliation destroys the effect of a deed of separation. 4 Eccl. 238.

RECONDUCTION. In Civil Law. A renewing of a former lease; relocation. Dig. 19. 2. 13. 11; Code Nap. art. 1737–1740.

RECONVENTION. In Civil Law. An action brought by a party who is defendant against the plaintiff, before the same judge. 4 Mart. La. N. s. 439. To entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it and incidental to the same. La. Code of Pr. art. 375; 11 La. 309; 7 Mart. La. N. s. 282; 8 *id.* 516. The reconvention of the civil law was a species of cross-bill. Story, Eq. Plead. § 402. See CONVENTIO.

RECORD. A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. 6 Call, Va. 78; 1 Dan. Ky. 595.

2. Records may be either of legislative or judicial acts. Memorials of other acts are sometimes made by statutory provisions.

Legislative acts. The acts of congress and of the several legislatures are the highest kind of records. The printed journals of congress have been so considered. 1 Wharton, Dig. *Evidence*, pl. 112. And see Dougl. 593; Cowp. 17.

3. The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record is not a record. 4 Wash. C. C. 698. See 10 Penn. St. 157; 2 Pick. Mass. 448; 4 N. H. 450; 6 *id.*

567; 5 Ohio St. 545; 3 Wend. N. Y. 267; 2 Vt. 573; 6 *id.* 580; 5 Day, Conn. 363; 3 T. B. Monr. Ky. 63.

Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered. Gresley, Ev. 101. And see 8 Mart. La. N. s. 303; 1 Rawle, Penn. 381; 8 Yerg. Tenn. 142; 1 Pet. C. C. 352.

The legislatures of the several states have made the enrolment of certain deeds and other documents necessary in order to perpetuate the memory of the facts they contain, and declared that the copies thus made should have the effect of records.

4. The fact of an instrument being recorded is held to operate as a constructive notice upon all subsequent purchasers of any estate, legal or equitable, in the same property. 1 Johns. Ch. N. Y. 394.

But all conveyances and deeds which may be *de facto* recorded are not to be considered as giving notice: in order to have this effect, the instruments must be such as are authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent purchaser or incumbrancer unless he has such actual notice as would amount to a fraud. 1 Schoales & L. 157; 2 *id.* 68; 4 Wheat. 466; 1 Binn. Penn. 40; 1 Johns. Ch. N. Y. 300; 1 Story, Eq. Jur. §§ 403, 404; 5 Me. 272.

5. By the constitution of the United States, art. 4, s. 1, it is declared that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." In pursuance of this power, congress have passed several acts directing the manner of authenticating public records. See Act of Congr. May 26, 1790, § 1, 1 U. S. Stat. at Large, 122; Mar. 27, 1804, 2 U. S. Stat. at Large, 298; Mar. 2, 1849, 9 U. S. Stat. at Large, 350. See FOREIGN LAWS; FOREIGN JUDGMENTS; CONFLICT OF LAWS; AUTHENTICATION.

RECORD OF NISI PRIUS. **In English Law.** A transcript from the issue-roll: it contains a copy of the pleadings and issue. Stephen, Plead. 105.

RECORDARI FACIAS LOQUELAM (Lat.). **In English Practice.** A writ commanding the sheriff that he cause the plaint to be recorded which is in his county, without writ, between the parties there named, of the cattle, goods, and chattels of the complainant taken and unjustly distrained as it is said, and that he have the said record before the court on a day therein named, and that he prefix the same day to the parties, that then they may be there ready to proceed in the same plaint. 2 Sellon, Pract. 166.

RECORDATUR (Lat.). An order or allowance that the verdict returned on the *nisi prius* roll be recorded. Bacon, Abr. *Arbitration*, etc., D.

RECORDER. A judicial officer of some cities, possessing generally the powers and authority of a judge. 3 Yeates, Penn. 300; 4 Dall. Penn. 299. But see 1 Const. So. C. 45.

Anciently, *recorder* signified to recite or testify on recollection, as occasion might require, what had previously passed in court; and this was the duty of the judges, thence called *recordeurs*. Stephen, Plead. note 11.

An officer appointed to make record or enrolment of deeds and other legal instruments authorized by law to be recorded.

RECOUPEMENT (Fr. *recouper*, to cut again). **In Practice.** That right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract. 4 Wend. N. Y. 483; 8 *id.* 109; 10 Barb. N. Y. 55; 13 N. Y. 151; 3 Ind. 72, 265; 4 *id.* 533; 7 *id.* 200; 9 *id.* 470; 7 Ala. N. s. 753; 13 *id.* 587; 16 *id.* 221; 27 *id.* 574; 12 Ark. 699; 16 *id.* 97; 17 *id.* 270; 6 B. Monr. Ky. 528; 13 *id.* 239; 15 *id.* 454; 3 Mich. 281; 4 *id.* 619; 39 Me. 382; 16 Ill. 495; 11 Mo. 415; 18 *id.* 368; 25 *id.* 430.

This is not a new title in the law, although it seems recently to have assumed a new signification. Originally it implied a mere deduction from the claim of the plaintiff, on account of payment in whole or in part, or a former recovery, or some analogous fact. 3 Coke, 65; 4 *id.* 94; 5 *id.* 2, 31; 11 *id.* 51, 52. See note to Jolly *vs.* Grew, 6 Nev. & M. 467; Viner, Abr. *Discount*, pl. 3, 4, 9. 10; 28 Vt. 413. This meaning has been retained in many modern cases, but under the name of deduction or reduction of damages. 11 East, 232; 1 Maule & S. 318, 323; 5 *id.* 6, 10; 4 Burr. 2133; 2 Mann. & G. 241; 7 Mees. & W. Exch. 314; 12 *id.* 772; 2 Taunt. 170; 2 Term, 97; 1 Stark. 343; 20 Conn. 204; 2 Den. N. Y. 609; 21 Wend. N. Y. 610; 20 *id.* 267; 24 *id.* 304; 3 Dan. Ky. 489; 6 Mass. 20; 14 Pick. Mass. 356; 18 *id.* 283; 3 Metc. Mass. 9; 13 *id.* 269. The word recoupement has also been applied to cases very similar to the above. 4 Den. N. Y. 227; 20 Wend. N. Y. 267.

Recoupement as now understood seems to correspond with the *Reconvention* of the civil law, sometimes termed *demandes incidentes* by the French writers, in which the *reus*, or defendant, was permitted to exhibit his claim against the plaintiff for allowance, provided it arose out of, or was incidental to, the plaintiff's cause of action. Œuvres de Pothier, 9 vol. p. 39; 1 White, New Recopilacion, 285; Voet. tit. de Judiciis, n. 78; La. Code Pr. art. 375; 4 Mart. La. N. s. 439; 6 *id.* 671; 7 *id.* 517; 10 La. 185; 14 *id.* 385; 12 La. Ann. 114, 170; 6 Tex. 406; 2 Hennen. Dig. *Recoupement*, pl. 8, b.

2. In England, as well as in some of the United States, the principles of recoupement as defined by us have been recognized only in a restricted form. Under the name of reduction of damages, the defendant is allowed to show all such violations of his contract by the plaintiff as go to render the consideration less valuable, but he is compelled to resort to an independent action for any immediate or

consequential damages affecting him in other respects. 8 Mees. & W. Exch. 858; 1 Stark. 107, 274; 3 Campb. 450; 1 Carr. & P. 384 2 *id.* 113; 6 Barb. N. Y. 387; 6 B. Monr. Ky. 528; 1 Burn. Ky. 33; 12 Conn. 129; 11 Johns. N. Y. 547; 14 *id.* 377; 12 Pick. Mass. 330; 22 *id.* 512; 8 Humphr. Tenn. 678; 9 How. 231. But these restrictions are all gradually disappearing, and the law is assuming the form expressed in the cases cited under the definition of modern recoupement, the main reason upon which the doctrine now rests being the avoidance of circuity of action.

3. There are some limitations and qualifications to the law of recoupement, as thus established. Thus, it has been held that the defendant is not entitled to any judgment for the excess his damages in recoupement may have over the plaintiff's claim, nor shall he be allowed to bring an independent action for that excess. 6 N. H. 481; 14 Ill. 424; 3 Mich. 281; 12 Ala. N. S. 643; 3 Hill, N. Y. 171; 17 Ark. 270. If recoupement is put upon the ground of a cross-action, and not a mere defence for the reduction of damages, there is no reason why he should not have judgment to the extent of his injury. Such seems to be the practice in Louisiana, under the name of *reconvention*, 12 La. Ann. 170; and such will probably be the practice under those systems of pleading which authorize the court, in any action which requires it, to grant the defendant affirmative relief. 2 E. D. Smith, N. Y. 317. See, also, Mo. Rev. Stat. (1855) 1278; 3 Watts & S. Penn. 472; 17 Serg. & R. Penn. 385; 12 How. Pract. N. Y. 310.

4. The damages recouped must be for a breach of the same contract upon which suit is brought. 3 Hill, N. Y. 171; 2 Wend. N. Y. 240; 4 Sandf. N. Y. 147; 10 Ind. 329. They may be for a tort; but it seems that the tort must be a violation of the contract, and they are to be measured by the extent of this violation, and no allowance taken of malice. 10 Barb. N. Y. 55; 17 Ill. 38; 4 Serg. & R. Penn. 249; 5 *id.* 122; 1 Yeates, Penn. 571; 2 Dall. Penn. 237; 3 Binn. Penn. 169. The language of some cases would seem to imply that recoupement may be had for damages connected with the subject-matter or transaction upon which the suit is brought, but which do not constitute a violation of any obligation imposed by the contract, or of any duty imposed by the law in the making or performance of the contract. 14 Ill. 424; 17 *id.* 38. But these cases will be found to be decided with reference to statutes of counter-claim. And even in the construction of such statutes it has been doubted whether it is not better to confine the damages to violations of the contract. 8 Ind. 399; 2 Sandf. N. Y. 120.

5. It is well established, in the absence of statutory provisions, that it is optional with the defendant whether he shall plead his cross-claim by way of recoupement, or resort to an independent action. 14 Johns. N. Y. 379; 13 Wend. N. Y. 277; 3 Sandf. N. Y. 743; 12 Ala. N. S. 643; 3 Ind. 59; 4 *id.* 585; 21 Mo. 415. Nor does the fact of a suit pending for the same damages estop him from pleading them in recoupement, although he may be compelled to choose upon which action he shall proceed. 3 E. D. Smith, N. Y. 135; 1 Watts & S. Penn. 58; 5 Watts, Penn. 116. Payment after action brought, although never pleadable in answer to the action, was usually admitted in reduction of damages. 4 N. H. 557; 6 Ind. 26; 2 Bingh. N. C. 88; 7 Carr. & P. 1; 1 Mees. & W. Exch. 463. But the defendant can never recoup for damages accruing since action brought. 20 Eng. L. & Eq. 277; 4 Barb. N. Y. 256; 2 Binn. Penn. 287.

6. It has been maintained by some courts that the law of recoupement is not applicable to real estate. Accordingly, they have denied the defendant the right, when sued for the purchase-money, to recoup for a partial failure of title. 11 Johns. N. Y. 50; 2 Wheat. 13; 12 Ark. 709; 17 *id.* 254. But the most of these cases will be found denying him that right only before eviction. A confusion has been introduced by regarding failure of title and failure of consideration as convertible terms. The consideration of a deed without covenants is the mere delivery of the instrument. Rawle, Cov. 489, 1st ed. A failure of title in such case is not a failure of consideration, and it therefore affords no ground for recoupement. The consideration of a deed with covenants does not fail till the covenantee has suffered damages on the covenants, which in most cases does not happen till eviction, either actual or constructive. After this has happened, his right to recoup is now pretty generally admitted. This is nothing more than allowing him to recoup as soon as he can sue upon the covenants. 21 Wend. N. Y. 131; 25 *id.* 107; 19 Johns. N. Y. 77; 13 N. Y. 151; 8 Barb. N. Y. 11; 3 Pick. Mass. 459; 14 *id.* 293; 6 Gratt. Va. 305; Dart, Vend. 381; Rawle, Cov. 516.

It has been more generally admitted that where there is a failure of the consideration as to the quantity or quality of the land, the purchaser may recoup upon his covenants. 12 Ark. 699; 17 *id.* 254; 2 Kent, Comm. Lect. 39, 470; 18 Mo. 368; 20 *id.* 443.

7. Under the common-law system of pleading, the evidence of a recoupement, if going to a total failure of consideration, might be given under the general issue without notice; but if it went only to a partial failure, notice was required to prevent surprise. 6 Barb. N. Y. 386; 5 Hill, N. Y. 71, 76; 7 *id.* 53; 2 N. Y. 157; 6 N. H. 497; 3 Ind. 265; 6 *id.* 489. This is the only way it could be admitted, for it could not be pleaded, a partial defence constituting neither a plea in bar nor in abatement. Under a notice it was admitted to aid in sustaining the general denial.

But under the new systems of practice fashioned more or less after the New York Code, there being no general issue to which the notice was subsidiary, the defendant is required to plead his defence whether it is in answer of the whole demand or only in reduction of damages. 6 How. Pract. N. Y.

433; 8 *id.* 441; 11 N. Y. 352; 16 *id.* 297; 18 Mo. 368.

8. The effect to be given to the law of recoupement will depend, in many of the states, upon the statutes of counter-claim and offset in force. In Missouri, for instance, the language seems rather broad. It may be for any "cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action." Mo. Rev. Stat. 1855, 1233. This probably contemplates a recoupement in actions *ex delicto* as well as *ex contractu*. In the former class, difficulty will sometimes be encountered in determining when the claim is so *connected with the subject of the action* as to constitute a legal ground of recoupement. In the latter class, perhaps it would be safer not to allow any thing by way of recoupement unless it worked a violation of some obligation imposed by the contract, or some duty imposed by the law in the making or performance of it. 2 Sandf. N. Y. 120; 8 Ind. 399.

See, generally, 2 Smith, Lead. Cases, Cutter *vs.* Powell; Barbour, Offset; Sedgwick, Meas. Dam. 427; Rawle, Cov. 516.

RECOVERER. The demandant in a common recovery, after judgment has been given in his favor, assumes the name of recoverer.

RECOVERY. The restoration of a former right, by the solemn judgment of a court of justice. 3 Murph. No. C. 169.

A *common recovery* is a judgment obtained 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 such suit. Bacon, Tracts, 148.

A *true recovery*, usually known by the name of recovery simply, is the procuring a former right by the judgment of a court of competent jurisdiction: as, for example, when judgment is given in favor of the plaintiff when he seeks to recover a thing or a right.

2. Common recoveries are considered as mere forms of conveyance or common assurances: although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The first thing, therefore, necessary to be done in suffering a common recovery is that the person who is to be the demandant, and to whom the lands are to be adjudged, would sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*. In obedience to this writ the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the voucher *vocatio*, or calling to warranty. The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The defendant then desires leave of the court to imparl, or confer with the vouchee in private, which is granted of course. Soon after the demandant returns into court, but the vouchee disappears or makes default, in consequence of which it is presumed by the court that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value in recompense for those so warranted by him, and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the crier of the court to act, who is hence called the common vouchee, the tenant can only have a nominal and not a real recompense for the land thus recovered against him by the demandant. A writ of *habere facias* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of the writ the recovery is completed. The recovery here described is with single voucher; but a recovery may be, and is frequently, suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

3. Common recoveries were invented by the ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing, or receiving under the pretence of a free gift, any land or tenements whatever. They have been used in some states for the purpose of breaking the entail of estates. See, generally, Cruise, Digest, tit. 36; 2 Wms. Saund. 42, n. 7; 4 Kent, Comm. 487; Pigot, Comm. Rec. *passim*.

All the learning in relation to common recoveries is nearly obsolete, as they are out of use. Rey, a French writer, in his work Des Institutions Judiciaires de l'Angleterres, tom. ii. p. 221, points out what appears to him the absurdity of a common recovery. As to common recoveries, see 3 Serg. & R. Penn. 435; 9 *id.* 330; 1 Yeates, Penn. 244; 4 *id.* 413; 1 Whart. Penn. 139, 151; 2 Rawle, Penn. 168; 6 Penn. St. 45; 2 Halst. N. J. 47; 5 Mass. 438; 6 *id.* 328; 8 *id.* 34; 3 Harr. & J. Md. 292.

RECREANT. A coward; a poltroon. 3 Blackstone, Comm. 340.

RECRIMINATION. In Criminal Law. An accusation made by a person accused against his accuser, either of having committed the same offence or another.

In general, recrimination does not excuse the person accused nor diminish his punishment, because the guilt of another can never excuse him. But in applications for divorce on the ground of adultery, if the party defendant can prove that the plaintiff or complainant has been guilty of the same offence, the divorce will not be granted. 1 Hagg. Cons. 144; 4 Eccl. 360. The laws of Pennsylvania contain a provision to the same effect. See 1 Hagg. Eccl. 790; 3 *id.* 77; 1 Hagg. Cons. 147; 2 *id.* 297; Shelford, Marr. & Div. 440; Dig. 24. 3. 39; 48. 3. 13. 5; 1 Add. Eccl. 411; COMPENSATION; CONDONATION; DIVORCE.

RECRUIT. A newly-made soldier.

RECTO (Lat.). Right. *Breve de recto*, writ of right.

RECTOR. In Ecclesiastical Law. One who rules or governs: a name given to certain officers of the Roman church. Dict Canonique.

RECTORY. In English Law. Corpo-

real real property, consisting of a church, glebe-lands, and tithes. 1 Chitty, Pract. 163.

RECTUS IN CURIA (Lat. right in court). The condition of one who stands at the bar, against whom no one objects any offence or prefers any charge.

When a person outlawed has reversed his outlawry, so that he can have the benefit of the law, he is said to be *rectus in curia*. Jacob, Law Dict.

RECUPERATORES (Lat.). **In Roman Law.** A species of judges originally established, it is supposed, to decide controversies between Roman citizens and strangers concerning the right to the possession of property requiring speedy remedy, but gradually extended to questions which might be brought before ordinary judges.

After the enlargement of their powers, the difference between them and judges, it is supposed, was simply this:—if the prætor named three judges, he called them *recuperatores;* if one, he called him *judex*. But opinions on this subject are very various. Colman, *De Romano judicio recuperatorio*. Cicero's oration *pro Cæcin.* 1, 3, was addressed to recuperators.

RECUSANT. In English Law. A person who refuses to make the declarations against popery, and promotes, encourages, or professes the popish religion.

RECUSATION. In Civil Law. A plea or exception by which the defendant requires that the judge having jurisdiction of the cause should abstain from deciding, upon the ground of interest, or for a legal objection to his prejudice.

A recusation is not a plea to the jurisdiction of the court, but simply to the person of the judge. It may, however, extend to all the judges, as when the party has a suit against the whole court. Pothier, Procéd. Civ. 1ère part. ch. 2, s. 5. It is a personal challenge of the judge for cause. See 2 La. 390; 6 *id.* 134.

The challenge of jurors. La. Code Pract. art. 499, 500. An act, of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir. Dig. 29. 2. 95. See, generally, 1 Hopk. Ch. N. Y. 1; 5 Mart. La. 292.

RED BOOK OF THE EXCHEQUER. An ancient record, wherein are registered the holders of lands *per baroniam* in the time of Henry III., the number of hides of land in certain counties before the conquest, and the ceremonies on the coronation of Eleanor, wife of Henry III.: compiled by Alexander de Swenford, archdeacon of Salop and treasurer of St. Paul's, who died in 1246. 31 Hen. III.; Jacob, Law Dict.; Cowel.

REDDENDO SINGULA SINGULIS (Lat.). Referring particular things to particular persons. For example: when two descriptions of property are given together in one mass, both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate, and the heir-at-law the real estate. 14 Ves. Ch. 490. See 11 East, 513, n.; Bacon, Abr. *Conditions* (L).

REDDENDUM (Lat.). That clause in a deed by which the grantor reserves something new to himself out of that which he granted before. It usually follows the *tenendum*, and is generally in these words, "yielding and paying." In every good *reddendum* or reservation these things must concur: namely, it must be in apt words; it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself nor of something issuing out of another thing; it must be of a thing on which the grantor may resort to distrain; it must be made to one of the grantors, and not to a stranger to the deed. See 2 Blackstone, Comm. 299; Coke, Litt. 47; Sheppard, Touchst. 80; Cruise, Dig. tit. 32, c. 24, s. 1; Dane, Abr. Index.

REDDIDIT SE (Lat.). **In English Practice.** An indorsement made on the bail-piece when a certificate has been made by the proper officer that the defendant is in custody. Comyns, Dig. *Bail* (Q. 4).

REDEMPTION (Lat. *re, red*, back, *emptio*, a purchase).

A purchase back by the seller from the buyer. It is applied to denote the performance of the conditions upon performance of which a conditional sale is to become ineffective as a transfer of title, or, more strictly, a right to demand a reconveyance becomes vested in the seller. In the case of mortgages, this right is a legal right until a breach of conditions, when it becomes an equitable right and is called the equity of redemption. See MORTGAGE; EQUITY OF REDEMPTION.

REDEMPTIONES (Lat.). Heavy fines. Distinguished from MISERICORDIA, which see.

REDHIBITION. In Civil Law. The avoidance of a sale on account of some vice or defect in the thing sold, which renders its use impossible or so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. La. Civ. Code, art. 2496.

This is essentially a civil-law right. The effect of the rule expressed by the maxim *caveat emptor* is to prevent any such right at common law, except in cases of express warranty. 2 Kent, Comm. 374; Sugden, Vend. 222.

REDHIBITORY ACTION. In Civil Law. An action instituted to avoid a sale on account of some vice or defect in the thing sold which renders its use impossible or so inconvenient and imperfect that it must be supposed the buyer would not have purchased it had he known of the vice. La. Civ. Code, 2496.

REDITUS ALBI (Lat.). A rent payable in money: sometimes called white rent, or blanche farm. See ALBA FIRMA.

REDITUS NIGRI (Lat.). A rent payable in grain, work, and the like: it was also called black mail. This name was given to it to

distinguish it from *reditus albi*, which was payable in money.

REDOBATORES (L. Lat.). Those that buy stolen cloth and turn it into some other color or fashion, that it may not be recognized. Redubbers. Barrington, Stat. 2d ed. 87, n.; Coke, 3d Inst. 134; Britton, c. 29.

REDRAFT. In Commercial Law. A bill of exchange drawn at the place where another bill was made payable and where it was protested, upon the place where the first bill was drawn, or, when there is no regular commercial intercourse rendering that practicable, then in the next best or most direct practicable course. 1 Bell, Comm. 5th ed. 405. See RE-EXCHANGE.

REDRESS. The act of receiving satisfaction for an injury sustained. For the mode of obtaining redress, see REMEDIES; 1 Chitty, Pract. Anal. Table.

REDUBBERS. In Criminal Law. Those who bought stolen cloth and dyed it of another color to prevent its being identified were anciently so called. Coke, 3d Inst. 134.

REDUNDANCY. Matter introduced in an answer or pleading which is foreign to the bill or articles.

2. The respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in a plea; but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but in this latter instance, if such matter be introduced into the answer, and not afterwards put in the plea, or proved, the court will give no weight or credence to such part of the answer. *Per* Lushington, 3 Curt. Eccl. 543.

3. A material distinction is to be observed between redundancy in the allegation and redundancy in the proof. In the former case, a variance between the allegation and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation. 1 Greenleaf, Ev. § 67; 1 Starkie, Ev. 401.

RE-ENTRY. The act of resuming the possession of lands or tenements in pursuance of a right which the party exercising it reserved to himself when he quit his former possession.

2. Conveyances in fee reserving a groundrent, and leases for a term of years, usually contain a clause authorizing the proprietor to re-enter in case of the non-payment of rent, or of the breach of some covenant in the lease, which forfeits the estate. Without such reservation he would have no right to re-enter for the mere breach of a covenant, although he may do so upon the breach of a condition which, by its terms, is to defeat the estate granted. 3 Wils. 127; 2 Bingh. 13; 1 Mann. & R. 694; Taylor, Landl. & T. § 290.

When a landlord is about to enforce his right to re-enter for the non-payment of rent, he must make a specific demand of payment, and be refused, before the forfeiture is complete, unless such demand has been dispensed with by an express agreement of the parties. 18 Johns. N. Y. 451; 8 Watts, Penn. 51; 6 Serg. & R. Penn. 151; 13 Wend. N. Y. 524; 6 Halst. N. J. 270; 7 Term, 117; 5 Coke, 41. In the latter case, a mere failure to pay, without any demand, constitutes a sufficient breach, upon which an entry may at any time subsequently be made. 2 N. Y. 147; 2 N. H. 164; 2 Dougl. 477; 2 Barnew. & C. 490.

3. The requisites of a demand upon which to predicate a forfeiture for the non-payment of rent, at common law, are very strict. It must be for the payment of the precise sum due upon the day when, by the terms of the lease, it becomes payable; if any days of grace are allowed for payment, then upon the last day of grace, Coke, Litt. 203; 7 Term, 117; Comyns, Dig. *Rent* (D7); 2 N. Y. 147; at a convenient time before sunset, while there is light enough to see to count the money, 17 Johns. N. Y. 66; 1 Saund. 287; at the place appointed for payment, or, if no particular place has been specified in the lease, then at the most public place on the land, which, if there be a dwelling-house, is the front door, 4 Wend. N. Y. 313; 18 Johns. N. Y. 450; 1 How. 211; Coke, Litt. 202 *a*, notwithstanding there be no person on the land to pay it, Bacon, Abr. *Rent* (I); and if the re-entry clause is coupled with the condition *that no sufficient distress be found upon the premises*, the landlord must search the premises to see that no such distress can be found. 15 East, 286; 6 Serg. & R. Penn. 151; 8 Watts, Penn. 51.

But the statutes of most of the states, following the English statute of 4 Geo. II. c. 28, now dispense with the formalities of a common-law demand, by providing that an action of ejectment may be brought as a substitute for such a demand in all cases where no sufficient distress can be found upon the premises. And this latter restriction disappears entirely from the statutes of such of the states as have abolished distress for rent.

4. The clause of re-entry for non-payment of rent operates only as a security for rent; for at any time before judgment is entered in the action to recover possession the tenant may either tender to the landlord, or bring into the court where the action is pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the landlord, and in such case all further proceedings will cease. And in some states, even after the landlord has recovered possession the tenant may in certain cases be reinstated upon the terms of the original

lease, by paying up all arrearages and costs. Taylor, Landl. & T. § 302.

But the courts will not relieve against a forfeiture which has been wilfully incurred by a tenant who assigns his lease, or neglects to repair or to insure, contrary to his express agreement, or if he exercises a forbidden trade, or cultivates the land in a manner prohibited by the lease; for in all such cases the landlord, if he has reserved a right to re-enter, may at once resume his former possession and avoid the lease entirely. 2 Price, Exch. 206, n.; 2 Mer. Ch. 459; 9 Carr. & P. 706; 1 Dall. Penn. 210; 9 Mod. 112; 3 Ves. & B. Ch. Ir. 29; 12 Ves. Ch. 291.

REEVE. An ancient English officer of justice, inferior in rank to an alderman.

He was a ministerial officer appointed to execute process, keep the king's peace, and put the laws in execution. He witnessed all contracts and bargains, brought offenders to justice and delivered them to punishment, took bail for such as were to appear at the county court, and presided at the court or folcmote. He was also called *gereſa*.

There were several kinds of reeves: as, the *shire-gereſa*, shire-reeve or sheriff; the *heh-gereſa*, or high-sheriff, tithing-reeve, burgh- or borough-reeve.

RE-EXAMINATION. A second examination of a thing. A witness may be re-examined, in a trial at law, in the discretion of the court; and this is seldom refused. In equity, it is a general rule that there can be no re-examination of a witness after he has once signed his name to the deposition and turned his back upon the commissioner or examiner. The reason of this is that he may be tampered with, or induced to retract or qualify what he has sworn to. 1 Mer. Ch. 130.

RE-EXCHANGE. The expense incurred by a bill's being dishonored in a foreign country where it is made payable and returned to that country in which it was made or indorsed and there taken up. 11 East, 265; 2 Campb. 65.

2. The amount of this depends upon the course of exchange between the two countries through which the bill has been negotiated. Thus, re-exchange is the difference between the draft and re-draft.

The drawer of a bill is liable for the whole amount of re-exchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return. 1 Parsons, Notes & B. 650; 2 H. Blackst. 378; 11 East, 265; 3 Bos. & P. 335. And see 10 La. 562; 24 Mo. 65; 8 Watts, Penn. 545; 10 Metc. Mass. 375; 7 Cranch, 500; 4 Wash. C. C. 310; 2 How. 711, 764; 9 Exch. 25; 6 Moore, Parl. Cas. 314.

3. In some states legislative enactments have been made which regulate damages on re-exchange. These damages are different in the several states; and this want of uniformity, if it does not create injustice, must be admitted to be a serious evil. See 2 Am. Jur. 79; 23 Penn. St. 137; 4 Johns. N. Y. 119; 12 *id.* 17; 4 Cal. 395; 3 Ind. 53; 9 *id.* 233; 8 Ohio, 292; MEASURE OF DAMAGES.

REFALO. A word composed of the three initial syllables re. fa. lo., for *recordari faciaſ loquelam*. 2 Sellon, Pract. 160; 8 Dowl. 514.

REFECTION (Lat. *re*, again, *facio*, to make). **In Civil Law.** Reparation; re-establishment of a building. Dig. 19. 1. 6. 1.

REFEREE. A person to whom has been referred a matter in dispute, in order that he may settle it. His judgment is called an award. See ARBITRATOR; REFERENCE.

REFERENCE. In Contracts. An agreement to submit to certain arbitrators matters in dispute between two or more parties, for their decision and judgment. The persons to whom such matters are referred are sometimes called referees.

In Mercantile Law. A direction or request by a party who asks a credit to the person from whom he expects it, to call on some other person named, in order to ascertain the character or mercantile standing of the former.

In Practice. The act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. That part of an instrument of writing where it points to another for the matters therein contained. For the effect of such reference, see 1 Pick. Mass. 27; 15 *id.* 66; 17 Mass. 443; 7 Halst. N. J. 25; 14 Wend. N. Y. 619; 10 Conn. 422; 3 Me. 393; 4 *id.* 14, 471. The thing referred to is also called a reference.

REFERENDARIUS (Lat.). An officer by whom the order of causes was laid before the Roman emperor, the desires of petitioners made known, and answers returned to them. Vicat, Voc. Jur.; Calvinus, Lex.

REFERENDUM (Lat.). **In International Law.** A note addressed by an ambassador to his government, submitting to its consideration propositions made to him touching an object over which he has no sufficient power and is without instructions. When such a proposition is made to an ambassador, he accepts it *ad referendum;* that is, under the condition that it shall be acted upon by his government, to which it is referred.

REFORM. To reorganize; to rearrange. Thus, the jury "shall be reformed by putting to and taking out of the persons so impanelled." Stat. 3 Hen. VIII. c. 12; Bacon, Abr. *Juries* (A).

To reform an instrument in equity is to make a decree that a deed or other agreement shall be made or construed as it was originally intended by the parties, when an error or mistake as to a fact has been committed. A contract has been reformed although the party applying to the court was in the lega'

profession and he himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties. 1 Sim. & S. Ch. 210; 3 Russ. 424. But a contract will not be reformed in consequence of an error of law. 1 Russ. & M. 418, 1 Chitty, Pract. 124.

REFRESH THE MEMORY. To revive the knowledge of a subject by having a reference to something connected with it.

A witness has a right to examine a memorandum or paper which he made in relation to certain facts when the same occurred, in order to refresh his memory; but the paper or memorandum itself is not evidence. 5 Wend. N. Y. 301; 12 Serg. & R. Penn. 328; 6 Pick. Mass. 222; 1 A. K. Marsh. Ky. 188; 2 Conn. 213; 1 Const. So. C. 336, 373.

REFUND. To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.

On a deficiency of assets, executors and administrators *cum testamento annexo* are entitled to have refunded to them legacies which they may have paid, or so much as may be necessary to pay the debts of the testator; and in order to insure this they are generally authorized to require a refunding bond. See Bacon, Abr. *Legacies* (H).

REFUSAL. The act of declining to receive or to do something.

A grantee may refuse a title, see ASSENT; one appointed executor may refuse to act as such. In some cases, a neglect to perform a duty which the party is required by law or his agreement to do will amount to a refusal.

REGARDANT (French, *regardant*, seeing or vigilant). A villein regardant was one who had the charge to do all base services within the manor, and to see the same freed of annoyances. Coke, Litt. 120; 2 Sharswood, Blackst. Comm. 93*.

REGENCY. The authority of the person in monarchical countries invested with the right of governing the state, in the name of the monarch, during his minority, absence, sickness, or other inability.

REGENT. A ruler; a governor. The term is usually applied to one who governs a regency, or rules in the place of another.

In the canon law, it signifies a master or professor of a college. Dict. du Dr. Can.

It sometimes means simply a ruler, director, or superintendent: as in New York, where the board who have the superintendence of all the colleges, academies, and schools are called the regents of the University of the state of New York.

REGIAM MAJESTATEM (Lat.). An ancient book purporting to contain the law of Scotland, and said to have been compiled by king David, who reigned 1124–1153. It is not part of the law of Scotland, though it was ordered to be revised with other ancient laws of Scotland by parliaments of 1405 and 1407. Stair, Inst. p. 12, § 16, p. 508, § 27. So Craig, Inst. 1. 8. 11; Scott, Border Antiq. prose works, 7, 30; but Erskine, Inst. b. 1, tit. 1, § 32, and Ross, Lect. 11, p. 60 *et seq.*, maintain its authenticity. It is cited in some modern Scotch cases. 2 Swint. 409; 3 Bell, Hou. L. It is, according to Dr. Robertson, a servile copy of Glanville. Robertson, Hist. Charles V., vol. 1. note 25, p. 262; Erskine, Inst. 1. 1. 3.

REGICIDE (Lat. *rex*, king, *cedere*, to kill, slay). The killing of a king, and, by extension, of a queen. Théorie des Lois Criminelles, vol. 1, p. 300.

REGIDOR. In Spanish Law. One of a body, never exceeding twelve, who formed a part of the *ayuntamiento*, or municipal council, in every capital of a jurisdiction in the colonies of the Indies. The office of regidor was held for life; that is to say, during the pleasure of the supreme authority. In most places the office was purchased; in some cities, however, they were elected by persons of the district, called *capitulares*. 12 Pet. 442, note.

REGIMIENTO. In Spanish Law. The body of regidores, who never exceeded twelve, forming a part of the municipal council, or *ayuntamiento*, in every capital of a jurisdiction. 12 Pet. 442, note.

REGISTER. In Evidence. A book containing a record of facts as they occur, kept by public authority; a register of births, marriages, and burials.

Although not originally intended for the purposes of evidence, public registers are in general admissible to prove the facts to which they relate. In *Pennsylvania*, the registry of births, etc. made by any religious society in the state is evidence, by act of assembly, but it must be proved as at common law. 6 Binn. Penn. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the lord mayor of London by an *ex-parte* affidavit, was allowed to be given in evidence to prove the death of a person, 1 Dall. 2; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, under his hand and seal, was held admissible to prove pedigree, the handwriting and office of the secretary being proved. 10 Serg. & R. Penn. 383.

In *North Carolina*, a parish register of births, marriages, and deaths, kept pursuant to the statute of that state, is evidence of pedigree. 2 Murph. No. C. 47. In *Connecticut*, a parish register has been received in evidence. 2 Root, Conn. 99. See 15 Johns. N. Y. 226. See 1 Phillipps, Ev. 305; 1 Curt. 755; 6 Eccl. 452.

In Common Law. The certificate of registry granted to the person or persons entitled thereto, by the collector of the district, comprehending the port to which any

ship or vessel shall belong; more properly, the registry itself. For the form, requisites, etc. of certificate of registry, see Acts of Cong. Dec. 31, 1792, 1 U. S. Stat. at Large, 287, § 9, May 6, 1864, 13 U. S. Stat. at Large, 69, § 4; 3 Kent, Comm. 4th ed. 141. See 1 Cranch, 158; 3 *id.* 338; 9 Pet. 682; 19 How. 76; 3 Wheat. 601; 9 *id.* 421; 1 Newb. Adm. 309; 1 Wash. C. C. 125; 1 Mas. C. C. 306; 1 Blatchf. & H. Adm. 52.

REGISTER, REGISTRAR. An officer authorized by law to keep a record called a register or registry: as, the register for the probate of wills.

REGISTER'S COURT. In American Law. A court in the state of Pennsylvania which has jurisdiction in matters of probate. See PENNSYLVANIA.

REGISTER OF WRITS. A book preserved in the English court of chancery, in which were entered, from time to time, all forms of writs once issued. Stat. Westm. 2, c. 25.

It is spoken of as one of the most ancient books of the common law. Coke, Litt. 159; Coke, 4th Inst. 150; 8 Coke, Pref.; 3 Sharswood, Blackst. Comm. 183*. It was first printed and published in the reign of Hen. VIII. This book is still in authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice.

But many of the writs now in use are not contained in it. And a variation from the register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. Stephen, Plead. 7, 8.

REGISTRARIUS (Lat.). An ancient name given to a notary. In England this name is confined to designate the officer of some court the records or archives of which are in his custody.

REGISTRUM BREVIUM (Lat.). The name of an ancient book which was a collection of writs. See REGISTER OF WRITS.

REGISTRY. A book, authorized by law, in which writings are registered or recorded.

REGNANT. One having authority as a king; one in the exercise of royal authority.

REGRATING. In Criminal Law. Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. Coke, 3d Inst. 196; 1 Russell, Crimes, 169.

In the Roman law, persons who monopolized grain, and other produce of the earth, were called *dardanarii*, and were variously punished. Dig. 47. 11. 6.

REGRESS. Returning; going back: opposed to *ingress*.

REGULAR CLERGY. Monks who lived according to the rules of their respective houses or societies, in contradistinction to the parochial clergy, who did their duties "*in seculo*," and hence were called secular clergy. 1 Sharswood, Blackst. Comm. 387, n.

REGULAR DEPOSIT. One where the thing deposited must be returned. It is distinguished from an irregular deposit.

REGULAR PROCESS. Regular process is that which has been lawfully issued by a court or magistrate having competent jurisdiction.

2. When the process is *regular*, and the defendant has been damnified, as in the case of a malicious arrest, his remedy is by an action on the case, and not trespass; when it is *irregular*, the remedy is by action of trespass.

If the process be *wholly* illegal or *misapplied* as to the *person* intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment, and may escape, be rescued, or even break prison; but if the process and imprisonment were in form legal, each of these acts would be punishable, however innocent the defendant might be, for he ought to submit to legal process and obtain his release by due course of law. 1 Chitty, Pract. 637; 5 East, 304, 308; 1 Smith, 555; 6 Term, 234; 2 Wils. 47; 1 East, Pl. Cr. 310; Hawkins, Pl. Cr. b. 2, c. 19, ss. 1, 2. See ESCAPE; ARREST; ASSAULT.

3. When a party has been arrested on process which has afterwards been set aside for irregularity, he may bring an action of trespass, and recover damages as well against the attorney who issued it as the party; though such process will justify the officer who executed it. 8 Ad. & E. 449; 15 East, 615, note c; 1 Strange, 509; 2 W. Blackst. 845; 2 Conn. 700; 9 *id.* 141; 11 Mass. 500; 6 Me. 421; 3 Gill & J. Md. 377; 1 Bail. So. C. 441; 2 Litt. Ky. 234; 3 Serg. & R. Penn 139; 12 Johns. N. Y. 257; 3 Wils. 376. And see MALICIOUS PROSECUTION.

REHABERE FACIAS SEISINAM (Lat. do you cause to regain seisin). When a sheriff in the "*habere facias seisinam*" had delivered seisin of more than he ought, this judicial writ lay to make him restore seisin of the excess. Reg. Jud. 13, 51, 54.

REHABILITATION. The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence, or judgment of a competent tribunal.

REHEARING. A second consideration which the court gives to a cause on a second argument.

A rehearing takes place principally when the court has doubts on the subject to be decided; but it cannot be granted by the supreme court after the cause has been remitted to the court below to carry into effect the decree of the supreme court. 7 Wheat. 58.

REI INTERVENTUS (Lat.). When a party is imperfectly bound in an obligation, he may, in general, annul such imperfect obliga-

tion; but when he has permitted the opposite party to act as if his obligation or agreement were complete, such *things have intervened* as to deprive him of the right to rescind such obligation: these circumstances are the *res interventus*. 1 Bell, Comm. 328, 329, 5th ed.; Burton, Man. 128.

REINSURANCE. Insurance effected by an underwriter upon a subject against certain risks with another underwriter, on the same subject, against all or a part of the same risks, not exceeding the same amount. In the original insurance, he is the insurer; in the second, the assured. His object in reinsurance is to protect himself against the risks which he had assumed. There is no privity of contract between the original assured and the reinsurer, and the reinsurer is under no liability to such original assured. 3 Kent, Comm. 227; 1 Phillips, Ins. § 78 *a*, 404; 20 Barb. N. Y. 468; 23 Penn. St. 250; 9 Ind. 443; 13 La. Ann. 246.

REISSUABLE NOTES. Bank-notes which, after having been once paid, may again be put into circulation.

They cannot properly be called valuable securities while in the hands of the maker, but, in an indictment, may properly be called goods and chattels. Ry. & M. Cr. Cas. 218. See 5 Mas. C. C. 537; 2 Russell, Crimes, 147. And such notes would fall within the description of *promissory* notes. 2 Leach, Cr. Cas. 1090, 1093; Russ & R. 232.

REJOINDER. In Pleading. The defendant's answer to the plaintiff's replication.

It must conform to the plea, 16 Mass. 1; 2 Mod. 343, be triable, certain, direct, and positive, and not by way of recital, or argumentative, 1 Harr. & M'H. Md. 159; must answer every material averment of the declaration. 23 N. H. 198. It must not be double, 6 Blackf. 421; 3 McLean, C. C. 163; and there may not be several rejoinders to the same replication, 1 How. Miss. 139; 1 Wms. Saund. 337, n., nor repugnant or insensible. See Coke, Litt. 304; Archbold, Civ. Plead. 278; Comyns, Dig. *Pleader* (H).

REJOINING GRATIS. Rejoining within four days from the delivery of the replication, without a notice to rejoin or demand of rejoinder. Wharton, Lex. *Rejoinder;* 1 Archbold, Pract. 280, 317; 10 Mees & W. Exch. 12. But judgment cannot be signed without demanding rejoinder. 3 Dowl. 537.

RELATION (Lat. *re*, back, *fero*, to bear). **In Civil Law.** The report which the judges made of the proceedings in certain suits to the prince were so called.

These relations took place when the judge had no law to direct him, or when the laws were susceptible of difficulties: it was then referred to the prince, who was the author of the law, to give the interpretation. They were made in writing, and contained the pleadings of the parties and all the proceedings, together with the judge's opinion, and prayed the emperor to order what should be done. This ordinance of the prince thus required was called a rescript. Their use was abolished by Justinian, Nov. 125.

In Contracts. When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation: as, if a man deliver a deed as an escrow, to be delivered, by the party holding it, to the grantor, on the performance of some act, the delivery to the latter will have relation back to the first delivery. Termes de la Ley. Again, if a partner be adjudged a bankrupt, the partnership is dissolved, and such dissolution relates back to the time when the commission issued. 3 Kent, Comm. 33. See Litt. Ky. 462–466; 2 Johns. N. Y. 510, 4 *id.* 230; 15 *id.* 309; 2 Harr. & J. Md. 151; FICTION.

RELATIONS. A term including all the kindred of the person spoken of. Those persons who are entitled as next of kin under the statute of distribution.

2. A legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them, will, therefore, entitle to a share such of the testator's relatives as would be entitled under the statute of distributions in the event of intestacy. 1 Madd. Ch. 45; 1 Brown, Ch. 33. See CONSTRUCTION, *Relations*.

3. Relations to either of the parties, even beyond the ninth degree, have been holden incapable to serve on juries. 3 Chitty, Pract. 795, note *c*. Relationship or affinity is no objection to a witness, unless in the case of husband and wife. See WITNESS.

RELATIVE. One connected with another by blood or affinity; a relation; a kinsman or kinswoman. In an adjective sense, having relation or connection with some other person or thing: as, relative rights, relative powers.

RELATIVE POWERS. Those which relate to land: so called to distinguish them from those which are collateral to it.

These powers are *appendant:* as, where a tenant for life has a power of making leases in possession. They are *in gross* when a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but, notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest appointed in the appointer. 2 Bouvier, Inst. n. 1930.

RELATIVE RIGHTS. Those to which a person is entitled in consequence of his relation with others: such as the rights of a husband in relation to his wife; of a father as to his children; of a master as to his servant; of a guardian as to his ward.

In general, the superior may maintain an action for an injury committed against his relative rights. See 2 Bouvier, Inst. nn. 2277–2296; 3 *id.* n. 3491; 4 *id.* nn. 3615–3618; ACTION.

RELATOR. A rehearser or teller; one who, by leave of court, brings an information in the nature of a *quo warranto*.

At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of Anne, c. 20. In this country, even where no statute similar to that of Anne prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators; though no judgment for costs can be rendered for or against them. 2 Dall. Penn. 112; 5 Mass. 231; 3 Serg. & R. Penn. 52; 15 *id.* 127; Angell, Corp. 470. In chancery, the relator is responsible for costs. 4 Bouvier, Inst. n. 4022.

RELEASE. The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced.

Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it or some estate in the same. Sheppard, Touchst. 320; Littleton, 444; Nelson, Abr.; Bacon, Abr.; Viner, Abr.; Rolle, Abr. In the former class a mere right is surrendered; in the other not only a right is given up, but an interest in the estate is conveyed and becomes vested in the releasee.

An *express* release is one directly made in terms by deed or other suitable means.

An *implied* release is one which arises from acts of the creditor or owner, without any express agreement. See Pothier, Obl. nn. 608, 609.

A *release by operation of law* is one which, though not expressly made, the law presumes in consequence of some act of the releasor: for instance, when one of several joint obligors is expressly released, the others are also released by operation of law. 3 Salk. 298; Hob. 10, 66; 4 Mod. 380; 7 Johns. N. Y. 207.

2. Releases of claims which constitute a cause of action acquit the releasee, and remove incompetency as a witness resulting from interest.

Littleton says a release of all *demands* is the best and strongest release. Sect. 508. Lord Coke, on the contrary, says *claims* is a stronger word. Coke, Litt. 291 *b*.

In general, the words of a release will be restrained by the particular occasion of giving it. 1 Lev. 235; 3 *id.* 273; 1 Show. 151; 2 *id.* 47; 2 Mod. 108, n.; 3 *id.* 277; T. Raym. 399; Palm. 218.

3. The reader is referred to the following cases where a construction has been given to the expressions mentioned. A release of "all actions, suits, and demands," 3 Mod. 277; "all actions, debts, duties, and demands," *id.* 1, 64; 8 Coke, 150 *b*; 2 Saund. 6 *a*; "all demands," 5 Coke, 70 *b*; 2 Mod. 281; 3 *id.* 185, 278; 12 *id.* 465; 1 Lev. 99; Salk. 578; 2 Rolle, 20; 2 Conn. 120; "all actions, quarrels, trespasses," Dy. 2171, pl. 2; Croke Jac. 487; "all errors, and all actions, suits, and writs of error whatsoever," T. Raym. 393; "all suits," 8 Coke, 150; "of covenants." 5 Coke, 70 *b*.

4. A release by a witness where he has an interest in the matter which is the subject of the suit, or release by the party on whose side he is interested, renders him competent. 1 Phillipps, Ev. 102, and the cases cited in n. *a*. See Chitty, Bail. 329; 1 Dowl. & R. 361.

As to the party who can make a release which shall restore competency to a witness, see 1 Bos. & P. 630; 4 Carr. & P. 383; 9 *id.* 199; 10 Johns. N. Y. 132; 14 *id.* 387; 18 *id.* 459; 3 N. H. 115; 5 *id.* 196; 5 Blackf. Ind. 486; 3 Me. 243; 6 *id.* 57; 4 Vt. 523; 20 Pick. Mass. 441.

In Estates. The conveyance of a man's interest or right which he hath unto a thing, to another that hath the possession thereof or some estate therein. Sheppard, Touchst. 320. The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. Burton, Real Prop. 15*.

5. The words generally used in such conveyance are "remised, released, and forever quit-claimed." Littleton, § 445.

Releases of land are, in respect of their operation, divided into five sorts: releases that enure by way of passing the estate, or *mitter l'estate* (*q. v.*), *e.g.* a release by joint-tenant to co-joint-tenant, which conveyance will pass a fee without words of limitation. Releases that enure by way of passing the right, or *mitter le droit*: *e.g.* by disseisee to disseisor. Releases that enure by enlargement of the estate.

Here there must be an actual privity of estate at the time between releasor and releasee, who must have an estate actually vested in him capable of enlargement.

Releases that enure by way of extinguishment: *e.g.* a lord releasing his seigniorial rights to his tenant.

Releases that enure by way of feoffment and entry: *e.g.* if there are two disseisors, a release to one will give him a sole estate, as if the disseisee had regained seisin by entry and enfeoffed him. 2 Sharswood, Blackst. Comm. 325*. See 4 Cruise, Dig. 71; Gilbert, Ten. 82; Coke, Litt. 264; 3 Brock. C. C. 185; 2 Sumn. C. C. 487; 8 Pick. Mass. 143; 10 *id.* 195; 7 Mass. 381; 5 Harr. & J. Md. 158; 2 N. H. 402; 5 Paige, Ch. N. Y. 299; 10 Johns. N. Y. 456.

The technicalities of English law as to releases are not generally applicable in the United States. The corresponding convey ance is a quit-claim deed. 2 Bouvier, Inst 416; 21 Ala. N. S. 125.

RELEASEE. A person to whom a release is made.

RELEASOR. He who makes a release

RELEGATIO (Lat.). A kind of banishment known to the civil law, which did not take away the rights of citizenship, which *deportatio* did.

Some say that *relegatio* was temporary, *deportatio* perpetual; that *relegatio* did not take away the pro

perty of the exile, and that *deportatio* did; but these distinctions do not seem always to exist. There was one sort of *relegatio* for slaves, viz. *in agrum*; another for freemen, viz. *in provincias*. *Relegatio* only exiled from certain limits; *deportatio* confined to a particular place (*locus pœnæ*). Calvinus, Lex.

RELEVANCY. Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. See 1 Greenleaf, Ev. § 49.

RELICT. A widow: as, A B relict of C B, A B widow of C B.

RELICTA VERIFICATIONE (Lat. his pleading being abandoned).

In Pleading. A confession of judgment made after plea pleaded: viz. a *cognovit actionem* accompanied by a withdrawal of the plea.

RELICTION (Lat. *relinquo*, to leave behind). An increase of the land by the retreat or recession of the sea or a river.

Lands left dry by the sudden and sensible recession of the sea, or of a river which flows and re-flows with the tide, belong to the sovereign or state, unless the property in the land so relicted has been granted to individuals. In other words, the right of property in the soil is not changed by such change of the water. But where the recession is gradual and insensible, or where it takes place in fresh-water rivers, the soil of which belongs to the riparian proprietors, the lands so relicted belong to the proprietors of the estates which are thereby increased. Woolrych, Wat. 29–36; Schultes, Aqu. Rights, 138; Ang. Tide-Wat. 2d ed. 264–267; 3 Barnew. & C. 91; 9 Conn. 41; 2 Md. Ch. Dec. 485; 13 N. Y. 296; 5 Bingh. 163. But this reliction must be from the sea in its usual state; for if it should inundate the land and then recede, this would be no reliction. Angell, Tide-Wat. *ub. sup.*; Hargrave, Tracts, 15; 16 Viner, Abr. 574. See RIVER.

In this country it has been decided that if a navigable lake recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietors; but if the recession be sudden and sensible, such land belongs to the state. 1 Hawks, No. C. 56; 1 Gill & J. Md. 249. See AVULSION; ALLUVION.

RELIEF. A sum payable by the new tenant, the duty being incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. At one time the amount was arbitrary; but afterwards the relief of a knight's fee became fixed at one hundred shillings. 2 Blackstone, Comm. 65.

RELIGION (Lat. *re*, back, *ligo*, to bind). Real piety in practice, consisting in the performance of all known duties to God and our fellow-men. See CHARITIES; CHARITABLE USES.

RELIGIOUS MEN (L. Lat. *religiosi*). Such as entered into some monastery or convent. In old English deeds, the vendee was often restrained from aliening to "Jews or religious men," lest the lands should fall into mortmain. Religious men were civilly dead. Blount.

RELIGIOUS TEST. The constitution of the United States, art. 6, s. 3, declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

This clause was introduced for the double purpose of satisfying the scruples of many respectable persons who feel an invincible repugnance to any religious test or affirmation, and to cut off forever every pretence of any alliance between church and state in the national government. Story, Const. § 1841.

RELINQUISHMENT. In Practice. A forsaking, abandoning, or giving over a right: for example, a plaintiff may relinquish a bad count in a declaration, and proceed on a good; a man may relinquish a part of his claim in order to give a court jurisdiction.

RELOCATIO (Lat.). **In Civil Law.** A renewal of a lease on its determination on like terms as before. It may be either express or tacit: the latter is when the tenant holds over with the knowledge and without objection of the landlord. Mackeldy, Civ. Law, § 379.

REMAINDER. The remnant of an estate in lands or tenements expectant on a particular estate created together with the same at one time.

A *contingent* remainder is one which is limited to take effect on 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 particular estate. A *vested* remainder is one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. See 2 Johns. N. Y. 288; 1 Yeates, Penn. 340; CONTINGENT REMAINDER; CROSS-REMAINDER; EXECUTORY DEVISE; LIMITATION; REVERSION.

REMAINDER-MAN. One who is entitled to the remainder of the estate after a particular estate carved out of it has expired.

REMAND (Lat. *re*, back, *mando*, to command). When a prisoner is brought before a judge on a *habeas corpus*, for the purpose of obtaining his liberty, the judge hears the case, and either discharges him or not: when there is cause for his detention, he remands him.

REMANDING A CAUSE. In Practice. The sending it back to the same court out of which it came, for the purpose of having some action on it there. March, 100.

REMANENT PRO DEFECTU EMPTORUM (Lat. *remanent*, they remain, *pro*

defectu, through lack, *emptorum*, of buyers). **In Practice.** The return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same *remains unsold for want of buyers;* in that case the plaintiff is entitled to a *venditioni exponas*. Comyns, Dig. *Execution* (C 8).

REMANET (Lat.). **In Practice.** The causes which are entered for trial, and which cannot be tried during the term, are *remanets*. Lee, Dict. *Trial;* 1 Sellon, Pract. 434; 1 Phillipps, Ev. 4.

REMEDIAL. That which affords a remedy: as, a remedial statute, or one which is made to supply some defects or abridge some superfluities of the common law. 1 Blackstone, Comm. 86. The term remedial statute is also applied to those acts which give a new remedy. Espinasse, Pen. Act. 1.

REMEDY. The means employed to enforce a right or redress an injury.

2. Remedies for *non-fulfilment* of contracts are generally by action, see ACTION; ASSUMPSIT; COVENANT; DEBT; DETINUE; or in equity, in some cases, by bill for specific performance. Remedies for the redress of injuries are either public, by indictment, when the injury to the individual or to his property affects the public, or private, when the tort is only injurious to the individual. See INDICTMENT; FELONY; MERGER; TORTS; CIVIL REMEDY.

3. Remedies are *preventive* which seek *compensation*, or which have for their object *punishment*. The *preventive*, or *removing*, or *abating* remedies may be by acts of the party aggrieved or by the intervention of legal proceedings: as in the case of injuries to the person or to personal or real property, *defence, resistance, recaption, abatement of nuisance*, and *surety of the peace*, or *injunction* in equity, and perhaps some others. Remedies *for compensation* may be either by the *acts of the party aggrieved*, or *summarily* before justices, or by *arbitration*, or *action*, or *suit* at law or in equity. Remedies which have for their object *punishments* or compensation and punishments are either *summary proceedings* before magistrates, or *indictment*, etc.

4. Remedies are *specific* and *cumulative:* the former are those which can alone be applied to restore a right or punish a crime; for example, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific, and must be pursued, and no other. Croke Jac. 644; 1 Salk. 45; 2 Burr. 803. But when an offence was antecedently punishable by a common-law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute. 1 Saund. 134, n. 4.

REMEMBRANCERS. In English Law. Officers of the exchequer, whose duty it is to remind the lord-treasurer and the justices of that court of such things as are to be called and attended to for the benefit of the crown.

REMISE, RELEASE, AND QUIT-CLAIM. The ordinary effective words in a release. These words are, in this country, sufficient to pass the estate in a primary conveyance. 7 Conn. 250; 24 N. H. 460; 21 Ala. N. s. 125; 7 N. Y. 422. Remise is a French word synonymous with release. See QUIT-CLAIM.

REMISSION (Lat. *re*, back, *mitto*, to send).

In Civil Law. A release of a debt.

It is *conventional* when it is expressly granted to the debtor by a creditor having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title, under private signature, constituting the obligation. La. Civ. Code, art. 2195.

Forgiveness or pardon of an offence.

It has the effect of putting back the offender into the same situation he was before the commission of the offence. Remission is generally granted in cases where the offence was involuntary or committed in self-defence. Pothier, Pr. Civ. sect. 7, art. 2, § 2.

At Common Law. The act by which a forfeiture or penalty is forgiven. 10 Wheat. 246.

REMIT. To annul a fine or forfeiture.

This is generally done by the courts where they have a discretion by law: as, for example, when a juror is fined for non-attendance in court, after being duly summoned, and, on appearing, he produces evidence to the court that he was sick and unable to attend, the fine will be remitted by the court.

In Commercial Law. To send money, bills, or something which will answer the purpose of money.

REMITTANCE. In Commercial Law. Money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise.

REMITTEE. A person to whom a remittance is made. Story, Bailm. § 75.

REMITTER. To be placed back in possession.

When one having a right to lands is out of possession, and afterwards the freehold is cast upon him by some defective title, and he enters by virtue of that title, the law *remits* him to his ancient and more certain right, and, by an equitable fiction, supposes him to have gained possession under it. 3 Sharswood, Blackst. Comm. 190; Comyns, Dig. *Remitter*.

REMITTIT DAMNA (Lat. he releases damages). An entry on the record, by which the plaintiff declares that he remits the damages or a part of the damages which have been awarded him by the jury, is so called.

In some cases a misjoinder of actions may be cured by the entry of a *remittit damna*. 1 Chitty, Plead. *207.

REMITTITUR DAMNUM or **DAMNA. In Practice.** The act of the plain-

tiff upon the record, whereby he abates or remits the excess of damages found by the jury beyond the sum laid in the declaration. See 1 Saund. 285, n. 6; 4 Conn. 109; Bouvier, Inst. Index.

REMITTITUR OF RECORD. After a record has been removed to the supreme court, and a judgment has been rendered, it is to be remitted or sent back to the court below, for the purpose of re-trying the cause, when the judgment has been reversed, or of issuing an execution when it has been affirmed. The act of so returning the record, and the writ issued for that purpose, bear the name of remittitur.

REMITTOR. A person who makes a remittance to another.

REMONSTRANCE. A petition to a court or deliberative or legislative body, in which those who have signed it request that something which it is in contemplation to perform shall not be done.

REMOTE. At a distance; afar off. See CAUSA PROXIMA; MEASURE OF DAMAGES.

REMOVAL FROM OFFICE. A deprivation of office by the act of a competent officer or of the legislature. It may be express, that is, by a notification that the officer has been removed, or implied, by the apointment of another person to the same office. Wall. Jr. C. C. 118. See 13 Pet. 130; 1 Cranch, 137.

REMOVER. In Practice. A transfer of a suit or cause out of one court into another, which is effected by writ of error, certiorari, and the like. 11 Coke, 41.

REMUNERATION. Reward; recompense; salary. Dig. 17. 1. 7.

RENDER. To yield; to return; to give again: it is the reverse of *prender*.

RENDEZVOUS. A place appointed for meeting. Especially used of places appointed for the meeting of ships and their convoy, and for the meeting of soldiers.

RENEWAL. A change of something old for something new: as, the renewal of a note; the renewal of a lease. See NOVATION; 1 Bouvier, Inst. n. 800.

RENOUNCE. To give up a right: for example, an executor may renounce the right of administering the estate of the testator; a widow, the right to administer to her intestate husband's estate.

RENOUNCING PROBATE. Giving up the right to be executor of a will, wherein he has been appointed to that office, by refusing to take out probate of such will. Toller, Exec. 42; 1 Williams, Exec. 230, 231; 20 & 21 Vict. c. 77, § 79; 21 & 22 Vict. c. 94, § 16.

RENT. A return or compensation for the possession of some corporeal inheritance, and is a certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use.

Some of its common-law properties are that it must be a profit to the proprietor, certain in its character, or capable of being reduced to a certainty, issuing yearly, that is, periodically, out of the thing granted, and not be part of the land or thing itself. Coke, Litt. 47; 2 Sharswood, Blackst. Comm. 41.

At common law there were three species of rent: rent *service*, having some corporeal service attached to the tenure of the land, to which the right of distress was necessarily incident; rent *charge*, which was a reservation of rent, with a clause authorizing its collection by distress; and rent *seek*, where there was no such clause, but the rent could only be collected by an ordinary action at law. These distinctions, however, for all practical purposes, have become obsolete, in consequence of various statutes both in England and in this country, allowing every kind of rent to be distrained for without distinction. See Taylor, Landl. & T. § 376.

2. The payment of rent is incident to every tenancy where the relation of landlord and tenant subsists, except as to mere tenancies at will or by sufferance, where this relation cannot be said to exist. And no tenant can resist a demand for rent unless he shows that he has been evicted or become otherwise entitled to quit the premises, and has actually done so, before the rent in question became due. By the strictness of the common law, when a tenant has once made an agreement to pay rent, nothing will excuse him from continuing to pay, although the premises should be reduced to a ruinous condition by some unavoidable accident of fire, flood, or tempest. 6 Mass. 63; 4 Harr. & J. Md. 564; 3 Johns. N. Y. 44; 4 Paige, Ch. N. Y. 355; 3 Du. N. Y. 464; 5 Barb. N. Y. 601; 1 Term, 310; Al. 26; 2 Ld. Raym. 1477; 9 Price, Exch. 294.

3. But this severity of the ancient law has been somewhat abated in this country, and in this respect conforms to the more reasonable provisions of the Code Napoléon, art. 1722, which declares that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded, but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the rent or a recision of the contract itself. The same provision is to be found substantially in the Code of Louisiana, art. 2667, and in the act of the legislature of New York of 1860. In South Carolina and Pennsylvania it was decided that a tenant who had been dispossessed by a public enemy ought not to pay rent for the time the possession was withheld from him; and in Maryland it has been held that where a hurricane rendered a house untenantable it was a good defence to an action for rent. But these cases are evidently exceptions to the general rule of law above stated. 1 Bay. So. C. 499; 5 Watts, Penn. 517; 4 M'Cord, So. C. 447.

4. The quiet enjoyment of the premises, unmolested by the landlord, is an implied condition to the payment of rent. If, therefore, he ousts the tenant from any considerable portion of the premises, or erects a nuisance of any description upon or so near

to them as to oblige the tenant to remove, or if the possession of the land should be recovered by a third person, by a title superior to that of the landlord, the dispossession in either case amounts to an eviction, and discharges the obligation to pay rent. 2 Ired. No. C. 350; 8 Cow. N. Y. 727; 3 Harr. N. J. 364; 4 Rawle, Penn. 339; 4 Wend. N. Y. 432; 4 Leigh, Va. 484; 24 Barb. N. Y. 178; 4 N. Y. 217; 1 Ld. Raym. 77; 1 Term, 671; 2 Brod. & B. 680; 1 Mees. & W. Exch. 717.

As rent issues out of the land, it is said to be incident to the reversion, and the right to demand it necessarily attaches itself to the ownership, and follows a transfer of the premises, and the several parts thereof, without the consent of the occupant. Every occupant is chargeable with rent by virtue of his occupation, whether he be the tenant or an assignee of the tenant. The original tenant cannot avoid his liability by transferring his lease to another, but his assignee is only liable so long as he remains in possession, and may discharge himself by the simple act of assigning over to some one else. 14 Wend. N. Y. 63; 5 Hill, N. Y. 481; 1 Nott. & M'C. S. C. 104; 12 Pick. Mass. 450; 4 Leigh, Va. 69; 2 Ohio, 221; 1 Wash. C. C. 375; 1 Rawle, Penn. 155; 3 Barnew. & Ald. 396; 8 East, 316; 8 Taunt. 715; 11 Ad. & E. 403; Croke Eliz. 256; Coke, Litt. 46 *b*; Croke Jac. 309, 521; 2 Atk. Ch. 546; 3 Campb. 394. When rent will be apportioned, see APPORTIONMENT; LANDLORD AND TENANT.

5. The day of payment depends, in the first instance, upon the contract: if this is silent in that respect, rent is payable quarterly or half-yearly, according to the custom of the country; but if there be no usage governing the case, it is not due until the end of the term. Formerly it was payable before sunset of the day whereon it was to be paid, on the reasonable ground that sufficient light should remain to enable the parties to count the money; but now it is not considered due until midnight or the last minute of the natural day on which it is made payable. This rule, however, may be varied by the custom of different places. Coke, Litt. 202 *a*; 1 Saund. 287; 15 Pick. Mass. 147; 5 Serg. & R. Penn. 432; 3 Kent, Comm. 374; 2 Madd. Ch. 268. And see FORFEITURE; RE-ENTRY.

When rent is payable in money, it must strictly be made in the gold and silver coin made current by the laws of congress. Such coin as is issued from the mint may be counted, and the creditor must take it at its nominal value; but with respect to foreign coin he may decline to receive it except by its true weight and value. Bank-notes constitute part of the currency of the country, and ordinarily pass as money, and are a good tender, unless specially objected to by the creditor at the time of the offer. 10 Wheat. 347. If the contract specifies a place of payment, a tender of rent, whether in money or in kind, must be made at that place; but, if no place is specified, a tender of either on the land will be sufficient to prevent a forfeiture. 16 Term, 222; 6 Cow. 728; 4 Wend. 313; 16 N. Y. 80; 4 Taunt. 555. See, generally, Bacon, Abr.; Bouvier, Inst. Index; Washburn, Real Prop.; DISTRESS; RE-ENTRY.

RENT CHARGE. A rent reserved with a power of enforcing its payment by distress.

RENT-ROLL. A list of rents payable to a particular person or public body.

RENT SECK. A rent collectable only by action at law in case of non-payment.

RENT SERVICE. A rent embracing some corporal service attendant upon the tenure of the land. Distress was necessarily incident to such a rent.

RENT, ISSUES, AND PROFITS. The profits arising from property generally. Mass. Gen. Stat. 1860, p. 537; N. Y. Rev. Stat., stat. of 1849 for better protection of property of married women.

This phrase in the Vermont statute has been held not to cover "yearly profits." 26 Vt. 741. See CONSTRUCTION, and the separate titles.

RENTAL. A roll or list of the rents of an estate, containing the description of the lands let, the names of the tenants, and other particulars connected with such estate. This is the same as *rent-roll*, from which it is said to be corrupted.

RENTE. In French Law. A word nearly synonymous with our word annuity.

RENTE FONCIERE. In French Law. A rent which issues out of land; and it is of its essence that it be perpetual, for if it be made but for a limited time it is a lease. It may, however, be extinguished. La. Civ. Code, art. 2750, 2759; Pothier. See GROUND-RENT.

RENTE VIAGERE. In French Law. An annuity for life. La. Civ. Code, art. 2764; Pothier, *Rente*, n. 215.

RENUNCIATION. The act of giving up a right.

2. It is a rule of law that any one may renounce a right which the law has established in his favor. To this maxim there are many limitations. A party may always renounce an acquired right: as, for example, to take lands by descent; but one cannot always give up a future right before it has accrued, nor to the benefit conferred by law, although such advantage may be introduced only for the benefit of individuals.

3. For example, the power of making a will, the right of annulling a future contract on the ground of fraud, and the right of pleading the act of limitations, cannot be renounced. The first, because the party must be left free to make a will or not; and the latter two, because the right has not yet accrued.

4. This term is usually employed to signify the abdication or giving up of one's country at the time of choosing another. The

act of congress requires from a foreigner who applies to become naturalized a renunciation of all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof such alien may at the time be a citizen or subject. See CITIZEN; EXPATRIATION; NATURALIZATION.

REPAIRS. That work which is done to an estate to keep it in good order.

2. What a party is bound to do, when the law imposes upon him the duty to make necessary repairs, does not appear to be very accurately defined. Natural and unavoidable decay in the buildings must always be allowed for, when there is no express covenant to the contrary; and it seems the lessee will satisfy the obligation the law imposes on him by delivering the premises at the expiration of his tenancy in a habitable state. Questions in relation to repairs most frequently arise between the landlord and tenant.

3. When there is no express agreement between the parties, the tenant is always required to do the necessary repairs. Woodfall, Landl. & T. 244; 6 Cow. N. Y. 475. He is, therefore, bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises; but he is not required to put a new roof on an old worn-out house. 2 Esp. 590.

4. An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay. Woodfall, Landl. & T. 256. See 7 Gray, Mass. 550. And it has been held that such a covenant does not bind him to rebuild a house which had been destroyed by a public enemy. 1 Dall. Penn. 210. See 1 Dy. 33 *a*.

5. As to the time when the repairs are to be made, it would seem reasonable that when the lessor is bound to make them he should have the right to enter and make them, when a delay until after the expiration of the lease would be injurious to the estate; but when no such damage exists, the landlord should have no right to enter without the consent of the tenant. See 18 Toullier, n. 297. When a house has been destroyed by accidental fire, neither the tenant nor the landlord is bound to rebuild, unless obliged by some agreement so to do. 4 Paige, Ch. N. Y. 355; 1 Term, 708; Fonblanque, b. 1, c. 5, s. 8. See 6 Term, 650; 4 Campb. 275; Com. 627; 2 Show. 401; 3 Ves. Ch. 34; Coke, Litt. 27 *a*, note 1; 3 Johns. N. Y. 44; 6 Mass. 63; Platt, Cov. 266; Comyns, Dig. *Condition* (L 12); La. Civ. Code, 2070; 1 Saund. 322, n. 1, 323, n. 7; 2 *id.* 158 *b*. n. 7 & 10; Bouvier, Inst. Index.

REPARATION. The redress of an injury; amends for a tort inflicted. See REMEDY.

REPARATIONE FACIENDA, WRIT DE (Lat.). The name of an ancient writ, which lies by one or more joint tenants against the other joint tenants, or by a person owning a house or building against the owner of the adjoining building, to compel the reparation of such joint property. Fitzherbert, Nat. Brev. 295.

REPEAL. The abrogation or destruction of a law by a legislative act.

2. A repeal is *express*, as, when it is literally declared by a subsequent law, or *implied*, when the new law contains provisions contrary to or irreconcilable with those of the former law.

A law may be repealed by implication, by an affirmative as well as by a negative statute, if the substance is inconsistent with the old statute. 1 Ohio, 10; 2 Bibb, Ky. 96; Harp. So. C. 101; 4 Wash. C. C. 691.

3. It is a general rule that when a penal statute punishes an offence by a certain penalty, and a new statute is passed imposing a greater or a lesser penalty for the same offence, the former statute is repealed by implication. 5 Pick. Mass. 168; 21 *id.* 373; 3 Halst. 48; 1 Stew. 506; 3 A. K. Marsh. 70. See 1 Binn. Penn. 601; Bacon, Abr. *Statute* (D); 7 Mass. 140.

By the common law, when a statute repeals another, and afterwards the repealing statute is itself repealed, the first is revived. 2 Blackf. Ind. 32. In some states this rule has been changed, as in Ohio and Louisiana. La. Civ. Code, art. 23.

4. When a law is repealed, it leaves all the civil rights of the parties acquired under the law unaffected. 3 La. 337; 4 *id.* 191; 2 South. N. J. 689; Breese, Ill. App. 29; 2 Stew. Ala. 160.

When a penal statute is repealed or so modified as to exempt a class from its operation, violations committed before the repeal are also exempted, unless specifically reserved, or unless there have been some private right vested by it. 2 Dan. Ky. 330; 4 Yeates, Penn. 392; 5 Rand. Va. 657; 1 Wash. C. C. 84; 2 Va. Cas. 382.

REPERTORY. In French Law. A word used to denote the inventory or minutes which notaries are required to make of all contracts which take place before them. Dalloz, Dict.

REPETITION. In Civil Law. The act by which a person demands and seeks to recover what he has paid by mistake or delivered on a condition which has not been performed. Dig. 12. 4. 5.

The name of an action which lies to recover the payment which has been made by mistake, when nothing was due.

Repetition is never admitted in relation to natural obligations which have been voluntarily acquitted, if the debtor had capacity to give his consent. 6 Toullier, 386.

In order to entitle the payer to recover back money paid by mistake, it must have been paid by him to a person to whom he did not owe it, for otherwise he cannot recover it back,—the creditor having, in such case, the just right to retain the money. *Repetitio nulla est ab eo qui suum recepit.*

How far money paid under a mistake of law is liable to repetition has been discussed by civilians; and opinions on this subject are divided. 2 Pothier, Obl. Evans ed. 369, 408–437; 1 Story, Eq. Plead. § 111, note 2.

In Scotch Law. The act of reading over a witness's deposition, in order that he may adhere to it or correct it, at his choice. The same as *recolement* (*q. v.*) in the French law. 2 Bentham, Ev. b. 3, c. 12, p. 239. See LEGACY.

REPLEADER. In Pleading. Making a new series of pleadings.

Judgment of repleader differs from a judgment *non-obstante veredicto* in this: that it is allowed by the court to do justice between the parties where the defect is in the form or manner of stating the right, and the issue joined is on an immaterial point, so that it cannot tell for whom to give judgment, 7 Mass. 312; 3 Pick. Mass. 124; 19 *id.* 419; while judgment *non obstante* is given only where it is clearly apparent to the court that the party who has succeeded has, upon his own showing, no merits, and cannot have by any manner of statement. 1 Chitty, Plead. 568. See 19 Ark. 194.

2. It may be ordered by the court for the purpose of obtaining a better issue, if it will effect substantial justice where issue has been reached on an immaterial point. 3 Bos. & P. 353; 2 Johns. N. Y. 388; 6 *id.* 1; 16 *id.* 230; 3 Hen. & M. Va. 118, 161. As a plea of payment on a given day to an action on a bond conditioned to pay *on or before* that day. 2 Strange, 994. It is not to be allowed till after trial for a defect which is aided by verdict. 2 Salk. 579; 2 Saund. 319 *b*; Bacon, Abr. *Pleas*. If granted or denied where it should not be, it is error. 2 Salk. 579. See 9 Ala. N. s. 198.

The judgment is general, and the parties must begin at the first fault which occasioned the immaterial issue, 1 Ld. Raym. 169; entirely anew, if the declaration is imperfect, 1 Chitty, Plead. 568; that the action must be dismissed in such case, 1 Wash. Va. 135, with the replication, if that be faulty and the bar be good. 3 Kebl. 664; 1 Wash. Va. 155. No costs are allowed to either side. 2 Ventr. 196; 6 Term, 131; 2 Bos. & P. 376.

3. It cannot be awarded after a default at *nisi prius*, 1 Chitty, Plead. 568, nor where the court can give judgment on the whole record, Willes, 532, nor after demurrer, 2 Mass. 81; 8 *id.* 488, unless, perhaps, where the bar and replication are bad, Croke Eliz. 318; 1 And. 167; 7 Me. 302, nor after writ of error, without the consent of the parties, 3 Salk. 306, nor at any time in favor of the person who made the first fault, 1 Ld. Raym. 170; Dougl. 396; 1 Hempst. 268; 1 Humphr. Tenn. 85; 6 Blackf. Ind. 375; see 3 Hen. & M. Va. 388, nor after judgment. 1 Tyl. Vt. 146. The same end is secured in many of the states by statutes allowing amendments. See, generally, Tidd, Pract. 813, 814; Comyns, Dig. *Pleader* (R 18); Bacon, Abr. *Pleas* (M 1).

REPLEGIARE (Lat.). To replevy; to redeem a thing detained or taken by another, by putting in legal sureties.

REPLEGIARE DE AVERIIS (Lat.) A writ brought by one whose cattle are impounded or distrained, upon security given to the sheriff to pursue or answer the action at law. 7 Hen. VIII. c. 4; Fitzherbert, Nat. Brev. 68; New Book of Entries, *Replevin*; Dy. 173; Reg. Orig. 81.

REPLEGIARE FACIAS (Lat.). A writ of replevin, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in regard to the matter in his own county court. It was abolished by statute of Marlbridge, which provided a shorter process. 3 Sharswood, Blackst. Comm. 147*.

REPLEVIN. In Practice. A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully.

The action originally lay for the purpose of recovering chattels taken as a distress, but has acquired a much more extended use. In England and most of the states of the United States it extends to all cases of illegal taking, and in some of the states it may be brought wherever a person wishes to recover specific goods to which he alleges title. See, beyond, § 4.

By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fail so to do. It is said to have laid formerly in the *detinuit*, which is the only form now found at common law, and also in the *detinet*, where the defendant retained possession, and the sheriff proceeded to take possession and deliver the property to the plaintiff after a trial and proof of title. Buller, Nisi P. 52; Chitty, Plead. 145; 3 Sharswood, Blackst. Comm. 146; DETINET; DETINUIT.

It differs from *detinue* in this: that it requires an unlawful taking as the foundation of the action; and from all other personal actions in that it is brought to recover the possession of the specific property claimed to have been unlawfully taken.

2. The action lies to recover personal property, 19 Penn. St. 71: including parish records, 11 Pick. Mass. 492; 21 *id.* 148; trees after they have been cut down, 3 Den. N. Y. 79; 2 Barb. N. Y. 613; 9 Mo. 259; 13 Ill. 192; records of a corporation, 5 Ind. 165; articles which might be fixtures under some circumstances, 4 N. J. 287; which can be *specifically* distinguished from all other chattels of the same kind by indicia or car-marks, 18 Ill. 286; including money tied up in a bag and taken in that state, 2 Mod. 61; trees cut into boards, 30 Me. 370; 13 Ill. 192; but *does not lie* for injuries to things annexed to the realty, 4 Term, 504; 2 M'Cord, 329; 17 Johns. N. Y. 116; 10 B. Monr. Ky. 72; nor to recover such things, if dissevered and removed as part of the same act, 2 Watts, Penn. 126; 3 Serg. & R. Penn. 509; 6 *id.* 476; 10 *id.* 114; 6 Me. 427; 8 Cow. N. Y. 220; nor for writings concerning the realty. 1 Brownl. 168.

A general property with the right to immediate possession gives the plaintiff sufficient title to maintain it, 1 Harr. & J. Md. 469; 3 Wend. N. Y. 280; 1 Hill, N. Y. 473; 2 Blackf. Ind. 172; 15 Pick. Mass. 63; 9 Gill & J. Md. 220; 2 Ark. 315; 11 *id.* 475; 4

Blackf. Ind. 304; 8 Dan. Ky. 268; 27 Miss. 198; 2 Swan, Tenn. 358; see 9 Pick. Mass. 441; 24 *id.* 42; 2 Murph. No. C. 357; as do a special property and actual possession. 2 Watts, Penn. 110; 2 Ark. 315; 4 Blackf. Ind. 304; 10 Mo. 277; 9 Humphr. Tenn. 739; 2 Ohio St. 82. See 15 Penn. St. 507.

3. It will not lie for the defendant in another action to recover goods belonging to him and taken on attachment, 5 Coke, 99; 20 Johns. N. Y. 470; 12 Am. Jur. 104; 2 N. H. 412; 2 B. Monr. Ky. 18; 4 *id.* 92; 3 Md. 54; nor, generally, for goods properly in the custody of the law. 2 Nott & M'C. So. C. 456; 7 Harr. & J. Md. 55; 3 Md. 54; 7 Watts, Penn. 173; 4 Ark. 525; 8 Ired. No. C. 387; 16 How. 622; 3 Mich. 163; 1 Hempst. C. C. 10; 2 Wisc. 92; 1 Sneed, Tenn. 390; but this rule does not prevent a third person, whose goods have been improperly attached in such suit, from bringing this action. 5 Mass. 280; 4 Pick. Mass. 107; 9 Cow. N. Y. 259; 14 Johns. N. Y. 84; 20 *id.* 465; 6 Halst. N. J. 370; 2 Blackf. Ind. 172; 7 Ohio, 133; 16 *id.* 431; 19 Me. 255; 9 Gill & J. Md. 220; 24 Vt. 371.

As to the rights of co-tenants to bring this action as against each other, see 1 Harr. & G. Md. 308; 12 Conn. 331; 15 Pick. Mass. 71; as against strangers, see 4 Mas. C. C. 515; 12 Wend. N. Y. 131; 15 Me. 245; 2 N. J. 552; 27 N. H. 220; 6 Ind. 414.

4. The action lies, in England and most of the United States, wherever there has been an illegal taking, 18 Eng. L. & Eq. 230; 7 Johns. N. Y. 140; 14 *id.* 87; 5 Mass. 283; 1 Dall. Penn. 157; 6 Binn. Penn. 2; 3 Serg. & R. Penn. 562; 1 Mas. C. C. 319; 11 Me. 28; 27 *id.* 453; 2 Blackf. Ind. 415; 1 Const. So. C. 401; 3 N. H. 36; 10 Johns. N. Y. 369; 6 Halst. N. J. 370; 1 Ill. 130; 1 Mo. 345; 6 T. B. Monr. Ky. 421; 6 Ark. 18; 4 Harr. Del. 327; see 1 Ala. 277; and in some states wherever a person claims title to specific chattels in another's possession, 2 Harr. & J. Md. 429; 4 Me. 306; 15 Mass. 359; 16 *id.* 147; 17 *id.* 666; 1 Dall. Penn. 156; 1 Penn. St. 238; Wright, Ohio, 159; 11 Me. 216; 4 Harr. N. J. 160; 4 Mo. 93; 8 Blackf. Ind. 244; 11 Ark. 249; 1 Hempst. C. C. 10; 4 R. I. 539; while in others it is restricted to a few cases of illegal seizure. 9 Conn. 140; 3 Rand. Va. 448; 16 Miss. 279; 8 Rich. So. C. 106; 4 Mich. 295. The object of the action is to recover possession; and it will not lie where the property has been restored. And when brought in the *detinet* the destruction of the articles by the defendant is no answer to the action. 3 Sharswood, Blackst. Comm. 147.

5. The *declaration* must describe the place of taking. Great accuracy was formerly required in this respect, 2 Wms. Saund. 74 *b*; 2 Chitty, Plead. 411; 10 Johns. N. Y. 53; but now a statement of the county in which it occurred is said to be sufficient. 1 P. A. Browne. Penn. 60.

The chattels must be accurately described in the writ. 6 Halst. N. J. 179; 1 Harr. & G. Md. 252; 4 Blackf. Ind. 70; 1 Mich. 92.

The *plea* of *non cepit* puts in issue the taking, and not the plaintiff's title. 6 Ired. No. C. 38; 25 Me. 464; 3 N. Y. 506; 2 Fla. 42; 12 Ill. 378; and the pleas not guilty, 9 Mo. 256, *cepit in alio loco*, and property in another are also of frequent occurrence.

An avowry, cognizance, or justification are often used in defence. See those titles.

The *judgment* when the action is in the *detinuit*, if for the plaintiff, confirms his title, and is also for damages assessed by the jury for the injurious taking and detention. 1 Watts & S. Penn. 513; 20 Wend. N. Y. 172; 15 Me. 20; 1 Ark. 557; 5 Ired. No. C. 192. See JUDGMENT, § **15.**

REPLEVY. To re-deliver goods which have been distrained to the original possessor of them, on his giving pledges in an action of replevin. It signifies also the bailing or liberating a man from prison, on his finding bail to answer. See REPLEVIN.

REPLIANT. One who makes a replication.

REPLICATION (Lat. *replicare*, to fold back).

In Pleading. The plaintiff's answer to the defendant's plea or answer.

In Equity. The plaintiff's avoidance or denial of the answer or defence. Story, Eq. Pl. § 877.

A general replication is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Cooper, Eq. Pl. 329, 330.

A special replication was one which introduced new matter to avoid the defendant's answer. It might be followed by rejoinder, surrejoinder, and rebutter. Special replications have been superseded by the practice of amending bills. 1 How. Intr. 55; 17 Pet. App. 68. A replication must be made use of where the plaintiff intends to introduce evidence, and a subpœna to the defendant to rejoin must be added, unless he will appear gratis. Story, Eq. Pl. § 879.

A replication may be filed *nunc pro tunc* after witnesses have been examined under leave of court. Story, Eq. Pl. § 881; Mitford, Eq. Plead. by Jeremy, 323.

At Law. The plaintiff's reply to the defendant's plea. It contains a statement of matter, consistent with the declaration, which avoids the effect of the defendant's plea or constitutes a joinder in issue thereon.

2. It is, in general, governed by the plea, whether dilatory or in bar, and most frequently denies it. When the plea concludes to the country, the plaintiff must generally reply by a similiter. See SIMILITER: 1 Hempst. C. C. 67. When it concludes with a verification, the plaintiff may either *conclude* the defendant by matter of estoppel, deny the truth of the plea in whole or in part, *confess and avoid* the plea, or new assign the cause of action in case of an evasive plea. Its

character varies with the form of action and the facts of the case. See 1 Chitty, Plead. 519.

As to the form of the replication:

The title contains the name of the court, and the term of which it is pleaded, and in the margin the names of the plaintiff and defendant. 2 Chitty, Plead. 641.

The commencement is that part which immediately follows the title, and contains a general denial of the effect of the defendant's plea. When the plea is to the jurisdiction, it contains a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction. Rastell, Entr. 101. When misnomer is pleaded, no such allegation is required. 1 Bos. & P. 61.

When matter in estoppel is replied, it is, in general, in the words "and the said plaintiff saith that the said defendant."

When the replication denies or confesses and avoids the plea, it contains a *precludi non*, which see.

3. *The body* should contain—

Matter of estoppel, which should be set forth in the replication if it does not appear from the previous pleadings: as, if the matter has been tried upon a particular issue in trespass and found by the jury, 3 East, 346; 4 Mass. 443; 4 Dan. Ky. 73; *denial of the truth* of the plea, either of *the whole* plea, which may be by a denial of the fact or facts constituting a single point in express words, 12 Barb. N. Y. 573; 36 N. H. 232; 28 Vt. 279; 1 Humphr. Tenn. 524; or by the general replication and *injuria, etc.*, according to the form of action, 1 Chitty, Plead. 525; 8 Coke, 67; 1 Bos. & P. 79; 13 Ill. 80; 19 Vt. 329; *or of a part* of the plea, which may be of any *material* fact, 20 Johns. N. Y. 406; 13 T. B. Monr. Ky. 288, and of such only, 20 N. H. 323; 21 *id.* 425; 37 Eng. L. & Eq. 479; 9 Gill, Md. 310; 3 Pet. 31; or of matter of right resulting from facts, 2 W. Blackst. 776; 1 Saund. 23 *a*, n. 5; 10 Ark. 147; see 2 Iowa, 120; and see TRAVERSE; *a confession and avoidance*, 23 N. H. 535; 2 Den. N. Y. 97; 10 Mass. 226; see CONFESSION AND AVOIDANCE; *a new assignment*, which see.

4. *The conclusion* should be to the country when the replication denies the whole of the defendant's plea containing matter of fact, 2 McLean, C. C. 92; 7 Pick. Mass. 117; 1 Johns. N. Y. 516, as well where the plea is to the jurisdiction, Clifton, Entr. 17; 1 Chitty, Plead. 385, as in bar, 1 Chitty, Plead. 554; but with a verification when new matter is introduced. 1 Saund. 103, n.; 17 Pick. Mass. 87; 1 Brev. No. C. 11; 11 Johns. N. Y. 56. See 5 Ind. 264. The conclusions in particular cases are stated in 1 Chitty, Plead. 615 *et seq.*; Comyns, Dig. *Pleader* (F 5). See 1 Saund. 103, n.; 2 Caines, N. Y. 60; 1 Johns. N. Y. 516; 2 *id.* 428; Archbold, Civ. Plead. 258; 19 Viner, Abr. 29; Bacon, Abr. *Trespass* (I 4); Doctrina Plac. 428; Beames, Eq. Plead. 247, 325, 326.

As to the qualities of a replication. It must be responsive to the defendant's plea, 17 Ark. 365; 4 McLean, C. C. 521; answering all which it professes to answer, 12 Ark. 183; 8 Ala. N. S. 375; and if bad in part is bad altogether, 1 Saund. 338; 7 Cranch, 156; 32 Ala. N. S. 506; *directly*, 10 East, 205; see 7 Blackf. Ind. 481; without *departing* from the allegations of the declaration in any material matter, 2 Watts, Penn. 306; 4 Munf. 205; 2 Root, Conn. 388; Hill & D. N. Y. 340; 22 N. H. 303; 5 Blackf. Ind. 306; 4 M'Cord, So. C. 93; 1 Ill. 26; see DEPARTURE; with *certainty*, 6 Fla. 25; see CERTAINTY; and without *duplicity*. 4 Ill. 423; 2 Halst. N. J. 77; Dav. Dist. Ct. 236; 14 N. H. 373; 1 Hempst. C. C. 238; 26 Vt. 397; 4 Wend. N. Y. 211. See DUPLICITY. See, generally, Bouvier, Inst. Index.

REPORTS. A printed or written collection of accounts or relations of cases judicially argued and determined.

2. In the jurisprudence of nearly every civilized country, the force of *adjudicated precedents* is to a greater or less degree acknowledged. But in no countries are they so deferentially listened to and, indeed, so implicitly obeyed as in England and in those countries which, like our own, derive their systems of judicial government from her. The European systems are composed, much more than either ours or the English, of *Codes;* and their courts rely far more than ours upon the opinions of eminent text-writers. With us we pay no implicit respect to any thing but a "case in point;" and, supposing the case to be by an authoritative court, when that is cited it is generally taken as conclusive on the question in issue. Hence both the English and American jurisprudence is filled with books of *Reports;* that is to say, with accounts of cases which have arisen, and of the mode in which they have been argued and decided. These books, which until the last half-century were not numerous, have now become, as will be seen in the list appended, or are becoming, almost infinite in number,—so much so that the profession has taken refuge in the system of *Leading Cases;* which, in the forms of Smith's Leading Cases, The American Leading Cases, and White & Tudor's Leading Cases in Equity, with one or two others, have now obtained a place in most good libraries.

3. Of these late years, in the United States at least, it is usual for the courts to *write out* their opinions and to deliver them to the reporter: so that usually the opinion of the court is correctly given. At the same time, the volumes of different reporters, even of quite modern times, are very different in character,—the accounts of what the *cases* were being often so badly presented as to render the opinion of the courts, even when the opinions themselves are good, comparatively worthless. In addition to this, an immense proportion of the reports—especially of the American—are by courts of no great eminence or ability, while in England, with their system of rival reporters, we have at times been borne down with such a multitude of "Reports" that the *cases* are fairly buried in their own masses.

4. We are speaking here of the business of reporting as practised say since the year 1800. Prior to this date there were only one or two American Reports. In England, however, there were even then very many, and among the English Reports prior to the date of which we speak are many of the highest authority, and which are constantly cited at this day both in England and America. There are, however, many also of very bad authority, and, indeed, of no authority at all: and against these the lawyer must be upon his guard. They are all called "Reports" alike, and in many cases have

the name of some eminent person attached to them, when, in fact, they are mere forgeries so far as that person is concerned. *Nothing can be so various, as respects their grade of merit, as the English Reports prior to about the year* 1776: and the lawyer should never rely on any one of them without knowing the character of the volume which he cites. They are often mere *note-books* of lawyers or of students, or copies hastily and very inaccurately made from genuine manuscripts. In some instances one part of a book is *good*, when another is perfectly worthless. This is specially true of the early Chancery Reports, which were generally printed as booksellers' "jobs."

5. Great judicial mistakes have arisen, even with the most able courts, from want of attention to the different characters of the old reporters. One illustration of this—not more striking, perhaps, than others—occurred lately in the supreme court of our own country. "It is well known," says Mr. J. W. Wallace, in his work entitled "The Reporters," "that, in a leading case, Chief-Justice Marshall, some years since, gave an opinion which had the effect of almost totally subverting, in two states of our Union, the entire law of charitable uses. And though some other states did not adopt the conclusions of the chief-justice, his venerated name was seized in all quarters of the country to originate litigation and uncertainty, and deeply to wound the whole body of trusts for religious, charitable, and literary purposes. For a quarter of a century the influences of his opinion were yet active in evil, —when, in 1844, an endeavor to subvert a large foundation brought the subject again before the court, in the Girard College case, and caused a more careful examination into it. The opinion of Chief-Justice Marshall was in review, and was overruled. Mr. Binney showed at the bar that as to the principal authority cited by the chief-justice, from one of the old books, there were no less than four different reports of it, all variant from each other; that, as to one of the reporters, the case had been decided thirty years before the time of his report; that he was not likely to know any thing personally about it; that 'he certainly knew nothing about it accurately;' that another reporter gave two versions of the case 'entirely different,' not only from that of his co-reporter, but likewise from another of his own; that a fourth account, by a yet distinct reporter, was 'different from all the rest;' that 'nothing is to be obtained from any of these reports, except perhaps the last, that is worthy of *any* reliance as a true history of the case;' and that even this, the best of them, had been rejected in modern times, as 'being contrary to all principle.' After such evidence that these judicial historians, like others of the title, were full of nothing so much as of 'most excellent differences,' the counsel might very well observe that it is 'essentially necessary to guard against the indiscriminate reception of the old reporters, especially the Chancery Reporters, as authority;' and certainly a knowledge less than that which Chief-Justice Marshall possessed in some other branches of the law would have reminded him that most of his authorities enjoyed a reputation but dubiously good, while the character of one of them was notoriously bad."

6. Among the English Reporters the following possess little authority: Noy, Godbolt, Owen, Popham, Winch, March, Hutton, Ley, Lane, Hetley, Carter, J. Bridgman, Keble, Siderfin, Latch, several volumes of the "Modern" Reports, 3d Salkeld, Gilbert's Cases in Law and Equity, the 1st and 2d parts of "Reports in Chancery," Chancery Cases, Reports *temp.* Finch, "Gilbert's Reports," 8th Taunton, Peake's Nisi Prius Reports. But even in books of the worst authority there are occasionally cases well reported. The fullest account which has yet been given of the Reporters—their chronological order, their respective merits, the history, public and private, of the volumes, with biographical sketches of the authors—is presented in an American work, "The Reporters Chronologically Arranged; with Occasional Remarks on their Respective Merits." The author (Mr. Wallace) spent a considerable time at Lincoln's Inn, and at the Temple, London, from the libraries of which he collected much history hitherto not generally known. In the case of *Farrell* vs. *Hilditch*, 94 English Common Law, p. 885, the work received from the judges of the court of common pleas, sitting in banc at Westminster, the characterization of "highly valuable and interesting," and one to which "they could not refrain from referring" on a question involving the reputation of one of the early English reporters.

7. The following list of reports and reporters is from the pen of the Hon. Theodore W. Dwight, LL.D., Professor of Law in Columbia College, New York. It is, without doubt, the most learned, full, and exact list which has ever been prepared either in England or the United States,—the result of immense labor and of most accurate knowledge and research. As such it deserves the highest praise, and, we are sure, will be properly valued by all American lawyers.

ABBOTT (Austin A.). District Court of the United States, Southern District of New York, 1847–1850. 1 vol.

ABBOTT (Brothers, Austin A. & Benjamin V.). Practice Reports in the Courts of the State of New York, 1854–1865. 18 vols.

ABBREVIATIO PLACITORUM. King's Bench, 1 Edw. I.–20 Edw. II. 1272–1327.

ACTA CANCELLARIÆ. See MONRO.

ACTON (Thomas H.). Prize Cases argued and determined on Appeal before the Lords Commissioners and in Council, 1809, 1810. 1 vol. and part of 2d.

ADAMS (John M.). See MAINE.

ADAMS (Nathaniel). See NEW HAMPSHIRE.

ADDAMS (J.). Ecclesiastical Courts at Doctors' Commons and High Court of Delegates, 1822–1826. 2 vols. and part of 3d.

ADDISON (Alexander). Pennsylvania County Courts of the Fifth Circuit, and Court of Errors, 1791–1799. 1 vol.

ADOLPHUS (J. L.) & ELLIS (T. F.). King's Bench, 1834–1840. 12 vols.

ADOLPHUS (J. L.) & ELLIS (T. F.). NEW SERIES. See QUEEN'S BENCH.

AIKENS (Asa). Vermont Supreme Court, 1826, 1827. 2 vols.

ALABAMA. Reports of the Supreme Court of Alabama, 1820–1839. 18 vols.

Vol. 1,	1820–1826.	Henry Minor.
2–4,	1827–1831.	George N. Stewart.
5–9,	1831–1834.	George N. Stewart & Benjamin F. Porter.
10–18,	1834–1839.	Benjamin F. Porter.

ALABAMA. New Series, 1840–1860. 35 vols.

Vol. 1–11,	1840–1847.	The Judges.
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REPRESENT. To exhibit; to expose before the eyes. To represent a thing is to produce it publicly. Dig. 10. 4. 2. 3.

REPRESENTATION. In Insurance. The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract. 1 Phillips, Ins. § 524; 12 Md. 348; 11 Cush. Mass. 324; 2 N. H. 551; 6 Gray, Mass. 221.

2. A fact obviously having such tendency is called a *material fact*. 1 Phillips, Ins. § 525. Doctrines respecting representation and concealment usually have reference to those by the assured, upon whose knowledge and statement of the facts the insurance is usually made; but the doctrine on the subject is equally applied to the underwriter, so far as facts are known to him. 1 Phillips, Ins. § 533; 3 Burr. 1905; 2 Taunt. 214.

A misrepresentation makes the insurance void, notwithstanding its being free of fraud. 1 Story, Confl. L. 57; 1 Term, 12; 1 Du. N. Y. 747; 18 Eng. L. & Eq. 427.

A statement of a mere expectation or belief is not a representation of the facts to which it has reference. 1 Phillips, Ins. § 551; Cowp. 785; 1 Dougl. 271, 305; 13 Mass. 172; 22 Pick. Mass. 200.

3. A substantial compliance with a representation is sufficient,—the rule being less strict than in case of an express warranty. 1 Phillips, Ins. §§ 544, 547, 669 *et seq.*; 3 Metc. Mass. 114; 7 East, 367; 4 Mas. C. C. 439.

Insurance against fire and on life rests upon the same general conditions of good faith as maritime insurance; but in the first two classes the contract is usually based mainly upon statements by the applicant in written replies to numerous inquiries expressly referred to in the policy, which answers are thus made express warranties, and must, accordingly, be strictly true whether their being so is or is not material to the risk. The inquiries are intended to cover all material circumstances, subject, however, to the principle, applicable to all contracts, that fraud by either party will exonerate the other from his obligations, if he so elects. 1 Phillips, Ins. c. 7, s. 15, 16; 5 Hill, N. Y. 188; 2 Hall, N. Y. 632; 7 Barb. N. Y. 570; 2 Den. N. Y. 75; 10 Pick. Mass. 535; 6 Gray, Mass. 288; 6 Cush. Mass. 42, 449; 2 Rob. La. 266; 24 Penn. St. 320; 3 Md. 341; 2 Ohio, 452; 21 Conn. 19; 6 Humphr. Tenn. 176; 6 McLean, C. C. 324; 8 How. 235; 1 W. Blackst. 312; 6 Taunt. 186; 8 Barnew. & C. 586; 2 Mees. & W. Exch. 505; 5 Bingh. 533; 3 Carr. & P. 353; 2 Mood. & R. 328. See CONCEALMENT; MISREPRESENTATION.

In Scotch Law. The name of a plea or statement presented to a lord-ordinary of the court of sessions, when his judgment is brought under review.

REPRESENTATION OF PERSONS. A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.

The heir represents his ancestor, Bacon, Abr. *Heir and Ancestor* (A); the devisee, his testator; the executor, his testator; the administrator, his intestate; the successor in corporations, his predecessor; and, generally speaking, they are entitled to the rights of the persons whom they represent, and bound to fulfil the duties and obligations which were binding upon them in those characters.

Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law. Toullier, Dr. Civ. Fr. liv. 3, t. 1, c. 3, n. 180. See Ayliffe, Pand. 397; Dalloz, Dict. *Succession*, art. 4, § 2.

REPRESENTATIVE. One who represents or is in the place of another.

In *legislation*, it signifies one who has been elected a member of that branch of the legislature called the house of representatives.

A representative of a deceased person, sometimes called a "personal representative," or "legal personal representative," is one who is executor or administrator of the person described. 6 Madd. Ch. 159; 5 Ves. Ch. 402.

REPRESENTATIVE DEMOCRACY. A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. 1 Bouvier, Inst. n. 31.

REPRIEVE (from Fr. *reprendre*, to take back). **In Criminal Practice.** The withdrawing of a sentence for an interval of time, which operates in delay of execution. 4 Blackstone, Comm. 394.

It is granted by the favor of the pardoning power, or by the court who tried the prisoner. Reprieves are sometimes granted *ex necessitate legis:* for example, when a woman is convicted of a capital offence, after judgment she may allege pregnancy in delay of execution. In order, however, to render this plea available, she must be *quick with child*, the law presuming—perhaps absurdly enough—that before that period life does not commence in the fœtus. Coke, 3d Inst. 17; 1 Hale, Pl. Cr. 368; 2 *id.* 413; 4 Blackstone, Comm. 395.

The judge is also bound to grant a reprieve when the prisoner becomes insane. 4 Hargrave, St. Tr. 205, 206; Coke, 3d Inst. 4; Hawkins, Pl. Cr. b. 1, c. 1, s. 4; 1 Chitty, Crim. Law, 757.

REPRIMAND. The censure which in some cases a public officer pronounces against an offender.

This species of punishment is used by legislative bodies to punish their members or others who have been guilty of some impropriety of conduct towards them. The reprimand is usually pronounced by the speaker.

REPRISALS. The forcibly taking a thing by one nation which belonged to another, in return or satisfaction for an injury committed by the latter on the former. Vattel, b. 2, c. 18, s. 342; 1 Blackstone, Comm. c. 7.

General reprisals take place by virtue of commissions delivered to officers and citizens of the aggrieved state, directing them to take the persons and property belonging to the offending state wherever found.

Negative reprisals take place when a nation refuses to fulfil a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims.

Positive reprisals consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.

Special reprisals are such as are granted in times of peace to particular individuals who have suffered an injury from the citizens or subjects of the other nation.

Reprisals are used between nation and nation to do themselves justice, when they cannot otherwise obtain it. Congress have the power to grant letters of marque and reprisal. U. S. Const. art. 1, s. 8, cl. 11.

Reprisals are made in two ways, either by embargo, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the citizen, authorized by the government. See 2 Brown, Civ. Law, 334.

The property seized in making reprisals is preserved while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete. Vattel, b. 2, c. 18, § 342. See Wheaton, Int. Law.

REPRISES. The deductions and payments out of lands, annuities, and the like are called reprises, because they are *taken back:* when we speak of the clear yearly value of an estate, we say it is worth so much a year *ultra reprises*, besides all reprises.

In Pennsylvania, lands are not to be sold when the rents can pay the encumbrances in seven years, beyond all reprises.

REPROBATION. In Ecclesiastical Law. The propounding exceptions either against facts, persons, or things: as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not, for legal reasons, to be admitted.

REPUBLIC. A commonwealth; that form of government in which the administration of affairs is open to all the citizens. In another sense, it signifies the state, independently of its form of government. 1 Toullier, n. 28, and n. 202, note.

REPUBLICAN GOVERNMENT. A government in the republican form; a government of the people: it is usually put in opposition to a monarchical or aristocratic government.

The fourth section of the fourth article of the constitution directs that "the United States shall guarantee to every state in the Union a republican form of government." The form of government is to be *guaranteed*, which supposes a form already *established;* and this is the republican form of government the United States have undertaken to protect. See Story, Const. § 1807.

REPUBLICATION. An act done by a testator, from which it can be concluded that he intended that an instrument which had been revoked by him should operate as his will; or it is the re-execution of a will by the testator, with a view of giving it full force and effect.

2. The republication is *express* when there has been an actual re-execution of it, 1 Ves. Ch. 440; 2 Rand. Va. 192; 9 Johns. N. Y. 312; it is *implied* when, for example, the testator by a codicil executed according to the statute of frauds, reciting that he had made his will, added, "I hereby ratify and confirm my said will, except in the alterations after mentioned." Com. 381; 3 Brown, Parl. Cas. 85. The will might be at a distance, or not in the power of the testator, and it may be thus republished. 1 Ves. Sen. Ch. 437; 3 Bingh. 614; 1 Ves. Ch. 486; 4 Brown, Ch. 2.

3. The republication of a will has the effect—*first*, to give it all the force of a will made at the time of the republication: if, for example, a testator by his will devise "all his lands in A," then revokes his will, and afterwards buys other lands in A, the republication, made after the purchase, will pass all the testator's lands in A. Croke Eliz. 493. See 1 P. Will. 275. *Second*, to set up a will which had been revoked. See, generally, Williams, Exec.; Jarman, Wills; 2 Bouvier, Inst. nn. 2162–2264.

REPUDIATE. To express in a sufficient manner a determination not to accept a right, when it is offered.

He who repudiates a right cannot by that act transfer it to another. Repudiation differs from renunciation in this, that by the former he who repudiates simply declares that he will not accept; while he who renounces a right does so in favor of another. Renunciation is, however, sometimes used in the sense of repudiation. See Renounce; Renunciation; Wolff, Inst. § 339.

REPUDIATION. In Civil Law. A term used to signify the putting away of a wife or a woman betrothed.

Properly, divorce is used to point out the separation of married persons; repudiation, to denote the separation either of married people, or those who are only affianced. *Divortium est repudium et separatio maritorum; repudium est renunciatio*

sponsalium, vel etiam est divortium. Dig. 50. 16. 101.

A determination to have nothing to do with any particular thing: as, a repudiation of a legacy is the abandonment of such legacy, and a renunciation of all right to it.

In Ecclesiastical Law. The refusal to accept a benefice which has been conferred upon the party repudiating.

REPUGNANCY (Lat. *re*, back, against, *pugnare*, to fight). **In Contracts.** A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty. Hardw. 94; Ow. 84; 2 Taunt. 109; 15 Sim. Ch. 118; 2 C. B. 830; 13 Mees. & W. Exch. 534.

In wills, the latter clause prevails, under the same exceptions. Coke, Litt. 112 *b*; Plowd. 541; 2 Taunt. 109; 6 Ves. 100; 2 Mylne & K. 149; 1 Jarm. Wills, 411. See 23 Am. Jur. 277; 1 Parsons, Contr. 26.

Repugnancy in a condition renders it void. 2 Salk. 463; 2 Mod. 285; 11 *id.* 191; 1 Hawks, No. C. 20; 7 J. J. Marsh. 192. And see, generally, 3 Pick. 272; 4 *id.* 54; 6 Cow. 677.

In Pleading. An inconsistency or disagreement between the statements of materials facts in a declaration or other pleading: as, where certain timber was said to be for the completion of a house already built. 1 Salk. 213.

Repugnancy of immaterial facts, or of redundant and unnecessary matter, if it does not contradict material allegations, will not, in general, vitiate the pleadings. Coke, Litt. 303 *b*; 10 East, 142; 1 Chitty, Plead. 233. See Lawes, Plead. 64; Stephen, Plead. 378; Comyns, Dig. *Abatement* (H 6); 1 Viner, Abr. 36; 19 *id.* 45; Bacon, Abr. *Amendment, etc.* (E 2), *Pleas* (I 4).

REPUTATION (Lat. *reputo*, to consider). The opinion generally entertained in regard to the character or condition of a person by those who know him or his family. The opinion generally entertained by those who may be supposed to be acquainted with a fact.

In general, reputation is evidence to prove a *man's character in society*; a *pedigree*, 14 Campb. 416; 4 Term, 356; 1 Sim. & S. Ch. 153; *certain prescriptive or customary rights* and obligations; *matters of public notoriety*. But as such evidence is in its own nature very weak, it must be supported, when it relates to the exercise of a right or privilege, by proof of acts of enjoyment of such right or privilege within the period of living memory. 1 Maule & S. 679; 5 Term, 32. Afterwards, evidence of reputation may be given. The fact must be of a public nature; it must be derived from persons likely to know the facts. 2 Bingh. 86; 9 B. Monr. 88; 4 Barnew. & Ald. 53. The facts must be general, and not particular; they must be free from suspicion. 1 Starkie, Ev. 54–65; 1 Phillipps, Ev. 4th Am. ed. 248 *et seq.*

Injuries to a man's reputation by circulating false accounts in relation thereto are remediable by action and by indictment. See LIBEL; SLANDER.

REQUEST (Lat. *requiro*, to ask for). **In Contracts.** A notice of a desire on the part of the person making it, that the other party shall do something in relation to a contract. Generally, when a debt is payable immediately, no request need be made. 10 Mass. 230; 3 Day, Conn. 327; 1 Johns. Cas. N. Y. 319.

In some cases, the necessity of a request is implied from the nature of the transaction: as, where a horse is sold to A, to be paid for on delivery, A must show a request, 5 Term, 409; 1 East, 209, or impossibility on the part of the vendor to comply, if requested, 10 East, 359; 5 Barnew. & Ad. 712, previous to bringing an action, or on a promise to marry. 2 Dowl. & R. 55. See DEMAND. And if the contract in terms provides for a request, it must be made. 1 Johns. Cas. N. Y. 327. It should be in writing, and state distinctly what is required to be done. 1 Chitty, Pract. 497.

In Pleading. The statement in the plaintiff's declaration that a demand or request has been made by the plaintiff of the defendant to do some act which he was bound to perform, and for which the action is brought.

A general request is that stated in the form "although often requested so to do" (*licet sæpe, requisitus*), generally added in the common breach to the money counts. Its omission will not vitiate the declaration. 2 H. Blackst. 131; 1 Wils. 33; 1 Bos. & P. 59; 1 Johns. Cas. N. Y. 100.

A special request is one provided for by the contract, expressly or impliedly. Such a request must be averred, 5 Term, 409; 1 East, 204; 3 Bulstr. 297; 3 Campb. 549; 2 Barnew. & C. 685, and proved. 1 Saund. 32, n. 2. It must state time and place of making, and by whom it was made, that the court may judge of its sufficiency. 1 Strange, 89. See Comyns, Dig. *Pleader* (C 69, 70); 1 Saund. 33, n.; 2 Ventr. 75; DEMAND.

REQUEST NOTES. In English Law. Certain notes or requests from persons amenable to the excise laws, to obtain a permit for removing any excisable goods or articles from one place to another.

REQUISITION. The act of demanding a thing to be done by virtue of some right.

The demand made by the governor of one state on the governor of another for a fugitive, under the provision of the United States constitution.

RES (Lat. things).

The terms Res, Bona, Biens, used by jurists who have written in the Latin and French languages, are intended to include movable or personal, as well as immovable or real, property. 1 Burge, Confl. of Laws, 19. See BIENS; BONA; THINGS.

RES COMMUNES (Lat.). **In Civil Law.** Those things which, though a separate share of them can be enjoyed and used

by every one, cannot be exclusively and wholly appropriated: as, light, air, running water. Mackeldy, Civ. Law, § 156; Erskine, Inst. 1. 1. 5, 6.

RES GESTÆ (Lat.). Transaction; thing done; the subject-matter.

When it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible evidence as a part of the transaction. East, Pl. Cr. 414; 2 Stark. 241; 1 Starkie, Ev. 47; 1 Phillipps, Ev. 4th Am. ed. 185 *et seq.*; Bouvier, Inst. Index.

RES INTEGRA (Lat. an entire thing; an entirely new or untouched matter). A term applied to those points of law which have not been decided, which are untouched by dictum or decision. 3 Mer. Ch. 269; 1 Burge, Confl. of Laws, 241.

RES INTER ALIOS ACTA (Lat.). A technical phrase which signifies acts of others or transactions between others.

Neither the declarations nor any other acts of those who are mere strangers, or, as it is usually expressed, any *res inter alios acta*, are admissible in evidence against any one: when the party against whom such acts are offered in evidence was privy to the act, the objection ceases: it is no longer *res inter alios*. 1 Starkie, Ev. 52; 3 *id.* 1300; 4 Mann. & G. 282. See 1 Metc. Mass. 55; MAXIMS.

RES JUDICATA (Lat. things decided). **In Practice.** A legal or equitable issue which has been decided by a court of competent jurisdiction.

It is a general principle that such decision is binding and conclusive upon all other courts of concurrent power. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy. If, therefore, Paul sue Peter to recover the amount due to him upon a bond, and on the trial the plaintiff fails to prove the due execution of the bond by Peter,—in consequence of which a verdict is rendered for the defendant and judgment is entered thereupon,—this judgment, till reversed on error, is conclusive upon the parties, and Paul cannot recover in a subsequent suit, although he may then be able to prove the due execution of the bond by Peter, and that the money is due to him; for, to use the language of the civilians, *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum* (a decision makes white black; black, white; the crooked, straight; the straight, crooked).

The constitution of the United States and the amendments to it declare that no fact once tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.

But in order to make a matter *res judicata* there must be a concurrence of the four conditions following, namely: *identity in the thing sued for*, 5 Mees. & W. Exch. 109; 3 East, 346; 7 Johns. N. Y. 20; 1 Hen. & M. Va. 449; 1 Dan. Ky. 434; *identity of the cause of action:* if, for example, I have claimed a right of way over Blackacre, and a final judgment has been rendered against me, and afterwards I purchase Blackacre, this first decision shall not be a bar to my recovery when I sue as owner of the land, and not for an easement over it which I claimed as a right appurtenant to my land Whiteacre, 6 Wheat. 109; 2 Gall. C. C. 216; 17 Mass. 237; 2 Leigh, Va. 474; 8 Conn. 268; 1 Nott & M'C. So. C. 329; 16 Serg. & R. Penn. 282; 17 *id.* 319; 3 Pick. Mass. 429; *identity of persons and of parties* to the action, 7 Cranch, 271; 1 Wheat. 6; 14 Serg. & R. Penn. 435; 4 Mass. 441; 2 Yerg. Tenn. 10; 5 Me. 410; 8 Gratt. Va. 68; 16 Mo. 168; 12 Ga. 271; 21 Ala. N. S. 813; 4 Den. N. Y. 302; 23 Barb. N. Y. 464: this rule is a necessary consequence of the rule of natural justice, *ne inauditus condemnetur; identity of the quality in the persons* for or against whom the claim is made: for example, an action by Peter to recover a horse, and a final judgment against him, is no bar to an action by Peter, administrator of Paul, to recover the same horse. 5 Coke, 32 *b*; 4 Term, 490; 6 Mann. & G. 164; 4 C. B. 884. See HABEAS CORPUS; FORMER JUDGMENT; 2 Phillipps, Ev. *passim*.

RES MANCIPI (Lat.). **In Roman Law.** Those things which might be sold and alienated, or of which the property might be transferred from one person to another.

The division of things into *res mancipi* and *res nec mancipi* was one of ancient origin, and it continued to a late period in the empire. Res mancipi (Ulph. Frag. xix.) are *prædia in italico solo*, both rustic and urban; also, *jura rusticorum prædiorum* or *servitutes*, as *via, iter, aquæductus*; also slaves, and four-footed animals, as oxen, horses, etc., *quæ collo dorsove domantur*. Smith, Dict. Gr. & Rom. Antiq. To this list may be added children of Roman parents, who were, according to the old law, *res mancipi*. The distinction between *res mancipi* and *nec mancipi* was abolished by Justinian in his Code. Id.; Cooper, Inst. 442.

RES NOVA (Lat.). Something new; something not before decided.

RES NULLIUS (Lat.). A thing which has no owner. A thing which has been abandoned by its owner is as much *res nullius* as if it had never belonged to any one.

The first possessor of such a thing becomes the owner: *res nullius fit primi occupantis* Bowyer, Comm. 97.

RES PERIIT DOMINO (Lat. the thing is lost to the owner). A phrase used to express that when a thing is lost or destroyed it is lost to the person who was the owner of it at the time. For example, an article is sold; if the seller have perfected the title of the buyer so that it is his, and it be destroyed, it is the buyer's loss; but if, on the contrary, something remains to be done before the title becomes vested in the buyer, then the loss falls on the seller.

RES PRIVATÆ (Lat.). **In Civil Law** Things the property of one or more individuals. Mackeldy, Civ. Law, § 157.

RES PUBLICÆ (Lat.). **In Civil Law.** Things the property of the state. Mackeldy, Civ. Law, § 157; Erskine, Inst. 2. 1. 5. 6.

RES RELIGIOSÆ (Lat.). **In Civil Law.** Things pertaining to religion. Places where the dead were buried. Thevenot Dessaules, Dict. du Dig. *Chose.*

RES SACRÆ (Lat.). **In Civil Law.** Those things which had been publicly consecrated.

RES SANCTÆ (Lat.). **In Civil Law.** Those things which were especially protected against injury of man.

RES UNIVERSATIS (Lat.). Those things which belong to cities or municipal corporations. They belong so far to the public that they cannot be appropriated to private use: such as public squares, market-houses, streets, and the like. 1 Bouvier, Inst. n. 446.

RESALE. A second sale made of an article: as, for example, when A, having sold a horse to B, and the latter, not having paid for him, and refusing to take him away, when by his contract he was bound to do so, again sells the horse to C.

The effect of a resale is not always to annul the first sale, because, as in this case, B would be liable to A for the difference of the price between the sale and resale. 4 Bingh. 722; 4 Mann. & G. 898; Blackburn, Sales, 336; Story, Sales.

RESCEIT, RECEIT. The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons: as, when an action is brought against a tenant for life or years, or any other particular tenant, and he makes default, in such case the reversioner may move that he may be received to defend his right and to plead with the demandant. Jacob, Law Dict.; Cowel.

The admittance of a plea when the controversy is between the same two persons. Coke, Litt. 192; 3 Nelson, Abr. 146.

RESCISSION OF CONTRACTS. The abrogation or annulling of contracts.

2. It may take place by mutual consent; and this consent may be inferred from acts. 4 Mann. & G. 898; 7 Bingh. 266; 1 Term, 133; 1 Pick. Mass. 57; 4 *id.* 114; 5 Me. 277. It may take place as the act of one party, in consequence of *a failure to perform* by the other, 2 C. B. 905; 4 Wend. N. Y. 285; 2 Penn. St. 454; 3 *id.* 445; 28 N. H. 561; 9 La. Ann. 31; not so where the failure is but partial, 4 Ad. & E. 599; 1 Mees. & W. Exch. 231; on account of *fraud*, even though partially executed, 5 Cush. Mass. 126; 15 Ohio, 200; 23 N. H. 519. See 1 Den. N. Y. 69; 10 Ala. N. S. 478; 7 Ired. No. C. 32.

3. A contract cannot, in general, be rescinded by one party unless both parties can be placed in the same situation and can stand upon the same terms as existed when the contract was made. 5 East, 449; 2 Younge & J. Exch. 278; 4 Mann. & G. 903; 1 Mees. & W. Exch. 231; 2 Exch. 783; 3 Me. 30; 14 *id.* 364; 1 Den. N. Y. 69; 1 Metc. Mass. 547; 22 Pick. Mass. 283; 4 Blackf. Ind. 515; 2 Watts, Penn. 433; 10 Ohio, 142; 27 Miss. 498; 3 Vt. 442; 1 N. H. 17; 9 *id.* 298. It must be done at the time specified, if there be such a time: otherwise, within a reasonable time, 2 Campb. 530; 1 Stark. 107; 1 J. B. Moore, 106; 6 Scott, 187; 14 Me. 57; 22 Pick. Mass. 546; in case of fraud, upon its discovery. 1 Den. N. Y. 69; 4 *id.* 554; 24 Wend. N. Y. 74; 5 Mees. & W. Exch. 83. The right may be waived by mere lapse of time, 3 Stor. C. C. 612; see 6 Clark & F. Hou. L. 234; 3 Eng. L. & Eq. 17, or other circumstances. 9 Barnew. & C. 59; 4 Den. N. Y. 554; 4 Paige, Ch. N. Y. 537; 4 Mass. 502; 1 Baldw. C. C. 331. A peculiar right of rescission of contracts of sale of real estate where security has been taken for the payment of the purchase-money exists in Pennsylvania. 4 Watts, Penn. 196, 199.

4. The equity for the rescission and cancellation of agreements, securities, deeds, and other instruments arises when a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation. The jurisdiction of the court of equity is exercised upon the principle of *quia timet;* that is, for fear that such agreements, securities, deeds, and other instruments may be vexatiously or injuriously used against the party seeking relief, when the evidence to impeach them may be lost; or that they may throw a cloud or suspicion over his interest or title; or where he has a defence good in equity which cannot be made available at law. The cases in which this relief will be granted on account of misrepresentation and fraud may be divided into four classes: *first*, where there is actual fraud in the party defendant in which the party plaintiff has not participated, 13 Pet. 26; *secondly*, where there is constructive fraud against public policy and the party plaintiff has not participated therein, see 4 Munf. Va. 316; *thirdly*, where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; *fourthly*, where there is a constructive fraud by both parties,—that is, where both parties are *in delicto*, but not *in pari delicto*. See 2 Story, Eq. Jur. §§ 694, 695; 3 Jones, Eq. No. C. 494; 2 Mas. C. C. 378; 25 Ga. 89; 1 Pat. & H. Va. 307. The court will decree that a deed or other solemn instrument shall be delivered up and cancelled, not only when it is avoidable on account of fraud, but also when it is absolutely void, unless its invalidity appears upon the face of it, so that it may be defeated at any time by a defence at law. 2 Story, Eq. Jur. §§ 698–701; 6 Du. N. Y. 597.

5. The ignorance or mistake which will authorize relief in equity must be an ignorance or mistake of material facts, 1 Stor. C. C. 173; 4 Mas. C. C. 414; 11 Conn. 134; 6 Wend N. Y. 77; 18 *id.* 407; 6 Harr. & J. Md. 500; 10 Leigh, Va. 37; and the mistake must be

mutual. 3 Green, Ch. N. J. 103; 2 Sumn. C. C. 387; 11 Pet. 63; 24 Me. 82; 10 Vt. 570; 6 Mo. 16; 35 Penn. St. 287. If the facts are known but the law is mistaken, the same rule applies in equity as at law, that a mere mistake or ignorance of law, where there is no fraud or trust, is immaterial: *ignorantia legis neminem excusat.* Adams, Eq. 188.

Instruments may also be rescinded and cancelled when they have been obtained from persons who were at the time under duress or incapacity, 2 Root, Conn. 216; 8 Ohio, 214; 3 Yerg. Tenn. 537; 36 Miss. 685; or by persons who stood in a confidential relation and took advantage of that relation. Adams, Eq. 182 *et seq.*; 5 Sneed, Tenn. 583; 31 Ala. N. s. 292; 3 Cow. N. Y. 537; 2 Mas. C. C. 378; 2 A. K. Marsh. Ky. 175; 9 Md. 348; 3 Jones, Eq. No. C. 152, 186; 4 *id.* 39, 245; 30 Miss. 369; 14 Ves. Ch. 273; 4 Mylne & C. 269; 8 Beav. Rolls, 437.

6. Gross inadequacy of consideration, 17 Vt. 9; 2 Leigh, Va. 149; 2 Yerg. Tenn. 294; 22 Ga. 637; 19 How. 303; see 2 Ired. Eq. No. C. 365; 2 Ov. Tenn. 426; 2 Green, Ch. N. J. 429; 33 Ala. N. s. 149; 2 Head, Tenn. 289; fraudulent misrepresentation and concealment, 3 Pet. 210; 13 *id.* 26; 2 Ala. N. s. 251; 10 Yerg. Tenn. 206; 1 A. K. Marsh. Ky. 235; 2 Paige, Ch. N. Y. 390; 1 Dev. & B. Eq. No. C. 318; 6 Munf. Va. 210; 5 How. Miss. 253; 2 Mo. 126; 34 Ala. N. s. 596; 6 Wisc. 295; 3 Ind. 331; 9 *id.* 172, 526; hardship and unfairness, 17 Vt. 542; 2 Root, Conn. 216; 2 Green, Ch. N. J. 357; 2 Harr. & J. Md. 285; 3 Yerg. Tenn. 537; 8 Ohio, 214; 31 Vt. 101; undue influence, 2 Mas. C. C. 378; see 2 Head, Tenn. 285, are among the causes for a rescission of contracts in equity.

RESCISSORY ACTIONS. In Scotch Law. Actions which are brought to set aside deeds. Patterson, Comp. 1058, n.

Proper improbation is an action brought for declaring writing false or forged.

Reduction-improbation is an action whereby a person who may be hurt or affected by a writing insists for producing or exhibiting it in court, in order to have it set aside, or its effects ascertained under the certification that the writing, if not produced, shall be declared false and forged.

In an action of *simple reduction* the certification is only temporary, declaring the writings called for null until they be produced; so that they recover their full force after their production. Erskine, b. 4, tit. 1, § 5, b. 4, tit. 1, § 8.

RESCOUS. An old term, synonymous with *rescue*, which see.

RESCRIPT. In Canon Law. A term including any form of apostolical letter emanating from the pope. The answer of the pope in writing. Dict. Droit Can.

In Civil Law. The answer of the prince, at the request of the parties, respecting some matter in dispute between them, or to magistrates, in relation to some doubtful matter submitted to him.

The rescript was differently denominated according to the character of those who sought it. They were called *annotations* or *subnotations*, when the answer was given at the request of private citizens; *letters* or *epistles*, when he answered the consultation of magistrates; *pragmatic sanctions*, when he answered a corporation, the citizens of a province, or a municipality. See Code.

At Common Law. A counterpart.

In Massachusetts it is used to denote the statement of the decision of the supreme judicial court as an appellate tribunal, and the accompanying brief statement of the reasons for the decision sent to the court from which the case was brought.

RESCRIPTION. In French Law. A rescription is a letter by which the maker requests some one to pay a certain sum of money, or to account for him to a third person for it. Pothier, Contr. de Change, n. 225.

According to this definition, bills of exchange are a species of rescription. The difference appears to be this,—that a bill of exchange is given when there has been a contract of exchange between the drawer and the payee; whereas the rescription is sometimes given in payment of a debt, and at other times it is lent to the payee.

RESCUE. In Criminal Law. The forcibly and knowingly freeing another from arrest or imprisonment. 4 Blackstone, Comm. 131.

A deliverance of a prisoner from lawful custody by a third person. 2 Bishop, Crim. Law, § 911.

Taking and setting at liberty, against law, a distress taken for rent, services, or damage feasant. Bacon, Abr. *Rescous.*

2. If the rescued prisoner were arrested for felony, then the rescuer is a felon; if for treason, a traitor, 3 P. Will. 468; Croke Car. 583; and if for a trespass, he is liable to a fine as if he had committed the original offence. Hawkins, Pl. Cr. b. 5, c. 21. See 2 Gall. C. C. 313; Russ. & R. Cr. Cas. 432. If the principal be acquitted, the rescuer may nevertheless be fined for the misdemeanor in the obstruction and contempt of public justice. 1 Hale, Pl. Cr. 598. See T. U. P. Charlt. Ga. 13; Hawkins, Pl. Cr. b. 2, c. 21.

In order to render the rescuer criminal, it is necessary he should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he is in the custody of a private person; but if he be under the care of a public officer, then he is to take notice of it at his peril. 1 Hale, Pl. Cr 606. See further, with regard to the law of rescue, 1 Stor. C. C. 88; 2 Gall. C. C. 313; 1 Carr. & M. 299; 1 Ld. Raym. 35, 589.

The rescue of cattle and goods distrained by pound-breach is a common-law offence and indictable. 2 Starkie, Crim. Plead. 617; 7 Carr. & P. 233; 5 Pick. Mass. 714. See 4 Leigh, Va. 675.

In Maritime Law. The retaking by a party captured of a prize made by the enemy. There is still another kind of rescue which partakes of the nature of a recapture: it occurs when the weaker party, before he is overpowered, obtains relief from the arrival

of fresh succors, and is thus preserved from the force of the enemy. 1 C. Rob. Adm. 224, 271; Halleck, Int. Law, cxxxv.

Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize; but the property is restored to the original owners by the right of postliminium.

RESCUSSOR. The party making a rescue is sometimes so called; but more properly he is a rescuer.

RESERVATION. That part of a deed or instrument which reserves a thing not *in esse* at the time of the grant, but newly created. 2 Hilliard, Abr. 359.

The creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, by means of a clause inserted by the grantor in the instrument of conveyance.

A reservation is distinguished from an exception in that it is of a new right or interest: thus, a right of way reserved at the time of conveying an estate, which may have been enjoyed by the grantor as owner of the estate, becomes a new right. 42 Me. 9.

A reservation may be of a life-estate, 28 Vt. 10; 33 N. H. 18; 3 Jones, No. C. 37, 38; 23 Mo. 373; 3 Md. Ch. Dec. 230; of a right of flowage, 41 Me. 298; right to use water, 41 Me. 177; 9 N. Y. 423; 16 Barb. N. Y. 212; right of way, 25 Conn. 331; 6 Cush. Mass. 254; 10 *id.* 313; 10 B. Monr. Ky. 463; and many other rights and interests. 33 N. H. 507; 9 B. Monr. Ky. 163; 5 Penn. St. 317. See 6 Cush. Mass. 162; 4 Penn. St. 173; 9 Johns. N. Y. 73.

RESET OF THEFT. In Scotch Law. The receiving and keeping stolen goods, knowing them to be stolen, with a design of feloniously retaining them from the real owner. Alison, Crim. Law, 328.

RESETTER. In Scotch Law. A receiver of stolen goods, knowing them to have been stolen.

RESIANCE. A man's residence or permanent abode. Such a man is called a resiant. Kitch. 33.

RESIDENCE (Lat. *resedeo*). Personal presence in a fixed and permanent abode. 20 Johns. N. Y. 208; 1 Metc. Mass. 251.

A residence is different from a domicil, although it is a matter of great importance in determining the place of domicil. See 13 Mass. 501; 5 Pick. Mass. 370; 1 Metc. Mass. 251; 2 Gray, Mass. 490; 19 Wend. N. Y. 11; 11 La. 175; 5 Me. 143; DOMICIL. Residence and habitancy are usually synonymous. 2 Gray, Mass. 490; 2 Kent, Comm. 10th ed. 574, n. Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation, but does not include so much as domicil, which requires an intention continued with residence. 19 Me. 293; 2 Kent, Comm. 10th ed. 576.

RESIDENT. One who has his residence in a place.

RESIDENT MINISTER. In International Law. The second or intermediate class between ambassadors and envoys, created by the conference of the five powers at Aix-la-Chapelle, in 1818. They are accredited to the sovereign. 2 Phillimore, Int. Law, 220*. They are said to represent the affairs, and not the person, of the sovereign, and so to be of less dignity. Vattel, b. 4, c. 6, § 73. The fourth class is chargés-d'affaires, accredited to the minister of foreign affairs. 2 Phillimore, Int. Law, 220; Wheaton, Int. Law, pt. 3, c. 1, § 6.

RESIDUARY CLAUSE. The clause in a will by which that part of the property is disposed of which remains after satisfying previous bequests and devises. 4 Kent, Comm. 541*; 2 Williams, Exec. 1014, n. 2.

RESIDUARY DEVISEE. The person to whom the residue of a testator's real estate is devised after satisfying previous devises.

RESIDUARY ESTATE. What remains of testator's estate after deducting the debts and the bequests and devises.

RESIDUARY LEGATEE. He to whom the residuum of the estate is devised or bequeathed by will. Roper, Leg. Index; Powell, Mortg. Index. See LEGACY.

RESIDUE. That which remains of something after taking away a part of it: as, the residue of an estate, which is what has not been particularly devised by will.

A will bequeathing the general residue of personal property passes to the residuary legatee every thing not otherwise effectually disposed of; and it makes no difference whether a legacy falls into the estate by lapse or as void at law, the next of kin is equally excluded. 15 Ves. Ch. 416; 2 Mer. Ch. 392. See 7 Ves. Ch. 391; 1 Brown, Ch. 589; 4 *id.* 55; Roper, Leg. Index; Jarman, Wills.

RESIGNATION (Lat. *resignatio: re*, back, *signo*, to sign). The act of an officer by which he declines his office and renounces the further right to use it. It differs from abdication.

As offices are held at the will of both parties, if the resignation of an officer be not accepted he remains in office. 4 Dev. No. C. 1.

RESIGNATION BOND. In Ecclesiastical Law. A bond given by an incumbent to resign on a certain contingency. It may be conditioned to resign for good and sufficient reason, and therefore lawful: *e.g.* to resign if he take a second benefice, or on request, if patron present his son or kinsman when of age to take the living, etc. Croke Jac. 249, 274. But equity will generally relieve the incumbent. 1 Rolle, Abr. 443.

RESIGNEE. One in favor of whom a resignation is made. 1 Bell, Comm. 125, n.

RESISTANCE (Lat. *re*, back, *sisto*, to stand, to place). The opposition of force to force. See ARREST; ASSAULT; OFFICER; PROCESS.

RESOLUTION (Lat. *re*, back, again, *solvo*, to loose, to free). A solemn judgment or decision of a court. This word is frequently used in this sense in Coke and some

of the more ancient reporters. An agreement to a law or other thing adopted by a legislature or popular assembly. See Dict. de Jurisp.

In Civil Law. The act by which a contract which existed and was good is rendered null.

Resolution differs essentially from rescission. The former presupposes the contract to have been valid, and it is owing to a cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning. Resolution may be by consent of the parties or by the decision of a competent tribunal; rescission must always be by the judgment of a court. 7 Troplong, de la Vente, n. 689; 7 Toullier, 551; Dalloz, Dict.

RESOLUTORY CONDITION. One which has for its object, when accomplished, the revocation of the principal obligation; for example, I will sell you my crop of cotton if my ship America does not arrive in the United States within six months: my ship arrives in one month: my contract with you is revoked. 1 Bouvier, Inst. n. 764.

RESPIRATION (Lat. *re*, back, *spiro*, to breathe). Breathing, which consists of the drawing into, inhaling, or, more technically, *inspiring*, atmospheric air into the lungs, and then forcing out, expelling, or, technically, *expiring*, from the lungs the air therein. Chitty, Med. Jur. 92, 416, note *n*.

RESPITE. In Civil Law. An act by which a debtor who is unable to satisfy his debts at the moment transacts (*i.e.* compromises) with his creditors and obtains from them time or delay for the payment of the sums which he owes to them. La. Code, 3051.

A *forced* respite takes place when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law.

A *voluntary* respite takes place when all the creditors consent to the proposal of the debtor to pay in a limited time the whole or a part of his debt.

A delay, forbearance, or continuation of time.

In Criminal Law. A temporary suspension of the execution of a sentence. It differs from a pardon, which is an absolute suspension. See PARDON.

RESPONDE BOOK. In Scotch Law. A book of record of the chancellary, in which are entered all non-entry and relief duties payable by heirs who take precepts from chancery. Stair, Inst. p. 296, § 28; Erskine, Inst. 11. 5. 50.

RESPONDEAT OUSTER (that he answer over). **In Practice.** A form of judgment anciently used when an issue in law upon a dilatory plea was decided against the party pleading it. See ABATEMENT.

RESPONDENT. The party who makes an answer to a bill or other proceeding in chancery.

In Civil Law. One who answers or is security for another; a fidejussor. Dig. 2. 8. 6.

RESPONDENTIA. In Maritime Law. A loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon.

The contract is called *respondentia* because the money is lent mainly, or most frequently, on the personal responsibility of the borrower. It differs principally from bottomry, which see, in the following circumstances: bottomry is a loan on the ship; respondentia is a loan upon the goods. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship in the one case, and of the goods in the other. In most other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the borrower; in the latter, the lender has, in general, it is said, only the personal security of the borrower. Marsh. Ins. b. 2, c. 1, p. 734.

2. If any part of the goods arrive safely at the end of the voyage, the lender is entitled to have the proceeds applied to the payment of his debt. If the loan is made by the master, and not by the owners of the goods, the necessity for the loan and for the hypothecation of the cargo must be clearly shown, or the owners of the goods, and, consequently, the goods themselves, will not be bound. The ship and freight are always to be first resorted to to raise money for the necessity of the ship or the prosecution of the voyage; and it seems that a bond upon the cargo is considered by implication of law a bond upon the ship and freight also, and that unless the ship be liable in law the cargo cannot be held liable. The Constancia, 4 Notes of Cases, 285, 512, 518, 677; 10 Jur. 845; 2 W. Rob. Adm. 83-85; 14 Jur. 96. And see 3 Mas. C. C. 255.

3. If the contract clearly contemplates that the goods on which the loan is made are to be sold or exchanged, free from any lien, in the course of the voyage, the lender will have no lien on them, but must rely wholly on the personal responsibility of the borrower. It has been frequently said by elementary writers, and without qualification, that the lender has no lien, 2 Blackstone, Comm. 458; 3 Kent, Comm. 354; but the form of bond generally in use in this country expressly hypothecates the goods, and thus, even when there is no express hypothecation, if the goods are still on board at the end of the voyage it is not doubtful that a court of admiralty will direct the arrest of the goods and enforce against them the maritime lien or privilege conferred by the respondentia contract. There is, perhaps, no common-law lien, but this maritime lien only; but the latter will be enforced by the proper admiralty process. See the au

thorities cited in note to 1 Abbott, Shipp. 154; 4 Wash. C. C. 662; form of respondentia bonds in Marvin on Wreck & Salvage, Appendix, 332–336; Conkling, Admiralty, 263–265; 1 Parsons, Mar. Law 437, and n. 5. And see, generally, Abbott, Shipping; Parsons, Marit. Law; Phillips, Ins.

RESPONDERE NON DEBET (Lat. ought not to reply). **In Pleading.** The prayer of a plea where the defendant insists that he ought not to answer, as, when he claims a privilege: for example, as being a member of congress or a foreign ambassador. 1 Chitty, Plead. *433.

RESPONSA PRUDENTUM (Lat.). **In Roman Law.** Opinions given by Roman lawyers.

Before the time of Augustus, every lawyer was authorized, *de jure*, to answer questions put to him; and all such answers, *responsa prudentum*, had equal authority, which had not the force of law, but the opinion of a lawyer. Augustus was the first prince who gave to certain distinguished jurisconsults the particular privilege of answering in his name; and from that period their answers required greater authority. Adrian determined in a more precise manner the degree of authority which these answers should have, by enacting that the opinions of such authorized jurisconsults, when unanimously given, should have the force of law (*legis vicem*) and should be followed by the judges, and that when they were divided the judge was allowed to adopt that which to him appeared the most equitable. The opinions of other lawyers held the same place they had before: they were considered merely as the opinions of learned men. Mackeldy, Man. Introd. § 43; Mackeldy, Hist. du Dr. Rom. §§ 40, 49; Hugo, Hist. du Dr. Rom. § 313; Inst. 1. 2. 8; Institutes Expliquées, n. 39.

RESPONSALIS. In Old English Law. One who appeared for another.

In Ecclesiastical Law. A proctor.

RESPONSIBILITY. The obligation to answer for an act done and to repair any injury it may have caused.

One person—as, for example, a principal, master, or parent—is frequently responsible, civilly, for the acts of another.

Penal responsibility is always personal; and no one can be punished for the commission of a crime but the person who has committed it, or his accomplice.

RESPONSIBLE. Able to pay the sum which may be required of him; able to discharge an obligation. Webster, Dict.; 26 N. H. 527.

RESPONSIBLE GOVERNMENT. A term used in England and her colonial possessions to indicate an obligation to resign, on the part of the executive council, upon the declaration of a want of confidence by vote of the legislative branch of the colonial government. Mills, Col. Const. 27.

RESTITUTIO IN INTEGRAM (Lat.). **In Civil Law.** A restoring parties to the condition they were in before entering into a contract or agreement on account of fraud, infancy, force, honest mistake, etc. Calvinus, Lex. The going into a cause anew from the beginning. Calvinus, Lex.

RESTITUTION. In Maritime Law. The placing back or restoring articles which have been lost by jettison: this is done, when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; but when the remainder of the goods is afterwards lost, there is not any restitution. Stevens, Av. pt. 1, c. 1, s. 1, art. 1, n. 8.

In Practice. The return of something to the owner of it or to the person entitled to it.

After property has been taken into execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution; and this is enforced by a writ of restitution. Croke Jac. 698; 4 Mod. 161. When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored. Rolle, Abr. 778; Bacon, Abr. *Execution* (Q); 1 Maule & S. 425.

RESTITUTION OF CONJUGAL RIGHTS. In Ecclesiastical Law. A compulsory renewal of cohabitation between a husband and wife who have been living separately.

A suit may be brought in the divorce and matrimonial court for this purpose whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without sufficient reason, by which the party injured may compel the other to return to cohabitation. 3 Blackstone, Comm. 94; 3 Stephen, Comm. 11; 1 Add. Eccl. 305; 3 Hagg. Eccl. 619.

RESTORE. To return what has been unjustly taken; to place the owner of a thing in the state in which he formerly was.

RESTRAINING. Narrowing down; making less extensive. For example, a restraining statute is one by which the common law is narrowed down or made less extensive in its operation. Restraining powers are the limitations or restrictions upon the use of a power imposed by the donor.

RESTRICTIVE INDORSEMENT. An indorsement which confines the negotiability of a promissory note or bill of exchange by using express words to that effect: as, by indorsing it payable to A B only. 1 Wash. C. C. 512; 2 Murph. No. C. 138; 1 Bouvier, Inst. n. 1138.

RESULTING TRUST. A trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.

All trusts created by implication or construction of law are often included under the general term implied trusts; but these are commonly distinguished into implied or resulting and constructive trusts: *resulting* or *presumptive* trusts being those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; *constructive* trusts, such as are raised independently of any such intention, and which are

...rced on the conscience of the trustee by equitable construction and the operation of law. Story, Eq. Jur. § 1095; Hill, Trust. 91; 1 Spence, Eq. Jur. 510; 2 *id.* 198; 3 Swanst. Ch. 585; 1 Ohio, 321; 6 Conn. 285; 2 Edw. Ch. N. Y. 373; 6 Humphr. Tenn. 93.

2. Where, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. 30 Me. 126; 8 N. H. 187; 15 Vt. 525; 5 Cush. Mass. 435; 10 Paige, Ch. N. Y. 618; 2 Green, Ch. N. J. 480; 4 Watts & S. Penn. 149; 18 Penn. St. 283; 2 Harr. Del. 225; 1 Md. Ch. Dec. 479; 7 Leigh, Va. 566; 1 Dev. & B. Eq. No. C. 119; 4 Des. Eq. So. C. 491; 1 Strobh. Eq. So. C. 103; 2 Ga. 297; 3 Ala. N. s. 302; 6 *id.* 404; 20 Miss. 65, 764; 6 Humphr. Tenn. 93; 4 J. J. Marsh. Ky. 592; 1 Ohio St. 1; 2 Blackf. Ind. 198, 444; 5 Ill. 35; 10 *id.* 534; 14 Mo. 580; 9 Ark. 519; 2 Tex. 139; 1 Iowa, 566; 3 Mas. C. C. 362; 2 Wash. C. C. 441.

The fact that a conveyance is voluntary, especially when accompanied by other circumstances indicative of such an intention, it is said, may raise a resulting trust. See 2 Vern. Ch. 473; 3 Swanst. Ch. 593; Ambl. 265; 1 Curt. C. C. 230; 23 Penn. St. 243; 29 Me. 410; 1 Johns. Ch. N. Y. 240; 1 Dev. Eq. No. C. 456; 14 B. Monr. Ky. 585.

Where a voluntary, 1 Atk. Ch. 188, disposition of property by deed, 1 Dev. Eq. No. C. 493, or will is made to a person as trustee, and the trust is not declared at all, 10 Ves. Ch. 527; 19 *id.* 359; 3 Sim. Ch. 538; 14 *id.* 8; 16 *id.* 124; 6 Hare, Ch. 148, or is ineffectually declared, 10 Ves. Ch. 527; 17 Jur. 798; 19 *id.* 273; 1 Mylne & K. 298; 1 Mylne & C. 286; 13 Sim. Ch. 496; 2 Dev. Eq. No. C. 255, or does not extend to the whole interest given to the trustee, 2 Powell, Dev. Jarm. ed. 32; 8 Pet. 326; 14 B. Monr. Ky. 585; 2 Smale & G. 247; 3 Hou. L. Cas. 492; 2 Vern. Ch. 644, or it fails either wholly or in part by lapse or otherwise, 1 Roper, Leg. 627; 5 Harr. & J. Md. 392; 6 *id.* 1; 5 Paige, Ch. N. Y. 318; 6 Ired. Eq. No. C. 137; 7 B. Monr. Ky. 481; 15 Penn. St. 500; 10 Hare, Ch. 204, the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate.

The property may be personal or real. 8 Humphr. Tenn. 447; 1 Ohio St. 10; 26 Miss. 615; 2 Beav. Rolls, 454; 10 Ves. Ch. 365; 17 *id.* 253; 2 Washburn, Real Prop. 171.

Consult Story, Eq. Jur. § 1195 *et seq.*; 1 Spence, Eq. Jur. 510; Adams, Eq. Jur.; Hill, Lewin, Sanders, on Trusts; 2 Washburn, Real Prop. 171 *et seq.*

RESULTING USE. A use raised by equity for the benefit of a feoffor who has made a voluntary conveyance to uses without any declaration of the use. 2 Washburn, Real Prop. 100.

The doctrine, at first limited to the case of an apparently voluntary conveyance with no express declaration, became so extended that a conveyance of the legal estate ceased to imply an intention that the feoffee should enjoy the beneficial interest therein; and if no intent to the contrary was expressed, and no consideration proved or implied, the use always resulted to the feoffor. 2 Washburn, Real Prop. 100. And if part only of the use was expressed, the balance resulted to the feoffor. 2 Atk. Ch. 150; 2 Rolle, Abr. 781; 1 Spence, Eq. Jur. 451; Coke, Litt. 23 *a.* And, under the statute, where a use has been limited by deed and expires, or cannot vest, it results back to the one who declared it. 4 Wend. N. Y. 494; 15 Me. 414; 5 Watts & S. Penn. 323; 3 Johns. N. Y. 388. And see Croke Jac. 200; Tudor, Lead. Cas. 258; 2 Washburn, Real Prop. 132 *et seq.*

RETAIL. To sell by small parcels, and not in the gross. 5 Mart. La. N. s. 279.

RETAILER OF MERCHANDISE. One who deals in merchandise by selling it in smaller quantities than he buys,—generally with a view to profit.

RETAIN. **In Practice.** To engage the services of an attorney or counsellor to manage a cause. See RETAINER.

RETAINER. The act of withholding what one has in one's own hands, by virtue of some right. See ADMINISTRATOR; EXECUTOR; LIEN.

In Practice. The act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.

The retaining fee.

In English practice a much more formal retainer is usually required than in American. Thus it is said by Chitty, 3 Pract. 116, note m, that, although it is not indispensable that the retainer should be in writing, unless required by the other side, it is very expedient. It is therefore recommended, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by contrivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and the others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer should also state whether it be given for a general or a qualified authority. See 9 Wheat. 738, 830; 6 Johns. N. Y. 34, 296; 11 *id.* 464; 1 N. H. 23; 28 *id.* 302; 7 Harr. & J. Md. 275; 27 Miss. 567.

2. The effect of a retainer to prosecute or defend a suit is to confer on the attorney all the powers exercised by the forms and usages of the courts in which the suit is pending. 2 M'Cord, Ch. So. C. 409; 13 Metc. Mass. 269. He may receive payment, 13 Mass. 320; 4 Conn. 517; 1 Me. 257; 39 *id.* 386; 1 Wash. C. C. 10; 8 Pet. 18; may bring a second suit after being nonsuited in the first for want of formal proof, 12 Johns. N. Y. 315; may

sue a writ of error on the judgment, 16 Mass. 74; may discontinue the suit, 6 Cow. N. Y. 385; may restore an action after a *nol. pros.*, 1 Binn. Penn. 469; may claim an appeal, and bind his client in his name for the prosecution of it, 1 Pick. Mass. 462; may submit the suit to arbitration, 1 Dall. Penn. 164; 16 Mass. 396; 8 Rich. So. C. 468; 6 McLean, C. C. 190; 7 Cranch, 436; may sue out an alias execution, 2 N. H. 376; see 9 Metc. Mass. 423; may receive livery of seisin of land taken by an extent, 13 Mass. 363; may waive objections to evidence, and enter into stipulation for the admission of facts or conduct of the trial, 2 N. H. 520, and for release of bail, 1 Murph. No. C. 146; may waive the right of appeal, review, notice, and the like, and confess judgment. 5 N. H. 393; 4 T. B. Monr. Ky. 377; 5 Pet. 99. But he has no authority to execute a discharge of a debtor but upon the actual payment of the full amount of the debt. 8 Dowl. 656; 8 Johns. N. Y. 361; 10 *id.* 220; 10 Vt. 471; 32 Me. 110; 36 *id.* 496; 21 Conn. 245; 3 Md. Ch. Dec. 392; 14 Penn. St. 87; 13 Ark. 644; 1 Pick. Mass. 347, and that in money only, 16 Ill. 272; 1 Iowa, 360; see 6 Barb. N. Y. 201; nor to release sureties, 3 J. J. Marsh, Ky. 532; 4 McLean, C. C. 87; nor to enter a *retraxit*, 3 Blackf. Ind. 137; nor to act for the legal representatives of his deceased client, 2 Penn. N. J. 689; nor to release a witness. 2 Greenleaf, Ev. § 141; 6 Barb. N. Y. 392. See 13 Metc. Mass. 413; 29 N. H. 170; 13 N. Y. 377; 36 Me. 339; 3 Ohio St. 528; 12 Mo. 76; 25 Penn. St. 264.

3. There is an implied contract on the part of an attorney who has been retained, that he will use due diligence in the course of legal proceedings; but it is not an undertaking to recover a judgment. Wright, Ohio, 446. See 3 Campb. 17; 7 Carr. & P. 289; 2 Bingh. No. C. 625; 16 Serg. & R. Penn. 368; 2 Cush. Mass. 316. An attorney is bound to act with the most scrupulous honor; he ought to disclose to his client if he has any adverse retainer which may affect his judgment or his client's interest; but the concealment of the fact does not necessarily imply fraud. 3 Mas. C. C. 305; 2 Greenleaf, Ev. § 139.

RETAINING FEE. A fee given to counsel on being consulted, in order to insure his future services.

RETAKING. The taking one's goods, wife, child, etc. from another, who without right has taken possession thereof. See RECAPTION; RESCUE.

RETALIATION. The act by which a nation or individual treats another in the same manner that the latter has treated them. For example, if a nation should lay a very heavy tariff on American goods, the United States would be justified in return in laying heavy duties on the manufactures and productions of such country. Vattel, Dr. des Gens, liv. 2, c. 18, § 341.

RETENTION. In Scotch Law. The right which the possessor of a movable has of holding the same until he shall be satisfied for his claim either against such movable or the owner of it; a lien.

General retention is the right to withhold or detain the property of another, in respect of any debt which happens to be due by the proprietor to the person who has the custody, or for a general balance of accounts arising on a particular train of employment. 2 Bell, Comm. 5th ed. 90, 91.

Special retention is the right of withholding or retaining property or goods which are in one's possession under a contract, till indemnified for the labor or money expended on them.

RETORNA BREVIUM. In Old English Law. The return of writs by sheriffs and bailiffs, which is only a certificate delivered to the court on the day of return, of that which he hath done touching the execution of their writ directed to him: this must be indorsed on back of writ by officer. 2 Lilly, Abr. 476. Each term has return-days, fixed, as early as 51 Hen. III., at intervals of about a week, on which all original writs are returnable. The first return-day is regularly the first day in the term; but there are three days' grace. 2 Sharswood, Blackst. Comm 277.

RETORNO HABENDO. In Practice. A writ issued to compel a party to return property to the party to whom it has been adjudged to belong, in an action of replevin.

Thus, where the property taken was cattle, it recites that the defendant was summoned to appear to answer the plaintiff in a plea whereof he took the cattle of the said plaintiff, specifying them, and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc. 2 Sellon, Pract. 168.

RETORSION. The name of the act employed by a government to impose the same hard treatment on the citizens or subjects of a state that the latter has used towards the citizens or subjects of the former, for the purpose of obtaining the removal of obnoxious measures. Vattel, liv. 2, c. 18, § 341; De Martens, Précis, liv. 8, c. 2, § 254; Klüber, Droit des Gens, s. 2, c. 1, § 234; Mann. Comm. 105.

The act by which an individual returns to his adversary evil for evil: as, if Peter call Paul thief, and Paul says, You are a greater thief.

RETRACT (Lat. *re*, back, *traho*, to draw). To withdraw a proposition or offer before it has been accepted.

2. This the party making it has a right to do as long as it has not been accepted; for no principle of law or equity can, under these circumstances, require him to persevere in it. See OFFER.

3. After pleading guilty, a defendant will, in certain cases where he has entered that plea by mistake or in consequence of some error, be allowed to retract it. But where a prisoner pleaded guilty to a charge of larceny, and sentence has been passed upon him, he will not be allowed to retract his plea and plead not guilty. 9 Carr. & P. 346; Dig. 12. 4. 5.

RETRAXIT (Lat. he withdraws). **In Practice.** The act by which a plaintiff withdraws his suit. It is so called from the fact that this was the principal word used when the law entries were in Latin.

A retraxit differs from a nonsuit,—the former being the act of the plaintiff himself, for it cannot even be entered by attorney, 8 Coke, 58; 3 Salk. 245; 8 Penn. St. 157, 163, and it must be after declaration filed, 3 Leon. 47; 8 Penn. St. 163; while the latter occurs in consequence of the neglect merely of the plaintiff. A retraxit also differs from a *nolle prosequi*. The effect of a *retraxit* is a bar to all actions of a like or a similar nature, Bacon, Abr. *Nonsuit* (A); a *nolle prosequi* is not a bar even in a criminal prosecution. 2 Mass. 172. See 2 Sellon, Pract. 338; Bacon, Abr. *Nonsuit*; Comyns, Dig. *Pleader* (X 2).

RETRIBUTION. That which is given to another to recompense him for what has been received from him: as, a rent for the hire of a house.

A salary paid to a person for his services.

The distribution of rewards and punishments.

RETROCESSION. In Civil Law. When the assignee of heritable rights conveys his rights back to the cedent, it is called a retrocession. Erskine, Inst. 3. 5. 1; Dict. de Jur.

RETROSPECTIVE (Lat. *retro*, back, *spectare*, to look). Looking backward. Having reference to a state of things existing before the act in question.

2. This word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts; and they are therefore called *retrospective laws*. These laws are generally unjust, and are to a certain extent forbidden by that article in the constitution of the United States which prohibits the passage of *ex post facto* laws or laws impairing contracts. See Ex Post Facto Law.

3. The right to pass retrospective laws, with the exceptions above mentioned, exists in the several states, according to their own constitutions, and they become obligatory if not prohibited by the latter. 4 Serg. & R. Penn. 364; 3 Dall. Penn. 396; 1 Bay, So. C. 179; 7 Johns. N. Y. 477. See 3 Serg. & R. Penn. 169; 2 Cranch, 272; 2 Pet. 414; 8 *id.* 110; 11 *id.* 420; 1 Baldw. C. C. 74; 5 Penn. St. 149.

4. An instance may be found in the laws of Connecticut. In 1795, the legislature passed a resolve setting aside a decree of a court of probate disapproving of a will, and granted a new hearing: it was held that the resolve, not being against any constitutional principle in that state, was valid. 3 Dall. 386. And in Pennsylvania a judgment was opened by the act of April 1, 1837, which was holden by the supreme court to be constitutional. 2 Watts & S. Penn. 271.

5. Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention. 12 La. 352. See Barrington, Stat. 466, n.; 7 Johns. N. Y. 477; 1 Kent, Comm. 455; Taylor, Civil Law, 168; Code, 1. 14. 7; Bracton, l. 4, f. 228; Story, Const. § 1393; 1 McLean, C. C. 40; 1 Meigs, Tenn. 437; 3 Dall. Penn. 391; 1 Blackf. Ind. 193; 2 Gall. C. C. 139; 1 Yerg. Tenn. 360; 5 *id.* 320; 12 Serg. & R. Penn. 330.

RETURN. Persons who are beyond the sea are exempted from the operation of the statute of limitations of Pennsylvania, and of other states, till after a certain time has elapsed after their *returning*. As to what shall be considered a return, see 14 Mass. 203; 17 *id.* 180; 1 Gall. C. C. 342; 3 Johns. N. Y. 263; 3 Wils. 145; 2 W. Blackst. 723; 3 Litt. Ky. 48; 1 Harr. & J. Md. 89, 350.

RETURN-DAY. A day appointed by law when all writs are to be returned which have issued since the preceding return-day. The sheriff is, in general, not required to return his writ until the return-day. After that period he may be ruled to make a return.

RETURN OF PREMIUM. In Insurance. A repayment of a part or the whole of the premium paid. Policies of insurance, especially those on marine risks, not unfrequently contain stipulations for a return of the whole or a part of the premium in certain contingencies, 2 Phillips, Ins. xxii. sect. xi.; but in the absence of any such stipulation, in a case free of fraud on the part of the assured, if the risk does not commence to run he is entitled to a return of it, if paid, or an exoneration from his liability to pay it, subject to deduction settled by stipulation or usage; and so, *pro rata*, if only a part of the insured subject is put at risk, 2 Phillips, Ins. ch. xxii. sect. i.; and so an abatement of the excess of marine interest over the legal rate is made in hypothecation of ship or cargo in like case. *Id. ibid.* sect. vii.; Boulay-Paty, Droit Com. tit. 9, s. 13, tom. 3, p. 63, ed. of 1822; Pothier, Cont. à la Grosse n. 39.

RETURN OF WRITS. In Practice. A short account, in writing, made by the sheriff, or other ministerial officer, of the manner in which he has executed a writ. Stephen, Pl. 24.

It is the duty of such officer to return all writs on the return-day: on his neglecting to do so, a rule may be obtained on him to return the writ, and if he do not obey the rule he may be attached for contempt. See 19 Viner, Abr. 171; Comyns, Dig. *Return*; 2 Lilly, Abr. 476; Wood. Inst. b. 1, c. 7; 1 Penn. 497; 1 Rawle, Penn. 520; 3 Yeates, Penn. 17, 47.

REUS (Lat.). **In Civil Law.** A party to a suit, whether plaintiff or defendant. *Reus est qui cum altero litem contestatem habet, sive id egit, sive cum eo actum est.*

A party to a contract. *Reus credendi* is he to whom something is due, by whatever title it may be; *reus debendi* is he who owes, for whatever cause. Pothier, Pand. lib. 50.

REVELAND. In Domesday Book we find land put down as thane-lands, which were afterwards converted into revelands, *i.e.* such lands as, having reverted to the king upon death of his thane, who had it for life, were not since granted out to any by the king, but vested in charge upon account of the reve or bailiff of the manor. Spelman, Feuds, c. 24. Coke was mistaken in thinking it was land held in socage.

REVENDICATION. In Civil Law. An action by which a man demands a thing of which he claims to be owner. It applies to immovables as well as movables, to corporeal or incorporeal things. Merlin, Répert.

2. By the civil law, he who has sold goods for cash or on credit may demand them back from the purchaser if the purchase-money is not paid according to contract. The action of *revendication* is used for this purpose. See an attempt to introduce the principle of revendication into our law, in 2 Hall, Law Journ. 181.

3. Revendication, in another sense, corresponds very nearly to the *stoppage in transitu* of the common law. It is used in that sense in the Code de Commerce, art. 577. Revendication, says that article, can take place only when the goods sold are on the way to their place of destination, whether by land or water, and before they have been received into the warehouse of the insolvent (failli) or that of his factor or agent authorized to sell them on account of the insolvent. See Dig. 14. 4. 15; 18. 1. 19. 53; 19. 1. 11.

REVENUE. The income of the government arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const. § 877. By revenue is also understood the income of private individuals and corporations.

REVERSAL. In International Law. A declaration by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that may happen to cause a deviation therefrom: as, for example, when the French court consented for the first time, in 1745, to grant to Elizabeth, the czarina of Russia, the title of empress, it exacted as a *reversal* a declaration purporting that the assumption of the title of an imperial government by Russia should not derogate from the rank which France had held towards her.

Letters by which a sovereign declares that by a particular act of his he does not mean to prejudice a third power. Of this we have an example in history: formerly the emperor of Germany, whose coronation, according to the golden ball, ought to have been solemnized at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, reversals, by which he declared that such coronation took place without prejudice to its rights, and without drawing any consequences therefrom for the future.

In Practice. The decision of a superior court by which the judgment, sentence, or decree of the inferior court is annulled.

After a judgment, sentence, or decree has been rendered by the court below, a writ of error may be issued from the superior to the inferior tribunal, when the record and all proceedings are sent to the supreme court on the return to the writ of error. When, on the examination of the record, the superior court gives a judgment different from the inferior court, they are said to reverse the proceeding. As to the effect of a reversal, see 9 Carr. & P. 513.

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. The return of land to the grantor and his heirs after the grant is over. Coke, Litt. 142 *b*.

The reversion arises by operation of law, and not by deed or will, and it is a vested interest or estate; and in this it differs from a remainder, which can never be limited unless by either deed or devise. 2 Blackstone, Comm. 175; Cruise, Dig. tit. 17; Plowd. 151; 4 Kent, Comm. 349; 19 Viner, Abr. 217. A reversion is said to be an incorporeal hereditament. See 4 Kent, Comm. 354; 1 Washburn, Real Prop. 37, 47, 63; 2 Bouvier, Inst. n. 1850; REMAINDER; LIMITATION.

REVERSIONARY INTEREST. The interest which one has in the reversion of lands or other property. The residue which remains to one who has carved out of his estate a lesser estate. See REVERSION. An interest in the land when possession shall fail. Cowel.

REVERSOR. In Scotch Law. A debtor who makes a wadset, and to whom the right of reversion is granted. Erskine, Inst. 2. 8. 1. A reversioner. Jacob, Law Dict.

REVERTER. Reversion. A possibility of reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate. See 1 Washburn, Real Prop. 63.

REVIEW. In Practice. A second examination of a matter. For example, by the laws of Pennsylvania, the courts having jurisdiction of the subject may grant an order for a view of a proposed road; the reviewers make a report, which, when confirmed by the court, would authorize the laying out of the same. After this, by statutory provision, the

parties may apply for a review or second examination, and the last viewers may make a different report. For the practice of reviews in chancery, see BILL OF REVIEW.

REVISING BARRISTERS. In English Law. Barristers appointed to revise the list of voters for county and borough members of parliament, and who hold courts for that purpose throughout the country, being appointed in July or August. 6 Vict. c. 18; 3 Chitty, Stat.

REVIVAL. Of Contracts. An agreement to renew the legal obligation of a just debt after it has been barred by the act of limitation or lapse of time is called its revival.

In Practice. The act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force.

When a judgment is more than a day and a year old, no execution can issue upon it at common law; but till it has been paid, or the presumption arises from lapse of time that it has been satisfied, it may be revived and have all its original force, which was merely suspended. This may be done by a *scire facias* or an action of debt on the judgment. See SCIRE FACIAS.

REVIVOR. In Equity Practice. A bill used to renew an original bill which, for some reason, has become inoperative. See BILL OF REVIVOR.

REVOCATION (Lat. *re*, back, *voco*, to call). The recall of a power or authority conferred, or the vacating of an instrument previously made.

2. *Revocation of grants.* Grants may be revoked by virtue of a power expressly reserved in the deed, or where the grant is without consideration or in the nature of a testamentary disposition. 3 Coke, 25.

Voluntary conveyances, being without pecuniary or other legal consideration, may be superseded or revoked, in effect, by a subsequent conveyance of the same subject-matter to another for valuable consideration. And it will make no difference that the first conveyance was meritorious, being a voluntary settlement for the support of one's self or family, and made when the grantor was not indebted, or had ample means besides for the payment of his debts. And the English cases hold that knowledge of the former deed will not affect the rights of the subsequent purchaser. 9 East, 59; 4 Bos. & P. 332; 8 Term, 528; 2 Taunt. 69; 18 Ves. Ch. 84. See, also, the exhaustive review of the American cases, in note to Sexton *vs.* Wheaton, 1 Am. Lead. Cas. 36–47.

3. In America, it is generally held that a voluntary conveyance which is also fraudulent is void as to subsequent *bonâ fide* purchasers for value with notice; but if not fraudulent in fact, it is only void as to those purchasing without notice. 14 Mass. 137; 18 Pick. Mass. 131; 20 *id.* 247; 2 B. Monr. Ky. 345; 8 *id.* 11; 1 A. K. Marsh. Ky. 126, 210; 10 Ala. N. S. 348, 352; 12 Johns. N. Y. 536, 557; 4 M'Cord, So. C. 295, 308. See FRAUDULENT CONVEYANCE.

The fact that the voluntary grantor subsequently conveys to another, is regarded as *primâ facie* evidence that the former deed was fraudulent as to subsequent purchasers without notice, or it would not have been revoked. 5 Pet. 265, 281; 4 M'Cord, So. C. 295, 308; 3 Strobh. So. C. 59, 63; 1 Rob. Va. 500, 544.

In some of the states, notice of the voluntary deed will defeat the subsequent purchaser. 1 Rawle, Penn. 231; 5 Watts, Penn. 378; 6 Md. 242; 4 M'Cord, So. C. 295, 310; 2 M'Mull. So. C. 508; 1 Bail. So. C. 575, 580; 15 Ala. 525, 530; 5 Pet. 265, 281. But in other states the English rule prevails. 1 Yerg. Tenn. 13–15; 5 *id.* 250; 1 A. K. Marsh. Ky. 208, 210; 1 Dan. Ky. 531; 3 Ired. Eq. No. C. 81; 8 Ired. No. C. 340.

There is a distinction between the creditors of the grantor by way of family settlement (he being not insolvent or in embarrassed circumstances), and a subsequent purchaser for value. The claim of the latter is regarded as superior to a mere creditor's, whether prior or subsequent to the voluntary conveyance, —especially if he buy without notice. Some of the foregoing cases do not advert to this distinction. 3 Ired. Eq. No. C. 81; 4 Vt. 389, 395.

4. So, too, if one bail money or other valuable to another, to be delivered to a third person on the day of marriage, he may countermand it at any time before delivery over. 1 Dy. 49. But if such delivery be made in payment or security of a debt, or for other valuable consideration, it is not revocable. 1 Strange, 165. And although the gift be not made known to the donee, being for his benefit, his assent will be presumed until he expressly dissent. 3 Coke, 26 *b*; 2 Salk. 618.

Powers of appointment to uses are revocable if so expressed in the deed of settlement. But it is not indispensable, it is said, that this power of revocation should be repeated in each successive deed of appointment, provided it exist in the original deed creating the settlement. 4 Kent, Comm. 336; 1 Coke, 110 *b*; 1 Chanc. Cas. 201; 2 *id.* 46; 2 Blackstone, Comm. 339, and notes.

It has been said that the power of revocation does not include the appointment of new uses. 1 Sid. 343; 2 Freem. 61; Prec. in Chanc. 474.

5. THE REVOCATION OF POWERS CONFERRED UPON AGENTS. *Naked powers*, not coupled with an interest, may always be revoked by the express act of the constituent, whenever he so elects, he being bound by all the acts of the agent until notice of the revocation. Until notice of revocation, the agent is entitled to compensation and indemnity for all acts done and all liabilities incurred. The act of revocation is merely provisional and contingent until notice is communicated to

the agent. 1 Parsons, Contr. 58, and notes; 6 Ired. No. C. 231.

As to third persons who deal with the agent before notice of the revocation of his powers, they are not affected by it. 1 Strange, 506; 5 Term, 211-214; 12 Q. B. 460; 4 Campb. 215; 12 Mod. 346; 4 Munf. Va. 130; 5 Binn. Penn. 305; 5 Dan. Ky. 513; 17 Mo. 204; 11 N. H. 397; 2 Kent, Comm. 644, and cases cited; 11 Ad. & E. 589, 592.

6. But as to strangers who have never dealt with the agent before the revocation of his powers, if the principal give public notice of the revocation in such manner as to render the fact generally known in the vicinity, it will protect him. 1 Parsons, Contr. 59, 60; *Hare*, J., in U. States *vs.* Jarvis, Dav. Dist. Ct. 287. But where the power was conferred in writing, which the agent retained and exhibited as the evidence of his authority, so that strangers were fairly justified in believing in its continuance, having no adequate means of knowledge of its revocation, the acts of the agent will bind the principal. 11 N. H. 397. It is a question of fact whether, under all the circumstances, the party was fairly justified in supposing the authority still continued. 12 Q. B. 460.

Unless the power provides a specific mode of revocation (in which it must be strictly followed), its authority may be revoked in any form which the constituent may adopt. 8 Ired. No. C. 74; 6 Pick. Mass. 198; Story, Ag. 474. See, *post*, REVOCATION OF POWERS OF ARBITRATORS.

7. The authority of an agent may be revoked by the incapacity either of the principal or agent, by *death*.

In the case of a naked authority, the death of the principal terminates the authority of the agent *ipso facto*, and without notice either to the agent or those with whom he deals. The civil law held that acts done *bonâ fide* in the discharge of the agent's duty before knowledge of the death of the principal, and which enured to the benefit of the principal's estate, were binding upon his personal representatives. Courts of equity have sometimes enforced a similar rule; but the strict legal rule of the common law is as first stated. Willes, 103; 10 Mees. & W. Exch. 1; Story, Ag. § 488; 4 Pet. 333, 334; 1 Humphr. Tenn. 294; 12 N. H. 146; 4 Metc. Mass. 333; 11 Leigh, Va. 137. But where the agent has entered upon the business or incurred expenses, he is entitled to compensation. 33 Eng. L. & Eq. 229; Dav. Dist. Ct. 287; Bacon, Abr. *Authority* (E). So, also, if he have incurred liabilities he is entitled to indemnity. Chitty, Contr. 225, and n. (o), Perkins ed. 1860.

8. So, also, in regard to powers coupled with an interest which are not revocable by the act of the principal during his life, they are nevertheless annulled by his death, so far as any act in his name is concerned. 4 Campb. 272; Willes, 105; 5 Esp. 117; 6 East, 356; 8 Wheat. 174; 2 Kent, Comm. 646; 2 Me. 14; Willes, 563; Prec. in Chanc. 125.

So, too, a joint authority to two persons terminates by the death of one of them. 2 Kent, Comm. 645; 15 East, 592. A warrant of attorney to confess judgment by two is vacated by the death of one of the constituents; but such warrant given to two being merely ministerial may be executed in the name of the survivor. 7 Taunt. 453.

The agent's authority terminates by the bankruptcy either of the principal or the agent. 2 Kent, Comm. 644, and notes; 4 Taunt. 544; 16 East, 382; 5 Barnew. & Ald. 27. But where the agent has a lien it may be enforced in the name of the assignee. Story, Bailm. § 211; Story, Ag. § 486.

9. *Insanity* either of the principal or agent terminates the agency. 2 Kent, Comm. 645, and cases cited in note. But as to third persons ignorant of the fact of insanity, and whose contract with the agent is fair and just, it will still be valid. 10 N. H. 156. But a commission of lunacy is constructive notice to all. 2 Kent, Comm. 645. And the inquisition forming the basis of the commission is allowed to antedate the finding of incapacity, in which case it would have no other effect, probably, than to throw the burden of proof on the other party. If the power confer an interest upon the agent which can be enforced in his name, insanity will not operate as a revocation.

The marriage of a *feme sole* will terminate her power either as principal or agent. 1 Rolle, Abr. 331, *Authority* (E Pl. 4); W. Jones, 388; 5 East, 266; 2 Kent, Comm. 645; 11 Vt. 525.

An authority limited by time expires of necessity with the period fixed. So will the authority cease with the accomplishment of the business, or the death of the agent, or the destruction of the subject-matter, or its essential change, or the loss of the principal's interest in it, or of the agent's disinterestedness in regard to it, or of his capacity fairly to discharge the duties of the agency. Chitty, Contr. 224, and notes, Perkins ed. 1860.

10. *Powers coupled with an interest* are, in general, not revocable. Being conferred upon consideration, a power is no more revocable than any other contract. 1 Parsons, Contr. 61, and notes; Chitty, Contr. 224, and notes, Perkins ed. 1860; 7 Ves. Ch. 3, 28.

Whenever the power confers an interest in the subject-matter, and not in the results only, and constitutes an essential part of a security upon the faith of which money or other thing has been advanced or liability incurred, it is not revocable even by the death of the principal, but may be thereafter executed, where it can be done, without the use of the name of the principal. 1 Caines, Cas. N. Y. 1; 3 Barnew. & C. 842, 851; 2 Esp. Cas. 565; 4 Campb. 272; 17 Mass. 234.

11. The American courts, following the case of Brown *vs.* McGraw, 14 Pet. 479, hold that the consignee of goods for sale, who has incurred liability or made advances upon the faith of the consignment, acquires

a power of sale which, to the extent of his interest, is not revocable or subject to the control of the consignor. But if orders are given by the consignor, contemporaneously with the consignment and advances, in regard to the time and mode of sale, and which are, either expressly or impliedly, assented to by the consignee, he is not at liberty to depart from them afterwards. But if no instructions are given at the time of the consignment and advances, the legal presumption is that the consignee has the ordinary right of factors to sell, according to the usages of trade and the general duty of factors, in the exercise of a sound discretion, and reimburse the advances out of the proceeds, and that this right is not subject to the interference or control of the consignor.

12. The case of Parker *vs.* Brancker, 22 Pick. Mass. 40, 46, seems to go to the length of holding that where the consignment is to sell at a limited price the consignee may after notice sell below that price, if necessary, to reimburse advances. But to this extent the American rule has not gone. 1 Parsons, Contr. 59, n. (h). See, also, 12 N. H. 239; 3 N. Y. 78.

The English courts do not hold such a power irrevocable in law. 3 C. B. 380; 5 *id.* 895. In the last case, *Wilde*, C. J., thus lays down the rule. It may furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor shall have an irrevocable authority to sell in case the principal made default. But it would be an inference of fact, not a conclusion of law. The fact that the agent has incurred expense in faith of the authority being continued, and will suffer loss by its revocation, is a ground of recovery against the principal, but does not render the power irrevocable. 28 Eng. L. & Eq. 321.

13. A pledge of personal property to secure liabilities of the pledgeor, with an express power of sale, confers such an interest in the subject-matter that it will not be revoked by his death. 10 Paige, Ch. N. Y. 205.

But a power to pledge or sell the property of the constituent and from the avails to reimburse advances made or liabilities incurred by the appointee is not so coupled with an interest as to be irrevocable. 8 Wheat. 174; 6 Conn. 559. The interest must exist in the subject-matter of the power, and not merely in the result of its exercise, to become irrevocable. 15 N. H. 468; 20 Ohio St. 185.

Hence, if one give a letter of credit agreeing to accept bills to a certain amount within a limited time, the letter is revoked by death, and bills drawn after the death and before knowledge thereof reaches the drawer cannot be enforced against the estate of such deceased party. 28 Vt. 209.

14. All contracts which are to be executed in the name of the constituent by virtue of an agency, although forming an essential part of a security upon the faith of which advances have been made, are of necessity revoked by the death of the constituent. Even a warrant of attorney to confess judgment, although not revocable by the act of the party, is revoked by his death. The courts, however, allow judgment in such cases to be entered as of a term prior to the death of the constituent. 2 Kent, Comm. 646, 647; 9 Wend. N. Y. 452; 8 Wheat. 174. See, also, 2 Ld. Raym. 766, 849, where the form of procedure is discussed; 7 Mod. 93; Strange, 108; 1 Ventr. 310; 1 Salk. 87; 3 *id.* 116. A warrant of attorney to confess judgment, executed by a *feme sole*, is revoked by her marriage; but if executed to a *feme sole* the courts will allow judgment to be entered up in the name of the husband and wife. 1 Salk. 117; 1 P. A. Browne, Penn. 253; 3 Harr. Del. 411.

15. The Powers of Arbitrators. These are revocable by either party at any time before final award. 20 Vt. 198. It is not competent for the parties to deprive themselves of this power by any form of contract. 8 Coke, 80; 16 Johns. N. Y. 205. But where the submission releases the original cause of action, and the adversary revokes, the party so releasing may recover the amount so released by way of damages caused by the revocation. 13 Vt. 97.

Where the submission is made a rule of court, it becomes practically irrevocable, since such an act would be regarded as a contempt of court and punishable by attachment. 7 East, 608. This is the only mode of making a submission irrevocable "when the fear of an attachment may induce them to submit." 6 Bingh. 443.

16. In the American courts, a submission by rule of court is made irrevocable by the express provisions of the statutes in most of the states, and the referee is required, after due notice, to hear the case *ex parte*, where either party fails to appear. 12 Mass. 47; 1 Conn. 498; 3 Halst. N. J. 116; 4 Me. 459; 1 Binn. Penn. 42; 5 Penn. St. 497; 3 Ired. No. C. 333. In Ohio, a submission under the statute is irrevocable after the arbitrators are sworn, 19 Ohio St. 245; and it has been held that a naked submission is not revocable after the arbitrator has made his award and published it to one of the parties. 6 N. H. 36. But while a statute requisite, as being witnessed, is not complied with, it is incomplete and so the submission revocable. 5 Paige, Ch. N. Y. 575. In New York it is provided by statute that neither party shall be allowed to revoke after the case is heard and finally submitted to the arbitrator. 5 Paige, Ch. N. Y. 575; 11 *id.* 529.

When one party to the submission consists of several persons, one cannot revoke without the concurrence of the others. Caldwell, Arb. 77, 78; 1 Brownl. 62; Rolle, Abr. *Authority* (H); 12 Wend. N. Y. 578. But the text-writers are not fully agreed in this proposition. See Russell, Arb. 147; 2 Chitty, Bail, 452, where it is held that the death of one of several parties on one side of the sub-

mission operates as a revocation as to such party at least, and that an award made in the name of the survivors and the executor of the deceased party is void. It is here intimated by way of query whether, where the cause of action survives, the award might not legally be made in the name of the surviving party.

An award made after the revocation of the submission is entirely void. 1 Sim. Ch. 134.

17. The power of the arbitrator is determined by the occurrence of any fact which incapacitates the party from proceeding with the hearing. The *marriage of a feme sole* is a revocation of the arbitrator's power. 2 Kebl. 865; 11 Vt. 525. So, also, if she be joined with another in the submission, her marriage is a revocation as to both. W. Jones, 338; Rolle, Abr. *Authority*.

Insanity in either party, or in the arbitrator, will determine his authority. The *death of either party*, or of the arbitrator, or one of them, or where the arbitrators decline to act, will operate as a revocation of the submission. Caldwell, Arb. 90; 1 Marsh. 366; 17 Ves. Ch. 241; 4 T. B. Monr. Ky. 3; 3 Swanst. Ch. 90; 1 Barnew. & C. 66.

It is competent to make provision in the submission for the completion of the award notwithstanding the death of one of the parties, by proceedings in the name of the personal representative. This seems to be the general practice in England in late years. 3 Barnew. & C. 144; 3 Bingh. 20; 4 *id.* 143, 435; 6 Bingh. N. C. 158; 8 Mees. & W. Exch. 873. And in some of the American states it is held that a submission by rule of court is not determined by the death of the party, where the cause of action survives, but may be revived and prosecuted in the name of the personal representative. 15 Pick. Mass. 79; 3 Halst. N. J. 116; 3 Gill, Md. 190; 2 Gill & J. Md. 475. *Bankruptcy of the party* does not operate to revoke a submission to arbitration. Caldwell, Arb. 89. But it seems to be considered, in Marsh *vs.* Wood, 9 Barnew. & C. 659, that the bankruptcy of one party will justify the other in revoking. But see 2 Chitt. Bail. 43; 1 C. B. 131.

18. The *time* when the revocation becomes operative. Where it is by the express act of the party, it will be, when notice reaches the arbitrator. Caldwell, Arb. 80; 5 Barnew. & Ald. 507; 8 Coke, 80. But in the case of death, or marriage, or insanity, the act itself terminates the power of the arbitrator at once, and all acts thereafter done by him are of no force. 1 Rolle, Abr. *Authority* (I 4); 11 Vt. 525; 5 East, 266.

The form of the revocation is not important, if it be in conformity with the submission, or if, when it is not, it be acquiesced in by the other party. 7 Vt. 237.

It is said in the books that the revocation must be of as high grade of contract as the submission. This seems to be assumed by the text-writers and judges as a settled proposition. Caldwell, Arb. 79; 8 Coke, 82; Brownl. 62; 8 Johns. N. Y. 125. Where the submission is in writing, the revocation "ought to be in writing." 18 Vt. 91. But see 7 Vt. 237, 240; 15 N. H. 468. It seems questionable whether at this day a submission by deed would require to be revoked by deed, since the revocation is not a contract, but a mere notice, and no special right is conferred upon such an act by the addition of wax or wafer. 8 Ired. 74. But see 26 Me. 251, *contra*. But it is conceded the party may revoke by any act which renders it impracticable for the arbitrators to proceed. 1 Salk. 73; 7 Mod. 8; Story, Ag. 474.

So a revocation imperfectly expressed, as of the bond instead of the submission, will receive a favorable construction, in order to affectuate the intention of the party. 1 Cow. N. Y. 325.

It has been held, too, that bringing a suit upon the same cause of action embraced in the submission, at any time before the award, was an implied revocation. 6 Dan. Ky. 107; Caldwell, Arb. Smith ed. 1860, 80, Am. notes.

19. The Power of a Partner to contract in the name of the firm may be revoked, by injunction out of chancery, where there is a wanton or fraudulent violation of the contract constituting the association. 1 Story, Eq. Jur. § 673, and notes.

This will sometimes be done on account of the impracticability of carrying on the undertaking. 1 Cox, Ch. 213; 2 Ves. & B. Ch. Ir. 299.

So, too, such an injunction may be granted on account of the insanity or permanent incapacity of one of the partners. 1 Story, Eq. Jur. § 673. But insanity is not alone sufficient to produce a dissolution of the partnership. 2 Mylne & K. Ch. 125.

The death of one of the partners is always a dissolution of the partnership, unless there is a provision for the continuance of the business for the benefit of the personal representatives. 2 Kent, Comm. 55–57; 9 Ves. Ch. 500; 3 Madd. Ch. 250; 7 Pet. 586, 594.

An oral license to occupy land is, where the Statute of Frauds prevails, revocable at pleasure, unless permanent and expensive erections have been made by the licensee in faith of the permission. In such case a court of equity will decree a conveyance on equitable terms, in conformity with the contracts of the parties, or else require compensation to be made upon equitable principles. 1 Stockt. Ch. 471; Redfield, Railw. 106, and notes; 13 Vt. 150; 27 *id.* 265; 10 Conn. 375; 5 Day, Conn. 464, 469.

For the law in regard to the revocation of wills, see Wills.

REVOCATUR (Lat. recalled). A term used to denote that a judgment is annulled for an error in fact. The judgment is then said to be recalled, *revocatur;* not *reversed*, which is the word used when a judgment is

annulled for an error in law. Tidd, Pract. 1126.

REVOLT. The endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. 11 Wheat. 417.

2. According to Wolff, revolt and rebellion are nearly synonymous: he says it is the state of citizens who unjustly take up arms against the prince or government. Wolff, Droit de la Nat. § 1232.

By the twelfth section of the act of 30th April, 1790, it was declared that if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship, such person so offending shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

Under this statute, doubts were entertained of the power of the courts to define a crime which had no statutory or common-law definition. 4 Wash. C. C. 528.

3. The act of 1790, above referred to, is substantially superseded by the act of 3d March, 1835, 4 U. S. Stat. at Large, 775, the first section of which declares that "if any one or more of the crew of any American ship or vessel, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully and wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority or command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony, and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. And the offence of making a revolt in a ship, which now is, under and in virtue of the eighth section of the act of congress passed the 30th day of April in the year of our Lord 1790, punishable as a capital offence, shall, from and after the passage of the present act, be no longer punishable as a capital offence, but shall be punished in the manner prescribed in the present act, and not otherwise."

4. The second section of said act declares that if any one or more of the crew of any American ship or vessel on the high seas, or any other waters, within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein, or shall assemble with others in a tumultuous and mutinous manner or make a riot on board thereof, every such person so offending shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

Revolts on shipboard are to be considered as defined by the last-mentioned act. 1 Woodb. & M. C. C. 306. See Brightly, Dig. 210, 211.

A confederacy or combination must be shown. 2 Sumn. C. C. 582; 1 Woodb. & M. C. C. 305; Crabbe, Dist. Ct. 558. The vessel must be properly registered, 3 Sumn. C. C. 342; must be pursuing her regular voyage. 2 Sumn. C. C. 470. The indictment must specifically set forth the acts which constitute the crime. Wharton, Prec. § 1061, n. And see 1 Mas. C. C. 147; 5 *id.* 402, 404; 1 Sumn. C. C. 448; 4 Wash. C. C. 402, 528; 2 Curt. C. C. 225; 1 Pet. C. C. 213.

REWARD. An offer of recompense given by authority of law for the performance of some act for the public good, which, when the act has been performed, is to be paid. The recompense actually so paid.

2. A reward may be offered by the government or by a private person. In criminal prosecutions, a person may be a competent witness although he expects on conviction of the prisoner to receive a reward. 1 Leach, Cr. Cas. 314, n.; 9 Barnew. & C. 556; 1 Leach, 134; 1 Hayw. No. C. 3; 1 Root, Conn. 249; Starkie, Ev. pt. 4, pp. 772, 773; Roscoe, Crim. Ev. 104; 1 Chitty, Crim. Law, 881; Hawkins, Pl. Cr. b. 2, c. 12, ss. 21–38; 4 Blackstone, Comm. 294; Burn, Just. *Felony*, iv. See 6 Humphr. Tenn. 113.

3. By the common law, informers who are entitled under penal statutes to part of the penalty are not, in general, competent witnesses. But when a statute can receive no execution unless a party interested be a witness, then it seems proper to admit him; for the statute must not be rendered ineffectual for want of proof. Gilbert, Ev. 114. In many acts of the legislature there is a provision that the informer shall be a witness notwithstanding the reward. 1 Phillipps, Ev. 92, 99.

RHODE ISLAND. One of the original thirteen states of the United States of America; its full style being, "The State of Rhode Island and Providence Plantations."

2. Its territory lies between Massachusetts and Connecticut, in the south-west angle of that portion of the territory of the former state which was known as the colony of New Plymouth, and is situated at the head and along both shores of the Narragansett bay, comprising the islands in the same, the principal of which is Rhode Island, placed at the mouth of the bay. It contains a population of about one hundred and fifty thousand. The settlement was commenced as early as June, 1636, on the present site of the city of Providence, by five men under Roger Williams. Williams founded his colony upon a compact which bound the settlers to obedience to the major part "only in civil things;" leaving to each perfect freedom in matters of religious concernment, so that he did not, by his religious practices, encroach upon the public order and peace. A portion of the Massachusetts colonists, who were of the Antinomian party, after their defeat in that colony settled on the island of Aquetnet, now Rhode Island, where they associated themselves as a colony on the 7th of March, 1638. These settlements, together with one at Shawomet, now Warwick, made by another sect of religious outcasts, under Gorton, in 1642–3, remained under separate voluntary governments until 1647, when

they were united under one government, styled "The Incorporation of Providence Plantations in the Narragansett Bay in New England," by virtue of a charter granted in 1643.

3. This colony remained under this charter, which, upon some divisions, was confirmed by Cromwell in 1655, until after the restoration, when a new charter was procured from Charles II., in the fifteenth year of his reign, under which a new colonial government was formed on the 24th of November, 1663, which continued, with the short interruption of the colonial administration of Sir Edmund Andros, down to the period of the American revolution. Under both the parliamentary charter which was procured by Williams, the founder of the settlement at Providence, and the royal charter which was procured by John Clark, one of the founders of the settlement at Aquetnet, religious liberty was carefully protected. By the parliamentary charter, the colony was authorized to make only "such *civil* laws and constitution as they or the greatest part of them shall by free consent agree unto;" and the royal charter, reciting "that it is much on the hearts" of the colonists, "if they may be permitted, to hold forth a lively experiment, that a most flourishing civil state may stand and best be maintained, and that amongst our English subjects with full liberty in religious concernments," expressly ordained "that no person within said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person or persons may, from time to time and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences in matters of religious concernments, throughout the tract of land hereafter mentioned, they behaving themselves peaceably and quietly, and not using the liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others; any law, statute, or clause therein contained or to be contained, usage or custom of this realm, to the contrary hereof, in any wise notwithstanding."

4. In the general assembly of the colony, on the first Wednesday of May, 1776, in anticipation of the declaration of independence, an act was passed which absolved the colonists from their allegiance to the king of Great Britain, and which ordered that in future all writs and processes should issue in the charter name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations," instead of the name of the king. The old colonial charter, together with a bill of rights adopted by the general assembly, remained the sole constitution of state government until the first Tuesday in May, 1843, when a state constitution framed by a convention assembled in November, 1842, and adopted by the people of the state, went into operation.

The third article of this constitution distributes the powers of government into the legislative, executive, and judicial.

5. The fourth article regulates the legislative power. It provides that the constitution shall be the supreme law, and the general assembly shall pass laws to carry it into effect; that there shall be a senate and house of representatives, constituting together the general assembly, and that a concurrence of these two houses shall be necessary to the validity of a law; that there shall be one session, to be holden at Newport, commencing the last Tuesday in May, and an adjournment from the same held annually at Providence, Amend. 1854, art. iii.; that members shall not take fees or be of counsel in any case pending before either house, under penalty of expulsion; against arrest of the person and attachment of the property of the members during the session and two days before and after; for freedom of debate; that each house shall judge the qualifications of its members, see Amend. art. i., as to evidence required; what shall be a quorum, and for continuing the session without a quorum; that each house may prescribe rules of proceedings, and punish and expel members; for keeping a journal of its proceedings; for not adjourning, without consent of the other house, for more than two days at a time; that the assembly shall exercise all their usual powers, though not granted by this constitution; for regulating the pay of members and all other officers. It also provides for abolishing lotteries; for restricting the power to create a debt of more than fifty thousand dollars, except in time of war or invasion or insurrection, without the express consent of the people; that the assent of two-thirds of the members of each house shall be required to a bill appropriating public money for local or private purposes; that new valuations of property may be made by order of the assembly for purposes of taxation; that laws may be passed to continue officers in office till their successors are chosen; that no bill to create a corporation other than for religious, charitable, or literary purposes, or for a military or fire company, shall be passed by the assembly to which it is first presented; for joining to elect senators in congress.

6. It is also provided that amendments to the constitution may be proposed to the people by vote of a majority of all the members elected to each house; that these amendments shall be read, at the annual election of members of the houses, by the clerks of the towns and cities: if the propositions are again approved by a majority of the members of both houses then elected, they are to be submitted to the electors, and if approved by three-fifths of those voting they are adopted.

The Legislative Power.

The Senate. The sixth article of the constitution provides that it shall consist of the lieutenant-governor and one senator from each town or city in the state; the governor, and in his absence the lieutenant-governor, shall preside, and may vote only in case of a tie; that the senate may elect a presiding officer in case of the death or disability of the governor and lieutenant-governor; that the secretary of state shall be secretary of the senate, unless otherwise provided by law, and shall preside over the senate in case of death of the presiding officer, till a new one is chosen.

The House of Representatives. The fifth article provides that it shall not exceed seventy-two members, elected on the basis of population, giving each town and city one at least, and one for more than half the ratio, allowing reappointment after each United States census, and forbidding districting any town or city; that the house shall elect its presiding officer, and the senior members from the town of Newport shall preside in the organization.

The Executive Power.

7. The seventh article provides that the chief executive power of the state shall be vested in a governor, who, together with a lieutenant-governor, shall be annually elected by the people; that the governor shall take care that the laws be faithfully executed; that he shall be captain-general and commander-in-chief of the military and naval force of the state, except when they shall be called into the service of the United States; that he shall have power to grant reprieves after conviction, in all cases except those of impeachment, until the end of the next session of the general assembly; that he may fill vacancies in office not otherwise provided for by this constitution, or by law, until the same shall be filled by the general assembly or by

the people; that he may adjourn the houses, in case of disagreement as to time of adjournment, till the time for the next session, or for a shorter period; that he may convene the assembly at a time or place not provided for by law, in case of necessity; that he shall sign all commissions, and that the secretary of state shall attest them; that the lieutenant-governor shall supply the place in case of vacancy or inability of the governor to fill the office; that the president of the senate shall act as governor if the governor and lieutenant-governor's offices be vacant; that the compensation of the governor and lieutenant-governor shall be fixed by law, and not diminished during their term of office; that the governor, by and with the advice and consent of the senate, shall hereafter exclusively exercise the pardoning power, except in cases of impeachment, to the same extent as such power is now exercised by the general assembly, Amend. art. ii.; that the duties and powers of the secretary, attorney-general, and general treasurer shall be the same under this constitution as are now established, or as from time to time may be prescribed by law.

The Judicial Power.

8. *The Supreme Court* consists of a chief justice and three associate justices, elected by the two houses of the assembly in grand committee. They are to hold office until their places are declared vacant by a resolution passed by a majority of both houses at the annual session for electing officers, unless removed by impeachment. In case of vacancy by death, resignation, removal from the state or from office, refusal or inability to serve, of any judge of the supreme court, the office may be filled by the grand committee, until the next annual election; and the judge then elected holds his office as before provided. In case of impeachment or temporary absence or inability, the governor may appoint a person to discharge the duties of the office during the vacancy caused thereby.

This court has original jurisdiction of all civil actions, as well between the state and its citizens as between citizens, where the damages laid exceed one hundred dollars; and of all criminal proceedings, concurrently with the court of common pleas; and exclusive jurisdiction over crimes for which the punishment is imprisonment for life; has a general superintendence of all courts of inferior jurisdiction; has exclusive authority to issue writs of error, certiorari, mandamus, prohibition, quo warranto, to entertain informations in the nature of quo warranto; has exclusive cognizance of all petitions for divorce, separate maintenance, alimony, custody of children, and all petitions for relief of insolvents; and exclusive jurisdiction in equity. It is also the supreme court of probate. Two sessions are held annually in each county in the state.

9. *The Court of Common Pleas* is held by some one of the justices of the supreme court, designated for that purpose by the justices of that court. This court has original jurisdiction of all civil actions which involve title to real estate or where real estate is attached, if the amount exceed fifty dollars, except in case of certain writs. It has jurisdiction, concurrently with the supreme court, of all crimes,—but if the prisoner be arraigned for a crime punishable by imprisonment for life, the case must be certified to the supreme court; and also of actions to recover possession of lands from tenants at will, sufferance, and the like. It has appellate jurisdiction in civil and criminal cases from justices of the peace and the magistrates' courts. Two sessions of this court are held annually in each county. Special terms of this court are also held, for which no jury is to be summoned unless required by notice from one of the parties to the suit. It has concurrent jurisdiction with the supreme court.

Justices of the Peace are elected for one year by the several towns, and also by the general assembly in their discretion as to the number in each town. They have original and exclusive jurisdiction of all civil actions for less than fifty dollars, except where the title to land is involved.

A Court of Magistrates exists in the larger cities, composed of one or more justices, which has exclusive jurisdiction, within specified limits, over all cases where jurisdiction is given to justices of the peace, civil and criminal. The justices of this court are elected by the general assembly in convention among the justices of the district.

Courts of Probate are held by the town councils of the various towns, except in Providence, where the municipal court acts as a probate court. This court has jurisdiction of the settlement of estates of deceased persons, supervision of guardians, probate of wills, and other similar matters, with a right of appeal to the supreme court.

RHODIAN LAWS. A code of maritime laws adopted by the people of Rhodes, who had by their commerce and naval victories obtained the sovereignty of the sea, about nine hundred years before the Christian era. There is reason to suppose this code has not been transmitted to posterity, at least not in a perfect state. A collection of marine constitutions, under the denomination of Rhodian Laws, may be seen in Vinnius; but they bear evident marks of a spurious origin. See Marshall, Ins. b. 1, c. 4, p. 15; CODE.

RIAL OF PLATE. A Spanish coin computed in custom-house calculations at ten cents. 1 Story, U. S. Laws, 626.

RIAL OF VELLON. A Spanish coin, computed in custom-house calculations at five cents. 1 Story, U. S. Laws, 626.

RIBAUD. A rogue; a vagrant. It is not used.

RIDER. A schedule or small piece of paper or parchment added to some part of the record: as, when on the reading of a bill in the legislature a new clause is added, this is tacked to the bill on a separate piece of paper, and is called a rider.

RIDING. In English Law. An ascertained district; part of a county. This term has the same meaning in Yorkshire that division has in Lincolnshire. 4 Term, 459.

RIEN. A French word which signifies *nothing*. It has generally this meaning: as, *rien en arrere; rien passe per le fait*, nothing passes by the deed; *rien per descent*, nothing by descent: it sometimes signifies not, as, *rien culpable*, not guilty. Doctrina Plac. 435.

RIEN EN ARRERE (L. Fr. nothing in arrear). **In Pleading.** A plea which alleges that there is nothing remaining due and unpaid of the plaintiff's demand. It is a good plea, and raises the general issue in an action for rent. 2 Wms. Saund. 297, n. 1; 2 Chitty, Plead. 486; 2 Ld. Raym. 1503.

RIEN PASSA PAR LE FAIT (L. Fr. nothing passed by the deed). **In Pleading.** A plea which avoids the effect of a deed

where its execution cannot be denied, by asserting that nothing passed thereby: for example, an allegation that the acknowledgment was before a court which had not jurisdiction.

RIGHT. A well-founded claim.

2. If people believe that humanity itself establishes or proves certain claims, either upon fellow-beings, or upon society or government, they call these claims human rights; if they believe that these claims inhere in the very nature of man himself, they call them inherent, inalienable rights; if people believe that there inheres in monarchs a claim to rule over their subjects by divine appointment, they call the claim divine right, *jus divinum;* if the claim is founded or given by law, it is a legal right. The ideas of claim and that the claim must be well founded always constitute the idea of right. Rights can only inhere in and exist between moral beings; and no moral beings can coexist without rights, consequently without obligations. Right and obligation are correlative ideas. The idea of a *well-founded* claim becomes in law a claim founded in or established by the law: so that we may say a right in law is an *acknowledged* claim.

Men are by their inherent nature moral and social beings: they have, therefore, mutual claims upon one another. Every well-grounded claim on others is called a right, and, since the social character of man gives the element of mutuality to each claim, every right conveys along with it the idea of obligation. Right and obligation are correlatives. The consciousness of all constitutes the first foundation of the right or makes the claim well grounded. Its incipiency arises instinctively out of the nature of man. Man feels that he has a right of ownership over that which he has produced out of appropriated matter,—for instance, the bow he has made of appropriated wood; he feels that he has a right to exact obedience from his children, long before laws formally acknowledge or protect these rights; but he feels, too, that if he claims the bow which he made as his own, he ought to acknowledge (as correlative obligation) the same right in another man to the bow which he may have made; or if he, as father, has a right to the obedience of his children, they have a corresponding claim on him for protection as long as they are incapable to protect themselves. The idea of rights is coexistent with that of authority (or government); both are inherent in man; but if we understand by government a coherent system of laws by which a state is ruled, and if we understand by state a sovereign society, with distinct authorities to make and execute laws, then rights precede government, or the establishment of states, which is expressed in the ancient law maxim: *Ne ex regula jus sumatur, sed ex jure quod est, regula fiat.* See GOVERNMENT. We cannot refrain from referring the reader to the noble passage of Sophocles, Œdyp. Tyr. 876 *et seq.*, and to the words of Cicero, in his oration for Milo: Est enim hæc, judices, non scripta sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti sed facti; non instituti sed imbuti sumus.

3. As rights precede government, so we find that now rights are acknowledged above governments and their states, in the case of international law. International law is founded on rights, that is, well-grounded claims which civilised states, as individuals, make upon one another. As governments come to be more and more clearly established, rights are more clearly acknowledged and protected by the laws, and right comes to mean a claim acknowledged and protected by the law. A legal right, a constitutional right, means a right protected by the law, by the constitution; but government does not create the idea of right or original rights; it acknowledges them; just as government does not create property or values and money, it acknowledges and regulates them. If it were otherwise, the question would present itself, whence does government come? whence does it derive its own right to create rights? By compact? But whence did the contracting parties derive their right to create a government that is to make rights? We would be consistently led to adopt the idea of a government by *jus divinum*,—that is, a government deriving its authority to introduce and establish rights (bestowed on it in particular) from a source wholly separate from human society and the ethical character of man, in the same manner in which we acknowledge revelation to come from a source not human.

4. Rights are claims of moral beings upon one another: when we speak of rights to certain things, they are, strictly speaking, claims of persons on persons,—in the case of property, for instance, the claim of excluding others from possessing it. The idea of right indicates an ethical relation, and all moral relations may be infringed; claims may be made and established by law which are wrong in themselves and destitute of a corollary obligation; they are like every other wrong done by society or government; they prove nothing concerning the origin or essential character of rights. On the other hand, claims are gradually more clearly acknowledged, and new ones, which were not perceived in early periods, are for the first time perceived, and surrounded with legislative protection, as civilization advances. Thus, original rights, or the rights of man, are not meant to be claims which man has always perceived or insisted upon or protected, but those claims which, according to the person who uses the term, logically flow from the necessity of the physical and moral existence of man; for man is born to be a man,—that is, to lead a human existence. They have been called inalienable rights; but they have been alienated, and many of them are not perceived for long periods. Lieber, in his Political Ethics, calls them primordial rights: he means rights directly flowing from the nature of man, developed by civilization, and always showing themselves clearer and clearer as society advances. He enumerates, as such especially, the following: the right of protection; the right of personal freedom,—that is, the claim of unrestricted action except so far as the same claim of others necessitates restriction: these two rights involve the right to have justice done by the public administration of justice, the right of production and exchange (the right of property), the right of free locomotion and emigration, the right of communion in speech, letter, print, the right of worship, the right of influencing or sharing in the legislation. All political civilization steadily tends to bring out these rights clearer and clearer, while in the course of this civilization, from its incipiency, with its relapses, they appear more or less developed in different periods and frequently wholly in abeyance: nevertheless, they have their origin in the personality of man as a social being.

Publicists and jurists have made the following further distinction of rights:

5. Rights are perfect and imperfect. When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demand his property which is withheld from him, the right that supports his demand is a perfect

one, because the thing demanded is or may be fixed and determinate; but if a poor man ask relief from those from whom he has reason to expect it, the right which supports his petition is an imperfect one, because the relief which he expects is a vague, indeterminate thing. Rutherforth, Inst. c. 2, § 4; Grotius, lib. 1, c. 1, § 4.

6. Rights are also absolute and qualified. A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property when it had been intrusted to his care, and which has been unlawfully taken out of his possession.

Rights might with propriety be also divided into natural and civil rights; but as all the rights which man has received from nature have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

7. Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected: these are the political rights which the humblest citizen possesses.

Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil, rights.

8. These latter rights are divided into absolute and relative. The absolute rights of mankind may be reduced to three principal or primary articles: the right of personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; the right of personal liberty, which consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct, without any restraint unless by due course of law; the right of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. 1 Blackstone, Comm. 124–139.

9. The relative rights are public or private: the first are those which subsist between the people and the government; as, the right of protection on the part of the people, and the right of allegiance which is due by the people to the government; the second are the reciprocal rights of husband and wife, parent and child, guardian and ward, and master and servant.

Rights are also divided into legal and equitable. The former are those where the party has the legal title to a thing; and in that case his remedy for an infringement of it is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not, in general, in that of the *cestui que trust*. 1 East, 497; 8 Term, 332; 1 Saund, 158, n. 1; 2 Bingh. 20. The latter, or equitable rights, are those which may be enforced in a court of equity by the *cestui que trust*. See, generally, Bouvier, Inst. Index.

RIGHT OF DISCUSSION. In Scotch Law. The right which the cautioner (surety) has to insist that the creditor shall do his best to compel the performance of the contract by the principal debtor, before he shall be called upon. 1 Bell, Comm. 5th ed. 347.

RIGHT OF DIVISION. In Scotch Law. The right which each of several cautioners (sureties) has to refuse to answer for more than his own share of the debt. To entitle the cautioner to this right, the other cautioners must be solvent, and there must be no words in the bond to exclude it. 1 Bell, Comm. 5th ed. 347.

RIGHT OF HABITATION. In Louisiana. The right of dwelling gratuitously in a house the property of another. La. Civ. Code, art. 623; 3 Toullier, c. 2, p. 325; 14 *id.* n. 279, p. 330; Pothier, n. 22–25.

RIGHT OF POSSESSION. The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant: *e.g.* the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents. 2 Sharswood, Blackst. Comm. 196*.

RIGHT OF PROPERTY. The abstract right (*merum jus*) which remains after the actual possession has been so long gone that the right of possession is also lost, and the law will only allow recovery of the land by a writ of right. It, together with possession and right of possession, makes a perfect title: *e.g.* a disseisor has naked possession, the disseisee has right of possession and right of property. But after twenty years without entry the right of possession is transferred from the disseisee to the disseisor; and if he now buys up the right of property which alone remains in the disseisee, the disseisor will unite all three rights in himself, and thereby acquire a perfect title. 2 Sharswood, Blackst. Comm. 197–199*.

RIGHT OF RELIEF. In Scotch Law. The right which the cautioner (surety) has against the principal debtor when he has been forced to pay his debt. 1 Bell, Comm. 5th ed. 347.

RIGHT OF SEARCH. See SEARCH,

RIGHT OF; 1 Kent, Comm. 9th ed. 153, n.; 1 Phillimore, Int. Law, 325.

RIGHT TO BEGIN. **In Practice.** The party who asserts the affirmative of an issue has the right to begin and reply, as on him is the burden of proof. The substantial affirmative, not the verbal, gives the right. 1 Greenleaf, Ev. § 74; 18 B. Monr. Ky. 136; 6 Ohio St. 307; 2 Gray, Mass. 260.

RIGHT PATENT. The name of an ancient writ, which, Fitzherbert says, "ought to be brought of lands and tenements, and not of an advowson, or of common, and lieth only of an estate of fee-simple, and not for him who has a lesser estate, as tenant in tail, tenant in frank-marriage, or tenant for life." Fitzherbert, Nat. Brev. 1.

RING-DROPPING. **In Criminal Law.** A phrase applied in England to a trick frequently practised in committing larcenies. It is difficult to define it: it will be sufficiently exemplified by the following cases. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to leave the ring with the prosecutor if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to a larceny. 1 Leach, Cr. Cas. 238; 2 East, Pl. Cr. 678. In another case, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him. This was also held to be larceny. 1 Leach, Cr. Cas. 314; 2 East, Pl. Cr. 679. In these cases the prosecutor had no intention of parting with the property in the money or goods stolen. It was taken, in the first case, while the transaction was proceeding, without his knowledge; and in the last, under the promise that it should be returned. See 2 Leach, Cr. Cas. 640.

RINGING THE CHANGE. **In Criminal Law.** A trick practised by a criminal, by which, on receiving a good piece of money in payment of an article, he pretends it is not good, and, changing it, returns to the buyer a spurious coin. For example, the prosecutor having bargained with the prisoner, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness, and, returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite, and then returned another shilling, saying it was a bad one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every respect bad. 2 Leach, Cr. Cas. 64. This was held to be an uttering of false money. 1 Russell, Crimes, 114.

RINGS-GIVING. The giving of golden rings by a newly-created serjeant-at-law to every person of rank at court, from the princes of the blood, through the lords in parliament and the justices and barons of the courts, down to the meanest clerk of common pleas, to each one according to his dignity. The expense was not less than forty pounds English money. Fortesque, Amos ed. 190; 10 Coke, Introd. 23.

RIOT. **In Criminal Law.** A tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. Hawkins, Pl. Cr. c. 65, § 1. See 3 Blackf. Ind. 209; 4 *id.* 72; 3 Rich. So. C. 337; 5 Penn. St. 83.

2. In this case there must be proved—*first*, an unlawful assembling, 15 N. H. 169; for if a number of persons lawfully met together, as, for example, at a fire, or in a theatre or a church, should suddenly quarrel and fight, the offence is an affray, and not a riot, because there was no unlawful assembling; but if three or more being so assembled, on a dispute occurring, form into parties with promises of mutual assistance, which promises may be express, or implied from the circumstances, then the offence will no longer be an affray, but a riot; the unlawful combination will amount to an assembling within the meaning of the law. In this manner any lawful assembly may be converted into a riot. 18 Me. 346; 2 Campb. 328. Any one who joins the rioters after they have actually commenced is equally guilty as if he had joined them while assembling.

3. *Secondly*, proof must be made of actual violence and force on the part of the rioters, or of such circumstances as have an apparent tendency to force and violence, and calculated to strike terror into the public mind, 2 Campb. 369. The definition requires that the offenders should assemble of their own authority, in order to create a riot: if, therefore, the parties act under the authority of the law, they may use any necessary force to enforce their mandate, without committing this offence. See 1 Hill, So. C. 362.

4. *Thirdly*, evidence must be given that the defendants acted in the riot and were participants in the disturbance. 1 Morr. Tenn. 142. It is sufficient if they be present encouraging or giving countenance, support, or acquiescence to the act. 9 Miss. 270. See 1 Russell, Crimes, 247; Viner, Abr.; Hawkins, Pl. Cr. c. 65, §§ 1, 8, 9; Coke, 3d Inst. 176;

4 Blackstone, Comm. 146; Comyns, Dig.; Roscoe, Crim. Ev.

RIOTOUSLY. In Pleading. A technical word, properly used in an indictment for a riot, which of itself implies violence. 2 Sess. Cas. Sc. 13; 2 Strange, 834; 2 Chitty, Crim. Law, 489.

RIPA (Lat.). The banks of a river, or the place beyond which the waters do not in their natural course overflow.

An extraordinary overflow does not change the banks of the river. Pothier, Pand. lib. 50. See BANKS; RIVER.

RIPARIAN PROPRIETORS. Those who own the land bounding upon a watercourse. 4 Mas. C. C. 397.

Each riparian proprietor owns that portion of the bed of the river (not navigable) which is adjoining his land *usque ad filum aquæ;* or, in other words, to the thread or central line of the stream. Hargrave, Tracts, 5; Holt, 499; 3 Dane, Abr. 4; 7 Mass. 496; 5 Wend. N. Y. 423; 26 *id.* 404; 3 Caines, N. Y. 319; 20 Johns. 91; 2 Conn. 482; 11 Ohio St. 138; Angell, Wat.-Courses, 3–10; Kames, Eq. part 1, c. 1, s. 1. See RIVER; WATER-COURSE; TIDE-WATER; WHARF; ALLUVION; AVULSION.

RIPUARIAN LAW. A code of laws of the Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, who were collectively known by the name Ripuarians, and their laws as Ripuarian law.

RISKS AND PERILS. In Insurance. Those causes against loss from which the insurer is to be protected in virtue of the contract for insurance.

The risk or peril in a life policy is death; under a fire policy, damage by fire; and under a marine policy, by perils of the seas, usually including fire; and under a policy upon subjects at risk in lake, river, or canal navigation, by perils of the same. See INSURABLE INTEREST; INSURANCE; POLICY; WARRANTY.

2. Under a marine insurance the risks are from a certain place to a certain other, or from one date to another. The perils usually insured against as "perils of the seas" are —fire, lightning, winds, waves, rocks, shoals, and collisions, and also the perils of hostile capture, piracy, theft, arrest, barratry, and jettisons. 1 Phillips, Ins. § 1099 *et seq.* But a distinction is made between the extraordinary action of perils of the seas, for which underwriters are liable, and wear and tear and deterioration by decay, for which they are not liable. 1 Phillips, Ins. § 1105.

Perils of lakes, rivers, etc. are analogous to those of the seas. 1 Phillips, Ins. § 1099, n. See, as to sea risks, Crabbe, 405; 16 Eng. L. & Eq. 215; 22 *id.* 573; 27 *id.* 140; 29 *id.* 111; 32 *id.* 63; 33 *id.* 325; 34 *id.* 266, 277; 36 *id.* 109, 455; 38 *id.* 39; 7 Ell. & B. 172, 469; 4 Rich. Eq. So. C. 416; 18 Mo. 198; 23 Penn. St. 65; 32 *id.* 351; 28 Me. 414; 2 Paine, C. C. 82; 16 B. Monr. Ky. 467; 4 Du. N. Y. 141; 6 *id.* 191, 282; 13 Miss. 57; 11 Ind. 171; 1 Bosw. N. Y. 61; 3 Dutch. N. J. 645; 13 Ala. 167; 6 Gray, Mass. 192; 35 N. H. 328.

3. Underwriters are not liable for loss occasioned by the gross misconduct of the assured or imputable to him; but if a vessel is seaworthy, with suitable officers and crew, underwriters are liable for loss though occasioned through the mistakes or want of assiduity and vigilance of the officers or men. 1 Phillips, Ins. § 1049. Underwriters are not answerable for loss directly attributable to the qualifications of the insured subject, independently of the specified risks, 1 Phillips, Ins. c. xiii. sect. v., or for loss distinctly occasioned by the fraudulent or gross negligence of the assured.

4. Insurance against illegal risks—such as trading with an enemy, the slave-trade, piratical cruisers, and illegal kinds of business—is void. 1 Phillips, Ins. §§ 210, 691. Policies usually contain express exceptions of some risks besides those impliedly excepted. These may be—in *maritime insurance*, contraband and illicit, interloping trade, violation of blockade, mobs and civil commotions; in *fire policies*, loss on jewelry, paintings, sculpture, by hazardous trades, etc.; in *life policies*, loss by suicide, risk in certain climates or localities and in certain hazardous employments without express permission. 1 Phillips, Ins. §§ 55, 63, 64. See Loss; TOTAL LOSS; AVERAGE.

RIVER. A natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide. Woolrych, Wat. 40; 16 N. H. 467.

2. Rivers are either public or private. Public rivers are divided into navigable and not navigable,—the distinction being that the former flow and reflow with the tide, while the latter do not. Both are navigable in the popular sense of the term. Angell, Tide-Wat. 74, 75; 7 Pet. 324; 5 Pick. Mass. 199; 26 Wend. N. Y. 404; 4 Barnew. & C. 602; 5 Taunt. 705.

At common law, the bed or soil of all rivers subject to the ebb and flow of the tide, to the extent of such ebb and flow, belongs to the crown; and the bed or soil of all rivers above the ebb and flow of the tide, or in which there is no tidal effect, belongs to the riparian proprietors, each owning to the centre or thread,—*ad filum aquæ*, which see,—where the opposite banks belong to different persons. Angell, Tide-Wat. 20; Dav. Dist. Ct. 149; 5 Barnew. & Ald. 268. In this country the common law has been recognized as the law of many of the states,—the state succeeding to the right of the crown, 4 Pick. Mass. 268; 26 Wend. N. Y. 404; 31 Me. 9; 1 Halst. N. J. 1; 2 Conn. 481; 2 Swan, Tenn. 9; 16 Ohio, 540; 4 Wisc. 486; but in Pennsylvania, North Carolina, South Carolina, Iowa, Mississippi, and Alabama, it has been

determined that the common law does not prevail, and that the ownership of the bed or soil of all rivers navigable for any useful purpose of trade or agriculture, whether tidal or fresh-water, is in the state. 2 Binn. Penn. 475; 14 Serg. & R. Penn. 71; 3 Ired. No. C. 277; 1 M'Cord, So. C. 580; 3 Iowa, 1; 4 *id.* 199; 29 Miss. 21; 11 Ala. 436. At common law, the ownership of the crown extends to high-water mark, Angell, Tide-Wat. 69–71; Woolrych, Wat. 433–450; 3 Barnew. & Ald. 967; 5 *id.* 268; and in several states of this country the common law has been followed, 12 Barb. N. Y. 616; 1 Dutch. N. J. 525; 3 Zabr. N. J. 624; 6 Mass. 435; 7 Cush. Mass. 53; 14 Gray, Mass. ; 7 Pet. 324; 3 How. 221; 25 Conn. 346; but in others it has been modified by extending the ownership of the riparian proprietor, subject to the servitudes of navigation and fishery, to low-water mark, 28 Penn. St. 206; 1 Whart. Penn. 124; 2 *id.* 508; 4 Call, Va. 441; 3 Rand. Va. 33; 14 B. Monr. Ky. 367; 11 Ohio, 138: unless these decisions may be explained as applying to fresh-water rivers. 2 Smith, Lead. Cas. 224.

3. In England, many rivers originally private have become public, as regards the right of navigation, either by immemorial use or by acts of parliament. Woolrych, Wat. 40. In this country, all rivers, whether tidal or fresh-water, are, of common right, navigable highways, if naturally capable of use for the floating of vessels, boats, rafts, or even logs, or "whenever they are found of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market." 8 Barb. N. Y. 239; 18 *id.* 277; 31 Me. 9; 42 *id.* 552; 20 Johns. N. Y. 90; 3 N. H. 321; 10 Ill. 351; 2 Swan, Tenn. 9; 2 Mich. 519; 5 Ind. 8. The state has the right to improve all such rivers, and to regulate them by lawful enactments for the public good. 4 Rich. So. C. 69; 31 Me. 361; 5 Ind. 13; 29 Miss. 21. Any obstruction of them without legislative authority is a nuisance, and any person having occasion to use the river may abate the same, or, if injured thereby, may receive his damages from its author. Angell, Tide-Wat. 111–123; 28 Penn. St. 195; 4 Wisc. 454; 4 Cal. 180; 6 Cow. N. Y. 518; 10 Mass. 70; 5 Pick. Mass. 492; 4 Watts, Penn. 437. And see BRIDGE. By the ordinance of 1787, art. 4, relating to the northwestern territory, it is provided that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, shall be common highways and forever free. 3 Story, U. S. Laws, 2077; 29 Miss. 21; 2 Mich. 519.

Rivers, when naturally unfit for public use, as above described, are called private rivers. They are the private property of the riparian proprietors, and cannot be appropriated to public use, as highways, by deepening or improving their channels, without compensation to their owners. 16 Ohio, 540; 26 Wend. N. Y. 404; 6 Barb. N. Y. 265; 18 *id.* 277; 8 Penn. St. 379; 10 Me. 278; 1 M'Cord, So. C 580. And see WATER-COURSE.

4. A river, then, may be considered—as private in the case of shallow and obstructed streams; as private property, but subject to public use, when it can be navigated; and as public, both with regard to its use and property. Some rivers possess all these qualities. The Hudson is mentioned as an instance: in one part it is entirely private property; in another, the public have the use of it; and it is public property from the mouth as high up as the tide flows. Angell, Wat.-Cour. 205, 206; 6 Barb. N. Y. 265. See, generally, La. Civ. Code, 444; Bacon, Abr. *Prerogatives* (B 3); Jacobsen, Sea Laws; 3 Kent, Comm. 411–439; Woolrych, Waters; Schultes, Aquatic Rights; Washburn, Real Prop.; Cruise, Dig. Greenleaf ed.; BOUNDARIES.

RIX DOLLAR. The name of a coin. The rix dollar of Bremen is deemed, as money of account at the custom-house, to be of the value of seventy-eight and three-quarters cents. Act of March 3, 1843. The rix dollar is computed at one hundred cents. Act of March 2, 1799, s. 61. See FOREIGN COINS.

RIXA (Lat.). **In Civil Law.** A dispute; a quarrel. Dig. 48. 8. 17.

RIXATRIX (Lat.). A common scold.

ROAD. A passage through the country for the use of the people. 3 Yeates, Penn. 421. See WAY.

In Maritime Law. An open passage of the sea, which, from the situation of the adjacent land and its own depth and wideness, affords a secure place for the common riding and anchoring of vessels. Hale, de Port. Mar. p. 2, c. 2. This word, however, does not appear to have a very definite meaning. 2 Chitty, Com. Law. 4, 5.

ROARING. A disease among horses, occasioned by the circumstance of the neck of the windpipe being too narrow for accelerated respiration: the disorder is frequently produced by sore throat or other topical inflammation.

A horse afflicted with this malady is rendered less serviceable, and he is, therefore, unsound. 2 Stark. 81; 2 Campb. 523.

ROBBER. One who commits a robbery. One who feloniously and forcibly takes goods or money to any value from the person of another by violence or putting him in fear.

ROBBERY. In Criminal Law. The felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear. 4 Blackst. Comm. 243; 1 Baldw. C. C. 102. See 12 Ga. 293.

2. Robbery, by the common law, is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other

larcenies. Jebb, Cr. Cas. 62; 1 Leach, Cr. Cas. 4th ed. 195; 7 Mass. 242; 17 *id.* 539; 8 Cush. Mass. 215.

3. By "taking from the person" is meant not only the immediate taking from his person, but also from his presence when it is done with violence and against his consent. 1 Hale, Pl. Cr. 533; 2 Russell, Crimes, 61; 3 Wash. C. C. 209; 11 Humphr. Tenn. 167. The taking must be by violence or putting the owner in fear; but both these circumstances need not concur; for if a man should be knocked down, and then robbed while he is insensible, the offence is still a robbery. 4 Binn. Penn. 379. And if the party be put in fear by threats and then robbed, it is not necessary there should be any greater violence. 17 Mass. 539. The violence or putting in fear must be at the time of the act or immediately preceding. 1 Carr. & P. 304.

ROD. A measure sixteen feet and a half long; a perch.

ROGATORY, LETTERS. See LETTERS ROGATORY.

ROGUE. A French word, which in that language signifies proud, arrogant. In some of the ancient English statutes it means an idle, sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants. Although the word rogue is a word of reproach, yet to charge one as a rogue is not actionable. 5 Binn. Penn. 219. See 2 Dev. No. C. 162; Hard. Ky. 529.

ROLE D'EQUIPAGE. The list of a ship's crew; the muster roll.

ROLL. A schedule of parchment which may be turned up with the hand in the form of a pipe or tube. Jacob, Law Dict.

In early times, before paper came in common use, parchment was the substance employed for making records, and, as the art of bookbinding was but little used, economy suggested as the most convenient mode the adding of sheet to sheet, as was found requisite, and they were tacked together in such a manner that the whole length might be wound up together in the form of spiral rolls.

The records of a court or office.

ROLLS OFFICE OF THE CHANCERY. An office in Chancery Lane, London, which contains rolls and records of the high court of chancery, of which the master of the rolls is keeper. It was formerly called *domus conversorum*, having been appointed by Henry III. for the use of converted Jews, but for irregularities they were expelled by Edward II., when it was put to its present use. Blount, Encyc. Lond.

ROMNEY MARSH. A tract of land in the county of Kent, England, containing twenty-four thousand acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry III.; from which laws all commissioners of sewers in England may receive light and direction. 3 Stephen, Comm. 442, note (*a*); 3 Blackstone, Comm. 73, note (*t*); Coke, 4th Inst. 276.

ROOD OF LAND. The fourth part of an acre.

ROOT. That part of a tree or plant under ground from which it draws most of its nourishment from the earth.

When the roots of a tree planted in one man's land extend into that of another, this circumstance does not give the latter any right to the tree, though such is the doctrine of the civil law, Dig. 41. 1. 7. 13; but such person has a right to cut off the roots up to his line. Rolle, 394. See TREE.

In a figurative sense, the term *root* is used to signify the person from whom one or more others are descended.

ROSTER. A list of persons who are in their turn to perform certain duties required of them by law. Tytler, Courts-Mart. 93.

ROTA (Lat.). A court. A celebrated court of appeals at Rome, of which one judge must be a German, one a Frenchman, two Spaniards, and eight Italians. Encyc. Brit. Its decisions had great weight, but were not law, although judged by the law. Sacciæ Trac. de Com. et Comb. § 1, quæst. 7, pars 2, ampl. 8, num. 219, 220, 253, 254. There was also a celebrated rota or court at Genoa about the sixteenth century, or before, whose decisions in maritime matters form the first part of *Straccha de Merc.*

ROTURIER. In Old French Law. One not noble. Dict. de l'Acad. Franç. A free commoner; one who did not hold his land by homage and fealty, yet owed certain services. Howard, Dict. de Normande.

ROUBLE. The name of a coin. The rouble of Russia, as money of account, is deemed and taken at the custom-house to be of the value of seventy-five cents. Act of March 3, 1843.

ROUP. In Scotch Law. Sale by auction. Auction. Index to Burton, Law of Scotl.; Bell, Dict. *Auction.*

ROUT. In Criminal Law. A disturbance of the peace by persons assembled together with an intention to do a thing which if executed would have made them rioters, and actually making a motion towards the execution of their purpose.

It generally agrees in all particulars with a riot, except only in this: that it may be a complete offence without the execution of the intended enterprise. Hawkins, Pl. Cr. c. 65, s. 14; 1 Russell, Crimes, 253; 4 Blackstone, Comm. 140; Viner, Abr. *Riots, etc.* (A 2); Comyns, Dig. *Forcible Entry* (D 9).

ROUTOUSLY. In Pleading. A technical word, properly used in indictments for a rout as descriptive of the offence. 2 Salk. 593.

ROYAL FISH. Whales and sturgeons,—to which some add porpoises,—which when cast on shore or caught near shore belong to the king of England by his prerogative. 1 Edw. I.; 17 Edw. V. c. 1; 1 Eliz. c. 5; 17 Edw. II. c. 11; Bracton, l. 3, c. 3; Britton, c. 17; Fleta, lib. 1, c. 45, 46.

ROYAL HONORS. In diplomatic language, by this term is understood the rights enjoyed by every empire or kingdom in Europe, by the pope, the grand duchies of Germany, and the Germanic and Swiss confederations, to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with other distinctive titles and ceremonies. Vattel, Law of Nat. b. 2, c. 3, § 38; Wheaton, Int. Law, pt. 2, c. 3, § 2.

ROYAL MINES. Mines of silver and gold belong to the king of England, as part of his prerogative of coinage, to furnish him with material. 1 Sharswood, Blackst. Comm. 294*. See MINES.

RUBRIC. The title or inscription of any law or statute; because the copyists formerly drew and painted the title of laws and statutes in red letters (*rubro colore*). Ayliffe, Pand. b. 1, t. 8; Dict. de Jur.

RUDENESS. In Criminal Law. An impolite action, contrary to the usual rules observed in society, committed by one person against another.

This is a relative term, which it is difficult to define: those acts which one friend might do to another could not be justified by persons altogether unacquainted; persons moving in polished society could not be permitted to do to each other what boatmen, hostlers, and such persons might perhaps justify. 2 Hagg. Eccl. 73. An act done by a gentleman towards a lady might be considered rudeness, which if done by one gentleman to another might not be looked upon in that light. Russ. & R. 130. A person who touches another with rudeness is guilty of a battery.

RULE OF COURT. An order made by a court having competent jurisdiction.

Rules of court are either general or special: the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

Disobedience to these is punished by giving judgment against the disobedient party, or by attachment for contempt.

RULE OF LAW. A general principle of law, recognized as such by authorities, and stated usually in the form of a maxim. It is called a rule because in doubtful and unforeseen cases it is a rule for their decision: it embraces particular cases within general principles. Toullier, tit. prél. n. 17; 1 Blackst. Comm. 44; Domat, liv. prél. t. 1, s. 1; Ram, Judgm. 30; 3 Barnew. & Ad. 34; 2 Russ. 216, 580, 581; 4 *id.* 305; 10 Price, Exch. 218, 219, 228; 1 Barnew. & C. 86; 7 Bingh. 280; 1 Ld. Raym. 728; 5 Term, 5; 4 Maule & S. 348. See MAXIM.

RULE NISI. In Practice. A rule obtained on motion *ex parte* to show cause against the particular relief sought. Notice is served on the party against whom the rule is obtained, and the case is then heard like other motions, except that the party showing cause is entitled to open and reply. The rule is made absolute unless (*nisi*) good cause is shown against it. Graham, Pract. p. 688; 3 Stephen, Comm. p. 680.

RULE TO SHOW CAUSE. An order made by the court, in a particular case, upon motion of one of the parties calling upon the other to appear at a particular time before the court, to show cause, if any he have, why a certain thing should not be done.

This rule is granted generally upon the oath or affirmation of the applicant; but upon the hearing the evidence of competent witnesses must be given to support the rule, and the affidavit of the applicant is insufficient.

RULE OF THE WAR OF 1756. In Commercial Law, War. A rule relating to neutrals was the first time practically established in 1756, and universally promulgated, that "neutrals are not to carry on in times of war a trade which was interdicted to them in times of peace." Chitty, Law of Nat. 166; 2 C. Rob. Adm. 186; 4 *id.* App.; Reeve, Shipp. 271; 1 Kent, Comm. 82.

RULES. Certain limits without the actual walls of the prisons, where the prisoner, on proper security previously given to the proper authority, may reside. These limits are considered, for all legal and practical purposes, as merely a further extension of the prison-walls. The rules or permission to reside without the prison may be obtained by any person not committed criminally, 2 Strange, 845, nor for contempt, *id.* 817, by satisfying the marshal or warden or other authority of the security with which he may grant such permission.

RULES OF PRACTICE. Certain orders made by the courts for the purpose of regulating the practice of members of the bar and others.

Every court of record has an inherent power to make rules for the transaction of its business; which rules they may from time to time change, alter, rescind, or repeal. While they are in force, they must be applied to all cases which fall within them; they can use no discretion, unless such discretion is authorized by the rules themselves. Rules of court cannot, of course, contravene the constitution or the law of the land. 3 Pick. Mass. 512; 5 *id.* 187; 2 Harr. & J. Md. 79; 1 Pet. 604; 3 Binn. Penn. 227, 417; 3 Serg. & R. Penn. 253; 8 *id.* 336; 2 Mo. 98.

RUMOR. A general public report of certain things, without any certainty as to their truth.

In general, rumor cannot be received in evidence; but when the question is whether such rumor existed, and not its truth or falsehood, then evidence of it may be given.

RUNCINUS (Lat.). A nag. 1 Thomas, Coke, Litt. 471.

RUNNING ACCOUNT. An open account. See ACCOUNT; 2 Parsons, Contr. 351.

RUNNING DAYS. Days counted in

succession, without any allowance for holidays. The term is used in settling lay-days or days of demurrage.

RUNNING LANDS. In Scotch Law. Lands where the ridges of a field belong alternately to different proprietors. Bell, Dict.

RUNNING OF THE STATUTE OF LIMITATIONS. A metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing. 1 Bouvier, Inst. n. 861.

RUNNING WITH THE LAND. A technical expression applied to covenants real which affect the land. See COVENANT.

RUPEE. In Commercial Law. A denomination of money in Bengal. In the computation of ad valorem duties it is valued at fifty-five and one-half cents. Act of March 2, 1799, s. 61; 1 Story, U. S. Laws, 627. See FOREIGN COINS.

The rupee of British India, as money of account, at the custom-house, shall be deemed and taken to be of the value of forty-four and one-half cents. Act of March 3, 1848.

RURAL. That which relates to the country: as, rural servitudes. See URBAN.

RUSE DE GUERRE (Fr.). Literally, a trick in war. A stratagem. It is said to be lawful among belligerents, provided it does not involve treachery and falsehood. Grotius, Droit de la Guerre, liv. 3, c. 1, § 9.

RUTA (Lat.). **In Civil Law.** The name given to those things which are extracted or taken from land: as, sand, chalk, coal, and such other things. Pothier, Pand. l. 50.

S.

SABBATH. A name sometimes improperly used for Sunday.

SABINIANS. A sect of lawyers whose first chief was Atteius Capito, and the second Cælius Sabinus, from whom they derived their name. Clef des Lois Rom.

SAC, SAK (Lat. *saca* or *sacha*). An ancient privilege, which a lord of a manor claimed to have in his court, of holding plea in causes of trespass arising among his tenants, and imposing fines touching the same. Termes de la Ley.

SACABURTH, SACABERE (from *sac*, cause, and *burh*, pledge). He that is robbed and puts in surety to prosecute the felon with fresh suit. Britton, c. 15, 29; Bracton, l. 3, c. 32; Cowel.

SACQUIER. In Maritime Law. The name of an ancient officer, whose business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise. Laws of Oleron, art. 11, published in an English translation in an Appendix to 1 Pet. Adm. XXV. See ARRAMEUR; STEVEDORE.

SACRAMENTALES (L. Lat. *sacramentum*, oath). *Compurgatores*, which see. Jurors. Law Fr. & Lat. Dict.

SACRAMENTUM (L. Lat.). **In Civil Law.** A gage in money laid down in court by both parties that went to law, returned to him who had the verdict on his side, but forfeited by the party who was cast, to the exchequer, to be laid out *in sacris rebus*, and therefore so called. Varro, lib. 4. *de Ling. Lat.* c. 36.

An oath, as a very sacred thing. Ainsworth, Dict.; Vicat, *Voc. Jur.*

The oath taken by soldiers to be true to their general and country. *Id.*

In Old Common Law. An oath. Carpentier, Gloss.; Cowel; Jacob.

SACRAMENTUM DECISIONIS (Lat.). The voluntary or decisive oath of the civil law, where one of the parties to a suit, not being able to prove his case, offers to refer the decision of the cause to the oath of his adversary, who is bound to accept or make the same offer on his part, or the whole is considered as confessed by him. 3 Sharswood, Blackst. Comm. 342.

SACRILEGE. The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses. Pen. Code of China, b, 1, s. 2, § 6; Ayliffe, Parerg. 476.

SÆVITIA (Lat.). Cruelty. To constitute *sævitia* there must be such a degree of cruelty as to endanger the party's suffering bodily hurt. 1 Hagg. Cons. 35; 2 Mass. 150; 3 *id.* 321; 4 *id.* 587.

SAFE-CONDUCT. A passport or permission from a neutral state to persons who are thus authorized to go and return in safety, and, sometimes, to carry away certain things in safety.

According to common usage, the term *passport* is employed on ordinary occasions for the permission given to persons when there is no reason why they should not go where they please; and *safe-conduct* is the name given to the instrument which authorizes certain persons, as enemies, to go into places where they could not go without danger unless thus authorized by the government.

The name of an instrument given to the captain or master of a ship to proceed on a particular voyage: it usually contains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship.

The act of congress of April 30, 1790, s. 27, punishes the violation of any safe-conduct or passport granted under the authority of the United States, on conviction, with imprisonment, not exceeding three years, and a fine at the discretion of the court. See CONDUCT; PASSPORT; 18 Viner, Abr. 272.

SAFE-PLEDGE. A surety given that a man shall appear upon a certain day. Bracton, l. 4, c. 1.

SAFEGUARD. A protection of the king to one who is a stranger, who fears violence from some of his subjects for seeking his right by course of law. Reg. Orig. 26.

SAID. Before mentioned.

In contracts and pleadings it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term *said* or *aforesaid*, or by some similar term; otherwise the latter description will be ill for want of certainty. 2 Lev. 207; Comyns, Dig. *Pleader* (C 18); Gould, Plead. c. 3, § 63.

SAILING INSTRUCTIONS. In Maritime Law. Written or printed directions, delivered by the commanding officer of a convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet in case of dispersion by storm, by an enemy, or by any other accident.

Without sailing instructions no vessel can have the full protection and benefit of convoy. Marshall, Ins. 368.

SAILORS. Seamen; mariners. See SEAMEN; SHIPPING ARTICLES.

SAISIE-EXECUTION. In French Law. A writ of execution by which the creditor places under the custody of the law the movables of his debtor, which are liable to seizure, in order that out of them he may obtain payment of the debt due by him. La. Code of Pract. art. 641; Dalloz, Dict. It is a writ very similar to the *fieri facias* of the common law.

SAISIE-FORAINE. In French Law. A permission given by the proper judicial officer to authorize a creditor to seize the property of his debtor in the district which he inhabits. Dalloz, Dict. It has the effect of an attachment of property, which is applied to the payment of the debt due.

SAISIE-GAGERIE. In French Law. A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm leased, and on which he has a lien, to be seized, in order to obtain the rent due to him. It is similar to the *distress* of the common law. Dalloz, Dict.

SAISIE-IMMOBILIERE. In French Law. A writ by which the creditor puts in the custody of the law the immovables of his debtor, that out of the proceeds of their sale he may be paid his demand.

SALARY. A reward or recompense for services performed.

It is usually applied to the reward paid to a public officer for the performance of his official duties.

Salary is also applied to the reward paid for the performance of other services; but if it be not fixed for each year it is called honorarium. Pothier, Pand. According to M. Duvergier, the distinction between honorarium and salary is this. By the former is understood the reward given to the most elevated professions for services performed; and by the latter the price of hiring of domestic servants and workmen. 19 Toullier, n. 268, p. 292, note.

There is this difference between salary and price: the former is the reward paid for services or for the hire of things; the latter is the consideration paid for a thing sold. Leç. Elem. §§ 907, 908.

SALE. An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price. Pardessus, Dr. Com. n. 6; Noy, Max. ch. 42; Sheppard, Touchst. 244; 2 Kent, Comm. 363; Pothier, Vente, n. 1.

This contract differs from a barter or exchange in this: that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. 3 Salk. 157; 12 N. H. 390; 10 Vt. 457. It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim, and not for a price. An onerous gift, when the burden it imposes is the payment of a sum of money, is, when accepted, in the nature of a sale. When partition is made between two or more joint owners of a chattel, it would seem the contract is in the nature of a barter. See 11 Pick. Mass. 311.

An *absolute* sale is one made and completed without any condition whatever.

A *conditional* sale is one which depends for its validity upon the fulfilment of some condition. See 4 Wash. C. C. 588; 10 Pick. Mass. 522; 18 Johns. N. Y. 141; 8 Vt. 154; 2 Rawle, Penn. 326; Coxe, N. J. 292; 2 A. K. Marsh. Ky. 430.

A *forced* sale is one made without the consent of the owner of the property, by some officer appointed by law, as by a marshal or a sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold; it merely transfers the rights of the person as whose property it has been seized. This kind of a sale is sometimes called a judicial sale.

A *private* sale is one made voluntarily, and not by auction.

A *public* sale is one made at auction to the highest bidder. Auction sales sometimes are voluntary, as, when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual rules relating to sales apply; or they are involuntary or forced, when the same rules do not apply.

A *voluntary* sale is one made freely without constraint by the owner of the thing sold: this is the common case of sales, and to this class the general rules of the law of sale apply.

2. *Parties.* As a general rule, all persons *sui juris* may be either buyers or sellers. See PARTIES. There is a class of persons who are incapable of purchasing except *sub modo*, as, infants and married women, 1 Parsons, Contr. 437; and *another class* who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers while that relation exists; these are trustees, guardians, assignees of insolvents, and, generally, all persons who, by their connection with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as, attorneys, conveyancers, and the like.

The thing sold. There must be a thing which is the *object* of the sale; for if the thing sold at the time of the sale had ceased to exist, it is clear there can be no sale: if, for example, you and I being in Philadelphia, I sell you my house in Cincinnati, and at the time of the sale it be burned down, it is manifest there was no sale, as there was not a thing to be sold. See 1 Leon. 42; Hob. 132; 7 Exch. 208; 5 Maule & S. 228; 2 Kent, Comm. 640. It is evident, too, that no sale can be made of things not in commerce: as, the air, the water of the sea, and the like. When there has been a mistake made as to the article sold, there is no sale: as, for example, where a broker, who is the agent of both parties, sells an article and delivers to the seller a sold note describing the article sold as "St. Petersburg clean hemp," and bought note to the buyer, as "Riga Rhine hemp," there is no sale. 5 Taunt. 786, 788; 5 Barnew. & C. 437; 7 East, 569; 2 Camph. 337; 4 Q. B. 747; 9 Mees. & W. Exch. 805; 1 Moore & P. 778.

3. There must be an agreement as to the specific goods which form the basis of the contract of sale; in other words, to make a perfect sale the parties must have agreed, the one to part with the title to a *specific article*, and the other to acquire such title: an agreement to sell one hundred bushels of wheat, to be measured out of a heap, does not change the property until the wheat has been measured. 3 Johns. N. Y. 179; 15 *id.* 349; 2 N. Y. 258; 5 Taunt. 176; 7 Ohio, 127; 3 N. H. 282; 6 Pick. Mass. 280; 6 Watts, Penn. 29; 7 Ell. & B. 885. And see 6 Barnew. & C. 388; 7 Gratt. Va. 240; 34 Me. 289; 25 Penn. St. 208; 22 N. H. 172; 24 *id.* 337; 7 Dan. Ky. 61; 11 Humphr. Tenn. 206, 11 Ired. No. C. 609.

Price. To constitute a sale, there must be a *price* agreed upon; but upon the maxim *id certum est quod reddi certum potest*, a sale may be valid although it is agreed that the price for the thing sold shall be determined by a third person. 4 Pick. Mass. 179. See 10 Bingh. 382, 487; 11 Ired. No. C. 166; 12 *id.* 79.

The price must be an *actual* or *serious* price, with an intention on the part of the seller to require its payment: if, therefore, one should sell a thing to another, and *by the same agreement* he should release the buyer from the payment, this would not be a sale, but a gift; because in that case the buyer never agreed to pay any price, the same agreement by which the title to the thing is passed to him discharging him from all obligations to pay for it. As to the quantum of the price, that is altogether immaterial, unless there has been fraud in the transaction. The price must be *certain or determined;* but it is sufficiently certain if, as before observed, it be left to the determination of a third person. 4 Pick. Mass. 179; Pothier, Vente, n. 24. And an agreement to pay for goods what they are worth is sufficiently certain. Coxe, N. J. 261; Pothier, Vente, n. 26. See 2 Sumn. C. C. 539; 20 Mo. 553; 22 Penn. St. 460. The price must *consist in a sum of money* which the buyer agrees to pay to the seller; for if paid for in any other way the contract would be an exchange or barter, and not a sale, as before observed.

4. The consent of the contracting parties, which is of the essence of a sale, consists in the agreement of the will of the seller to sell a certain thing to the buyer for a certain price, and in the will of the buyer to purchase the same thing for the same price. Care must be taken to distinguish between an agreement to enter into a future contract and a present actual agreement to make a sale.

The consent is certain when the parties expressly declare it. This, in some cases, it is requisite should be in writing. See FRAUDS, STATUTE OF. This writing may be a letter. See LETTER; 4 Bingh. 653; 3 Metc. Mass. 207; 16 Me. 458.

An express consent to a sale may be given verbally, when it is not required by the statute of frauds to be in writing.

When a party, by his acts, approves of what has been done, as, if he knowingly uses goods which have been left at his house by another who intended to sell them, he will by that act confirm the sale.

5. In order to pass the property by a sale, there must be an express or implied agreement that the title shall pass. An agreement for the sale of goods is *primâ facie* a bargain and sale of those goods; but this arises merely from the presumed intention of the parties; and if it appear that the parties have agreed, not that there shall be

a mutual credit by which the property is to pass from the seller to the buyer and the buyer is bound to pay the price to the seller, but that the exchange of the money for the goods shall be made on the spot, no property is transferred; for it is not the intention of the parties to transfer any. 4 Wash. C. C. 79. See 20 Ohio, 304; 3 Sandf. N. Y. 230; 1 C. B. 385. But on the contrary when the making of part-payment, or naming a day for payment, clearly shows an intention in the parties that they should have some time to complete the sale by payment and delivery, and that they should in the mean time be trustees for each other, the one of the property in the chattel and the other in the price. As a general rule, when a bargain is made for the purchase of goods and nothing is said about payment and delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. 5 Barnew. & C. 862; 6 Dan. Ky. 48; 7 *id.* 61; 13 Pick. Mass. 183.

6. The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him; and the only remedy of the purchaser at law is to bring an action on the contract and recover pecuniary damages for a breach of the contract. In equity, however, after a contract for the sale, the lands are considered as belonging to the purchaser, and the court will enforce his rights by a decree for a specific performance; and the seller will be entitled to the purchase-money. Williams, Real Prop. 127. See SPECIFIC PERFORMANCE.

In general, the seller of real estate does not guarantee the title; and if it be desired that he should, this must be done by inserting a warranty to that effect. See, generally, Brown, Blackburn, Long, Story, on Sales; Sugden, on Vendors; Pothier, Vente; Duvergier, Vente; 2 Kent, Comm. 10th ed. 640 *et seq.*; Parsons, Story, on Contracts; CONTRACTS; DELIVERY; PARTIES; STOPPAGE IN TRANSITU.

SALE-NOTE. A memorandum given by a broker to a seller or buyer of goods, stating the fact that certain goods have been sold by him on account of a person called the seller to another person called the buyer. Sale-notes are also called *bought and sold notes*, which see.

SALE AND RETURN. When goods are sent from a manufacturer or wholesale dealer to a retail trader, in the hope that he may purchase them, with the understanding that what he may choose to take he shall have as on a contract of sale, and what he does not take he will retain as a consignee for the owner, the goods are said to have been sent on sale and return.

The goods taken by the receiver as on sale will be considered as sold, and the title to them is vested in the receiver of them; the goods he does not buy are considered as a deposit in the hands of the receiver of them, and the title is in the person who sent them. 1 Bell, Comm. 268, 5th ed.

SALIQUE LAW. The name of a code of laws, so called from the Salians, a people of Germany who settled in Gaul under their king Pharamond.

The most remarkable law of this code is that which regards succession. *De terrâ vero salicâ nulla portio hæreditatis transit in mulierem, sed hoc virilis sextus acquirit; hoc est, filii in ipsâ hæreditate succedunt:* no part of the salique land passes to females, but the males alone are capable of taking; that is, the sons succeed to the inheritance. This has ever excluded females from the throne of France.

SALVAGE. In Maritime Law. A compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake, where inter-state or foreign commerce is carried on. 1 Sumn. C. C. 210, 416; 12 How. 466; 1 Blatchf. C. C. 420; 5 McLean, C. C. 359.

The property saved. 2 Phillips, Ins. § 1488; 2 Parsons, Marit. Law, 595.

2. *The peril.* In order to found a title to salvage, the peril from which the property was saved must be real, not speculative merely, 1 Cranch, 1; but it need not be such that escape from it by any other means than by the aid of the salvors was impossible. It is sufficient that the peril was something extraordinary, something differing in kind and degree from the ordinary perils of navigation. 1 Curt. C. C. 353; 2 *id.* 350. All services rendered at sea to a vessel in distress are salvage services. 1 W. Rob. Adm. 174; 3 *id.* 71. But the peril must be present and pending, not future, contingent, and conjectural. 1 Sumn. C. C. 216; 3 Hagg. Adm. 344. It may arise from the sea, rocks, fire, pirates, or enemies, 1 Cranch, 1, or from the sickness or death of the crew or master. 1 Curt. C. C. 376; 2 Wall. Jr. C. C. 59; 1 Swab. Adm. 84.

3. *The saving.* In order to give a title to salvage, the property must be effectually saved; it must be brought to some port of safety, and it must be there in a state capable of being restored to the owner, before the service can be deemed completed. 1 Sumn. C. C. 417; 1 W. Rob. Adm. 329, 406. It must be saved by the instrumentality of the asserted salvors, or their services must contribute in some certain degree to save it, 4 Wash. C. C. 651; Olc. Adm. 462; though, if the services were rendered on the request of the master or owner, the salvor is entitled to salvage

though the services were slight and the property was saved mainly by a providential act. 5 McLean, C. C. 359; 1 Newb. Adm. 130; 2 W. Rob. Adm. 91; Bee, Adm. 90; 9 Lond. Jur. 119.

4. *The place.* In England, it has been held that the services must be rendered on the high seas, or, at least, *extra corpus comitatus*, in order to give the admiralty court jurisdiction to decree salvage; but in this country it is held that the district courts of the United States have jurisdiction to decree salvage for services rendered on tide-waters and on the lakes or rivers where inter-state or foreign commerce is carried on, although *infra corpus comitatus*. 12 How. 466; 1 Blatchf. C. C. 420; 5 McLean, C. C. 359.

5. *The amount.* Some foreign states have fixed by law the amount or proportion to be paid for salvage services; but in England and the United States no such rule has been established. In these countries the amount rests in the sound discretion of the court awarding the salvage, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opere et labore*, the excess being intended, upon principles of sound policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services. 2 Cranch, 240; 1 C. Rob. Adm. 312, note; 3 *id.* 355; 3 Hagg. Adm. 95. But it is equally the policy of the law not to provoke the salvor's appetite of avarice, nor encourage his exorbitant demands, nor tench him to stand ready to devour what the ocean has spared. Gilp. Dist. Ct. 75. Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance and tend to augment the risk and loss of vessels in distress. 7 Notes of Cases. The amount is determined by a consideration of the peril to which the property was exposed, the value saved, the risk to life or property incurred by the salvors, their skill, the extent of labor or time employed, and the extent of the necessity that may exist in any particular locality to encourage salvage services. 3 Hagg. Adm. 121; 1 Gall. C. C. 133; 1 Sumn. C. C. 413. An ancient rule of the admiralty allowed the salvors one-half of the property saved, when it was absolutely derelict or abandoned; but that rule has been latterly distinctly repudiated by the high court of admiralty and our supreme court, and the reward in cases of derelict is now governed by the same principles as in other salvage cases. 20 Eng. L. & Eq. 607; 4 Notes of Cases, 144; 19 How. 161. Risking life to save the lives of others is an ingredient in salvage service which will enhance the salvage upon the property saved. Dav. Dist. Ct. 61; 3 Hagg. Eccl. 84. But no salvage is due for saving life merely, unaccompanied by any saving of property, 1 W. Rob. Adm. 330, unless it be the life of a slave. Bee, Adm. 226, 260. If one person saves property and another life, the latter is entitled to share in the salvage on the property saved. 6 N. Y. Leg. Obs.

6. *The property saved.* Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit from the salvage service. 1 Stor. C. C. 469. *Qui sentit commodum sentire debet et onus.* It follows that salvage expenses incurred in saving ship, cargo, and freight in one common and continuous service are apportionable upon them all, according to their respective values; but expenses incurred for any one interest separately, or any two interests only, are chargeable wholly to it or to them. 2 W. Rob. Adm. 315; 7 Ell. & B. 523; 2 Pick. Mass. 1; 11 *id.* 90; 4 Whart. Penn. 301; 5 Du. N. Y. 310. Goods of the government pay the same rate as if owned by individuals, 3 Sumn. C. C. 308; 3 Hagg. Eccl. 246; Edw. Adm. 79; but not the mails, Marvin, Salvage, 132; nor can vessels of war belonging to a foreign neutral power be arrested in our ports for salvage. 7 Cranch, 116; 2 Dods. Adm. 451. Salvage is not allowed on the clothing left by the master and crew on board the vessel which they abandon, but this should be returned free of charge, Ware, Dist. Ct. 378, or for saving from a wreck bills of exchange or other evidences of debt, or documents of title. Dav. Dist. Ct. 20.

7. *Bar to salvage claim.* An express explicit agreement, in distinct terms, to pay at all events, whether the property shall be saved or not, a sum certain, or a reasonable sum, for work, labor, and the hire of a vessel in attempting to save the property, is inconsistent with a claim for salvage; and when such agreement is pleaded in bar and proved, any claim for salvage will be disallowed. 2 Curt. C. C. 350; 2 W. Rob. Adm. 177. An agreement, fairly made and fully understood by the salvors, to perform a salvage service for a stipulated sum or proportion, to be paid in the event of a successful saving, does not alter the nature of the service as a salvage service, but fixes the amount of compensation. But such an agreement will not be binding upon the master or owner of the property unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable. 1 Stor. C. C. 323; 1 Sumn. C. C. 207; 1 Blatchf. Adm. 414; 19 How. 160. A custom in any particular trade that vessels shall assist each other without claiming salvage is legal, and a bar to a demand for salvage in all cases where it properly applies. 1 W. Rob. Adm. 440.

Forfeiture or denial of salvage. Embezzlement of any of the goods saved works a forfeiture of the salvage of the guilty party, Ware, Dist. Ct. 380; 1 Sumn. C. C. 328; and, in general, fraud, negligence, or carelessness in saving or preserving the property, or any gross misconduct on the part of the salvors in connection with the property saved, will work a total forfeiture of the salvage or a diminution of the amount. 2 Cranch, 240;

1 W. Rob. Adm. 497; 2 *id.* 470; 3 *id.* 122; 2 Eng. L. & Eq. 554; 6 Wheat. 152; 19 Bost. Law Rep. 490.

8. *Distribution.* The distribution of salvage among the salvors, like the amount, rests in the sound discretion of the court. In general, all persons, not under a pre-existing obligation of duty to render assistance, who have contributed by their exertions to save the property, and who have not forfeited their rights by their misconduct, are entitled to share in the salvage, as well those who remain on board the salvor vessel in the discharge of their duty, but are ready and willing to engage in the salvage enterprise, as those who go on board and navigate the wreck. Ware, Dist. Ct. 483; 2 Dods. Adm. 132; 2 W. Rob. Adm. 115; 2 Cranch, 240. The apportionment between the owners and crew of the salvor ship depends upon the peculiar circumstances of each case: such as, the character, size, value, and detention of the vessel, its exposure to peril, and like considerations, and the number, labor, exposure, and hazard of the crew. In ordinary cases, the more usual proportion allowed the owners of a salvor sail-vessel is one-third. 2 Cranch, 240; 1 Sumn. C. C. 425; 3 *id.* 579. The owner of a steam-vessel, if of considerable value, is often allowed a larger proportion. Marvin, Wreck & Salvage, 247. The master's share is usually double that of the mate, and the mate's double that of a seaman, and the share of those who navigate the derelict into port, or do the labor, double that of those who remain on board the salvor vessel. But these proportions are often varied according to the circumstances, so as to reward superior zeal and energy and discourage indifference and selfishness. 3 Hagg. Adm. 121.

9. In marine insurance, the salvage is to be accounted for by the assured to underwriters in an adjustment of a total or salvage loss, or assigned to the underwriters by abandonment or otherwise. 2 Phillips, Ins. § 1726. And so, also, the remnant of the subject insured or of the subject pledged in bottomry, and (if there be such) in that of a fire insurance, and of the interest in the life of a debtor (if so stipulated in this case), is to be brought into the settlement for the loss in like manner. 2 Dutch. N. J. 541; 5 Du. N. Y. 1; 2 Phillips, Ins. ch. xvii.; 15 Ohio, 81; 2 N. Y. 285; 4 La. 289; 2 Sumn. C. C. 157.

SALVAGE CHARGES. In Insurance. All those costs, expenses, and charges necessarily incurred in and about the saving and preservation of the property imperilled, and which, if the property be insured, are eventually borne by the underwriters. Stevens, Av. c. 2, § 1.

SALVAGE LOSS. That kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. It also means, among underwriters and average-adjusters, a mode of settling a loss, under a policy, in cases where the goods have been necessarily sold at a port short of the port of destination, in consequence of the perils insured against. In such cases, though the property be not abandoned to the underwriter, the principle of abandonment is assumed in the adjustment of the loss. The underwriter pays a total loss. The net proceeds of the sale of the goods, after deducting all expenses, are retained by the assured, and he credits the underwriter with the amount. 2 Phillips, Ins. § 1480; Stevens, Av. c. 2, § 1.

SALVOR. In Maritime Law. A person who saves property or rescues it from impending peril on the sea or when wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake where inter-state commerce is carried on, and who is under no pre-existing contract or obligation of duty by his relation to the property to render such services. 1 Hagg. Adm. 236; 1 Curt. C. C. 378.

2. In general, the crew cannot claim as salvors of their own ship or cargo, they being under a pre-existing obligation of duty to be vigilant to avoid the danger, and when in it to exert themselves to rescue or save the property, in consideration of their wages merely. 14 Bost. Law Rep. 487; 21 *id.* 99; 1 Hagg. Adm. 236; 2 Mas. C. C. 319. But if their connection with the ship be dissolved, as by a capture, or the ship or cargo be voluntarily abandoned by order of the master, *sine spe revertendi aut recuperandi*, such abandonment taking place *bonâ fide* and without coercion on their part, and for the purpose of saving life, their contract is put an end to, and they may subsequently become salvors. 20 Eng. L. & Eq. 607; 16 Jur. 572; 3 Sumn. C. C. 270; 2 Cranch, 240; Dav. Dist. Ct. 121. A passenger, 2 Hagg. Adm. 3, note; 3 Bos. & P. 612, a pilot, 10 Pet. 108; Gilp. Dist. Ct. 65, Lloyd's agent, 3 W. Rob. Adm. 181, official persons, 3 Wash. C. C. 567; 1 C. Rob. Adm. 46, officers and crews of naval vessels, 2 Wall. Jr. C. C. 67; 1 Hagg. Adm. 158; 15 Pet. 518, may all become salvors, and, as such, be entitled to salvage for performing services in saving property, when such services are not within or exceed the line of their proper official duties.

3. The finders of a derelict (that is, a ship or goods at sea abandoned by the master and crew without the hope or intention of returning and resuming the possession) who take actual possession with an intention and with the means of saving it acquire a right of possession which they can maintain against all the world, even the true owner, and become bound to preserve the property with good faith and bring it to a place of safety for the owner's use. They are not bound to part with the possession until their salvage is paid, or the property is taken into the custody of the law preparatory to the amount of salvage being legally ascertained. Dav. Dist. Ct. 20; Olc. Adm. 462; Ware, Dist. Ct. 339. If they cannot with their own force convey the pro-

perty to a place of safety without imminent risk of a total or material loss, they cannot, consistently with their obligations to the owner, refuse the assistance of other persons proffering their aid, nor exclude them from rendering it under the pretext that they are the finders and have thus gained the right to the exclusive possession. But if third persons unjustifiably intrude themselves, their services will enure to the benefit of the original salvors. 1 Dods. Adm. 414; 3 Hagg. Adm. 156; Olc. Adm. 77.

4. If a first set of salvors fall into distress, and are assisted by a second or third set, the first or second do not lose their claim to salvage, unless they voluntarily and without fraud or coercion abandon the enterprise, but they all share together according to their respective merits. 1 Sumn. C. C. 400; 1 W. Rob. Adm. 406; 2 *id.* 70. In cases of ships stranded or in distress, not derelicts, salvors do not acquire an exclusive possession as against the owner, the master, or his agent. While the master continues on board, he is entitled to retain the command and control of the ship and cargo and to direct the labor. The salvors are assistants and laborers under him; and they have no right to prevent other persons from rendering assistance, if the master wishes such aid. 3 Hagg. Adm. 383; 2 W. Rob. Adm. 307; 2 Eng. L. & Eq. 551. When the ship has been relieved from its peril, salvors forfeit no right and impair no remedy by leaving the ship. 1 Hagg. Adm. 156; 1 Newb. Adm. 275. Their remedy to recover salvage is by libel or suit in the district court of the United States, sitting as a court of admiralty.

SAMPLE. A small quantity of any commodity or merchandise, exhibited as a specimen of a larger quantity, called the bulk.

When a sale is made by sample, and it afterwards turns out that the bulk does not correspond with it, the purchaser is not, in general, bound to take the property on a compensation being made to him for the difference. 1 Campb. 113. See 2 East, 314; 4 Campb. 22; 9 Wend. N. Y. 20; 12 *id.* 413, 566; 5 Johns. N. Y. 395; 6 N. Y. 73, 95; 13 Mass. 139; 2 Nott & M'C. So. C. 538; 3 Rawle, Penn. 37; 14 Mees. & W. Exch. 651.

SANCTION. That part of a law which inflicts a penalty for its violation or bestows a reward for its observance. Sanctions are of two kinds,—those which redress civil injuries, called civil sanctions, and those which punish crimes, called penal sanctions. 1 Hoffman, Leg. Outl. 279; Rutherforth, Inst. b. 2, c. 6, s. 6; Toullier, tit. prél. 86; 1 Blackstone, Comm. 56.

SANCTUARY. A place of refuge, where the process of the law cannot be executed.

Sanctuaries may be divided into religious and civil. The former were very common in Europe,—religious houses affording protection from arrest to all persons, whether accused of crime or pursued for debt. This kind was never known in the United States.

Civil sanctuary, or that protection which is afforded to a man by his own house, was always respected in this country. The house protects the owner from the service of all civil process in the first instance, but not if he is once lawfully arrested and takes refuge in his own house. See DOOR; HOUSE; ARREST.

No place affords protection from arrest in criminal cases: a man may, therefore, be arrested in his own house in such cases, and the doors may be broken for the purpose of making the arrest. See ARREST.

SANE MEMORY. That understanding which enables a man to make contracts and his will, and to perform such other acts as are authorized by law. See LUNACY; MEMORY; NON COMPOS MENTIS.

SANG, SANC. Blood. These words are nearly obsolete.

SANITY. The state of a person who has a sound understanding; the reverse of insanity.

The sanity of an individual is always presumed. 5 Johns. N. Y. 144; 1 Pet. 163; 1 Hen. & M. Va. 476; 4 Wash. C. C. 232. See 9 Conn. 102; 1 Mass. 71; 3 *id.* 330; 8 *id.* 371; 9 *id.* 225; 4 Pick. Mass. 32; 8 Me. 42; 15 Johns. N. Y. 503.

SANS CEO QUE. The same as *Absque hoc*, which see.

SANS NOMBRE (Fr. without number). **In English Law.** A term used in relation to the right of putting animals on a common. The term common *sans nombre* does not mean that the beasts are to be innumerable, but only indefinite, not certain, Willes, 227; but they are limited to the commoner's own commonable cattle, levant et couchant, upon his lands, or as many cattle as the land of the commoner can keep and maintain in winter. 2 Brownl. 101; Ventr. 54; 5 Term, 48; 1 Wms. Saund. 28, n. 4.

SANS RECOURS (Fr. without recourse). Words which are sometimes added to an indorsement by the indorsee to avoid incurring any liability. Chitty, Bills, 179; 7 Taunt. 160; 1 Carr. N. Y. 538; 3 Cranch, 193; 7 *id.* 159; 12 Mass. 172; 14 Serg. & R. Penn. 325.

SATISDATIO (Lat. *satis*, and *dare*). **In Civil Law.** Security given by a party to an action to pay what might be adjudged against him. It is a satisfactory security in opposition to a naked security or promise. Vicat, Voc. Jur.; 3 Sharswood, Blackst. Comm. 291.

SATISFACTION (Lat. *satis*, enough, *facio*, to do, to make). **In Practice.** An entry made on the record, by which a party in whose favor a judgment was rendered declares that he has been satisfied and paid.

2. In Alabama, Delaware, Illinois, Indi-

ana, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, South Carolina, and Vermont, provision is made by statute, requiring the mortgagee to discharge a mortgage upon the record, by entering satisfaction in the margin. The refusal or neglect to enter satisfaction after payment and demand renders the mortgagee liable to an action after the time given him by the respective statutes for doing the same has elapsed, and subjects him to the payment of damages, and, in some cases, treble costs. In Indiana and New York, the register or recorder of deeds may himself discharge the mortgage upon the record on the exhibition of a certificate of payment and satisfaction signed by the mortgagee or his representatives, and attached to the mortgage, which shall be recorded. Ind. Stat. 1836, 64; 1 N. Y. Rev. Stat. 761.

In Equity. The donation of a thing, with the intention, express or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. See LEGACY; CUMULATIVE LEGACY.

SATISFACTION PIECE. In English Practice. An instrument of writing in which it is declared that satisfaction is acknowledged between the plaintiff and defendant. It is signed by the attorney, and on its production and the warrant of attorney to the clerk of the judgments, satisfaction is entered on payment of certain fees. Lee, Dict. of Pract. *Satisfaction.*

SATISFACTORY EVIDENCE. That which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. 3 Bouvier, Inst. n. 3049.

SCANDAL. A scandalous verbal report or rumor respecting some person.

SCANDALOUS MATTER. In Equity Pleading. Unnecessary matter criminatory of the defendant or any other person, alleged in the bill, answer, or other pleading, or in the interrogatories to or answers by witnesses. Adams, Eq. 306. Matter which is relevant can never be scandalous, Story, Eq. Pl. § 270; 15 Ves. Ch. 477; and the degree of relevancy is of no account in determining the question. Cooper, Eq. Pl. 19; 2 Ves. 24; 6 *id.* 514; 11 *id.* 256; 15 *id.* 477. Where scandal is alleged, whether in the bill, 2 Ves. Ch. 631, answer, Mitford, Eq. Plead. Jer. ed. 313, or interrogatories to or answer of witnesses, 2 Younge & C. 445, it will be referred to a master at any time, 2 Ves. Ch. 631, and, by leave of court, even upon the application of a stranger to the suit, 6 Ves. Ch. 514; 5 Beav. Rolls, 82, and matter found to be scandalous by him will be expunged, Story, Eq. Plead. §§ 266, 862; 4 Hen. & M. Va. 414, at the cost of counsel introducing it, in some cases. Story, Eq. Plead. § 266. The presence of scandalous matter in the bill is no excuse for its being in the answer. 19 Me. 214.

SCANDALUM MAGNATUM (L. Lat. slander of great men). Words spoken in derogation of a peer, a judge, or other great officer of the realm. 1 Ventr. 60. This was distinct from mere slander in the earlier law, and was considered a more heinous offence. Buller, Nisi P. 4. See 3 Sharswood, Blackst. Comm. 124.

SCHEDULE. In Practice. When an indictment is returned from an inferior court in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the schedule. 1 Saund. 309 *a*, n. 2.

Schedules are also frequently annexed to answers in a court of equity, and to depositions and other documents, in order to show more in detail the matter they contain than could otherwise be conveniently shown.

The term is frequently used instead of inventory.

SCHOOLMASTER. One employed in teaching a school.

2. A schoolmaster stands *in loco parentis* in relation to the pupils committed to his charge, while they are under his care, so far as to enforce obedience to his commands lawfully given in his capacity of schoolmaster, and he may, therefore, enforce them by moderate correction. Comyns, Dig. *Pleader* (3 M 19); Hawkins, Pl. Cr. c. 60, sect. 23; 4 Gray, Mass. 36. See CORRECTION.

3. The schoolmaster is justly entitled to be paid for his important and arduous services by those who employ him. See 1 Bingh. 357; 8 J. B. Moore, 368. His duties are to teach his pupils what he has undertaken, and to have a special care over their morals. See 1 Stark. 421; ASSAULT.

SCIENDUM (Lat.). **In English Law.** The name given to a clause inserted in the record by which it is made "known that the justice here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law." Lee, Dict. *Record.*

SCIENTER (Lat. knowingly). The allegation of knowledge on the part of a defendant or person accused, which is necessary to charge upon him the consequences of the crime or tort.

A man may do many acts which are justifiable or not, as he is ignorant or not ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offence; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money.

SCILICET (Lat. *scire*, to know, *licet*, it is permitted: you may know: translated by *to wit*, in its old sense of to know). That is to say; to wit; namely.

It is a clause to usher in the sentence of another, to particularize that which was too general before, distribute what was too gross, or to explain what was doubtful and obscure.

It neither increases nor diminishes the premises or *habendum*, for it gives nothing of itself; it may make a restriction when the preceding words may be restrained. Hob. 171; 1 P. Will. Ch. 18; Coke, Litt. 180 *b*, note 1.

When the scilicet is repugnant to the precedent matter, it is void: for example, when a declaration in trover states that the plaintiff on the *third* day of May was possessed of certain goods which on the fourth day of May came to the defendant's hands, who afterwards, to wit, on the *first* day of May, converted them, the scilicet was rejected as surplusage. Croke Jac. 428. And see 6 Binn. Penn. 15; 3 Saund. 291, note 1.

Stating material and traversable matter under a scilicet will not avoid the consequences of a variance, 1 M'Clel. & Y. 277; 4 Taunt. 321; 6 Term, 462; 2 Bos. & P. 170, n. 2; 1 Cow. N. Y. 676; 4 Johns. N. Y. 450; 2 Pick. Mass. 223; nor will the mere omission of a scilicet render immaterial matter material, 2 Saund. 206 *a*; 3 Term, 68; 1 Chitty, Plead. 276; even in a criminal proceeding. 2 Campb. 307, n. See 3 Term, 68; 3 Maule & S. 173.

SCINTILLA JURIS (Lat. a spark of law or right). A legal fiction resorted to for the purpose of enabling feoffees to uses to support contingent uses when they come into existence, thereby to enable the Statute of Uses, 27 Hen. VIII., to execute them. For example, a shifting use: a grant to A and his heirs to the use of B and his heirs, until C perform an act, and then to the use of C and his heirs. Here the statute executes the use in B, which, being coextensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin C's use is served. It is said to be served out of A's original seisin; for upon the cesser of B's use it is contended that the original seisin reverted to A for the purpose of serving C's use, and is a possibility of seisin, or *scintilla juris*. See 4 Kent, Comm. 238 *et seq.*, and the authorities there cited, for the learning upon this subject; Burton, Real Prop. 48, 49; Wilson, Springing Uses, 59, 60; Washburn, Real Prop.

SCIRE FACIAS (Lat. that you make known). The name of a writ (and of the whole proceeding) founded on some public record.

2. Public records, to which the writ is applicable, are of two classes, *judicial* and *non-judicial*.

Judicial records are of two kinds, judgments in former suits, and recognizances which are of the nature of judgments. When founded on a judgment, the purpose of the writ is either to revive the judgment, which because of lapse of time—a year and a day at common law, but now varied by statutes—is presumed in law to be executed or released, and therefore execution on it is not allowed without giving notice, by *scire facias*, to the defendant to come in, and show if he can, by release or otherwise, why execution ought not to issue; or to make a person, who derives a benefit by or becomes chargeable to the execution, a party to the judgment, who was not a party to the original suit. In both of these classes of cases, the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance, its purpose is, as in cases of judgment, to have execution; and though it is not a continuation of a former suit, as in the case of judgments, yet, not being the commencement and foundation of an action, it is not an original, but a judicial, writ, and at most is only in the nature of an original action. When founded on a judicial record, the writ must issue out of the court where the judgment was given or recognizance entered of record, if the judgment or recognizance remains there, or if they are removed out of the court where they are. 3 Blackst. Comm. 416, 421; Coke, 2d Inst. 469–472; 3 Gill & J. Md. 359; 2 Wms. Saund. 71, 72, notes.

3. Non-judicial records are letters patent and corporate charters. The writ, when founded on a non-judicial record, is the commencement and foundation of an original action; and its purpose is always to repeal or forfeit the record. *Quo warranto* is the usual and more appropriate remedy to forfeit corporate charters and offices; and *scire facias*, though used for that purpose, is more especially applicable to the repeal of letters patent. When the crown is deceived by a false suggestion, or when it has granted any thing which by law it cannot grant, or where the holder of a patent office has committed a cause of forfeiture, and other like cases, the crown may by its prerogative repeal by *scire facias* its own grant. And where by several letters patent the selfsame thing has been granted to several persons, the first patentee is of right permitted, in the name and at the suit of the crown by *scire facias*, to repeal the subsequent letters patent; and so, in any case of the grant of a patent which is injurious to another, the injured party is permitted to use the name of the crown in a suit by *scire facias* for the repeal of the grant. This privilege of suing in the name of the crown for the repeal of the patent is granted to prevent multiplicity of suits. 2 Wms. Saund. 72, notes; 6 Mod. 230, 239; 10 *id.* 258; Dy. 197 *b*, 198 *a*; 4 Inst. 88; 2 Ventr. 354. A state may by *scire facias* repeal a patent of land fraudulently obtained. 1 Harr. & M'H. Md. 162.

In the United States, jurisdiction over patents for writings and discoveries is, by the 8th section of the federal constitution, vested in the general government. And by the act of congress of February 21, 1793, ch. ii., process in the nature of a *scire facias*, founded on a record to be made of the preliminary proceedings, is prescribed as the

mode for repealing letters patent. 9 Wheat. 603; 1 Kent, Comm. 381. The circuit courts of the United States have original jurisdiction and exclusive authority to declare a patent void. Act of Congress of July 4, 1836; 2 Kent, Comm. 368; 8 Paige, Ch. N. Y. 132.

4. *Scire facias* is also used by government as a mode to ascertain and enforce the forfeiture of a corporate charter, where there is a legal existing body capable of acting, but who have abused their power: it cannot, like *quo warranto* (which is applicable to all cases of forfeiture), be applied where there is a body corporate *de facto* only, who take upon themselves to act, but cannot legally exercise their powers. In *scire facias* to forfeit a corporate charter, the government must be a party to the suit; for the judgment is that the parties be ousted and the franchises be seized into the hands of the government. 2 Kent, Comm. 313; 10 Barnew. & C. 240; Yelv. 190; 5 Mass. 230; 16 Serg. & R. Penn. 140; 4 Gill & J. Md. 1; 9 *id.* 365; 4 Gill, Md. 404.

Scire facias is also used to suggest further breaches on a bond with a condition, where a judgment has been obtained for some but not all of the breaches and to recover further instalments where a judgment has been obtained for the penalty before all the instalments are due. 1 Wms. Saund. 58, n. 1; 4 Md. 375.

As to the effects of the judgment, and the principle of forfeiture, see QUO WARRANTO.

5. The pleadings in *scire facias* are peculiar. The writ recites the judgment or other record, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*. The writ, therefore, presents the plaintiff's whole case, and constitutes the declaration, to which the defendant must plead. 1 Blackf. Ind. 297. And when the proceeding is used to forfeit a corporate charter, all the causes of forfeiture must be assigned in distinct breaches in the writ, as on a bond with a condition is done in the declaration or replication. And the defendant must either disclaim the charter or deny its existence, or deny the facts alleged as breaches, or demur to them. The suggestions in the writ, disclosing the foundation of the plaintiff's case, must also be traversed if they are to be avoided. The *scire facias* is founded partly upon them and partly upon the record. 2 Inst. 470, 679. They are substantive facts, and can be traversed by distinct pleas embracing them alone, just as any other fundamental allegation can be traversed alone. All the pleadings after the writ or declaration are in the ordinary forms. There are no pleadings in *scire facias* to forfeit a corporate charter to be found in the books, as the proceeding has been seldom used. There is a case in 1 P. Will. 207, but no pleadings. There is a case also in 9 Gill, Md. 379, with a synopsis of the pleadings. Perhaps the only other case is in Vermont; and it is without pleadings. A defendant cannot plead more than one plea to a *scire facias* to forfeit a corporate charter: the statutes of 4 & 5 Anne, ch. 16, and 9 Anne, ch. 20, allowing double pleas, do not extend to the crown. 1 Chitty, Plead. 479; 1 P. Will. Ch. 220.

SCIRE FACIAS AD AUDIENDUM ERRORES (Lat.). The name of a writ which is sued out after the plaintiff in error has assigned his errors. Fitzherbert, Nat. Brev. 20; Bacon, Abr. *Error* (F).

SCIRE FACIAS AD DISPROBANDUM DEBITUM (Lat.). The name of a writ in use in Pennsylvania, which lies by a defendant in foreign attachment against the plaintiff, in order to enable him, within a year and a day next ensuing the time of payment to the plaintiff in the attachment, to disprove or avoid the debt recovered against him. Act relating to the commencement of actions, s. 61, passed June 13, 1836.

SCIRE FECI (Lat. I have made known). **In Practice.** The return of the sheriff, or other proper officer, to the writ of *scire facias*, when it has been served.

SCIRE FIERI INQUIRY. In English Law. The name of a writ formerly used to recover the amount of a judgment from an executor.

The history of the origin of the writ is as follows. When on an execution *de bonis testatoris* against an executor the sheriff returned *nulla bona* and also a *devastavit*, a *fieri facias*, *de bonis propriis*, might formerly have been issued against the executor, without a previous inquisition finding a *devastavit* and a *scire facias*. But the most usual practice upon the sheriff's return of *nulla bona* to a *fieri facias de bonis testatoris* was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause in it, "et si tibi constare, poterit," that the executor had wasted the goods, then to levy *de bonis propriis*. This was the practice in the king's bench till the time of Charles I.

2. In the common pleas a practice had prevailed in early times upon a suggestion in the special writ of *fieri facias* of a *devastavit* by the executor, to direct the sheriff to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued out against him, and, unless he made a good defence thereto, an execution *de bonis propriis* was awarded against him.

The practice of the two courts being different, several cases were brought into the king's bench on error, and at last it became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias* inquiry, and *scire facias*, into one writ, thence called a *scire fieri inquiry*,—a name compounded of the first words of the two writs of *scire facias* and *fieri facias*, and that of inquiry, of which it consists.

3. This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor, if they could be levied thereof, but if it should appear to him by the inquisition of a jury that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, etc.

If the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged, upon a *scire facias* to revive the judgment, that the executor or administrator should have execution for the debt, etc. Clift, Entr. 659; Lilly, Entr. 664.

4. Although this practice is sometimes adopted, yet the most usual proceeding is by action of debt on the judgment, suggesting a *devastavit*, because in the proceeding by *scire fieri inquiry* the plaintiff is not entitled to costs unless the executor appears and pleads to the *scire facias*. 1 Saund. 219, n. 8. See 2 Archbold, Pract. 934.

SCITE. The setting or standing of any place. The seat or situation of a capital messuage, or the ground on which it stood. Jacob, Law Dict.

SCOLD. A woman who by her habit of scolding becomes a nuisance to the neighborhood is called a. common scold. See COMMON SCOLD.

SCOT AND LOT. In English Law. The name of a customary contribution, laid upon all the subjects according to their ability.

SCOTALE. An extortion by officers of the forests who kept ale-houses and compelled people to drink there under fear of their displeasure. Charter of the Forest, c. 7; Manwood, For. Laws, pt. 1, 216.

SCOUNDREL. An opprobrious title, applicable to a person of bad character. General damages will not lie for calling a man a scoundrel, but special damages may be recovered when there has been an actual loss. 2 Bouvier, Inst. n. 2250; 1 Chitty, Pract. 44.

SCRAWL. A mark which is to supply the place of a seal. 2 Parsons, Contr. 100. See SCROLL.

SCRIP. A certificate or schedule. Evidence of the right to obtain shares in a public company; sometimes called scrip certificate, to distinguish it from the real title to shares. Wharton, Law Dict. 2d Lond. ed.; 15 Ark. 12. The possession of such scrip is *primâ facie* evidence of ownership of the shares therein designated. Addison, Contr. 203*. It is not goods, wares, or merchandise within the Statute of Frauds. 16 Mees. & W. Exch. 66.

SCRIPT. The original or principal instrument, where there are part and counterpart.

SCRIVENER. A person whose business it is to write deeds and other instruments for others; a conveyancer.

Money scriveners are those who are engaged in procuring money to be lent on mortgages and other securities, and lending such money accordingly. They act also as agents for the purchase and sale of real estates.

To be considered a money scrivener, a person must be concerned in carrying on the trade or profession as a means of making a livelihood. He must in the course of his occupation receive other men's moneys into his trust and custody, to lay out for them as occasion offers. 3 Campb. 538; 2 Esp. Cas. 555.

SCROLL. A mark intended to supply the place of a seal made with a pen or other instrument of writing.

A scroll is adopted as a sufficient seal in Jamaica, 1 Bos. & P. 360, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Wisconsin, and perhaps one or two other states. In the New England states, New Jersey, and New York, the common-law seal is required. Thornton, Conv. *passim*. And see 7 Leigh, Va. 301; 4 Gratt. Va. 283; 17 Miss. 34; 2 Fla. 418.

SCRUET ROLL (called, also, *Scruet Finium*, or simply *Scruet*). **In Old English Law.** A record of the bail accepted in cases of habeas corpus. The award was set down in the remembrance roll, together with the cause of commitment, the writ and return were put on file, the bail was recorded in the scruet. 3 Howell, St. Tr. 134, 135, arg. For remembrance roll, see Reg. Michael. 1654, § 15.

SCRUTATOR (Lat. from *scrutari*, to search). **In Old English Law.** A bailiff whom the king of England appointed in places that were his in franchise or interest, whose duty was to look after the king's water-rights: as, *flotsam*, *jetsam*, wreck, etc. 1 Hargr. Tracts, p. 23; Pat. 27 Hen. VI. parte 2, m. 20; Pat. 8 Ed. IV. parte 1, m. 22.

SCUTAGE (from Lat. *scutum*, a shield). Knight-service. Littleton, § 99. The tax which those who, holding by knight-service, did not accompany the king, had to pay on its being assessed by parliament. Escuage certain was a species of socage where the compensation for service was fixed. Littleton, §§ 97, 98; Reg. Orig. 88; Wright, Ten. 121–134.

SCYREGEMOTE. The name of a court among the Saxons. It was the court of the shire, in Latin called *curia comitatus*, and the principal court among the Saxons. It was holden twice a year for determining all causes both ecclesiastical and secular.

SE DEFENDENDO (Lat.). Defending himself.

Homicide *se defendendo* may be justifiable.

SEA. The ocean; the great mass of water which surrounds the land, and which probably extends from pole to pole, covering nearly three-quarters of the globe. Waters within the ebb and flow of the tide are to be considered the sea. Gilp. Dist. Ct. 526.

A large body of salt water communicating with the ocean is also called a sea: as, the Mediterranean sea, etc.

Very large inland bodies of salt water are also called seas: as, the Caspian sea, etc.

The open sea is public and common property, and any nation or person has ordinarily an equal right to navigate it or to fish therein, 1 Kent, Comm. 27; Angell, Tide-Waters, 44–49; 1 Bouvier, Inst. 170, 174, and to land upon the sea-shore. 1 Bouvier, Inst. 173, 174. But it is generally conceded that every nation has jurisdiction to the distance of a cannon-shot, or marine league, over the waters adjacent to its shore. 2 Cranch, 187, 234; Bynkershoek, Qu. Pub. Juris. 61; Vattel, 207.

Every nation has jurisdiction over the person of its own subjects in its own public and private vessels when at sea; and so far territorial jurisdiction may be considered as preserved; for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. The extent of jurisdiction over adjoining seas is often a question of difficulty, and one that is still open to controversy. As far as a nation can conveniently occupy, and that occupation is acquired by prior possession or treaty, the jurisdiction is exclusive. 1 Kent, Comm. 29–31. This has been heretofore limited to the distance of a *cannon-shot*, or marine league, over the waters adjacent to its shore. 2 Cranch, 187, 234; 1 Cranch, C. C. 62; Bynkershoek, Qu. Pub. Juris. 61; 1 Azuni, Marit. Law, 204, 185; Vattel, 207.

SEA-LETTER, SEA-BRIEF. **In Maritime Law.** A document which should be found on board of every neutral ship: it specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. Chitty, Law of Nat. 197; 1 Johns. N. Y. 192.

SEA-SHORE. That space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark. Hargrave, St. Tr. 12; 6 Mass. 435, 439; 1 Pick. Mass. 180, 182; 5 Day, Conn. 22; 12 Me. 237; 2 Zabr. N. J. 441; 27 Eng. L. & Eq. 242; 4 DeGex, M. & G. 206. See TIDE; TIDE-WATER.

2. At common law, the sea-shore, in England, belongs to the crown; in this country, to the state. Angell, Tide-Wat. 20 *et seq.*; 3 Kent, Comm. 347; 27 Eng. L. & Eq. 242; 6 Mass. 435; 1 Dutch. N. J. 525; 16 Pet. 367; 3 How. 221; 3 Zabr. N. J. 624. In England, the sovereign is not the absolute proprietor, but holds the sea-shore subject to the public rights of navigation and fishery; and if he grants it to an individual his grantee takes subject to the same rights. Pheas, Rights of Water, 45–55; Angell, Tide-Wat. 21. So in this country it has been held that the rights of fishery and navigation remain unimpaired by the grant of lands covered by navigable water. 6 Gill, Md. 121. But the power of the states, unlike that of the crown, is absolute, except in so far as it is controlled by the federal constitution. Angell, Tide-Wat. 59. The states, therefore, may regulate the use of their shores and the fisheries thereon, provided such regulations do not interfere with the laws of congress. 4 Wash. C. C. 371; 18 How. 71; 4 Zabr. N. J. 80; 2 Pet. 245. And see TIDE-WATER; RIVER.

3. The public right of fishing includes shrimping and gathering all shell-fish or other fish whose natural habitat is between high and low water mark. 5 Day, Conn. 22; 2 Bos. & P. 472; 22 Me. 353. In England and in some of the United States it has been held that the public have no right to use the banks of rivers for the purpose of towing vessels, 3 Term, 253; 11 Miss. 366; though in other states a different rule seems to have been adopted. 4 Ill. 520; 12 *id.* 29; 31 Me. 9; 42 *id.* 552; 18 Barb. N. Y. 277; 4 Mo. 343; 1 Jones, No. C. 299.

In Pennsylvania and some of the other states it has been held, contrary to the common law, that the soil of the sea-shore belongs to the riparian proprietor. 6 Penn. St. 379; 28 *id.* 206; 1 Whart. Penn. 536; 14 B. Monr. Ky. 367; 11 Ohio, 138. And see RIVER.

In Massachusetts and Maine, by the colony ordinance of 1691, and by usage arising therefrom, the proprietors of the adjoining land on bays and arms of the sea, and other places where the tide ebbs and flows, go to low-water mark, subject to the public easement, and not exceeding one hundred yards below high-water mark. 3 Kent, Comm. 429; Dane, Abr. c. 68, a. 3, 4. See WHARF.

4. By the Roman law, the shore included the land as far as the greatest wave extended in winter: *est autem littus maris, quatenus hibernus, fluctus maximus excurrit.* Inst. l. 2, t. 1, s. 3. *Littus publicum est eatenus qua maxime fluctus æstuat.* Dig. 50. 16. 112.

The Civil Code of Louisiana seems to have followed the law of the Institutes and the Digest; for it enacts, art. 442, that the "sea-shore is that space of land over which the waters of the sea are spread in the highest water during the winter season." See 5 Rob. Adm. 182; Dougl. 425; 1 Halst. N. J. 1; 2 Rolle, Abr. 170; Dy. 326; 5 Coke, 107; Bacon, Abr. *Courts of Admiralty* (A); 1 Am. Law Mag. 76; 16 Pet. 234, 367; Angell, Tide-Waters, Index, *Shore;* 2 Bligh, N. S. 146; 5 Mees. & W. Exch. 327; Merlin, Quest. de Droit, *Rivage de la Mer;* Inst. 2. 1. 1; 22 Me. 350.

SEA-WEED. A species of grass which grows in the sea.

When cast upon land, it belongs to the owner of the land adjoining the sea-shore, upon the grounds that it increases gradually, that it is useful as manure and a protection to the ground, and that it is some compensation for the encroachment of the sea upon the land. 2 Johns. N. Y. 313, 323. See 5 Vt. 223.

The French differs from our law in this respect, as sea-weeds there, when cast on the beach, belong to the first occupant. Dalloz, Dict. *Propriété*, art. 3, § 2, n. 128.

SEAL. An impression upon wax, wafer, or some other tenacious substance capable of being impressed. 5 Johns. N. Y. 239.

Lord Coke defines a seal to be wax, with an impression. 3 Inst. 169. "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum.*" The definition given above is the common-law definition of a seal. Perkins, 129, 134; Broke, Abr. *Faits*, 17, 30; 2 Leon. 21; 5 Johns. N. Y. 239; 2 Caines, N. Y. 362; 21 Pick. Mass. 417. In some of the states of the United States a scroll is equally effective. See SCROLL.

Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device, with which an impression may be made on wax or other substance on paper or parchment, in order to authenticate them: the impression thus made is also called a seal. Répert. mot *Sceau*; 3 M'Cord, So. C. 583; 5 Whart. Penn. 563.

2. When a seal is affixed to an instrument it makes it a specialty. See SPECIALTY.

When an instrument concludes with the words, "witness our hands and seals," and is signed by two persons, with only one seal, the jury may infer from the face of the paper that the person who signed last adopted the seal of the first. 6 Penn. St. 302. See 9 Am. Jur. 290–297; 1 Ohio, 368; 3 Johns. N. Y. 470; 12 *id.* 76; as to the origin and use of seals, Addison, Contr. 6; SCROLL.

3. The public seal of a foreign state proves itself; and public acts, decrees, and judgments exemplified under this seal are received as true and genuine. 2 Cranch, 187, 238; 4 Dall. Penn. 416; 7 Wheat. 273, 335; 1 Den. N. Y. 376; 2 Conn. 85, 90; 6 Wend. N. Y. 475; 9 Mod. 66. See 2 Munf. Va. 53. But to entitle its seal to such authority the foreign state must have been acknowledged by the government within whose jurisdiction the forum is located. 3 Wheat. 610; 9 Ves. Ch. 347.

The seal of a notary public is taken judicial notice of the world over, 2 Esp. 700; 5 Cranch, 535; 6 Serg. & R. Penn. 484; 3 Wend. N. Y. 173; 1 Gray, Mass. 175; but it must not be a scroll. 4 Blackf. Ind. 158. Judicial notice is taken of the seals of superior courts, Comyns, Dig. *Evidence* (A 2); not so of foreign courts, 3 East, 221; 9 *id.* 192, except admiralty or maritime courts. 2 Cranch, 187; 4 *id.* 292, 435; 3 Conn. 171. See Story, Confl. Laws, § 643; 2 Phillipps, Ev. 4th Am. ed. 454, notes.

SEAL OFFICE. In English Practice. The office at which certain judicial writs are sealed with the prerogative seal, and without which they are of no authority. The officer whose duty it is to seal such writs is called "sealer of writs."

SEAL OF THE UNITED STATES. The seal used by the United States in congress assembled shall be the seal of the United States, viz.: ARMS, paleways of thirteen pieces argent and gules; a chief azure; the escutcheon on the breast of the American eagle displayed proper, holding in his dexter talon an olive-branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this motto, "*E pluribus unum.*" For the CREST: over the head of the eagle which appears above the escutcheon, a glory, or breaking through a cloud, proper, and surrounding thirteen stars, forming a constellation argent on an azure field. REVERSE, a pyramid unfinished. In the zenith, an eye in a triangle, surrounded with a glory proper: over the eye, these words, "*Annuit cœptis.*" On the base of the pyramid, the numerical letters MDCCLXXVI; and underneath, the following motto, "*Novus ordo sectorum.*" Resolution of Congress, June 20, 1782; Gordon, Dig. art. 207.

SEALING A VERDICT. In Practice. The putting a verdict in writing, and placing it in an envelop, which is sealed. To relieve jurors after they have agreed, it is not unusual for the counsel to agree that the jury shall seal their verdict and then separate. When the court is again in session, the jury come in and give their verdict in all respects as if it had not been sealed; and a juror may dissent from it if since the sealing he has honestly changed his mind. 8 Ohio, 405; 1 Gilm. 333; 3 Bouvier, Inst. n. 3257.

SEALS. In Louisiana. A method of taking the effects of a deceased person into public custody.

2. On the death of a person, according to the laws of Louisiana, if the heir wishes to obtain the benefit of inventory and the delays for deliberating, he is bound, as soon as he knows of the death of the deceased to whose succession he is called, and before committing any act of heirship, to cause the seals to be affixed on the effects of the succession by any judge or justice of the peace. La. Civ. Code, art. 1027.

In ten days after this affixing of the seals, the heir is bound to present a petition to the judge of the place in which the succession is opened, praying for the removal of the seals and that a true and faithful inventory of the effects of the succession be made. *Id.* art. 1028.

In case of vacant estates, and estates of which the heirs are absent and not represented, the seals, after the decease, must be affixed by a judge or justice of the peace within the limits of his jurisdiction, and may be fixed by him either *ex officio* or at the request of the parties. La. Civ. Code, art. 1070. The seals are affixed at the request of the parties when a widow, a testamentary executor, or any other person who pretends to have an interest in a succession or community of property, requires it. *Id.* art. 1071. They are affixed *ex officio* when the presumptive heirs of the deceased do not all reside in the place where he died, or if any of them happen to be absent. *Id.* art. 1072.

3. The object of placing the seals on the effects of a succession is for the purpose of preserving them, and for the interest of third persons. *Id.* art. 1068.

The seals must be placed on the bureaus, coffers, armoires, and other things which contain the effects and papers of the deceased, and on the doors of the apartments which contain these things, so that they cannot be opened without tearing off, breaking, or altering the seals. *Id.* art. 1069.

The judge or justice of the peace who affixes the seals is bound to appoint a guardian, at the expense of the succession, to take care of the seals and of the effects, of which an account is taken at the end of the procès-verbal of the affixing of the seals. The guardian must be domiciliated in the place where the inventory is taken. *Id.* art. 1079. And the judge, when he retires, must take with him the keys of all things and apartments upon which the seals have been affixed. *Id.*

The raising of the seals is done by the judge of the place, or justice of the peace appointed by him to that effect, in the presence of the witnesses of the vicinage, in the same manner as for the affixing of the seals. *Id.* art. 1084.

SEAMAN. A sailor; a mariner; one whose business is navigation. 2 Boulay-Paty, Dr. Com. 232; Code de Commerce, art. 262; Laws of Oleron, art. 7; Laws of Wisbuy, art. 19.

2. The term seamen, in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors. 3 Pardessus, n. 667. But the mate, 1 Pet. Adm. 246, the cook and steward, 2 Pet. Adm. 268, and engineers, clerks, carpenters, firemen, deck-hands, porters, and chambermaids, on passenger-steamers, when necessary for the service of the ship, 1 Conkling, Adm. 107; 2 Parsons, Marit. Law, 582, are considered, as to their rights to sue in the admiralty, as common seamen; and persons employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction; while those employed in ferry-boats are not. Gilp. Dist. Ct. 203, 532. Persons who do not contribute their aid in navigating the vessel or to its preservation in the course of their occupation, as musicians, are not to be considered as seamen with a right to sue in the admiralty for their wages. Gilp. Dist. Ct. 516. See LIEN.

3. Seamen are employed either in merchant-vessels for private service, or in public vessels for the service of the United States.

Seamen in the merchant-vessels are required to enter into a contract in writing, commonly called shipping articles, which see. This contract being entered into, they are bound, under severe penalties, to render themselves on board the vessel according to the agreement: they are not at liberty to leave the ship without the consent of the captain or commanding officer; and for such absence, when less than forty-eight hours, they forfeit three days' wages for every day of absence; and when the absence is more than forty-eight hours at one time, they forfeit all the wages due to them, and all their goods and chattels which were on board the vessel, or in any store where they may have been lodged at the time of their desertion, to the use of the owners of the vessel; and they are liable for damages for hiring other hands. They may be imprisoned for desertion until the ship is ready to sail.

4. On board, a seaman is bound to do his duty to the utmost of his ability; and when his services are required for extraordinary exertions, either in consequence of the death of other seamen or on account of unforeseen perils, he is not entitled to an increase of wages, although it may have been promised to him. 2 Campb. 317; Peake, 72; 1 Term 73. For disobedience of orders he may be imprisoned or punished with stripes; but the correction must be reasonable, 4 Mas. C. C. 508; Bee, Adm. 161; 2 Day, Conn. 294; 1 Wash. C. C. 316; and, for just cause, may be put ashore in a foreign country. 1 Pet. Adm. 186; 2 *id.* 268; 2 East, 145. By act of congress, September 28, 1850, 9 U. S. Stat. at Large, 515, it is provided that flogging in the navy and on board vessels of commerce be, and the same is hereby, abolished from and after the passage of this act. And this prohibits corporal punishment by stripes inflicted with a cat, and any punishment which in substance and effect amounts thereto. 1 Curt. C. C. 501.

5. Seamen are entitled to their wages, of which one-third is due at every port at which the vessel shall unlade and deliver her cargo before the voyage be ended; and at the end of the voyage an easy and speedy remedy is given them to recover all unpaid wages. When taken sick, a seaman is entitled to medical advice and aid at the expense of the ship, such expense being considered in the nature of additional wages and as constituting a just remuneration for his labor and services. Gilp. Dist. Ct. 435, 447; 2 Mas. C. C. 541.

The right of seamen to wages is founded not in the shipping articles, but in the services performed, Bee, Adm. 395; and to recover such wages the seaman has a triple remedy,—against the vessel, the owner, and the master. Gilp. Dist. Ct. 592; Bee, Adm. 254.

6. When destitute in foreign ports, American consuls and commercial agents are required to provide for them, and for their passage to some port of the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board at the request of the consul, but not exceeding two men for every hundred tons of the ship, and transport them to the United States, on such terms, not exceeding ten dollars for each person, as may be agreed on. See, generally, Brightly, Dig. U. S. Laws; 3 Kent, Comm. 136–156; Marshall, Ins. 90; Pothier, Mar. Contr., translated by Cushing, Index; 2 Brown, Civ. & Adm. Law, 155; Parsons, Marit. Law; Conkling, Adm.; Abbott, Shipping; LIEN; CAPTAIN.

Seamen in the public service are governed by particular laws. See NAVY; NAVAL CODE.

SEAMANSHIP. The skill of a good seaman; an acquaintance with the art of navigating and managing a ship or other vessel. See Dana, Seaman's Friend; Parish, Sea-Officer's Manual; Bowditch, Navigator; The Sheet-Anchor; The Kedge-Anchor.

SEAMEN'S FUND. By the act of July

16, 1798, a provision is made for raising a fund for the relief of disabled and sick seamen: the master of every vessel arriving from a foreign port into the United States is required to pay to the collector of customs at the rate of twenty cents per month for every seaman employed on board of his vessel, which sum he may retain out of the wages of such seaman; vessels engaged in the coasting-trade, and boats, rafts, or flats navigating the Mississippi with intention to proceed to New Orleans, are also laid under similar obligations. The fund thus raised is to be employed by the president of the United States, as circumstances shall require, for the benefit and convenience of sick and disabled American seamen. Act of March 3, 1802, s. 1.

2. By the act of congress passed February 28, 1803, c. 62, 2 U. S. Stat. at Large, 223, it is provided that when a seaman is discharged in a foreign country with his own consent, or when the ship is sold there, he shall, in addition to his usual wages, be paid three months' wages into the hands of the American consul, two-thirds of which are to be paid to such seaman on his engagement on board any vessel to return home, and the remaining one-third is retained in aid of a fund for the relief of distressed American seamen in foreign ports. See 11 Johns. N. Y. 66; 12 *id.* 143; 1 Mas. C. C. 45; 4 *id.* 541; Edw. Adm. 239.

SEARCH. In Criminal Law. An examination of a man's house, premises, or person, for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused.

2. The constitution of the United States, Amendments, art. 4, protects the people from unreasonable searches and seizures. 3 Story, Const. § 1895; Rawle, Const. ch. 10, p. 127; 10 Johns. N. Y. 263; 11 *id.* 500; 1 U. S. Stat. at Large, 651; 3 Cranch, 447.

By the act of March 2, 1799, s. 68, it is enacted that every collector, naval officer, and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel or any dwelling-house in the daytime, upon taking proper measures, to search for goods forfeited for non-payment of duties.

SEARCH. In Practice. An examination made in the proper lien office for mortgages, liens, judgments, or other incumbrances against real estate. The certificate given by the officer as to the result of such examination is also called a search.

Conveyancers and others who cause searches to be made ought to be very careful that they should be correct with regard—to the time during which the person against whom the search has been made owned the premises; to the property searched against, which ought to be properly described; to the form of the certificate of search.

SEARCH, RIGHT OF. In Maritime Law. The right existing in a belligerent to examine and inspect the papers of a neutral vessel at sea. On the continent of Europe this is called the right of visit. Dalloz, Dict. *Prises maritimes*, n. 104–111.

2. The right does not extend to examine the cargo, nor does it extend to a ship of war, it being strictly confined to the searching of merchant-vessels. The exercise of the right is to prevent the commerce of contraband goods. Although frequently resisted by powerful neutral nations, yet this right appears now to be fixed beyond contravention. The penalty for violently resisting this right is the confiscation of the property so withheld from visitation. Unless in extreme cases of gross abuse of his right by a belligerent, the neutral has no right to resist a search. 1 Kent, Comm. 154; 2 Brown, Civ. & Adm. Law, 319.

3. The right of search—or rather of visitation—in time of peace, especially in its connection with the efforts of the British government for the suppression of the slave-trade, has been the subject of much discussion; but it is not within the scope of this work to review such discussions. Wheaton, Right of Search; The Life of Genl. Cass, by Smith, c. 25, 26; Webster, Works, vol. 6, 329, 335, 338; and the documents relating to this subject communicated to congress from time to time, and most of the works on international law, may be profitably examined by those who desire to trace the history and understand the merits of the questions involved in the proposed exercise of this right. See, also, Edinburgh Review, vol. 11, p. 9; Foreign Quarterly Review, vol. 35, p. 211; 3 Phillimore, International Law, Index, title *Visit and Search*.

SEARCH-WARRANT. In Practice. A warrant requiring the officer to whom it is addressed to search a house, or other place, therein specified, for property therein alleged to have been stolen, and, if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully-authorized officer.

2. It should be given under the hand and seal of the justice, and dated.

The constitution of the United States, Amendments, art. 4, declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." See 11 Johns. N. Y. 500; 3 Cranch, 447.

3. Lord Hale, 2 Pl. Cr. 149, 150, recommends great caution in granting such warrants:—*first*, that they be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect that the goods are in such a house or place, and his reasons for

such suspicion, see 2 Wils. 283; 1 Dowl. & R. 97; 13 Mass. 236; 5 Ired. No. C. 45; 1 R. I. 464; *second*, that such warrants express that the search shall be made in daytime; *third*, that they ought to be directed to a constable or other proper officer, and not to a private person; *fourth*, that they ought to command the officer to bring the stolen goods, and the person in whose custody they are, before some justice of the peace. See 6 Barnew. & C. 332; 5 Metc. Mass. 98; 4 Wash. C. C. . They should designate the place to be searched. 1 Mees. & W. Exch. 255; 2 Metc. Mass. 329; 5 *id.* 98; 2 J. J. Marsh. Ky. 44; 6 Blackf. Ind. 249; 1 Conn. 40. Trespass will not lie against a party who has procured a search-warrant to search for stolen goods, if the warrant be duly issued and regularly executed. 6 Wend. N. Y. 382. And see 6 Me. 421; 2 Conn. 700; 9 *id.* 141; 10 Johns. N. Y. 263; 11 Mass. 500; 2 Litt. Ky. 231; 6 Gill & J. Md. 377.

SEARCHER. In English Law. An officer of the customs, whose duty it is to examine and search all ships outward bound, to ascertain whether they have any prohibited or uncustomed goods on board.

SEATED LANDS. In the early land-legislation of some of the United States, *seated* is used, in connection with improved, to denote lands of which actual possession was taken. 5 Pet. 468.

SEAWORTHINESS. In Maritime Law. The sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit, for the trade or service in which it is employed.

2. Under a marine policy on ship, freight, or cargo, the fitness for the service of the vessel, if there is no provision to the contrary at the outset, is an implied condition, non-compliance with which defeats the insurance. 1 Phillips, Ins. ch. viii. sect. ii.; Marshall, Ins. 160; 2 Johns. N. Y. 231; 1 Whart. Penn. 399; Cowp. 143; 1 Arnoult, Ins. 662; 1 Dow. 32; 1 Campb. 1; 5 Pick. Mass. 21; 2 Ohio, 211; 2 Barnew. & Ald. 73; 6 Cow. N. Y. 270; 7 Term, 160; 3 Hill, N. Y. 250; 4 Mas. C. C. 439; 20 Wend. N. Y. 287; 1 Pet. C. C. 410; 1 Wall. Jr. C. C. 273; 1 Curt. C. C. 278; 14 Barb. N. Y. 206; 33 Eng. L. & Eq. 325; 34 *id.* 266, 277; 26 Penn. St. 192; 4 Hou. L. Cas. 253; Olc. Adm. 110; 4 Du. N. Y. 234; 12 Md. 348.

It is of no consequence whether the insured was aware of the condition of the ship, or not. His innocence or ignorance is no answer to the fact that the ship was not seaworthy. When the want of seaworthiness arises from justifiable ignorance of the cause of the defect, and is discovered and remedied before any injury occurs, it is not to be considered as a defect. 1 Johns. N. Y. 241; 2 *id.* 124, 129; 3 Johns. Cas. N. Y. 76; 1 Pet. 183; 2 Barnew. & Ald. 73.

3. The opinion of carpenters who have repaired the vessel, however they may strengthen the presumption that the ship is seaworthy, when it is favorable, is not conclusive of the fact of seaworthiness. 4 Dowl. 269. The presumption *primâ facie* is for seaworthiness. 1 Dowl. 336. And it is presumed that a vessel continues seaworthy if she was so at the inception of the risk. 20 Pick. Mass. 389. See 1 Brev. No. C. 252. Any sort of disrepair left in the ship, by which she or the cargo may suffer, is a breach of the warranty of seaworthiness. A deficiency of force in the crew, or of skill in the master, mate, etc., is a want of seaworthiness. 1 Campb. 1; 14 East, 481; 4 Du. N. Y. 234. But if there was once a sufficient crew, their temporary absence will not be considered a breach of the warranty. 2 Barnew. & Ald. 73; 1 Johns. Cas. N. Y. 184; 1 Pet. 183. A vessel may be rendered not seaworthy by being overloaded. 2 Barnew. & Ald. 320.

It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them. 2 Parsons, Marit. Law, 134. Seaworthiness is, therefore, in general, a question of fact for the jury. *Id.* 137; 1 Pet. 170, 184; 1 Bouvier, Inst. 441.

SECK. A want of remedy by distress. Littleton, s. 218. See RENT. Want of present fruit or profit, as in the case of the reversion without rent or other service, except fealty. Coke, Litt. 151 *b*, note 5.

SECOND. A measure equal to one-sixtieth part of a minute. See MEASURE.

SECOND DELIVERANCE. In Practice. The name of a writ given by statute of Westminster 2d, 13 Edw. I. c. 2, founded on the record of a former action of replevin. Coke, 2d Inst. 341. It commands the sheriff, if the plaintiff make him secure of prosecuting his claim and returning the chattels which were adjudged to the defendant by reason of the plaintiff's default, to make deliverance. On being nonsuited, the plaintiff in replevin might, at common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant. The statute of Westminster restrains the plaintiff when nonsuited from so doing, but allows him this writ, issuing out of the original record, in order to have the same distress delivered again to him, on his giving the like security as before. 3 Blackstone, Comm. 150; Fitzherbert, Nat. Brev. 68.

SECOND SURCHARGE, WRIT OF. The name of a writ issued in England against a commoner who has a second time surcharged the common. 3 Blackstone, Comm 239.

SECONDARY. In English Law. An

officer who is second or next to the chief officer; as, secondaries to the prothonotaries of the courts of king's bench or common pleas; secondary of the remembrancer in the exchequer, etc. Jacob, Law Dict.

SECONDARY CONVEYANCES, or derivative conveyances, are those which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 2 Sharswood, Blackst. Comm. 324*.

SECONDARY EVIDENCE. That species of proof which is admissible on the loss of primary evidence, and which becomes by that event the best evidence. 3 Bouvier, Inst. n. 3055. See HEARSAY; DECLARATION COPY.

SECONDS. In Criminal Law. Those persons who assist, direct, and support others engaged in fighting a duel.

As they are often much to blame in inciting the duellists to their rash act, and as they are always assisting in the commission of the crime, the laws generally punish them with severity; but, in consequence of the false ideas too generally entertained on the subject of honor, they are too seldom enforced.

SECRET. A knowledge of something which is unknown to others, out of which a profit may be made: for example, an invention of a machine, or the discovery of the effect of the combination of certain matters.

Instances have occurred of secrets of that kind being kept for many years; but they are liable to constant detection. As such secrets are not property, the possessors of them in general prefer making them public, and securing the exclusive right for years, under the patent laws, to keeping them in an insecure manner without them. See Phillips, Pat. ch. 15; Godson, Pat. 171; Davies, Pat. Cas. 429; 8 Ves. Ch. 215; 2 Ves. & B. Ch. Ir. 218; 2 Mer. Ch. 446; 3 *id.* 157; 1 Jac. & W. Ch. 394; 1 Pick. Mass. 443; 4 Mas. C. C. 15; 3 Bos. & P. 630.

SECRETARY. An officer who, by order of his superior, writes letters and other instruments. He is so called because he is possessed of the *secrets* of his employer. This term was used in France in 1343, and in England the term secretary was first applied to the clerks of the king, who being always near his person were called *clerks of the secret*, and in the reign of Henry VIII. the term secretary of state came into use.

In the United States the term is used to denote the head of a department: as, secretary of state, etc. See DEPARTMENT.

SECRETARY OF EMBASSY. An officer appointed by the sovereign power to accompany a minister of the first or second rank, and sometimes, though not often, of an inferior rank.

He is, in fact, a species of public minister; for, independently of his protection as attached to an ambassador's suite, he enjoys in his own right the same protection of the law of nations, and the same immunities, as an ambassador. But *private secretaries* of a minister must not be confounded with secretaries of embassy or of legation. Such private secretaries are entitled to protection only as belonging to the suite of the ambassador.

The functions of a secretary of legation consist in his employment by his minister for objects of ceremony; in making verbal reports to the secretary of state or other foreign ministers; in taking care of the archives of the mission; in ciphering and deciphering despatches; in sometimes making rough draughts of the notes or letters which the minister writes to his colleagues or to the local authorities; in drawing up *procès-verbaux;* in presenting passports to the minister for his signature, and delivering them to the persons for whom they are intended; and, finally, in assisting the minister, under whom he is placed, in every thing concerning the affairs of the mission. In the absence of the minister he is admitted to conferences, and to present notes signed by the minister.

SECRETARY OF LEGATION. An officer employed to attend a foreign mission and to perform certain duties as clerk.

His salary is fixed by the act of congress of May 1, 1810, s. 1, at such a sum as the president of the United States may allow, not exceeding two thousand dollars.

The salary of a secretary of embassy, or the secretary of a minister plenipotentiary, is the same as that of a secretary of legation.

SECTA (Lat. *sequor*, to follow). The persons, two or more in number, whom the plaintiff produced in court, in the ancient form of proceedings, immediately upon making his declaration, to confirm the allegations therein, before they were called in question by the defendant's plea. Bracton, 214 *a*. The word appears to have been used as denoting that these persons *followed* the plaintiff into court; that is, came in a matter in which the plaintiff was the leader or one principally concerned. The actual production of *suit* was discontinued very early, 3 Sharswood, Blackst. Comm. 295; but the formula "*et inde producit sectam*" (for which in more modern pleadings "and thereupon he brings suit" is substituted) continued till the abolition of the Latin form of pleadings. Stephen, Plead. 429, 430. The count in dower and writs of right did not so conclude, however. 1 Chitty, Plead. 399. A suit or action. Hob. 20; Bracton, 399 *b*. A suit of clothes. Cowel; Spelman, Gloss.

Ad Furnum. Suit due a public bakehouse.

Ad Molendrinum. A service arising from the usage, time out of mind, of carrying corn to a particular mill to be ground. 3 Sharswood, Blackst. Comm. 235. A writ adapted to the injury lay at the old law. Fitzherbert, Nat. Brev. 123.

Ad Torrale. Suit due a man's kiln or malt-house. 3 Sharswood, Blackst. Comm. 235.

Curiæ. Suit at court. The service due from tenants to the lord of attending his courts-baron, both to answer complaints alleged against themselves, and for the trial of their fellow-tenants. 2 Sharswood, Blackst. Comm. 54.

SECTION OF LAND. A parcel of government land containing six hundred and forty acres. The lands of the United States are surveyed into parcels of six hundred and forty acres; each such parcel is called a section.

These sections are divided into half-sections, each of which contains three hundred and twenty acres, and into quarter-sections of one hundred and sixty acres each. See 2 Washburn, Real Prop.

SECTORES (Lat.). **In Roman Law.** Bidders at an auction. Babington, Auct. 2.

SECURITY. That which renders a matter sure; an instrument which renders certain the performance of a contract. A person who becomes the surety for another, or who engages himself for the performance of another's contract. See 3 Blackf. Ind. 431.

SECURITY FOR COSTS. In Practice. In some courts there is a rule that when the plaintiff resides abroad he shall give security for costs, and until that has been done, when demanded, he cannot proceed in his action.

2. This is a right which the defendant must claim in proper time; for if he once waives it he cannot afterwards claim it: the waiver is seldom or perhaps never expressly made, but is generally implied from the acts of the defendant. When the defendant had undertaken to accept short notice of trial, 2 H. Blackst. 573; 3 Taunt. 272, or after issue joined, and when he knew of plaintiff's residence abroad, or, with such knowledge, when the defendant takes any step in the cause, these several acts will amount to a waiver. 5 Barnew. & Ald. 702; 1 Dowl. & R. 348; 1 Moore & P. 30. See 1 Johns. Ch. N. Y. 202; 3 *id.* 520; 1 Ves. Ch. 396.

3. The fact that the defendant is out of the jurisdiction of the court will not alone authorize the requisition of security for costs: he must have his domicil abroad. 1 Ves. Ch. 396. When the defendant resides abroad, he will be required to give such security although he is a foreign prince. See 11 Serg. & R. Penn. 121; 1 Miles, Penn. 321; 2 *id.* 402.

SECUS (Lat.). Otherwise.

SEDITION. In Criminal Law. The raising commotions or disturbances in the state: it is a revolt against legitimate authority. Erskine, Inst. 4. 4. 14; Dig. 49. 16. 3. § 19.

The distinction between sedition and treason consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws, or the subversion of the constitution. Alison, Crim. Law of Scotl. 580.

The obnoxious and obsolete act of July 14, 1798, 1 Story, U. S. Laws, 543, was called the *sedition law*, because its professed object was to prevent disturbances.

In the Scotch law, sedition is either verbal or real. Verbal is inferred from the uttering of words tending to create discord between the king and his people; real sedition is generally committed by convocating together any considerable number of people, without lawful authority, under the pretence of redressing some public grievance, to the disturbing of the public peace. Erskine, Inst. 4. 4. 14.

SEDUCTION (Lat. *seductio*, from *se*, away, *duco*, to lead, to draw).

The act of a man in inducing a woman to commit unlawful sexual intercourse with him.

The woman herself has no action for damages, though practically the end is reached by a suit for breach of promise of marriage, in many cases. The parent, as being entitled to the services of his daughter, may maintain an action in many cases grounded upon that right, but only in such cases. 6 Mees. & W. Exch. 55; 1 Exch. 61; 10 Q. B. 725; 7 Ired. No. C. 408; 4 N. Y. 38; 8 *id.* 191; 11 *id.* 343; 14 Ala. N. S. 235; 11 Ga. 603; 13 Gratt. Va. 726; 3 Sneed, Tenn. 29; 6 Ind. 262; 10 Mo. 634. By statute, it has been made a criminal offence in *Indiana*, Acts of 1847, c. 95, *New York*, Laws of 1848, c. 111, and *Wisconsin*, Rev. Stat. 1849, c. 146, § 6.

SEEDS. The substance which nature prepares for the reproduction of plants or animals.

Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur.* Inst. 2. 1. 32.

SEIGNIOR, SEIGNEUR. Among the feudists, this name signified lord of the fee. Fitzherbert, Nat. Brev. 23. The most extended signification of this word includes not only a lord or peer of parliament, but is applied to the owner or proprietor of a thing: hence the owner of a hawk, and the master of a fishing vessel, is called a seigneur. 37 Edw. III. c. 19; Barrington, Stat. 258.

SEIGNIORY. In English Law. The rights of a lord, as such, in lands. Swinburne, Wills, 174.

SEISIN. The completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rites of homage and fealty. Stearns, Real Act. 2.

Possession with an intent on the part of him who holds it to claim a freehold interest. 8 N. H. 58; 1 Washburn, Real Prop. 35.

Immediately upon the investiture or livery of seisin the tenant became tenant of the freehold; and the term seisin originally contained the idea of possession derived from a superior lord of whom the tenant held. There could be but one seisin, and the person holding it was regarded for the time as the rightful owner. Littleton, § 701; 1 Spence, Eq. Jur. 136. In the early history of the country, livery of seisin seems to have been occasionally practised. See 1 Washburn, Real Prop. 34, n.; Colony Laws (Mass.), 85, 86; Smith, Landl. & T Morris ed. 6, n.

In Connecticut, Massachusetts, Pennsylvania, and Ohio, seisin means merely ownership, and the

distinction between seisin in deed and in law is not known in practice. Walker, Am. Law, 324, 330; 4 Day, Conn. 305; 4 Mass. 489; 14 Pick. Mass. 224; 6 Metc. Mass. 439. A patent by the commonwealth, in Kentucky, gives a right of entry, but not actual seisin. 3 Bibb, Ky. 57.

Seisin in fact is possession with intent on the part of him who holds it to claim a freehold interest.

Seisin in law is a right of immediate possession according to the nature of the estate. Cowel; Comyns, Dig. *Seisin* (A 1, 2).

2. If one enters upon an estate having title, the law presumes an intent in accordance, and requires no further proof of the intent, 12 Metc. Mass. 357; 4 Wheat. 213; 8 Cranch, 229; but if one enters without title, an intent to gain seisin must be shown. 5 Pet. 402; 9 *id.* 52. Seisin once established is presumed to continue till the contrary is shown. 5 Metc. Mass. 173. Seisin will not be lost by entry of a stranger if the owner remains in possession. 1 Salk. 246; 9 Metc. Mass. 418. Entry by permission of the owner will never give seisin without open and unequivocal acts of disseisin known to the owner. 10 Gratt. Va. 305; 9 Metc. Mass. 418. Simple entry by one having the freehold title is sufficient to regain seisin. Stearns, Real Act. 44; 4 Mass. 416; 25 Vt. 316; 10 Pet. 412; 8 Cranch, 247. The heir is invested with the seisin by law upon descent of the title. 24 Pick. Mass. 78. As a general proposition by the law in this country, the making, delivery, and recording of a deed of lands passes the seisin without any formal entry being necessary. This is generally by force of the statutes of the several states,—in some such a deed being in terms declared to be equivalent to livery of seisin, and in others dispensing with any further act to pass a full and complete title. 4 Greenleaf, Cruise, Dig. 45, n., 47, n.; Smith, Landl. & T. Am. ed. 6, n.; 3 Dall. Penn. 489.

3. The seisin could never be in abeyance, 1 Atkinson, Conv. 11; 1 Preston, Est. 255; and this necessity gave rise to much of the difficult law in regard to estates enjoyable in the future. See 1 Spence, Eq. Jur. 156; 2 Flintoff, Real Prop. 258.

Consult Smith, Landl. & T. Am. ed.; Greenleaf, Cruise; Stearns, Real Act.; and especially Washburn on Real Prop., from which this article is mainly taken.

SEIZURE. **In Practice.** The act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. The taking possession of goods for a violation of a public law: as, the taking possession of a ship for attempting an illicit trade. 2 Cranch, 187; 4 Wheat. 100; 1 Gall. C. C. 75; 2 Wash. C. C. 127, 567; 6 Cow. N. Y. 404.

2. The seizure is complete as soon as the goods are within the power of the officer. 16 Johns. N. Y. 287; 2 Nott & M'C. So. C. 392; 2 Rawle, Penn. 142; 3 *id.* 401; Watson, Sher 172; Comyns, Dig. *Execution*, C 5.

3. The taking of part of the goods in a house, however, by virtue of a fieri facias in the name of the whole, is a good seizure of all. 8 East, 474. As the seizure must be made by virtue of an execution, it is evident that it cannot be made after the return-day. 2 Caines, N. Y. 243; 4 Johns. N. Y. 450. See DOOR; HOUSE; SEARCH-WARRANT.

SELECTI JUDICES (Lat.). **In Roman Law.** Judges who were selected very much like our juries. They were returned by the prætor, drawn by lot, subject to be challenged and sworn. 3 Blackstone, Comm. 366.

SELECTMEN. The name of certain town officers in several states of the United States, who are invested by the statutes of the states with extensive powers for the conduct of the town business.

SELF-DEFENCE. **In Criminal Law.** The protection of one's person and property from injury.

2. A man may defend himself, and even commit a homicide for the prevention of any forcible and atrocious crime which if completed would amount to a felony, 17 Ala. N. s. 587; 5 Ga. 85; 1 Jones, No. C. 190; 30 Miss. 619; 14 B. Monr. Ky. 103, 614; 3 Wash. C. C. 515; and, of course, under the like circumstances, mayhem, wounding, and battery would be excusable at common law. 1 East, Pl. Cr. 271; 4 Blackstone, Comm. 180. A man may repel force by force in defence of his person, property, or habitation against any one who manifests, intends, attempts, or endeavors, by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary, and the like. In these cases he is not required to retreat, but he may resist, and even pursue his adversary, until he has secured himself from all danger. 7 J. J. Marsh. Ky. 478; 4 Bingh. 628.

3. A man may defend himself when no felony has been threatened or attempted. *First*, when the assailant attempts to beat another and there is no mutual combat: as, where one meets another and attempts to commit or does commit an assault and battery on him, the person attacked may defend himself, 4 Den. N. Y. 448; Hill & D. N. Y. 229; 24 Vt. 218; 3 Harr. Del. 22; 3 Brev. No. C. 515; 5 Gray, Mass. 475; 3 Carr. & P. 31; 9 *id.* 474; see 10 Ired. No. C. 214; and in case of an offer or attempt to strike another, when sufficiently near, so that there is danger, the person assailed may strike first, and is not required to wait until he has been struck. Buller, Nisi P. 18; 2 Rolle, Abr. 547. *Second*, when there is a mutual combat upon a sudden quarrel. In these cases both parties are the aggressors; and if in the fight one is killed, it will be manslaughter at least, unless the survivor can prove two things, viz., that before the mortal stroke was given he had

refused any further combat, and had retreated as far as he could with safety, 8 N. Y. 396; 4 Dev. & B. No. C. 491; 15 Ga. 117; 17 *id.* 465; 9 Ired. No C. 485; 10 *id.* 214; 1 Ohio, St. 66; 1 Hawks, No. C. 78, 210; Selfridge's case; and that he killed his adversary from necessity, to avoid his own destruction. 32 Me. 279; 2 Halst. N. J. 220; 11 Humphr. Tenn. 200; 4 Barb. N. Y. 460; 2 N. Y. 193; Coxe, N. J. 424; 25 Ala. N. S. 15; 18 B. Monr. Ky. 49; 16 Ill. 17.

A man may defend himself against animals, and he may during the attack kill them, but not afterwards. 1 Carr. & P. 106; 10 Johns. N. Y. 365; 13 *id.* 12.

SELLER. One who disposes of a thing in consideration of money; a vendor.

This term is more usually applied in the sale of chattels, that of vendor in the sale of estates. See SALE.

SEMBLE (Fr. it seems). A term frequently used before the statement of a point of law which has not been directly settled, but about which the court have expressed an opinion and intimated what a decision would be.

SEMI-PROOF. In Civil Law. Presumption of fact. This degree of proof is thus defined: "Non est ignorandum, probationem semiplenam eam esse, per quam rei gestæ fides aliqua fit judici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi." Mascardus, de Prob. vol. 1, Quæst. 11, n. 1, 4.

SEMINARY. A place of education. Any school, academy, college, or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments. Webster, Dict.

The word is said to have acquired no fixed and definite legal meaning. *Hand*, J., 12 N. Y. 229.

SEMINAUFRAGIUM (Lat.). A term used by Italian lawyers, which literally signifies *half-shipwreck*, and by which they understand the jetsam, or casting merchandise into the sea to prevent shipwreck. Locré, Esp. du Code de Com. art. 409. The state of a vessel which has been so much injured by tempest or accident that to repair the damages, after being brought into port, and prepare her for sea, would cost more than her worth. 4 Bost. Law Rep. 120.

SEMPER PARATUS (Lat. always ready). **In Pleading.** The name of a plea by which the defendant alleges that he has always been ready to perform what is demanded of him. 3 Blackstone, Comm. 303. The same as *Tout temps prist.*

SEN. This is said to be an ancient word which signified justice. Coke, Litt. 61 *a.*

SENATE. The name of the less numerous of the two bodies constituting the legislative branch of the government of the United States, and of the several states. See UNITED STATES, and the articles upon the various states.

SENATOR. A member of a senate.

SENATUS CONSULTUM (Lat.). **In Roman Law.** A decree or decision of the Roman senate, which had the force of law.

When the Roman people had so increased that there was no place where they could meet, it was found necessary to consult the senate, instead of the people, both on public affairs and those which related to individuals. The opinion which was rendered on such an occasion was called *senatus consultum.* Inst. 1. 2. 5; Clef des Lois Rom.; Merlin, Répert. These decrees frequently derived their titles from the names of the consuls or magistrates who proposed them: as, senatus-consultum Claudianum, Libonianum, Velleianum, etc., from Claudius, Libonius, Valleius. Ayliffe, Pand. 30.

SENESCHALLUS (Lat.). A steward. Coke, Litt. 61 *a.*

SENILITY. The state of being old.

2. Sometimes it is exceedingly difficult to know whether the individual in this state is or is not so deprived of the powers of his mind as to be unable to manage his affairs. In general, senility is merely a loss of energy in some of the intellectual operations, while the affections remain natural and unperverted: such a state may, however, be followed by actual dementia or idiocy.

3. When on account of senility the party is unable to manage his affairs, a committee will be appointed as in case of lunacy. 1 Collier, Lun. 66; 2 Johns. Ch. N. Y. 232; 5 *id.* 158; 4 Call, Va. 423; 12 Ves. Ch. 446; 8 Mass. 129; 2 Ves. Sen. Ch. 407; 19 *id.* 285.

SENIOR. The elder. This addition is sometimes made to a man's name, when two persons bear the same, in order to distinguish them. In practice, when nothing is mentioned, the senior is intended. 3 Miss. 59.

SENTENCE. A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal, proceedings.

Sentences are final, when they put an end to the case; or interlocutory, when they settle only some incidental matter which has arisen in the course of its progress. See Aso & Man. Inst. b. 3, t. 8, c. 1.

SEPARALITER (Lat. separately). A word sometimes used in indictments to show that the defendants are charged separately with offences which without the addition of this word would seem, from the form of the indictment, to be charged jointly: as, for example, when two persons are indicted together for perjury, and the indictment states that A and B came before a commissioner, etc., this is alleging that they were both guilty of the same crime, when by law their crimes are distinct, and the indictment is vicious; but if the word *separaliter* is used, then the affirmation is that each was guilty of a separate offence. 2 Hale, Pl. Cr. 174.

SEPARATE ESTATE. That which belongs to one only of several persons: as, the separate estate of a partner, which does not belong to the partnership. 2 Bouvier, Inst. n. 1519.

The separate estate of a married woman is that which belongs to her and over which her husband has no right in equity. It may consist of lands or chattels. 4 Barb. N. Y. 407; 1 Const. So. C. 452; 4 Bouvier, Inst. n. 3996.

SEPARATE MAINTENANCE. An allowance made by a husband to his wife for her separate support and maintenance.

When this allowance is regularly paid, and notice of it has been given, no person who has received such notice will be entitled to recover against the husband for necessaries furnished to the wife, because the liability of the husband depends on a presumption of authority delegated by him to the wife, which is negatived by the facts of the case. 2 Starkie, Ev. 699.

SEPARATE TRIAL. See JOINDER.

SEPARATION. A cessation of cohabitation of husband and wife by mutual agreement.

2. Contracts of this kind are generally made by the husband for himself and by the wife with trustees. 3 Paige, Ch. N. Y. 483; 4 *id.* 516; 5 Bligh, N. S. 339; 1 Dow & C. Hou. L. 519. This contract does not affect the marriage, and the parties may at any time agree to live together as husband and wife. The husband who has agreed to a *total* separation cannot bring an action for criminal conversation with the wife. Roper, Husb. & Wife, *passim;* 4 Viner, Abr. 173; 2 Starkie, Ev. 698; Shelford, Marr. & D. ch. 6, p. 608.

3. Reconciliation after separation supersedes special articles of separation, in courts of law and equity. 1 Dowl. Parl. Cas. 245; 2 Cox, 105; 3 Brown, Ch. 619, n.; 11 Ves. Ch. 532. Public policy forbids that parties should be permitted to make agreements for themselves to hold good whenever they choose to live separate. 5 Bligh, N. S. 367, 375. And see 1 Carr. & P. 36; 5 Bligh, N. S. 339; 2 Dowl. Parl. Cas. 332; 2 Carr. & M. 388; 2 East, 283; 11 Ves. Ch. 526; 2 Sim. & S. Ch. 372; 1 Younge & C. Ch. 28; 3 Johns. Ch. N. Y. 521; 1 Edw. Ch. N. Y. 380; 1 Des. Eq. So. C. 45, 198; 8 N. H. 350; 1 Hoffm. Ch. N. Y. 1.

SEPARATION A MENSA ET THORO. A partial dissolution of the marriage relation.

By the ecclesiastical or canon law of England, which had exclusive jurisdiction over marriage and divorce, marriage was regarded as a sacrament and indissoluble. This doctrine originated with the church of Rome, and became established in England while that country was Catholic; and though after the reformation it ceased to be the doctrine of the church of England, yet the law remained unchanged until the recent statute of 20 & 21 Vict. (1857) c. 85. Bishop, Marr. & D. §§ 274, 278. Hence, as has been seen in the article on Divorce, a valid marriage could not be dissolved in England except by what has been termed the omnipotent power of parliament.

This gave rise, in the ecclesiastical courts, to the practice of granting divorces from bed and board, as they used to be called, or judicial separation, as they are called in the recent statute 20 & 21 Vict. c. 85, § 7. Bishop, Marr. & D. §§ 277, 278. From England this practice was introduced into this country; and though in some of the states it has entirely given way to the divorce *a vinculo matrimonii*, in others it is still in use, being generally granted for causes which are not sufficient to authorize the latter.

2. The only causes for which such a divorce is granted in England are adultery and cruelty. In this country it is generally granted also for wilful desertion, and in some states for other causes.

The legal consequences of a separation from bed and board are much less extensive than those of a divorce *a vinculo matrimonii* or a sentence of nullity. Such a separation works no change in the relation of the parties either to each other or to third persons, except in authorizing them to live apart until they mutually come together. In coming together, no new marriage is required, neither, it seems, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation. Bishop, Marr. & D. § 679; 5 Pick. Mass. 461, 468; 4 Johns. Ch. N. Y. 187; 2 Dall. Penn. 128; 3 Yeates, Penn. 56; Croke Eliz. 908.

3. Nor does such a separation, at common law and without statutory aid, change the relation of the parties as to property. Thus, it neither takes away the right of the wife to dower, nor the right of the husband to the wife's real estate, either during her life or after her death, as tenant by the curtesy; neither does it affect the husband's right in a court of law to reduce into possession the choses in action of the wife; though in equity it may be otherwise. Bishop, Marr. & D. §§ 680–685; 2 Pick. Mass. 316; 5 *id.* 61; 6 Watts & S. Penn. 85; Croke Eliz. 908; 4 Barb. N. Y. 295.

4. It should be observed, however, that in this country the consequences of a judicial separation are frequently modified by statute. See Bishop, Marr. & D. §§ 676–691.

Of those consequences which depend upon the order and decree of the court, the most important is that of alimony. See ALIMONY. In respect to the custody of children, the rules are the same as in case of divorces *a vinculo matrimonii*. Bishop, Marr. & D. c 29.

SEPULCHRE. The place where a corpse is buried. The violation of sepulchres is a misdemeanor at common law.

SEQUESTER. In Civil and Ecclesiastical Law. To renounce. Example: when a widow comes into court and disclaims having any thing to do or to inter meddle with her deceased husband's estate, she is said to sequester. Jacob, Law Dict.

SEQUESTRATION. In Chancery Practice. A writ of commission, sometimes

directed to the sheriff, but usually to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues, and profits into their own hands, and keep possession of or pay the same, as the court shall order and direct, until the party who is in contempt shall do that which he is enjoined to do and which is specially mentioned in the writ. Newland, Chanc. Pract. 18; Blake, Chanc. Pract. 103.

2. Upon the return of *non est inventus* to a commission of rebellion, a sergeant-at-arms may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made upon his certificate for an order for a sequestration. 2 Maddock, Chanc. Pract. 203; Blake, Chanc. Pract. 103. It is the process formerly used instead of an attachment to secure the appearance of persons having the privilege of peerage or parliament, before a court of equity. Adams, Eq. 326.

3. Under a sequestration upon mesne process, as in respect of a contempt for want of appearance or answer, the sequestrators may take possession of the party's personal property and keep him out of possession; but no sale can take place, unless perhaps to pay expenses; for this process is only to form the foundation of taking the bill *pro confesso*. After a decree it may be sold. See 3 Brown, Ch. 72, 372; 2 Cox, Ch. 224; 1 Ves. Ch. 86; 2 Maddock, Chanc. Pract. 206.

See, generally, as to this species of sequestration, 19 Viner, Abr. 325; Bacon, Abr. *Sequestration;* Comyns, Dig. *Chancery* (D 7, Y 4); 1 Hov. Suppl. to Ves. Ch. 25–29; 7 Vern. Ch. Raithby ed. 58, n. 1, 421, n. 1.

In Contracts. A species of deposit which two or more persons, engaged in litigation about any thing, make of the thing in contest with an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong. La. Code, art. 2942; Story, Bailm. § 45. See 19 Viner, Abr. 325; 1 Vern. Ch. 58, 420; 2 Ves. Ch. 23.

In Louisiana. A mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration. See 1 Mart. La. 79; 1 La. 439; La. Civ. Code, 2941, 2948.

In this acceptation, the word sequestration does not mean *a judicial deposit*, because sequestration may exist together with the right of administration, while mere deposit does not admit it.

All species of property, real or personal, as well as the revenue proceeding from the same, obligations and titles, when their ownership is in dispute, may be sequestered.

Judicial sequestration is generally ordered only at the request of one of the parties to a suit: as, where there is reason to believe that the defendant may destroy or injure the property in dispute during the delay of adjudication. There are cases, nevertheless, where it is decreed by the court without such request,—as, where the title appears equally balanced, to continue till the question is decided,—or is the consequence of the execution of judgments.

Security is required from the petitioner asking a sequestration to reimburse the defendant his damages in case of disputed title.

When the sheriff has sequestered property pursuant to an order of the court, he must, after serving the petition and the copy of the order of sequestration on the defendant, send his return in writing to the clerk of the court which gave the order, stating in the same in what manner the order was executed, and annex to such return a true and minute inventory of the property sequestered, drawn by him in the presence of two witnesses.

The sheriff, while he retains possession of a sequestered property, is bound to take proper care of the same, and to administer the same, if it be of such nature as to admit of it, as a prudent father of a family administers his own affairs. He may confide them to the care of guardians or overseers, for whose acts he remains responsible, and he will be entitled to receive a just compensation for his administration, to be determined by the court, to be paid to him out of the proceeds of the property sequestered, if judgment be given in favor of the plaintiff. La. Civ. Code, arts. 274–283.

SEQUESTRATOR. One to whom a sequestration is made.

A depositary of this kind cannot exonerate himself from the care of the thing sequestered in his hands, unless for some cause rendering it indispensable that he should resign his trust. La. Civ. Code, art. 2947. See STAKEHOLDER.

Officers appointed by a court of chancery and named in a writ of sequestration. As to their powers and duties, see 2 Maddock, Chanc. Pract. 205; Blake, Chanc. Pract. 103.

SERF. **In Feudal Law.** A term applied to a class of persons who were bound to perform very onerous duties towards others. Pothier, Des Personnes, pt. 1, t. 1, a. 6, s. 4.

There is this essential difference between a serf and a slave: the serf was bound simply to labor on the soil where he was born, without any right to go elsewhere without the consent of his lord; but he was free to act as he pleased in his daily action: the slave, on the contrary, is the property of his master, who may require him to act as he pleases in every respect, and who may sell him as a chattel. Lepage, Science du Droit, c. 3, art. 2, § 2.

SERGEANT. **In Military Law.** An inferior officer of a company of foot or troop of dragoons, appointed to see discipline observed, to teach the soldiers the exercise of their arms, and to order, straighten, and form ranks, files, etc.

SERGEANT-AT-ARMS. An officer appointed by a legislative body, whose duties are to enforce the orders given by such bodies, generally under the warrant of its presiding officer.

SERIATIM (Lat.). In a series; severally: as, the judges delivered their opinions *seriatim*.

SERJEANTS-AT-LAW. A very ancient and the most honorable order of advocates at the common law.

They were called, formerly, countors, or serjeant-countors, or countors of the bench (in the old law-Latin phrase, *banci narratores*), and are mentioned by Matthew Paris in the life of John II., written in 1255. They are limited to fifteen in number, in addition to the judges of the courts of Westminster, who are always admitted before being advanced to the bench.

The most valuable privilege formerly enjoyed by the serjeants was the monopoly of the practice in the court of common pleas. A bill was introduced into parliament for the purpose of destroying this monopoly, in 1755, which did not pass. In 1834, a warrant under the sign manual was directed to the judges of the common pleas, commanding them to open that court to the bar at large. The order was received and complied with. In 1839, the matter was brought before the court and decided to be illegal. 10 Bingh. 571; 6 Bingh. N. C. 187, 232, 235. The statute 9 & 10 Vict. c. 54 has since extended the privilege to all barristers. 3 Sharswood, Blackst. Comm. 27, note.

SERJEANTY. In English Law. A species of service which cannot be due or performed from a tenant to any lord but the king, and is either grand or petit serjeanty.

SERVANTS. In Louisiana. A term including slaves and, in general, all free persons who let, hire, or engage their services to another in the state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain sum or retribution, or upon certain conditions. La. Civ. Code, arts. 155–157.

Personal Relations. Domestics; those who receive wages, and who are lodged and fed in the house of another and employed in his services. Such servants are not particularly recognized by law. They are called menial servants, or domestics, from living *infra mœnia*, within the walls of the house. 1 Blackstone, Comm. 324; Wood, Inst. 53.

The right of the master to their services in every respect is grounded on the contract between them.

Laborers or persons hired by the day's work or any longer time are not considered servants. 5 Binn. Penn. 167; 3 Serg. & R. Penn. 351. See 12 Ves. Ch. 114; 16 *id.* 486; 2 Vern. Ch. 546; 1 Roper, Leg. 121; 3 Deac. & C. Bank. 332; 1 Mont. & B. 413; 2 Mart. La. N. S. 652; Pothier, Proc. Civ. sect. 2, art. 5, § 5; Pothier, Obl. French ed. n. 710, 828; 9 Toullier, n. 314; DOMESTIC; OPERATIVE; MASTER.

SERVICE. In Contracts. The being employed to serve another.

In cases of seduction, the gist of the action is not the injury which the seducer has inflicted on the parent by destroying his peace of mind and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. See SEDUCTION; 2 Mees. & W. Exch. 539; 7 Carr. & P. 528.

In Feudal Law. That duty which the tenant owed to his lord by reason of his fee or estate.

The services, in respect of their quality, were either free or base, and in respect of their quantity, and the time of exacting them, were either certain or uncertain. 2 Blackstone, Comm. 62.

In Civil Law. A servitude.

In Practice. The execution of a writ or process. Thus, to serve a writ of capias signifies to arrest a defendant under the process, Kirb. Conn. 48; 2 Aik. Vt. 338; 11 Mass. 181; to serve a summons is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him: notices and other papers are served by delivering the same at the house of the party, or to him in person.

When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do every thing in his power to serve it. 1 Mann. & G. 238.

SERVIENT. In Civil Law. A term applied to an estate or tenement by or in respect of which a servitude is due to another estate or tenement.

SERVITORS OF BILLS. Such servants or messengers of the marshal belonging to the king's bench as were heretofore sent abroad with bills or writs to summon men to that court, being now called "tipstaves." Blount; 2 Hen. IV. c. 23.

SERVITUDE. In Civil Law. The subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing.

A right which subjects a land or tenement to some service for the use of another land or tenement which belongs to another master. Domat, Civ. Law, Cushing's ed. § 1018.

A *mixed* servitude is the subjection of persons to things, or things to persons.

A *natural* servitude is one which arises in consequence of the natural condition or situation of the soil.

A *personal* servitude is the subjection of one person to another: if it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to

do: this right arises from all kinds of contracts or quasi-contracts. Lois des Bât. p. 1, c. 1, art. 1.

A *real* or *predial* servitude is a charge laid on an estate for the use and utility of another estate belonging to another proprietor. La. Code, art. 643. When used without any adjunct, the word servitude means a real or predial servitude. Lois des Bât. p. 1, c. 1. Real servitudes are divided into rural and urban.

Rural servitudes are those which are due by an estate to another estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime, and wood from it, and the like.

Urban servitudes are those which are established over a building for the convenience of another, such as the right of resting the joists in the wall of the serving building, of opening windows which overlook the serving estate, and the like. Dalloz, Dict. *Servitudes.*

This term is used as a translation of the Latin term *servitus* in the French and Scotch law, Dalloz, Dict.; Paterson, Comp., and by many common-law writers, 3 Kent, Comm. 434; Washburn, Easem., and in the Civil Code of Louisiana. Service is used by Wood, Taylor, Harris, Cowper, and Cushing in his translation of Domat. Much of the common-law doctrine of easements is closely analogous to, and probably in part derived from, the civil-law doctrine of servitudes.

SERVITUS (Lat.). **In Roman Law.** Servitude; slavery; a state of bondage; a disposition of the law of nations by which, against common right, one man has been subjected to the dominion of another. Inst. 1. 2. 3; Bracton, 4 *b*; Coke, Litt. 116.

A service or servitude; a burden imposed by law, or the agreement of parties, upon one estate for the advantage of another, or for the benefit of another person than the owner.

Servitus actus, a right of way on horseback or in a carriage. Inst. 2. 3. pr.

Servitus altius non tollendi, a servitude preventing the owner of a house from building higher than his neighbor. Inst. 2. 3. 4; Paterson, Comp.

Servitus aquæ ducendæ, a right of leading water to one's own land over that of another. Inst. 2. 3. pr.

Servitus aquæ educendæ, a right of conducting water from one's own land unto a neighbor's. Dig. 8. 3. 29.

Servitus aquæ hauriendæ, a right of drawing water from another's spring or well. Inst. 2. 3. 2.

Servitus cloacæ mittendæ, a right of having a sewer through a neighbor's estate. Dig. 8. 1. 7.

Servitus fumi immittendi, a right of conducting smoke or vapor through a neighbor's chimney or over his ground. Dig. 8. 5. 8.

Servitus itineris, a right of way on horseback or in a carriage. This includes a *servitus actus*. Inst. 2. 3.

Servitus luminum, a right to have an open place for receiving light into a chamber or other room. Domat, l. 1. 4; Dig. 8. 2. 4.

Servitus oneris ferendi, a servitude of supporting a neighbor's building.

Servitus pascendi, a right of pasturing one's cattle on another's land. Inst. 2. 3. 2.

Servitus pecoris ad aquam adpulsam, a right of driving one's cattle on a neighbor's land to water.

Servitus prædii rustici, a rural servitude.

Servitus prædii urbani, an urban servitude.

Servitus prædiorum, a servitude on one estate for the benefit of another. See PRÆDIÆ.

Servitus projiciendi, a right of building a projection into the open space belonging to a neighbor. Dig. 8. 2. 2.

Servitus prospectus, a right of prospect. Dig. 8. 2. 15. This may be either to give one a free prospect over his neighbor's land, or to prevent a neighbor from having a prospect over one's own land. Domat, l. 1. 6.

Servitus stillicidii, a right of having the water drip from the eaves of one's house upon a neighbor's house or ground.

Servitus tigni immittendi, a right of inserting beams in a neighbor's wall. Inst. 2. 3. 1. 4; Dig. 8. 2. 2.

Servitus viæ, a right of way on foot or horseback, or with a loaded beast or wagon, over a neighbor's estate. Inst. 2. 3.

See, generally, Inst. 2. 3; Dig. 8. 2; Dict. de Jur.; Domat, Civ. Law; Bell, Dict.; Washburn, Easem.

SERVUS (Lat.). **A slave.**

The institution of slavery is traced to the remotest antiquity. It is referred to in the poems of Homer; and all the Greek philosophers mention it without the slightest censure. Aristotle justified it on the ground of a diversity of race. The Roman jurists rest the institution of slavery on the law of nations: in a fragment of Florentinus copied in the Institutes of Justinian, servitude is defined, *Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.* D. 1. 5. 4. 1; Inst. 1. 3. 2. The Romans considered that they had the right of killing their prisoners of war, *manu capti*; and that by preserving their lives, *servati*, they did not abandon but only postponed the exercise of that right. Such was, according to their ideas, the origin of the right of the master over his slave. Hence the etymology of the words *servi*, from *servati*, and *mancipia*, from *manu capti*, by which slaves were designated. It is, however, more simple and correct to derive the word *servus* from *servire*. Inst. 1. 3. 3. Children born of a woman who was a slave followed the condition of their mother: *servi nascuntur aut fiunt.*

2. A free person might be reduced to slavery in various ways: by captivity, *ex captivitate.* The Roman who was taken prisoner by the enemy lost all his rights as a citizen and a freeman: thus, when Regulus was brought to Rome by the Carthaginian ambassadors he refused to take his seat among the senators, saying that he was nothing but a slave. But if he made his escape and returned to Rome, all his rights were restored to him by the *jus postliminii;*

and, by a legal fiction, the whole period of his captivity was effaced, and he was considered as if he had never lost his freedom. According to the laws of the Twelve Tables, the insolvent debtor became the slave of his creditor, by a judgment rendered in a proceeding called *manus injectio*,—one of the four *leges actiones*. The thief who was taken in the *mainour*—that is to say, in the act of stealing, or while he was carrying the thing stolen to the place where he intended to conceal it—was deprived of his freedom, and became a slave. So was a person, who, for the purpose of defrauding the state, omitted to have his name inscribed on the table of the *census*. The illicit intercourse of a free woman with a slave without the permission of his master, the sentence to a capital punishment and the sentence to work perpetually in the mines,—*in metallum dati*,—made the culprit the slave as his punishment (*servi pœnæ*). The ingratitude of the emancipated slave towards his patron or former master and the fraud of a freeman who had suffered himself to be sold by an accomplice (after having attained the age of twenty years) in order to divide the price of the sale, were so punished.

3. Liberty being inalienable, no one could sell himself; but in order to perpetrate a fraud on the purchaser, a freeman was offered for sale as a slave and bought by an innocent purchaser: after the price had been paid and divided between the confederates, the pretended slave claimed and, of course, obtained his freedom. To remedy this evil and punish this fraud, a *senatus consultum* issued under Claudius provided that the person who had thus suffered himself to be sold should lose his liberty and remain a slave. In the social and political organization slaves were not taken into consideration; they had no *status*. *Quod attinet ad jus civile, servi pro nullis habentur. Servitutem mortalitati fere comparamus.* With regard to the master there was no distinction in the condition of slaves: they were all equally subject to the *domina potestas*. But the master sometimes established a distinction between the *servi vicarii* and the *servi ordinarii:* the former exercised a certain authority over the latter. But there was a marked difference between those slaves of whom we have been speaking and the *coloni censili, adscripti*, and *tributarii*, who resembled the serfs of the middle ages. 1 Ortolan, 27 *et seq.;* 1 Etienne, 68 *et seq.;* Lagrange, 93 *et seq.* See SLAVE; SLAVERY.

SESSION. The time during which a legislative body, a court, or other assembly, sits for the transaction of business: as, a session of congress, which commences on the day appointed by the constitution, and ends when congress finally adjourns before the commencement of the next session; the session of a court, which commences at the day appointed by law, and ends when the court finally rises. A term.

SESSION COURT. See COURT OF SESSION.

SESSIONS OF THE PEACE. In English Law. Sittings of justices of the peace for the execution of the powers which are confided to them as such.

Petty sessions (or petit sessions) are sittings held by one or more justices for the trial of minor offences, admitting to bail prisoners accused of felony, and the like purposes.

When sitting for purposes of preliminary inquiry, the public cannot claim admittance; but it is otherwise when sitting for purposes of adjudication.

Special sessions are sittings of two or more justices on a particular occasion for the exercise of some given branch of their authority, upon reasonable notice given to the other magistrates of the hundred or other division of the county, city, etc. for which they are convened. See stat. 7 & 8 Vict. c. 33.

The counties are distributed into divisions, and authority given by various statutes to the justices acting for the several divisions to transact different descriptions of business, such as licensing alehouses, or appointing overseers of the poor, surveyors of the highways, etc., at special sessions. 3 Stephen, Comm. 43, 44.

General sessions of the peace are courts of record, holden before the justices, whereof one is of the *quorum*, for execution of the general authority given to the justices by the commission of the peace and certain acts of parliament.

The only description of general sessions now usually held is the court of general quarter sessions of the peace; but in the county of Middlesex, besides the four quarter sessions, four general sessions are held in the intervals, and original intermediate sessions occasionally take place. They may be called by any two justices in the jurisdiction, one being of the *quorum*, or by the *custos rotulorum* and one justice, but not by one justice or the *custos rotulorum* alone.

General quarter sessions of the peace. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

SET ASIDE. To annul; to make void: as, to set aside an award.

When proceedings are irregular, they may be set aside on motion of the party whom they injuriously affect.

SET OF EXCHANGE. The different parts of a bill of exchange, taken together. Each part is a perfect instrument by itself; but the parts are numbered successively, and upon payment of any one the others become useless. See Chitty, Bills, 1836 ed. 175; Parsons, Notes & B.

SET-OFF. In Practice. A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim. See 7 Fla. 329.

2. A set-off was unknown to the common law, according to which mutual debts were distinct, and inextinguishable except by actual payment or release. 1 Rawle, Penn. 293: Babington, Set-Off, 1.

The statute 2 Geo. II. c. 22, which has been generally adopted in the United States, with some modifications, in cases of mutual debts, however, allowed the defendant to set his debt against the other, either by pleading it in bar, or giving it in evidence, when proper notice had been given of such intention, under the general issue. The statute, being made for the benefit of the defendant, is not compulsory, 8 Watts, Penn. 39; the defendant may waive his right, and bring a cross-action against the plaintiff. 2 Campb. 594; 5 Taunt. 148; 9 Watts, Penn. 179.

3. It seems, however, that in some cases of intestate estates and of insolvent estates, perhaps owing to the peculiar wording of the law, the statute has been held to operate on the rights of the parties before action brought or an act done by either of them. 2 Rawle, Penn. 293; 3 Binn. Penn. 135; Bacon, Abr. *Bankrupt* (K). See 7 Gray, Mass. 191, 425.

Set-off takes place only in actions on contracts for the payment of money: as, assumpsit, debt, and covenant. A set-off is not allowed in actions arising *ex delicto;* as, upon the case, trespass, replevin, or detinue. Buller, Nisi P. 181; 4 E. D. Smith, N. Y. 162.

The matters which may be set off may be mutual liquidated debts or damages; but unliquidated damages cannot be set off. 3 Bosw. N. Y. 560; 34 Penn. St. 239; 34 Ala. N. S. 659; 20 Tex. 31; 2 Head, Tenn. 467; 2 Metc. Ky. 143; 3 Iowa, 163; 8 *id.* 325; 1 Blackf. Ind. 394; 8 Conn. 325; 6 Halst. N. J. 397; 5 Wash. C. C. 232. The statutes refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, the balance only is considered to be the debt, and therefore in an action it is not necessary in such cases either to plead or give notice of set-off. 4 Burr. 2221.

4. In general, when the government is plaintiff, no set-off will be allowed. 9 Pet. 319; 4 Dall. Penn. 303. See 9 Cranch. 313; 1 Paine, C. C. 156. But when an act of congress authorizes such set-off, it may be made. 9 Cranch, 213.

Judgments in the same rights may be set off against each other, at the discretion of the court. 3 Bibb, Ky. 233; 3 Watts, Penn. 78; 3 Halst. N. J. 172; 29 Barb. N. Y. 295; 18 Tex. 541; 30 Ala. N. S. 470; 4 Ohio, 90; 7 Mass. 140, 144; 8 Cow. N. Y. 126. See Montague, Set-Off; Babington, Set-Off; 3 Starkie, Ev.; 3 Chitty, Blackst. Comm. 304, n.; 1 Chitty, Plead. Index; 1 Sellon, Pract. 321; Bouvier, Inst. Index.

SETTLE. To adjust or ascertain; to pay. Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance. 11 Ala. N. S. 419.

SETTLEMENT. A residence under such circumstances as to entitle a person to support or assistance in case of becoming a pauper.

2. It is obtained in various ways, to wit: by *birth;* by the *legal settlement* of the father, in the case of minor children; by *marriage;* by *continued residence;* by the payment of requisite taxes; by the *lawful exercise of a public office;* by *hiring and service* for a specified time; by *serving an apprenticeship;* and perhaps some others, which depend upon the local statutes of the different states. See 1 Blackstone, Comm. 363; 1 Dougl. 9; 6 Serg. & R. Penn. 103, 565; 10 *id.* 179.

In Contracts. An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full.

The conveyance of an estate for the benefit of some person or persons.

3. Settlements of the latter class are usually made on the prospect of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons; as, their children. Such settlements vest the property in trustees upon specified terms, usually for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

Ante-nuptial agreements of this kind will be enforced in equity by a specific performance of them, provided they are fair and valid and the intention of the parties is consistent with the principles and policy of law. 8 Blackf. Ind. 284; 4 R. I. 276; 28 Penn. St. 73; 7 Pet. 348; 9 How. 196. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid both against creditors and purchasers. 22 Ga. 402.

4. When made without consideration, after marriage, and the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors if at the time of the settlement being made he was not indebted, 8 Wheat. 229; 4 Mas. C. C. 443; 21 N. H. 34; 28 Miss. 717; 25 Conn. 154; but if he was then indebted it will be void as to the creditors existing at the time of the settlement, 3 Johns. Ch. N. Y. 481; 16 Barb. N. Y. 136; 5 Md. 68; 13 B. Monr. Ky. 496; 15 Eng. L. & Eq. 265; 8 Wheat. 229, unless in cases where the husband received a fair consideration in value of the thing settled, so as to repel the presumption of fraud. 2 Ves. Ch. 16; 10 *id.* 139; 6 Ind. 121; 28 Ala. N. S. 432; 7 Pick. Mass. 533; 4 Mas. C. C. 443. See 1 Madd. Ch. 459; 1 Chitty, Pract. 57; 2 Kent, Comm. 174; Roberts, Fraud. Conv. 188.

SEVER. In Practice. To separate; to insist upon a plea distinct from that of other co-defendants.

SEVERAL. Separate; distinct. A several agreement or covenant is one entered into by two or more persons separately, each

binding himself for the whole; a several action is one in which two or more persons are separately charged; a several inheritance is one conveyed so as to descend or come to two persons separately by moieties. Several is usually opposed to joint. See CONTRACT; COVENANT; PARTIES.

SEVERALTY, ESTATE IN. An estate which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest during the continuance of his estate. 2 Blackstone, Comm. 179; Cruise, Dig. 479, 480.

SEVERANCE. The separation of a part of a thing from another: for example, the separation of machinery from a mill is a severance, and in that case the machinery, which while annexed to the mill was real estate, becomes by the severance personalty, unless such severance be merely temporary. 8 Wend. N. Y. 587.

In Pleading. When an action is brought in the name of several plaintiffs, in which the plaintiffs must of necessity join, and one or more of the persons so named do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically called, judgment *ad sequendum solum.*

But in personal actions, with the exception of those by executors, and of detinue for charters, there can be no summons and severance. Coke, Litt. 139.

After severance, the party severed can never be mentioned in the suit nor derive any advantage from it.

When there are several defendants, each of them may use such plea as he may think proper for his own defence; and they may join in the same plea, or sever, at their discretion, Coke, Litt. 303 *a*, except, perhaps, in the case of dilatory pleas. Hob. 245, 250. But when the defendants have once united in the plea they cannot afterwards sever at the rejoinder, or other later stage of the pleading. See, generally, Brooke, Abr. *Summ. and Sev.*; 2 Rolle, 488; Archbold, Civ. Plead. 59.

Of Estates. The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy, but is severed.

A severance may be effected in various ways, namely: by *partition*, which is either voluntary or compulsory; by *alienation* of one of the joint tenants, which turns the estate into a tenancy in common; by the *purchase* or descent of all the shares of the joint tenants, so that the whole estate becomes vested in one only. Comyns, Dig. *Estates by Grant* (K 5); 1 Binn. Penn. 175.

SEWER (L. Lat. *sewera, severa*). A fresh-water trench or little river, encompassed with banks on both sides, to carry the water into the sea and thereby preserve the lands against inundation, etc. See Callis, Sew. 80, 99, 100; Cowel. Properly, a trench artificially made for the purpose of carrying water into the sea, river, or some other place of reception. Crabb, Real Prop. s. 113. A ditch or trench through marshy places to carry off water. Spelman, Gloss. See Washburn, Easem. Index.

SEX. The physical difference between male and female in animals.

In the human species the male is called *man*, and the female *woman*. Some human beings whose sexual organs are somewhat imperfect have acquired the name of *hermaphrodite.*

In the civil state the sex creates a difference among individuals. Women cannot generally be elected or appointed to offices, or service in public capacities. In this our law agrees with that of other nations. The civil law excluded women from all offices civil or public: *fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt.* Dig. 50. 17. 2. The principal reason of this exclusion is to encourage that modesty which is natural to the female sex, and which renders them unqualified to mix and contend with men; the pretended weakness of the sex is not probably the true reason. Pothier, Des Personnes, tit. 5; Wood, Inst. 12; La. Civ. Code, art. 24; 1 Beck, Med. Juris. 94.

SHAM PLEA. One entered for the mere purpose of delay; it must be of a matter which the pleader knows to be false: as, judgment recovered, that is, that judgment has already been recovered by the plaintiff for the same cause of action.

These sham pleas are generally discouraged, and in some cases are treated as a nullity. 1 Barnew. & Ald. 197, 199; 5 *id.* 750; 1 Barnew. & C. 286; Archbold, Civ. Plead. 249; 1 Chitty, Plead. 401.

SHARE. A portion of any thing. Sometimes shares are equal, at other times they are unequal.

In companies and corporations the whole of the capital stock is usually divided into equal portions, called shares. Shares in public companies have sometimes been held to be real estate, but most usually they are considered as personal property. See CORPORATION; PERSONAL PROPERTY. The proportion which descends to one of several children from his ancestor is called a share. The term share and share alike signifies in equal proportions. See PURPART.

SHEEP. A wether more than a year old. 4 Carr. & P. 216.

SHELLEY'S CASE, RULE IN. "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." 1 Coke, 104.

This rule has been the subject of much comment. It is given by Mr. Preston, Estates, vol. 1, pp. 263-419, as follows: When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there

is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. See 15 B. Monr. Ky. 282; Hargrave, Law Tracts, 489, 551; 2 Kent, Comm. 214.

If the limitation be to *heirs of the body*, he takes an estate tail; if to *heirs* generally, a fee-simple. 1 Day, Conn. 299; 2 Yeates, Penn. 410.

It does not apply where the ancestor's estate is equitable and that of the heirs legal. 1 Curt. C. C. 419.

SHERIFF (Sax. *scyre*, shire, *reve*, keeper). A county officer representing the executive or administrative power of the state within his county.

The office is said by Camden to have been created by Alfred when he divided England into counties; but Lord Coke is of opinion that it is of still greater antiquity, and that it existed in the time of the Romans, being the deputy of the earl (*comes*), to whom the custody of the shire was originally committed, and hence known as *vice-comes*. Camden, 156; Coke, Litt. 168 *a*; Dalton, Sheriff, 5.

2. The selection of sheriffs in England was formerly by an election of the inhabitants of the respective counties, except that in some counties the office was hereditary, and in Middlesex the shrivealty was and still is vested by charter in the city of London. But now the lord chancellor, in conjunction with the judges of the courts at Westminster, nominates suitable persons for the office, and the king appoints. In this country the usual practice is for the people of the several counties to elect sheriffs at regular intervals, generally of three years, and they hold subject to the right of the governor to remove them at any time for good cause, in the manner pointed out by law. Before entering upon the discharge of their duties, they are required to give bonds to the people of the state, conditioned for the faithful performance of their duties, without fraud, deceit, or oppression.

3. It is the sheriff's duty to preserve the peace within his bailiwick or county. To this end he is the first man within the county, and may apprehend and commit to prison all persons who break or attempt to break the peace, or may bind them over in a recognizance to keep the peace. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and rioters; has the safe-keeping of the county jail, and must defend it against all rioters; and for this, as well as for any other purpose, in the execution of his duties he may command the inhabitants of the county to assist him, which is called the *posse comitatus*. And this summons every person over fifteen years of age is bound to obey, under pain of fine and imprisonment. Dalton, Sheriff, 355; Coke, 2d Inst. 454.

4. In his ministerial capacity he is bound to execute, within his county, all process that issues from the courts of justice, except where he is a party to the proceeding, in which case the coroner acts in his stead. On *mesne* process he is to execute the writ, to arrest, and take bail; when the cause comes to trial he summons and returns the jury, and when it is determined he carries into effect the judgment of the court. In criminal cases he also arrests and imprisons, returns the jury, has the custody of the prisoner, and executes the sentence of the court upon him, whatever it may be.

5. As bailiff to the chief executive, it is his business to seize, on behalf of the state, all lands that devolve to it by attainder or escheat, levy all fines and forfeitures, and seize and keep all waifs, wrecks, estrays, and the like. Dalton, Sheriff, c. 9.

He also possesses a judicial capacity, and may hold a court and summon a jury for certain purposes; this jurisdiction, in this respect, is at common law quite extensive. This branch of his powers, however, is circumscribed in this country by the statutes of the several states, and is generally confined to the execution of writs of inquiry of damages, and the like, sent to him from the superior courts of law. 1 Sharswood, Blackstone, Comm. 389.

6. He has no power or authority out of his own county, except when he is commanded by a writ of *habeas corpus* to carry a prisoner out of his county; and then if he conveys him through several counties the prisoner is in custody of the sheriffs of each of the counties through which he passes. Plowd. 37 *a*; 2 Rolle, 163. If, however, a prisoner escapes and flies into another county, the sheriff or his officers may, upon fresh pursuit, take him again in such county. But he may do mere ministerial acts out of his county, if within the state, such as making out a panel or return, or assigning a bail-bond, or the like. 2 Ld. Raym. 1455; 2 Strange, 727; Dalton, Sheriff, 22.

7. To assist him in the discharge of his various duties, he may appoint an undersheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the service and return of process, and the like, but not the execution of a writ of inquiry, for this is in the nature of a judicial duty, which may not be delegated. All acts of the under-sheriff or of the deputies are done in the name of the sheriff, who is responsible for them although such acts should amount to a trespass or an extortion of the officer; for which reason he usually takes bonds from all his subordinates for the faithful performance of their duties. Croke Eliz. 294; 2 Wils. 378; 3 *id.* 309; 2 Blackst. 832; Dougl. 40.

8. The sheriff also appoints a jailer, who is usually one of his deputies, and has two kinds of jails, one for debtors, which he may appoint in any house within his bailiwick, and the other for felons, which is the common jail of the county. The jailer is responsible for the escape of any prisoner committed to his charge, and is bound to have sufficient

force at his disposal to prevent a breach of the prison by a mob or otherwise; and nothing will excuse him but an act of God or the public enemy. He must not be guilty of cruelty, or of putting debtors in irons, or the like, without sufficient cause; but he may defend himself at all hazards if attacked. In a case where a prisoner, notwithstanding his remonstrances, was confined by the jailer in a room in which was a person ill with the small-pox, which disease he took and died, it was held to be murder in the jailer. Viner, Abr. *Gaol* (A); 4 Term, 789; 4 Coke, 84; Coke, 3d Inst. 34; 2 Strange, 856.

9. A deputy cannot depute another person to do the duty intrusted to him; although it is not necessary that his should be the hand that executes the writ: it is sufficient if he is present and assists. In the execution of criminal process, he may, after demanding admittance, break open the outer door of a house; but in civil actions he may not forcibly enter a dwelling-house, for every man's house is said to be his castle and fortress, as well for defence as for repose. But a warehouse, store, or barn, or the inner door of a dwelling-house after the officer has peaceably entered, is not privileged. Process or writs of any description may not be served on Sunday, except in cases of treason, felony, or breach of the peace; nor may the sheriff on that day retake a prisoner who has escaped from custody. 6 Wend. N. Y. 454; 8 *id.* 47; 16 Johns. N. Y. 287; 4 Taunt. 619; 8 *id.* 250; Cowp. 63; Croke Eliz. 908; Croke Car. 537; W. Jones, 429; 5 Term, 25; 3 East, 155; 3 Bos. & P. 223; Dalton, Sheriff; Watson, Sheriff.

SHERIFF'S COURT. In Scotch Law. A court having an extensive civil and criminal jurisdiction.

Its judgments and sentences are subject to review by the court of session and court of justiciary. Alison, Pract. 25; Paterson, Comp. 941, n.

SHERIFF'S COURT IN LONDON. A tribunal having cognizance of personal actions under the London (city) Small Debts Act of 1852, 21 & 22 Vict. c. 157, s. 3. See 11 & 12 Vict. c. 121; 15 & 16 Vict. c. 127; 18 & 19 Vict. c. 122, s. 99; 20 & 21 Vict. c. 157.

The sheriff's court in London is one of the chief of the courts of limited and local jurisdiction in London. 3 Stephen, Comm. 449, note (l); 3 Blackstone, Comm. 80, note (j).

SHERIFF'S JURY. In Practice. A jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purposes of an inquisition or inquest of office. 3 Sharswood, Blackst. Comm. 258.

SHERIFF'S TOURN. A court of record in England, held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county.

It is, indeed, only the *turn* or circuit of the sheriff to keep a court-leet in each respective hundred. It is the great court leet of the county, as the county court is the court-baron; for out of this, for the ease of the sheriff, was taken the court-leet or view of frank-pledge, which see. 4 Stephen, Comm. 339; 4 Blackstone, Comm. 273.

SHERIFFALTY. The office of sheriff.

SHIFTING USE. Such a use as takes effect in derogation of some other estate, and is limited expressly by the deed or is allowed to be created by some person named in the deed. Gilbert, Uses, Sugden ed. 152, n.; 2 Washburn, Real Prop. 284.

For example, a feoffment in fee is made to the use of W and his heirs till A pays £40 to W, and then to the use of A and his heirs. A very common application is in the case of marriage settlements. Williams, Real Prop. 243. The doctrine of shifting uses furnished a means of evading the principle of law that a fee could not be limited after a fee. See 2 Washburn, Real Prop. 284 *et seq.*; Williams, Real Prop. 242; 1 Spence, Eq. Jur. 452; 1 Vern. Ch. 402; 1 Edw. Ch. 34; Plowd. 25; Pollexf. 65.

SHILLING. In English Law. The name of an English coin, of the value of one-twentieth part of a pound. In the United States while they were colonies there were coins of this denomination; but they varied greatly in their value.

SHIP. A vessel employed in navigation: for example, the terms the ship's papers, the ship's husband, shipwreck, and the like, are employed whether the vessel referred to be a brig, a schooner, a sloop, or a three-masted vessel.

A vessel with three masts, employed in navigation. 4 Wash. C. C. 530; Weskett, Ins. 514. The boats and rigging, 2 Marshall, Ins. 727, together with the anchors, masts, cables, and such-like objects, are considered as part of the ship. Pardessus, n. 599; Dig. 22. 2. 44.

As to what passes by a bill of sale under the general term ship, or ship and her appurtenances, or ship, apparel, and furniture, see 1 Parsons, Marit. Law, 71, n. 3; APPAREL. The capacity of a ship is ascertained by its tonnage, or the space which may be occupied by its cargo.

Ships are of different kinds: as, ships of war and merchant-ships, steamships and sailing-vessels. Merchant-ships may be devoted to the carriage of passengers and property, or either alone. When propelled in whole or in part by steam, and employed in the transportation of passengers, they are subject to inspection and certain stringent regulations imposed by act of congress passed Aug. 30, 1852, 10 U. S. Stat. at Large, 61; and steam-vessels not carrying passengers are likewise subject to inspection and certain regulations prescribed by the act of congress of July 7, 1838. 5 U. S. Stat. at Large, 304.

Stringent regulations in regard to the number of passengers to be taken on board of sailing-vessels, and the provisions to be

made for their safety and comfort, are also prescribed by the act of 3d March, 1855. 10 U. S. Stat. at Large, 715.

Numerous other acts of congress have been passed from time to time in reference to the registering, enrolling, licensing, employment, and privileges of the vessels of commerce owned in the United States; and a reference to the titles and provisions of these acts would occupy more space than can properly be devoted to them in this article. See the various titles in this work, and in Brightley's Digest of the Laws of the United States.

See, also, the Act of Congress of March, 3, 1851, to limit the liability of ship-owners, and for other purposes; the English Merchant Shipping Act, 1854; Code de Commerce; Abbott, Shipping; Parsons, Marit. Law; Phillips, Insurance; Emerigon, Insurance, etc. Meredith ed.; Arnould, Insurance; Marvin, Wreck & Salvage; Conkling, Admiralty; Flanders, Shipping; Flanders, Maritime Law; McCulloch, Commercial Dictionary; Homans, Cyclopedia of Commerce; Pritchard, Admiralty Digest; Curtis, Admiralty Digest; The United States Digest; Boulay-Paty, Cours de Droit Commerciel Maritime; Pardessus, Cours de Droit Commerciel; Pardessus, Collection de Lois Maritimes; Reddie, History of Maritime Commerce; Edwards, Admiralty Jurisdiction; Ware, Reports.

SHIP-BROKER. One who transacts business relating to vessels and their employment between the owners of vessels and merchants who send cargoes.

SHIP-DAMAGE. In the charter-parties with the English East India Company these words occur: their meaning is, damage from negligence, insufficiency, or bad stowage in the ship. Dougl. 272; Abbott, Shipp. 204.

SHIP'S HUSBAND. In Maritime Law. An agent appointed by the owner of a ship, and invested with authority to make the requisite repairs and attend to the management, equipment, and other concerns of the ship. He is the general agent of the owners in relation to the ship, and may be appointed in writing or orally. He is usually, but not necessarily, a part-owner. 1 Parsons, Marit. Law, 97. He must *see to the proper outfit* of the vessel in the repairs adequate to the voyage and in the tackle and furniture necessary for a seaworthy ship; must *have a proper master*, mate, and crew for the ship, so that in this respect it shall be seaworthy; must *see to the due furnishing* of provisions and stores according to the necessities of the voyage; must *see to the regularity of the clearances* from the custom-house and the regularity of the registry; must *settle the contracts* and provide for the payment of the furnishings which are requisite to the performance of those duties; must *enter into proper charter-parties*, or engage the vessel for general freight under the usual conditions, and settle for freight and adjust averages with the merchant, and must *preserve the proper certificates*, surveys, and documents, in case of future disputes with insurers and freighters, and to keep regular books of the ship. Bell, Comm. § 428; 4 Barnew. & Ad. 375; 13 East, 538; 1 Younge & C. Exch. 326; 8 Wend. N. Y. 144; 16 Conn. 12. These are his general powers; but, of course, they may be limited or enlarged by the owners; and it may be observed that without special authority he cannot borrow money generally for the use of the ship; though, as above observed, he may settle the accounts for furnishings, or grant bills for them, which form debts against the concern whether or not he has funds in his hands with which he might have paid them. 1 Bell, Comm. § 499. Although he may, in general, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he would not have power to take bills for the freight and give up the possession of the lien over the cargo, unless it has been so settled by the charter-party.

He cannot insure or bind the owners for premiums. 17 Me. 147; 2 Maule & S. 485; 13 East, 274; 7 B. Monr. Ky. 595; 11 Pick. Mass. 85; 5 Burr. 2627; Paley, Ag. Lloyd ed. 23, note 8; Abbott, Shipp. pt. 1, c. 3, s. 2; Marshall, Ins. b. 1, c. 8, s. 2; Livermore, Ag. 72, 73.

As the power of the master to enter into contracts of affreightments is superseded in the port of the owners, so it is by the presence of the ship's husband or the knowledge of the contracting parties that a ship's husband has been appointed. 2 Bell, Comm. 199. The ship's husband, as such, has no lien on the vessel or proceeds. 2 Curt. C. C. 427.

SHIP'S PAPERS. The papers or documents required for the manifestation of the ownership and national character of a vessel and her cargo, and to show her compliance with the revenue and navigation laws of the country to which she belongs.

The want of these papers or any of them renders the character of a vessel suspicious, 2 Boulay-Paty, Droit Com. 14; and the use of false or simulated papers frequently subjects the vessel to confiscation, 15 East, 46, 70, 364; Molloy, b. 2, c. 2, s. 9, or avoids an insurance, unless the insurer has stipulated that she may carry such papers. *Id.*

A ship's papers are of two sorts: *first*, those required by the law of the particular country to which the ship belongs: as, the certificate of registry or of enrolment, the license, the crew-list, the shipping articles, clearance, etc.; and, *second*, such as are required by the law of nations to be on board of neutral ships as evidence of their title to that character: as, the sea brief or letter, or passport; the proofs of property in the ship, as bills of sale, etc.; the charter-party; the bills of lading; the invoices; the crew-list or muster-roll; the log-book, and the bill of health. M'Culloch, Com. Dict. *Ship's Papers.*

SHIPPER. One who ships or puts goods on board of a vessel, to be carried to another

place during her voyage. In general, the shipper is bound to pay for the hire of the vessel or the freight of the goods. 1 Bouvier, Inst. n. 1030.

SHIPPING. Ships in general; ships or vessels of any kind intended for navigation Relating to ships: as, shipping interest, shipping affairs, shipping business, shipping concerns. Putting on board a ship or vessel, or receiving on board a ship or vessel. Webster, Dict.; Worcester, Dict. See SHIP; SHIP'S PAPERS.

SHIPPING ARTICLES. An agreement, in writing or print, between the master and seamen or mariners on board his vessel (except such as shall be apprenticed or servant to himself or owners), declaring the voyage or voyages, term or terms of time, for which such seamen or mariners shall be shipped. It is also required that at the foot of every such contract there shall be a memorandum, in writing, of the day and the hour on which each seaman or mariner who shall so ship and subscribe shall render himself on board to begin the voyage agreed upon.

2. For want of shipping articles, the seaman is entitled to the highest wages which have been given at the port or place where such seaman or mariner shall have been shipped for a similar voyage, within three months next before the time of such shipping, on his performing the service, or during the time he shall continue to do duty on board such vessel, without being bound by the regulations or subject to the penalties and forfeitures contained in the said act of congress; and the master is further liable to a penalty of twenty dollars. Act of Congr. July 20, 1790.

3. The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen; and, if they do, such clause will be declared void. 2 Sumn. C. C. 443; 2 Mas. C. C. 541.

A seaman who signs shipping articles is bound to perform the voyage; and he has no right to elect to pay damages for non-performance of the contract. 2 Va. Cas. 276.

See, generally, Gilp. Dist. Ct. 147, 219, 452; 1 Pet. Adm. 212; Bee, Adm. 48; 1 Mas. C. C. 443; 5 *id.* 272; 14 Johns. N. Y. 260; 1 Parsons, Marit. Law, 442–452.

SHIPWRECK. The loss of a vessel at sea, either by being swallowed up by the waves, by running against another vessel or thing at sea, or on the coast.

SHIRE. In English Law. A district or division of country. Coke, Litt. 50 *a*.

SHIRE-GEMOT (spelled, also, *Scire-gemote, Scir-gemot, Scyre-gemote, Shire-mote;* from the Saxon *scir* or *scyre*, county, shire, and *gemote*, a court, an assembly).

The Saxon county court.

It was held twice a year before the bishop and alderman of the shire, and was the principal court. Spelman, Gloss. *Gemotum;* Cunningham, Law Dict. *Shire;* Crabb, Hist. Eng. Law, 28.

SHOP-BOOKS. The books of a retail dealer, mechanic, or other person, in which entries or charges are made of work done or goods sold and delivered to customers: commonly called "account-books," or "books of account." The party's own *shop-books* are in certain cases admissible in evidence to prove the delivery of goods therein charged, where a foundation is laid for their introduction. The following are the general rules governing the production of this kind of evidence. *First*, that the party offering the books kept no clerk; *second*, that the books offered by the party are his books of account, and that the entries therein are in his handwriting; *third*, it must appear, by some of those who have dealt with the party and settled by the books offered, that they found them correct; *fourth*, it must be shown that some of the articles charged have been delivered. Where entries are made by a clerk who is dead, such entries are admissible in evidence on proof of his handwriting. 4 Ill. 120; 19 *id.* 393; 8 Johns. N. Y. 212; 11 Wend. N. Y. 568; 1 Greenleaf, Ev. § 117; 1 Smith, Lead. Cas. Hare & W. ed. 282. See ORIGINAL ENTRY.

SHORE. Land on the side of the sea, a lake, or a river. Strictly speaking, when the water does not ebb and flow in a river, there is no shore. See RIVER; SEA.

SHORT ENTRY. A term used among bankers to denote the act which takes place when a note has been sent to a bank for collection, and an entry of it is made in the customer's bank-book, stating the amount in an inner column, and carrying it out into the accounts between the parties when it has been paid.

A bill of this kind remains the property of the depositor. 1 Bell, Comm. 271; 9 East, 12; 1 Rose, Bank. 153; 2 *id.* 163; 2 Barnew. & C. 422.

SHORT NOTICE. In English Practice. Four days' notice of trial. Wharton, Dict. 2d Lond. ed. *Notice of Trial at Common Law;* 3 Chitty, Stat. 148; 1 Crompt. & M. Exch. 499. Where short notice has been given, two days is sufficient notice of continuance. Wharton, Lex. 2d Lond. ed.

SI TE FECERIT SECURUM (Lat. if he make you secure). Words which occur in the form of writs, which originally required, or still require, that the plaintiff should give security to the sheriff that he will prosecute his claim, before the sheriff can be required to execute such writ.

SICKNESS. By sickness is understood any affection of the body which deprives it temporarily of the power to fulfil its usual functions.

Sickness is either such as affects the body generally, or only some parts of it. Of the former class a fever is an example; of the latter, blindness. When a process has been issued against an individual for his arrest, the sheriff or other officer is authorized, after he has arrested him, if he be so dangerously sick that to remove him would endanger his life or health, to let him remain where he found him, and to return the facts at large, or simply *languidus*.

SIDE-BAR RULES. In English Practice. Rules which were formerly moved for by attorneys on the side-bar of the court, but now may be had of the clerk of the rules, upon a *præcipe*. These rules are, that the sheriff return his writ, that he bring in the body, for special imparlance, to be present at the taxing of costs, and the like.

SIDESMEN (*testes, synodales*). **In Ecclesiastical Law.** A kind of impanelled jury, consisting of two, three, or more persons, in every parish, who were upon oath to present all heretics and irregular persons. In process of time they became standing officers in many places, especially cities. They were called synodsmen,—by corruption sidesmen; also questmen. But their office has become absorbed in that of church-warden. 1 Burn, Eccl. Law, 399.

SIGHT. Presentment. Bills of exchange are frequently drawn payable at sight or a certain number of days or months after sight.

2. Bills payable at sight are said to be entitled to days of grace by the law merchant. Beawes, Lex Merc. pl. 256; Kyd, Bills, 10; Chitty, Bills, 343; Parsons, Notes & B.

The holder of a bill payable at sight is required to use due diligence to put it into circulation, and, if payable after sight, have it presented in reasonable time. 20 Johns. N. Y. 146; 7 Cow. N. Y. 705; 12 Pick. Mass. 399; 28 Eng. L. & Eq. 131; 13 Mass. 137; 4 Mas. C. C. 336; 5 *id.* 118; 1 M'Cord, So. C. 322; 1 Hawks, No. C. 195.

3. When the bill is drawn payable any number of days after sight, the time begins to run from the period of presentment and acceptance. 1 Mas. C. C. 176; 20 Johns. N. Y. 176. It is usual to leave a bill for acceptance one whole day; but the acceptance is dated as on the day it was left. Sewell, Bank.

A bill drawn payable a certain number of days after sight, acceptance waived, must be presented to fix the time at which the bill is to become due, and the term of the bill begins to run from the date of presentment.

Sight draft and sight bill are bills payable at sight.

SIGILLUM (Lat.). A seal.

SIGN. In Contracts. A token of any thing; a note or token given without words.

2. Contracts are express or implied. The express are manifested *viva voce* or by writing; the implied are shown by silence, by acts, or by *signs*.

Among all nations and at all times, certain signs have been considered as proof of assent or dissent: for example, the nodding of the head, and the shaking of hands, 2 Blackstone, Comm. 448; 6 Toullier, n. 33; Heineccius, Antiq. lib. 2, t. 23, n. 19, silence and inaction, facts and signs, are sometimes very strong evidence of cool reflection, when following a question. I ask you to lend me one hundred dollars: without saying a word, you put your hand in your pocket and deliver me the money. I go into a hotel, and I ask the landlord if he can accommodate me and take care of my trunk: without speaking, he takes it out of my hands and sends it into his chamber. By this act he doubtless becomes responsible to me as a bailee. At the expiration of a lease, the tenant remains in possession, without any objection from the landlord: this may be fairly interpreted as a sign of a consent that the lease shall be renewed. 13 Serg. & R. Penn. 60.

3. The learned author of the Decline and Fall of the Roman Empire, in his 44th chapter, remarks, "Among savage nations the want of letters is imperfectly supplied by the use of visible signs, which awaken attention and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomime; the words were adapted to the gestures, and the slightest error or neglect in the *forms* of proceeding was sufficient to annul the *substance* of the fairest claim. The communion of the marriage-life was denoted by the necessary elements of fire and water; and the divorced wife resigned the bunch of keys by the delivery of which she had been invested with the government of the family. The manumission of a son or a slave was performed by turning him round with a gentle blow on the cheek; a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clenched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence. The indenture of covenants was a broken straw; weights and scales were introduced into every payment; and the heir who accepted a testament was sometimes obliged to snap his fingers, to cast away his garments, and to leap and dance with real or affected transport. If a citizen pursued any stolen goods into a neighbor's house, he concealed his nakedness with a linen towel, and hid his face with a mask or busin, lest he should encounter the eyes of a virgin or a matron. In a civil action, the plaintiff touched the ear of his witness, seized his reluctant adversary by the neck, and implored, in solemn lamentation, the aid of his fellow-citizens. The two competitors grasped each other's hand, as if they stood prepared for combat before the tribunal of the prætor: he commanded them to produce the object of the dispute; they went, they returned with measured steps, and a clod of earth was cast at his feet to represent the field for which they contended. This occult science of the words and actions of law was the inheritance of the pontiffs and patricians. Like the Chaldean astrologers, they announced to their clients the days of business and repose; those important trifles were interwoven with the religion of Numa; and, after the publication of the Twelve Tables, the Roman people were still enslaved by the ignorance of judicial proceedings. The treachery of some plebeian officers at length revealed the profitable mystery; in a more enlightened age, the legal actions were derided and observed; and the same antiquity which sanctified the practice obliterated the use and meaning of this primitive language."

In Measures. In angular measures, a sign is equal to thirty degrees.

In Mercantile Law. A board, tin, or other substance, on which are painted the name and business of a merchant or tradesman.

Every man has a right to adopt such a sign as he may please to select; but he has no right to use another's name without his consent. See Dalloz. Dict. *Propriété Industrielle;* TRADE-MARKS.

SIGN MANUAL. In English Law. The signature of the king to grants or letters patent, inscribed at the top. 2 Sharswood, Blackst. Comm. 347*.

Any one's name written by himself. Webster, Dict.; Wharton, Law Dict. 2d Lond. ed. The sign manual is not good unless countersigned, etc. 9 Mod. 54.

SIGNA (Lat.). **In Civil Law.** Those species of indicia which come more immediately under the cognizance of the senses: such as, stains of blood on the person of one accused of murder, indications of terror at being charged with the offence, and the like.

Signa, although not to be rejected as instruments of evidence, cannot always be relied upon as conclusive evidence; for they are frequently explained away. In the instance mentioned, the blood may have been that of a beast; and expressions of terror have been frequently manifested by innocent persons who did not possess much firmness. See Best, Pres. Ev. 13, n. *f;* Denisart.

SIGNATURE. In Ecclesiastical Law. The name of a sort of rescript, without seal, containing the supplication, the signature of the pope or his delegate, and the grant of a pardon. Dict. Dr. Can.

In Practice. By signature is understood the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written is also called a signature.

2. It is not necessary that a party should write his name himself, to constitute a signature: his mark is now held sufficient, though he was able to write. 8 Ad. & E. 94; 3 Nev. & P. 228; 3 Curt. C. C. 752; 5 Johns. N. Y. 144. A signature made by a party, another person guiding his hand with his consent, is sufficient. 4 Wash. C. C. 262, 269.

3. The signature is usually made at the bottom of the instrument; but in wills it has been held that when a testator commenced his will with these words, "I, A B, make this my will," it was a sufficient signing. 3 Lev. 1. And see Roberts, Wills, 122; Chitty, Contr. 212; Newland, Contr. 173; Sugden, Vend. 71; 2 Starkie, Ev. 605, 613; Roberts, Frauds, 121. But this decision is said to be absurd. 1 Brown, Civ. Law, 278, n. 16. See Merlin, Répert. *Signature*, for a history of the origin of signatures; and, also, 4 Cruise, Dig. 32, c. 2, s. 73 *et seq.* See, generally, 8 Toullier, nn. 94–96; 1 Dall. Penn. 64; 5 Whart. Penn. 386; 2 Bos. & P. 238; 2 Maule & S. 286; Redfield, Wills.

SIGNIFICATION (Lat. *signum*, a sign, *facere*, to make).. **In French Law.** The notice given of a decree, sentence, or other judicial act.

SIGNIFICAVIT (Lat.). **In Ecclesiastical Law.** When this word is used alone, it means the bishop's certificate to the court of chancery in order to obtain the writ of excommunication; but where the words *writ of significavit* are used, the meaning is the same as *writ de excommunicato capiendo.* 2 Burn, Eccl. Law, 248; Shelford, Marr. & D. 502.

SIGNING JUDGMENT. In English Practice, the plaintiff or defendant, when the cause has reached such a stage that he is entitled to a judgment, obtains the signature or allowance of the proper officer; and this is called signing judgment, and is instead of the delivery of judgment in open court. Stephen, Plead. 111. It is the leave of the master of the office to enter up judgment, and may be had in vacation. 3 Barnew. & C. 317; Tidd, Pract. 616.

In American Practice, it is an actual signing of the judgment on the record, by the judge or other officer duly authorized. Graham, Pract. 341.

SILENCE. The state of a person who does not speak, or of one who refrains from speaking.

2. Pure and simple silence cannot be considered as a consent to a contract, except in cases where the silent person is bound in good faith to explain himself: in which case silence gives consent. 6 Toullier, l. 3, t. 3, n. 32, note; 14 Serg. & R. Penn. 393; 2 Belt, Suppl. Ves. Ch. 442; 1 Dane, Abr. c. 1, art. 4, § 3; 8 Term, 483; 6 Penn. St. 336; 1 Greenleaf, Ev. 201; 2 Bouvier, Inst. n. 1313. But no assent will be inferred from a man's silence unless he knows his rights and knows what he is doing, nor unless his silence is voluntary.

When any person is accused of a crime or charged with any fact, and he does not deny it, in general, the presumption is very strong that the charge is correct. 5 Carr. & P. 332; 7 *id.* 832; Joy, Conf. s. 10, p. 77.

3. The rule does not extend to the silence of the prisoner when, on his examination before a magistrate, he is charged by another prisoner with having joined with him in the commission of an offence. 3 Stark. 33.

When an oath is administered to a witness, instead of expressly promising to keep it, he gives his assent by his silence and kissing the book.

The person to be affected by the silence must be one not disqualified to act, as *non compos*, an infant, or the like; for even the express promise of such a person would not bind him to the performance of any contract.

The rule of the civil law is that silence is not an acknowledgment or denial in every case: *qui tacet, non utique fatetur; sed tamen verum est, eum non negare.* Dig. 50. 17. 142.

SILVA CÆDUA (Lat.). By these words, in England, is understood every sort of wood, except gross wood of the age of twenty years. Bacon, Abr. *Tythes* (C).

SIMILITER (Lat. likewise). **In Pleading.** The plaintiff's reply that, as the defendant has put himself upon the country, he, the plaintiff, does the like. It occurs only when the plea has the conclusion to the country, and its effect is to join the plaintiff in the issue thus tendered by the defendant. Coke, Litt. 126 *a.* The word *similiter* was the effective word when the proceedings were in Latin. 1 Chitty, Plead. 519; Archbold, Civ. Plead. 250. See Stephen, Plead. 255; 2 Saund. 319 *b;* Cowp. 407; 1 Strange, 551; 11 Serg. & R. Penn. 32.

SIMONY. In Ecclesiastical Law. The selling and buying of holy orders or an ecclesiastical benefice. Bacon, Abr. *Simony.*

By simony is also understood an unlawful agreement to receive a temporal reward for something holy or spiritual. Code, 1. 3. 31; Ayliffe, Parerg. 496.

SIMPLE CONTRACT. A contract the evidence of which is merely oral or in writing, not under seal nor of record. 1 Chitty, Contr. 1; 1 Chitty, Plead. 88. And see 11 Mass. 30; 11 East, 312; 4 Barnew. & Ald. 588; 3 Starkie, Ev. 995; 2 Blackstone, Comm. 472.

SIMPLE LARCENY. The felonious taking and carrying away the personal goods of another, unattended by acts of violence: it is distinguished from compound larceny, which is stealing from the person or with violence.

SIMPLE OBLIGATION. An unconditional obligation: one which is to be performed without depending upon any event provided by the parties to it.

SIMPLE TRUST. A simple trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law. It differs from a *special trust*. 2 Bouvier, Inst. n. 1896.

SIMPLEX (Lat.). Simple or single: as, *charta simplex* is a deed-poll or single deed. Jacob, Law Dict.

SIMPLICITER (Lat.). Simply; without ceremony; in a summary manner.

SIMUL CUM (Lat. together with). **In Pleading.** Words used in indictments and declarations of trespass against several persons, when some of them are known and others are unknown.

In cases of riots, it is usual to charge that A B, together with others unknown, did the act complained of. 2 Chitty, Crim. Law, 488; 2 Salk. 593.

When a party sued with another pleads separately, the plea is generally entitled in the name of the person pleading, adding, "sued with ——," naming the other party. When this occurred, it was, in the old phraseology, called pleading with a *simul cum*.

SIMULATION (Lat. *simul*, together). **In French Law.** The concert or agreement of two or more persons to give to one thing the appearance of another, for the purpose of fraud. Merlin, Répert.

With us, such act might be punished by indictment for a conspiracy, by avoiding the pretended contract, or by action to recover back the money or property which may have been thus fraudulently obtained.

SINE DIE (Lat.). Without day. A judgment for a defendant in many cases is *quod eat sine die*, that he may go without day. While the cause is pending and undetermined, it may be continued from term to term by *dies datus*. See CONTINUANCE; Coke, Litt. 362 *b*, 363 *a*. When the court or other body rise at the end of a session or term, they adjourn *sine die*.

SINECURE. In Ecclesiastical Law. A term used to signify that an ecclesiastical officer is without a charge or cure.

In common parlance, it means the receipt of a salary for an office when there are no duties to be performed.

SINGLE BILL. One without any condition, and which does not depend upon any future event to give it validity.

SINGLE ENTRY. A term used among merchants, signifying that the entry is made to charge or to credit an individual or thing, without at the same time presenting any other part of the operation: it is used in contradistinction to *double entry*. For example, a single entry is made, A B debtor, or A B creditor, without designating what are the connections between the entry and the objects which composed the fortune of the merchant.

SINGULAR. In grammar, the singular is used to express only one; not plural. Johnson.

In law, the singular frequently includes the plural. A bequest to "*my nearest relation*," for example, will be considered as a bequest to all the relations in the same degree who are nearest to the testator. 1 Ves. Sen. Ch. 357; 1 Brown, Ch. 293. A bequest made to "*my heir*," by a person who had three heirs, will be construed in the plural. 4 Russ. Cr. Cas. 384.

The same rule obtains in the civil law: *in usu juris frequenter uti nos singulari appellatione, cùm plura significari vellemus*. Dig. 50. 16. 158.

SINKING FUND. A fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual payment of the principal. See FUNDING SYSTEM.

SIRE. A title of honor given to kings or emperors in speaking or writing to them.

SISTER. A woman who has the same father and mother with another, or has one of them only. In the first case, she is called sister, simply; in the second, half-sister.

SITTINGS IN BANK OR BANC. The sittings which the respective superior courts of common law hold during every term for the purpose of hearing and determining the various *matters of law* argued before them.

They are so called in contradistinction to the sittings at *nisi prius*, which are held for the purpose of trying issues of fact. The former are usually held, in England, before four of the judges, while at the latter one judge only presides. Holthouse, Law Dict.; 3 Stephen, Comm. 423.

In America, the practice is essentially the same, all the judges, or a majority of them, usually, sitting *in banc*, and but one holding the court for jury trials; and the term has the same application here as in England.

SITUS (Lat.). Situation; location. 5 Pet. 524.

Real estate has always a fixed situs, while personal estate has no such fixed situs: the law *rei sitæ* regulates real but not the personal estate. Story, Confl. of Laws, § 379.

SIX CLERKS IN CHANCERY. Officers who received and filed all proceedings, signed office copies, attended court to read the pleadings, etc. Abolished by 5 Vict. c. 5. 3 Sharswood, Blackst. Comm. 443*; Spence, Eq. Jur.; Fleta, lib. 2, c. 13, § 15.

SKELETON BILL. **In Commercial Law.** A blank paper, properly stamped, in those countries where stamps are required, with the name of a person signed at the bottom.

In such case the person signing the paper will be held as the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name, to the sum of which the stamp is applicable. 1 Bell, Comm. 390, 5th ed.

SKILL. The art of doing a thing as it ought to be done.

2. Every person who purports to have skill in a business, and undertakes for hire to perform it, is bound to do it with ordinary skill, and is responsible civilly in damages for the want of it, 11 Mees. & W. Exch. 483; and sometimes he is responsible criminally. See MALA PRAXIS; 2 Russell, Crimes, 288.

3. The degree of skill and diligence required rises in proportion to the value of the article and the delicacy of the operation: more skill is required, for example, to repair a very delicate mathematical instrument, than upon a common instrument. Jones, Bailm. 91; 2 Kent, Comm. 458, 463; 1 Bell, Comm. 459; 2 Ld. Raym. 909, 918; Domat, l. 1, t. 4, § 8, n. 1; Pothier, Louage, n. 425; Pardessus, 528; Ayliffe, Pand. b. 4, t. 7, p. 466; Erskine, Inst. 3. 3. 16; 1 Rolle, Abr. 10; Story, Bailm. § 431 *et seq.*; 2 Greenleaf, Ev. § 144.

SLANDER. **In Torts.** Words, spoken or written, which are injurious to the character of another.

2. The ground of all liability to an *action* for words spoken or written consists in injury to character; and an action may be maintained in the following cases. To be actionable in themselves, the words when only spoken, not written, must be such as in their plain and popular sense convey to the minds of the hearers a charge of some offence for which the plaintiff is amenable to the law, or of *having* some disease which will exclude him from society. Words which are not actionable in themselves become so when they are spoken of a person in his profession, office, or trade, and necessarily or naturally tend to injure him therein. And any words defamatory or injurious in their nature, spoken of another, without legal justification, are actionable, if productive of special damage flowing naturally from the slander. The term "libel" is applied to written or printed slander. Heard, Libel & S. § 8.

Verbal Slander. Actionable words are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages.

Words of the first description must impute—

First, the guilt of some offence for which the party, if guilty, might be indicted and punished by the criminal courts: as, to call a person a "traitor," "thief," "highwayman," or to say that he is guilty of "perjury," "forgery," "murder," and the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable. Croke Jac. 114, 142; 6 Term, 674; 3 Wils. 186; 2 Ventr. 266; 5 Bos. & P. 335.

A very recent writer, after reviewing the authorities, concludes "that an action will lie for all words spoken of another which impute to him the commission of a crime involving moral turpitude and which is punishable by law." Heard, Libel & S. § 24. See 3 Serg. & R. Penn. 255; 7 *id.* 451; 10 *id.* 44; 8 Mass. 248; 13 Johns. N. Y. 124, 275; Starkie, Slander, 13–42.

3. *Second*, that the party has a disease or distemper which renders him unfit for society. Bacon, Abr. *Slander* (B 2). An action can, therefore, be sustained for calling a man a leper. Croke Jac. 144; Starkie, Slander, 67. Imputations of having at the present time the venereal disease or the gonorrhœa are actionable in themselves. 8 C. B. N. S. 9; 7 Gray, Mass. 181; 22 Barb. N. Y. 396; 2 Ind. 82; 2 Ga. 57. But charging another with *having had* a contagious disease is not actionable, as he will not on that account be excluded from society. 2 Term, 473, 474; 2 Strange, 1189; Bacon, Abr. *Slander* (B 2).

Third, unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office: in such a case an action lies. 1 Salk. 695, 698; Rolle, Abr. 65; 2 Esp. 500; 4 Coke. 16 *a.*; 5 *id.* 125; 1 Strange, 617; 2 Ld. Raym. 1369; Buller, Nisi P. 4; Starkie, Slander, 100.

Fourth, the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, in which the party is engaged, is actionable, 1 Mal. Entr. 234: as, to accuse an attorney or artist of inability, inattention, or want of integrity, 3 Wils. 187; 2 W. Blackst. 750, or a clergyman of being a drunkard, 1 Binn. Penn. 178, is actionable. It is one of the general rules governing the action for words spoken, that words are actionable, when spoken of one in an office of profit, which have a natural tendency to occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and which have a natural tendency to their damage. The ground of action in these cases is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office,

in consequence of the slanderous words; not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken, in this class of cases, are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they were spoken. The fact of his maintaining that special character, therefore, lies at the very foundation of the action. Heard, Libel & S. §§ 41, 45.

4. Of the second class are words which are actionable only in respect of special damages sustained by the party slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained the party aggrieved may support an action for the publication of an untruth, 1 Lev. 53; 1 Sid. 79, 80; 3 Wood, 210; 2 Leon. 111; unless the assertion be made for the assertion of a supposed claim, Comyns, Dig. *Action upon the Case for Defamation* (D 30); Bacon, Abr. *Slander* (B); but it lies if maliciously spoken. In this case special damage is the gist of the action, and must be particularly specified in the declaration. For it is an established rule that no evidence shall be received of any loss or injury which the plaintiff had sustained by the speaking of the words, unless it be specially stated in the declaration. And this rule applies equally where the special damage is the gist of the action and where the words are in themselves actionable. Heard, Libel & S. § 51. See 1 Rolle, Abr. 36; 1 Saund. 243; Bacon, Abr. *Slander* (C); 8 Term, 130; 8 East, 1; Starkie, Slander, 157.

5. The charge must be false. 5 Coke, 125, 126; Hob. 253. The falsity of the accusation is to be implied till the contrary is shown. 2 East, 436; 1 Saund. 242. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption, from the occasion of the speaking, that the words were true. 1 Term, 111; 3 Bos. & P. 587; Starkie, Sland. 44, 175, 223.

The slander must, of course, be published, —that is, communicated to a third person,— and, if verbal, then in a language which he understands; otherwise the plaintiff's reputation is not impaired. 1 Rolle, Abr. 74; Croke Eliz. 857; 1 Saund. 242, n. 3; Bacon, Abr. *Slander* (D 3). A letter addressed to the party, containing libellous matter, is not sufficient to maintain a civil action, though it may subject the libeller to an indictment, as tending to a breach of the peace. 2 Blackst. Comm. 1038; 1 Term, 110; 1 Saund. 132, n. 2; 2 Esp. 623; 4 *id.* 117; 2 East, 361. The slander must be published respecting the plaintiff. A mother cannot maintain an action for calling her daughter a bastard. 11 Serg. & R. Penn. 343. In an action for slander, whether oral or written, it will afford no justification that the defamatory matter has been previously published by a third person, that the defendant at the time of *his* publication disclosed the name of that third person and believed all the statements to be true. Heard, Libel & S. §§ 148, 149. And a repetition of oral slander already in circulation, without expressing any disbelief of it or any purpose of inquiring as to its truth, though without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, is actionable. 5 Gray, Mass. 3.

6. To render words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another; in others it is excusable, provided it be uttered without express malice. Bacon, Abr. *Slander* (D 4); Rolle, Abr. 87; 1 Viner, Abr. 540. It is justifiable for an attorney to use scandalous expressions in support of his client's cause and pertinent thereto. 1 Maule & S. 280; 1 Holt, 531; 1 Barnew. & Ald. 232. See 2 Serg. & R. Penn. 469; 1 Binn. Penn. 178; 11 Vt. 536; Starkie, Slander, 182. Members of congress and other legislative assemblies cannot be called to account for any thing said in debate. See PRIVILEGED COMMUNICATIONS.

Malice is essential to the support of an action for slanderous words. But malice is, in general, to be presumed until the contrary be proved, 4 Barnew. & C. 247; 1 Saund. 242, n. 2; 1 Term, 111, 544; 1 East, 563; 2 *id.* 436; 5 Bos. & P. 335; Buller, Nisi P. 8, except in those cases where the occasion *primâ facie* excuses the publication. 4 Barnew. & C. 247. See 14 Serg. & R. Penn. 359; Starkie, Slander, 201.

See, generally, Comyns, Dig. *Action upon the Case for Defamation;* Bacon, Abr. *Slander;* 1 Viner, Abr. 187; 1 Phillipps, Ev. c. 8; Yelv. 28, n.; Doctrina Plac. 53; Starkie, Slander; Heard, Libel & Slander.

SLANDER OF TITLE. In Torts. A statement tending to cut down the extent of title. An action for *slander of title* is not properly an action for words spoken or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the digests and other writers on the text law, and is so held by the courts at the present day. An action for slander of title is a sort of metaphorical expression. Slander of title may be of such a nature as to fall within the scope of ordinary slander. Slander of title ordinarily means a statement tending to cut down the extent of title, which is injurious only if it is false. It is essential, to give a cause of action, that the statement should be false. It is essential, also, that it should be malicious,—not malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie however malicious the defendant's intention might be. Heard, Libel & S §§ 10, 59 *et seq.*

SLANDERER. A calumniator who maliciously and without reason imputes a crime or fault to another of which he is innocent.

For this offence, when the slander is merely verbal, the remedy is an action on the case for damages; when it is reduced to writing or printing, it is a *libel*.

SLAVE. One over whose life, liberty, and property another has unlimited control. The *jus vitæ et necis* is included in pure or absolute slavery. Such a power has no foundation in natural law; and hence the Justinian Code declared it *contra naturam esse*. Inst. 1. 4. 2.

2. Every limitation placed by law upon this absolute control modifies and to that extent changes the condition of the slave. In every slaveholding state of the United States the life and limbs of a slave were protected from violence inflicted by the master or third persons.

Among the Romans the slave was classed among things (*res*). He was *homo sed non persona*. Heineccius, Elem. Jur. l. 1, § 75. He was considered pro nullo et mortuo, quia nec statu familiæ nec civitatis nec libertatis gaudet. *Id.* § 77. See, also, 4 Dev. No. C. 340; 9 Ga. 582. In the United States, as a person, he was capable of committing crimes, of receiving his freedom, of being the subject of homicide, and of modifying by his volition very materially the rules applicable to other species of property. His existence as a person being recognized by the law, that existence was protected by the law. 1 Hawks, No. C. 217; 2 *id.* 454; 1 Ala. 8; 1 Miss. 83; 11 *id.* 518; 2 Va. Cas. 394; 5 Rand. Va. 678; 1 Yerg. Tenn. 156; 11 Humphr. Tenn. 172.

3. In the slaveholding states the relations of husband and wife and parent and child were recognized by statutes in relation to public sales, and by the courts in all cases where such relations were material to elucidate the motives of their acts.

A slave has no political rights, the government being the judge who shall be its citizens. His civil rights, though necessarily more restricted than the freeman's, are based upon the same foundation,—the law of the land. He has none but such as are by that law and the law of nature given to him. The civil-law rule "*partus sequitur ventrem*" was adopted in all the slaveholding states, the status of the mother at the time of birth deciding the status of the issue. 1 Hen. & M. Va. 134; 2 Rand. Va. 246; 4 *id.* 600; 1 Hayw. No. C. 234; 1 Cooke, Tenn. 381; 2 Bibb, Ky. 298; 2 Dan. Ky. 432: 5 *id.* 207; 2 Mo. 71; 3 *id.* 540; 8 Pet. 290; 14 Serg. & R. Penn. 446; 15 *id.* 18; 2 Brev. No. C. 307; 3 Harr. & M'H. Md. 139; 20 Johns. N. Y. 1; 12 Wheat. 568; 2 How. 265, 496. In South Carolina, Georgia, Mississippi, Virginia, Louisiana, and perhaps Maryland, this rule was adopted by statute.

4. The slave cannot acquire property: his acquisitions belong to his master. 5 Cow. N. Y. 397; 1 Bail. So. C. 633; 2 Hill, Ch. So. C. 397; 2 Rich. So. C. 424: 6 Humphr. Tenn. 299; 2 Ala. 320; 5 B. Monr. Ky. 186. The *peculium* of the Roman slave was *ex gratia*, and not of right. Institutes, 2. 9. 3; Heineccius, Elem. Jur. lib. ii. tit. xviii. In like manner, negro slaves in the United States were, as a matter of fact, sometimes permitted by their masters, *ex gratia*, to obtain and retain property. The same was true of ancient villeins in England. The slave could not be a witness, except for and against slaves or free negroes. This was, perhaps, the rule of the common law. None but a freeman was *otherworth*. The privilege of being sworn was one of the characteristics of a "*liber et legalis homo*." To lose this privilege, *amittere liberam legem*, was a severe punishment. 3 Blackstone, Comm. 340; Fortescue, c. xxvi.; Coke, Litt. 6 *b*. With this the civil law agreed. Huberus, Prælec. l. xxv. tit. v. § 2. In the United States the rule of exclusion which we have mentioned was enforced in all cases where the evidence was offered for or against free white persons. 6 Leigh, Va. 74. In most of the states this exclusion is by express statutes, while in others it exists by custom and the decision of the courts. 10 Ga. 519. In the slaveholding states, and in Ohio, Indiana, Illinois, and Iowa, by statute, the rule has been extended to include free persons of color or emancipated slaves. 14 Ohio, 199; 3 Harr. & J. Md. 97. The slave could be a suitor in court only for his freedom. For all other wrongs he appeared through his master, for whose benefit the recovery was had. 9 Gill & J. Md. 19; 1 Litt. Ky. 326; 1 Mo. 608; 4 Yerg. Tenn. 303; 3 Brev. No. C. 11; 4 Gill, Md. 249; 9 La. 156; 4 T. B. Monr. Ky. 169. The suit for freedom is favored. 1 Hen. & M. Va. 143; 8 Pet. 44; 2 A. K. Marsh. Ky. 467; 2 Call, Va. 350; 4 Rand. Va. 134. Lapse of time worked no forfeiture by reason of his dependent condition, 3 Dan. Ky. 382; 8 B. Monr. Ky. 631; 1 Hen. & M. Va. 141; and such was the civil law. Code, 7. 22. 2. 3. The master was bound to maintain, support, and defend his slave, however helpless or impotent. If he failed to do so, public officers were provided to supply his deficiency at his expense. In Tennessee the master in such a case was responsible for all that he stole.

5. Cruel treatment was a penal offence of a high grade. Emancipation of the slave was the consequence of conviction in Louisiana; and the sale of the slave to another master was a part of the penalty in Alabama and Texas. In some of the ancient German states, and also by the "Code noir," another and more effectual penalty was a total disqualification of the master forever to hold slaves.

Among the ancient Lombards, if a master debauched his slave's wife, the slave and his wife were thereby emancipated. Among the Romans, double damages were given for the corruption of a slave. The enfranchisement of a slave is called manumission. The word is expressive of the idea. Thus, Littleton, § 204, "*manumittere quod idem est, quod extra manum, vel potestatem alterius ponere.*" Manumission being merely the withdrawal of the dominion of the master, the right to manumit exists everywhere, unless forbidden by law. No one but the owner can manumit, 4 J. J. Marsh. Ky. 103; 10 Pet. 583; and the effect is simply to make a freeman, not a citizen. The state must decide who shall be citizens. See MANUMISSION; SERVUS; FREEDOM.

Slavery having been abolished in the United States, it is only as affecting the future rights and liabilities of those formerly slaves that the elaborate slave codes of those states recognizing the status can be of interest or value.

SLAVE-TRADE. The traffic in slaves, or the buying and selling of slaves for profit. It is either foreign or domestic. The former is when the trade includes transportation from a foreign state; the latter, when confined within a single state or states connected in a federal union.

The history of the slave-trade is as old as the authentic records of the race. Joseph was sold to Ishmaelitish slave-traders, and Egypt has been a mart for the traffic from that day to this. The negro early became a subject of it. In every slave-market he has been found, and never as a master except in Africa. The Roman mart, however ex

hibited a variety of all the conquered races of the world. At Bristol, in England, for many years about the eleventh century, a brisk trade was carried on in purchasing Englishmen and exporting them to Ireland for sale. And William of Malmsbury states that it seems to be a natural custom with the people of Northumberland to sell their nearest relations.

The African slave-trade on the eastern coast has been carried on with India and Arabia from a period difficult to be established, and was continued with British India while British ships-of-war hovered on the western coast to capture the pirates engaged in the same trade. On the western coast the trade dates from 1442. The Spaniards for a time monopolized it. The Portuguese soon rivalled them in its prosecution. Sir John Hawkins, in 1562, was the first Englishman who engaged in it; and queen Elizabeth was the first Englishwoman known to share in the profits.

Immense numbers of African negroes were transported to the New World, although thousands were landed in England and France and owned and used as servants. The large profits of the trade stimulated the avarice of bad men to forget all the claims of humanity; and the horrors of the middle passage, though much exaggerated, were undoubtedly very great.

The American colonies raised the first voice in Christendom for its suppression; but the interests of British merchants were too powerful with the king, who stifled their complaints. The constitution of the United States, in 1789, was the first governmental act towards its abolition. By it, congress was forbidden to prohibit the trade until the year 1808. This limitation was made at the suggestion of South Carolina and Georgia, aided by some of the New England states. Yet both of those states, by state action, prohibited the trade many years before the time limited,—Georgia as early as 1793. In 1807, an act of congress was passed which prohibited the trade after 1808; and by subsequent acts it was declared piracy. The federal legislation on the subject will be found in acts of congress passed respectively March 22, 1794, May 10, 1800, March 2, 1807, April 20, 1818, March 3, 1819, and May 15, 1820. These several acts, with the decisions under them, will be found collected in Brightly's U. S. Digest, 835, etc. In the year 1807, the British parliament also passed an act for the abolition of the slave-trade,—the consummation of a parliamentary struggle continued for nineteen years, and fourteen years after a similar act had been adopted by Georgia. Great efforts have been made by Great Britain, by treaties and otherwise, to suppress this trade. The immense profits, however, induce reckless men to continue it still,—the chief market for their slaves being at this time the Spanish West Indies. See Buxton's Slave-Trade, etc.; Carey's Slave-Trade, Foreign and Domestic; Cobb's Historical Sketch of Slavery.

SLAVERY. The status or condition of a slave.

2. Slavery, being a personal *status*, does, as a general rule, accompany the individual, like minority or incapacity, wherever he may go, so long as his domicil remains unchanged; and the domicil of the slave is that of his master. How far and under what circumstances the right of the master or the *status* of the slave is affected by the escape of the latter, or the removal of the master and slave into, or their transit through, a state where slavery does not exist, is a subject as to which there is a want of entire agreement among the various decisions. The following are the principal authorities: 18 Pick. Mass. 193; 3 Metc. Mass 72; 12 Conn. 38; 2 Serg. & R. Penn. 305; 7 *id.* 378; 6 Binn. Penn. 213; 1 P. A. Browne, Penn. 113; 1 Watts, Penn. 155; 4 Yeates, Penn. 204; Add. Penn. 284; 5 Ill. 461; 3 Am. Jur. 407; 2 A. K. Marsh. Ky. 467; 3 T. B. Monr. Ky. 104; 1 Bibb, Ky. 423; 5 B. Monr. Ky. 173; 7 *id.* 635; 8 *id.* 545; 9 *id.* 565; 1 Mo. 472; 2 *id.* 19, 37; 3 *id.* 194, 400; 4 *id.* 350, 592; 14 Mart. La. 401; 1 La. Ann. 329; 7 *id.* 170; 1 Leigh, Va. 172; 1 Gilm. Va. 143; 4 Harr. & M'H. Md. 322, 418. See, also, decisions in federal courts, in 16 Pet. 610; 5 How. 229; 10 *id.* 2; 19 *id.* 1; 1 Baldw. C. C. 571; 1 Wash. C. C. 499; 2 McLean, C. C. 605; 3 *id.* 530. See SERVUS; BONDAGE; FREEDOM.

SMART-MONEY. Vindictive or exemplary damages given beyond the actual damage, by way of punishment and example, in cases of gross misconduct of defendant 15 Conn. 225; 14 Johns. N. Y. 352; 6 Hill, N. Y. 466. That it cannot be given by jury, see 2 Greenleaf, Ev. 4th ed. § 253, n. See EXEMPLARY DAMAGES.

SMOKE-SILVER. A modus of sixpence in lieu of tithe-wood. Twisdale, Hist. Vindicat. 77.

SMUGGLING. The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited. Bacon, Abr. *Smuggling.*

SO HELP YOU GOD. The formula at the end of a common oath, as administered to a witness who testifies in chief.

SOCAGE. (This word, according to the earlier common-law writers, originally signified a service rendered by a tenant to his lord, by the *soke* or ploughshare; but Mr. Somner's etymology, referred to by Blackstone, seems more apposite, who derives it from the Saxon word *soc*, which signifies liberty or privilege, denoting thereby a free or privileged tenure.) A species of English tenure, whereby the tenant held his lands of the lord by any certain service in lieu of all other services, so that the service was not a knight's service. Its principal feature was its certainty: as, to hold by fealty and a certain rent, or by fealty-homage and a certain rent, or by homage and fealty without rent, or by fealty and certain corporal service, as ploughing the lord's land for a specified number of days. 2 Blackstone, Comm. 80.

2. The term socage was afterwards extended to all services which were not of a military character, provided they were fixed: as, by the annual payment of a rose, a pair of gilt spurs, a certain number of capons, or of so many bushels of corn. Of some tenements the service was to be hangman, or executioner of persons condemned in the lord's court; for in olden times such officers were not volunteers, nor to be hired for lucre, and could only be bound thereto by tenure. There were three different species of these socage tenures,—one in frank tenure, another in an-

cient tenure, and the third in base tenure: the second and third kinds are now called, respectively, tenure in ancient demesne, and copyhold tenure. The first is called free and common socage, to distinguish it from the other two; but, as the term socage has long ceased to be applied to the two latter, socage and free and common socage now mean the same thing. Bracton; Coke, Litt. 17, 86. See TENURE, § 5.

3. By the statute of 12 Car. II. c. 24, the ancient tenures by knight's service were abolished, and all lands, with the exception of copyholds and of ecclesiastical lands, which continued to be held in free alms (frankalmoigne), were turned into free and common socage, and the great bulk of real property in England is now held under this ancient tenure. Many grants of land in the United States, made, previous to the revolution, by the British crown, created the same tenure among us, until they were formally abolished by the legislatures of the different states. In 1787, the state of New York converted all feudal tenures within its boundaries into a tenure by free and common socage; but in 1830 it abolished this latter tenure, with all its incidents, and declared that from thenceforth all lands in the state should be held upon a uniform allodial tenure, and vested an absolute property in the owners according to their respective estates. Similar provisions have been adopted by other states; and the ownership of land throughout the United States is now essentially free and unrestricted. See TENURE.

SOCER (Lat.). The father of one's wife; a father-in-law.

SOCIDA (Lat.). **In Civil Law.** The name of a contract by which one man delivers to another, either for a small recompense or for a part of the profits, certain animals, on condition that if any of them perish they shall be replaced by the bailer or he shall pay their value.

A contract of hiring, with the condition that the bailee takes upon him the risk of the loss of the thing hired. Wolff, § 638.

SOCIETAS (Lat.). **In Civil Law.** A contract in good faith made to share in common the profit and loss of a certain business or thing, or of all the possessions of the parties. Calvinus, Lex.; Inst. 3. 26; Dig. 17. 21. See PARTNERSHIP.

Also, companionship or partnership in good or evil. Cicero, pro S. Rosc. 34; Fleta, l. 1, c. 38, § 18.

SOCIETAS LEONINA (Lat.). **In Roman Law.** That kind of society or partnership by which the entire profits should belong to some of the partners in exclusion of the rest.

It was so called in allusion to the fable of the lion and other animals, who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself. Dig. 17. 2. 29. 2; Poth. Traité de Société, n. 12. See 2 M'Cord, So. C. 421; 6 Pick. Mass. 372.

SOCIETE EN COMMENDITE. **In Louisiana.** A partnership 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, art. 2810; Code de Comm. 26, 33; 4 Pardessus, Dr. Com. n. 1027; Dalloz, Dict. *Société Commerciale*, n. 166. See COMMENDAM; PARTNERSHIP.

SOCIETY. A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose.

Societies are either incorporated and known to the law, or unincorporated, of which the law does not generally take notice.

By *civil society* is usually understood a state, a nation, or a body politic. Rutherforth, Inst. c. 1, 2.

SODOMITE. One who has been guilty of sodomy. Formerly such offender was punished with great severity, and was deprived of the power of making a will.

SODOMY. A carnal copulation by human beings with each other against nature, or with a beast. 2 Bishop, Crim. Law. § 1029.

It may be committed between two persons both of whom consent, even between husband and wife, 8 Carr. & P. 604; and both may be indicted. 1 Den. Cr. Cas. 464; 2 Carr. & K. 869. Penetration of the mouth is not sodomy. Russ. & R. Cr. Cas. 331. As to emission, see 12 Coke, 36; 1 Va. Cas. 307. See 1 Russell, Crimes, Greaves ed. 698; 1 Mood. Cr. Cas. 34; 8 Carr. & P. 417; 3 Harr. & J. Md. 154.

SOIL. The superficies of the earth on which buildings are erected or may be erected.

The soil is the principal, and the building, when erected, is the accessory.

SOIT DROIT FAIT AL PARTIE. **In English Law.** Let right be done to the party. A phrase written on a petition of right, and subscribed by the king. See PETITION OF RIGHT.

SOKEMANS. **In English Law.** Those who held their land in socage. 2 Blackstone, Comm. 100.

SOLAR DAY. That period of time which begins at sunrise and ends at sunset; the same as "artificial day." Coke, Litt. 135 *a*; 3 Chitty, Stat. 1376, n.

SOLAR MONTH. A calendar month. Coke, Litt. 135 *b*; 1 W. Blackst. 450; 1 Maule & S. 111; 1 Bingh. 307; 3 Chitty, Stat. 1375, n.

SOLARES. **In Spanish Law** Lots of ground. This term is frequently found in grants from the Spanish government of lands in America. 2 White, Coll. 474.

SOLD NOTE. The name of an instrument in writing, given by a broker to a buyer of merchandise, in which it is stated that the goods therein mentioned have been sold to him. 1 Bell, Comm. 5th ed. 435; Story, Ag. § 28. Some confusion may be found in the books as to the name of these notes: they are sometimes called *bought notes*.

SOLDIER. A military man; a private in the army.

The constitution of the United States, Amendm. art. 3, directs that no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

SOLE. Alone, single: used in contradistinction to *joint* or *married*. A sole tenant, therefore, is one who holds lands in his own right, without being joined with any other. A feme sole is a single woman; a sole corporation is one composed of only one natural person.

SOLEMNITY. The formality established by law to render a contract, agreement, or other act valid.

A marriage, for example, would not be valid if made in jest and without solemnity. See MARRIAGE; Dig. 4. 1. 7; 45. 1. 30.

SOLICITATION OF CHASTITY. The asking a person to commit adultery or fornication.

This of itself is not an indictable offence. Salk. 382; 2 Chitty, Pract. 478. The contrary doctrine, however, has been held in Connecticut. 7 Conn. 267. In England, the bare solicitation of chastity is punished in the ecclesiastical courts. 2 Chitty, Pract. 478. See 2 Strange, 1100; 10 Mod. 384; Say. 33; 1 Hawkins, Pl. Cr. ch. 74; 2 Ld. Raym. 809.

The civil law punished arbitrarily the person who solicited the chastity of another. Dig. 47. 11. 1. See 3 Phill. Eccl. 508.

SOLICITOR. A person whose business is to be employed in the care and management of suits depending in courts of chancery.

A solicitor, like an attorney, will be required to act with perfect good faith towards his clients. He must conform to the authority given him. It is said that to institute a suit he must have a special authority, although a general authority will be sufficient to defend one. The want of a written authority may subject him to the expenses incurred in a suit. 3 Mer. Ch. 12; Hovenden, Fr. ch. 2, pp. 28–61. See 1 Phillipps, Ev. 102; 2 Chitty, Pract. 2. See ATTORNEY AT LAW; COUNSELLOR AT LAW; PROCTOR.

SOLICITOR-GENERAL. In English Law. A law officer of the crown, appointed by patent during the royal pleasure, and who assists the attorney-general in managing the law business of the crown. Selden, 1. 6. 7. He is first in right of preaudience. 3 Sharswood, Blackst. Comm. 28, n. (a), n. 9; Encyc. Brit.

SOLICITOR OF THE TREASURY The title of one of the officers of the United States, created by the act of May 29, 1830, 4 U. S. Stat. at Large, 414, which prescribes his duties and his rights.

2. His powers and duties are—*First*, those which were by law vested and required from the agent of the treasury of the United States. *Second*, those which theretofore belonged to the commissioner or acting commissioner of the revenue, relating to the superintendence of the collection of outstanding direct and internal duties. *Third*, to take charge of all lands which shall be conveyed to the United States, or set off to them in payment of debts, or which are vested in them by mortgage or other security; and to release such lands which had at the passage of the act become vested in the United States, on payment of the debt for which they were received. *Fourth*, generally to superintend the collection of debts due to the United States, and receive statements from different officers in relation to suits or actions commenced for the recovery of the same. *Fifth*, to instruct the district attorneys, marshals, and clerks of the circuit and district courts of the United States, in all matters and proceedings appertaining to suits in which the United States are a party or interested, and to cause them to report to him any information he may require in relation to the same. *Sixth*, to report to the proper officer from whom the evidence of debt was received, the fact of its having been paid to him, and also all credits which have by due course of law been allowed on the same. *Seventh*, to make rules for the government of collectors, district attorneys, and marshals, as may be requisite. *Eighth*, to obtain from the district attorneys full accounts of all suits in their hands, and submit abstracts of the same to congress.

3. His rights are—*First*, to call upon the attorney-general of the United States for advice and direction as to the manner of conducting the suits, proceedings, and prosecutions aforesaid. *Second*, to receive a salary of three thousand five hundred dollars per annum. *Third*, to employ, with the approbation of the secretary of the treasury, a clerk, with a salary of one thousand five hundred dollars, and a messenger, with a salary of five hundred dollars. *Fourth*, to receive and send all letters, relating to the business of his office, free of postage.

SOLIDO, IN. See IN SOLIDO.

SOLUTIO (Lat. release). **In Civil Law.** Payment. By this term is understood every species of discharge or liberation, which is called satisfaction, and with which the creditor is satisfied. Dig. 46. 3. 54; Code 8. 43. 17; Inst. 3. 30. This term has rather a reference to the substance of the obligation than to the numeration or counting of the money. Dig. 50. 16. 176.

SOLUTIO INDEBITI (Lat.). **In Civil Law.** The case where one has paid a debt,

or done an act or remitted a claim because he thought that he was bound in law to do so, when he was not. In such cases of mistake there is an implied obligation (*quasi ex contractu*) to pay back the money, etc. Mackeldy, Civ. Law, § 468.

SOLVENCY. The state of a person who is able to pay all his debts: the opposite of *insolvency*.

SOLVENT. One who has sufficient to pay his debts and all obligations. Dig. 50. 16. 114.

SOLVERE (Lat. to unbind; to untie). To release; to pay: *solvere dicimus eum qui fecit quod facere promisit.* 1 Bouvier, Inst. n. 807.

SOLVIT AD DIEM (Lat. he paid at the day). **In Pleading.** The name of a plea to an action on a bond, or other obligation to pay money, by which the defendant pleads that he paid the money on the day it was due. See 1 Strange, 652; Rep. *temp.* Hardw. 133; Comyns, Dig. *Pleader* (2 W 29). This plea ought to conclude with an averment, and not to the country. 1 Sid. 215; 12 Johns. N. Y. 253. See 2 Phillipps, Ev. 92; Coxe, N. J. 467.

SOLVIT POST DIEM (Lat. he paid after the day). **In Pleading.** The name of a special plea in bar to an action of debt on a bond, by which the defendant asserts that he paid the money after the day it became due. 1 Chitty, Plead. 480, 555; 2 Phillipps, Ev. 93.

SOMNAMBULISM (Lat. *somnium*, sleep, *ambulo*, to walk). **In Medical Jurisprudence.** Sleep-walking.

2. The mental condition in this affection is not very unlike that of dreaming. Many of their phenomena are the same; and the former differs from the latter chiefly in the larger number of the functions involved in the abnormal process. In addition to the mental activity common to both, the somnambulist enjoys the use of his senses in some degree, and the power of locomotion. He is thereby enabled to perform manual operations as well, frequently, as in his waking state. The farmer goes to his barn and threshes his grain; the house-servant lights a fire and prepares the breakfast for the family; and the scholar goes to his desk and writes or reads. Usually, however, the action of the senses is more or less imperfect, many of the impressions being incorrectly or not at all perceived. The person walks against a wall, or stumbles over an object in his path; he mistakes some projection for a horse, strides across it, and imagines himself to be riding; he hears the faintest sound connected with what he is doing, while the voices of persons near him, and even the blast of a trumpet, are entirely unnoticed. Occasionally the power of the senses is increased to a degree unknown in the waking state. Jane Rider, whose remarkable history was published some thirty years ago, could read the almost obliterated dates of coins, in a dark room, and was able to read and write while her eyes were covered with several folds of handkerchief. For the most part, however, the operations of the somnambulist consist in getting up while asleep, groping about in the dark, endeavoring to make his way out of the house through doors or windows, making some inarticulate sounds, perhaps, and all the while unconscious of persons or things around him. The power of the perceptive faculties, as well as that of the senses, is sometimes increased in a wonderful degree. It is related of the girl just mentioned that in the fit she would sing correctly, and play at backgammon with considerable skill, though she had never done either when awake.

3. The somnambulist always awakes suddenly, and has but a faint conception, if any, of what he has been thinking and doing. If conscious of any thing, it is of an unpleasant dream imperfectly remembered. This fact, not being generally known, will often enable us to detect simulated somnambulism. If the person on waking continues the same train of thought and pursues the same plans and purposes which he did while asleep, there can be no doubt that he is feigning the affection. When a real somnambulist, for some criminal purpose, undertakes to simulate a paroxysm, he is not at all likely to imitate one of his own previous paroxysms, for the simple reason that he knows less than others how he appeared while in them. If, therefore, somnambulism is alleged in any given case, with no other proof than the occurrence of former paroxysms unquestionably genuine, it must be viewed with suspicion if the character of the alleged paroxysm differs materially from that of the genuine ones. In one way or another, a case of simulation would generally be detected by means of a close and intelligent scrutiny, so difficult is it to imitate that mixture of consciousness and unconsciousness, of dull and sharp perceptions, which somnambulism presents. The history of the individual may throw some light on the matter. If he has had an opportunity of witnessing the movements of a somnambulist in the course of his life, this fact alone would rouse suspicion, which would be greatly increased if the alleged paroxysm presented many traits like those of the paroxysms previously witnessed.

4. The legal consequences of somnambulism should be precisely those of insanity, which it so nearly resembles. The party should be exempt from punishment for his criminal acts, and be held amenable in damages for torts and trespasses. The only possible exception to this principle is to be found in those cases where the somnambulist, by meditating long on a criminal act while awake, is thereby led to commit it in his next paroxysm. Hoffbauer contends that, such being generally the fact, too much indulgence ought not to be shown to the criminal acts of the somnambulist. Die Psychologie, etc. c. 4. art. 2. But surely this is rather refined and hazardous speculation, and seems like punishing men solely for bad intentions,—because the acts, though ostensibly the ground of punishment, are actually those of a person deprived of his reason. The truth is, however, that criminal acts have been committed in a state of somnambulism by persons of irreproachable character. See Gray, Med. Jur. 265; Wharton & S. Med. Jur.; Tirrell's case, Mass.

SON. An immediate male descendant. In its technical meaning in devises, this is a word of purchase; but the testator may make it a word of descent. Sometimes it is extended to more remote descendants.

SON ASSAULT DEMESNE (L. Fr his own first assault). **In Pleading.** A form of a plea to justify an assault and battery, by which the defendant asserts that the

plaintiff committed an assault upon him and the defendant merely defended himself.

When the plea is supported by evidence, it is a sufficient justification, unless the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received. 1 East, Pl. Cr. 406; 1 Chitty, Pract. 595.

SON-IN-LAW. The husband of one's daughter.

SORS (Lat.). **In Civil Law.** A lot; chance; fortune. Calvinus, Lex.; Ainsworth, Dict. Sort; kind. The little scroll on which the thing to be drawn by lot was written. Carpentier, Gloss. A principal or capital sum: *e.g.* the capital of a partnership. Calvinus, Lex.

In Old English Law. A principal lent on interest, as distinguished from the interest itself. Pryn, Collect. tom. 2, p. 161; Cowel.

SOUL-SCOT. A mortuary, or customary gift due ministers, in many parishes of England, on the death of parishioners. It was originally voluntary and intended as amends for ecclesiastical dues neglected to be paid in the lifetime. 2 Sharswood, Blackst. Comm. 425*.

SOUND MIND. That state of a man's mind which is adequate to reason and comes to a judgment upon ordinary subjects like other rational men.

The law presumes that every person who has acquired his full age is of sound mind, and, consequently, competent to make contracts and perform all his civil duties; and he who asserts to the contrary must prove the affirmation of his position by explicit evidence, and not by conjectural proof. 2 Hagg. Eccl. 434; 3 Add. Eccl. 86; 8 Watts, Penn. 66; Ray, Med. Jur. § 92; 3 Curt. Eccl. 671.

SOUNDING IN DAMAGES. When an action is brought, not for the recovery of lands, goods, or sums of money (as is the case in real or mixed actions or the personal action of debt or detinue), but for damages only, as in covenant, trespass, etc., the action is said to be *sounding in damages*. Stephen, Plead. 126, 127.

SOUNDNESS. General health; freedom from any permanent disease. 1 Carr. & M. 291. To create unsoundness, it is requisite that the animal should not be useful for the purpose for which he is bought, and that inability to be so useful should arise from disease or accident. 2 Mood. & R. 113, 137; 9 Mees. & W. Exch. 670.

In the sale of slaves and animals they are sometimes warranted by the seller to be sound; and it becomes important to ascertain what is soundness. Horses affected by roaring; a temporary lameness, which rendered the horse less fit for service, 4 Campb. 271; but see 2 Esp. Cas. 573; a cough, unless proved to be of a temporary nature, 2 Chitty, Bail. 245, 416; and a nerved horse, have been held to be unsound. But crib-biting is not a breach of a general warranty of soundness. Holt, Cas. 630.

An action on the case is the proper remedy for a verbal warrant of soundness. 1 H Blackst. 17; 3 Esp. 82; 9 Barnew. & C. 259; 2 Dowl. & R. 10; 5 *id.* 164; 1 Bingh. 344; 1 Taunt. 566; 7 East, 274; Bacon. Abr. *Action on the Case* (E); Oliphant, Horses; Stephen, Horses.

SOURCES OF THE LAW. The authority from which the laws derive their force. A term used to include all the reliable testimonials of what constitutes the law.

2. The power of making all laws is in the people or their representatives, and none can have any force whatever which is derived from any other source. But it is not required that the legislator shall expressly pass upon all laws, and give the sanction of his seal, before they can have life or existence. The laws are, therefore, such as have received an express sanction, and such as derive their force and effect from implication. The first, or express, are the constitution of the United States, and the treaties and acts of the legislature which have been made by virtue of the authority vested by the constitution. To these must be added the constitution of the state, and the laws made by the state legislature, or by other subordinate legislative bodies, by virtue of the authority conveyed by such constitution. The latter, or *tacit*, received their effect by the general use of them by the people,—when they assume the name of customs—or by the adoption of rules by the courts from systems of foreign laws.

3. The *express* laws are—first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws made by the several state legislatures; sixthly, the laws made by inferior legislative bodies, such as the councils of municipal corporations, and the general rules made by the courts.

The constitution is an act of the people themselves, made by their representatives elected for that purpose. It is the supreme law of the land, and is binding on all future legislative bodies until it shall be altered, by the authority of the people, in the manner provided for in the instrument itself; and if an act be passed contrary to the provisions of the constitution it is, *ipso facto*, void. 2 Pet. 522; 12 Wheat. 270; 2 Dall. 309; 3 *id.* 386; 4 *id.* 18; 6 Cranch, 128.

4. Treaties made under the authority of the constitution are declared to be the supreme law of the land, and, therefore, obligatory on courts. 1 Cranch, 103. See TREATY.

The acts and resolutions of congress enacted constitutionally are, of course, binding as laws, and require no other explanation.

The constitutions of the respective states, if not opposed to the provisions of the constitution of the United States, are of binding force in the states respectively; and no act of the state legislature has any force which is made in contravention of the state constitution.

The laws of the several states constitutionally made by the state legislatures have full and complete authority in the respective states.

5. Laws are frequently made by inferior legislative bodies which are authorized by the legislature: such are the municipal councils of cities or boroughs. Their laws are generally known by the name of ordinances, and when lawfully ordained they are binding on the people. The courts, perhaps by a necessary usurpation, have been in the practice of making general rules and orders, which sometimes affect suitors and parties as much as the most regular laws enacted by congress. These apply to all future cases. There are also rules made in particular cases as they arise; but these are rather decrees or judgments than laws.

6. The *tacit* laws, which derive their authority from the consent of the people without any legislative enactment, may be subdivided into,—

The *common law*, which is derived from two sources,—the common law of England, and the practice and decisions of our own courts. In some states it has been enacted that the common law of England shall be the law, except where the same is inconsistent with our constitutions and laws. See LAW.

Customs which have been generally adopted by the people have the force of law.

The principles of the *Roman* law, being generally founded in superior wisdom, have insinuated themselves into every part of the law. Many of the refined rules which now adorn the common law appear there without any acknowledgment of their paternity; and it is at this source that some judges dipped to get the wisdom which adorns their judgments. The proceedings of the courts of equity, and many of the admirable distinctions which manifest their wisdom, are derived from this source. To this fountain of wisdom the courts of admiralty owe most of the law which governs in admiralty cases.

The *Canon* law, which was adopted by the ecclesiastical courts, figures in our laws respecting marriage, divorces, wills and testaments, executors and administrators, and many other subjects.

The *jurisprudence*, or decisions of the various courts, have contributed their full share of what makes the law. These decisions are made by following precedents, by borrowing from the sources already mentioned, and sometimes by the less excusable disposition of the judges to legislate on the bench.

7. The monument where the common law is to be found are the records, reports of cases adjudicated by the courts, and the treatises of learned men. The books of reports are the best proof of what is the common law; but, owing to the difficulty of finding out any systematic arrangement, recourse is had to treatises upon the various branches of the law. The records, owing to their being kept in one particular place and therefore not generally accessible, are seldom used.

SOUS SEING PRIVE. In Louisiana. An act or contract evidenced by writing under the *private signature* of the parties to it. The term is used in opposition to the *authentic act*, which is an agreement entered into in the presence of a notary or other public officer.

The form of the instrument does not give it its character so much as the fact that it appears or does not appear to have been executed before the officer. 5 Mart. La. N. S. 196; 7 *id.* 548.

The effect of a *sous seing privé* is not the same as that of the *authentic act*. The former cannot be given in evidence until proved, and, unless accompanied by possession, it does not, in general, affect third persons, 6 Mart. La. N. S. 429, 432; the latter, or authentic acts, are full evidence against the parties and those who claim under them. 8 Mart. La. N. S. 132.

SOUTH CAROLINA. One of the original thirteen United States.

2. This state was originally part of the British province of *Carolina*, then comprehending both North Carolina and South Carolina. That province was granted by Charles II., by charter issued to eight lords proprietors, in 1663, and amended in 1665 so as to extend it from north latitude twenty-nine degrees to thirty degrees thirty minutes, and include it within parallel lines drawn from these points on the Atlantic to the Pacific ocean. The first permanent settlement in South Carolina was effected in 1670, at Beaufort, then Port Royal, by a colony of Scottish Presbyterians under Lord Cardruff. In 1671, the emigrants removed to the point on the river Ashley nearly opposite the present site of Charleston; but, abandoning this position, they again removed, in 1680, to Oyster Point, at the confluence of the Ashley and Cooper, where they began Charleston.

In 1719, the colonial legislature disowned the proprietary government and threw the colony into the hands of the king, who, accordingly, assumed the control of it. It was not, however, until 1729 that the charter was surrendered. In that year the shares of seven out of the eight lords proprietors were ceded. The eighth share, which belonged to the family of Lord Granville, formerly Carteret, was retained, and laid off in North Carolina,—which was about the same time divided from South Carolina.

3. In 1732, that part of South Carolina lying west of the river Savannah was granted by the crown to the Georgia Company, under Oglethorpe. Thus South Carolina was reduced in extent, and, in consequence of subsequent arrangements of boundaries, made with Georgia in 1787 in the treaty of Beaufort, and with North Carolina in the early part of the present century, is now separated from those two states by a line begining at a cedar stake, marked with nine notches, planted near the mouth of Little river on the Atlantic (north latitude thirty-five degrees eight minutes), and running by various traverses a west-northwest course to the forks of the Catawba, thence irregularly a west course to a point of intersection in the Appalachian mountains, from which it proceeds due south to the Chattooga, and thence along the Chattooga, Tugaloo, Keowee, and the Savannah (as regulated by the treaty of Beaufort) to the most northern mouth of the latter river on the Atlantic.

On the twenty-sixth of March, 1776, she adopted her first constitution,—the earlicst, it is believed, of the American constitutions. This constitution was replaced in 1778 by another, some parts of which are still in force, being recognized by the present constitution of 1790, particularly such parts as secure the rights of religious bodies, with their property.

The constitution of this state was adopted the third day of June, 1790, to which two amendments have been made, one ratified December seventeenth, 1808, and the other December nineteenth, 1816. The powers of the government are distributed into three branches,—the legislative, the executive, and the judicial.

The Legislative Power.

4. The legislative power consists of two chambers, a senate and a house of representatives. This legislature, by joint ballot of the two houses, elects the governor and superior judges, and formerly elected all the state and district officers.

The *Senate* is composed of one member from each district as now established for the election of the house of representatives, except the district formed by the districts of the parishes of St. Philip and St. Michael, to which shall be allowed two senators, as heretofore. Amend. of December seventeenth, 1808. The members are elected for four years. The election takes place on the second Monday in October. Art. 1, s. 10.

The *House of Representatives* consists of one hundred and twenty-four members, Amend. Dec. 17, 1808, elected for two years, Art. 1, § 2, at the same time that the election of senators is held.

No person is eligible to a seat in the senate unless he is a free white man of the age of thirty

years and has been a citizen and resident in the state five years previous to his election. If a resident in the election district, he is not eligible unless he is legally seised and possessed in his own right of a settled freehold estate of the value of three hundred pounds sterling, clear of debt. If a non-resident in the election district, he is not eligible unless he is legally seised and possessed in his own right of a settled freehold estate in the district of the value of one thousand pounds sterling, clear of debt. No person is eligible to a seat in the house of representatives unless he is a free white man of the age of twenty-one years and has been a citizen and resident in the state three years previous to his election. If a resident in the election district, he is not eligible to a seat in the house of representatives unless he is legally seised and possessed in his own right of a settled freehold estate of five hundred acres of land and ten negroes, or of a real estate of the value of one hundred and fifty pounds sterling, clear of debt. If a non-resident, he must be legally seised and possessed of a settled freehold estate therein of the value of five hundred pounds sterling, clear of debt.

5. Every free white man who is a citizen of the state and has resided therein two years previous to the day of election, and who has a freehold of fifty acres of land or a town lot of which he has been legally seised and possessed at least six months before such election, or, not having such freehold or town lot, has been a resident in the election district in which he offers to give his vote, six months before the said election and has paid a tax the preceding year of three shillings sterling towards the support of this government, has a right to vote for a member or members to serve in either branch of the legislature for the election district in which he holds such property or is so resident.

The Executive Power.

The *Governor.* No person is eligible to the office of governor unless he has attained the age of thirty years and has resided within the state and been a citizen thereof ten years, and unless he is seised and possessed of a settled estate within the same, in his own right, of the value of fifteen hundred pounds sterling, clear of debt. Art. 2, s. 2.

He is elected, by the senate and house of representatives jointly, in the house of representatives, whenever a majority of both houses is present, for two years and until a new election shall be made. The governor is commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the actual service of the United States. He may grant reprieves and pardons after conviction, except in cases of impeachment, and remit fines and forfeitures unless otherwise directed by law, shall cause the laws to be faithfully executed in mercy, may prohibit the exportation of provisions for any time not exceeding thirty days, may require information from the executive departments, shall recommend such measures as he may deem necessary, and give the assembly information as to the condition of the state, may on extraordinary occasions convene the assembly, and, in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the fourth Monday in the month of November then next ensuing.

6. A *Lieutenant-Governor* is to be chosen at the same time, in the same manner, continue in office for the same period, and be possessed of the same qualifications, as the governor. Art. 2, s. 3. In case of the impeachment of the governor or his removal from office, death, resignation, or absence from the state, the lieutenant-governor succeeds to his office. And in case of the impeachment of the lieutenant-governor or his removal from office, death, resignation, or absence from the state, the president of the senate succeeds to his office till a nomination to those offices respectively is made by the senate and house of representatives for the remainder of the time for which the officer so impeached, removed from office, dying, resigning, or being absent, was elected. Art. 2, s. 5.

The Judicial Power.

7. The judicial power is vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish. The judges of each hold their commissions during good behavior; and judges of the superior courts are, at stated times, to receive a compensation for their services, which is neither to be increased nor diminished during their continuance in office; but they are to receive no fees or perquisites of office nor hold any other office of profit or trust under the state, the United States, or any other power. Art. 3, s. 1. The judges are required to meet at such times and places as shall be prescribed by the act of the legislature, and sit for the purpose of hearing and determining all motions which may be made for new trials and in arrest of judgment, and such points of law as may be submitted to them. Amend. of Dec. 19, 1816.

Until 1769, the business of the superior courts was done in Charleston. Since that time it has been extended, until at present these courts sit twice a year—spring and fall—in every district. We now speak of the law courts. The districts are arranged in circuits, which the judges take in rotation. The courts of equity sit in each district once a year, except in Charleston, where they are held twice a year; and the chancellors take the circuits in rotation. The superior law judges have exclusive jurisdiction of criminal matters, and of civil matters both *ex contractu* and *ex delicto*. The process runs throughout the state; but trials in criminal cases and in civil cases relating to real estate are confined to the district where the cause of prosecution or of suit arose. There are some exceptions: in the law courts there is a jurisdiction entitled the "summary process jurisdiction," limited to twenty pounds currency, equal to $85.91. In this jurisdiction elaborate pleading is dispensed with, no imparlance is given, and a jury is not employed unless one or the other of the parties require it; and a party may be called upon to answer interrogatories on oath. An equitable jurisdiction has existed from the planting of the colony, and was at first lodged in the proprietors and their deputies and council. By the colonial statute of 1721, which was passed after the regal had succeeded to the proprietary government, it was established as the rule of proceeding that it should conform, as far as the peculiar situation of the colony permitted, to the usages in chancery in England. This court has also a less formal and more summary jurisdiction, limited to unlitigated cases and to cases involving not more than one hundred pounds, in which the suit may be brought by petition. The court was remodelled in 1784, and again in 1808, by the creation of chancellors, and an appeal was given to all the chancellors from the circuit decisions. The circuit courts have masters, or commissioners, and registrars. The sheriff executes the decrees by attachment, or by fieri facias, according to the nature of the case.

8. The law judges and the chancellors are all elected, under the constitution of 1790, by joint ballot of the two legislative chambers, and hold office *dum bene se gesserint.* They may be impeached before the senate for high crimes and misdemeanors, misbehavior in office, corruption in procuring office, or any act degrading their official character, and, by virtue of an amendment adopted in 1828, may

be removed by a vote of two-thirds of the two houses for disability arising from permanent bodily or mental infirmity.

There was formerly an appellate bench for each jurisdiction, law and equity (apart from one another), consisting of the law judges for the one and the chancellors for the other. This plan continued until 1824, when a separate court of appeals, consisting of three judges, was established for both jurisdictions. This court was broken up in 1835, by electing its members to the equity and law benches respectively, and an appeal bench was constituted, in its stead, of all the chancellors and judges. This arrangement, after one year's trial, was given up in 1836, and the appeal benches as originally existing were restored, with an obligation, however, to carry the cause or the question, when a constitutional point arose, before all the chancellors and judges, and a right, also, to carry it before them on the request of any two chancellors or judges. This last resort was denominated the court of errors. In December, 1859, a separate court of appeals was again established in three judges, with a resort to all the chancellors and judges on constitutional questions or on the request of two appeal judges. And this is the present plan.

The *State Reporter* is appointed by the legislature instead of the court; but the appeal court appoints all other of its officers.

The inferior courts consist of a magistracy of justices of the peace, etc., for the conservation of peace and order, and have a jurisdiction in matters of contract limited to twenty dollars. They are appointed by the general assembly; and appeals lie from them to the superior law courts.

There is also a court of limited jurisdiction, called the "Court of Ordinary." This juriadiction was in colonial times administered by the governor and privy council. There is now an ordinary for every district, elected by popular suffrage, whose jurisdiction deals in the probate of wills, granting of administrations, etc., like the ecclesiastical courts of England. To the ordinary is also allotted, by statute, the sale and partition of lands under the value of one thousand dollars. When the probate of a will is concerned, the matter may be taken up, by appeal, to the superior law courts, where the evidence is taken and the matter laid before a jury *de novo*. From the ordinary's decision in matters of account an appeal lies to the courts of equity. In all other cases the appeal is to the superior law courts. There are no county courts.

Jurisprudence.

9. By a colonial statute passed in 1712, the common law of England, not unsuitable to the condition of the colony, was adopted, together with leading English statutes selected and enumerated. Among the latter were the statutes relating to the writ of habeas corpus and to the confirmation of Magna Charta, 9 Edw. I., A.D. 1297. The constitution of 1790 secures rights in the following particulars, among others:—an independent judiciary, the freedom of religion, not amounting to licentiousness nor inconsistent with public peace and safety, subordination of military to civil power, perpetuation of jury trial, liberty of the press, no hereditary offices or titles, inhibition of excessive bail, excessive fines, and cruel punishments, that no freeman of this state shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land (it is not, however, further declared that private property shall be taken for public use only by direct act of the legislature, by giving contemporaneously full *bonâ fide* compensation for the property taken and the injury therefrom accruing, or by authority conferred by the legislature by statute prescribing the rule by which similar compensation shall be made); that no bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed by the legislature of this state.

The people have also by this constitution endeavored to secure themselves against their own caprice, by anticipating that no alteration of this instrument shall be made except by bill read three times in each house, agreed to by two-thirds of both houses, and (after an intervening election securing three months' previous publication of the bill) passed, by a similar process, at the immediately consecutive session. And, by an amendment adopted in 1810, it is also provided that no convention of the people shall be called but by the concurrent vote of both branches of the legislature.

These constitutional and fundamental provisions, and the common law, and leading English statutes, adopted in 1712, together with the statutes subsequently enacted, and the decisions of the courts, constitute the law of the state.

SOVEREIGN. A chief ruler with supreme power; a king or other ruler with limited power.

In English Law. A gold coin of Great Britain, of the value of a pound sterling.

SOVEREIGN STATE. One which governs itself independently of any foreign power.

SOVEREIGNTY. The union and exercise of all human power possessed in a state: it is a combination of all power; it is the power to do every thing in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. § 207.

2. Abstractly, sovereignty resides in the body of the nation and belongs to the people. But these powers are generally exercised by delegation.

When analyzed, sovereignty is naturally divided into three great powers· namely, the legislative, the executive, and the judiciary: the first is the power to make new laws and to correct and repeal the old; the second is the power to execute the laws, both at home and abroad; and the last is the power to apply the laws to particular facts, to judge the disputes which arise among the citizens, and to punish crimes.

3. Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state. 2 Dall. 471. And see, generally, 2 Dall. 433, 455; 3 *id.* 93; 1 Story, Const. § 208; 1 Toullier, n. 20; Merlin, Répert.

SPADONES (Lat.). **In Civil Law** Those who, on account of their temperament or some accident they have suffered, are unable to procreate. Inst. 1. 11. 9; Dig. 1. 7. 2. 1. And see IMPOTENCE.

SPARSIM (Lat.) Here and there; in

a scattered manner; sparsedly; dispersedly. It is sometimes used in law: for example, the plaintiff may recover the place wasted, not only where the injury has been total, but where trees growing *sparsim* in a close are cut. Bacon, Abr. *Waste* (M); Brownl. 240; Coke, Litt. 54 *a*; 4 Bouvier, Inst. n. 3690.

SPEAK. A term used in the English law to signify the permission given by a court to the prosecutor and defendant, in some cases of misdemeanor, to agree together, after which the prosecutor comes into court and declares himself to be satisfied; when the court pass a nominal sentence. 1 Chitty, Pract. 17.

SPEAKER. The title of the presiding officer of the house of representatives of the United States. The presiding officer of either branch of the state legislatures generally is called the speaker.

SPEAKING DEMURRER. In Pleading. One which alleges new matter in addition to that contained in the bill as a cause for demurrer. 4 Brown, Ch. 254; 2 Ves. Ch. 83; 4 Paige, Ch. N. Y. 374.

SPECIAL. That which relates to a particular species or kind; opposed to general: as, special verdict and general verdict; special imparlance and general imparlance; special jury, or one selected for a particular case, and general jury; special issue and general issue, etc.

The meaning of special, as used in a constitutional provision authorizing the legislature to confer jurisdiction in *special cases*, has been the subject of much discussion in the court of appeals of the state of New York. 12 N. Y. 593; 16 *id.* 80; 18 *id.* 57.

SPECIAL AGENT. An agent whose authority is confined to a particular or an individual instance. It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind his principal beyond what he is authorized to do. 2 Bouvier, Inst. n. 1299; 2 Johns. N. Y. 48; 5 *id.* 48; 15 *id.* 44; 8 Wend. N. Y. 494; 1 Wash. C. C. 174. See AGENT.

SPECIAL ASSUMPSIT. In Practice. An action of assumpsit brought on a special contract, which the plaintiff declares upon setting out its particular language or its legal effect.

It is distinguished from a general assumpsit, where the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a debt arising out of the execution of the contract, where that constitutes the debt. 3 Bouvier, Inst. n. 3426.

SPECIAL BAIL. A person who becomes specially bound to answer for the appearance of another.

The recognizance or act by which such person thus becomes bound.

SPECIAL CONSTABLE. One who has been appointed a constable for a particular occasion, as in the case of an actual tumult or a riot, or for the purpose of serving a particular process.

SPECIAL DAMAGES. The damages recoverable for the actual injury incurred through the peculiar circumstance of the individual case, above and beyond those presumed by law from the general nature of the wrong.

These damages must be specially averred in the declaration, or they cannot be recovered; while damages implied by law are recoverable without any such special averment. Thus, in the case of an action for libel the law presumes an injury as necessarily involved in the loss of reputation, and will award damages therefor without any distinct averment. But if there was any peculiar loss suffered in the individual case, as the plaintiff's marriage prevented or the plaintiff's business diminished, etc., this must be especially averred. See DAMAGES.

SPECIAL DEMURRER. In Pleading. 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 the exception. 3 Bouvier, Inst. n. 3022. See DEMURRER.

SPECIAL DEPOSIT. A deposit made of a particular thing with the depositary: it is distinguished from an irregular deposit.

When a thing has been specially deposited with a depositary, the title to it remains with the depositor, and if it should be lost the loss will fall upon him. When, on the contrary, the deposit is irregular, as where money is deposited in a bank, the title to which is transferred to the bank, if it be lost, the loss will be borne by the bank. This will result from the same principle: the loss will fall, in both instances, on the owner of the thing, according to the rule *res periit domino*. See 1 Bouvier, Inst. n. 1054.

SPECIAL ERRORS. Special pleas in error are those which assign for error matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur.

SPECIAL IMPARLANCE. In Pleading. An imparlance which contains the clause, "saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid." 2 Chitty, Plead. 407, 408. See IMPARLANCE.

SPECIAL INJUNCTION. An injunction obtained only on motion and petition, with notice to the other party. It is applied for sometimes on affidavit before answer, but more frequently upon merits disclosed in the defendant's answer. 4 Bouvier, Inst. n. 3756. See INJUNCTION.

SPECIAL ISSUE. In Pleading. A plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. It differs from the general issue, which traverses or denies the whole declaration or indictment

Gould, Plead. c. 2, § 38. See GENERAL ISSUE; ISSUE.

SPECIAL JURY. One selected in a particular way by the parties. See JURY.

SPECIAL NON EST FACTUM. The name of a plea by which the defendant says that the deed which he has executed is not his own or binding upon him, because of some circumstance which shows that it was not intended to be his deed, or because it was not binding upon him for some lawful reason: as, when the defendant delivered the deed to a third person as an escrow to be delivered upon a condition, and it has been delivered without the performance of the condition, he may plead *non est factum*, state the fact of the conditional delivery, the non-performance of the condition, and add, "and so it is not his deed;" or if the defendant be a feme covert, she may plead *non est factum*, that she was a feme covert at the time the deed was made, "and so it is not her deed." Bacon, Abr. *Pleas*, etc. (H 3, I 2); Gould, Plead. c. 6, pt. 1, § 64. See ISSINT.

SPECIAL OCCUPANT. When an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed, and is called a special occupant. 2 Sharswood, Blackst. Comm. 259. In the United States the statute provisions of the different states vary considerably upon this subject. In New York and New Jersey, special occupancy is abolished. Virginia, and probably Maryland, follow the English statutes. In Massachusetts and other states, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material. 4 Kent, Comm. 27.

SPECIAL PARTNERSHIP. See PARTNERSHIP.

SPECIAL PLEA IN BAR. One which advances new matter. It differs from the general in this, that the latter denies some material allegation, but never advances new matter. Gould, Plead. c. 2, § 38.

SPECIAL PLEADER. In English Practice. A lawyer whose professional occupation is to give verbal or written opinions upon statements submitted to him, either in writing or verbally, and to draw pleadings, civil or criminal, and such practical proceedings as may be out of the general course. 2 Chitty, Pract. 42.

SPECIAL PLEADING. The science of pleading.

The allegation of special or new matter to avoid the effect of the previous allegations of the opposite party, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Plead. c. 1, § 18; 3 Wheat. 246; Comyns, Dig. *Pleader* (E 15).

SPECIAL PROPERTY. That property in a thing which gives a qualified or limited right. See PROPERTY.

SPECIAL REQUEST. A request actually made, at a particular time and place: this term is used in contradistinction to a general request, which need not state the time when nor place where made. 3 Bouvier, Inst. n. 2843.

SPECIAL RULE. A rule or order of court made in a particular case, for a particular purpose: it is distinguished from a *general* rule, which applies to a class of cases. It differs also from a *common* rule, or rule of course.

SPECIAL TRAVERSE. See TRAVERSE.

SPECIAL TRUST. A special trust in one where a trustee is interposed for the execution of some purpose particularly pointed out, and is not, as in the case of a simple trust, a mere passive depositary of the estate, but is required to exert himself actively in the execution of the settler's intention: as, where a conveyance is made to trustees upon trust to reconvey, or to sell for the payment of debts. 2 Bouvier, Inst. n. 1896. See TRUST.

SPECIAL VERDICT. In Practice. A special verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. See VERDICT; Bacon, Abr. *Verdict* (D).

SPECIALTY. A writing sealed and delivered, containing some agreement. 2 Serg. & R. Penn. 503; Willes, 189; 1 P. Will. Ch. 130. A writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. Bacon, Abr. *Obligation* (A).

Although in the body of the writing it is not said that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty, and if it be not sealed it is not a specialty, although the parties in the body of the writing make mention of a seal. 2 Serg. & R. Penn. 504; 2 Coke, 5 *a*; Perkins, § 129. See BOND; DEBT; OBLIGATION.

SPECIE. Metallic money issued by public authority.

This term is used in contradistinction to paper money, which in some countries is emitted by the government, and is a mere engagement which represents specie. Bank-paper in the United States is also called paper money Specie is the only constitutional money in this country. See 4 T. B. Monr. 483.

SPECIES FACTI (Lat.). The particular kind of act. Ainsworth, Dict.

SPECIFIC LEGACY. A bequest of a particular thing.

It follows that a specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things: a specific legacy may, therefore, be of money in a bag, or of money marked and so described: as, I give two eagles to A B, on which are engraved the initials of my name. A specific legacy may also be given out of a

general fund. Touchstone, 433; Ambl. 310; 4 Ves. Ch. 565; 3 Ves. & B. Ch. Ir. 5. If the specific article given be not found among the assets of the testator, the legatee loses his legacy; but, on the other hand, if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies. 1 Vern. Ch. 31; 1 P. Will. 422; 3 *id.* 365; 3 Brown, Ch. 160. See 1 Roper, Leg. 150; 1 Belt, Suppl. Ves. Ch. 209, 231; 2 *id.* 112; LEGACY; LEGATEE.

SPECIFIC PERFORMANCE. The actual accomplishment of a contract by the party bound to fulfil it.

2. Many contracts are entered into by parties to fulfil certain things, and then the contracting parties neglect or refuse to fulfil their engagements. In such cases the party grieved has generally a remedy at law, and he may recover damages for the breach of the contract; but in many cases the recovery of damages is an incompetent remedy, and the party seeks to recover a specific performance of the agreement.

3. It is a general rule that courts of equity will entertain jurisdiction for a specific performance of agreements, whenever courts of law can give but an inadequate remedy; and it is immaterial whether the subject relate to real or personal estate. 1 Maddock, Ch. Pr. 295; 2 Story, Eq. § 717; 1 Sim. & S. Ch. 607; 1 P. Will. Ch. 570; 1 Schoales & L. Ir. Ch. 553; 1 Vern. Ch. 159. But the rule is confined to cases where courts of law cannot give an adequate remedy, 1 Grant, Cas. Penn. 83; 18 Ga. 473; 2 Story, Eq. Jur. § 718; and a decree is to be granted or refused in the discretion of the court. 38 N. H. 400; 2 Iowa, 126; 5 *id.* 525; 9 Ohio St. 511; 8 Wisc. 392; 1 Grant, Cas. Penn. 83; 5 Harr. Del. 74; 1 Hempst. Ark. 245; 2 Jones, Eq. No. C. 267; 6 Ind. 259.

4. As the doctrine of a specific performance in equity arises from the occasional inadequacy of the remedy at law upon a violated contract, it follows that the contract must be such a one as is binding at law, 33 Ala. N. S. 449; and it must be executory, certain in its terms, and fair in all its parts. It must also be founded upon a valuable consideration, and its performance in *specie* must be practicable and necessary; and, if it be one of the contracts which is embraced in the Statute of Frauds, it must be evidenced in writing. 2 Story, Eq. Jur. § 751; Adams, Eq. 77; Busb. Eq. No. C. 80; 1 Chitty, Gen. Pract. 828. The *first* requisite is that the contract must be founded *upon a valuable consideration*, 19 Ark. 51, either in the way of benefit bestowed or of disadvantage sustained by the party in whose favor it is sought to be enforced, 1 Beasl. Ch. N. J. 498; and this consideration must be proved even though the contract be under seal. 12 Ind. 539; 14 La. Ann. 606; 17 Tex. 397. The consideration must be strictly a valuable one, and not one merely arising from a moral duty or affection, as towards a wife and children; although it need not necessarily be an adequate one. Adams, Eq. 78. See 6 Iowa, 279; 6 Mich. 364.

The *second* requisite is that the mutual enforcement of the contract must be practicable; for if this cannot be judicially secured on both sides, it ought not to be compelled against either party. Among the cases which the court deems impracticable is that of a covenant by a husband to convey his wife's land, because this cannot be effectuated without danger of infringing upon that freedom of will which the policy of the law allows the wife in the alienation of her real estate. 2 Story, Eq. Jur. §§ 731–735. See 6 Wisc. 127; 9 Md. 480.

5. The *third* requisite is that the enforcement in *specie* must be necessary; that is, it must be really important to the plaintiff, and not oppressive to the defendant. 1 Beasl. Ch. N. J. 497. We have seen, for instance, that mere inadequacy of consideration is not necessarily a bar to a specific performance of a contract; but if it be so great as to induce the suspicion of fraud or imposition, the court of equity will refuse its aid to the party seeking to enforce it, and leave him to his remedy at law. 2 Jones, Eq. No. C. 267. This is upon the ground that the specific enforcement of the contract would be oppressive to the defendant. The court will equally withhold its aid where such enforcement is not really important to the plaintiff, as it will not be in any case where the damages which he may recover at law will answer his purpose as well as the possession of the thing which was contracted to be conveyed to him. Adams, Eq. 83 *et seq.* As a general rule, a contract to convey real estate will be deemed necessary, and therefore will be specifically enforced; while one for the transfer of personal chattels will be denied any relief in equity unless the chattel have some peculiar value to the person who seeks to obtain it. In most, if not all, slave states, a contract for the purchase of slaves will be enforced specifically in equity upon the latter ground. 3 Murph. No. C. 74; 7 Ired. Eq. No. C. 190; 1 McMull. Eq. So. C. 256; 3 Munf. Va. 559; 9 Miss. 231.

When the Statute of Frauds requires that a contract shall be evidenced in writing, that will be a *fourth* requisite to the specific execution of it. In such case the contract must be in writing and certain in its terms; but it will not matter in what form the instrument may be, for it will be enforced even if it appear only in the consideration of a bond secured by a penalty. 6 Gray, Mass. 25; 2 Story, Eq. Jur. § 751.

6. In applying the equity of specific performance to real estate, there are some modifications of legal rules, which at first sight appear inconsistent with them and repugnant to the maxim that equity follows the law. The modifications here referred to are those of enforcing parol contracts relating to land, on the ground that they have been already performed in part; of allowing time to make out a title beyond the day which the contract

specifies; and of allowing a conveyance with compensation for defects. Adams, Eq. 85.

7. The principle upon which it is held that part-performance of a contract will in equity take a case out of the operation of the Statute of Frauds, is that it would be a fraud upon the opposite party if the agreement were not carried into complete execution. 11 Cal. 28; 30 Barb. N. Y. 633; 24 Ga. 402; 28 Mo. 134; 40 Me. 94. What will be a sufficient part-performance must depend on circumstances. The taking possession of the land and making improvements thereon will answer, 10 Cal. 156; 8 Mich. 463; 6 Iowa, 279; 30 Vt. 516; 5 R. I. 149; 33 N. H. 32; 4 Wisc. 79; though the payment of a part or even the whole of the purchase-money will not. 14 Tex. 373; 22 Ill. 643; 4 Kent, Comm. 451. See 8 Wisc. 249; 1 Dev. Eq. No. C. 180, 341, 398. If the purchaser have entered and made improvements upon the land, and the vendor protect himself from a specific performance by taking advantage of the statute, the plaintiff shall be entitled to a decree for the value of his improvements. 14 Tex. 331; 1 Dev. & B. Eq. No. C. 9; 1 Jones, Eq. No. C. 302, 339.

The doctrine of allowing time to make out a title beyond the day which the contract specifies, and which is embodied in the maxim that time is not of the essence of a contract in equity, has no doubt been generally adopted in the United States. It certainly has in North Carolina. 1 Dev. & B. Eq. No. C. 237; 3 Jones, Eq. No. C. 84, 240. But to entitle the purchaser to a specific performance he must show good faith and a reasonable diligence. 4 Ired. Eq. No. C. 386; 3 Jones, Eq. No. C. 321.

8. The third equity, to wit, that of allowing a conveyance with compensation for defects, applies where a contract has been made for the sale of an estate, which cannot be literally performed in *toto*, either by reason of an unexpected failure in the title to part of the estate, 34 Ala. N. s. 633; 1 Head, Tenn. 251; 6 Wisc. 127, of inaccuracy in the terms of the description, or of diminution in value by a liability to a charge upon it. In any such case, the court of equity will enforce a specific performance, allowing a just compensation for defects, whenever it can do so consistently with the principle of doing exact justice between the parties. Adams, Eq. 89 *et seq.* This doctrine has also been adopted in the United States. See 2 Story, Eq. Jur. 794–800; 1 Ired. Eq. No. C. 299. See 20 N. Y. 412; 35 Penn. St. 381; 1 Head, Tenn. 251; 2 *id.* 221; 8 Rich. Eq. So. C. 241.

SPECIFICATIO (Lat.). **In Civil Law.** The process by which, from material either of one kind or different kinds, either belonging to the person using them or to another, a new form or thing is created: as, if from gold or gold and silver a cup be made, or from grapes wine. Calvinus, Lex. Whether the property in the new article was in the owner of the materials or in him who effected the change was a matter of contest between the two great sects of Roman lawyers. Stair, Inst. p. 204, § 41; Mackeldey, Civ. Law, § 241.

SPECIFICATION. A particular and detailed account of a thing.

For example, in order to obtain a patent for an invention, it is necessary to file a specification or an instrument of writing, which must lay open and disclose to the public every part of the process by which the invention can be made useful. If the specification does not contain the whole truth relative to the discovery, or contains more than is requisite to produce the desired effect, and the concealment or addition was made for the purpose of deception, the patent would be void; for if the specification were insufficient on account of its want of clearness, exactitude, or good faith, it would be a fraud on society that the patentee should obtain a monopoly without giving up his invention. 2 Kent, Comm. 300; 1 Bell, Comm. pt. 2, c. 3, s. 1, p. 112; Perpigna, Pat. 67; Renouard, Des Brevets d'Inv. 252. See PATENT.

In Military Law. The clear and particular description of the charges preferred against a person accused of a military offence. Tytler, Courts-Mart. 109.

SPECIMEN. A sample; a part of something by which the other may be known.

The act of congress of July 4, 1836, section 6, requires the inventor or discoverer of an invention or discovery to accompany his petition and specification for a patent with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of the composition of matter.

SPECULATION. The hope or desire of making a profit by the purchase and resale of a thing. Pardessus, Droit Com. n. 12. The profit so made: as, he made a good speculation.

SPEECH. A formal discourse in public.

The liberty of speech is guaranteed to members of the legislature, in debate, and to counsel in court.

The reduction of a speech to writing and its publication is a libel if the matter contained in it is libellous; and the repetition of it upon occasions not warranted by law, when the matter is slanderous, will be slander; and the character of the speaker will be no protection to him from an action. 1 Maule & S. 273; 1 Esp. 226; Bouvier, Inst. Index. See DEBATE; LIBERTY OF SPEECH.

SPELLING. The art of putting the proper letters in words in their proper order.

It is a rule that bad spelling will not void a contract when it appears with certainty what is meant: for example, where a man agreed to pay *threty* pounds he was held bound to pay *thirty* pounds; and *seutene* was holden to be *seventeen*. Croke Jac. 607; 10 Coke, 133 *a*; 2 Rolle, Abr. 147. Even in an indictment *undertood* has been holden as *understood*. 1 Chitty, Crim. Law.

A misspelling of a name in a declaration will not be sufficient to defeat the plaintiff, on the ground of variance between the writing produced and the declaration, if such name be idem sonans: as, *Kay* for *Key*, 16 East,

110; 2 Stark. 29; *Segrave* for *Seagrave*. 2 Strange, 889. See IDEM SONANS.

SPENDTHRIFT. A person who by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or family. Vt. Rev. Stat. c. 65, § 9.

SPERATE (Lat. *spero*, to hope). That of which there is hope.

In the accounts of an executor and the inventory of the personal assets, he should distinguish between those which are sperate and those which are desperate: he will be *primâ facie* responsible for the former and discharged for the latter. 1 Chitty, Pract. 520; 2 Williams, Exec. 644; Toller, Exec. 248. See DESPERATE.

SPES RECUPERANDI (Lat. the hope of recovery). A term applied to cases of capture of an enemy's property as a booty or prize, while it remains in a situation in which it is liable to be recaptured. As between the belligerent parties, the title to the property taken as a prize passes the moment there is no longer any hope of recovery. 2 Burr. 683. See INFRA PRÆSIDIA; JUS POSTLIMINII; BOOTY; PRIZE.

SPINSTER. An addition given, in legal writings, to a woman who never was married. Lovelace, Wills, 269.

SPLITTING A CAUSE OF ACTION. The bringing an action for only a part of the cause of action. This is not permitted either at law or in equity. 4 Bouvier, Inst. n. 4167.

SPOLIATION. In English Ecclesiastical Law. The name of a suit sued out in the spiritual court to recover for the fruits of the church or for the church itself. Fitzherbert, Nat. Brev. 85.

A waste of church property by an ecclesiastical person. 3 Sharswood, Blackst. Comm. 90.

In Torts. Destruction of a thing by the act of a stranger: as, the erasure or alteration of a writing by the act of a stranger is called spoliation. This has not the effect to destroy its character or legal effect. 1 Greenleaf, Ev. § 566.

In Admiralty Law. By spoliation is also understood the total destruction of a thing: as, the spoliation of papers by the captured party is generally regarded as a proof of guilt; but in America it is open to explanation, except in certain cases where there is a vehement presumption of bad faith. 2 Wheat. 227, 241; 1 Dods. Adm. 480, 486. See ALTERATION.

SPONSALIA, STIPULATIO SPONSALITIA (Lat.). A promise lawfully made between persons capable of marrying each other, that at some future time they will marry. See ESPOUSALS; Erskine, Inst. 1. 6. 3.

SPONSIONS. In International Law. Agreements or engagements made by certain public officers as generals or admirals, in time of war, either without authority or by exceeding the limits of authority under which they purport to be made.

Before these conventions can have any binding authority on the state, they must be confirmed by express or tacit ratification. The former is given in positive terms and in the usual forms; the latter is justly implied from the fact of acting under the agreement as if bound by it, and from any other circumstance from which an assent may be fairly presumed. Wheaton, Int. Law, pt. 3, c. 2, § 3; Grotius, de Jur. Bel. ac Pac. l. 2, c. 15, § 16; *id.* l. 3, c. 22, §§ 1–3; Vattel, Law of Nat. b. 2, c. 14, §§ 209–212; Wolff, § 1156.

SPONSOR. In Civil Law. He who intervenes for another voluntarily and without being requested. The engagement which he enters into is only accessory to the principal. See Dig. 17. 1. 18; Nov. 4. 1; Code de Comm. art. 158, 159; Code Nap. 1236; Wolff, Inst. § 1556.

SPRING. A fountain.

2. The owner of the soil has the exclusive right to use a spring arising on his grounds. When another has an easement or right to draw water from such a spring, acquired by grant or prescription, if the spring fails the easement ceases, but if it returns the right revives.

The owner of land on which there is a natural spring has a right to use it for domestic and culinary purposes and for watering his cattle, and he may make an aqueduct to another part of his land and use all the water required to keep the aqueduct in order or to keep the water pure. 15 Conn. 366. He may also use it for irrigation, provided the volume be not materially decreased. Angell, Wat.-C. 34. See 1 Root, Conn. 535; 9 Conn. 291; 2 Watts, Penn. 327; 2 Hill, So. C. 634; Coxe, N. J. 460; 2 Dev. & B. No. C. 50; 8 Mass. 106; 13 *id.* 420; 3 Pick. Mass. 269; 8 *id.* 136; 8 Me. 253.

3. The owner of the spring cannot lawfully turn the current or give it a new direction. He is bound to let it enter the inferior estate on the same level it has been accustomed to, and at the same place, for every man is entitled to a stream of water flowing through his land without diminution or alteration. 6 East, 206; 2 Conn. 584. See 3 Rawle, Penn. 84; 12 Wend. N. Y. 330; 10 Conn. 213; 14 Vt. 239.

The owner of the superior inheritance, or of the land on which there is a spring, has no right to deprive the owner of the estate below him, 1 Yeates, Penn. 574; 5 Pick. Mass. 175; 3 Harr. & J. Md. 231; 12 Vt. 178; 13 Conn. 303; 4 Ill. 492; nor can he detain the water unreasonably. 17 Johns. N. Y. 306; 2 Barnew. & C. 910. See 1 Dall. Penn. 211; 3 Rawle, Penn. 256; 13 N. H. 360; POOL; STAGNUM; BACK-WATER; IRRIGATION; MILL; RAIN-WATER; WATER-COURSE.

SPRING-BRANCH. A branch of a stream flowing from a spring. 12 Gratt. Va. 196.

SPRINGING USE. A use limited to arise on a future event where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the mean time. Gilbert, Uses, Sugden ed. 153, n.; 2 Crabb, Real Prop. 498.

A future use, either vested or contingent, limited to arise without any preceding limitation. Cornish, Uses, 91.

It differs from a remainder in not requiring any other particular estate to sustain it than the use resulting to the one who creates it, intermediate between its creation and the subsequent taking effect of the springing use. Dy. 274; Pollexf. 65; 1 Ed. Ch. 34; 4 Drur. & Warr. Ch. 27; 1 Mod. 238; 1 Me. 271. It differs from an executory devise in that a devise is created by will, a use by deed. Fearne, Cont. Rem. 385, Butler's note; Wilson, Uses. It differs from a shifting use, though often confounded therewith. See, generally, 2 Washburn, Real Prop. 281.

SPULZIE (*spoliatio*). **In Scotch Law.** The taking away movables without the consent of the owner or order of law. Stair, Inst. 96, § 16; Bell, Dict.

SPY. One who goes into a place for the purpose of ascertaining the best way of doing an injury there.

The term is mostly applied to an enemy who comes into the camp for the purpose of ascertaining its situation in order to make an attack upon it. The punishment for this crime is death. See Articles of War; Vattel, Droit des Gens, liv. 3, § 179; Halleck, Int. Law.

SQUATTER. One who settles on the lands of others without any legal authority: this term is applied particularly to persons who settle on the public land. 3 Mart. La. N. S. 293.

STAB. To make a wound with a pointed instrument. A stab differs from a cut or a wound. Russ. & R. Cr. Cas. 356; Russell, Crimes, 597; Bacon, Abr. *Maihem* (B).

STAGNUM (Lat.). A pool. It is said to consist of land and water; and therefore by the name of *stagnum* the water and the land may be passed. Coke, Litt. 5.

STAKEHOLDER. A third person chosen by two or more persons to keep in deposit property the right or possession of which is contested between them, and to be delivered to the one who shall establish his right to it. Thus, each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee. Domat, Lois Civ. liv. 1, t. 7, s. 4; 1 Vern. Ch. 44, n. 1.

A person having in his hands money or other property claimed by several others is considered in equity as a stakeholder. 1 Vern. Ch. 144.

The duties of a stakeholder are to deliver the thing holden by him to the person entitled to it on demand. It is frequently questionable who is entitled to it. In case of an unlawful wager, although he may be justified for delivering the thing to the winner, by the express or implied consent of the loser, 8 Johns. N. Y. 147, yet if before the event has happened he has been required by either party to give up the thing deposited with him by such party, he is bound so to deliver it, 3 Taunt. 377; 4 *id.* 492; or if, after the event has happened, the losing party give notice to the stakeholder not to pay the winner, a payment made to him afterwards will be made in his own wrong, and the party who deposited the money or thing may recover it from the stakeholder. 16 Serg. & R. Penn. 147; 7 Term, 536; 8 *id.* 575; 4 Taunt. 474; 2 Marsh. 542. See 3 Penn. 468; 4 Johns. N. Y. 426; 5 Wend. N. Y. 250; 1 Bail. So. C. 486, 503. See WAGERS.

STALE DEMAND. A claim which has been for a long time undemanded: as, for example, where there has been a delay of twelve years unexplained. 3 Mas. C. C. 161.

STALLAGE (Sax. *stal*). The liberty or right of pitching or erecting stalls in fairs or markets, or the money paid for the same. Blount; Wharton, Dict. 2d Lond. ed.; 6 Q. B. 31.

STALLARIUS (Lat.). **In Saxon Law.** The *præfectus stabuli*, now master of the horse (Sax. *stalstabulum*). Blount. Sometimes one who has a stall in a fair or market. Fleta, lib. 4, c. 28, p. 13.

STAMP. An impression made by order of the government, on paper, which must be used in reducing certain contracts to writing, for the purpose of raising a revenue. See Starkie, Ev.; 1 Phillipps, Ev. 444.

A paper bearing an impression or device authorized by law and adapted for attachment to some subject of duty or excise.

The term in American law is used often in distinction from stamped paper, which latter meaning, as well as that of the device or impression itself, is included in the broader signification of the word.

Stamps or stamped paper are prepared under the direction of officers of the government, and sold at a price equal to the duty or excise to be collected. The stamps are affixed and cancelled; and where stamped paper is used, one use obviously prevents a second use. The Internal Revenue acts of the United States of 1862 and subsequent years require stamps to be affixed to a great variety of subjects, under severe penalties in the way of fines, and also under penalty of invalidating written instruments and rendering them incapable of being produced in evidence. Neither the system nor the law upon the subject, however, has become sufficiently established to warrant a full examination of the matter here.

Maryland has enacted a stamp law.

STAND. To abide by a thing; to submit to a decision; to comply with an agreement; to have validity: as, the judgment must stand.

STANDARD. **In War.** An ensign or flag used in war.

In Measures. A weight or measure of certain dimensions, to which all other weights and measures must correspond: as, a stand-

and bushel. Also, the quality of certain metals, to which all others of the same kind ought to be made to conform: as, standard gold, standard silver. See DOLLAR; EAGLE; MONEY.

STANNARY COURTS (*stannary*,—from Lat. *stannum*, Cornish *stéan*, tin,—a tin-mine).

In English Law. Courts of record, in Devonshire and Cornwall, England, for the administration of justice among the tinners therein. They are of the same limited and exclusive nature as those of the counties palatine.

2. They are held before a judge called the vice-warden, in virtue of a privilege granted to the workers in the tin-mines, or *stannaries*, there, during the time of their working *bonâ fide* in the stannaries, to sue and be sued only in these their own courts, in all matters arising within the stannaries, except pleas of land, life, and member, that they may not be drawn from their business, which is highly profitable to the public, by attending their law-suits in other courts.

3. No proceedings in error can be brought; but by 18 and 19 Vict. c. 32, s. 26, from all decrees and orders of the vice-warden on the equity side of his court, and from all his judgments on the common-law side thereof, an appeal is given to the lord-warden (assisted by two or more assessors, members of the judicial committee of the privy council, or judges of the high court of chancery, or courts of common law, at Westminster), and from the lord-warden a final appeal to the judicial committee of the privy council. 3 Stephen, Comm. 448; 3 Blackstone, Comm. 79, 80.

STAPLE. In International Law. The right of staple, as exercised by a people upon foreign merchants, is defined to be that they may not allow them to set their merchandises and wares to sale but in a certain place.

This practice is not in use in the United States. 1 Chitty, Comm. Law, 103; Coke, 4th Inst. 238; Malone, Lex Merc. 237; Bacon, Abr. *Execution* (B 1). See STATUTE STAPLE.

STAR-CHAMBER. See COURT OF STAR-CHAMBER.

STARE DECISIS (Lat.). To abide by, or adhere to, decided cases. *Stare decisis et non quieta movere.* It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of *stare decisis* is not always to be relied upon; for the courts find it necessary to overrule cases which have been decided contrary to principle. Many hundreds of such overruled cases may be found in the American and English reports. See Greenleaf, Overruled Cases; 1 Kent. Comm. 477; Livingston, Syst. of Pen. Law, 104, 105; AUTHORITIES; PRECEDENTS.

STARE IN JUDICIO (Lat.). To appear before a tribunal, either as plaintiff or defendant.

STATE (Lat. *stare*, to place, establish). **In Governmental Law.** A self-sufficient body of persons united together in one community for the defence of their rights and to do right and justice to foreigners. In this sense, the state means the whole people united into one *body politic;* and the state, and the people of the state, are equivalent expressions. 1 Pet. Cond. Rep. 37–39; 2 Dall. Penn. 425; 3 *id.* 93; 2 Wilson, Lect. 120; Dane, Appx. § 50, p. 63; 1 Story, Const. § 361. The positive or actual organization of the legislative or judicial powers: thus, the actual government of the state is designated by the name of the state: hence the expression, the state has passed such a law or prohibited such an act. The section of territory occupied by a state: as, the state of Pennsylvania.

One of the commonwealths which form the United States of America.

2. The constitution of the United States makes the following provisions in relation to the states. Art. 1, s. 9, § 5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another. Art. 1, s. 10, § 1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post-facto law or law impairing the obligation of contracts; or grant any title of nobility. 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 congress. No state shall, without the consent of congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

3. 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 several states composing the United States are sovereign and independent in all things not surrendered to the national government by the constitution, and are considered, on general principles, by each other as foreign states: yet their mutual relations are rather those of domestic independence than of foreign alienation. 7 Cranch, 481; 3 Wheat. 324; 1 Greenleaf, Ev. §§ 489, 504.

See, generally, Mr. Madison's report in the legislature of Virginia, January, 1800; 1 Story, Const. § 208; 1 Kent, Comm. 189, note *b;* Curtis, Const.; Sedgwick, Const. Law; Grotius, b. 1, c. 1, s. 14; *id.* b. 3, c. 3, s. 2; Burlamaqui, vol. 2, pt. 1, c. 4, s. 9; Vattel, b. 1, c. 1; 1 Toullier, n. 202, note 1; Cicero, *de Respub.* l. 1, s. 25.

In Society. That quality which belongs to a person in society, and which secures to and imposes upon him different rights and duties in consequence of the difference of that quality.

4. Although all men come from the hands of nature upon an equality, yet there are among them marked differences. The distinctions of the sexes, fathers and children, age and youth, etc. come from nature.

The civil or municipal laws of each people have added to these natural qualities distinctions which are purely civil and arbitrary, founded on the manners of the people or in the will of the legislature. Such are the differences which these laws have established between citizens and aliens, between magistrates and subjects, and between freemen and slaves, and those which exist in some countries between nobles and plebeians, which differences are either unknown or contrary to natural law.

Although these latter distinctions are more particularly subject to the civil or municipal law, because to it they owe their origin, it nevertheless extends its authority over the natural qualities, not to destroy or to weaken them, but to confirm them and to render them more inviolable by positive rules and by certain maxims. This union of the civil or municipal and natural law forms among men a third species of differences, which may be called mixed, because they participate of both, and derive their principles from nature and the perfection of the law: for example, infancy, or the privileges which belong to it, have their foundation in natural law; but the age and the term of these prerogatives are determined by the civil or municipal law.

Three sorts of different qualities which form the state or condition of men may, then, be distinguished: those which are purely natural, those purely civil, and those which are composed of the natural and civil or municipal law.

See 3 Blackstone, Comm. 396; 1 Toullier, n. 170, 171; CIVIL STATE.

In Practice. To make known specifically; to explain particularly: as, to state an account or to show the different items in an account; to state the cause of action in a declaration.

STATEMENT. See PARTICULAR STATEMENT.

STATION. In Civil Law. A place where ships may ride in safety. Dig. 49. 12. 1. 13; 50. 15. 59.

STATING-PART OF A BILL. See BILL.

STATU LIBERI (Lat.). **In Louisiana.** Slaves for a time, who have acquired the right of being free at a time to come, or on a condition which is not fulfilled, or in a certain event which has not happened, but who in the mean time remain in a state of slavery. La. Civ. Code, art. 37. See 3 La. 176; 6 *id.* 571; 4 Mart. La. 102; 7 *id.* 351; 8 *id.* 219. This is substantially the definition of the civil law. Hist. de la Jur. l. 40; Dig. 40. 7. 1; Code, 7. 2. 13.

STATUS (Lat.). The condition of persons. It also means estate, because it signifies the condition or circumstances in which the owner stands with regard to his property. 2 Bouvier, Inst. n. 1689.

STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

This word is used to designate the written law in contradistinction to the unwritten law. See COMMON LAW.

Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits any thing is designated a statute, without considering from what source it arises. Sometimes the word is used in contradistinction from the imperial Roman law, which, by way of eminence, civilians call the common law.

An affirmative statute is one which is enacted in affirmative terms.

Such a statute does not necessarily take away the common law. Coke, 2d Inst. 200; Dwarris, Stat. 474. If, for example, a statute without negative words declares that when certain requisites shall have been complied with, deeds shall have a certain effect as evidence, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner as they might have been before the statute was passed. 2 Caines, N. Y. 169. Nor does such an affirmative statute repeal a precedent statute if the two can both be given effect. Dwarris, Stat. 474.

A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.

A negative statute is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute. Bacon, Abr. *Statute* (G).

Penal statutes are those which command or prohibit a thing under a certain penalty. Espinasse, Pen. Act. 5; Bacon, Abr. See, generally, Bacon, Abr.; Comyns, Dig. *Parliament;* Viner, Abr.; Dane, Abr. Index; Chitty, Pract.; 1 Kent, Comm. 447–459; Barrington, Statutes; Boscawen, Pen. Stat.; Espinasse, Pen. Act.; Dwarris, Stat.; Sedgwick, Const. Law. A statute affixing a penalty to an act, though it does not in words prohibit it, thereby makes it illegal. 14 Johns. N. Y. 273; 1 Binn. Penn. 110; 37 Eng. L. & Eq. 475; 14 N. H. 294; 4 Iowa, 490; 7 Ind. 77.

A perpetual statute is one for the continuance of which there is no limited time, although it be not expressly declared to be so.

If a statute which did not itself contain any limitation is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter. Bacon, Abr. *Statute* (D).

Private statutes or *acts* are those of which the judges will not take notice without pleading; such as concern only a particular species or person.

Private statutes may be rendered public by being so declared by the legislature. Bacon, Abr. *Statute* (F); 1 Blackstone, Comm. 85, 86; Dwarris, Statutes

629; 4 Coke, 76; 1 Term, 125; Skinn. 350. And see Hale, Hist. Comm. Law, Runnington's ed. 3; 1 Kent, Comm. 459. Private statutes will not bind *strangers;* though they should not contain any saving of their rights. A general saving clause used to be inserted in all private bills; but it is settled that, even if such saving clause be omitted, the act will bind none but the parties.

Public statutes are those of which the courts will take judicial notice without pleading or proof.

They are either general or local,—that is, have operation throughout the state at large, or within a particular locality. It is not easy to say what degree of limitation will render an act local. Thus, it has been held that a public act relating to one county only is not local within the meaning of a constitutional provision which forbids enactments of local bills embracing more than one subject. 5 N. Y. 285; 2 Sandf. N. Y. 355; 1 Hilt. N. Y. 483.

A remedial statute is one made to supply such defects and abridge such superfluities in the common law as may have been discovered. 1 Blackstone, Comm. 86.

These remedial statutes are themselves divided into *enlarging* statutes, by which the common law is made more comprehensive and extended than it was before, and into *restraining* statutes, by which it is narrowed down to that which is just and proper. The term *remedial statute* is also applied to those acts which give the party injured a remedy; and in some respects such statutes are penal. Espinasse, Pen. Act. 1.

A temporary statute is one which is limited in its duration at the time of its enactment.

It continues in force until the time of its limitation has expired, unless sooner repealed. A statute which by reason of its nature has only a single and temporary operation—*e.g.* an appropriation bill—is also called a temporary statute.

The most ancient English statute extant is Magna Charta. Formerly the statutes enacted after the beginning of the reign of Edw. III. were called *Nova Statuta*, or new statutes, to distinguish them from the ancient statutes. The modern English statutes are divided into Public General Acts, Local and Personal Acts declared public, Private Acts printed, and Private Acts not printed. In parliamentary practice are adopted other distinctions, resting upon different grounds.

2. By the civilians, statutes are considered as real, personal, or mixed. *Mixed statutes* are those which concern at once both persons and property. But in this sense almost all statutes are mixed, there being scarcely any law relative to persons which does not at the same time relate to things. *Personal statutes* are those which have principally for their object the person, and treat of property only incidentally: such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, to plead in person, and the like. A personal statute is universal in its operation, and in force everywhere. *Real statutes* are those which have principally for their object property, and which do not speak of persons except in relation to property, Story, Confl. of L. § 13: such are those which concern the disposition which one may make of his property either alive or by testament. A real statute, unlike a personal one, is confined in its operation to the country of its origin.

3. It is a general rule that when the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law, Coke, Litt. 235; Coke, 2d Inst. 222; Bacon, Abr. *Statute* (B); and when a power is given by statute, every thing necessary for making it effectual is given by implication: *quando lex aliquid concedit, concedere videtur et id per quod devenitur ad aliud.* 12 Coke, 130, 131; Coke, 2d Inst. 306

As to the doctrine of the interpretation of statutes, see CONSTRUCTION.

As to the mode of enacting statutes in England, see 1 Blackstone, Comm. 182. The mode in the United States is regulated by the constitution of the Union and of the several states respectively. The advantage of having a law officer, or board of officers, to revise bills and amendments of bills during their progress through the legislature, has been somewhat discussed. It is urged that legislators often have no general knowledge of law, are ignorant or careless of the extent to which a proposed law may affect previous statutes on the same or collateral subjects; amendments, too, are affixed without carefully harmonizing them with the bill amended; and special provisions are resorted to when a more general and simple remedy should be applied. Reports of the English Statute Law Commissioners, March, 1856, March, 1857. Consult, also, Street, Council of Revision.

4. Much interesting discussion has arisen on the question whether a statute which appears to be contrary to the laws of God and nature, and to right reason, is void. Dwarris states the English doctrine to be that an act of parliament of which the terms are explicit and the meaning plain cannot be questioned or its authority controlled in any court of justice. But resort has been had in such cases to the cover of a construction, and it has been contended that such a case must be interpreted to be exempted out of the provisions of the statute,—that a contrary construction could not be within the meaning of the act. The law, therefore, was to be properly *construed* not to apply to such cases; but the law itself was not to be held void. Dwarris, Stat. 482. And see 8 Coke, 116; 12 Mod. 687; 1 W. Blackstone, 42, 91; Bentham, Fragment on Gov.; 1 Bay, So. C. 93; Harp. So. C. 101. Consult, also, 18 Wend. N. Y. 9; 21 *id.* 563; 1 Hill, N. Y. 323; 10 N. Y. 374, 393: 19 *id.* 445; 4 Barb. N. Y. 64.

5. In the United States, a statute which contravenes a provision of the constitution of the state by whose legislature it was enacted, or of the constitution of the United States, is in so far void. See CONSTITUTIONAL LAW. The presumption, however, is that every state statute the object and provision of which are among the acknowledged powers of legislation is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated. 6 Cranch, 87; 1 Cow. N. Y. 564; 3 Den. N. Y. 381; 7

N. Y. 109; 19 Barb. N. Y. 81. Where a part only of a statute is unconstitutional, the rest is not void if it can stand by itself. 1 Gray, Mass. 1.

6. By the common law, statutes took effect by relation back to the first day of the session at which they were enacted. The injustice which this rule often worked led to the statute of 33 Geo. III. c. 13, which declared that, except when otherwise provided, statutes should take effect from the day of obtaining the royal assent. This rule, however, does not obviate the hardship of sometimes holding men responsible under a law before its promulgation. By the Code Napoléon, a law takes effect in each department of the empire as many days after its promulgation in that department as there are distances of twenty leagues between the seat of government and the place of promulgation. The revised statutes of several of the American states provide that every statute shall take effect twenty days from the time of its enactment, except when otherwise provided. As to retroactive statutes, see Ex Post Facto.

7. A statute is not to be deemed repealed merely by the enactment of another statute on the same subject. There must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy. 16 Pet. 342. This rule is supported by a vast variety of cases. There is, however, a qualification to be observed in the case of a revised law. Where the new statute is in effect a revision of the old, it may be treated as superseding the former, though not expressly so declared. 7 Mass. 140; 12 *id.* 537, 545; 1 Pick. Mass. 43, 45, 154; 9 *id.* 97; 10 *id.* 39; 3 Me. 22; 31 *id.* 34; 42 *id.* 53; 16 Barb. N. Y. 15; 5 Eng. L. & Eq. 588; 37 N. H. 295; 30 Vt. 344; 8 Tex. 62; 14 Ill. 334; 6 B. Monr. Ky. 146. But compare 9 Ind. 337; 10 *id.* 566. A mere change of phraseology in the revision does not, however, necessarily imply a change in the law. 21 Wend. N. Y. 316; 2 Hill, N. Y. 380; 4 Sandf. N. Y. 374; 7 Barb. N. Y. 191; 33 N. H. 246; 6 Tex. 34.

Where a new statute expressly repeals the former statute, and the new and the repeal of the old are to take effect at the same time, a provision in the old statute which is embodied in the new is deemed to have continued in force without suspension. 3 Wisc. 667; 15 Ill. 595. But it has been held that where the new law does not go into effect until a time subsequent to that at which the repeal takes effect, such a provision is to be deemed repealed meantime. 12 La. Ann. 593. But see 1 Pick. Mass. 33.

8. When one statute is repealed by another, the unqualified repeal of the repealing statute revives the original. 2 Metc. Mass. 118; 21 Pick. Mass. 492; 1 Gray, Mass. 163; 7 Watts & S. Penn. 263; 1 Ga. 32. This is the common-law rule; but the contrary is provided by statute in some of the United States.

It is not to be presumed in the courts of any state that statutes which have been enacted in that state have also been enacted in other states. The courts assume that the common law still prevails, unless it is shown to have been modified. 22 Barb. N. Y. 118; 23 *id.* 498; 2 Du. N. Y. 419. See Foreign Laws.

Some laws, such as charters, or other statutes granting franchises, if accepted or acted upon by the persons concerned, acquire some of the qualities of a contract between them and the state. 4 Wheat. 518; 6 Cranch, 87; 7 *id.* 164; 9 *id.* 43, 292; 10 How. 190, 218, 224, 511.

STATUTE MERCHANT. A security entered before the mayor of London, or some chief warden of a city, in pursuance of 13 Ed. I. stat. 3, c. 1, whereby the lands of the debtor are conveyed to the creditor till out of the rents and profits of them his debt may be satisfied. Cruise, Dig. t. 14, s. 7; 2 Blackstone, Comm. 160.

STATUTE STAPLE. The statute of the staple, 27 Ed. III. stat. 2, confined the sale of all commodities to be exported to certain towns in England, called *estaple* or *staple*, where foreigners might resort. It authorized a security for money, commonly called statute staple, to be taken by traders for the benefit of commerce; the mayor of the place is entitled to take a recognizance of a debt in proper form, which has the effect to convey the lands of the debtor to the creditor till out of the rents and profits of them he may be satisfied. 2 Blackstone, Comm. 160; Cruise, Dig. tit. 14, s. 10; 2 Rolle, Abr. 446; Bacon, Abr. *Execution* (B 1); Coke, 4th Inst. 238.

STATUTI (Lat.). **In Roman Law.** Those advocates whose names were inscribed in the registers of matriculation, and formed a part of the college of advocates. The number of advocates of this class was limited. They were distinguished from the supernumeraries from the time of Constantine to Justinian. See Calvinus, Lex.

STAY OF EXECUTION. In Practice. A term during which no execution can issue on a judgment.

It is either conventional, when the parties agree that no execution shall issue for a certain period, or it is granted by law, usually on condition of entering bail or security for the money.

An execution issued before the expiration of the stay is irregular and will be set aside; and the plaintiff in such case may be liable to an action for damages. What is said above refers to civil cases.

In criminal cases, when a woman is capitally convicted and she is proved to be *en ceinte* there shall be a stay of execution till after her delivery. See Pregnancy.

STAYING PROCEEDINGS. The suspension of an action.

Proceedings are stayed absolutely or conditionally.

They are peremptorily stayed when the

plaintiff is wholly incapacitated from suing: as, for example, when the plaintiff is not the holder, nor beneficially interested in a bill on which he has brought his action, 2 Crompt. & M. Exch. 416; 2 Dowl. 336; Chitty, Bills, 335; 3 Chitty, Pract. 628, or when the plaintiff admits in writing that he has no cause of action, 3 Chitty, Pract. 370, 630, or when an action is brought contrary to good faith. Tidd, Pract. 515, 529, 1134; 3 Chitty, Pract. 633.

Proceedings are sometimes stayed until some order of the court shall have been complied with: as, when the plaintiff resides in a foreign country or in another state, or is insolvent, and he has been ruled to give security for costs, the proceedings are stayed until such security shall be given, 3 Chitty, Pract. 633, 635, or until the payment of costs in a former action. 1 Chitty, Bail. 195.

STEALING. This term imports, *ex vi termini*, nearly the same as larceny; but in common parlance it does not always import a felony: as, for example, you stole an acre of my land.

In slander cases, it seems that the term stealing takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter. Starkie, Sland. 80; 12 Johns. N. Y. 239; 3 Binn. Penn. 546.

STEELBOW GOODS. Instruments of husbandry, cattle, corn, etc., delivered by a landlord to his tenant on condition that the like number of goods of like quality should be returned on expiration of the lease. Bell, Dict.; Stair, Inst. 285, § 81.

STELLIONATE. In Civil Law. A name given generally to all species of frauds committed in making contracts.

This word is said to be derived from the Latin *stellio*, a kind of lizard remarkable for its cunning and the change of its color, because those guilty of frauds used every art and cunning to conceal them. But more particularly it was the crime of a person who fraudulently assigned, sold, or engaged the thing which he had before assigned, sold, or engaged to another, unknown to the person with whom he was dealing. Dig. 47. 20. 3; Code, 9. 34. 1; Merlin, Répert.; La. Civ. Code, art. 2069; 1 Brown, Civ. Law, 426.

STEP-DAUGHTER. The daughter of one's wife by a former husband, or of one's husband by a former wife.

STEP-FATHER. The husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

STEP-MOTHER. The wife of one's father by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

STEP-SON. The son of one's wife by a former husband, or of one's husband by a former wife.

STERE. A French measure of solidity, used in measuring wood. It is a cubic metre. See MEASURE.

STERILITY. Barrenness; incapacity to produce a child. It is curable and incurable: when of the latter kind at the time of the marriage, and arising from impotency, it is a good cause for dissolving a marriage. 1 Foderé, Méd. Lég. § 254. See IMPOTENCY.

STERLING. Current money of Great Britain, but anciently a small coin worth about one penny, and so called, as some suppose, because it was stamped with the figure of a small star, or, as others suppose, because it was first stamped in England in the reign of king John by merchants from Germany called Esterlings. *Pounds sterling* originally signified so many pounds in weight of these coins. Thus, we find in Matthew Paris, A.D 1242, the expression *Accepit a rege pro sti pendio tredecim libras esterlingorum.* The secondary or derived sense is a certain value in current money, whether in coins or other currency. Lowndes, 14; Watts, Gloss. *Sterling.*

STET PROCESSUS (Lat.). **In Practice.** An order made, upon proper cause shown, that the *process remain stationary.* As, where a defendant having become insolvent would, by moving judgment in the case of nonsuit, compel a plaintiff to proceed, the court will, on an affidavit of the fact of insolvency, award a *stet processus.* See 7 Taunt. 180; 1 Chitty, Bail. 738; 10 Wentworth, Plead. 43.

STEVEDORE. A person employed in loading and unloading vessels. He has no maritime lien on the ship for wages. Dunlap, Adm. Pract. 98.

STEWARD OF ALL ENGLAND. In Old English Law. An officer who was invested with various powers; and, among others, it was his duty to preside on the trial of peers.

STEWS. In English Law. Places formerly permitted in England to women of professed lewdness, and who for hire would prostitute their bodies to all comers.

These places were so called because the dissolute persons who visited them prepared themselves by bathing,—the word stews being derived from the old French *estuves*, stove, or hot bath. Coke, 3d Inst. 205.

STILLICIDIUM (Lat.). **In Civil Law.** The rain-water that falls from the roof or eaves of a house by scattered drops. When it is gathered into a spout, it is called *flumen.*

Without the constitution of one or other of these servitudes, no proprietor can build so as to throw the rain that falls from his house directly on his neighbor's grounds; for it is a restriction upon all property, *nemo potest immittere in alienum;* and he who in building breaks through that restraint truly builds on another man's property; because to whomsoever the area belongs, to him also belongs whatever is above it: *cujus est solum, ejus est usque ad cœlum.* 3 Burge, Confl. of Laws, 405. See SERVITUS STILLICIDII; Inst. 3. 2. 1; Dig. 8. 2. 2.

STINT. The proportionable part of a

man's cattle which he may keep upon the common. The general rule is that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed. There may be such a thing as common without stint or number; but this is seldom granted, and a grantee cannot grant it over. 3 Blackstone, Comm. 239; 1 Ld. Raym. 407.

STIPES. Stock; source of descent or title. Ainsworth, Dict.; 2 Sharswood, Blackst. Comm. 209.

STIPULATIO (Lat.). **In Roman Law.** A contract made in the following manner: viz., the person to whom the promise was to be made proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete.

It was essentially necessary that both parties should speak (so that a dumb man could not enter into a stipulation), that the person making the promise should answer conformably to the specific question proposed without any material interval of time, and with the intention of contracting an obligation. No consideration was required.

STIPULATION. A material article in an agreement.

The term appears to have derived its meaning from the use of *stipulatio* above given; though it is applied more correctly and more conformably to its original meaning to denote the insisting upon and requiring any particular engagement. 2 Pothier, Obl. Evans ed. 19.

In Admiralty Practice. A recognizance of certain persons (called in the old law *fide jussors*) in the nature of bail for the appearance of a defendant. 3 Blackstone, Comm. 108.

These stipulations are of three sorts: namely, *judicatum solvi*, by which the party is absolutely bound to pay such sum as may be adjudged by the court; *de judicio sisti*, by which he is bound to appear from time to time during the pendency of the suit, and to abide the sentence; *de ratio*, or *de rato*, by which he engages to ratify the acts of his proctor: this stipulation is not usual in the admiralty courts of the United States.

The securities are taken in the following manner: namely, *cautio fide jussoria*, by sureties; *pignoratitia*, by deposit; *juratoria*, by oath: this security is given when the party is too poor to find sureties, at the discretion of the court; *nude promissoria*, by bare promise: this security is unknown in the admiralty courts of the United States. Hall, Adm. Pract. 12; Dunlap, Adm. Pract. 150, 151. See 17 Am. Jur. 51.

STIRPES (Lat.). **Descents.** The root, stem, or stock of a tree. Figuratively, it signifies in law that person from whom a family is descended, and also the kindred or family. 2 Blackstone, Comm.

STOCK. In Mercantile Law. The capital of a merchant, tradesman, or other person, including his merchandise, money, and credits. The goods and wares he has for sale and traffic. The capital of corporations: this latter is usually divided into equal shares of a determined value. The indebtedness of states is sometimes represented by stock, and sometimes by bonds. Stock is inscribed on the proper books in the name of the person owning it, and can only be transferred by such person or his attorney. Bonds are transferable by delivery, and are payable to bearer. The United States debt consists in part of stock and bonds, as does also the debt of several of the states. The debt of Great Britain is entirely in stock.

2. Stock held by individuals in corporate companies or in government loans is generally considered as personal property 4 Dane, Abr. 670; 6 Cush. Mass. 282; Angell & A. Corp. § 560. See PERSONAL PROPERTY. Certificates of stock are usually issued to the person to whom it is transferred; and when a new transfer is effected, such certificate is surrendered and cancelled, a new one being issued to the transferee. Stock is sometimes sold by delivering the certificate, accompanied by a power of attorney to transfer it; but it appears that such a sale amounts to no more than a mere equitable assignment. 2 Wheat. 393; 1 Pet. 299; 10 *id.* 616. See 3 T. B. Monr. Ky. 126.

Stock issued by the agent of a company transcending his authority, as in the case of an over-issue, is not binding on the company. 13 N. Y. 599; 17 *id.* 592.

Descents. A metaphorical expression which designates in the genealogy of a family the person from whom others are descended: those persons who have so descended are called branches. See 1 Roper, on Leg. 103; 2 Belt, Suppl. Ves. Ch. 307; BRANCH; DESCENT; LINE; STIRPES.

STOCK-BROKER. See BROKER.

STOCK-EXCHANGE. A building or room in which stock-brokers meet to transact their business of purchasing or selling stocks.

In large cities the stock business is transacted through the medium of the members of the board of brokers. This is an association of stock-brokers governed by rules and regulations made by themselves, to which all the members are obliged to subject themselves. Admission is procured by ballot, and a member defaulting in his obligations forfeits his seat. A regular register of all the transactions is kept by an officer of the association, and questions arising between the members are generally decided by an arbitration committee. The official record of sales is the best evidence of the price of any stock on any particular day. The stocks dealt in at the sessions of the board are those which are placed on the list by a regular vote of the association; and when it is proposed to add a stock to the list, a committee is appointed to examine into the matter, and the board is generally guided by the report of such committee. Sewell, Bankruptcy.

STOCKS. In Criminal Law. A machine, commonly made of wood, with holes in

it, in which to confine persons accused of or guilty of crime.

It was used either to confine unruly offenders by way of security, or convicted criminals for punishment. This barbarous punishment has been generally abandoned in the United States.

STOPPAGE IN TRANSITU. A resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them. 15 Me. 314.

For most purposes, the possession of the carrier is considered to be that of the buyer; but by virtue of this right, which is an extension of the right of lien, the vendor may reclaim the possession before they reach the vendee, in case of the insolvency of the latter. 12 Pick. Mass. 313; 4 Gray, Mass. 336; 2 Caines, N. Y. 98; 8 Mees. & W. Exch. 341.

2. The vendor, or a consignor to whom the vendee is liable for the price, 3 East, 93; 6 *id.* 17; 15 *id.* 419; 13 Me. 103; 1 Binn. Penn. 106; see 4 Campb. 31; 2 Bingh. N. C. 83; or a general or special agent acting for him, 9 Mees. & W. Exch. 518; 2 Jac. & W. Ch. 349; 5 Whart. Penn. 189; 13 Me. 93. See 1 Moore & P. 515; 4 Bingh. 479; 5 Term, 404; 4 Gray, Mass. 367; 1 Hill, N. Y. 302; 5 Mass. 157, may exercise the right.

There need not be a manual seizure: it is sufficient if a claim adverse to the buyer be made during their passage. 2 Bos. & P. 457; 7 Taunt. 169; 1 Esp. 240; 2 *id.* 613; 9 Mees. & W. Exch. 518; 13 Me. 93; 5 Den. N. Y. 333.

3. The goods sold *must be unpaid for*, either wholly or partially. 3 East, 102; 7 Term, 440; 15 Me. 314; 2 Exch. 702. See 5 Carr. & P. 179. As to the rule where a note has been given, see 2 Mees. & W. Exch. 375; 7 Mass. 453; 4 Cush. Mass. 33; 7 Penn. St. 301; 14 *id.* 48; where there has been a pre-existing debt, 4 Campb. 31; 16 Pick. Mass. 475; 3 Paige, Ch. N. Y. 373; 1 Binn. Penn. 106; 1 Bos. & P. 563; where there are mutual credits, 7 Dowl. & R. 126; 4 Campb. 31; 16 Pick. Mass. 467. The *vendee* must be *insolvent*. 6 East, 17; 4 Ad. & E. 332; 5 Barnew. & Ad. 313; 20 Conn. 54; 8 Pick. Mass. 198; 14 Penn. St. 51; Smith, Merc. Law, Am. ed. 1847, 548, n. See 3 East, 585; 6 C. Rob. Adm. 321.

4. The goods must be in transit, 3 Term, 466; 15 B. Monr. Ky. 270; 16 Pick. Mass. 474; 20 N. H. 154; the goods must have come actually into the hands of the vendee or some person acting for him, 2 Mees. & W. Exch. 632; 10 *id.* 436; 2 Crompt. & J. Exch. 218; 1 Pet. 386; 3 Mas. C. C. 107; 2 Strobh. So. C. 309; 23 Wend. N. Y. 611, or constructively, as, by reaching the place of destination, 9 Barnew. & C. 422; 4 C. B. 837; 3 Bos. & P. 320, 469; 7 Mass. 457; 20 N. H. 154; 2 Curt. C. C. 259; 3 Vt. 49, or by coming into an agent's possession, 5 East, 175; 7 Term, 440; 4 Campb. 181; 7 Mass. 453; 4 Dan. Ky. 7; 30 Penn. St. 254; see 22 Conn. 473; 17 N. Y. 249; 7 Cal. 213, or by being deposited for the vendee in a public store or warehouse, 5 Den. N. Y. 631; 7 Penn. St. 301; 7 Mann. & G. 360; 4 Campb. 251, or by delivery of part for the whole, 14 Mees. & W. Exch. 28; 4 Bos. & P. 69; 1 Carr. & P. 207; 1 Barnew. & C. 180; 2 *id.* 540; 14 B. Monr. Ky. 324, to defeat the right. As to the effect of transfer of bill of lading, see Story, Sales, §§ 343–347; 16 N. Y. 325; 16 Pick. Mass. 467; 24 *id.* 42; 34 Me. 554; 3 Conn. 9; 24 Vt. 55; 4 Mas. C. C. 5; 6 Cranch, 338; 1 Pet. 445; 7 Ad. & E. 29.

5. The effect of the exercise of this right is to repossess the parties of the same rights which they had before the vendor resigned his possession of the goods sold. 6 East, 27; 1 Q. B. 389; 5 Barnew. & Ad. 339; 10 Barnew. & C. 99; 14 Me. 314; 5 Ohio, 98; 20 Conn. 53; 10 Tex. 2.

See, generally, Brown, Story, Long, on Sales; Parsons, on Contracts; Cross, on Lien; Whittaker, on Stoppage in Transitu.

STORES. The victuals and provisions collected together for the subsistence of a ship's company, of a camp, and the like.

STOUTHRIEFF. In Scotch Law. Formerly this word included in its signification every species of theft accompanied with violence to the person; but of late years it has become the *vox signata* for forcible and masterful depredation within or near the dwelling-house; while robbery has been more particularly applied to violent depredation on the highway or accompanied by housebreaking. Alison, Princ. Scotch Law, 227.

STOWAGE. In Maritime Law. The proper arrangement in a ship of the different articles of which a cargo consists, so that they may not injure each other by friction or be damaged by the leakage of the ship.

The master of the ship is bound to attend to the stowage unless by custom or agreement this business is to be performed by persons employed by the merchant. Abbott, Shipp. 228; Pardessus, Dr. Com. n. 721. See STEVEDORE.

Merchandise and other property must be stored under deck, unless a special agreement or established custom and usage authorizes their carriage on deck.

STRANDING. In Maritime Law. The running of a ship or other vessel on shore: it is either accidental or voluntary.

Accidental stranding takes place where the ship is driven on shore by the winds and waves.

Voluntary stranding takes place where the ship is run on shore either to preserve her from a worse fate or for some fraudulent purpose. Marshall, Ins. b. 1, c. 12, s. 1.

2. It is of great consequence to define accurately what shall be deemed a stranding; but this is no easy matter. In one case, a ship having run on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from shore, which were placed there to keep up the banks of the river, and having remained on these piles until they

were cut away, was considered by Lord Kenyon to have been stranded. Marshall, Ins. b. 7, s. 3. In another case, a ship arrived in the river Thames, and upon coming up to the Pool, which was full of vessels, one brig ran foul of her bow and another of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her: this Lord Kenyon told the jury that, unskilled as he was in nautical affairs, he thought he could safely pronounce to be no stranding. 1 Campb. 131; 3 *id.* 431; 4 Maule & S. 503; 5 Barnew. & Ald. 225; 4 Barnew. & C. 736; 7 *id.* 224. See PERILS OF THE SEA.

3. It may be said, in general terms, that in order to constitute a stranding the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing object; and the vessel must take the ground by reason of extraordinary casualty, and not from one of the ordinary incidents of a voyage. Arnould, Insurance, §§ 297, 318, 319. And see Phillips, Ins.

STRANGER. A person born out of the United States; but in this sense the term alien is more properly applied until he becomes naturalized.

A person who is not privy to an act or contract: example, he who is a *stranger* to the issue shall not take advantage of the verdict. Brooke, Abr. *Record*, pl. 3; Viner, Abr. 1. And see Comyns, Dig. *Abatement* (H 54).

When a man undertakes to do a thing, and a stranger interrupts him, this is no excuse. Comyns, Dig. *Condition* (L 14). When a party undertakes that a stranger shall do a certain thing, he becomes liable as soon as the stranger refuses to perform it. Bacon, Abr. *Conditions* (Q 4).

STRATAGEM. A deception, either by words or actions, in times of war, in order to obtain an advantage over an enemy.

Stratagems, though contrary to morality, have been justified unless they have been accompanied by perfidy, injurious to the rights of humanity, as in the example given by Vattel of an English frigate, which during a war between France and England appeared off Calais and made signals of distress in order to allure some vessel to come to its relief, and seized a shallop and its crew who had generously gone out to render it assistance. Vattel, Droit des Gens, liv. 3, c. 9, § 178.

Sometimes stratagems are employed in making contracts. This is unlawful and fraudulent, and avoids the contract. See FRAUD.

STRATOCRACY. A military government; government by military chiefs of an army.

STREAM. A current of water. The right to a water-course is not a right in the fluid itself, so much as a right in the current of the stream. 2 Bouvier, Inst. n. 1612. See RIVER; WATER-COURSE.

STREET. A public thoroughfare or highway in a city or village. 4 Serg. & R. Penn. 106; 11 Barb. N. Y. 399. See HIGHWAY.

2. A street, besides its use as a highway for travel, may be used for the accommodation of drains, sewers, aqueducts, water- and gas-pipes, lines of telegraph, and for other purposes conducive to the general police, sanitary and business interests, of a city. 10 Barb. N. Y. 26, 360; 15 *id.* 210; 17 *id.* 435; 2 R. I. 15. A street may be used by individuals for the lading and unlading of carriages, for the temporary deposit of movables or of materials and scaffoldings for building or repairing, provided such use shall not unreasonably abridge or incommode its primary use for travel. 6 East, 427; 3 Campb. 230; Hawkins, Pl. Cr. c. 76, s. 49; 4 Ad. & E. 405; 4 Iowa, 199; 1 Den. N. Y. 524; 1 Serg. & R. Penn. 219. So a sidewalk which is part of a street may be excavated for a cellar, pierced by an aperture for the admission of light, or overhung by an awning. But if the highway becomes more unsafe and a passenger is injured by reason thereof, the individual so using the street will be responsible for the damages. 18 N. Y. 79–84; 4 Carr. & P. 262; 23 Wend. N. Y. 446; 3 Cush. Mass. 174; 6 *id.* 524; 13 Metc. Mass. 299. But an individual has no right to have an auction in a street, 13 Serg. & R. Penn. 403, or to keep a crowd of carriages standing therein, 3 Campb. 230, or to attract a disorderly crowd to witness a caricature in a shop-window. 6 Carr. & P. 636. Such an act constitutes a nuisance. Angell, High. c. 6.

3. The owners of lands adjoining a street are not entitled to compensation for damages occasioned by a change of grade or other lawful alteration of the street, 4 Term, 794; 2 Barnew. & A. 403; 1 Pick. Mass. 417; 4 N. Y. 195; 18 Penn. St. 87; 14 Mo. 20; 2 R. I. 154; 6 Wheat. 593; 20 How. 135, unless such damages result from a want of due skill and care or an abuse of authority. 3 Wils. 461; 5 Barnew. & Ald. 837; 1 Sandf. N. Y. 22; 16 N. Y. 158, and note.

Under the statutes of several of the states, assessments are levied upon the owners of lots specially benefited by opening, widening, or improving streets, to defray the expense thereof; and such assessments have been adjudged to be a constitutional exercise of the taxing power. 4 N. Y. 419; 8 Wend. N. Y. 85; 18 Penn. St. 26; 21 *id.* 147; 3 Watts, Penn. 293; 23 Conn. 189; 5 Gill, Md. 383; 27 Mo. 209; 4 R. I. 230; Angell, Highways, c. 4.

STRICT SETTLEMENT. A settlement of lands to the parent for life, and after his death to his first and other sons in tail, with an interposition of trustees to preserve the contingent remainders.

STRICTISSIMI JURIS (Lat. the most strict right or law). In general, when a person receives an advantage, as the grant of a license, he is bound to conform strictly

to the exercise of the rights given him by it, and in case of a dispute it will be strictly construed. See 3 Stor. C. C. 159.

STRICTUM JUS (Lat.). Mere law, in contradistinction to equity.

STRIKING A DOCKET. In English Practice. Entering the creditor's affidavit and bond in bankruptcy. 1 Deac. Bank. 106.

STRIKING A JURY. In English Practice. Where, for nicety of the matter in dispute, or other cause, a special jury is necessary, upon motion and rule granted thereon, the sheriff is to attend the prothonotary or proper officer with the book of freeholders, and to take indifferently forty-eight of the principal freeholders, when the attorneys on each side, being present, are to strike off twelve respectively, and the remaining twenty-four are returned. 3 Sharswood, Blackst. Comm. 357. Essentially the same practice prevails in New York. Graham, Pract. 277.

STRUCK. In Pleading. A word essential in an indictment for murder, when the death arises from any wounding, beating, or bruising. 1 Bulstr. 184; 5 Coke, 122; 3 Mod. 202; Croke Jac. 655; Palm. 282; 2 Hale, Pl. Cr. 184, 186, 187; Hawkins, Pl. Cr. b. 2, c. 23, s. 82; 1 Chitty, Crim. Law, *243; 6 Binn. Penn. 179.

STRUCK OFF. A term applied to a case which the court, having no jurisdiction over, and not being able to give judgment, order to be taken off the record. This is done by an entry to that effect.

STRUMPET. A harlot, or courtesan. The word was formerly used as an addition. Jacob, Law Dict.

STULTIFY (Lat. *stultus*, stupid). To make one out mentally incapacitated for the performance of an act.

It has been laid down by old authorities, Littleton, § 405; 4 Coke, 123; Croke Eliz. 398, that no man should be allowed to stultify himself, *i.e.* plead disability through mental unsoundness. This maxim was soon doubted as law, 1 Hagg. Eccl. 414; 2 Sharswood, Blackst. Comm. 292, and has been completely overturned. 4 Kent, Comm. 451.

STUPIDITY. In Medical Jurisprudence. That state of the mind which cannot perceive and embrace the data presented to it by the senses; and therefore the stupid person can, in general, form no correct judgment. It is a want of the perceptive powers. Ray, Med. Jur. c. 3, § 40. See IMBECILITY.

STUPRUM (Lat.). **In Roman Law.** The criminal sexual intercourse which took place between a man and a single woman, maid, or widow, who before lived honestly. Inst. 4. 18. 4; Dig. 48. 5. 6; 50. 16. 101; 1 Bouvier, Inst. Theolo. ps. 3, quæst. 2, art. 2, p. 252.

SUB-AGENT. A person appointed by an agent to perform some duty, or the whole of the business relating to his agency.

2. A sub-agent is generally invested with the same rights, and incurs the same liabilities in regard to his immediate employers, as if he were the sole and real principal. To this general rule there are some exceptions: for example, where, by the general usage of trade or the agreement of the parties, sub-agents are ordinarily or necessarily employed to accomplish the ends of the agency, there, if the agency is avowed and the credit is exclusively given to the principal, the intermediate agent may be entirely exempted from all liability to the sub-agent. The agent, however, will be liable to the sub-agent unless such exclusive credit has been given, although the real principal or superior may also be liable. Story, Ag. § 386; Paley, Ag. Lloyd ed. 49. When the agent employs a sub-agent to do the whole or any part of the business of the agency, without the knowledge or consent of his principal, either express or implied, the latter will only be entitled to recover from his immediate employer, and his sole responsibility is also to him. In this case the superior or real principal is not responsible to the sub-agent, because there is no privity between them. Story, Ag. §§ 13, 14, 15, 217, 387.

3. Where, by an express or implied agreement of the parties, or by the usages of trade, a sub-agent is to be employed, a privity exists between the principal and the sub-agent, and the latter may justly maintain his claim for compensation both against the principal and his immediate employer, unless exclusive credit is given to one of them; and in that case his remedy is limited to that party. 1 Livermore, Ag. 64; 6 Taunt. 147.

SUB-CONTRACT. A contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service. 9 Mees. & W. Exch. 710; 3 Gray, Mass. 362; 17 Wend. N. Y. 550; 22 *id.* 395; 1 E. D. Smith, N. Y. 716; 2 *id.* 558.

SUB MODO (Lat.). Under a qualification. A legacy may be given *sub modo*, that is, subject to a condition or qualification.

SUB PEDE SIGILLI (Lat.). Under the foot of the seal; under seal. This expression is used when it is required that a record should be certified under the seal of the court.

SUB POTESTATE (Lat.). Under, or subject to, the power of another: as, a wife is under the power of her husband; a child is subject to that of his father; a slave to that of his master.

SUB SILENTIO (Lat.). Under silence; without any notice being taken. Sometimes passing a thing *sub silentio* is evidence of consent. See SILENCE.

SUB-TENANT. An under-tenant.

SUBALTERN. An officer who exercises his authority under the superintendence and control of a superior.

SUBDIVIDE. To divide a part of a thing which has already been divided. For example, when a person dies leaving children, and grandchildren, the children of one of his own who is dead, his property is divided into as many shares as he had children, including the deceased, and the share of the deceased is subdivided into as many shares as he had children.

SUBINFEUDATION. The act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself.

It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation. This was forbidden by the statute of Quia Emptores. 18 Ed. I.; 2 Blackstone, Comm. 91; 3 Kent, Comm. 406.

SUBJECT. In Scotch Law. The thing which is the object of an agreement.

In Governmental Law. An individual member of a nation, who is subject to the laws. This term is used in contradistinction to *citizen*, which is applied to the same individual when considering his political rights.

In monarchical governments, by subject is meant one who owes permanent allegiance to the monarch. See Body Politic; Greenleaf, Ev. § 286; Phillipps, Ev. 732, n. 1.

SUBJECT-MATTER. The cause; the object; the thing in dispute.

It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action: as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding in a court having jurisdiction of civil cases only. 10 Coke, 68, 76; 1 Ventr. 133; 8 Mass. 87; 12 *id.* 367. In such case, neither a plea to the jurisdiction nor any other plea would be required to oust the court of jurisdiction. The cause might be dismissed upon motion by the court, ex officio.

SUBJECTION (Lat. *sub*, under, *jacio*, to put, throw). The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private* subjection is subjection to the authority of private persons. *Public* subjection is subjection to the authority of public persons.

SUB-LEASE. A lease by a tenant to another person of a part of the premises held by him; an under-lease.

SUBMISSION (Lat. *submissio*, — *sub*, under, *mittere*, to put,—a putting under. Used of persons or things. A putting one's person or property under the control of another). A yielding to authority. A citizen is bound to submit to the laws, a child to his parents, a guardian to his ward. A victor may enforce the submission of his enemy.

In Maritime Law. Submission on the part of the vanquished, and complete possession on the part of the victor, transfer property as between belligerents. 1 Gall. C. C. 532.

In Practice. An agreement, parol (oral or written) or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference. Encycl. Am. *Arbiter;* Kyd, Arb. 11; Caldwell, Arb. 16; 17 Ves. Ch. 419; 6 Bingh. 596; 3 Mees. & W. Exch 816; 6 Watts, Penn. 359; 16 Vt. 663; 4 N. Y. 157; 2 Barb. Ch. N. Y. 430.

2. It is the authority given by the parties to the arbitrators, empowering them to inquire into and determine the matters in dispute.

It may be *in pais*, or by rule of court, or under the various statutes. 1 Dev. No. C. 82.

It may be oral, but this is inconvenient, because open to disputes; by written agreement not under seal (in Louisiana and California the submission must be in writing, 5 La. 133; 2 Cal. 92); by indenture, with mutual covenants to abide by the decision of the arbitrator; by deed-poll, or by bond, each party executing an obligation to the other conditioned to be void respectively upon the performance of the award. Caldwell, Arb. 16; 6 Watts, Penn. 357. If *general* in terms, both law and fact are referred, 7 Ind. 49; if *limited*, the arbitrator cannot exceed his authority. 11 Cush. Mass. 37.

3. *When to be made.* A submission may be made at any time of causes not in court; and at common law, where a cause was depending, submission might be made by rule of court before the trial, or by order of *nisi prius* after it had commenced, which was afterwards made a rule of court. 1 Mann. & G. 976; 2 Barnew. & Ald. 395; 3 Serg. & R. Penn. 262; 1 Dall. Penn. 145, 355; 4 Halst. N. J. 198.

Who may make. Any one capable of making a disposition of his property or release of his right, or capable of suing or being sued, may make a binding submission to arbitration; but one under civil or natural incapacity cannot be bound by his submission. Watson, Arb. 65; Russell, Arb. 20; 2 P. Will. Ch. 45–50; 9 Ves. Ch. 350; 1 Dowl. & L. 145; 8 Me. 315; 11 *id.* 326; 2 N. H. 484; 8 Vt. 472; 16 Mass. 396; 5 Conn. 367; 1 Barb. N. Y. 584; 14 Johns. N. Y. 302; 5 Wend. N. Y. 20; 5 Hill, N. Y. 419; 2 Rob. Va. 761; 6 Munf. Va. 458; Paine, C. C. 646; 1 Wheat. 304; 5 How. 83.

4. In general, in cases of incapacity of the real owner of property, as well as in many cases of agency, the person who has the legal control of the property may make submission, including a *husband* for his wife, Strange, 351; 5 Ves. 846; a *parent* or *guardian* for an infant, Latch, 207; March, 111, 141; Freem. Ch. 62, 139; 1 Wils. 28; 11 Me. 326; 12 Conn. 376; 3 Caines, N. Y. 253; but not a *guardian ad litem*, 9 Humphr. Tenn. 129; a *trustee* for his cestui que trust, 3 Esp. 101; 2 Chitt. Bail. 40; 1 Lutw. 571; an *attorney* for his client, 1 Wils. 28, 58;

1 Salk. 70; 1 Ld. Raym. 246; 12 Mod. 129; Dy. 217 *b*; 12 Ala. 252; 9 Penn. St. 101; 19 *id.* 418; 23 *id.* 393; 1 Park. Crim. N. Y. 387; 2 Hill, N. Y. 271; 4 T. B. Monr. Ky. 375; 7 Cranch, 436; but see 6 Weekl. Rep. 10; an *agent* duly authorized for his principal, 4 Taunt. 378, 486; 8 Barnew. & C. 16; 5 *id.* 141; 8 Vt. 472; 11 Mass. 449; 5 Green, N. J. 38; 20 N. H. 405; 8 N. Y. 160; an *executor* or *administrator* at his own peril, but not thereby necessarily admitting assets, 2 Strange, 1144; 5 Term, 6; 7 *id.* 453; 5 Mass. 15; 20 Pick. Mass. 584; 6 Leigh, Va. 62; 5 T. B. Monr. Ky. 240; 5 Conn. 621; see 5 Bingh. 200; 1 Barb. N. Y. 419; 3 Harr. N. J. 442; *assignees* under bankruptcy and insolvency laws, under the statutory restrictions, stat. 6 Geo. IV. c. 16, and state statutes; the right being limited in all cases to that which the person acting can control and legally dispose of, 6 Mass. 78; 6 Munf. Va. 453; 4 T. B. Monr. Ky. 240; 21 Miss. 133; BUT NOT INCLUDING a *partner* for a partnership. 3 Bingh. 101; Holt, 143; 1 Crompt. M. & R. Exch. 681; 1 Pet. 221; 19 Johns. N. Y. 137; 2 N. H. 284; 5 Gill & J. Md. 412; 12 Serg. & R. Penn. 243; Collyer, Partn. §§ 439–470; 3 Kent, Comm. 49.

5. *What may be* included in a submission. Generally, any matter which the parties might adjust by agreement, or which may be the subject of an action or suit at law, except perhaps actions (*qui tam*) on penal statutes by common informers; for crimes cannot be made the subject of adjustment and composition by arbitration, this being against the most obvious policy of the law, Caldwell, Arb. 12; Comyns, Dig. *Arb.* (D 3, 4); 5 Wend. N. Y. 111; 2 Cow. N. Y. 638; 3 Caines, N. Y. 320; 9 Johns. N. Y. 38; 13 Serg. & R. Penn. 319; 2 Rawle, Penn. 341; 7 Conn. 345; 6 N. H. 177; 16 Miss. 298; 16 Vt. 450; 10 Gill & J. Md. 192; 5 Munf. Va. 10; 4 Dall. Penn. 120; including a debt certain on a specialty, any question of law, the construction of a will or other instrument, any personal injury on which a suit will lie for damages, although it may be also indictable. 2 Madd. Ch. 6; 7 Taunt. 422; 9 Ves. Ch. 367; 10 Mod. 59; 1 Lev. 592; 8 Me. 119, 288; 6 Pick. Mass. 148.

6. An agreement to refer future disputes will not be enforced by a decree of specific performance, nor will an action lie for refusing to appoint an arbitrator in accordance with such an agreement. 6 Ves. Ch. 815; 2 Sim. & S. Ch. 418; 2 Bos. & P. 135; 2 Stor. C. C. 800; 15 Ga. 473. It is considered against public policy to exclude from the tribunals of the state disputes the nature of which cannot be foreseen. 1 Wils. Ch. 129; 4 Brown, Ch. 312, 315; 2 Ves. Ch. 131; 19 *id.* 431; 1 Swanst. Ch. 40. See 31 Penn. St. 306.

Effect of. A submission of a case in court works a discontinuance and a waiver of defects in the process, 2 Penn. St. 868; 18 Johns. N. Y. 22; 12 Wend. N. Y. 403; 3 Sandf. N. Y. 4; 10 Yerg. Tenn. 439; 2 Humphr. Tenn. 516; 10 Mass. 253; 5 Gray, Mass. 492; 4 Hen. & M. Va. 363; 5 Munf. Va. 10; 5 Wisc. 421; 4 N. J. 647; 41 Me. 355; 30 Vt. 610; 2 Curt. C. C. 28; see 20 Barb. N. Y. 262; 9 Tex. 44; and the bail or sureties on a replevin bond are discharged. 17 Mass. 591; 1 Pick. Mass. 192; 4 Green, N. J. 277; 7 *id.* 348; 1 Ired. No. C. 9; 3 Ark. 214; 2 Barnew. & Ad. 774; Russell, Arb. 88. But see 6 Taunt. 379; 10 Bingh 118. But this rule has been modified in England by statute. Stat. 17 & 18 Vict. c. 125, § 11; 8 Exch. 327.

7. The submission which defines and limits as well as confers and imposes the duty of the arbitrator must be followed by him in his conduct and award; but a fair and liberal construction is allowed in its interpretation. 1 Wms. Saund. 65; Croke Car. 226; 11 Ark. 477; 3 Penn. St. 144; 13 Johns. N. Y. 187; 2 N. H. 126; 2 Pick. Mass. 534; 3 Halst. N. J. 195; 1 Pet. 222. If general, it submits both law and fact, 7 Ind. 49; if limited, the arbitrator cannot exceed his authority. 11 Cush. Mass. 37.

The statutes of many of the states of the United States provide for submissions by the parties before a justice of the peace, in which case the award will be enforced as if it had been made under rule of court; and statutes also regulate submissions made under rule of court.

8. *Revocation of* a submission may take place at any time previous to the award, though it be expressed in the agreement to be irrevocable. The remedy of the injured party is by an action for breach of the agreement. 2 Kebl. 64; 8 Coke, 81; 5 Taunt. 402; 7 East, 608; 6 Bingh. 443; 4 Barnew. & C. 103; 10 *id.* 483; 16 Johns. N. Y. 205; 1 Cow. N. Y. 235; 12 Wend. N. Y. 578; 1 Hill, N. Y. 44; 12 Mass. 49; 20 Vt. 198; 28 *id.* 532; 26 Me. 251, 459; 3 Day, Conn. 118; 23 Penn. St. 393; 4 Sneed, Tenn. 462; 6 Dan. Ky. 307. A submission by deed must be revoked by deed. 8 Coke, 72, and cases above.

A submission under rule of court is generally irrevocable, by force of statutory provisions, both in England and the United States. Stat. 3 & 4 Will. IV. c. 42; 5 Burr. 497; 12 Mass. 47; 4 Me. 459; 1 Ashm. Penn. 45; 1 Binn. Penn. 42; 3 Yeates, Penn. 42; 6 N. H. 36; 4 Conn. 498; 5 Paige, Ch. N. Y. 575; 11 *id.* 529; 3 Halst. N. J. 116; 3 Ired. No. C. 333; 19 Ohio, 245.

9. A submission at common law is generally revoked by the *death* of either party (unless it be stipulated otherwise), or of the arbitrator, or his refusal to act, 1 Marsh. 366; 7 Taunt. 571; 1 Moore, 287; 2 Barnew. & Ald. 394; 3 Barnew. & C. 144; 3 Dowl. & R. 608; 3 Bingh. N. C. 20; 6 *id.* 158; 8 Mees. & W. Exch. 873; but see 15 Pick. Mass. 79; 3 Halst. N. J. 116; 3 Gill, Md. 192; 2 Gill & J. Md. 479; 3 Swan, Tenn. 90; 15 Ga. 473; by *marriage* of a feme sole, and the husband and wife may then be sued on her arbitration bond. 2 Kebl. 865; Rolle. 331; 5 East, 266. It is not revoked by the bank

ruptcy of the party or by the death of the arbitrator after publication of the award. 4 Barnew. & Ald. 250; 2 Chitt. Bail, 43; 2 Mann. & G. 55; 1 C. B. 131; 9 Barnew. & C. 629; 29 Eng. L. & Eq. 362; 21 Ga. 1.

SUBNOTATIONS (Lat.). **In Civil Law.** The answers of the prince to questions which had been put to him respecting some obscure or doubtful point of law. See RESCRIPT.

SUBORNATION OF PERJURY. In Criminal Law. The procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited. Hawkins, Pl. Cr. b. 1, c. 69, s. 10.

2. To complete the offence, the false oath must be actually taken, and no abortive *attempt* to solicit will complete the crime. 2 Show. 1; 5 Metc. Mass. 241.

But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law. 2 East, 17; 6 *id.* 464; 2 Chitty, Crim. Law, 317. For a form of an indictment for an attempt to suborn a person to commit perjury, see 2 Chitty, Crim. Law, 480.

3. The act of congress of March 3, 1825, § 13, provides that if any person shall knowingly or wilfully procure any such perjury, mentioned in the act, to be committed, every such person so offending shall be guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. See 8 How. 41, and, generally, Viner, Abr.; Bishop, Crim. Law.

SUBPŒNA (Lat. *sub*, under, *pœna*, penalty). **In Practice.** A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a *subpœna ad testificandum*.

On proof of service of a subpœna upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend as commanded.

In Chancery Practice. A mandatory writ or process directed to and requiring one or more persons to appear at a time to come and answer the matters charged against him or them. The writ of subpœna was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence; but this writ was used in the court of chancery for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff.

It was invented by John Waltham, bishop of Salisbury, and chancellor to Rich. II., under the authority of the statutes of Westminster 2, and 13 Edw. I. c. 34, which enabled him to devise new writs. Cruise, Dig. t. 11, c. 1, §§ 12–17. See Viner, Abr. *Subpœna;* 1 Swanst. 209; Spence, Eq. Jur.

SUBPŒNA DUCES TECUM. In Practice. A writ or process of the same kind as the *subpœna ad testificandum*, including a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue. 3 Blackstone, Comm. 382. See DISCOVERY.

SUBREPTIO (Lat.). **In Civil Law.** Obtaining gifts of escheat, etc. from the king by concealing the truth. Bell, Dict.; Calvinus, Lex. *Subripere.*

SUBREPTION. In French Law. The fraud committed to obtain a pardon, title, or grant, by alleging facts contrary to truth.

SUBROGATION. The substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor, and which makes the right, the mortgage, or the security which the creditor has pass to the person who is subrogated to him,—that is to say, who enters into his right. Domat, Civ. Law, pt. i. l. iii. t. i. § vi.

It is a legal fiction by force of which an obligation extinguished by payment made by a third party is considered as continuing to subsist for the benefit of this third person, who makes but one and the same person with the creditor in the view of the law. Subrogation is the act of putting one thing in place of another, or one person in place of another. Guyot, Répertoire Universelle, *Subrogation*, sect. ii.

The substitution of one creditor to the rights and securities of another. *Subrogatio est transfusio unius creditoris in alium eadem vel mitiori conditione.* Merlin, Inst. de Droit, *Subrogatio.*

Subrogation gives to the substitute all the rights of the party for whom he is substituted. 4 Md. Ch. Dec. 253. Among the earlier civil-law writers, the term seems to have been used synonymously with *substitution;* or, rather, *substitution* included subrogation as well as its present more limited signification. See Domat, Civ. Law, *passim;* Pothier, Obl. *passim.* The term *substitution* is now almost altogether confined to the law of devises and chancery practice. See SUBSTITUTION.

The word subrogation is originally found only in the civil law, and has been adopted, with the doctrine itself, thence into equity; but in the law as distinguished from equity it hardly appears as a term, except perhaps in those states where, as in Pennsylvania, equity is administered through the forms of law. There the term subrogation, adopted from the Roman law, has of late years come into quite general use. 6 Penn. St. 504. The equitable doctrine of marshalling assets is plainly derived from the Roman law of subrogation or substitution; and although the word is or, rather, has been used sparingly in the common law, many of the doctrines of subrogation are familiar to the courts of common law.

Subrogation differs from cession in this that while cession only substitutes the one to whom the debt is ceded in place of the ceder, in subrogation the debt would have become extinguished but for the effect of the subrogation; and, also, because

although subrogation supposes a change in the person of the creditor, it does not imply novation; but, through the fiction of the law, the party who is subrogated is considered as making only one and the same person with the creditor, whom he succeeds. Massè, Droit Commerciel, *Payment in Subrogation.*

It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide that he is entitled to be subrogated or substituted as to the equities and securities to the place of the creditor, as against the debtor and his co-sureties. Story, Eq. Jur. § 493, n.; 2 McLean, C. C. 451; 1 Dev. Ch. No. C. 137.

Subrogation of persons is of three sorts:—

First, the canonists understand by subrogation the succession of a priest to the rights of action of the occupant of a benefice who has died during a suit. Guyot, Répert. Univ. *Subrogation of Persons*, sect. i.

Second, the second sort arose from a local custom of the Bourbonnais, and had for its object the protection of the debtor from the effects of collusion on the part of the attaching creditor.

Third, subrogation in fact to aliens and pledges, which is only the change of one creditor for another. See Guyot, *ut sup.*, and, also, Massè, Droit Commerciel.

Nearly all the instances in which the common law has adopted the doctrines of subrogation have arisen under this latter class.

2. *Conventional* subrogation results, as its name indicates, from the agreement of the parties, and can take effect only by agreement. This agreement is, of course, with the party to be subrogated, and may be either by the debtor or creditor. La. Civ. Code, 1249.

Thus, it may happen when the creditor receiving payment from the third person subrogates the payer to his right against the debtor. This must happen by *express* agreement; but no formal words are required. This sort of subrogation only takes place where there is a payment of the debt by a third party,—not where there is an assignment, in which case subrogation results from the assignment.

This principle is recognized by the common law in cases where upon payment the securities are transferred to a party having an interest in the payment. Or, in case the debtor borrows money from a third party to pay a debt, he may subrogate the lender to the rights of the creditor; for by this change the rights of the other creditors are not injuriously affected. To make this mode of subrogation valid, the borrowing and discharge must take place before a notary; in the borrowing it must be declared that the money has been borrowed to make payment, and in the discharge, that it has been made with money furnished by the creditor. Massè, Droit Commerciel, lib. 5, tit. 1, ch. 5, §§ 1, 2.

3. *Legal* subrogation takes place to its full extent—

First, for the benefit of one who being himself a creditor pays the claim of another who has a preference over him by reason of his liens and securities. For in this case, it is said, it is to be presumed that he pays for the purpose of securing his own debt; and this distinguishes his case from that of a mere stranger. Domat, Civ. Law, part 1, lib. 3, tit. 1, § 6, art. 6; Dig. *qui pvt. in pig.* l. 16; l. 11, § 4; l. 12, § 9; l. 17, § 9. And so, at common law, if a junior mortgagor pays off the prior mortgage, he is entitled to demand an assignment thereof.

Second, for the benefit of the purchasers of an immovable, who uses the price which he paid in paying the creditors to whom the inheritance was mortgaged.

Third, for the benefit of him who, being held with others or for others for the payment of the debt, has an interest in discharging it.

Subrogation takes place for the benefit of co-promisors or co-guarantors, as between themselves, and for the benefit of sureties against their principals.

But between co-guarantors and co-promisors subrogation benefits him who pays the debt only to the extent of enabling him to recover from each separately his portion of the debt.

Whether one of four debtors who pays is subrogated *in solido* against the other three for their proportion, or only against each one separately for his share, is an open question. Guyot, *ub. sup.* But in case of the insolvency of one of the three, all who are solvent must divide the loss. This doctrine is adopted in the common law under the name of contribution. See CONTRIBUTION.

4. As against his co-sureties, the surety increasing the value of their joint security is entitled to subrogation only to the amount actually paid. 6 Ind. 857; 12 Gratt. Va. 642. Any arrangement by one co-surety with the principal enures to the benefit of all the co-sureties. 26 Ala. N. S. 280, 728.

If one of several grantees of a mortgagor pays the mortgage, the debt is discharged as to all. 7 Mass. 355.

Subrogation for the whole sum takes place only when the person who pays ought to have recourse to the principal debtor for the whole. But when the person paying ought only to have recourse for part, and is debtor without recourse and on his own account also, the subrogation will only be for the portions for which he might have recourse. Massè, *ub. sup.*

Most of the cases of subrogation so called in the common law arise from transactions of principals and sureties.

Courts of equity have held sureties entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt. Story, Eq. Jur. § 499.

It is a settled rule that in all cases where a party only secondarily liable on an obligation is compelled to discharge it, he has a right in a court of equity to stand in the place of the creditor, and be subrogated to all his rights against the party previously liable. 4 Johns. Ch. N. Y. 123; 3 Paige, Ch. N. Y. 117; 17 Johns. N. Y. 584; 2 Call, Va. 125; 11 Ves. Ch. 12, 22; 14 *id.* 162; 2

Binn. Penn. 382; 3 Stor. C. C. 392; 1 Gill & J. Md. 346; 2 Yerg. Tenn. 346; 6 Rand. Va. 98; 8 Watts, Penn. 384; 2 Penn. St. 296; 1 Harr. Del. 367; 1 Ired. Eq. No. C. 113; 11 Gratt. Va. 522; 2 M'Cord, Ch. So. C. 455; 3 Ala. N. s. 302; 25 *id.* 250; 5 B. Monr. Ky. 393; 3 Humphr. Tenn. 547; 6 Gill & J. Md. 243; 3 Leigh, Va. 272; 4 Hen. & M. Va. 436; 1 Dev. Eq. No. C. 137; 2 Dev. & B. Eq. No. C. 390; 10 Yerg. Tenn. 310; 27 Miss. 679; 17 Conn. 575; 17 Eng. L. & Eq. 346. This is clearly the case where the surety takes an assignment of the security. 2 Me. 341.

5. If a surety on a debt secured by mortgage pays the debt, he is entitled to the mortgage as security. 1 Turn. & R. Ch. 224; 4 Russ. Ch. 277; 1 Younge, Ch. 111; 3 Mylne & R. Ch. 183; 2 Swanst. Ch. 191; 2 Sim. Ch. 155. In all cases the payment must have been made by a party liable, and not by a mere volunteer. 3 Paige, Ch. N. Y. 117; 1 Spears, Eq. So. C. 37; 2 Brock. Va. 252. The creditor must have had his claim fully satisfied, 1 Gill & J. Md. 347; 3 Md. Ch. Dec. 334, and the surety claiming subrogation must have paid it, 6 Watts, Penn. 221; 7 Watts & S. Penn. 99; 3 Heyw. No. C. 14; 3 Barb. Ch. N. Y. 625; 11 Ired. No. C. 118; 13 Ill. 68, and is subrogated, where he has paid to redeem a security, only to the amount he has paid, whatever be the value of the security. 19 Miss. 632; 2 Sneed, Tenn. 93; 11 Gratt. Va. 522. But giving a note is payment within this rule. 8 Tex. 66.

Judgment obtained against the principal and surety does not destroy the relation as between themselves. 2 Ga. 239; 11 Barb. N. Y. 159. If a judgment is recovered against a debtor and surety separately for the same amount, the surety can enforce the judgment against his principal when assigned to him after he paid the amount of the judgment. 10 Johns. N. Y. 524; 3 Rich. Eq. So. C. 139.

A surety in a judgment, to obtain a stay of execution, is not entitled to be substituted on paying the judgment. 5 Watts & S. Penn. 352; 1 Penn. St. 512. Nor can the surety be subrogated, although he has paid a judgment, if he has brought suit against his principal and failed to recover. 8 Watts, Penn. 384.

6. If a judgment is recovered and the sureties pay, they are entitled to be subrogated, 1 Watts & S. Penn. 155; 3 Leigh, Va. 272; 14 Ga. 674; 5 B. Monr. Ky. 393; 22 Ala. N. s. 782; 3 Sandf. Ch. N. Y. 431, even where a mortgage had been given them, but which turned out to be invalid. 4 Hen. & M. Va. 436. This seems to be contradicted in 3 Gratt. Va. 343.

Entry of satisfaction on a judgment does not destroy subrogation, if the entry was not made at the instance of the surety. 20 Penn. St. 41.

Where the surety has become liable on the contract of his principal, when the principal fails to perform the contract the surety may pay and be subrogated. 6 Gill & J. Md. 243; 15 N. H. 119: thus, where the surety was held on a bond which he was obliged to pay, 2 Call, Va. 125; 1 Ired. Ch. No. C. 340; 3 *id.* 17, 147; 22 Vt. 274; and this even where the bond was given to the United States to pay duties on goods belonging to a third person. 4 Rand. Va. 438. And where the bond was given for the payment of the price of land, he was allowed to sell the land. 2 Dev. & B. No. C. 390; 3 Ala. N. s. 430; 2 B. Monr. Ky. 50.

But it is said the mere payment does not *ipso facto* subrogate him. 6 Watts & S. Penn. 190.

If the surety be also a debtor, there will be no substitution, unless expressly made, 2 Penn. St. 296; and the person who claims a right of subrogation must have superior equities to those opposing him. 3 Penn. St. 200.

Sureties of a surety, and his assignee, are entitled to all the rights of the surety, and to be substituted to his place as to all remedies against the principal or his estate. 5 Barb. N. Y. 398; 22 Vt. 274.

7. *Fourth*, subrogation is allowed in the civil law for the benefit of the beneficiary heir who has paid with his own money the debts of the inheritance. Massè, *ub. sup.*

Fifth, and for the benefit of the payer of a debt through the medium of a bill of exchange or promissory negotiable note. Code Commerciel, 159.

Sixth, and for the benefit of the successive indorsers of a note, to the rights of those who follow them against those who precede them, when they are called upon to pay the note.

The debt of the accepter of a bill is not extinguished by the payment of the bill by the indorser or drawer; for the same rights will remain against him, in their favor, which the holder had himself, unless he is a mere accommodation accepter. Story, Bills, § 422. See a limitation in 19 Barb. N. Y. 562.

But if payment is made by an indorser who had not received due notice, it is at his own risk, and he can ordinarily have no recourse over to third persons. Chitty, Bills, c. 9.

An accommodation accepter is not entitled on payment to a security given to an accommodation indorser. 1 Dev. Eq. No. C. 205.

An accommodation indorser who is obliged to pay the note is subrogated to the collateral securities. 12 La. Ann. 733. This subrogation in the civil law operates for the benefit of a holder by intervention (*i.e.* who pays for the honor of the drawer).

This species of subrogation (by indorsement) is to be distinguished from that which a surety on a note has when he is compelled to pay. Such surety is entitled to the benefit of all the securities which the holder has. 2 Rich. Eq. So. C. 179; 4 Ired. Eq. No. C. 22; 22 Penn. St. 68; 7 N. H. 236; 7 Rich. So. C. 112.

8. In the civil law, an agent who buys

goods for his principal with his own money is so far subrogated to the principal's rights that if he fails the agent may sell his goods as if they were his own. Cour de Cass. Nov. 14, 1810; Dev. et Car. 3. 1. 258.

An insurer of real property is subrogated to the rights of the insured against third parties who are responsible for the loss at common law. 3 Dougl. 63, 245; 2 Barnew. & C. 254; 13 Metc. Mass. 99; 39 Me. 253; 25 Conn. 265. But an insurance company is not subrogated to the rights of a mortgagee who has paid the premiums himself, so as to demand an assignment of the mortgage before paying his claim when the buildings were burned. 7 Cush. Mass. 1; 2 Gray, Mass. 216; 8 Hare, Ch. 216.

In Canada, this subrogation takes place, 1 Low. Can. 222, and would probably in New York. 17 N. Y. 429.

In the civil law, whoever paid privileged debts, such, for example, as the funeral expenses, had by subrogation the prior claim: *Eorum ratio prior est creditorum quorum pecunia ad creditores privilegios pervenit.* Dig. *de reb. anc. jud. pos.* l. 24, § 3.

So, if during the community of goods arising from the relation of husband and wife an annuity which was due from one of them only was redeemed by the money belonging to both, the other was subrogated *pleno jure* as to that part of the claim. Pothier, Obl. pt. 3, c. 1, art. 6, § 2.

In the civil law, the consignee of goods who pays freight is said to be subrogated to the rights of the carrier and forwarder. Cour de Cass. 7 Dec. 1826; Dev. et Car. 8. 1. 476.

The common law does not recognize this right as a subrogation. But see LIEN.

In marshalling assets, where a mortgagee has a lien on two funds, if he satisfy himself out of one which is mortgaged to a junior mortgagee so as to extinguish the fund, the junior mortgagee is subrogated to the other fund. 4 Sandf. Ch. N. Y. 510.

This right of subrogation is a personal right, but may be assigned, 3 Penn. St. 300; and the creditors of the surety may claim the benefit of the right. 8 Penn. St. 347; 10 *id.* 519; 22 Miss. 87. As to which of two parties liable for the debt shall be subrogated, see 23 Vt. 169.

Sureties of a surety are entitled to the rights by subrogation of their principal. 5 Barb. N. Y. 398; 22 Vt. 274. The creditor need not be made a party to a bill to obtain subrogation. 10 Yerg. Tenn. 310. Consult Domat, Civil Law; Guyot, Répert. Univ.; Massè, Droit Comm.; Dixon, Subrogation.

SUBSCRIBING WITNESS. One who subscribes his name to a writing in order to be able at a future time to prove its due execution. An attesting witness.

In order to make a good subscribing witness, it is requisite he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party. 6 Hill, N. Y. 303; 11 Mees. & W. Exch. 168; 1 Greenleaf, Ev. 4th ed. § 569 *a*; 5 Watts, Penn. 399.

SUBSCRIPTION (Lat. *sub*, under, *scribo*, to write). The placing a signature at the bottom of a written or printed engagement; or it is the attestation of a witness by so writing his name; but it has been holden that the attestation of an illiterate witness by making his mark is a sufficient subscription. 7 Bingh. 457; 2 Ves. Sen. Ch. 454; 1 Atk. Ch. 177; 1 Ves. Ch. 11; 3 P. Will. Ch. 253; 1 Ves. & B. Ir. Ch. 392.

The act by which a person contracts, in writing, to furnish a sum of money for a particular purpose: as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like.

SUBSCRIPTION LIST. A list of subscribers to some agreement with each other or a third person.

The subscription list of a newspaper is an incident to the newspaper, and passes with the sale of the printing materials. 2 Watts, Penn. 111.

SUBSIDY. In English Law. An aid, tax, or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods. Jacob, Law Dict.

In International Law. The assistance given in money by one nation to another to enable it the better to carry on a war, when such nation does not join directly in the war. Vattel, liv. 3, § 82. See NEUTRALITY.

SUBSTANCE (Lat. *sub*, under, *stare*, to stand). That which is essential: it is used in opposition to form.

It is a general rule that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient. 2 Strange, 690; 1 Phillipps, Ev. 161.

SUBSTITUTE (Lat. *substitutus*). One placed under another to transact business for him. In letters of attorney, power is generally given to the attorney to nominate and appoint a substitute.

Without such power, the authority given to one person cannot, in general, be delegated to another, because it is a personal trust and confidence, and is not, therefore, transmissible. The authority is given to him to exercise his judgment and discretion, and it cannot be said that the trust and confidence reposed in him shall be exercised at the discretion of another. 2 Atk. Ch. 88; 2 Ves. Ch. 645. But an authority may be delegated to another when the attorney has express power to do so. Bunb. 166; T. Jones, 110. See Story, Ag. §§ 13, 14. When a man is drawn into the militia, he may in some cases hire a substitute.

SUBSTITUTES. In Scotch Law. Where an estate is settled on a long series of heirs, substituted one after another, in tailzie, the person first called in the tailzies is the

institute; the rest, the heirs of tailzie, or the substitutes. Erskine, Inst. 3. 8. 8. See TAILZIE.

SUBSTITUTION (Lat. *substitutio*). **In Civil Law.** The putting of one person in the place of another, so that he may, in default of ability in the former, or after him, have the benefit of a devise or legacy.

Direct substitution is merely the institution of a second legatee in case the first should be either incapable or unwilling to accept the legacy: for example, if a testator should give to Peter his estate, but in case he cannot legally receive it, or he wilfully refuses it, then I give it to Paul. *Fidei commissary substitution* is that which takes place when the person substituted is not to receive the legacy until after the first legatee, and, consequently, must receive the thing bequeathed from the hands of the latter: for example, I institute Peter my heir, and I request that at his death he shall deliver my succession to Paul. Merlin, Répert.; 5 Toullier, 14. See SUBROGATION.

SUBSTRACTION. In French Law. The act of taking something fraudulently: it is generally applied to the taking of the goods of the estate of a deceased person fraudulently. See EXPILATION.

SUBTRACTION (Lat. *sub*, away, *traho*, to draw). The act of withholding or detaining any thing unlawfully.

SUBTRACTION OF CONJUGAL RIGHTS. The act of a husband or wife living separately from the other without a lawful cause. 3 Blackstone, Comm. 94.

SUCCESSION. In Louisiana. The right and transmission of the rights and obligations of the deceased to his heirs. The estate, rights, and charges which a person leaves after his death, whether the property exceed the charges or the charges exceed the property, or whether he has left only charges without property. The succession not only includes the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. That right by which the heir can take possession of the estate of the deceased, such as it may be.

Irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament.

Legal succession is that which is established in favor of the nearest relations of the deceased.

Testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. See HEIR; DESCENT; Pothier, des Successions; Toullier, l. 3, tit. 1.

In Common Law. The mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them. This term in strictness is to be applied only to such corporations. 2 Sharswood, Blackst. Comm. 430.

SUCCESSOR. One who follows or comes into the place of another.

This term is applied more particularly to a sole corporation, or to any corporation. The word heir is more correctly applicable to a common person who takes an estate by descent. 12 Pick. Mass. 322; Coke, Litt. 8 *b*.

A person who has been appointed or elected to some office after another person.

SUCKEN, SUCHEN. In Scotch Law. The whole lands restricted to a mill,—that is, whose tenants are bound to grind there. The possessors of these lands are called suckeners. Bell, Dict.

SUE. To commence or continue legal proceedings for the recovery of a right. See ACTION; SUIT.

SUFFRAGAN (L. Lat. *suffraganeus*). A titular bishop ordained to assist the bishop of the diocese in his spiritual functions, or to take his place. The number was limited to two to each bishop by 26 Hen. VIII. c. 14. So called because by his suffrage ecclesiastical causes were to be judged. Termes de la Ley.

SUFFRAGE. Vote; the act of voting.

The right of suffrage is given by the constitution of the United States, art. 1, s. 2, to such of the electors in each state as shall have the qualifications requisite for electors of the most numerous branch of the state legislature. See 2 Story, Const. § 578 *et seq.*; Amer. Citiz. 201; 1 Blackstone, Comm. 171; 2 Wilson, Lect. 130; Montesquieu, Esp. des Lois, liv. 11, c. 6; 1 Tucker, Blackst. Comm. App. 52, 53.

SUGGESTIO FALSI (Lat.). A statement of a falsehood. This amounts to a fraud whenever the party making it was bound to disclose the truth.

The following is an example of a case where chancery will interfere and set aside a contract as fraudulent, on account of the *suggestio falsi*: a purchaser applied to the seller to purchase a lot of wild land, and represented to him it was worth nothing, except for a sheep pasture, when he knew there was a valuable mine on the lot, of which the seller *was ignorant*. The sale was set aside. 2 Paige, Ch. N. Y. 390; 4 Bouvier, Inst. n. 3837 *et seq.* See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUPPRESSIO VERI.

SUGGESTION. In Practice. Information. It is applied to those cases where during the pendency of a suit some matter of fact occurs which puts a stop to the suit in its existing form, such as death or insolvency of a party; the counsel of the other party announces the fact in court or enters it upon the record: the fact is usually admitted, if true, and the court issues the proper order thereupon. See 2 Sellon, Pract. 191.

In wills, when suggestions are made to a testator for the purpose of procuring a devise of his property in a particular way, and when such suggestions are false, they gene-

rally amount to a fraud. Bacon, Abr. *Wills* (G 3); 5 Toullier, n. 706.

SUGGESTIVE INTERROGATION. A phrase which has been used by some writers to signify the same thing as *leading question*. 2 Bentham, Ev. b. 3, c. 3. It is used in the French law.

SUI JURIS (Lat. of his own right). Possessing all the rights to which a freeman is entitled; not being under the power of another, as a slave, a minor, and the like.

To make a valid contract, a person must, in general, be *sui juris*. Every one of full age is presumed to be *sui juris*. Story, Ag. 10.

SUICIDE (Lat. *suus*, oneself, *cædere*, to kill). **In Medical Jurisprudence.** Self-destruction.

This was once regarded by the common law as exclusively a felonious act: of late, however, it has been often treated as the result of insanity, to be followed by all the legal consequences of that disease, so far as it is practicable. That suicide may be committed by a person in the full enjoyment of his reason, there can be no doubt; nor can there be any doubt that it is often the result of unquestionable insanity. Between the two kinds of suicide here indicated, the medical jurist is obliged to discriminate, and in performing this duty the facts on the subject should be carefully considered.

The instinct of self-preservation is not so strong as to prevent men entirely from being tired of life and seeking their own destruction. They may have exhausted all their sources of enjoyment, their plans of business or of honor may have been frustrated, poverty or dishonor may be staring them in the face, the difficulties before them may seem utterly insurmountable, and, for some reason like these, they calmly and deliberately resolve to avoid the evil by ending their life. The act may be unwise and presumptuous, but there is in it no element of disease. On the other hand, it is well known that suicidal desires are a very common trait of insanity,—that a large proportion of the insane attempt or meditate self-destruction. It may be prompted by a particular delusion, or by a sense of irresistible necessity. It may be manifested in the shape of a well-considered, persistent intention to seize upon the first opportunity to terminate life, or of a blind, automatic impulse acting without much regard to means or circumstances. As the disease gives way and reason is restored, this propensity disappears, and the love of life returns.

Besides these two forms of the suicidal propensity, there are other phases which cannot be referred with any degree of certainty to either of them. Persons, for instance, in the enjoyment of every thing calculated to make life happy, and exhibiting no sign of mental disease, deliberately end their days. Another class, on approaching a precipice or a body of water, are seized with a desire, which may be irresistible, to take the fatal plunge. Many are the cases of children who, after some mild reproof, or slight contradiction, or trivial disappointment, have gone at once to some retired place and taken their lives. Now, we are as little prepared to refer all such cases to mental disease as we are to free voluntary choice. Every case, therefore, must be judged by the circumstances accompanying it, always allowing the benefit of the doubt to be given to the side of humanity and justice.

2. By the common law, suicide was treated as a crime, and the person forfeited all chattels real or personal, and various other property. 4 Blackstone, Comm. 190. This result can be avoided by establishing the insanity of the party; and in England, of late years, courts have favored this course whenever the legal effect of suicide would operate as a punishment. On the other hand, where the rights and interests of other parties are involved, the question of insanity is more closely scrutinized; and ample proof is required of the party on whom the burden of proof lies.

In regard to wills made just before committing suicide, the prevalent doctrine on this point, both in the United States and in England, is that the act of self-destruction may not necessarily imply insanity, and that if the will is a rational act, rationally done, the sanity of the testator is established. 7 Pick. Mass. 94; 1 Hagg. Eccl. 109; 2 Harr. Del. 583; 2 Eccl. 415.

In regard to life-insurance, it is the law of England, at present, that in every case of intentional suicide, whatever may have been the mental condition, the policy becomes void. 3 Mann. & G. 437; 5 *id.* 639; 4 All. Mass. 96. See Wharton, Mental Unsoundness; Phillips, Ins.

3. In cases of persons found dead, the cause may not be always perfectly obvious, and it becomes necessary to determine whether death was an act of suicide, or murder. This is often one of the most difficult questions in the whole range of medical jurisprudence, requiring for its solution the most profound knowledge of surgery and physiology, and great practical sagacity. In case of death caused by wounds, the kind and situation of the weapon, the extent, direction, and situation of the wounds, their connection with marks of blows, the temper and disposition of the person, all these and many other circumstances must be carefully and intelligently investigated. The frequency with which cases of suicide strongly resemble, in their external characters, those of murder, renders necessary the highest degree of skill and careful discrimination. If one counsels another to commit suicide, and is present at the consummation of the act, it is murder in the principal. 13 Mass. 359; Russ. & R. Cr. Cas. 523.

SUIT (L. Lat. *secta;* from Lat. *sequi*, to follow. French, *suite*). **In Practice.** An action.

The word suit in the twenty-fifth section of the Judiciary Act of 1789 applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. An application for a prohibition is, therefore, a suit. 2 Pet. 449. According to the Code of Practice of Louisiana, art. 96, a suit is a real, personal, or mixed demand made before a competent judge, by which the parties pray to obtain their rights and a decision of their disputes. In that acceptation, the words suit, process, and cause are in that state almost synonymous. See SECTA; Stephen, Plead. 427; 3 Sharswood, Blackst. Comm. 395; 1 Chitty, Plead. 399; Wood, Civ. Law, b. 4, p. 315; 4 Mass. 263; 18 Johns. N. Y. 14; 4 Watts, Penn. 154; 3 Story, Const. § 1719. In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, in-

formation, and a conviction by a magistrate. Hammond, Nisi P. 270. Suit is applied to proceedings in chancery as well as in law, 1 Smith, Chanc. Dec. 26, 27, and is, therefore, more general than *action*, which is almost exclusively applied to matters of law. 10 Paige, Ch. N. Y. 516, 517. But Actions is a title in the United States Equity Digest.

The witnesses or followers of the plaintiff. 3 Sharswood, Blackst. Comm. 295. See SECTA.

Suit of court, an attendance which a tenant owes to his lord's court. Cowel, Gloss.; Jacob, Law Dict. 4.

Suit covenant, where one has covenanted to do suit and service in his lord's court.

Suit custom, where service is owed time out of mind.

The following one in chase: as, fresh suit.

A petition to a king, or a great person, or a court.

SUITE (French). Those persons who by his authority *follow* or attend an ambassador or other public minister.

In general, the suite of a minister are protected from arrest, and the inviolability of his person is communicated to those who form his suite. Vattel, lib. 4, c. 9, § 120. See 1 Dall. Penn. 177; Baldw. C. C. 240; AMBASSADOR.

SUITOR. One who is a party to a suit or action in court. One who is a party to an action. In its ancient sense, suitor meant one who was bound to attend the county court; also, one who formed part of the *secta*.

SULTAN. The title of the Turkish sovereign and other Mohammedan princes.

SUMMARY PROCEEDING. A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. See 8 Gray, Mass. 329.

In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempts; for the common law is a stranger to such a mode of trial. 4 Blackstone, Comm. 280. See 2 Kent, Comm. 6th ed. 73; 2 Conn. 819; 4 *id.* 535; 37 Me. 172; 4 Hill, N. Y. 145; 8 Gray, Mass. 329; 4 Dev. No. C. 15; 10 Yerg. Tenn. 59.

SUMMING UP. In Practice. The act of making a speech before a court and jury, after all the evidence has been heard, in favor of one of the parties in the cause, is called summing up. When the judge delivers his charge to the jury, he usually sums up the evidence in the case. 6 Hargrave, St. Tr. 832; 1 Chitty, Crim. Law, 632. See CHARGE.

SUMMON. In Practice. To notify the defendant that an action has been instituted against him, and that he is required to answer to it at a time and place named. This is done by a proper officer's either giving the defendant a copy of the summons, or having it at his house, or by reading the summons to him.

SUMMONERS. Petty officers who cite men to appear in any court.

SUMMONS. In Practice. The name of a writ commanding the sheriff, or other authorized officer, to notify a party to appear in court to answer a complaint made against him and in the said writ specified, on a day therein mentioned. Viner, Abr. *Summons;* 2 Sellon, Pract. 356; 3 Blackstone, Comm. 279.

SUMMONS AND SEVERANCE. See SEVERANCE.

SUMMUM JUS (Lat.). Extreme right, strict right. See MAXIMS, *Summum jus*.

SUMPTUARY LAWS. Laws relating to the expenses of the people, and made to restrain excess in apparel, food, furniture, etc.

They originated in the view that luxury is, in some of its degrees, opposed to public policy, and that the state is bound to interfere against it. Montesquieu, Esprit des Lois, b, 7, c. 2, 4, and Tacitus, Ann. b. 2, ch. 33, b. 3, ch. 52.

In England, in 1336, it was enacted, 10 Edw. III. c. 3, that inasmuch as many mischiefs had happened to the people of the realm by excessive and costly meats, by which, among other things, many who aspired in this respect beyond their means were impoverished and unable to aid themselves or their liege lord in time of need, all men were forbidden to have served more than two courses at a meal, each of but two sorts of victual, except on the principal feasts of the year, and then only three courses were allowed. Blackstone states that this is still unrepealed. 4 Comm. 170. Subsequent statutes—that of 1363, and those of 1463 and 1482—regulated the dress, and to some extent the diet, of the people, with careful regard to their rank. The substance of these statutes will be found in Knight's History of England, vol. 2, pp. 272–274. They were repealed by 1 Jac. I. c. 25.

In modern times, legislation is not resorted to in respect to this object; but the subject is frequently discussed in connection with the laws for the prevention or punishment of intemperance, which is so direct and fruitful a source of crime.

SUNDAY. The first day of the week.

2. In some of the New England states it begins at sunsetting on Saturday and ends at the same time the next day. But in other parts of the United States it generally commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter. 6 Gill & J. Md. 268. And see Bacon, Abr. *Heresy*, etc. (D), *Sheriff* (N 4); 1 Salk. 78; 1 Sellon, Pract. 12. The *Sabbath*, the *Lord's day*, and *Sunday*, all mean the same thing. 6 Gill & J. Md. 268. See 3 Watts, Penn. 56, 59; 6 *id.* 231.

3. In some states, owing to statutory provisions, contracts made on Sunday are void, 6 Watts, Penn. 231; Leigh, Nisi P. 14; 5 Barnew. & C. 406; 4 Bingh. 84; but in general they are binding although made on that day, if good in other respects. 1 Crompt. & J. Exch. 130; 3 Law In. 210; Chitty, Bills, 59; Wright, Ohio, 764; 10 Mass. 312; 1 Cow. N. Y. 76, n.; Cowp. 640; 1 W. Blackst.

499; 1 Strange, 702. See 8 Cow. N. Y. 27; 6 Penn. St. 417, 420.

No one is bound to do work in performance of his contract on Sunday, unless the work by its very nature or by express agreement is to be done on that day and can be then done without a breach of law. 2 Conn. 69; 18 *id.* 181; 6 Johns. N. Y. 326; 10 Ohio, 426; 7 Blackf. Ind. 479. See 6 Gill & J. Md. 268; 10 Ad. & E. 57.

4. Sundays are computed in the time allowed for the performance of an act; but if the last day happen to be a Sunday it is to be excluded, and the act must, in general, be performed on Saturday. 3 Penn. 201; 3 Chitty, Pract. 110. See 21 Bost. Law Rep. 36. Promissory notes and bills of exchange, when they fall due on Sunday, are generally paid on Saturday. See, as to the origin of keeping Sunday as a holiday, Neale, F. & F. Index, *Lord's Day;* Story, Pr. Notes, § 220; Story, Bills, § 233; Parsons, Notes & Bills.

SUPER ALTUM MARE (Lat.). Upon the high sea. See HIGH SEAS.

SUPER VISUM CORPORE (Lat.). Upon view of the body. When an inquest is held over a body found dead, it must be *super visum corpore.* See CORONER; INQUEST.

SUPERCARGO. In Maritime Law. A person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

Supercargoes have complete control over the cargo and every thing which immediately concerns it, unless their authority is either expressly or impliedly restrained. 12 East, 381. Under certain circumstances they are responsible for the cargo, 4 Mass. 115; see 1 Gill & J. Md. 1; but the supercargo has no power to interfere with the government of the ship. 3 Pardessus, n. 646; 1 Boulay-Paty, Dr. Com. 421.

SUPERFICIARIUS (Lat.). **In Civil Law.** He who has built upon the soil of another, which he has hired for a number of years or forever, yielding a yearly rent. This is not very different from the owner of a lot on ground-rent in Pennsylvania. Dig. 43. 18. 1.

SUPERFICIES (Lat.). **In Civil Law.** Whatever has been erected on the soil.

SUPERFŒTATION. In Medical Jurisprudence. The conception of a second embryo during the gestation of the first, or the conception of a child by a woman already pregnant with another, during the time of such pregnancy.

This doctrine, though doubted, seems to be established by numerous cases. 1 Beck, Med. Jur. 193; Cassan, Superfœtation; New York Medical Repository; 1 Briand, Méd. Lég. prem. partie, c. 3, art. 4; 1 Foderé, Méd. Lég. § 299; Buffon, Hist. Nat. de l'Homme, *Puberté.*

SUPERIOR. One who has a right to command; one who holds a superior rank: as, a soldier is bound to obey his superior.

In estates, some are superior to others: an estate entitled to a servitude or easement over another estate is called the superior or dominant, and the other the inferior or servient estate. 1 Bouvier, Inst. n. 1612.

SUPERIOR COURT. In English Law. A term applied collectively to the three courts of common law at Westminster: namely, the king's bench, the common pleas, the exchequer.

It denotes a court of intermediate jurisdiction between the courts of inferior or limited jurisdiction and the courts of last resort.

In American Law. A court of intermediate jurisdiction between the inferior courts and those of last resort.

In Delaware it is the court of last resort; and in some of the states there is a superior court for cities. See DELAWARE; NEW YORK; OHIO; ILLINOIS.

SUPERNUMERARII (Lat.). **In Roman Law.** Those advocates who were not *statuti,* which title see.

The *statuti* were inscribed in the matriculation books, and formed a part of the college of advocates in each jurisdiction. The supernumeraries were not attached to any bar in particular, and could reside where they pleased: they took the place of advocates by title as vacancies occurred in that body.

SUPERONERATIO (L. Lat. *superonerare*). Surcharging a common: *i.e.* putting in beasts of a number or kind other than the right of common allows. It can only be of a common appendant or appurtenant. Bracton, 229, and Fleta, lib. 4, c. 23, § 4, give two remedies, novel disseisin and writ of admeasurement, by which latter remedy no damages are recovered till the second offence. Now, distraining, trespass, and case are used as remedies. 3 Sharswood, Blackst. Comm. 238*.

SUPERSEDEAS (Lat. that you set aside). **In Practice.** The name of a writ containing a command to stay the proceedings at law.

It is granted on good cause shown that the party ought not to proceed. Fitzherbert, Nat. Brev. 236. There are some writs which, though they do not bear this name, have the effect to supersede the proceedings: namely, a writ of error when bail is entered operates as a supersedeas; and a writ of certiorari to remove the proceedings of an inferior into a superior court has, in general, the same effect. 8 Mod. 373; 1 Barnes, 260; 6 Binn. Penn. 461. But, under special circumstances, the *certiorari* has not the effect to stay the proceedings, particularly where summary proceedings, as to obtain possession under the landlord and tenant law, are given by statute. 6 Binn. Penn. 460; 4 Dall. Penn. 214. See Bacon, Abr.; Comyns, Dig.; Yelv. 6, note.

SUPERSTITIOUS USE. In English Law. When lands, tenements, rents, goods,

or chattels are given, secured, or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere; to have and maintain perpetual obits, lamps, torches, etc. to be used at certain times to help to save the souls of men out of purgatory; in such cases the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable. Bacon, Abr. *Charitable Uses and Mortmain* (D); Duke, Char. Uses, 105; 6 Ves. Ch. 567; 4 Coke, 104.

In the United States, where all religious opinions are free and the right to exercise them is secured to the people, a bequest to support a Catholic priest, and perhaps certain other uses in England, would not be considered as superstitious uses. 1 Penn. 49; 8 Penn. St. 327; 17 Serg. & R. Penn. 388; 1 Wash. C. C. 224. Yet many of the *superstitious uses* of the English law would fail to be considered as charities, and would undoubtedly come under the prohibition against perpetuities. See CHARITIES; CHARITABLE USES.

SUPERVISOR. An overseer; a surveyor.

An officer whose duty it is to take care of the highways.

The chief officer of a town or organized township in the states of Michigan, Illinois, Wisconsin, and Iowa. He has various duties assigned him by the statutes as a town officer, and likewise represents his town in the general assembly, or county board of supervisors. See BOARD OF SUPERVISORS.

SUPPLEMENTAL. That which is added to a thing to complete it: as, a supplemental affidavit, which is an additional affidavit to make out a case; a supplemental bill.

SUPPLEMENTAL BILL. In Equity Practice. A bill brought as an addition to an original bill to supply some defect in its original frame or structure which cannot be supplied by amendment. See 1 Paige, Ch. N. Y. 200; 15 Miss. 456; 22 Barb. N. Y. 161; 14 Ala. N. S. 147; 18 *id.* 771. It may be brought by a plaintiff or defendant, 2 Atk. Ch. 533; 2 Ball & B. Ch. Ir. 140; 1 Stor. C. C. 218, and as well after as before a decree, 3 Md. Ch. Dec. 306; 1 Macn. & G. 405; Story, Eq. Plead. § 338; Hinde, Chanc. Pract. 43, but must be within a reasonable time. 2 Halst. Ch. N. J. 465.

2. It may be filed when a necessary party has been omitted, 6 Madd. Ch. 369; 4 Johns. Ch. N. Y. 605, to introduce a party who has acquired rights subsequent to the filing of the original bill, 3 Iowa, 472; when, after the parties are at issue and witnesses have been examined, some point not already made seems to be necessary, or some additional discovery is found requisite, 3 Atk. Ch. 110; 1 Paige, Ch. N. Y. 200; Cooper, Eq. Plead. 73; when new events referring to and supporting the rights and interests already mentioned have occurred subsequently to the filing of the bill, Story, Eq. Plead. 336; 5 Beav. Rolls. 253; 3 Hare, Ch. 39; 2 Md. Ch. Dec. 289; for the statement only of facts and circumstances material and beneficial to the merits, and not merely matters of evidence, 3 Stor. C. C. 299; when, after a decision has been made on the original bill, it becomes necessary to bring other matter before the court to get the full effect of it, Story, Eq. Plead. § 336; 3 Atk. Ch. 370; when a material fact, which existed before the filing of the bill, has been omitted, and it can no longer be introduced by way of amendment, 3 Stor. C. C. 54; 2 Md. Ch. Dec. 303; Mitford, Chanc. Plead. 55, 61, 325; but only by special leave of court when it seeks to change the original structure of the bill and introduce a new and different case. 4 Sim. Ch. 76, 628; 3 Atk. Ch. 110; 8 Price, Exch. 518; 4 Paige, Ch. N. Y. 259; 2 Md. Ch. Dec. 42. See 2 Sumn. C. C. 316.

3. The bill must be in respect to the same title in the same person as the original bill. Story, Eq. Plead. 339.

It must state the original bill, and the proceedings thereon; and when it is occasioned by an event which has occurred subsequently to the original bill, it must state that event and the consequent alteration with regard to the parties. In general, the supplemental bill must pray that all defendants appear and answer the charges it contains. Mitford, Chanc. Plead. Jerem. ed. 75; Story, Eq. Plead. § 343.

SUPPLETORY OATH. In Ecclesiastical Law. An oath given by the judge to the plaintiff or defendant upon half proof, as by one witness, already made. The oath added to the half proof enables the judge to decide. It is discretionary with the judge. Strange, 80; 3 Sharswood, Blackst. Comm. 370*.

SUPPLICATIO (Lat.). **In Civil Law.** A petition for pardon of a first offence; also, a petition for reversal of judgment; also, equivalent to *duplicatio*, which is our rejoinder. Calvinus, Lex.

SUPPLICAVIT (Lat.). **In English Law.** The name of a writ issuing out of the king's bench or chancery for taking sureties of the peace: it is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity. 4 Blackstone, Comm. 233. See Viner, Abr.; Comyns, Dig. *Chancery* (4 R), *Forcible Entry* (D 16, 17).

SUPPLICIUM (Lat.). **In Civil Law.** A corporal punishment ordained by law; the punishment of death: so called because it was customary to accompany the guilty man to the place of execution and there offer *supplications* for him.

SUPPLIES. In English Law. Extraordinary grants to the king by parliament to supply the exigencies of the state. Jacob, Law Dict.

SUPPORT. The right of support is an easement which one man, either by contract or prescription, enjoys, to rest the joists or timbers of his house upon the wall of an adjoining building owned by another person. 3 Kent, Comm. 435. See Washburn, Easem.; Lois des Bât. pt. 1, c. 3, s. 2, a. 1, § 7.

A right to the support of one's land so as to prevent its falling into an excavation made by the owner of adjacent lands.

SUPPRESSIO VERI (Lat.). Concealment of truth.

2. In general, a suppression of the truth when a party is bound to disclose it vitiates a contract. In the contract of insurance, a knowledge of the facts is required to enable the underwriter to calculate the chances and form a due estimate of the risk; and, in this contract perhaps more than any other, the parties are required to represent every thing with fairness. 1 W. Blackst. 594; 3 Burr. 1809.

3. *Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution. 3 Atk. Ch. 383; Chanc. Prec. 138; 1 Fonblanque, Eq. c. 2, s. 8; 1 Ball & B. Ch. Ir. 241; 3 Munf. Va. 232; 1 Pet. 383; 2 Paige, Ch. N. Y. 390; 4 Bouvier, Inst. n. 3841. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUGGESTIO FALSI.

SUPRA PROTEST. Under protest. See ACCEPTANCE; ACCEPTOR; BILLS OF EXCHANGE.

SUPREMACY. Sovereign dominion, authority, and pre-eminence; the highest state. In the United States the supremacy resides in the people, and is exercised by their constitutional representatives, the president and congress. See SOVEREIGNTY.

SUPREME. That which is superior to all other things: as, the supreme power of the state, which is an authority over all others; the supreme court, which is superior to all other courts.

SUPREME COURT. In American Law. A court of superior jurisdiction in many of the states of the United States.

The name is properly applied to the court of last resort, and is so used in most of the states. In nearly all the states there is a supreme court, but in one or two there is a court of appellate jurisdiction from the supreme court.

See the articles on the respective states, COURTS OF THE UNITED STATES, and 3 Bouvier, Inst. 69; 4 Sharswood, Blackst. Comm. 259.

SUPREME COURT OF ERRORS. In American Law. An appellate tribunal, and the court of last resort, in the state of Connecticut. See CONNECTICUT.

SUPREME JUDICIAL COURT. In American Law. An appellate tribunal, and the court of last resort, in the states of Maine, Massachusetts, and New Hampshire. See MAINE; MASSACHUSETTS; NEW HAMPSHIRE.

SURCHARGE. To put more cattle upon a common than the herbage will sustain or than the party hath a right to do. 3 Sharswood, Blackst. Comm. 237.

In case of common without stint it could only happen when insufficient herbage was left for the lord's own cattle. 1 Rolle, Abr. 399.

The remedy was by distraining the beasts beyond the proper number; an action of trespass which must have been brought by the lord of the manor; an action on the case, or a writ of admeasurement of pasture. 2 Sharswood, Blackst. Comm. 238, n.

In Equity Practice. To prove the omission of an item from an account which is before the court as complete, which should be inserted to the credit of the party surcharging. Story, Eq. Jur. § 526; 2 Ves. Ch. 565; 11 Wheat. 237; 8 Rich. Eq. So. C. 248. It is opposed to falsify, which see. Leave to surcharge and falsify is granted in preference to opening an account, in case of an account stated by the parties or reported by an auditor, where the party obtaining the liberty would be concluded by the account were it not granted. See ACCOUNT; AUDITOR.

SURETY. A person who binds himself for the payment of a sum of money, or for the performance of something else, for another, who is already bound for the same.

A surety differs from a guarantor, and the latter cannot be sued until after a suit against the principal. 10 Watts, Penn. 258. The surety differs from bail in this, that the latter actually has, or is by law presumed to have, the custody of his principal, while the former has no control over him. The bail may surrender his principal in discharge of his obligation; the surety cannot be discharged by such surrender.

For a full discussion of the principles regulating the liability of the surety, see the article on Suretyship, below.

SURETYSHIP. An undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound. It differs from guaranty in this, that suretyship is a primary obligation to see that the debt is paid, while guaranty is a collateral undertaking, essentially in the alternative, to pay the debt if the debtor does not pay it. 24 Pick. Mass. 252. And accordingly a surety may be sued as a promisor to pay the debt, while a guarantor must be sued specially on his contract. 8 Pick. Mass. 423.

While guaranty applies only to contracts not under seal, and principally to mercantile obligations, suretyship may apply to all obligations under seal or by parol. The subjects are, however, nearly related, and many of the principles are common to both. There must be a principal debtor liable, otherwise the promise becomes an original contract; and, the promise being collateral, the surety must be bound to no greater extent than the principal. Suretyship is one of the contracts included in the Statute of Frauds, 29 Car. II. c. 3.

2. Kent, C. J., divides secondary undertakings into three classes:—*First*, cases in

which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. Here there is not, and need not be, any other consideration than that moving between the creditor and original debtor. *Second*, cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise. *Third*, when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the Statute of Frauds; the last is not. 8 Johns. N. Y. 29. This classification has been reviewed and affirmed in numerous cases. 21 N. Y. 415; 21 Me. 459; 15 Pick. Mass. 159. A simpler division is into two classes. *First*, where the principal obligation exists before the collateral undertaking is made. *Second*, where there is no principal obligation prior in time to the collateral undertaking. In the last class the principal obligation may be contemporaneous with or after the collateral undertaking. The first class includes Kent's second and third, the second includes Kent's first, to which must be added cases where the guaranty referring to a present or future principal obligation does not share the consideration thereof, but proceeds on a distinct consideration. Moreover, there are other original undertakings out of the Statute of Frauds and valid though by parol, besides his third class. These are where the credit is given exclusively to the promisor though the goods or consideration pass to another. Under this division, undertakings of the first class are original: *first*, when the principal obligation is thereby abrogated; *second*, when without such abrogation the promisor for his own advantage apparent on the bargain undertakes for some new consideration moving to him from the promisee; *third*, where the promise is in consideration of some loss or disadvantage to the promisee; *fourth*, where the promise is made to the principal debtor on a consideration moving from the debtor to the promisor. Theobald, Surety, 37 *et seq.*, 49 *et seq.* The cases under these heads will be considered separately.

3. *First*, where the principal obligation is pre-existent, there must be a new consideration to support the promise; and where this consideration is the discharge of the principal debtor, the promise is original and not collateral, as the first requisite of a collateral promise is the existence of a principal obligation. This has been held in numerous cases. The discharge may be by agreement, by novation or substitution by discharge or final process, or by forbearance under certain circumstances. 5 Barnew. & Ald. 297; 1 Q. B. 933; 4 Bos. & P. 124; 11 Mees. & W. Exch. 857; 7 Johns. N. Y. 463; 8 *id.* 376; 21 N. Y. 412; Hill & D. N. Y. 109; 19 Barb. N. Y. 258; 5 Cush. Mass. 488; 8 Gray, Mass. 233; 13 Md. 141; 5 Chandl. Wisc. 61; 28 Vt. 135; 29 *id.* 169; 10 Ired. No. C. 13; Browne, Stat. Frauds, §§ 166, 193.

But the converse of this proposition, that where the principal obligation remains, the promise is collateral, cannot be sustained, though there have been repeated dicta to that effect. Browne, Stat. Fr. § 193; 12 Johns. N. Y. 291; 20 Wend. N. Y. 201; 2 Den. N. Y. 45; 4 Barb. N. Y. 131; denied in 21 N. Y. 415; 7 Ala. N. S. 54; 6 Vt. 666; 30 *id.* 641; 33 *id.* 132.

The main question arising in cases under this head is whether the debtor is discharged; and this is to a great extent a question for the jury. But if in fact the principal debt is discharged by agreement and the new promise is made upon this consideration, then the promise is original, and not collateral. Fell, Guar. c. ii. § 9; 1 All. Mass. 405.

It has been held that the entry on the creditor's books of the debtor's discharge is sufficient to prove it. 3 Hill, So. C. 41.

A discharge of the debtor from custody, or surrender of property taken on an execution, is a good discharge of the debt. 1 Barnew. & Ald. 297; 11 Mees. & W. Exch. 857; 1 Q. B. 937; 9 Vt. 137; 4 Dev. 261; 7 Johns. N. Y. 463; 10 Wend. N. Y. 461; 21 N. Y. 415.

Where the transaction amounts to a sale of the principal debt in consideration of the new promise, the debtor is discharged, and the promise is original. 4 Bos. & P. 124; 3 Barnew. & C. 855; 4 Dowl. & R. 7; 1 Crompt. M. & R. Exch. 743.

So where a purchaser of goods transfers them to another, who promises the vendor to pay for them, this is a substitution and an original promise. 5 Taunt. 450; 5 Me. 81; 9 Cow. N. Y. 266; 11 Ired. No. C. 298; 21 Me. 545; 10 Mo. 538; 7 Cush. Mass. 133.

A mere forbearance to press the principal debt is not such a discharge of the debtor as will make the promise original, 1 Smith, Lead. Cas. 5th Am. ed. 387; 4 Johns. N. Y. 422; Jal. N. Y. 47; 15 Wend. N. Y. 122, 343; 20 *id.* 201; 3 Metc. Mass. 396; 21 N. Y. 412; 2 Wils. 94; 13 B. Monr. Ky. 356; Buller, N. P. 281; but where the forbearance is so protracted as to discharge the debtor, it may be questioned whether the promise does not become original. 33 Vt. 132.

4. *Second*, the promise will be original if made in consideration of some new benefit moving from the promisee to the promisor. 3 Dutch. N. J. 371; 4 Cow. N. Y. 432; 2 Den. N. Y. 45; 4 Barb. N. Y. 131; 29 *id.* 610; 4 Johns. N. Y. 422; 12 *id.* 291; Buller, Nisi P. 281.

5. *Third*, the promise is original where the consideration is some loss to the promisee or principal creditor; but it is held in many such cases that the loss must also work some

benefit to the promisor. 6 Ad. & E. 564; 2 East, 325; 3 Strobh. Eq. So. C. 177; 10 Wend. N. Y. 461; 24 *id.* 260; 4 Cow. N. Y. 432; 10 Johns. N. Y. 412; 18 *id.* 12; 20 N. Y. 268; 2 Bosw. N. Y. 392. As to merely refraining from giving an execution to the sheriff, 14 Me. 140.

So the loss of a lien. 7 Johns. N. Y. 463; Lal. N. Y. 251; Addison, Contr. 38; Burge, Sur. 26; Fell, Guar. c. ii. §§ 7, 8. It would seem that a surrender of a lien merely is not a sufficient consideration, 3 Metc. Mass. 396; but it must appear that the surrender is in some way beneficial to the promisor.

The rule is well settled that when the leading object of a promisor is to induce a promisee to forego some lien, interest, or advantage, and thereby to confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original, and binding contract, although the effect of it may be to assume the debt and discharge the liability of another. Bigelow, C. J., 2 All. Mass. 417; 3 Burr. 1886; 6 Maule & S. 204; 2 Barnew. & Ald. 613; 1 Gray, Mass. 391; 1 All. Mass. 405. The advantage relinquished by the promisee must directly enure to the benefit of the promisor, so as in effect to make it a purchase by the promisor. 5 Cush. Mass. 488; 2 Wils. 94; 12 Johns. N. Y. 291.

6. *Fourth*, the promise is original if made on a consideration moving from the debtor to the promisor. 10 Johns. N. Y. 412; 12 *id.* 291; 5 Wend. N. Y. 235; Browne, Stat. Fr. § 170; 4 Cow. N. Y. 432; 9 *id.* 639; 2 Den. N. Y. 45; 8 Johns. N. Y. 39; 9 Cal. 92; 30 Ala. N. S. 599; 1 E. D. Smith, N. Y. 5; 2 *id.* 124; 16 Barb. N. Y. 645; 5 Me. 31; 1 Gray, Mass. 391.

For the rule in a class of cases quite analogous, see 9 Ill. 40; 3 Conn. 272; 21 Me. 410; 1 South. N. J. 219; 1 Speers, So. C. 4; 2 Bosw. N. Y. 392; 13 Ired. No. C. 86; 5 Cranch, 666.

7. Where the guaranty relates to a contemporaneous or future obligation, the promise is original, and not suretyship, (*a*) if credit is given exclusively to the promisor, (*b*) if the promise is merely to indemnify.

8. In the first of these cases the question to whom credit was given must be ultimately for the jury in each case. If there is any primary liability, and the creditor resorts to the principal debtor first, the promise is collateral. Thus, if the promisor says, "Deliver goods to A, and I will pay you, there is no primary obligation on the part of A, and the promise is original. 3 Metc. Mass. 396. But if he says, "I will see you paid," or, "I promise you that he will pay," or, "If he do not pay, I will," the promise would be collateral. 2 Term, 80; 1 H. Blackst. 120; 3 All. Mass. 540; 5 *id.* 370; 13 Gray, Mass. 613; Browne, Stat. Fr. § 195.

9. A promise merely to indemnify against contingent loss from another's default, is original. 15 Johns. N. Y. 425; 4 Wend. N. Y. 657. A doubt is expressed by Mr. Browne, Stat. of Frauds, § 158, whether the fact that mere indemnity is intended makes the promise original, because in many cases—those where the indemnity is against the default of a third person—there is an implied liability of that person, and the promise is collateral thereto. Now, there are three classes of cases. *First*, it is clear that where the indemnity is against the promisor's default of debt he is already liable without his promise; and to use this as a defence and make the promise collateral thereto would be using the law as a cover to a fraud. 1 Conn. 519; 16 *id.* 549; 46 Me. 41; 6 Bingh. 506; 10 Johns. N. Y. 42; 17 *id.* 113; 2 Johns. Cas. N. Y. 52; 17 Pick. Mass. 538. *Second*, so where the only debt against which indemnity is promised is the promisee's, this, being not the debt of another, but of the promisee, is clearly not within the statute, but the promise is original. And even if the execution of such a promise would discharge incidentally some other liability, this fact does not make the promise collateral. 11 Ad. & E. 446; 13 Mees. & W. Exch. 561; 17 Mass. 229; 17 Pick. Mass. 538; 1 Gray, Mass. 391; 9 *id.* 76; 25 Wend. N. Y. 243; 2 Den. N. Y. 45; 10 Gill & J. Md. 404; 22 Conn. 317; 23 Miss. 430; 34 N. H. 414; 31 Vt. 142. *Third*, but where there is a liability implied in another person, and the promise refers to his liability or default, and if executed will discharge such liability or default, the promise would seem on reason to be collateral and binding like a suretyship for future advances,—that is, when accepted. 9 Ired. No. C. 10; 1 Speers, So. C. 4; 1 Ala. 1; 1 Gill & J. Md. 424; 6 Md. 78; 10 Ad. & E. 453; 6 La. N. S. 605; 4 Barb. N. Y. 131; 5 Hill, N. Y. 483. But in many cases the rule is broadly stated that a promise to indemnify merely is original, 8 Barnew. & C. 728 [overruled, 10 Ad. & E. 453]; 1 Gray, Mass. 391; 10 Johns. N. Y. 242; 4 Wend. N. Y. 657 [overruled, 4 Barb. N. Y. 131]; 1 Ga. 294; 5 B. Monr. Ky. 382; 20 Vt. 205; 10 N. H. 175; 1 Conn. 519; 5 Me. 504. In other cases the distinction is made to rest on the fact that the engagement is made to the debtor, 9 Gray, Mass. 76; 11 Ad. & E. 438; and in other cases, on the futurity of the risk or liability. 12 Mass. 297.

The last ground is untenable; future guaranties binding when accepted or acted upon, and those against torts, are expressly to the contrary. The first ground is too broad, as shown above; and the second seems to ignore the clear primary liability of the principal debtor.

10. When the principal obligation is void, voidable, not enforceable, or unascertained, the promise is original, there being in this case no principal obligation to sustain the promise as collateral. Browne, Stat. Fr. § 156. It may be questionable, however, whether the promise will in such cases be original unless the promisor knows the principal liability to be void or voidable, Burge, Surety. 6–10; but this question may be settled by the principle that where credit is given to the principal, notwithstanding his obligation is void or voidable, the promise of the surety is collateral.

4 Bingh. 470; 7 N. H. 368; but if no such credit is given or implied, the promise is collateral. See 34 Barb. N. Y. 208; 1 N. Y. 113; 15 *id.* 576; 33 Ala. N. S. 106; 6 Gray, Mass. 90. Such would be the guaranty of an infant's promise, 7 N. H. 368; and this is accordingly so held, 20 Pick. Mass. 467; 4 Me. 521; though a distinction has been made in the case of a married woman, 4 Bingh. 470; but the promise is collateral where the married woman has separate property which she can charge with the payment of her debts, and the credit is given exclusively to her. 6 Ga. 14.

So where the liability is unascertained at the time of the promise, the promise is original; as the liabilities must concur at the time of the undertaking to make a guaranty. Browne, Stat. Fr. § 196; 1 Salk. 27: *contra*, Ambl. 330. Under this head would come a promise to pay a liability for tort, there being no principal liability until judgment, 1 Wils. 305; or where the liability rests upon a future award, 2 All. Mass. 417; and liability upon indefinite executory contracts in general.

The promise is clearly original where the promisor undertakes for his own debt. The rule is, unless the promisor himself or his property is ultimately to be made liable in default of the principal debtor, the statute does not apply. Browne, Stat. Fr. § 177. Thus, an engagement by one who owes the principal debtor to retain the principal debt, so that it may be attached by trustee or garnishee process, is not a collateral promise. 9 Pick. Mass. 306; 20 Conn. 486; 1 Bingh. N. R. 103.

UNDER THE STATUTE OF FRAUDS.

11. At common law, a contract of guaranty or suretyship could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, "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 and signed by the party to be charged therewith, or by some person thereunto lawfully authorized:" so that under the statute all contracts of guaranty and suretyship must be in writing and signed. The words debt and default in the statute refer to contracts, 2 East, 325, per Lord Ellenborough; and debt includes only pre-existing liability, 12 Mass. 297; miscarriage refers to torts. 2 Barnew. & Ald. 613. Torts are accordingly within the statute, and may be guarantied against, 2 Barnew. & Ald. 613; 2 Day, Conn. 467; though this is doubted in regard to future torts. 1 Wils. 305. Perhaps a guaranty against future torts might be open to objections on the ground of public policy.

12. The doctrine that a future contingent liability on the part of the principal is not within the statute, 1 Salk. 27; 12 Mass. 297, is not tenable; and it is clear, both by analogy and on authority, that such a liability may support a guaranty, although such cases must be confined within very narrow limits, and the mere fact of the contingency is a very strong presumption that the promise is original. Browne, Stat. Fr. § 196; 6 Vt. 666.

Where the promise is made to the debtor, it is not within the statute. 7 Halst. N. J. 188; 2 Den. N. Y. 162; Browne, Stat. Fr. § 188, and cases cited. "We are of opinion that the statute applies only to promises made to the person to whom another is answerable." 11 Ad. & E. 446; 3 Perr. & D. 282; 1 Gray, Mass. 391. The word another in the statute must be understood as referring to a third person, and not to a debt due from either of the contracting parties. 6 Cush. Mass. 552; 7 *id.* 136; 5 All. Mass. 370. False and deceitful representations of the credit or solvency of third persons are not within the statute. Browne, Stat. Fr. §§ 181–184; 3 Term, 51; 4 Campb. 1. See, also, 5 Bos. & P. 241; 6 Cow. N. Y. 346; 4 Gray, Mass. 156.

13. In New York, the consideration must be expressed. This was so held before the revision of the statutes, and is now expressly provided by statute. 2 Rev. St. 135; 20 N. Y. 331; 21 *id.* 316; 3 Johns. N. Y. 210; 24 Wend. N. Y. 35; 7 *id.* 246; 29 Barb. N. Y. 486; 5 Den. N. Y. 484. The rule is the same in New Hampshire. 36 N. H. 73. For the English doctrine, see 5 East, 10.

But in applying this rule the courts lay hold of any language which implies a consideration, 21 N. Y. 315: the delivery of goods is presumed without being expressly stated, as where the promise was, "I guaranty the payment of any goods which A delivers to B," 9 East, 348; or in the case of an offer to become security "for silver put into A's hands for the purpose of manufacturing." 12 Wend. N. Y. 520. So on a promise "to hold A harmless for any indorsement to be made," 4 Den. N. Y. 559, or on a guaranty of payment of drafts to be issued, 3 N. Y. 203, the court infers the consideration. And see 13 N. Y. 232; 24 Wend. N. Y. 82; 4 Hill, N. Y. 200; 3 Den. N. Y. 312. So where the guaranty and the matter guarantied are one simultaneous transaction, both will be construed in connection, and the consideration expressed in the latter applied to the support of the former, if there are words of reference in the guaranty. 3 N. Y. 203; 10 Wend. N. Y. 209; 11 Johns. N. Y. 221; 36 N. H. 73.

FORMATION OF THE OBLIGATION.

14. In construing the language of the contract to decide whether it constitutes an original promise or a guaranty, it is difficult to lay down a general rule: the circumstances of particular cases vary widely. The word guaranty or surety may or may not indicate correctly the contract, and the circumstances of the case may make an indorser liable as a guarantor or surety, without any words to indicate the obligation. 24 Wend. N. Y. 456.

In general, if a promissory note is signed or indorsed when made by a stranger to the note, he becomes a joint promisor and liable on the note, 44 Me. 433; 9 Cush. Mass. 104; 6 Me. 478; 14 Tex. 275; 10 Rich. Law So. C. 17; 20 Mo. 571; and this will be true if

indorsed after delivery to the payee in pursuance of an agreement made before the delivery, 7 Gray, Mass. 284; 9 Mass. 314; 11 Penn. St. 482; 19 *id.* 260; but parol evidence may be introduced to show that he is a surety or guarantor. 23 Ga. 368; 18 Ill. 548. If the third party indorses after delivery to the payee without any previous agreement, he is merely a second indorser, 11 Penn. St. 466; 28 *id.* 147, 189, 193; and he is liable as a maker to an innocent holder. 20 Mo. 591. But it was held otherwise where the signature was on the face of the note, 19 N. H. 572; and the same is held where he signs an inception of the note, in pursuance of a custom, leaving a blank for the payee's signature above his name. 12 La. Ann. 517. In Connecticut, such an indorser is held to guaranty that the note shall be collectible when due. 5 Conn. 595; 14 *id.* 479; 25 *id.* 576. The time of signing may be shown by parol evidence. 9 Ohio, 139; 12 *id.* 228.

It has been held that a third person indorsing in blank at the making of the note may show his intention by parol, 11 Mass. 436; 13 Ohio, 228; but not if he describes himself as guarantor, or if the law fixes a precise liability to indorsements in blank. 2 Hill, N. Y. 80; 4 *id.* 420. But this has been doubted. 33 Eng. L. & Eq. 282. In New York the cases seem to take the broad ground that an indorser in blank, under all circumstances, is an indorser merely, and cannot be made a guarantor or surety. 4 Du. N. Y. 45; 7 Hill, N. Y. 416; 1 N. Y. 324; 2 *id.* 548.

15. In regard to the consideration necessary to sustain the contract of guaranty or suretyship, it need not necessarily be a consideration distinct from that of the principal contract. Where the two contracts are simultaneous, the guaranty may share the consideration of the other. 8 Johns. N. Y. 29; 1 Paine, C. C. 580; 24 Wend. N. Y. 246; 2 Pet. 176; 3 Metc. Mass. 396; 36 N. H. 73; 3 Kent, Comm. 122.

The giving of new credit where a debt already exists has been held a sufficient consideration to support a guaranty of the old and new debt, 15 Pick. Mass. 159; 15 Ga. 321; but the weight of authority would seem to require that there should be some further consideration. Browne, Stat. Fr. § 191; 2 Wils. 94; 7 Term, 201; 5 East, 10; 1 Pet. 476; 3 Johns. N. Y. 211; 20 Me. 28; 24 *id.* 177; 29 *id.* 79; 7 Harr. & J. Md. 457; R. M. Charlt. Ga. 311.

Forbearance to sue the debtor is a good consideration, if definite in time, Hardr. 71; 1 Kebl. 114; or even if of considerable, Croke Jac. 683, or reasonable time. 3 Bulstr. 206; Burge, Suret. 12. But there must be an actual forbearance, and the creditor must have had a power of enforcement. 4 East, 465; 3 Term, 17; Willes, 482. But the fact that it is doubtful whether such a power exists does not injure the consideration. 5 Barnew. & Ad. 123. A short forbearance, or the deferment of a remedy, as postponement of a trial, or postponement of arrest, may be a good consideration; and perhaps an agreement to defer indefinitely may support a guaranty. Browne, Stat. Fr. § 190; 1 Cow. N. Y. 99; 4 Johns. N. Y. 257; 2 Rich. So. C. 113; 6 Conn. 81; 5 Jones, No. C. 329. A mere agreement not to push an execution is too vague to be a consideration, 4 McCord, So. C. 409; and a postponement of a remedy must be made by agreement as well as in fact. 3 Cush. Mass. 85; 11 Metc. Mass. 170; 6 Conn. 81; 7 *id.* 523; 11 C. B. 172.

16. The contract of suretyship may be entered into absolutely and without conditions, or its formation may be made to depend on certain conditions precedent. But there are some conditions implied in every contract of this kind, however absolute on its face. In the case of bonds, as in other contracts of suretyship, it is essential that there should be a principal, and a bond executed by the surety is not valid until executed by the principal also. One case, 10 Coke, 100 *b*, sometimes cited to the contrary, is not clear to the point. The argument that the surety is bound by his recital under seal fails, especially in all statute bonds, where one important requisite of the statute, that the bond should be executed by the principal, fails. 17 Mass. 591; 2 Pick. Mass. 24; 4 Beav. Ch. 383; 11 *id.* 265; 14 Cal. 421.

Where the surety's undertaking is conditional on others joining, he is not liable until they do so, 4 Barnew. & Ad. 440; 4 Cranch, 219: *contra*, if the obligee is ignorant of the condition. 2 Metc. Ky. 608. So the surety is not bound if the signatures of his co-sureties are forged, although he has not made his signature expressly conditional on theirs. 2 Am. Law Reg. 349.

17. The acceptance of the contract by the promisee by words or by acts under it is often made a condition precedent to the attaching of the liability of the surety. The general rule is that where a future guaranty is given, absolute and definite in amount, no notice of acceptance is necessary; but if it is contingent and indefinite in amount, notice must be given. 4 Me. 521; 1 Mas. C. C. 324, 371; 8 Conn. 438; 16 Johns. N. Y. 67; 5 All. Mass. 47; but the promisee has a reasonable time to give such notice. 8 Gray, Mass. 211. And see, on this last point, 21 Ala. N. S. 721.

A distinction is to be made between a guaranty and an offer to guaranty. No notice of acceptance is requisite when a guaranty is absolute, 3 N. Y. 212; 2 Mich. 511; but an offer to guaranty must have notice of acceptance. Burge, Suretyship; 32 Penn. St. 10. And where acceptance is required, it may be as well implied by acts as by words; as, by receiving the written guaranty from the promisor, 8 Gray, Mass. 211; or by actual knowledge of the amount of sales under a guaranty of the purchase-money. 28 Vt. 160.

EXTENT OF OBLIGATION.

18. The liability of a surety cannot exceed, in any event, that of the principal, though it may be less. The same rule does not apply to the remedies, which may be greater against

the surety. But, whatever may be the liability imposed upon the surety, it is clear that it cannot be extended by implication beyond the terms of the contract. His obligation is *strictissimi juris*, and cannot be extended beyond the precise terms of the contract. 10 Johns. N. Y. 180; 2 Penn. 27; 15 Pet. 187. The rule is thus laid down by the United States Supreme Court: sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are never allowed to enlarge, or in any degree to change, their legal obligations. 21 How. 66. And this rule has been repeatedly reaffirmed. 3 Kent, Comm. 10th ed. 183; 5 Hill, N. Y. 635; 11 N. Y. 598; 29 Penn. St. 460; 6 How. 296; 2 Wall. 235.

The remedies against the surety may be more extensive than those against the principal, and there may be defences open to the principal but not to the surety,—as, infancy or coverture of the principal,—which must be regarded as a part of the risks of the surety. 30 Vt. 122.

The liability of the surety extends to and includes all securities given to him by the principal debtor, the converse of the rule stated below in the case of collateral security given to the creditor. 26 Vt. 308. Thus, in Missouri a creditor is entitled in equity to the benefit of all securities given by the principal debtor for the indemnity of his surety. 18 Mo. 136; 19 Ala. N. S. 798; 22 Miss. 87. If the surety receives money from the principal to discharge the debt, he holds it as trustee of the creditor. 6 Ohio, 80.

19. In general, the obligations of a surety are the same as the obligations of the principal, within the scope of the contract; but the principal may be under obligations not imposed by the contract, but yet coming so close as to render the distinction a matter of some difficulty. The obligation must, therefore, be limited as to its subject-matter in time, and in amount may be limited in its operation to a single act, or be continuous, and may include only certain liabilities.

In the common case of bonds given for the faithful discharge of the duties of an office, it is of course the rule that the bond covers only the particular term of office for which it is given, and it is not necessary that this should be expressly stated; nor will the time be extended by a condition to be bound "during all the time A (the principal) continues," if after the expiration of the time A holds over merely as an acting officer, without a valid appointment. 3 Sandf. N. Y. 403. The circumstances of particular cases may extend the strict rule stated above, as in the case of officers annually appointed. Here, although the bond recites the appointment, if it is conditioned upon his faithful accounting for money received before his appointment, the surety may be held. 9 Barnew. & C. 35; 9 Mass. 267. But the intention to extend the time, either by including past or future liabilities, must clearly appear, and the condition of the bond in this particular is sometimes restrained by the recital. 4 Bos. & P. 175; 4 Taunt. 593. Generally the recital cannot be enlarged and extended by the condition. Theobald, Surety, 66, n. [b]. And where the recital sets forth an employment for twelve months, this time is not controlled by a condition, "from time to time annually, and at all times thereafter during the continuance of this employment," although the employment is actually continued beyond the year. 6 East, 507; 2 Campb. 39; 3 *id.* 52; 2 Barnew. & Ald. 431; 2 Saund. 403; 2 Bingh. 32; Theobald, Surety. 72; 8 Mass. 275; 7 Gray, Mass. 1; 1 All. Mass. 340.

So the obligation may cease by a change in the character of the office or employment, as where the principal who has given a bond for faithful discharge of the duties of clerk, is taken into partnership by the obligee, 3 Wils. 530; but an alteration in the character of the obligees, by taking in new partners, does not necessarily terminate the obligation. 10 Barnew. & C. 122. But where an essential change takes place, as the death of the obligee, the obligation is terminated, although the business is carried on by the executors. 1 Term, 18. Where one becomes surety for two or either of them, the obligation is terminated by the death of one of the principals, 1 Bingh. 452; but this is where the obligation is essentially personal; and where a bond for costs was given by two as "defendants," the surety was not discharged by the death of one. 5 Barnew. & Ald. 261.

So a surety for a lessee is not liable for rent after the term, although the lessee holds over. 1 Pick. Mass. 332.

If the law provides that a public officer shall hold over until a successor is appointed, the sureties on the official bond are liable during such holding over. 37 Miss. 518; 2 Metc. Mass. 522; *contra*, in the case of officers of corporations. 7 Gray, Mass. 1; 1 All. Mass. 340. And this provision is not controlled by an alteration of the law extending the term but leaving the provision intact. 15 Gratt. Va. 1.

20. In bonds, the penalty is the extreme amount of liability of the surety; but various circumstances may reduce the liability below this. 2 South. N. J. 498; 3 Cow. N. Y. 151; 5 *id.* 424; 2 H. Blackst. 1190; 6 Term, 303. If the engagement of the surety is general, the surety is understood to be obliged to the same extent as his principal, and his liability extends to all the accessories of the principal obligation. Theobald, Surety. 90; 14 La. Ann. 183.

It is said by Ellenborough, J., that a recital only for bills to a certain amount accepted by the plaintiff, is extended by a condition to be liable "for that or any other account thereafter to subsist." 2 Campb. 39.

A continuing guaranty up to a certain amount covers a constant liability of that amount; but if the guaranty is not continuing, the liability ceases after the execution of the contract to the amount limited. 3 Barnew. & Ald. 593; 6 Bingh. 276.

21. A guaranty may be continuing or may be exhausted by one act; but in drawing distinctions on this point, each case must rest upon its own circumstances. The general principle may be thus stated: when by the terms of the undertaking, by the recitals in the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend. 7 Pet. 113; 2 Tyrwh. 86; 3 Barnew. & Ald. 593. Thus, a guaranty for *any* goods to one hundred pounds is continuous, 12 East, 227; or for "any debts not exceeding," &c., 2 Campb. 413; or, "I will undertake to be answerable for *any* tallow not exceeding," &c., but "without the word *any* it might perhaps have been confined to one dealing." 3 Campb. 220, per Ellenborough, C. J. The words, "I do hereby agree to guaranty the payment of goods according to the custom of their trading with you, *in the sum of* £200," are held to constitute a continuing guaranty, 6 Bingh. 244; so of the words, "I agree to be responsible for the price of goods purchased at any time, to the amount of," &c. 1 Metc. Mass. 24. The words "answerable for the amount of five sacks of flour" are clearly not continuous. 6 Bingh. 276. See 6 Maule & S. 239.

22. Where the surety is bound for the acts of the principal in a certain capacity or office, the obligation ceases, as we have seen above, on the termination of the office. But, besides being limited in point of time to the duration of the particular employment, it is essential, to bind the surety, that the liabilities of the principal should be of such a character as may fairly be covered by the contract. In official bonds, the liability of the surety is limited to the acts of the principal in his official capacity: *e.g.* a surety on a cashier's bond is not liable for money collected by the cashier as an attorney-at-law, and not accounted for to the bank. 4 Pick. Mass. 314. So also where one was surety, and the bond was conditioned on the accounting by the principal for money received by him in virtue of his office as parish overseer, the surety was held not liable for money borrowed by the principal for parochial purposes. 7 Barnew. & C. 491. On the other hand, a surety on a collector's bond is liable for his principal's neglect to collect, as well as failure to pay over. 6 Carr. & P. 106.

As the surety is only liable to the obligations fairly intended at the execution of the bond, he cannot be held for a breach of new duties attached to his principal's office, Theobald, Surety. 72; 4 Pick. Mass. 314, or if any material change is made in the duties. 2 Pick. Mass. 223.

If one guaranties payment for services, and the promisee partly performs the services, but fails of completing them from no fault of his own, the guarantor is liable to the amount of the part-performance. 12 Gray, Mass. 445.

A bond for faithful performance of duties renders the sureties responsible for ordinary skill and diligence, as well as for integrity. 12 Pick. Mass. 303.

23. The contracts of guaranty and suretyship are not negotiable or assignable, and in general can be taken advantage of only by those who were included as obligees at the formation of the contract. 3 McLean, 279; 4 Cranch, 224. Accordingly, the contract is terminated by the death of one of several obligees, 4 Taunt. 673; 8 East, 484; 7 Term, 354, or by material change, as incorporation. 3 Bos. & P. 34. But where a bond is given to trustees in that capacity, their successors can take advantage of it. 12 East, 399. The fact that a stranger has acted on a guaranty does not entitle him to the benefits of the contract, 20 Vt. 499; and this has been held in the case of one of two guarantees who acted on the guaranty. 3 Tex. 199.

It is stated that a guaranty addressed to no one in particular may be acted on by any one, 1 Parsons, Contr. 567; 22 Vt. 160; but the true rule would seem to be that in such cases a party who had acted on the contract might show, as in other contracts, that he was a party to it within the intention at the making; the mere fact that no obligee is mentioned does not open it to everybody.

ENFORCEMENT OF OBLIGATION.

24. As the surety cannot be bound to any greater extent than the principal, it follows that the creditor cannot pursue the surety until he has acquired a full right of action against the principal debtor. A surety for the performance of any future or executory contract cannot be called upon until there is an actual breach by the principal. A surety on a promissory note cannot be sued until the note has matured, as there is no debt until that time. All conditions precedent to a right of action against the principal must be complied with. Where money is payable on demand, there must have been a demand and refusal. But it is not necessary that the creditor should have exhausted all the means of obtaining his debt. In some cases, which will be treated of in detail, it may be requisite to notify the surety of the default of the debtor, or to sue the debtor; but this depends upon the particular conditions and circumstances of each case, and cannot be considered a condition precedent in all cases. Even where the creditor has a fund or other security to resort to, he is not obliged to exhaust this before resorting to the surety; he may elect either remedy, and pursue the surety first. But if the surety pay the debt, he is entitled to claim that the creditor should proceed against such fund or other security for his benefit. 15 Md. 308; 4 Jones, Eq. No. C. 212; 33 Ala. N. S. 261; 2 Head, Tenn. 549.

And if the creditor, having received such collateral security, avail himself of it, he is

bound to preserve the original debt; for in equity the surety will be entitled to subrogation. 38 Penn. St. 98. In Kentucky, a judgment against the principal may be assigned to the surety upon payment of the debt. 1 Metc. Ky. 489. So in North Carolina, 4 Jones, Eq. No. C. 262. But an assignment of the debt must be for the whole: the surety cannot pay a part and claim an assignment *pro tanto*. 39 N. H. 150.

25. In general, it is not requisite that notice of the default of the principal should be given to the surety, especially when the engagement is absolute and for a definite amount. Theobald, Surety. 137; 14 East, 514. Laches in giving notice to the surety upon a draft of the default of the principal can only be set up as a defence in an action against the surety, in cases where he has suffered damage thereby, and then only to the extent of that damage, 3 N. Y. 203; it is no defence to an action against a surety on a bond that the plaintiff knew of the default of the principal, and delayed for a long time to notify the surety or to prosecute the bond. 1 Zabr. N. J. 100.

If after a joint judgment against a principal and his surety on their joint and several bond, the surety die, the obligee has no remedy in equity against his executor. 9 How. 83.

DISCHARGE OF OBLIGATION.

26. The obligation may be discharged by acts of the principal, or by acts of the creditor. Payment, or tender of payment, by the one, and any act which would deprive the creditor of remedies which in case of default would enure to the benefit of the surety, are instances of discharge. In the first place, a payment by the debtor would of course operate to discharge the liability. The only questions which can arise upon this point are, whether the payment is applicable to the payment in question, and as to the amount. Upon the first of these, this contract is governed by the general rule that the debtor can apply his payment to any debt he chooses. The surety has no power to modify or direct the application, but is bound by the election of the principal. 9 Bingh. 544; 2 Bingh. N. C. 7. If no such election is made by the debtor, the creditor may apply the payment to whichever debt he sees fit. 7 Wheat. 20; 9 *id.* 720; 5 Pet. 161; 9 Cow. N. Y. 409, 747; 1 Pick. Mass. 336. This power, however, only applies to voluntary payments, and not to payments made by process of law. 10 Pick. Mass. 129. A surety on a promissory note is discharged by the payment, and the note cannot be again put in circulation. 12 Cush. Mass. 163; 7 Pick. Mass. 88. Whatever will discharge the surety in equity will be a defence at law. 7 Johns. N. Y. 337; 2 Ves. Ch. 542; 2 Pick. Mass. 223; 8 *id.* 128; 21 *id.* 488; 16 Serg. & R. Penn. 252; 5 Wend. N. Y. 85.

27. A release of the principal debtor operates as a discharge of the surety; though the converse is not true, 17 Tex. 128, unless the obligation is such that the liability is joint only, and cannot be severed. See, on this point, Fell, Guar. c. ii.; 8 Penn. St. 265.

28. Any material alteration in the contract without the assent of the surety, or change in the circumstances, will discharge the surety. Such are the cases where the sureties on a bond for faithful performance are released by a change in the employment or office of the principal, 6 C. B. N. S. 550; and it makes no difference whether the change is prejudicial to the surety or not. 30 Vt. 122; 32 N. H. 550; 3 Barnew. & C. 605, per Tindal, C. J.; 9 Wheat. 680, per Story, J.; Paine, C. C. 305; 3 Binn. Penn. 520; 3 Wash. C. C. 70. If the principal and obligee change the terms of the obligation without the consent of the surety, the latter is discharged. 4 Wash. C. C. 26.

29. If the creditor without the assent of the surety gives time to the principal, the surety is discharged. Burge, Suret. 203; 3 Mer. Ch. 272; 2 Browne, Ch. 579; 3 Young & C. 187; 2 Ves. Ch. 540; 10 Bligh, N. S. 548; 4 Taunt. 456; 2 Bos. & P. 61; 3 Madd. Ch. 221; 2 Swanst. Ch. 539; 7 Price, Exch. 223; 8 Bingh. 156.

The contract must be effectual, binding the creditor as well as the debtor; and it is not enough that the creditor merely forbears to press the debtor. 2 Ad. & E. 528; 5 Gray, Mass. 457; 2 Pick. Mass. 581; 15 Ind. 45. See, also, 17 Johns. N. Y. 176; 6 Ves. Ch. 734; 10 East, 34; 1 Bos. & P. 419; 1 Gall. C. C. 35; 2 Caines, Cas. N. Y. 30; 5 Cal. 173; 9 Tex. 615; 9 Clark & F. Hou. L. 45.

The receipt of interest on a promissory note, after the note is overdue, is not sufficient to discharge the surety. 8 Pick. Mass. 458; 6 Gray, Mass. 319.

And as a requisite to the binding nature of the agreement, it is necessary that there should be some consideration, 2 Dutch. N. J. 191; 6 Md. 113, 461; 30 Miss. 424; but a part-payment by the principal is held not to be such a consideration. 31 Miss. 664. Prepayment of interest is a good consideration, 30 Miss. 432; but not an agreement to pay usurious interest, where the whole sum paid can be recovered back, 10 Md. 227; though it would seem to be otherwise if the contract is executed, and the statutes only provide for a recovery of the excess. 2 Patt. & H. Va. 504. See, also, 8 B. Monr. Ky. 382; 23 Vt. 142.

It has been questioned how far the receipt of interest in advance shows an agreement to extend the time: it may undoubtedly be a good consideration for such an agreement, but does not of itself constitute it. At the most it may be said to be *primâ facie* evidence of the agreement. 30 Vt. 711; 15 N. H. 119.

The surety is not discharged if he has given his assent to the extension of the time. 6 Bosw. N. Y. 600; 2 McLean, C. C. 99; 16 Penn. St. 112. Such assent by one surety does not bind his co-surety, 10 N. H. 318; and subsequent assent given by the surety without new consideration, after he has been discharged by a

valid agreement for delay, will not bind him. 12 N. H. 320. He need not show notice to the creditor of his dissent. 12 Ga. 271.

Where an execution against a principal is not levied on, or a levy is postponed without the consent of the surety, he is discharged from his liability as surety, unless he has property of the principal in his hands at the time; if he has property in his hands liable for the principal's debts, the creditors of the principal may insist on an application of the property to the payment of their debts. 9 B. Monr. Ky. 235.

30. If the creditor releases any security which he holds against the debtor, the surety will be discharged, 7 Mo. 497; 8 Serg. & R. Penn. 452; but if the security only covers a part of the debt, it would seem that the surety will be released only *pro tanto*. 9 Watts & S. Penn. 36. Nor will it matter if the security is received after the contract is made. A creditor who has the personal contract of his debtor, with a surety, and has also or takes afterwards property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety he shall lose his claim against the surety to the amount of the property so surrendered in equity, 43 Me. 381; 8 Pick. Mass. 121; 4 Johns. Ch. N. Y. 129; 4 Ves. 829; 2 Cox, 86; 5 N. H. 353; Theobald, Surety. 142; or at law. 8 Serg. & R. Penn. 457; 13 *id.* 157. The fact that other security, as good as, or better than, that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge. 15 N. H. 119.

31. But a surety is not discharged by the fact that the creditor has released or compounded with his co-surety; much less if his co-surety has been released by process of law. The only effect of such a release or composition is that the surety is then not liable for the proportion which would properly fall on his co-surety. 6 Ves. 605, per Lord Eldon. This at least is the doctrine in equity; although it may be questioned whether it would apply at law where the obligation is joint. 4 Ad. & E. 675. See 4 Ga. 397.

But if the obligation is joint and several, a surety is not released from his proportion by such discharge of his co-surety. 31 Penn. St. 460.

RIGHTS OF SURETY AGAINST PRINCIPAL.

32. Until default, the surety has, in general, no rights against the principal, except the passive right to be discharged from the obligation on the conditions stated before. But after default on the part of the principal, and before the surety is called upon to pay, the latter has a remedy against the further continuance of the obligation, and he cannot in all cases, as we shall see below, compel the creditor to proceed against the debtor; but the English courts in equity allow him to bring a bill against the debtor, requiring him to exonerate him. 2 Brown, Ch. 579.

So, in this country, a surety for a debt which the creditor neglects or refuses to enforce by proper proceedings for that purpose may, by bill in equity, bring both debtor and creditor before the court, and have a decree to compel the debtor to make payment and discharge the surety, 5 Sneed, Tenn. 86; 3 E. D. Smith, N. Y. 432; and in courts having full equity powers there can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not. 2 Md. Ch. Dec. 442. 4 Johns. Ch. N. Y. 123.

33. The surety, after payment of the debt, may recover the amount so paid of the principal, the process varying according to the practice of different courts. 2 Term, 104; 4 Me. 200; 1 Pick. Mass. 121; 1 Metc. Mass. 389; 3 *id.* 169; 13 Ill. 68. The liability assumed by the surety is held to be a good consideration to sustain another contract. 21 Pick. Mass. 241.

And such payment refers back to the original undertaking, and overrides all intermediate equities, as of the assignee of a claim against the surety assigned by the principal before payment. 28 Vt. 391.

The payment must not be voluntary, or made in such a manner as to constitute a purchase; for the surety, by purchasing the claim, would take the title of the creditor, and must claim under that, and not on his own implied contract of the principal. By an involuntary payment is intended only a payment of a claim against which the surety cannot defend. It is not necessary that a suit should be brought. But a surety who pays money on a claim which is absolutely barred has no remedy against the principal. 3 Rand. Va. 490; 3 N. H. 270.

A surety, having in his hands funds or securities of the principal, may apply them to the discharge of the debt, 10 Rich. Eq. So. C. 557; but where the fund is held by one surety he must share the benefit of it with his co-surety. 3 Jones, Eq. No. C. 170; 28 Vt. 65. But a surety who has security for his liability may sue the principal on his implied promise all the same, unless it was agreed that he should look to the security only. 4 Pick. Mass. 444.

Payment of a note by a surety by giving new note is sufficient payment, even if the new note has not been paid when the suit is commenced, 4 Pick. Mass. 444; 14 *id.* 286; 2 Metc. Mass. 561; 2 All. Mass. 474; 3 N. H. 366: *contra*, where judgment had been rendered against the surety, 3 Md. 47: or by conveyance of land. 11 Mass. 494; 9 Cush. Mass. 213.

If the surety pays too much by mistake, he can recover only the correct amount of the principal. 1 Dane, Abr. Mass. 197. If a surety pays usurious interest to obtain time to pay the debt of the principal, he cannot recover it of the principal. 1 Mich. 193.

Extraordinary expenses of the surety, which might have been avoided by payment of the

money, or remote and unexpected consequences, are never considered as coming within the contract. 17 Mass. 169; 5 Rawle, Penn. 106. Costs incurred and paid by the surety in litigating in good faith the claim of the creditor can be recovered of the principal, 30 Vt. 467; 5 Barb. N. Y. 398; but not so if the litigation is in bad faith, 24 Barb. N. Y. 546, or where the surety, being indemnified for his liability, incurred expenses in defending a suit contrary to the expressed wishes of the principal and after being notified by him that there was no defence to such action. 22 Conn. 299.

Joint sureties who pay the debt of the principal may sue jointly for reimbursement, 3 Metc. Mass. 169; and if each surety has paid a moiety of the debt, they have several rights of action against the principal. 20 N. H. 418.

RIGHTS OF SURETY AGAINST CREDITOR.

34. It is not quite clear whether a surety can enforce any remedies on the part of the creditor before actual payment by the surety; and, of course, as connected with this, what is the effect of a request by the surety to the creditor to proceed against the debtor, and neglect or refusal to comply by the creditor. The objection to discharging the surety on account of such neglect is the fact that the surety may pay the debt and at once become subrogated to all the rights of the creditor. 6 Md. 210. But where there are courts in the exercise of full equity powers, the surety may insure a prompt prosecution either by discharging the obligation and becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed by an application to a court of equity, 2 Johns. Ch. N. Y. 554; though in the latter case he would probably be required to indemnify the creditor against the consequences of risk, delay, and expense. 2 Md. Ch. Dec. 442. The same indemnity would in general be required where a request is made; but it has been held that a simple request to sue the principal debtor, without a tender of expenses, or a stipulation to pay them, or an offer to take the obligation and bring suit, is sufficient to discharge the surety, unless the creditor at the time of the notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be removed. 18 Penn. St. 460. A creditor is not bound to make use of active diligence against a principal debtor on the mere request of a surety. 13 Ill. 376.

35. The surety who pays the debt of the principal in full is entitled to have every advantage which the creditor has in pursuing the debtor, and for this purpose may have an assignment of the debt, or be subrogated either in law or equity. 15 N. H. 119; 39 *id.* 150. Whether the remedy will be by subrogation, or whether the suit must be in the name of the creditor, will depend upon the rules of practice in the different states. 38 Penn. St. 98. The right of subrogation does not depend upon any contract or request by the principal debtor, but rests upon principles of justice and equity, 1 N. Y. 595; 4 Ga. 343, and, though originating in courts of equity, is now fully recognized as a legal right. 11 Barb. N. Y. 159.

RIGHTS OF SURETY AGAINST CO-SURETY.

36. The co-sureties are bound to contribute equally to the debt they become liable to pay when their undertaking is joint, or joint and several, not separate and successive, 3 Pet. 470; but the creditor may recover the whole amount of one surety, and leave him to his remedy by contribution from the others and reimbursement from the principal. 1 Dan. Ky. 355. To support the right of contribution, it is not necessary that the sureties should be bound by the same instrument. 2 Swanst. Ch. 185; 14 Ves. Ch. 160. But where two sureties are bound by separate and distinct agreements for distinct amounts, although for equal portions of the same debt, there is no right of contribution between them. 1 Turn. & R. Ch. 426; 3 Pet. 470. The right of contribution, however, does not arise out of any contract or agreement between co-sureties to indemnify each other, but rests on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden it shall be borne equally between them. In such cases the law raises an implied promise from the mutual relation of the parties. 3 All. Mass. 566.

It is not necessary that the co-sureties should know of the agreements of each other, as the principle of contribution rests only on the equality of the burden, and not on any privity. 1 Cox, 318; 2 Bos. & P. 270; 4 Young & C. 424; 23 Penn. St. 294.

37. A surety may compel contribution for the costs and expenses of defending a suit, if the defence were made under such circumstances as to be regarded as prudent. 23 Vt. 581. And where the suit is defended at the instance or request of the co-surety, costs would be a subject of contribution, both on equitable grounds and on the implied promise. 1 Mood. & M. 406.

A claim for contribution extends to all securities given to one surety. 30 Barb. N. Y. 403; 3 Jones, Eq. No. C. 170. If one of several sureties takes collaterals from the principal, they will enure to the benefit of all. 28 Vt. 65; 3 Dutch. N. J. 503. Where one of several sureties is secured by mortgage, he is not bound to enforce his mortgage before he pays the debt or has reason to apprehend that he must pay it, unless the mortgagor is wasting the estate; and if the mortgagor be squandering the mortgaged property, and the surety secured by the mortgage fails to enforce his rights, he is chargeable between himself and his co-sureties with the fair vendible value of the mortgaged property at a coercive sale. 11 B. Monr. Ky. 399. The surety in a suit for contribution can recover only the amount which he has actually paid. Any reduction which he has obtained must be regarded as

for the benefit of all the co-sureties. 12 Gratt. Va. 642. And see 11 B. Monr. Ky. 297.

38. The right of contribution may be controlled by particular circumstances: thus, where one becomes surety at the request of another, he cannot be called on to contribute by the person at whose request he entered into the security. 2 Esp. N. P. Cas. 478; 37 N. H. 567. The agreement between the first surety and the second in such a case is not within the Statute of Frauds. 4 Zabr. N. J. 812.

A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands. 21 Ala. N. S. 779.

39. The remedy for contribution may be either in equity or at law. The law raises an implied promise, as we have seen, and clearly gives the right of action, and the remedy at law is ancient, writs of contribution being found in the Register, fo. 176, and in Fitzherbert, Nat. Brev. 162. But the majority of the cases are in equity, whose rules of practice are much better suited to the proceeding, especially where the accounts are complicated or the sureties numerous. The result reached either in law or in equity is the same, with one important exception; in the case of the insolvency of one of the sureties. In such cases the law takes no notice of the insolvency, but awards the paying surety his due proportion as if all were solvent. But equity takes no notice of the surety who is insolvent, but awards contribution as if he had never existed. 1 Chanc. Rep. 34; 1 Chanc. Cas. 246; 6 Barnew. & C. 689; 4 Gratt. Va. 267. One surety cannot by injunction arrest the proceedings at law of his co-surety against him for contribution, unless he tenders the principal and interest due such co-surety, who has paid the principal, or alleges that he is ready and willing to bring the same into court to be paid to him as a condition of the court's interference. 4 Gill, Md. 225. Where a surety has been compelled to pay the debt of his principal, and one of his co-sureties is out of the jurisdiction of the court, and others are within it, the surety who has paid is at liberty to proceed in a suit in equity for contribution against those co-sureties only who are within the jurisdiction, by stating the fact in his bill, and the defendants will be required to make contribution without regard to the share of the absent co-surety. 6 Ired. Eq. No. C. 115.

CONFLICT OF LAWS.

40. The contract of suretyship, like other contracts, is governed by the *lex loci contractus;* but the *locus* is not necessarily the same as that of the principal contract. Thus, the contract made by the indorser of a note is, not to pay the note where it is payable, but that if not paid there he will pay it at the place where the indorsement is made. 5 East, 124; 12 Johns. N. Y. 142; 3 Mass. 77; 13 *id.* 20; 11 Mart. La. 23; 16 *id.* 606; 4 Barnew. & Ald. 654; 8 Pick. Mass. 194; Story, Confl. L. § 317. The *lex loci* applies as well to the interest as to the principal amount. A question has been made in the case of bonds for faithful performance given by public officers; and in these it has been held that the place of performance is to be regarded as the place of making the contract, and sureties are bound as if they made the contract at the seat of the government to which the bonds are given. And under this rule the obligation of all on the bond is governed by the same law, although the principal and sureties may sign in different states. Story, Confl. L. 291; 6 Pet. 172; 7 *id.* 435. A letter of guaranty written in the United States and addressed to a person in England must be construed according to the laws of England. 1 How. 161.

Consult BOND; GUARANTY; PROMISSORY NOTES; Burge, Ross, Theobald, on Suretyship; Fell, on Guaranty; Pitman, on Principal and Surety; Browne, Statute of Frauds; Addison, Chitty, Newland, Parsons, Shaw, Smith, Story, Verplanck, on Contracts; Burge, Story, Conflict of Laws; Adams, Story, Eq. Jur.; Dixon, Subrogation; Bouvier, Institutes; Blackstone, Kent, Commentaries.

SURGEON. One who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. One who practises surgery.

This definition is imperfect, it being impossible to define the term surgeon or surgery. The term *surgery*, or *chirurgery*, comes from two Greek words signifying *the hand* and *work*, meaning a manual procedure by means of instruments, or otherwise, in the healing of injuries and the cure of disease. The practice of *medicine*, in contradistinction to the practice of *surgery*, denotes the treatment of disease by the administration of drugs or other sanative substances. There cannot be a complete separation between the practice of medicine and surgery as they are developed by modern science, and understood by the most learned in the profession of medicine: the principles of both are the same throughout, and no one is qualified to practise either who does not completely understand the fundamental principles of both.

2. The general principles of law defining the civil responsibilities of physicians and surgeons are the same as those that apply to and govern the conduct of lawyers, engineers, machinists, ship-builders, brokers, and other classes of men whose employment requires them to transact business demanding special skill and knowledge. Elwell, Malp. 19; 27 N. H. 468. The surgeon does not warrant or insure as to the result, ordinarily. 7 Carr. & P. 81; Elwell, Malp. 20. The surgeon or physician may bind himself by an express contract to cure. Elwell, Malp. 21; Chitty, Contr. 629, 630; 27 N. H. 468; Jones, Bailm. 22, 23, 62, 97, 120; 2 Ld. Raym. 909; 1 Bell, Comm. 459, 5th ed.; 3 Blackstone, Comm. 122.

3. Lord-chief-justice Tindall says, Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable, fair, and competent degree of skill. 8 Carr. & P. 475. This degree of skill is what is usually termed *ordinary* and reason-

able. Story, Bailm. 433; Elwell, Malp. 22, 23. In addition to the application of ordinary skill in the treatment of disease and injuries, the physician and surgeon undertake to give to their cases ordinary care and diligence and the exercise of their best judgment. Elwell, Malp. 26; 5 Barnew. & Ald. 820; 15 East, 62; 15 Greenl. Me. 97. See PHYSICIAN.

SURNAME. A name which is added to the Christian name. In modern times these have become family names.

They are called surnames, because originally they were written *over the name* in judicial writings and contracts. They were and are still used for the purpose of distinguishing persons of the same name. They were taken from something attached to the persons assuming them: as, John Carpenter, Joseph Black, Samuel Little, etc. See NAME.

SURPLUS. That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue. See 18 Ves. Ch. 466.

SURPLUSAGE. In Accounts. A greater disbursement than the charges amount to. A balance over. 1 Lew. 219.

In Pleading. Allegations of matter wholly foreign and impertinent to the cause. All matter beyond the circumstances necessary to constitute the action is surplusage. Cowp. 683; 5 East, 275; 10 *id.* 205; 2 Johns. Cas. N. Y. 52; 1 Mas. C. C. 57; 16 Tex. 656. Generally, matter of surplusage will be rejected and will not be allowed to vitiate the pleading, Coke, Litt. 303 *b*; 2 Saund. 306, n. 14; 7 Johns. N. Y. 462; 13 *id.* 80; 3 Dougl. 472; 1 Root, Conn. 456; 1 Pet. 18; 2 Mass. 283; 8 Serg. & R. Penn. 124; 1 Pet. 18; 1 Ala. 326; 1 Hempst. Ark. 221; 21 N. H. 535, as new and needless matter stated in an innuendo, 9 East, 95; 7 Johns. N. Y. 272, even if repugnant to what precedes, 10 East, 142; see 16 Tex. 656; but if it shows that the plaintiff has no cause of action, demurrer will lie. 1 Salk. 363; 3 Taunt. 139; 2 East, 451; 4 *id.* 400; Dougl. 667; 2 W. Blackstone, 842; 3 Cranch, 193; 2 Dall. 300; 1 Wash. C. C. 257. Where the whole of an allegation is immaterial to the plaintiff's right of action, it may be struck out as surplusage. 1 Mas. C. C. 57. Matter laid under a videlicet, inconsistent with what precedes, may be rejected as surplusage, 4 Johns. N. Y. 450; 2 Blackf. Ind. 143; and when the unnecessary matter is so connected with what is material that it cannot be separated, the whole matter may be included in the traverse, Dy. 365; 2 Saund. 206 *a*, n. 21-24; and the whole must be proved as laid. 1 Ohio, 483; 1 Brev. No. C. 11.

SURPRISE. In Equity Practice. The act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised. 2 Brown, Ch. 150; 1 Story, Eq. Jur. § 120, note.

The situation in which a party is placed, without any default of his own, which will be injurious to his interests. 8 Mart. La. N. S. 407.

Mr. Jeremy, Eq. Jur. 366, 383, note, seems to think that the word surprise is a technical expression, and nearly synonymous with fraud. It is sometimes used in this sense when it is deemed presumptive of, or approaching to, fraud. 1 Fonblanque, Eq. 123; 3 Chanc. Cas. 56, 74, 103, 114. See 6 Ves. Ch. 327, 338; 16 *id.* 81, 86, 87; 2 Brown, Ch. 326; 1 Cox, Ch. 340.

SURREBUTTER. In Pleading. The plaintiff's answer to the defendant's rebutter. It is governed by the same rules as the replication. See 6 Comyns, Dig. 185; 7 *id.* 389.

SURREJOINDER. In Pleading. The plaintiff's answer to the defendant's rejoinder. It is governed in every respect by the same rules as the replication. Stephen, Plead. 77; Archbold, Civ. Plead. 284; 7 Comyns, Dig. 389.

SURRENDER. A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. Coke, Litt. 337 *b*.

The deed by which the surrender is made.

A surrender is of a nature directly opposite to a release; for, as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderer, and vests it in the surrenderee, even without the assent of the latter. Sheppard, Touchst. 300, 301.

The technical and proper words of this conveyance are, surrender and yield up; but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender. Perkins, § 607; 1 Term, 441; Comyns, Dig. *Surrender* (A).

The surrender may be express or implied. The latter is when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands. 16 Johns. N. Y. 28; 2 Wils. 26; 1 Barnew. & Ald. 50; 2 *id.* 119; 5 Taunt. 518. And see 6 East, 86; 9 Barnew. & C. 288; 7 Watts, Penn. 123; Cruise, Dig. tit. 32, c. 7; Comyns, Dig.; 4 Kent, Comm. 102; Rolle, Abr.; 11 East, 317, n.

SURRENDER OF CRIMINALS. The act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime has been committed. See EXTRADITION; FUGITIVES FROM JUSTICE.

SURRENDEREE. One to whom a surrender has been made.

SURRENDEROR. One who makes a surrender: as, when the tenant gives up the estate and cancels his lease before the expiration of the term. One who yields up a freehold estate for the purpose of conveying it.

SURREPTITIOUS. That which is done in a fraudulent, stealthy manner.

SURROGATE (Lat. *surrogatus*, from *subrogare*, or *surrogare*, to substitute). **In English Law.** A deputy or substitute of the chancellor, bishop, ecclesiastical or admiralty judge, appointed by him. He must take an oath of office. He can grant licenses, hold courts, and adjudicate cases, to the same extent and with the same authority as his principal, provided his grant of powers has been coextensive with those possessed by his principal. The office has arisen by usage, but is sanctioned by canon 128, and recognized by stat. 26 Geo. II. c. 33, 56 Geo. III. c. 82, and 10 Geo. IV. c. 53, by which latter act it was provided that the surrogates of the arches and consistory of London are to continue after the death of the judges of those courts till new appointments are made. 1 Phill. Eccl. 205; 3 Burn, Eccl. Law, 667.

In American Law. A term used in some states to denote the judge to whom jurisdiction of the probate of wills, the grant of administration and of guardianship is confided. In other states he is called surrogate, in others, judge of probate, register, judge of the orphans' court, etc. He is ordinarily a county officer, with a local jurisdiction limited to his county.

SURROGATE'S COURT. In American Law. In the United States, a state tribunal, with similar jurisdiction to the *court of ordinary*, *court of probate*, etc., relating to matters of probate, etc. See above titles; 2 Kent, Comm. 409, note *b*; NEW YORK.

SURVEY. The act by which the quantity of a piece of land is ascertained; the paper containing a statement of the courses, distances, and quantity of land is also called a survey.

A survey made by authority of law, and duly returned into the land office, is a matter of record, and of equal dignity with the patent. 3 A. K. Marsh. Ky. 226; 2 J. J. Marsh. Ky. 160. See 3 Me. 126; 5 *id.* 24; 14 Mass. 149; 1 Harr. & J. Md. 201; 1 Ov. Tenn. 199; 1 Dev. & B. No. C. 76.

By survey is also understood an examination: as, a survey has been made of your house, and now the insurance company will insure it.

SURVIVOR. The longest liver of two or more persons.

2. In cases of partnership, the surviving partner is entitled to have all the effects of the partnership, and is bound to pay all the debts owing by the firm. Gow, Partn. 157; Watson, Partn. 364. He is, however, bound to account for the surplus to the representatives of his deceased partners, agreeably to their respective rights. See PARTNERSHIP.

3. A surviving trustee is generally vested with all the powers of all the trustees, and the surviving administrator is authorized to act for the estate as if he had been sole administrator. As to the presumption of survivorship, when two or more persons have perished by the same event, see DEATH; Fearne, Cont. Rem. 4; 2 Pothier, Obl. Evans ed. 346; 8 Ves. Ch. 10; 14 *id.* 578; 17 *id.* 482; 6 Taunt. 213; Cowp. 257.

4. The right of survivorship among joint-tenants has been abolished, except as to estates held in trust, in Pennsylvania, New York, Kentucky, Virginia, Indiana, Missouri, Tennessee, Alabama, Georgia, North and South Carolina. See ESTATES IN JOINT-TENANCY. In Connecticut it never existed. 1 Swift, Dig. 102; Washburn, Real Prop. As to survivorship among legatees, see 1 Turn. & R. Ch. 413; 1 Brown, Ch. 574; 3 Russ. Ch. 217.

SUS' PER COLL'. In English Law. In the English practice, a calendar is made out of attainted criminals, and the judge signs the calendar with their separate judgments in the margin. In the case of a capital felony it is written opposite the prisoner's name, "let him be hanged by the neck," which, when the proceedings were in Latin, was "suspendatur per collum," or, in the abbreviated form, "sus' per coll'." 4 Blackstone, Comm. 403.

SUSPENDER. In Scotch Law. He in whose favor a suspension is made.

In general, a suspender is required to give caution to pay the debt in the event it shall be found due. Where the suspender cannot, from his low or suspected circumstances, procure unquestionable security, the lords admit juratory caution; but the reasons of suspension are in that case to be considered with particular accuracy at passing the bill. Act. S. 8 Nov. 1682; Erskine, Inst. 4. 3. 6.

SUSPENSE. When a rent, profit *à prendre*, and the like, are, in consequence of the unity of possession of the rent, etc. of the land out of which they issue, not *in esse* for a time, they are said to be in suspense, *tunc dormiunt*; but they may be revived or awakened. Coke, Litt. 313 *a*.

SUSPENSION. A temporary stop of a right, of a law, and the like.

In times of war the habeas corpus act may be suspended by lawful authority.

There may be a suspension of an officer's duties or powers when he is charged with crimes. Wood, Inst. 510.

Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time. It differs from an extinguishment in this: a suspended right may be revived; one extinguished is absolutely dead. Bacon, Abr. *Extinguishment* (A).

The suspension of a statute for a limited time operates so as to prevent its operation for the time; but it has not the effect of a repeal. 3 Dall. Penn. 365.

In Scotch Law. That form of law by which the effect of a sentence-condemnatory, that has not yet received execution, is stayed or postponed till the cause be again considered. Erskine, Inst. 4. 3. 5. Suspension is competent also, even where there is no decree, for putting a stop to any illegal act whatsoever. Erskine, Inst. 4. 3. 7

Letters of suspension bear the form of a summons, which contains a warrant to cite the charger.

In Ecclesiastical Law. An ecclesiastical censure, by which a spiritual person is either interdicted the exercise of his ecclesiastical function or hindered from receiving the profits of his benefice. It may be partial or total; for a limited time, or forever, when it is called deprivation or amotion. Ayliffe, Parerg. 501.

SUSPENSION OF ARMS. An agreement between belligerents, made for a short time or for a particular place, to cease hostilities between them. See ARMISTICE; TRUCE.

SUSPENSION OF A RIGHT. The act by which a party is deprived of the exercise of his right for a time.

When a right is suspended by operation of law, the right is revived the moment the bar is removed; but when the right is suspended by the act of the party, it is gone forever. See 1 Rolle, Abr. *Extinguishment* (L, M).

SUSPENSIVE CONDITION. One which prevents a contract from going into operation until it has been fulfilled: as, if I promise to pay you one thousand dollars on condition that the ship Thomas Jefferson shall arrive from Havre, the contract is suspended until the arrival of the ship. 1 Bouvier, Inst. n. 731.

SUTLER. A man whose employment is to sell provisions and liquor to a camp.

By the articles of war, art. 29, no sutler is permitted to sell any kind of liquor or victuals, or to keep his house or shop open for the entertainment of soldiers, after nine at night, or before the beating of the reveillée, or upon Sundays during divine service or sermon, on penalty of being dismissed all future sutling. And, by art. 60, all sutlers are to be subject to orders according to the rules and discipline of war.

SUUS HÆRES (Lat.). **In Civil Law.** The proper heir, as it were, not called in from outside.

Those descendants who were under the power of the deceased at the time of his death, and who are most nearly related to him. Calvinus, Lex.

SUZERAIGN (Norman Fr. *suz*, under, and *re* or *rey*, king). A lord who possesses a fief whence other fiefs issue. Dict. de l'Académie Française. A tenant in capite or immediately under the king. Note 77 of Butler & Hargrave's notes, Coke, Litt. l. 3.

SWAIN-GEMOTE. See COURT OF SWEINMOTE.

SWEAR. To take an oath administered by some officer duly empowered. See AFFIRMATION; OATH.

To use such profane language as is forbidden by law. This is generally punished by statutory provisions in the several states.

SWINDLER. A cheat; one guilty of defrauding divers persons. 1 Term, 748; 2 H. Blackst. 531; Starkie, Sland. 135.

Swindling is usually applied to a transaction where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use. 2 Russell, Crimes, 130; Alison, Crim. Law of Scotland, 250; 2 Mass. 406.

The terms cheat and swindler are not actionable unless spoken of the plaintiff in relation to his business. 6 Cush. Mass. 185. The words "you are living by imposture," spoken of a person with the intention of imputing that he is a swindler, are not actionable *per se*. 8 C. B. 142.

SYMBOLIC DELIVERY. The delivery of some thing as a representation or sign of the delivery of some other.

Where an actual delivery of goods cannot be made, a symbolical delivery of some particular thing, as, a halfpenny, will vest the property equally with an actual delivery. Long, Sales, 162; 8 How. 399; 6 Md. 10; 19 N. H. 419; 39 Me. 496; 11 Cush. Mass. 282; 3 Cal. 140.

SYNALLAGMATIC CONTRACT. In Civil Law. A contract by which each of the contracting parties binds himself to the other: such are the contracts of sale, hiring, etc. Pothier, Obl. 9.

SYNDIC. In French Law. The assignee of a bankrupt.

One who is chosen to conduct the affairs and attend to the concerns of a body corporate or community. In this sense the word corresponds to director or manager. Rodman, Notes to Code de Com. p. 351; La. Civ. Code, art. 429; Dalloz, Dict. *Syndic*.

SYNDICUS (Gr. *σὺν*, with, *δικη*, cause). One chosen by a college, municipality, etc. to defend its cause. Calvinus, Lex. See SYNDIC.

SYNGRAPH (Gr. *σὺν*, with, *γράφω*, to write). A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties *wrote together*.

Formerly such writings were attested by the subscription and crosses of the witnesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which, being cut through the parchment and one being delivered to each party, on being afterwards put together proved their authenticity.

Deeds thus made were denominated *syngraphs* by the canonists, and by the common-lawyers *chirographs*. 2 Blackstone, Comm. 296.

SYNOD. An ecclesiastical assembly.

T.

TABELLA (Lat.). **In Civil Law.** A small table on which votes were often written. Cicero, in Rull. 2. 2. Three tablets were given to the judges, one with the letter A for *Absolutio*, one with C for *Condemnatio*, and one with N. L. for *Non Liquet*, not proven. Calvinus, Lex.

TABELLIO (Lat.). **In Roman Law.** An officer among the Romans, who reduced to writing, and into proper form, agreements, contracts, wills, and other instruments, and witnessed their execution.

The term tabellio is derived from the Latin *tabula, seu tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toullier, n. 53; Delaurière, sur Ragneau, *Notaire*.

Tabelliones differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the tabelliones; they received the agreements of the parties, which they reduced to short *notes*; and these contracts were not binding until they were written *in extenso*, which was done by the tabelliones. Encyclopédie de M. D'Alembert, *Tabellion*; Jacob, Law Dict. *Tabellion*; Merlin, Répert. *Notaire*, § 1; 3 Giannone, Istoria di Napoli, p. 86.

TABLE-RENTS. Rents paid to bishops and other ecclesiastics, appropriated to their table or housekeeping. Jacob, Law Dict.

TABLEAU OF DISTRIBUTION. In Louisiana. A list of creditors of an insolvent estate, stating what each is entitled to. 4 Mart. La. N. s. 535.

TABLES. A synopsis in which many particulars are brought together in a general view: as, genealogical tables, which are composed of the names of persons belonging to a family. As to the law of the Twelve Tables, see Code, § 27; 2 Bouvier, Inst. nn. 1963, 1964.

TABULA IN NAUFRAGIO (Lat. a plank in a wreck). **In English Law.** A figurative term used to denote the power of a third mortgagee, who, having obtained his mortgage without any knowledge of a second mortgage, may acquire the first incumbrance, and squeeze out and have satisfaction before the second. 2 Ves. Ch. 573; 2 Fonblanque, Eq. b. 3, c. 2, § 2; 2 Ventr. 337; 1 Chanc. Cas. 162; 1 Story, Eq. §§ 414, 415; TACKING.

TABULÆ. In Civil Law. Contracts and written instruments of all kinds, especially wills. So called because originally written on tablets and with wax. Calvinus, Lex.

TAC. A kind of customary payment by a tenant. Blount, Ten. 155.

TAC FREE. Free from payments, etc.: *e.g.* "*tac free de omnibus propriis porcis suis infra metas de C*," *i.e.* paying nothing for his hogs running within that limit. Jacob, Law Dict.

TACIT (from Lat. *taceo*, to be silent). That which, although not expressed, is understood from the nature of the thing or from the provision of the law; implied.

TACIT LAW. A law which derives its authority from the common consent of the people without any legislative enactment. 1 Bouvier, Inst. 120.

TACIT RELOCATION. In Scotch Law. The tacit or implied renewal of a lease when the landlord instead of warning a tenant has allowed him to continue without making a new agreement. Bell, Dict. *Relocation*.

TACIT TACK. See TACIT RELOCATION.

TACK. In Scotch Law. A contract of location by which the use of land or any other immovable subject is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. Erskine, Inst, 2. 6. 8. This word is nearly synonymous with lease.

TACKING. In English Law. The union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien, which is prior, without redeeming or discharging other liens also which are subsequent, to his own title. Jeremy, Eq. Jur. b. 1, c. 2, § 1, pp. 188–191; 1 Story, Eq. Jur. § 412.

2. It is an established doctrine in the English chancery that a *bonâ fide* purchaser and without any notice of a defect in his title at the time of the purchase may lawfully buy any statute, mortgage, or incumbrance, and if he can defend by those at law his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover any thing. 2 Fonblanque, Eq. 306; 2 Cruise, Dig. t. 15, c. 5, s. 27; Powell, Mortg. Index; 1 Vern. Ch. 188; Maddock, Chanc. Index.

3. This doctrine is inconsistent with the

laws of the several states, which require the recording of mortgages. 1 Caines, Cas. N. Y. 112; 1 Hopk. Ch. N. Y. 231; 2 Pick. Mass. 517; 3 *id.* 50; 12 Conn. 195; 14 Ohio, 318; 11 Serg. & R. Penn. 208; 8 Dan. Ky. 82; 1 White & T. Lead. Cas. Am. ed. 406.

The doctrine of *tacking* seems to have been acknowledged in the civil law. Code, 8. 27. 1. But see Dig. 13. 7. 8; and see 7 Toullier, 110. But this tacking could not take place to the injury of intermediate incumbrancers. Story, Eq. Jur. § 1010, and the authorities cited in the note.

TAIL. See ESTATE TAIL.

TAKE. A technical expression which signifies to be entitled to: as, a devisee will take under the will.

To seize: as, to take and carry away, either lawfully or unlawfully.

To choose: *e.g. ad capiendas assisas*, to choose a jury.

To obtain: *e.g.* to take a verdict in court, to get a verdict.

TAKING. In Criminal Law, Torts. The act of laying hold upon an article, with or without removing the same. A felonious taking is not sufficient, without a carrying away, to constitute the crime of larceny. See Dearsl. Cr. Cas. 621. And when the taking has been legal, no subsequent act will make it a crime. 1 Mood. Cr. Cas. 160.

2. The taking is either actual or constructive. The former is when the thief takes, without any pretence of a contract, the property in question.

A constructive felonious taking occurs when, under pretence of a contract, the thief obtains the felonious possession of goods: as, when under the pretence of hiring he had a felonious intention, at the time of the pretended contract, to convert the property to his own use.

When property is left through inadvertence with a person, and he conceals it *animo furandi*, he is guilty of a felonious taking and may be convicted of larceny. 17 Wend. N. Y. 460.

3. But when the owner parts with the property willingly, under an agreement that he is never to receive the same identical property, the taking is not felonious: as, when a person delivered to the defendant a sovereign to get it changed, and the defendant never returned either with the sovereign or the change, this was not larceny. 9 Carr. & P. 741. See 1 Mood. Cr. Cas. 179, 185; 1 Hill, N. Y. 94; 2 Bos. & P. 508; 2 East, Pl. Cr. 554; 1 Hawkins, Pl. Cr. c. 33, s. 8; 1 Hale, Pl. Cr. 507; Coke, 3d Inst. 408; LARCENY; ROBBERY.

4. The wrongful taking of the personal property of another, when in his actual possession, or such taking of the goods of another who has the right of immediate possession, subjects the tort-feasor to an action. For example, such wrongful taking will be evidence of a conversion, and an action of trover may be maintained. 2 Saund. 47; 3 Willes, 55. Trespass is a concurrent remedy in such a case. 3 Wils. 336. Replevin may be supported by the unlawful taking of a personal chattel. See CONVERSION; TRESPASS; TROVER; REPLEVIN.

TALE. In Common Law. A denomination of money in China. In the computation of the ad valorem duty on goods, etc., it is computed at one dollar and forty-eight cents. Act of March 2, 1799, s. 61; 1 Story, U. S. Laws, 626. See FOREIGN COIN.

In English Law. The ancient name of the declaration or count. 3 Blackstone, Comm. 293.

TALES (Lat. *talis*, such, like). **In Practice.** A number of jurors added to a deficient panel sufficient to supply the deficiency.

A list of such jurymen as were of the tales, kept in the king's bench office in England.

TALES DE CIRCUMSTANTIBUS (Lat. a like number of the bystanders). A sufficient number of jurors selected from the bystanders to supply a deficiency in the panel.

The order of the judge for taking such bystanders as jurors.

Whenever from any cause the panel of jurors is insufficient, the judge may issue the above order, and the officer immediately executes it. See 2 Hill, So. C. 381; 2 Penn. 412; Coxe, N. J. 283; 1 Blackf. Ind. 63; 2 Harr. & J. Md. 426; 1 Pick. Mass. 43, n. The number to be drawn on successive panels is in the discretion of the court. 17 Ga. 497.

TALLAGE (Fr. *tailler*, to cut). **In English Law.** A term used to denote subsidies, taxes, customs, and, indeed, any imposition whatever by the government for the purpose of raising a revenue. Bacon, Abr. *Smuggling, etc.* (B); Fortescue, De Laud. 26; Maddock, Exch. c. 17; Coke, 2d Inst. 531, 532; Spelman, Gloss.

TALLAGIUM (perhaps from Fr. *taille*, cut off). A term including all taxes. Coke, 2d Inst. 532; Stat. de tal. non concedendo, temp. Edw. I.; Stow, Annals, 445; 1 Sharswood, Blackst. Comm. 311*. Chaucer has talaigiers for "tax-gatherers."

TALLY (Fr. *tailler;* It. *tagliare*, i.e. *scindere*, to cut off). A stick cut into two parts, on each whereof is marked, with notches or otherwise, what is due between debtor and creditor. Hence the tallier of the exchequer is now called the teller. Lex. Constit. 205; Cowel. One party must have one part, and the other the other, and they must match. Tallies in the exchequer are abolished by 2d Geo. III. c. 82. There was the same usage in France. Dict. de l'Acad. Franç.; Pothier, Obl. pt. 4, c. 1, art. 2, § 8.

TALZIE, TAILZIE. In Scotch Law. Entail.

TANGIBLE PROPERTY. That which may be felt or touched: it must necessarily be corporeal, but it may be real or personal.

TANISTRY (*a thanis*). **In Irish Law** A species of tenure founded on immemorial

usage, by which lands, etc. descended *seniori et dignissimo viri sanguinis et cognominis*, i.e. to the oldest and worthiest man of the blood and name. Jacob, Law Dict.

TARDE VENIT (Lat.). **In Practice.** The name of a return made by the sheriff to a writ, when it *came into his hands too late* to be executed before the return-day.

The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, quod breve adeo tarde venit quod exequi non possunt. It is usual to return the writ with an indorsement of *tarde venit*. Comyns, Dig. *Return* (D 1).

TARE. An allowance in the purchase and sale of merchandise for the weight of the box, bag, or cask, or other thing, in which the goods are packed. It is also an allowance made for any defect, waste, or diminution in the weight, quality, or quantity of goods. It differs from TRET, which see.

TARIFF. Customs, duties, toll, or tribute payable upon merchandise to the general government is called tariff; the rate of customs etc. also bears this name, and the list of articles liable to duties is also called the tariff.

TAVERN. A place of entertainment; a house kept up for the accommodation of strangers. Webster, Dict. Originally, a house for the retailing of liquors to be drunk on the spot. Webster, Dict.

In almost all the states the word has come to mean the same as inn, with no particular reference to the sale of liquors. See 2 Kent, Comm. 9th ed. 597*, note a.

These are regulated by various local laws. For the liability of tavern-keepers, see Story, Bailm. § 7; 2 Kent, Comm. 458; 12 Mod. 487; Jones, Bailm. 94; 1 Blackstone, Comm. 430; 1 Rolle, Abr. (3 F); Bacon, Abr. *Inn*, etc.; 1 Bouvier, Inst. 1015 *et seq.*; INN; INNKEEPER.

TAX. A contribution imposed by government on individuals for the service of the state. It is distinguished from a subsidy, as being certain and orderly, which is shown in its derivation from Greek τάξις, *ordo*, order or arrangement. Jacob, Law Dict. See TAXES.

A direct tax, as distinguished from duties, imposts, and excises.

The eighth section of art. 1 of the constitution of the United States provides that "congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay," etc. But all duties, imposts, and excises shall be uniform throughout the United States. In this sense taxes are usually divided into two great classes,—those which are direct and those which are indirect. Under the former denomination are included taxes on land or real property, and under the latter taxes on articles of consumption. 5 Wheat. 317. See, generally, Story, Const. c. 14; 1 Kent, Comm. 254; 3 Dall. Penn. 171; 1 Sharswood, Blackst. Comm. 308.

TAX DEED. An instrument whereby the officer of the law undertakes to convey the title of the rightful proprietor to the purchaser at the tax sale, or sale of the land for non-payment of taxes.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See Blackwell, Tax Titles, 430; 2 Washburn, Real Prop. 542.

TAX SALE. A sale of lands for the non-payment of taxes assessed thereon.

2. The power of sale does not attach until every prerequisite of the law has been complied with. 9 Miss. 627. The regularity of the anterior proceedings is the basis upon which it rests. Those proceedings must be completed and perfected before the authority of the officer to sell the land of the delinquent can be regarded as consummated. The land must have been duly listed, valued, and taxed, the assessment roll placed in the hands of the proper officer with authority to collect the tax, the tax demanded, all collateral remedies for the collection of the tax exhausted, the delinquent list returned, a judgment rendered when judicial proceedings intervene, the necessary precept, warrant, or other authority delivered to the officers intrusted with the power of sale, and the sale advertised in due form of law, before a sale can be made. Blackwell, Tax Titles, 294; 4 Wheat. 78; 6 *id.* 119; 7 Cow. N. Y. 88; 6 Mo. 64; 12 Miss. 627; 5 Serg. & R. Penn. 332.

3. There are important details connected with the auction itself and the duties of the officer intrusted with the conducting thereof.

The sale must be a *public*, and not a *private*, one. The sale must take place at the precise time fixed by the law or notice, otherwise it will be void.

It is equally important that the sale should be made at the *place* designated in the advertisement.

The sale to be valid must be made to the "highest bidder," which ordinarily means the person who offers to pay for the land put up the largest sum of money. This is the rule in Pennsylvania; but in most of the states the highest bidder is he who will pay the taxes, interest, and costs due upon the tract offered for sale for the least quantity of it.

The sale must be for cash.

Where a part of the land sold is liable to sale and the residue is not, the sale is void *in toto*.

The sale must be according to the parcels and descriptions contained in the list and the other proceedings, or it cannot be sustained.

When a tract of land is assessed against tenants in common, and one of them pays the tax on his share, the interest of the other may be sold to satisfy the residue of the assessment.

Where several parcels of land belonging to the same person are separately assessed, each parcel is liable for its own specific tax and no more.

The quantity of land that may be sold by the officer depends upon the phraseology of each particular statute.

Where, after an assessment is made, the county in which the proceedings were had is divided, the collector of the old county has power to sell land lying in the territory in the newly-created county. 4 Pet. 349, 362; 4 Yerg. Tenn. 307; 11 How. 414; 5 Ired. & R. No. C. 129; 24 Me. 283; 26 *id.* 306; 13 Ill. 253; 9 Ohio, 43; 13 Pick. Mass. 492; 21 N. H. 400; 9 Watts & S. Penn. 80. See Blackwell, Tax Titles; Washburn, Real Prop. 540.

TAXATION. The process of taxing or imposing a tax. Webster, Dict.

In Practice. Adjustment. Fixing the amount: *e.g.* taxation of costs. 3 Chitty, Gen. Pract. 602.

TAXATION OF COSTS. In Practice. Fixing the amount of costs to which a party is entitled.

It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment. This is said to be done *ex assensu* of the plaintiff, because at his prayer. Bacon, Abr. *Costs* (K). The costs are taxed in the first instance by the prothonotary or clerk of the court. See 2 Wend. N. Y. 244; 1 Cow. N. Y. 591; 7 *id.* 412; 2 Yerg. Tenn. 245, 310; 6 *id.* 412; Harp. So. C. 326; 1 Pick. Mass. 211; 10 Mass. 26; 16 *id.* 370. A bill of costs having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another. 2 Wend. N. Y. 252.

TEAMSTER. One who drives horses in a wagon for the purpose of carrying goods for hire. He is liable as a common carrier. Story, Bailm. § 496. See CARRIER.

TECHNICAL. That which properly belongs to an art.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates, unless they have manifestly been understood in another sense by the parties. 2 Bos. & P. 164; 6 Term, 320; 3 Starkie, Ev. 1036; and the article CONSTRUCTION.

Words which do not of themselves denote that they are used in a technical sense are to have their plain, popular, obvious, and natural meaning. 6 Watts & S. Penn. 114.

The law, like other professions, has a technical language. "When a mechanic speaks to me of the instruments and operations of his trade," says Mr. Wynne, Eunom. Dial. 2, s. 5, "I shall be as unlikely to comprehend him as he would me in the language of my profession, though we both of us spoke English all the while. Is it wonderful, then, if in systems of law, and especially among the hasty recruits of commentators, you meet (to use Lord Coke's expression) with a whole army of words that cannot defend themselves in a grammatical war? Technical language, in all cases, is formed from the most intimate knowledge of any art. One word stands for a great many, as it is always to be resolved into many ideas by definitions. It is, therefore, unintelligible because it is concise, and it is useful for the same reason." See LANGUAGE.

TEIND COURT. In Scotch Law. A court which has jurisdiction of matters relating to the augmentation of stipends and the valuation and sale of tithes.

It is held before justices of the court of sessions organized as a separate court, with distinct clerks and ministerial officers. Bell, Dict.

TEINDS. In Scotch Law. That liquid proportion of the rents or goods of the people which is due to churchmen for performing divine service or exercising the other spiritual functions proper to their several offices. Erskine, Inst. 2. 10. 2.

TELLER (*tallier*, one who keeps a tally). An officer in a bank or other institution. A person appointed to receive votes. A name given to certain officers in the English exchequer.

The duties of tellers in banks in this country consist of the receiving of all sums of money paid into the bank, and the paying of all sums drawn out. In large institutions there are generally three,—the first or paying teller, the second or receiving teller, and the third or note teller. It is the duty of the first teller to pay all checks drawn on the bank, and, where the practice of certification is in use, to certify those that are presented for that purpose. The position ranks next in importance to that of cashier. The second teller receives the deposits made in the bank, and also payment for bills that may be drawn on other places. The third teller receives payment of bills and notes held by the bank. The receiving teller often does the duty of the note teller. Sewell, Bank.

TEMPORALITIES (L. Lat. *temporalia*). Revenues, lands, tenements, and lay fees which bishops have from livery of the king, and in virtue of which they sit in parliament. 1 Rolle, Abr. 881.

TEMPORARY. Which is to last for a limited time. See STATUTE.

TEMPORIS EXCEPTIO (Lat.). **In Civil Law.** A plea of lapse of time in bar

of an action, like our statute of limitations. Dig. *de diversis temporalibus actionibus.*

TEMPUS (Lat.). **In Civil and Old English Law.** Time in general. A time limited; a season: e.g. *tempus pessonis* mast time in the forest.

TEMPUS CONTINUUM (Lat.). **In Civil Law.** A period of time which runs continually having once begun, feast-days being counted as well as ordinary days, and it making no difference whether the person against whom it runs is present or absent. Calvinus, Lex.

TEMPUS UTILE (Lat.). **In Civil Law.** A period of time which runs beneficially: *i.e.* feast-days are not included, nor does it run against one absent in a foreign country, or on business of the republic, or detained by stress of weather. But one detained by sickness is not protected from its running; for it runs where there is power to act by an agent as well as where there is power to act personally; and the sick man might have deputed his agent. Calvinus, Lex.

TENANCY. The state or condition of a tenant; the estate held by a tenant.

TENANT (Lat. *teneo, tenere*, to hold). One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In a popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupation are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant. See LANDLORD AND TENANT; 5 Mann. & G. 54; Bouvier, Inst. Index.

TENANTS IN COMMON are such as hold lands and tenements by several and distinct titles, and not by a joint title, but occupy in common, the only unity recognized between them being that of possession. They are accountable to each other for the profits of the estate; and if one of them turns another out of possession, an action of ejectment will lie against him. They may also have reciprocal actions of waste against each other. 2 Blackstone, Comm. 191. See ESTATE IN COMMON; 7 Cruise, Dig.; Bacon, Abr. *Joint Tenants, and Tenants in Common;* Comyns, Dig. *Abatement* (E 10, F 6), *Chancery* (3 V 4), *Devise* (N 8), *Estates* (K 8, R 2); 1 Vern. Ch. 353; Archbold, Civ. Plead. 53, 73.

TENANT BY THE CURTESY is a species of life tenant who on the death of his wife seized of an estate of inheritance, after having issue by her which is capable of inheriting her estate, holds her lands for the period of his own life: after the birth of such a child, the tenant is called tenant by the curtesy *initiate*, Coke, Litt. 29 *a;* 2 Blackstone, Comm. 126; but to *consummate* the tenancy the marriage must be lawful, the wife must have possession, and not a mere right of possession, the issue must be born alive, during the lifetime of the mother, and the husband must survive the wife. See CURTESY.

TENANT OF THE DEMESNE. One who is tenant of a mesne lord: as, where A is tenant of B, and C of A; B is the lord, A the mesne lord, and C tenant of the demesne. Hammond, Nisi P. 392, 393.

TENANT IN DOWER is another species of life tenant, occurring where the husband of a woman is seized of an estate of inheritance and dies, and the wife thereby becomes entitled to hold the third part of all the lands and tenements of which he was seized at any time during the coverture to her own use, for the term of her natural life. See DOWER; 2 Blackstone, Comm. 129; Comyns, Dig. *Dower* (A).

TENANT IN FEE, *under the feudal law*, held his lands either immediately or derivatively from the sovereign, in consideration of the military or other services he was bound to perform. If he held directly from the king he was called a tenant in fee, *in capite*. With us, the highest estate which a man can have in land has direct reference to his duty to the state: from it he ultimately holds his title, to it he owes fealty and service, and if he fails in his allegiance to it, or dies without heirs upon whom this duty may devolve, his lands revert to the state under which he held. Subject to this qualification, however, a tenant in fee has an absolute unconditional ownership in land, which upon his death vests in his heirs; and hence he enjoys what is called an estate of inheritance. See ESTATE; 2 Sharswood, Blackst. Comm. 81; Litt. § 1; Plowd. 555.

JOINT-TENANTS are two or more persons to whom lands or tenements have been granted to hold in fee-simple, for life, for years, or at will. In order to constitute an estate in joint-tenancy, the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. 2 Blackstone, Comm. 180. The principal incident to this estate is the right of survivorship, by which upon the death of one joint-tenant the entire tenancy remains to the surviving co-tenant, and not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. It is an estate which can only be created by the acts of the parties, and never by operation of law. Coke, Litt. 184 *b;* 2 Cruise, Dig. 43; 4 Kent, Comm. 358; 2 Blackstone, Comm. 179; 7 Cruise, Dig. *Joint Tenancy;* Preston, Est.

TENANT FOR LIFE has a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event. 1 Cruise, 76. When he holds the estate by the life of another, he is usually called tenant *pur autre vie.* 2 Blackstone, Comm. 120; Comyns, Dig. *Estates* (F 1). See ESTATE FOR LIFE; EMBLEMENTS.

TENANT BY THE MANNER. One who has

a less estate than a fee in land, which remains in the reversioner. He is so called because in avowries and other pleadings it is specially shown in what manner he is tenant of the land, in contradistinction to the *veray tenant*, who is called simply tenant. See VERAY.

TENANT PARAVAIL. The tenant of a tenant. He is so called because he has the avails or profits of the land.

TENANT IN SEVERALTY is he who holds lands and tenements in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. 2 Blackstone, Comm. 179.

TENANT AT SUFFERANCE is he who comes into possession by a lawful demise, but after his term is ended continues the possession wrongfully by holding over. He has only a naked possession, stands in no privity to the landlord, and may, consequently, be removed without notice to quit. Coke, Litt. 57 *b*; 2 Leon. 46; 3 *id.* 153; 1 Johns. Cas. N. Y. 123; 4 Johns. N. Y. 150, 312; 5 *id.* 128.

TENANT IN TAIL is one who holds an estate in fee, which by the instrument creating it is limited to some particular heirs, exclusive of others: as, to the heirs of *his body*, or to the heirs, *male* or *female*, of his body. The whole system of entailment, rendering estates unalienable, is so directly opposed to the spirit of our republican institutions as to have become very nearly extinct in the United States. Most of the states at an early period of our independence passed laws declaring such estates to be estates in fee-simple, or provided that the tenant and the remainderman might join in conveying the land in fee-simple. In New Hampshire, chancellor Kent says, entails may still be created; while in some of the states they have not been expressly abolished by statute, but in practice they are now almost unknown. See ENTAILS; 2 Blackstone, Comm. 113; 2 Kent, Comm.; 2 Washburn, Real Prop.

TENANT AT WILL is where a person holds rent-free by permission of the owner, or where he enters under an agreement to purchase, or for a lease, but has not paid rent. Formerly all leases for uncertain periods were considered to be tenancies at will merely; but in modern times they are construed into tenancies from year to year; and, in fact, the general language of the books now is that the former species of tenancy cannot exist without an express agreement to that effect. 8 Cow. N. Y. 75; 4 Ired. No. C. 291; 3 Dan. Ky. 66; 12 Mass. 325; 23 Wend. N. Y. 616; 12 N. Y. 346. The great criterion by which to distinguish between tenancies from year to year, and at will, is the payment or reservation of rent. 5 Bingh. 361; 2 Esp. 718.

A tenancy at will must always be at the will of either party, and such a tenant may be ejected at any time, and without notice; but as soon as he once pays rent he becomes tenant from year to year. 1 Watts & S. Penn. 90; Taylor, Landl. & Ten. § 56; Coke, Litt. 55; 2 Lilly, Reg. 555; 2 Blackstone, Comm. 145. See Comyns, Dig. *Estates* (H 1); 12 Mass. 325; 17 *id.* 282; 1 Johns. Cas. N. Y. 33; 2 Caines, Cas. N. Y. 314; 2 Caines, N. Y. 169; 9 Johns. N. Y. 13, 235, 331.

TENANT FOR YEARS is he to whom another has let lands, tenements, or hereditaments, for a certain number of years, agreed upon between them, and the tenant enters thereon. Before entry he has only an inchoate right, which is called an *interesse termini;* and it is of the essence of this estate that its commencement as well as its termination be fixed and determined, so that the lapse of time limited for its duration will, *ipso facto*, determine the tenancy; if otherwise, the occupant will be tenant from year to year, or at will, according to circumstances. See LEASE; Taylor, Landl. & Ten. § 54; 2 Blackstone, Comm. 140.

TENANT FROM YEAR TO YEAR is where lands or tenements have been let without any particular limitation for the duration of the tenancy: hence any general occupation with permission, whether a tenant is holding over after the expiration of a lease for years, or otherwise, becomes a tenancy from year to year. 3 Burr. 1609; 1 Term, 163; 3 East, 451; 3 Barnew. & C. 478; 9 Johns. N. Y. 330; 3 Zabr. N. J. 311. The principal feature of this tenancy is that it is not determinable even at the end of the current year, unless a reasonable notice to quit is served by the party intending to dissolve the tenancy upon the other. 4 Cow. N. Y. 349; 3 Hill, N. Y. 547; 11 Wend. N. Y. 616; 8 Term, 3; 5 Bingh. 185. See LANDLORD AND TENANT.

TENANT RIGHT. In leases from the crown, corporations, or the church, it is usual to grant a further term to the old tenants in preference to strangers; and, as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bacon, Abr. *Leases and Terms for Years* (U).

TENDER (Lat. *tendere*, to extend, to offer). An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.

Legal tender, money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself. See LEGAL TENDER.

In Contracts. It may be either of money or of specific articles.

2. *Tender of money* must be made by some person authorized by the debtor, Coke, Litt. 206; Croke Eliz. 48, 132; 2 Maule & S. 86, to the creditor, or to some person properly authorized, and who must have capacity to receive it, 1 Campb. 477; Dougl. 632; 5 Taunt. 307; 1 Esp. 349; 6 *id.* 95; 3 Term, 683; 1 Nev. & M. 398; 4 Barnew. & C. 29; 1 Carr. & P. 365; 3 *id.* 453; 1 Mees. & W.

Exch. 310; Mood. & M. 238; 14 Serg. & R. Penn. 307; 11 Me. 475; 1 Gray, Mass. 600; 13 La. Ann. 529; 2 Parsons, Contr. 151, in lawful coin of the country, 5 Coke, 114; 13 Mass. 235; 4 N. H. 296, or paper money which has been legalized for this purpose, 2 Mas. C. C. 1, or foreign coin made current by law, 2 Nev. & M. 519; but a tender in bank-notes will be good if not objected to on that account, 3 Term, 554; 2 Bos. & P. 526; 9 Pick. Mass. 539; 1 Johns. N. Y. 476; 1 Bay, So. C. 115; 5 Yerg. Tenn. 199; 8 Ohio, 172; 1 Rawle, Penn. 408; 6 Harr. & J. Md. 53; 7 Mo. 556; 6 Ala. N. s. 226; 19 N. H. 569; 3 Humphr. Tenn. 162; or by a check. Dowl. Pract. Cas. 442; 7 Ohio, 257. See 16 Ill. 262. As to what has been held objection, see 2 Caines, N. Y. 116; 13 Mass. 235; 5 N. H. 296; 10 Wheat. 333. The exact amount due must be tendered, 3 Campb. 70; 6 Taunt. 336; 2 Esp. 710; 2 Dowl. & R. 305; 5 C. B. 365; 5 Mass. 365; 2 Conn. 659; though more may be tendered, if the excess is not to be handed back, 5 Coke, 114; 3 Term, 683; 4 Barnew. & Ad. 546; 5 Mees. & W. Exch. 306; and asking change does not vitiate unless objection is made on that account, 6 Taunt. 336; 1 Campb. 70; 5 Dowl. & R. 289; and the offer must be unqualified. 2 Term, 305; 1 Campb. 131; 3 *id.* 70; 4 *id.* 156; 1 Mees. & W. Exch. 310; 2 Dowl. & R. 305; 9 Metc. Mass. 162; 20 Wend. N. Y. 47; 23 *id.* 342; 18 Vt. 224; 1 Wisc. 141.

3. It is said that the amount must be stated in making the offer. 30 Vt. 577. See 31 Miss. 599. It must be made at the *time* agreed upon, 5 Taunt. 240; 7 *id.* 487; 8 East, 168; 1 Saund. 33 *a*, n.; 5 Pick. Mass. 187, 240; 8 Wend. N. Y. 562; 4 Ark. 450, but may be given in evidence in mitigation of damages, if made subsequently, before suit brought, 1 Saund. 33 *a*, n.; at a suitable hour of the day, during daylight, 7 Me. 31; 19 Vt. 587; at the *place* agreed upon, or, if no place has been agreed upon, wherever the person authorized to receive payment may be found, 20 Eng. L. & Eq. 498; 2 Mees. & W. Exch. 223; 2 Brod. & B. 165; 2 Maule & S. 120; and, in general, all the conditions of the obligation must be fulfilled. The money must have been actually produced and offered, unless the circumstances of the refusal amount to a waiver, 10 East, 101; 7 J. B. Moore, 59; 3 Carr. & P. 342; 8 Me. 107; 15 Wend. N. Y. 637; 6 Md. 37; 6 Pick. Mass. 356; 1 Wisc. 141, or at least be in the debtor's possession, ready for delivery. 5 N. H. 440; 7 *id.* 535; 3 Penn. St. 381. As to what circumstances may constitute a waiver, see 2 Maule & S. 86; 1 Scott, 70; 2 Parsons, Contr. 154, n.; 1 Tyl. Vt. 381; 1 A. K. Marsh. Ky. 321. Presence of the debtor with the money ready for delivery is enough, if the creditor be absent from the appointed place at the appointed time of payment, 4 Pick. Mass. 258; 7 Cush. Mass. 391, or if the tender is refused. 3 Penn. St. 381; 18 Conn. 18.

4. *Tender of specific articles* must be made to a proper person, by a proper person, at a proper time. 2 Parsons, Contr. 158. The *place* of delivery is to be determined by the contract, or, in the absence of specific agreement, by the situation of the parties and circumstances of the case, 7 Barb. N. Y. 472: for example, at the manufactory or store of the seller on demand, 2 Den. N. Y. 145; at the place where the goods are at the time of sale, 7 Me. 91; 20 *id.* 325; 3 Watts & S. Penn. 295; 7 Barb. N. Y. 472; 5 Cow. N. Y. 518; 6 Ala. N. s. 326; Hard. Ky. 80, n.; 1 Wash. C. C. 328; the creditor's place of abode, when the articles are portable, like cattle, and the time fixed. 8 Johns. N. Y. 474; 4 Wend. N. Y. 377; 3 Watts & S. Penn. 295; 2 Penn. St. 63; 1 Me. 120. When the goods are cumbrous, it is presumed that the creditor was to appoint a place, 5 Me. 192; 20 *id.* 325; 3 Dev. No. C. 78; or, if he fails to do so upon request, the debtor may appoint a place, giving notice to the creditor, if possible. 13 Wend. N. Y. 95; 1 Me. 120; Chipman, Contr. 51–56. Whether a request is necessary if the creditor be without the state, see 5 Me. 192; 2 Greenleaf, Ev. § 611. The articles must be set apart and distinguished so as to admit of identification by the creditor. 7 Me. 91; 24 *id.* 316; 32 *id.* 31; 5 Johns. N. Y. 119; 4 Cow. N. Y. 452; 7 Conn. 110; 1 Miss. 401. See 4 Mass. 474; 14 N. H. 459. It must be made during daylight, and the articles must be at the place till the last hour of the day, 5 Yerg. Tenn. 410; 3 Wash. C. C. 140; 19 Vt. 587; 5 T. B. Monr. Ky. 372, unless waived by the parties. See 2 Scott, N. s. 485.

5. In Pleading. If made before action brought, 5 Pick. Mass. 106; 1 Parsons, Contr. 148; 1 Moore, 200; 3 Sharswood, Blackst. Comm. 303, tender may be pleaded in excuse, 3 Taunt. 95; 2 Bos. & P. 550; 5 Bingh. 31; 4 Barnew. & Ad. 132; 5 Pick. Mass. 291; 6 *id.* 340; that it must be on the exact day of performance. 8 East, 168; 5 Taunt. 240; 1 Saund. 33 *a*, n. It cannot be made to an action for general damages when the amount is not liquidated, 1 Parsons, Contr. 149; 3 Sharswood, Blackst. Comm. 303, n.; 2 Burr, 1120; 2 Ad. & E. 82; 19 Vt. 592: as, upon a *contract*, 1 Ventr. 356; 2 W. Blackst. 837; 2 Bos. & P. 234; 3 *id.* 14; *covenant* other than for the payment of money, 7 Taunt. 486; 5 Mod. 18; 12 *id.* 376; 2 H. Blackst. 837; 1 Ld. Raym. 566; *tort*, 2 Strange, 787; or *trespass*, 2 Wils. 115. See 3 Sharswood, Blackst. Comm. 303, n. It may be pleaded, however, to a *quantum meruit*, 1 Parsons, Contr. 149, n.; 1 Strange, 576, accidental or involuntary *trespass*, in the United States, 13 Wend. N. Y. 390; 2 Conn. 659; 36 Me. 407; *covenant* to pay money. 7 Taunt. 486; F. Moore, 200.

6. The effect of a tender is to put a stop to accruing damages and interest, 5 C. B. 365; 3 Bingh. 290; 9 Cow. N. Y. 641; 12 Johns. N. Y. 274; 3 Johns. Cas. N. Y. 243; 17 Mass. 389; 10 Serg. & R. Penn. 14; Wright, Ohio, 336; 9 Mo. 697; and it may be of effect to prevent interest accruing,

though not a technical tender. 5 Pick. Mass. 106; 2 Cush. Mass. 475.

It admits the plaintiff's right of action as to the amount tendered. 1 Bibb, Ky. 272; 14 Wend. N. Y. 221; 6 Watts, Penn. 74; 2 Dall. Penn. 190; 1 Barb. N. Y. 114. The benefit may be lost by a subsequent demand and refusal of the amount due, 1 Campb. 181; 5 Barnew. & Ad. 630; 5 C. B. 365; Kirb. Conn. 293; 24 Pick. Mass. 168; but not by a demand for more than the sum tendered, 22 Vt. 440, or due. 5 C. B. 378; 3 Q. B. 915; 11 Mees. & W. Exch. 356.

TENEMENT (from Lat. *teneo*, to hold). Every thing of a permanent nature which may be holden.

House, or homestead. Jacob, Law Dict. Rooms let in houses.

In its most extensive signification, tenement comprehends every thing which may be *holden*, provided it be of a *permanent* nature; and not only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has any frank-tenement, and of which he may be seized *ut de libero tenemento*, are included under this term. Coke, Litt. 6 *a*; Perkins, 114; 2 Blackstone, Comm. 17; 1 Washburn, Real Prop. 10. But the word *tenements* simply, without other circumstances, has never been construed to pass a fee. 10 Wheat. 204; 1 Preston, Est. 8. See 4 Bingh. 293; 1 Term, 358; 3 *id.* 772; 3 East, 113; 5 *id.* 239; 1 Barnew. & Ad. 161; Comyns, Dig. *Grant* (E 2), *Trespass* (A 2); Wood, Inst. 120; Babington, Auct. 211, 212; 1 Washburn, Real Prop. 10.

Its original meaning, according to some, was house or homestead. Jacob. In modern use it also signifies rooms let in houses. Webster, Dict.; 10 Wheat. 204.

Bracton says that tenements acquired by a villein were as to the lord in the same condition as chattels, because bought with the chattels which rightfully belong to the lord. Bracton, 26.

TENENDAS (Lat.). **In Scotch Law.** The name of a clause in charters of heritable rights, which derives its name from its first words, *tenendas prædictas terras*, and expresses the particular tenure by which the lands are to be holden. Erskine, Inst. b. 2, t. 3, n. 10.

TENENDUM (Lat.). That part of a deed which was formerly used in expressing the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use even in England, and is therefore joined to the *habendum* in this manner,—to have and to hold. The words "to hold" have now no meaning in our deeds. 2 Blackstone, Comm. 298. See HABENDUM.

TENERI (Lat.). **In Contracts.** That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators, and assigns, is called the *teneri*. 3 Call, Va. 350.

TENET (Lat. he holds). **In Pleading.** A term used in stating the tenure in an action for waste done during tenancy.

When the averment is in the *tenet*, the plaintiff on obtaining a verdict will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenleaf, Ev. § 652.

TENNESSEE. The name of one of the United States of America.

2. It was originally a part of North Carolina. In April, 1784, the legislature of North Carolina passed an act ceding to the United States, upon certain conditions, all her territory west of the Appalachian or Alleghany mountains. Before the cession was accepted by congress, it was repealed by another act passed in October, 1784. In the mean time, movements had been set on foot by the people to constitute themselves an independent state. They acted upon the assumed but erroneous ground that North Carolina had by the cession abdicated her sovereignty, and, as the congress had not accepted it, and might not upon the conditions proposed, they were left without any regular government, and therefore had an inherent right to provide one for themselves. They consummated their design after the cession act was repealed, and gave to their new state the name of The State of Franklin.

This revolutionary state maintained its existence for about three years, when it was suppressed and the rightful dominion of North Carolina reinstated. In December, 1789, the legislature again ceded the territory to the United States; and the cession was accepted by congress by an act approved April 2, 1790. North Carolina made it a fundamental condition of the cession that the territory so ceded shall be laid out and formed into a state or states, containing a suitable extent of territory, the inhabitants of which shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late congress for the government of the western territory of the United States: *provided, always*, that no regulations made or to be made by congress shall tend to emancipate slaves. One of the privileges thus secured to the territory was that when the number of its inhabitants should amount to sixty thousand it should be entitled to admission into the Union upon an equality with the original states. Under the authority of the territorial legislature, the census was taken in 1795, and, the necessary number of inhabitants being found in the territory, a convention was called, and a constitution established on February 6, 1796. The legal name of the territory while in a colonial condition was The Territory of the United States south of the river Ohio. But in the constitution the people adopt the name of The State of Tennessee.

3. As congress had not previously decided whether the territory should constitute one state or more than one, and had not itself authorized the enumeration of the inhabitants or the formation of a constitution, there was a strong minority against the admission of Tennessee into the Union. 1 Benton, Debates, 154–159. But she was admitted by an act approved June 1, 1796. Prior to that time a government legislature had been elected and the state government organized and many important laws enacted.

It was a part of the avowed object of the cession made by North Carolina to the United States to furnish "further means of hastening the extinguishment of the national debt." This object has wholly failed. The land was to be first subject to the satisfaction of the claims which had originated against it under the laws of North Carolina. These claims ultimately absorbed nearly all the land that

was fit for cultivation. Congress from time to time ceded the refuse lands to Tennessee, and finally, by an act passed August 7, 1846, surrendered to her the last remnant to which the right of the United States had been previously reserved.

The constitution of 1796 was not submitted to the people for ratification. The authority of the convention established it as the constitution of the state. The present constitution is the work of a convention assembled in 1834 to revise and amend the first. It was submitted to the people, and ratified by popular vote, in 1835. The government was reorganized in 1835–36, in accordance with its provisions.

The Legislative Power.

4. *The legislature* is styled "the General Assembly." It consists of a senate and house of representatives. The number of senators is not to exceed one-third the number of representatives. The number of representatives is not to exceed seventy-five, until the population of the state is a million and a half, and never to exceed ninety-nine. A representative must be twenty-one years old, and a senator thirty. In all other respects their qualifications are the same. They are—citizenship of the United States, three years' residence in the state, and one year's residence in the county or district represented. Art. 2, §§ 9, 10. They are elected by ballot biennially, every odd year, on the first Tuesday in August. The sessions of the assembly are also biennial, commencing on the first Monday in October next ensuing the election. Art. 2, §§ 7, 8.

An elector for members of the general assembly and other civil officers must be a free white man, twenty-one years of age, a citizen of the United States, a citizen of the county wherein he may offer his vote six months next preceding the day of election. A freeman of color who is four generations removed from negro ancestry may vote. Art. 4, § 1.

The Executive Power.

5. *The Governor* is to be thirty years of age, a citizen of the United States, and a citizen of the state seven years next before his election. The supreme executive power is vested in him. He is elected at the times and places of electing members of the general assembly, and by the same electors. A plurality of votes elects either a governor or member of assembly. Art. 3, §§ 1, 2. He holds his office for two years and until his successor is elected and qualified. He is not eligible more than six years in any term of eight. § 4. The power of appointment to subordinate executive offices is not vested in him. He has no negative on the acts and resolutions of the general assembly. In other respects he has the ordinary powers of the chief executive magistrate of the American states. His compensation can neither be increased nor diminished during the term for which he is elected. Art. 3, §§ 1–7.

The Judicial Power.

The judicial power is vested in one supreme court, in such inferior courts as the legislature may establish, and in the judges thereof, and in justices of the peace, and corporation courts.

6. *The Supreme Court* is composed of three judges, one of whom must reside in each of the grand divisions of the state. Its jurisdiction is appellate only, with a few inconsiderable exceptions. It is held at one place only in each of the grand divisions of the state. § 2. Its sessions are held annually, at Knoxville, Nashville, and Jackson. The judges are elected for eight years, by the qualified voters of the state at large. They must be thirty-five years of age.

The court of general original jurisdiction is *the Circuit Court.* The state is divided into sixteen judicial circuits; and three terms of the court are held annually in every county in the state. The people of each circuit elect the judge thereof, for the term of eight years. The only qualification required by the constitution is that he shall be thirty years of age. Art. 6, § 4. An appeal lies from every decision of the circuit court to the supreme court. Constitution, art. 6, §§ 1–4; Code, §§ 3165, 3172, 3176.

The Chancery Court has general original jurisdiction of all cases of an equitable nature where the demand exceeds fifty dollars. Code, § 4280. There are some cases of an equitable nature in which the circuit and county courts have concurrent jurisdiction with the chancery courts. The state is divided into seven chancery districts, in each of which a chancellor is elected, by the people, for eight years. In nearly every county in the state two terms of the chancery court are held annually. An appeal lies to the supreme court from all its decisions.

7. *The County Court* has a very extensive miscellaneous jurisdiction, mostly, however, of matters of police. It is held monthly by the justices of the peace, with the exception of a few counties which have a county judge; and in them the justices of the peace hold quarterly terms. It has original jurisdiction of the probate of uncontested wills, the granting of administrations, the appointment of guardians, and the general administration of decedents' estates. There are some cases in which its jurisdiction is concurrent with the circuit and chancery courts. Code, §§ 4201–4205. An appeal lies from its decisions to the circuit court in all cases, and in some to the supreme court. Code, §§ 3147–3154.

Justices of the Peace have jurisdiction in cases to an extent varying from fifty to five hundred dollars, according to the nature of the demand. An appeal lies from their decisions to the circuit court.

These five tribunals constitute the general court system of Tennessee. There are besides these a few special courts established in particular localities, and a variety of special and inferior jurisdictions, which are subject to the general supervision of the circuit courts, as such tribunals are to the king's bench in England.

An Attorney-General and Reporter is elected by the people of the state at large, for the term of six years. His business is to report the decisions of the supreme court, and to prosecute all the pleas of the state in that court.

By the constitution of 1796, these judicial officers were elected by the general assembly, and held their offices during good behavior. By the constitution of 1834, they were elected by the general assembly for a term of years. By an amendment of the constitution in 1853, they are elected by the people, as above set forth. The executive officers for the state at large, such as the secretary of state, the treasurer, and the comptroller of the treasury, are still elected by the general assembly. All the important county officers are elected by the people, for terms varying from one to four years.

TENOR. In Pleading. A term used to denote that an exact copy is set out. 2 Phillipps, Ev. 99; 2 Russell, Crim. 365; 1 Chitty, Crim. Law, 235; 1 Mass. 203; 1 East, 180, and the cases cited in the notes.

In Chancery Pleading. A certified copy of records of other courts removed into chancery by certiorari. Gresley, Ev. 309.

TENSE. A term used in grammar to denote the distinction of time.

The acts of a court of justice ought to be in the present tense: as, *præceptum est*, not

præceptum fuit; but the acts of the party may be in the preterperfect tense: as, *venit et protulit hic in curiâ quandum querelam suam,* and the continuances are in the preterperfect tense: as, *venerunt,* not *veniunt.* 1 Mod. 81.

The contract of marriage should be made in language of the present tense. 6 Binn. Penn. 405. See 1 Saund. 393, n. 1.

TENUIT (Lat. he held). **In Pleading.** A term used in stating the tenure in an action for waste done after the termination of the tenancy. See TENET.

TENURE. (from Lat. *tenere,* to hold). The mode by which a man holds an estate in lands.

Such a holding as is coupled with some service, which the holder is bound to perform so long as he continues to hold.

2. The thing held is called a tenement; the occupant, a tenant; and the manner of his holding constitutes the tenure. Upon common-law principles, all lands within the state are held directly or indirectly from the king, as lord paramount or supreme proprietor. To him every occupant of land owes fidelity and service of some kind, as the necessary condition of his occupation. If he fails in either respect, or dies without heirs upon whom this duty may devolve, his land reverts to the sovereign as ultimate proprietor. In this country, the people in their corporate capacity represent the state sovereignty; and every man must bear true allegiance to the state, and pay his share of the taxes required for her support, as the condition upon which alone he may hold land within her boundaries. Coke, Litt. 65 *a;* 2 Blackstone, Comm. 105; 3 Kent, Comm. 487.

3. In the earlier ages of the world the condition of land was probably *allodial,* that is, without subjection to any superior,—every man occupying as much land as his necessities required and which he found unappropriated. Over this he exercised an unqualified dominion; and when he parted with his ownership the possession of his successor was equally free and absolute. An estate of this character necessarily excludes the idea of any tenure, since the occupant owes no service or allegiance to any superior as the condition of his occupation. But when the existence of an organized society became desirable, to secure certain blessings only by its means to be acquired, there followed the establishment of governments, and a new relation arose between each government and its citizens,—that of protection on the one hand and dependence on the other,—necessarily involving the idea of service to the state as a condition to the use and enjoyment of land within its boundaries. This relation was of course modified according to the circumstances of particular states; but throughout Europe it early took the form of the feudal system. See ALLODIUM.

4. Some writers suggest that the image of a feudal policy may be discovered in almost every age and quarter of the globe; but, if so, its traces are very indistinct, and, in fact, we have nothing reliable on the subject until we come to the history of the Gothic conquerors of the Roman empire. The military occupation of the country was their established policy, and enabled them more effectually to secure their conquests. The commander-in-chief, as head of the conquering nation, parcelled out the conquered lands among his principal followers, and they in turn granted portions of it to their vassals; but all grants were upon the same condition of fealty and service. The essential element of a feudal grant was that it did not create an estate of absolute ownership, but the grantee was merely a tenant or holder of the land, on condition of certain services to be rendered by him, the neglect of which caused a forfeiture to the grantor. Hargrave's note to Coke, Litt. 64 *a;* Wright, Ten. 7; Spelman, Feuds, c. 2; 1 Hallam, Mid. Ages, 83; 6 Cranch, 87; 12 Johns. N. Y. 365.

5. The introduction of feudal tenures into England is usually attributed to the Normans, but it evidently existed there before their arrival. It appears from the laws of the Saxons that a considerable portion of land was held under their lords by persons of a greater or less degree of bondage, who owed services of either a civil, military, or agricultural character. A large quantity of the lands which were entered in the Conqueror's celebrated Domesday book were then held by the same tenure and subjected to the same services as they had been in the time of Edward the Confessor. The Normans probably introduced some new provisions, and attempted to re-establish more, which had become obsolete, and we know there were many severe contests between the Normans and the English with respect to their restoration; but the general system of their laws remained much the same under the new dynasty of the Normans as it was under that of the Saxons. Hale, Hist. Com. Law, 120; Stevens, Const. Eng. 22.

6. The principal species of tenure which grew out of the feudal system was the tenure by *knight's service.* This was essentially military in its character, and required the possession of a certain quantity of land, called a knight's fee,—the measure of which, in the time of Edward I., was estimated at twelve ploughlands, of the value of twenty pounds per annum. He who held this portion of land was bound to attend his lord to the wars forty days in every year, if called upon. It seems, however, that if he held but half a knight's fee he was only bound to attend twenty days. Many arbitrary and tyrannical incidents or lordly privileges were attached to this tenure, which at length became so odious and oppressive that the whole system was destroyed at a blow by the statute of Charles II. c. 24, which declared that all such lands should thenceforth be held in free and common socage,—a statute, says Blackstone, which was a greater acquisition to the civil property of this kingdom than even Magna Charta itself; since that only pruned the luxuriances which had grown out of military tenures, and thereby preserved them in vigor, but the statute of king Charles extirpated the whole, and demolished both root and branches. See FEUDAL LAW; Coke, Litt. 69; Stat. Westm. 1, c. 36.

7. Tenure *in socage* seems to have been a relic of Saxon liberty which, up to the time of the abolition of military tenures, had been evidently struggling with the innovations of the Normans. Its great redeeming quality was its certainty; and in this sense it is by the old law-writers put in opposition to the tenure by knight's service, where the tenure was altogether precarious and uncertain. Littleton defines it to be where a tenant holds his tenement by any certain service, in lieu of all other services, so that they be not services of chivalry or knight's service: as, to hold by fealty and twenty shillings rent, or by homage, fealty, and twenty shillings

rent, or by homage and fealty without any rent, or by fealty and a certain specified service, as, to plough the lord's land for three days. Littleton, 117; 2 Sharswood, Blackst. Comm. 79. See SOCAGE.

8. Other tenures have grown out of the two last-mentioned species of tenure, and are still extant in England, although some of them are fast becoming obsolete. Of these is the tenure by *grand serjeanty*, which consists in some service immediately respecting the person or dignity of the sovereign: as, to carry the king's standard, or to be his constable or marshal, his butler or chamberlain, or to perform some similar service. While the tenure by *petit serjeanty* requires some inferior service, not strictly military or personal, to the king: as, the annual render of a bow or sword. The late duke of Wellington annually presented his sovereign with a banner, in acknowledgment of his tenure. There are also tenures by *copyhold* and in *frankalmoigne*, in *burgage* and of *gavelkind;* but their nature, origin, and history are explained in the several articles appropriated to those terms. 2 Sharswood, Blackst. Comm. 66; Coke, 2d Inst. 233.

9. Tenures were distinguished by the old common-law writers, according to the quality of the service, into *free* or *base:* the former were such as were not unbecoming a soldier or a freeman to perform, as, to serve the lord in the wars; while the latter were only considered fit for a peasant, as, to plough the land, and the like. They were further distinguished with reference to the person from whom the land was held: as, a tenure in *capite*, where the holding was of the person of the king, and tenure in *gross*, where the holding was of a subject. Before the statute of Quia Emptores, 18 Edw. I., any person might by a grant of land have created an estate as a tenure of his person or of his house or manor; and although by Magna Charta a man could not alienate so much of his land as not to leave enough to answer the services due to the superior lord, yet, as that statute did not remedy the evil then complained of, it was provided by the statute above referred to, that if any tenant should alien any part of his land in fee, the alienee should hold immediately of the lord of the fee, and should be charged with a proportional part of the service due in respect to the quantity of land held by him. The consequence of which was that upon every such alienation the services upon which the estate was originally granted became due to the superior lord, and not to the immediate grantee. 4 Term, 443; 4 East, 271; Crabb, Real Prop. § 735.

10. The remote position of the United States, as well as the genius of its institutions, has preserved its independence of these embarrassing tenures. With scarce an exception, its present condition includes no tenure but that which, as we have intimated, is necessarily incident to all governments. Every estate in fee-simple is held as absolutely and unconditionally as is compatible with the state's right of eminent domain. Many grants of land made by the British government prior to the revolution created socage tenures, which were subsequently abolished or modified by the legislatures of the different states. Thus, by the charter of Pennsylvania, the proprietary held his estate of the crown in free and common socage, his grantees being thereby also authorized to hold of him direct, notwithstanding the statute of Quia Emptores. The act of Pennsylvania of November 27, 1779, substituted the commonwealth in place of the proprietaries as the ultimate proprietor of whom lands were held. In New York there was supposed to have been some species of military tenure introduced by the Dutch previous to their surrender to the English, in 1664; but the legislature of that state in 1787 turned them all into a tenure in free and common socage, and finally, in 1830, abolished this latter tenure entirely, and declared that all lands in that state should thenceforth be held upon a uniform allodial tenure. On this subject, consult Bracton; Glanville; Coke, Litt.; Wright, Tenures; Maddox, Hist. Exch.; Sullivan, Lect.; Craig, de Feud.; DuCange; Reeve, Hist. of Eng. Law; Kent, Commentaries; Sharswood's Lecture before the Law Academy of Philadelphia, at the opening session of 1855–56; Washburn, Real Property.

TERCE. In Scotch Law. A life-rent competent by law to widows who have not accepted of special provisions in the third part of the heritable subjects in which the husband died infeft.

The terce takes place only where the marriage has subsisted for a year and a day, or where a child has been born alive of it. No terce is due out of lands in which the husband was not infeft, unless in case of a fraudulent omission. Craig, Inst. 423, § 28. The terce is not limited to lands, but extends to teinds, and to servitudes and other burdens affecting lands. Erskine, Inst. 2. 9. 26; Burge, Confl. of Laws, 429–435.

TERM. In Construction. Word; expression; speech.

Terms are words or characters by which we announce our sentiments, and make known to others things with which we are acquainted. These must be properly construed or interpreted in order to understand the parties using them. See CONSTRUCTION; INTERPRETATION; WORD.

In Contracts. The space of time granted to a debtor for discharging his obligation: these are express terms, resulting from the positive stipulations of the agreement, as, where one undertakes to pay a certain sum on a certain day, and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engage to construct a house for me, I must allow a reasonable time for fulfilling his engagement. 1 Wisc. 314.

In Estates The limitation of an estate: as, a term for years, for life, and the like. The word *term* does not merely signify the time specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as, by surrender, forfeiture, and the like. 2 Blackstone, Comm. 145; 8 Pick. Mass. 339.

In Practice. The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of the term, all adjournments are to be included. 9 Watts, Penn. 200. Courts are presumed to know judicially when their terms are required to be held by public law. 4 Dev. No. C. 427. See, generally, 1 Peck, Tenn. 82; 6 Yerg. Tenn. 395; 7 *id.* 365; 6 Rand. Va. 704; 1 Cow. N. Y. 58; 2 *id.* 445; 5 Binn. Penn. 389; 4 Serg. & R. Penn. 507; 5 Mass. 195, 435.

TERM PROBATORY. The time during which evidence may be taken in a cause.

TERM FOR YEARS. An *estate for years* and the *time* during which such estate is to be held are each called a term: hence the term may expire before the time, as, by a surrender. Coke, Litt. 45. See ESTATE FOR YEARS.

TERMINUM (Lat.). **In Civil Law.** A day set to the defendant. Spelman. In this sense Bracton, Glanville, and some others sometimes use it. Reliquiæ Spelmanianæ, p. 71; Beames, Glanville, 27, n.

TERMINUS (Lat.). A boundary or limit, either of space or time. A bound, goal, or borders parting one man's land from another's. *Est inter eos non de terminis*, sed tota possessione contentio. Cic. Acad. 4, 43. It is used also for an estate for a term of years: e.g. "*interesse termini.*" 2 Sharswood, Blackst. Comm. 143. See TERM.

Terminus a quo (Lat.). The starting-point of a private way is so called. Hammond, Nisi P. 196.

Terminus ad quem (Lat.). The point of termination of a private way is so called.

TERMOR. One who holds lands and tenements for a term of years, or life. Littleton, § 100; 4 Tyrwh. 561.

TERRE-TENANT (improperly spelled *ter-tenant*). One who has the actual possession of land; but, in a more technical sense, he who is seised of the land; and in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. 4 Watts & S. Penn. 256; Bacon, Abr. *Uses and Trusts.* It has been holden that mere occupiers of the land are not terre-tenants. See 16 Serg. & R. Penn. 432; 3 Penn. 229; 2 Saund. 7, n. 4; 2 Blackstone, Comm. 91, 328.

TERRIER. In English Law. A roll, catalogue, or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like.

By the ecclesiastical law, an inquiry is directed to be made from time to time of the temporal rights of the clergyman of every parish, and to be returned into the registry of the bishop: this return is denominated a terrier. 1 Phillipps, Ev. 602, 603.

TERRITORIAL COURTS. The courts established in the territories of the United States. See COURTS OF THE UNITED STATES.

TERRITORY. A part of a country separated from the rest and subject to a particular jurisdiction.

The word is derived from *terreo*, and is said to be so called because the magistrate within his jurisdiction has the power of inspiring a salutary fear. *Dictum est ab eo quod magistratus intra fines ejus* terendi *jus habet.* Henrion de Pansy, Auth. Judiciaire, 98. In speaking of the ecclesiastical jurisdictions, Francis Duaren observes that the ecclesiastics are said not to have *territory*, nor the power of arrest or removal, and are not unlike the Roman magistrates of whom Gellius says *vocationem habebant non prehensionem.* De Sacris Eccles. Minist. lib. 1, cap. 4.

In American Law. A portion of the country subject to and belonging to the United States which is not within the boundary of any of the states.

2. The constitution of the United States, art. 4, s. 3, provides that the congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States; and nothing in this constitution shall be construed so as to preclude the claims of the United States or of any state.

3. Congress possesses the power to erect territorial governments within the territory of the United States: the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled. Story, Const. § 1322; Rawle, Const. 237; 1 Kent, Comm. 243, 359; 1 Pet. 511, 512, 517. See the articles on the various territories.

TERROR (Lat.). That state of the mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger.

One of the constituents of the offence of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is not requisite in order to constitute this crime that personal violence should be committed. 3 Campb. 369; 1 Hawkins, Pl. Cr. c. 65, s. 5; 4 Carr. & P. 373, 538. See Rolle, 109; Dalton, Just. c. 186; Viner, Abr. *Riots* (A 8).

To constitute a forcible entry, 1 Russell, Crimes, 287, the act must be accompanied with circumstances of violence or terror; and in order to make the crime of robbery there must be violence or putting in fear; but both these circumstances need not concur. 4 Binn. Penn. 379. See RIOT; ROBBERY; PUTTING IN FEAR.

TERTIUS INTERVENIENS (Lat.). **In Civil Law.** One who, claiming an interest in the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervener; or he who interpleads in equity. 4 Bouvier, Inst. n. 3819, note.

TEST. Something by which to ascertain the truth respecting another thing. 7 Penn. St. 428; 6 Whart. Penn. 284.

TEST ACT. The act of 25 Car. II. c. 2, by which it was enacted that all persons holding any office, civil or military (excepting some very inferior ones), or receiving pay from the crown, or holding a place of trust under it, should take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England, under a penalty of £500 and disability to the office. 4 Sharswood, Blackst. Comm. 59. Abolished, 9 Geo. IV. c. 17, so far as taking sacrament is concerned, and new form of declaration substituted. Encyc. Brit.

TEST-PAPER. A paper submitted to the jury as a test or standard by which to determine the genuineness of other writings. 7 Penn. St. 428; 6 Whart. Penn. 284. Only admissible when no collateral issue can be raised concerning it. See 14 N. Y. 439; 1 Greenleaf, Ev. § 581.

TESTAMENT. In Civil Law. The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, liv. 1, tit. 1, s. 1.

At first there were only two sorts of testaments among the Romans,—that called *calatis comitiis*, and another called *in procinctu*. (See below.) In the course of time, these two sorts of testament having become obsolete, a third form was introduced, called *per æs et libram*, which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testaments; and the prætor introduced another, which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments, which could be made without writing. Afterwards military testaments were introduced, in favor of soldiers actually engaged in military service.

A *testament calatis comitiis*, or made in the comitia,—that is, the assembly of the Roman people,—was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis*. None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

A *civil testament* is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments are more ancient than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See Hist. de la Jurisp. Rom. de M. Terrason, p. 119.

A *common testament* is one which is made jointly by several persons. Such testaments are forbidden in Louisiana, Civ. Code of La. art. 1565, and by the laws of France, Code Civ. 968, in the same words, namely: "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition."

A *testament ab irato* is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee. When the facts of unreasonable anger are proved, the will is annulled as unjust and as not having been freely made. See AB IRATO.

A *mystic testament* (called a solemn testament, because it requires more formality than a nuncupative testament) is a form of making a will which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

This kind of testament is used in Louisiana. The following are the provisions of the Civil Code of that state on the subject, namely: the mystic or secret testament, otherwise called the close testament, is made in the following manner: the testator must sign his dispositions, whether he has written them himself, or has caused them to be written by another person. The paper containing these dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it thus closed and sealed to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence; then he shall declare to the notary in the presence of the witnesses that that paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper, or on the sheet that serves as its envelope, and that act shall be signed by the testator and by the notary and the witnesses. 5 Mart. La. 182. All that is above prescribed shall be done without interruption or turning aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary in that case to increase the number of witnesses. Those who know not how or are not able to write, and those who know not how or are not able to sign their names, cannot make dispositions in the form of the mystic

will. If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses. La. Civ. Code, art. 1577–1580.

A *nuncupative testament* was one made verbally, in the presence of seven witnesses: it was not necessary that it should have been in writing; the proof of it was by parol evidence. See NUNCUPATIVE.

In Louisiana, testaments, whether nuncupative or mystic, must be drawn up in writing, either by the testator himself, or by some other person under his dictation. The custom of making verbal statements, that is to say, resulting from the mere deposition of witnesses who were present when the testator made known to them his will, without his having committed it or caused it to be committed to writing, is abrogated. Nuncupative testaments may be made by public act, or by act under private signature. La. Civ. Code, art. 1568–1570.

An *olographic testament* is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated, and signed by the hand of the testator. It is subject to no other form. See La. Civ. Code, art. 1581.

TESTAMENTARY. Belonging to a testament: as, a testamentary gift; a testamentary guardian, or one appointed by will or testament; letters testamentary, or a writing under seal, given by an officer lawfully authorized, granting power to one named as executor to execute a last will or testament.

TESTAMENTARY CAUSES. In English Law. Causes relating to probate of testaments and administration and accounts upon the same. They are enumerated among ecclesiastical causes by Lord Coke. 5 Coke, 1, and Table of Cases at the end of the part. Over these causes probate court has now exclusive jurisdiction, by 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95.

TESTAMENTARY GUARDIAN. A guardian appointed by last will of a father to have custody of his child and his real and personal estate till he attains the age of twenty-one. In England, the power to appoint such guardian was given by 12 Car. II. c. 24. The principles of this statute have been generally adopted in the United States, 12 N. H. 437; but not in Connecticut. 1 Swift, Dig. 48.

TESTATE. The condition of one who leaves a valid will at his death.

TESTATOR (Lat.). One who has made a testament or will.

In general, all persons may be testators. But to this rule there are various exceptions. *First*, persons who are deprived of understanding cannot make wills: idiots, lunatics, and infants are among this class. *Second*, persons who have understanding, but being under the power of others cannot freely exercise their will; and this the law presumes to be the case with a married woman, and therefore she cannot make a will without the express consent of her husband to the particular will. When a woman makes a will under some general agreement on the part of the husband that she shall make a will, the instrument is not properly a will, but a writing in the nature of a will or testament. *Third*, persons who are deprived of their free will cannot make a testament: as, a person in duress. 2 Blackstone, Comm. 497; 2 Bouvier, Inst. n. 2102 *et seq.* See DEVISOR; DURESS; FEME COVERT; IDIOT; WIFE; WILL.

TESTATRIX (Lat.). A woman who makes a will or testament.

TESTATUM (Lat.). **In Practice.** The name of a writ which is issued by the court of one county to the sheriff of another county in the same state, when the defendant cannot be found in the county where the court is located: for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. See Viner, Abr. *Testatum*, 259.

In Conveyancing. That part of a deed which commences with the words "this indenture witnesseth."

TESTE OF A WRIT (Lat.). **In Practice.** The concluding clause, commencing with the word *witness*, etc. A signature in attestation of the fact that a writ is issued by authority.

The act of congress of May 8, 1792, 1 Story, U. S. Laws, 227, directs that all writs and process issuing from the supreme or a circuit court shall bear teste of the chief justice of the supreme court, or, if that office be vacant, of the associate justice next in precedence; and that all writs or process issuing from a district court shall bear teste of the judge of such court, or, if the said office be vacant, of the clerk thereof. See Sergeant, Const. Law, Index; 20 Viner, Abr. 262; Stephen, Plead. 25.

TESTES. Witnesses.

TESTIFY. To give evidence according to law; the examination of a witness who declares his knowledge of facts.

TESTIMONIAL PROOF. In Civil Law. A term used in the same sense as *parol evidence* is used at common law, and in contradistinction to *literal proof*, which is written evidence.

TESTIMONIES. In Spanish Law. An attested copy of an instrument by a notary. Newman & Barretti, Dict.; Tex. Dig.

TESTIMONY. The statement made by a witness under oath or affirmation.

TESTMOIGNE. This is an old and barbarous French word, signifying, in the old books, evidence. Comyns, Dig. *Testmoigne.*

TEXAS. The name of one of the new states of the American Union.

2. Under the name of Coahuila and Texas, it was a province of Mexico until 1836, when the inhabit-

ants established a separate republic. On the first day of March, 1845, the congress of the United States, by a joint resolution, submitted to the new republic a proposition providing for the erection of the territory of Texas into a new state, and for its annexation to that country under the name of the state of Texas. This proposition was accepted by the existing government of Texas on the 23d of June, 1845, and was ratified by the people in convention on the 6th of July. On the 29th of December following, by a joint resolution of congress, the new state was formally admitted into the Union.

The state constitution was adopted by a convention of the people, at Austin, on the 27th of August, 1845. It provides for the distribution of the powers of the government among three distinct departments,—the legislative, the executive, and the judicial.

Every free male person who has attained the age of twenty-one years, and who is a citizen of the United States, or who was at the time of the adoption of the constitution by the congress of the United States a citizen of the republic of Texas, and who has resided in the state one year next preceding an election, and the last six months within the district, county, city, or town in which he offers to vote, and every free male person over the age of twenty-one years who had resided six months in Texas immediately preceding the acceptance of the constitution by the congress of the United States (Indians not taxed, Africans, and the descendants of Africans, excepted) is deemed a qualified elector; and should such qualified elector happen to be in any other county situated in the district in which he resides at the time of an election, he is permitted to vote for any district officer: *Provided*, That the qualified electors shall be permitted to vote anywhere in the state for state officers: *And provided, further*, That no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by the constitution. Const. art. 6, §§ 1, 2.

The Legislative Power.

3. The legislative department is composed of the senate and house of representatives. The regular sessions of the legislature take place biennially. Extra sessions may be called by the executive at any time.

The third article of the constitution contains the customary provisions for securing the organization of the two houses, choice of officers, qualification of members, power of expulsion and punishment of members, privilege from arrest, preservation and publication of proceedings, and open sessions. Const. art. 3, §§ 12–18.

Senators are chosen by the qualified electors, for four years, at such times and places as are or may hereafter be designated by law. No person can be a senator unless he is a citizen of the United States, or was at the time of the acceptance of the constitution by the congress of the United States a citizen of the republic of Texas, and has been an inhabitant of the state three years next preceding the election, and for the last year thereof a resident of the district for which he is chosen, and must have attained the age of thirty years.

The House of Representatives is composed of members chosen by the qualified electors for the term of two years from the day of the general election, at such times and places as are now, or may hereafter be, designated by law. Const. art. 3, §§ 5–7. No person can be a representative unless he is a citizen of the United States, or was at the time of the adoption of this constitution a citizen of the republic of Texas, and has been an inhabitant of this state two years next preceding his election, and the last year thereof a citizen of the county, city, or town for which he shall be chosen; and he must have attained the age of twenty-one years at the time of his election.

The Executive Power.

4. *The Governor* is elected by the qualified electors of the state, at the time and places of elections for members of the legislature. Art. 5, § 2. He holds his office for two years from the regular time of installation, and until his successor has been duly qualified, but is not eligible for more than four years in any term of six years. Art. 5, § 4. He must be at least thirty years of age, a citizen of the United States or of Texas at the time of the adoption of the constitution, and have resided in the same three years next immediately preceding his election. Art. 5, § 4. He is commander-in-chief of the army and navy of the state, may require information from officers of the executive department, may convene the legislature, or adjourn the same when the houses cannot agree, may recommend measures to the legislature, must cause the laws to be executed.

A Lieutenant-Governor is chosen at every election for governor, by the same persons and in the same manner, continues in office for the same time, and must possess the same qualifications. In voting for governor and lieutenant-governor, the electors are to distinguish for whom they vote as governor and for whom as lieutenant-governor. The lieutenant-governor, by virtue of his office, is president of the senate, and has, when in committee of the whole, a right to debate and vote on all questions, and, when the senate is equally divided, to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the governor to serve, or of his impeachment or absence from the state, the lieutenant-governor exercises the power and authority appertaining to the office of governor until another is chosen at the periodical election and is duly qualified, or until the governor impeached, absent, or disabled is acquitted, returns, or his disability is removed. Const. art. 5, § 12.

The Judicial Power.

5. The judicial power is vested in one supreme court, in district courts, and in such inferior courts as the legislature may from time to time ordain and establish; and such jurisdiction may be vested in corporation courts, as may be deemed necessary and be directed by law. Const. art. 4, § 1. The governor nominates and, by and with the advice and consent of two-thirds of the senate, appoints the judges of the supreme and district courts; and they hold their offices for six years. Const. art. 4, § 5.

The Supreme Court consists of a chief justice and two associates, any two of whom form a quorum. Art. 4, § 2. It appoints its own clerk. The supreme court has appellate jurisdiction only, coextensive with the limits of the state, but in criminal cases, and in appeals from interlocutory judgments, with such exceptions and under such regulations as the legislature may make; and the supreme court and judges thereof have power to issue the writ of *habeas corpus*, and, under such regulations as may be prescribed by law, may issue writs of *mandamus*, and such other writs as may be necessary to enforce its own jurisdiction; and may also compel a judge of the district court to proceed to trial and judgment in a cause. The supreme court holds its sessions once every year, between the months of October and June inclusive, at Austin, Galveston, and Tyler.

The District Courts, of which there are some twenty in the state, holding semi-annual terms, have original jurisdiction of all criminal actions, and power to inquire, through the intervention of a grand jury, into all offences committed or triable within their respective jurisdictions; to hear and determine all prosecutions in the name of the state,

by indictment or information; to inquire into the cause of the detention of persons imprisoned in the jails of their respective districts, and make all orders necessary for their recommitment, discharge, or admission to bail, by the writ of habeas corpus, or in such other manner as may be prescribed by law; and to exercise all other powers conferred by the code of criminal procedure. In civil cases the district courts have original jurisdiction of all suits in behalf of the state to recover penalties, forfeitures, and escheats; of all cases of divorce; of all suits, complaints, and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy is valued at or amounts to one hundred dollars, exclusive of interest. They have original jurisdiction in probate matters when the judge or clerk of the county court is interested therein. The district courts and the judges thereof have power to grant all remedial writs known to the law, and to issue all writs necessary to enforce their own jurisdiction and to give them a general superintendence and control over the courts of inferior jurisdiction.

6. The pleading and practice of the district court are peculiar, and deserve some attention. Prior to the revolution which severed Texas from the Mexican confederacy, the Spanish civil law, modified to some extent by local statutes, was in force. The common law was introduced at an early period after the declaration of independence; but the old system left behind it distinct traces, and some of its features are apparent in the existing laws. Amid the changes which followed the revolution, when the body of the civil law was abrogated, and the common law was adopted in its application to juries and to evidence, and as a rule of decision, where not inconsistent with the constitution and laws, the system of pleading previously in use was carefully preserved. That system is still in force, except where it has been expressly changed by subsequent legislation altering or establishing the course of proceedings in the courts, or where it has been necessarily modified by the introduction of the trial by jury,—a mode of trial wholly unknown to the civil law,—and with it, to a great extent, the practice peculiar to the common-law courts, the analogies of which are constantly consulted by the Texas practitioner.

The system of pleading formerly in force, and which has impressed its character on that now practised, consisted in written allegations by the parties on either side.

As defined by the Spanish law-writers, an *action* was the legal method of demanding in a court of justice that which is our own and is withheld from us. They were divided into real and personal,—the former having reference to the right which we have in a thing, the latter, to the obligation which one has assumed to perform a certain duty. The *defence* to an action was called an *exception*. It embraced every allegation and defence used to defeat a recovery by the plaintiff. Exceptions were either *dilatory*, when they delayed or suspended the action, and *peremptory*, when they destroyed it and prevented further litigation.

7. The first step in the progress of the action was the demand, which was a written petition adapted to the nature of the action, and must have contained the following requisites:—*first*, the name of the judge to whom it was addressed; *second*, the name of the plaintiff; *third*, the name of the defendant; *fourth*, the statement of the cause of action; *fifth*, the ground of the demand, or the right by which the relief was sought.

The demand concluded with the word "*juro*," which signified that the party had taken an oath that his action was begun in good faith, and the words "*el oficio de vmd. implora*," by which the interposition of the judge was invoked.

The *citation* followed the demand. This was the process by which the defendant was brought into court to answer the demand.

Then followed the *contestation*, which was the answer made by the defendant, either confessing or denying the plaintiff's right.

To this the plaintiff might present a *replica*, or replication; and the defendant might add a *duplica*, or rejoinder. Here the pleadings originally ended, and new facts could only be presented upon affidavit that they had but just come to the knowledge of the party pleading them.

8. The *history of a lawsuit* in the present district courts of the state will give the reader an insight into their system of pleading and practice, and show how far the ancient form of the pleadings has been preserved, and wherein it has been modified.

It will be recollected that the district courts have jurisdiction in all cases without regard to any distinction between law and equity. There is no difference in the mode of proceeding in the application of legal and equitable remedies, nor are there any forms of action adapted to different injuries. The pleadings in all cases consist of the *petition* and *answer*. Demands entitling a party to legal and equitable relief can be united in the same action: an equitable defence can be opposed to a legal demand. The court may so frame its judgment as to afford all the relief required by the nature of the case and which could be granted by a court of law or equity, and may also grant all such orders, writs, and process as may be necessary to make the relief granted effectual.

There being no forms of action, the rules of pleading known to the common-law and equity systems are only applicable so far as they are the rules of sound logic and conduce to a clear and methodical statement of the cause of action or ground of defence. No rule of pleading which is purely technical and has reference to the form of proceeding has any place in the system. The pleadings are the same in cases of legal and equitable cognizance, and the application of legal or equitable principles to the decision of the case presented depends upon the facts, and not upon the manner of stating them.

9. Every suit is commenced by the *filing of the petition*, which is a written statement of the cause of action, and of the relief sought by the plaintiff. The petition should contain certain formal but essential parts, the omission of any of which would render it defective. They are—

The marginal venue: "The State of Texas, County of ——;" the term of the court: "District Court, —— Term, A.D. 18—;" the address: "To the District Court of said County;" the commencement, consisting of the names and residences of the parties; the statement of the cause of action, which should be a clear, logical, and succinct statement of the facts which, upon the general denial, the plaintiff would be bound to prove, and which if admitted will entitle him to a judgment; the statement of the nature of the relief sought; the signature of the party or his attorney. The petition must be filed with the clerk of the proper county, whose duties are the same as at common law, to indorse upon it the day on which it was filed, together with its proper file-number. The clerk must also make an entry of the case in his docket.

Next follows the *citation*, or writ, which is issued by the clerk, and dated, tested, and signed by him. Its style is, "The State of Texas." It is addressed to the sheriff of the county in which the defendant is alleged to be found, and commands him to summon the defendant to appear at the next term of the court to answer the plaintiff's petition, a certified copy of which accompanies the writ.

The citation is executed by the sheriff like an original writ.

10. There are certain auxiliary writs, which may be sued out at the commencement or during the progress of the suit, whereby the effects of the defendant or the property in controversy may be seized by the sheriff and held until replevied until the final termination of the suit, so that it may be subject to the judgment rendered therein, or the defendant is restrained from the commission of some act until the question of right between the parties shall be determined. These are the writs of *attachment, garnishment, sequestration,* and *injunction.* But there is no peculiarity in these writs under the Texas practice which renders it necessary to explain them here.

When the citation has been served, the defendant is in court, and must file his answer within the time prescribed by law for pleading. In those counties in which the term of the court is limited to one week, the answer must be filed on or before the fourth day of the term; if the term is not so limited, the answer must be filed on or before the fifth day; and this is, accordingly, called the *appearance-day.*

Upon the morning of the appearance-day the cases upon the appearance docket are called over by the judge in the order in which they have been filed. If the defendant in any suit has failed to appear by his answer, a final *judgment by default* may be rendered against him, and a short entry to that effect is made upon the judge's docket. If the cause of action is liquidated, and established by an instrument in writing, the amount due may be computed by the clerk, or may be found by a jury, upon a writ of inquiry, if asked for by either party. Where the cause of action is unliquidated, the damages must be assessed by a jury upon the writ of inquiry when the case is reached on the regular call of the docket. When the damages have been assessed by the clerk, or jury, as the case may be, judgment is accordingly entered upon the minutes.

11. The defendant, if he does not intend to resist the suit, may appear and *confess judgment;* or, if he has pleaded, he may *withdraw his answer,* and suffer judgment by *nil dicit,*—in either of which cases the appearance is a waiver of all errors. If the defendant intends to resist the plaintiff's recovery, he must, within the time prescribed for pleading, file his *answer.*

The *answer* includes all defensive pleading, and may consist of as many several matters, whether of law or of fact, as the defendant may deem necessary for his defence and which may be pertinent to the cause. They must all be filed at the same time, and in the due order of pleading.

The answer may be by *demurrer,* usually termed an *exception,* or by *plea,* or by both. The demurrer is either general or special; and its office is the same as under the common-law system of pleading. It is not, however, an admission of the allegations of fact, but simply calls upon the court to say whether, granting all the facts to be as the plaintiff states them, any cause of action is shown requiring an answer.

A *plea* is an answer either denying the truth of the matter alleged in the petition, or admitting its truth, and showing some new matter to avoid its effect.

The exception or plea may, as at common law, be either dilatory or peremptory.

The *due order of pleading* above referred to is the ancient and what is said to be the natural order of pleading. See PLEADING.

12. The answer may embrace one or all of the grounds of defence, provided only that they be presented in the due order of pleading.

The defendant may also, by a *plea in reconvention,* which is analogous to the cross-bill of the equity system, show that he has a claim against the plaintiff similar in its nature to that set out in the petition, and pray for judgment over against the plaintiff; and, upon the trial, judgment will be given for that party who may establish the largest claim, for the excess of his claim over that of his opponent.

The pleading may proceed one step further the plaintiff may, by a *replication,* set up new matter in avoidance of that relied upon by the defendant in his answer; or he may, as at common law, demur to the answer.

No formal *joinder in demurrer* or in issue is necessary. The demurrer is to be decided by the court before the questions of fact are submitted to the jury. The party against whom judgment is rendered sustaining the demurrer may abide by his pleadings,—in which case judgment final will be given against him; or he may, under leave of the court, remove the objection by amendment.

The questions of law having been thus disposed of, the *issues of fact* arising upon the pleadings are submitted to the jury in the same manner as at common law, who may respond thereto by a general or special verdict, upon which the judgment of the court is then rendered.

13. *The County Court,* of which there is one for each county, sitting as a court of probate, has power to take probate of wills, to appoint guardians, to grant letters testamentary and of administration, to settle the accounts of executors, administrators, and guardians, and to transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, and persons of unsound mind, and the settlement, partition, and distribution of the estates of decedents. The court sits once in each month. The pleadings are committed to writing, but generally without any regard to form; and no uniform system has been adopted.

Justices of the Peace, of whom there are a convenient number in each county, have jurisdiction to try and determine criminal actions against persons accused of the following offences: simple assaults and batteries; affrays; violations of the penal laws against gaming, where the highest penalty does not exceed one hundred dollars; violations of the laws prohibiting the sale of liquor to slaves and free persons of color, and trading with slaves, concurrently with the district courts; and of petty offences committed by slaves and free persons of color; and cases of vagrants and disorderly persons exclusively.

14. In civil cases they have jurisdiction of suits and actions in behalf of the state, or any county thereof, or any individual, to recover penalties, fines, and forfeitures not exceeding one hundred dollars in amount; of suits in behalf of the state, or of any county, for any violation of the revenue laws, where the matter in controversy does not exceed one hundred dollars. They have jurisdiction of suits and actions for the recovery of money on any account, bill, bond, note, or other instrument in writing; of suits for the recovery of specified articles, or the value thereof; of suits for torts, trespasses, and other injuries to person or property, where the amount claimed, or the value of the articles, or the damages sought to be recovered, do not exceed one hundred dollars, exclusive of interest and costs; of actions for forcible entry and detainer, and for the recovery of rent and distress.

They hold monthly terms. The pleadings consist of oral altercations, which are taken down in brief by the justice and entered in a docket to be kept by him for that purpose.

THAINLAND. **In Old English Law.** The land which was granted by the Saxon kings to their thains or thanes was so called. Crabb, Comm. Law, 10.

THALER. A silver coin of Germany.

The composition and value of this piece formerly varied considerably in different portions of the country,—the value ranging from 95 to 105 cents. But the convention of the German states in 1838 fixed the weight of the thaler at 343.8 grains troy, and the fineness at 750 thousandths, which is the only standard now in use. The value, at this rate, is 72 cents. The name (thaler) is supposed to have originated from the German word *thal*, a dale, or valley,—the first thalers having been coined in the valley of Joachim, from which it obtained the name of "Joachim's thaler." From this coin the word *dollar*, as applied to Spanish and American coins, is derived. See DOLLAR.

THANE (Sax. *thenian*, to serve). **In Saxon Law.** A word which sometimes signifies a nobleman, at others a freeman, a magistrate, an officer, or minister. A tenant of the part of the king's lands called the king's "thaneage." Termes de la Ley.

THEFT. A popular term for larceny.

In Scotch Law. The secret and felonious abstraction of the property of another for sake of lucre, without his consent. Alison, Crim. Law, 250.

THEFT-BOTE. The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment.

This is an offence punishable at common law by fine and imprisonment. Hale, Pl. Cr. 130. See COMPOUNDING A FELONY.

THEOCRACY. A species of government which claims to be immediately directed by God.

La religion, qui, dans l'antiquité, s'associa souvent au despotisme, pour régner par son bras ou à son ombrage, a quelquefois tenté de régner seule. C'est ce qu'elle appelait le règne de Dieu, la théocratie. Matter, De l'Influence des Mœurs sur les Lois, et de l'Influence des Lois sur les Mœurs, 189. (Religion, which in former times frequently associated itself with despotism, to reign by its power or under its shadow, has sometimes attempted to reign alone; and this she has called the reign of God,—theocracy.)

THIEF. One who has been guilty of larceny or theft.

THINGS. By this word is understood every object, except man, which may become an active subject of right. Code du Canton de Berne, art. 332. In this sense it is opposed, in the language of the law, to the word persons. See PROPERTY; RES.

THIRD-BOROW. **In Old English Law.** A constable. Lambard, Duty of Const. 6; 28 Hen. VIII. c. 10.

THIRD PARTIES. A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. 1 Mart. La. N. S. 384. See, also, 2 La. 425; 6 Mart. La. 528.

But it is difficult to give a very definite idea of *third persons;* for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See 1 Bouvier, Inst. n. 1335 *et seq.*

THIRD PENNY. **In Old English Law.** Of the fines and other profits of the county courts (originally, when those courts had superior jurisdiction, before other courts were created) two parts were reserved to the king, and a third part, or *penny*, to the earl of the county. See DENARIUS TERTIUS COMITATUS; Kennett, Paroch. Antiq. 418; Cowel.

THIRLAGE. **In Scotch Law.** A servitude by which lands are astricted or thirled to a particular mill, and the possessors bound to grind their grain there, for the payment of certain multures and sequels as the agreed price of grinding. Erskine, Inst. 2. 9. 18.

THOROUGHFARE. A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac*, which is open only at one end.

Whether a street which is not a thoroughfare is a highway seems not fully settled. 1 Ventr. Ch. 189; 1 Hawkins, Pl. Cr. c. 76, § 1. In a case tried in 1790, where the *locus in quo* had been used as a common street for fifty years, but was no thoroughfare, Lord Kenyon held that it would make no difference; for otherwise the street would be a trap to make people trespassers. 11 East, 375. This decision in several subsequent cases was much criticized, though not directly overruled. 5 Taunt. 126; 5 Barnew. & Ald. 456; 3 Bingh. 447; 1 Campb. 260; 4 Ad. & E. 698. But in a recent English case the decision of Lord Kenyon was affirmed by the unanimous opinion of the court of queen's bench. The doctrine established in the latter case is that it is a question for the jury, on the evidence, whether a place which is not a thoroughfare is a highway or not. 14 Eng. L. & Eq. 69. And see 28 *id.* 30. In the United States there are but few cases in which this question has been discussed; though in Rhode Island it has been determined that a street terminating upon private land and extending neither to another way, a mill, a market, nor other public place, is incapable of dedication to the public as a highway. 2 R. I. 172. And a similar decision has been made in New York. 23 N. Y. 103. And see 23 N. H. 331; 7 Johns. N. Y. 106.

THOUGHT. The operation of the mind. No one can be punished for his mere thoughts, however wicked they may be. Human laws cannot reach them,—first, because they are unknown; and secondly, unless made manifest by some action, they are not injurious to any one; but when they manifest themselves, then the act which is the consequence may be punished. Dig. 50. 16. 225.

THREAD. A figurative expression used to signify the central line of a stream or

watercourse. Hargrave, Law Tracts, 5; 4 Mas. C. C. 397; Holt, 490. See FILUM AQUÆ; ISLAND; WATERCOURSE; RIVER.

THREAT. **In Criminal Law.** A menace of destruction or injury to the lives, character, or property of those against whom it is made.

Sending threatening letters to persons for the purpose of extorting money is said to be a misdemeanor at common law. Hawkins, Pl. Cr. b. 1, c. 53, s. 1; 2 Russell, Crimes, 575; 2 Chitty, Crim. Law, 841; 4 Blackstone, Comm. 126. To be indictable, the threat must be of a nature calculated to overcome a firm and prudent man; but this rule has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed. 1 Den. Cr. Cas. 512. The party who makes a threat may be held to bail for his good behavior. See Comyns, Dig. *Battery* (D).

In Evidence. Menace.

When a confession is obtained from a person accused of crime, in consequence of a threat, evidence of such confession cannot be received, because, being obtained by the torture of fear, it comes in so questionable a shape that no credit ought to be given to it. 1 Leach, Cr. Cas. 263. This is the general principle; but what amounts to a threat is not so easily defined. It is proper to observe, however, that the threat must be made by a person having authority over the prisoner, or by another in the presence of such authorized person and not dissented from by the latter. 8 Carr. & P. 733. See CONFESSION.

THREE-DOLLAR PIECE. A gold coin of the United States, of the value of three dollars.

The three-dollar piece was authorized by the seventh section of the act of Feb. 21, 1853. 10 U. S. Stat. at Large. It is of the same fineness as the other gold coins of the United States. The weight of the coin is 77.4 grains. The devices upon this coin, and upon the gold dollar also, are not authoritatively fixed by act of congress, as is the case with all the other gold coins of the United States; and hence greater latitude was allowed to the treasury department and the officers of the mint in fixing these devices. The *obverse* of the piece presents an ideal head, emblematic of America, enclosed within the national legend; on the *reverse* is a wreath composed of wheat, cotton, corn, and tobacco, the staple productions of the United States; within the wreath the value and date of the coin are given.

The three-dollar piece is a legal tender in payment of any amount.

THROAT. **In Medical Jurisprudence.** The anterior part of the neck. Dunglison, Med. Dict.; Cooper, Dict.; 2 Good, Study of Med. 302; 1 Chitty, Med. Jur. 97, n.

The word *throat*, in an indictment which charged the defendant with murder by cutting the throat of the deceased, does not mean, and is not to be confined to, that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat. 6 Carr. & P. 401.

TICK. Credit: as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet if the master were trusted by the trader he is liable. 1 Show. 95; 3 Kebl. 625; 10 Mod. 111; 3 Esp. 214; 4 *id.* 174.

TIDE. The ebb and flow of the sea.

The law takes notice of three kinds of tides, viz.: the *high* spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials; the *spring* tides, which happen twice every month, at the full and change of the moon; the *neap* or *ordinary* tides, which happen between the full and change of the moon, twice in twenty-four hours. Angell, Tide-Wat. 68. The changeable condition of the tides produces, of course, corresponding changes in the line of high-water mark. Now, inasmuch as the soil of all tidal waters up to the limit of high-water mark, at common law, is in the crown, or, in this country, in the state, it is important to ascertain what is high-water mark, in legal contemplation, considered as the boundary of the royal or public ownership. In a recent English case this ownership has been held to be limited by the average of the medium high tides between the spring and the neap in each quarter of a lunar revolution during the year, excluding only extraordinary catastrophes or overflows. 4 DeGex, M. & G. 206. See, also, 3 Barnew. & Ald. 967; 5 *id.* 268; 2 Dougl. 629; 7 Pet. 324; 1 Pick. Mass. 180; 2 Johns. N. Y. 357; RIVER.

TIDE-WATER. Water which flows and reflows with the tide. All arms of the sea, bays, creeks, coves or rivers, in which the tide ebbs and flows, are properly denominated tide-waters.

2. The term tide-water is not limited to water which is salt, but embraces, also, so much of the water of fresh rivers as is propelled backwards by the ingress and pressure of the tide. 5 Coke, 107; 2 Dougl. 441; 6 Clark & F. Hou. L. 628; 7 Pet. 324. The supreme court of the United States has decided that, although the current of the river Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might properly be said to be within the ebb and flow of the tide. 7 Pet. 324. The flowing, however, of the waters of a lake into a river, and their reflowing, being caused by the occasional swell and subsidence of the lake, and not by the ebb and flow of regular tides, do not constitute such a river a tidal or, technically, navigable river. 20 Johns. N. Y. 98. And see 17 Johns. N. Y. 195; 2 Conn. 481; Woolrych, Waters, c. ii.; Angell, Tide-Wat. c. iii.

3. The bed or soil of all tide-waters belongs, in England, to the crown, and in this country to the state in which they lie; and the waters themselves are public: so that all persons may use the same for the purposes of navigation and fishery, unless

restrained by law. 5 Barnew & A. 304; 1 Macq. Hou. L. 49; 27 Eng. L. & Eq. 242; 4 Ad. & E. 384; 8 *id.* 329; Angell, Watercourses, c. iii., xiii. In England, the power of parliament to restrain or improve these rights is held to be absolute. 4 Barnew. & C. 598. In this country, such a power is subject to the limitations of the federal constitution; and while both the general and state governments may adopt measures for the improvement of navigation, 7 Pick. Mass. 209; 6 Rand. Va. 245; 14 Serg. & R. Penn. 71; 4 Rawle, Penn. 9; 9 Watts, Penn, 119; 9 Conn. 436, and the states may grant private rights in tide-waters, provided they do not conflict with the public right of navigation, 21 Pick. Mass. 344; 23 *id.* 360, yet neither the general nor the state governments have the power to destroy or materially impair the right of navigation. The state governments have no such power, because its exercise would be in collision with the laws of congress regulating commerce, 9 Wheat. 1: the general government has no such power, because the states have never relinquished to it such a power over the waters within their jurisdictional limits. 2 Pet. 245. And see BRIDGE. As to the power of the state to regulate the public fisheries, see FISHERY. And see, generally, RIVER; WHARF.

TIE. When two persons receive an equal number of votes at an election, there is said to be a tie.

In that case neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. See MAJORITY.

TIEL. An old manner of spelling *tel:* such as, nul tiel record, no such record.

TIEMPO INHABIL (Span.). **In Louisiana.** A time when a man is not able to pay his debts.

A man cannot dispose of his property, at such a time, to the prejudice of his creditors. 4 Mart. La. N. S. 292; 3 Mart. La. 270; 10 *id.* 70

TIERCE. A liquid measure, containing the third part of a pipe, or forty-two gallons.

TIGNI IMMITTENDI (Lat.). **In Civil Law.** A servitude which confers the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter and that the wall of the latter may bear this weight. Dig. 8. 2. 36; 8. 5. 14.

TIMBER-TREES. Oak, ash, elm, and such other trees as are commonly used for building. 2 Blackstone, Comm. 28. But it has been contended, *arguendo*, that to make it timber the trees must be felled and severed from the stock. 6 Mod. 23; Starkie, Slander, 9. See 12 Johns. N. Y. 239; 2 Belt, Suppl. Ves. Jr.; WASTE.

TIME. The measure of duration. Lapse of time often furnishes a presumption, stronger or weaker according to the length of time which has passed, of the truth of certain facts, such as the legal title to rights, payment of or release from debts. See PRESCRIPTION; LIMITATIONS.

Generally, in computing time, one day is included and one excluded, 2 P. A. Browne, Penn. 18; 4 T. B. Monr. Ky. 464; 26 Ala. N. S. 547; see 2 Harr. Del. 461; 5 Blackf. Ind. 319; 16 Ohio, 408; 10 Rich. So. C. 395; excluding the day on which an act is done, when the computation is to be made from such an act, 15 Ves. Ch. 248; 1 Ball & B. Ch. Ir. 196; 16 Cow. N. Y. 659; 11 Mass. 204; 1 Pick. Mass. 485; 1 Metc. Mass. 127; Anth. 179; 3 Den. N. Y. 12; 1 Mod. 8; 27 Ala. N. S. 311; 19 Mo. 60; see 18 Conn. 18; including it, according to Dougl. 463; Hob. 139; 3 Term, 623; 3 East, 417; 2 P. A. Browne, Penn. 18; 15 Mass. 193; 4 Blackf. Ind. 320; 18 How. 151; except where the exclusion will prevent forfeiture. Hob. 139; 2 Campb. 294; Cowp. 714; 4 Me. 298. See 2 Sharswood, Blackst. Comm. 140, n. 3; 13 Viner, Abr. 52, 499; 15 *id.* 554; 20 *id.* 266; Comyns, Dig. *Temps;* 1 Roper, Leg. 518; Graham, Pract. 185; 2 Pothier, Obl. Evans ed. 50. Time from and after a given day excludes that day. 1 Pick. Mass. 485; 7 J. J. Marsh. Ky. 202; 1 Blackf. Ind. 392; 9 Cranch, 104; 4 N. H. 267; 3 Penn. 200; 1 Nott & M'C. So. C. 565. But see 9 Cranch, 104.

In Pleading. A point in or space of duration at or during which some fact is alleged to have been committed.

In *criminal actions*, both the day and the year of the commission of the offence must appear; but there need not be an express averment, if they can be collected from the whole statement. Comyns, Dig. *Indictment* (G 2); 5 Serg. & R. Penn. 315. The prosecutor may give evidence of an offence committed on any day which is previous to the finding of the indictment, Archbold, Crim. Pl. 95; Phillipps, Ev. 203; 9 East, 157; 5 Serg. & R. Penn. 316; but a day subsequent to the trial must not be laid. Add. Penn. 36.

In *mixed and real actions*, no particular day need be alleged in the declaration. 3 Chitty, Plead. 620–635; Gould, Plead. c. 3, § 99; Stephen, Plead. 314; Metc. Yelv. 182 *a*, n.; Croke Jac. 311.

In personal actions, all traversable affirmative facts should be laid as occurring on some day, Gould, Plead. c. 3, § 63; Stephen, Plead. 292; Yelv. 94; but no day need be alleged for the occurrence of negative matter, Comyns, Dig. *Pleader* (C 19); Plowd. 24 *a;* and a failure in this respect is, in general, aided after verdict. 13 East, 407. Where the cause of action is a trespass of a permanent nature or constantly repeated, it should be laid with a *continuando*, which title see. The day need not, in general, be the actual day of commission of the fact, 2 Saund. 5 *a;* Coke, Litt. 283 *a;* 12 Johns N. Y. 287; 3 N. H. 299: if the actual day is not stated, it should be laid under a videlicet. Gould, Plead. c. 3, § 63. The exact time may become ma-

terial, and must then be correctly laid, Cowp. 671; 4 Esp. 152; 6 Term, 463; 10 Barnew. & C. 215; 1 Crompt. & J. Exch. 391; 4 Serg. & R. Penn. 576; 7 *id.* 405; 1 Stor. C. C. 528: as, the time of execution of an executory written document. Gould, Plead. c. 3, § 67. The defence must follow the time laid in the declaration, if time is not material, 1 Chitty, Plead. 509; 1 Saund, 14, 82; need not when it becomes material. 2 Saund. 5 *a*, *b* (n. 3), or in pleading matter of discharge, 2 Burr. 944; 2 Wils. 150; Plowd. 46; 2 Strange, 944, or a record. Gould, Plead. c. 3, § 83.

TIPPLING-HOUSE. A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere selling is considered as evidence of keeping a tippling-house.

TIPSTAFF. An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of rod or *staff tipped* with silver.

In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to wait on the court and serve its process.

TITHES. In English Law. A right to the tenth part of the produce of lands, the stocks upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy.

Fortunately, in the United States, the clergy can be supported by the zeal of the people for religion, and there are no tithes. See Cruise, Dig. tit. 22; Ayliffe, Parerg. 504.

TITHING. In English Law. Formerly, a district containing ten men, with their families. In each tithing there was a tithingman, whose duty it was to keep the peace, as a constable now is bound to do. St. Armand, in his Historical Essay on the Legislative Power of England, p. 70, expresses an opinion that the tithing was composed not of ten common families, but of ten families of lords of a manor.

TITHINGMAN. In Saxon Law. The head or chief of a decennary of ten families: he was to decide all lesser causes between neighbors. Now tithingmen and constables are the same thing. Jacob, Law Dict.

In New England, a parish officer to keep good order in church. Webster, Dict.

TITLE. Estates. The means whereby the owner of lands hath the just possession of his property. Coke, Litt. 345; 2 Blackstone, Comm. 195. See 1 Ohio, 349. This is the definition of title to lands only.

A *bad* title is one which conveys no property to the purchase of an estate.

A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it. 1 Jac. & W. Ch. 568; 9 Cow. N. Y. 344.

A *good* title is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser.

The ordinary acceptation of the term *marketable title* would convey but a very imperfect notion of its legal and technical import. To common apprehension, unfettered by the technical and conventional distinction of lawyers, all titles being either good or bad, the former would be considered marketable, the latter non-marketable. But this is not the way they are regarded in courts of equity, the distinction taken there being, not between a title which is absolutely good or absolutely bad, but between a title which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare a bad title, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it. 1 Jac. & W. Ch. 568. In short, whatever may be the private opinion of the court as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law or fact involved in it, a purchaser will not be compelled to complete his purchase; and such a title, though it may be perfectly secure and unimpeachable as a holding title, is said, in the current language of the day, to be unmarketable. Atkins, Tit. 2.

The doctrine of marketable titles is purely equitable and of modern origin. *Id.* 26. At law every title not bad is marketable. 5 Taunt. 625; 6 *id.* 263; 1 Marsh. 258. See 2 Penn. Law Journ. 17.

2. There are several stages or degrees requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession: this happens when one man disseises another. The next step to a good and perfect title is the *right of possession*, which may reside in one man while the actual possession is not in himself but in another. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. The mere *right of property*, the *jus proprietatis*, without either possession or the right of possession. 2 Sharswood, Blackst. Comm. 195.

3. Title to real estate is acquired by two methods, namely, by *descent* and by *purchase*. See these words.

Title to personal property may accrue in three different ways: by *original acquisition*; by *transfer by act of law*; by *transfer by act of the parties*.

Title by original acquisition is acquired by *occupancy*, see OCCUPANCY; by *accession*, see ACCESSION; by *intellectual labor*. See PATENT; COPYRIGHT.

The title to personal property is acquired and lost by transfer by act of law, in various ways: by *forfeiture; succession; marriage; judgment; insolvency; intestacy*. See those titles.

Title is acquired and lost by transfer by the act of the party, by *gift, by contract or sale.*

4. In general, possession constitutes the criterion of title of *personal* property, because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but it seems that a purchaser from a tenant for life of personal chattels will not be secure against the claims of those entitled in remainder. Cowp. 432; 1 Brown, Ch. 274; 2 Term, 376; 3 Atk. Ch. 44; 3 Ves. & B. Ch. Ir. 16.

As an exception to the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register. 15 Ves. Ch. 60; 17 *id.* 251; 8 Price, Exch. 256, 277.

5. To convey a title, the seller must himself have a title to the property which is the subject of the transfer. But to this general rule there are exceptions. The lawful coin of the United States will pass the property along with the possession. A negotiable instrument indorsed in blank is transferable by any person holding it, so as by its delivery to give a good title "to any person honestly acquiring it." 3 Barnew. & C. 47; 3 Burr. 1516; 5 Term, 683; 7 Bingh. 284; 7 Taunt. 265, 278; 13 East, 509.

In Legislation. That part of an act of the legislature by which it is known and distinguished from other acts; the name of the act.

6. A practice has prevailed, of late years, to crowd into the same act a mass of heterogeneous matter, so that it is almost impossible to describe or even to allude to it in the title of the act. The practice has rendered the title of little importance; yet in some cases it is material in the construction of an act. 7 East, 132, 134; 2 Cranch, 386. See Ld. Raym. 77; Hardr. 324; Barrington, Stat. 499, n.

In Literature. The particular division of a subject, as a law, a book, and the like: for example, Digest, book 1, *title* 2. For the law relating to bills of exchange, see Bacon, Abr. *Merchant.*

Personal Relations. A distinctive appellation denoting the rank to which the individual belongs in society.

7. The constitution of the United States forbids the grant by the United States or any state of any title of nobility. Titles are bestowed by courtesy on certain officers: the president of the United States sometimes receives the title of *excellency;* judges and members of congress, that of *honorable;* and members of the bar and justices of the peace are called *esquires.* Cooper, Just. Inst. 416; Brackenridge, Law Misc.

Titles are assumed by foreign princes, and among their subjects they may exact these marks of honor; but in their intercourse with foreign nations they are not entitled to them as a matter of right. Wheaton, Int. Law, pt. 2, c. 3, § 6.

In Pleading. The right of action which the plaintiff has. The declaration must show the plaintiff's title, and if such title be not shown in that instrument the defect cannot be cured by any of the future pleadings. Bacon, Abr. *Pleas, etc.* (B 1).

In Rights. The name of a newspaper, a book, and the like.

The owner of a newspaper having a particular title has a right to such title; and an injunction will lie to prevent its use unlawfully by another. 8 Paige, Ch. N. Y. 75. See Pardessus, n. 170.

TITLE-DEEDS. Those deeds which are evidences of the title of the owner of an estate.

The person who is entitled to the inheritance has a right to the possession of the title-deeds. 1 Carr. & M. 653.

TITLE OF A DECLARATION. In Pleading. At the top of every declaration the name of the court is usually stated, with the term of which the declaration is filed, and in the margin the venue—namely, the city or county where the cause is intended to be tried—is set down. The first two of these compose what is called the title of the declaration. 1 Tidd, Pract. 366.

TO WIT. That is to say; namely; scilicet; videlicet.

TOFT. A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay: it also signifies a messuage.

TOGATI (Lat.). **In Roman Law.** Under the empire, when the *toga* had ceased to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati.* This denomination received an official or legal sense in the imperial constitutions of the fifth and sixth centuries; and the words *togati, consortium* (*corpus, ordo, collegium*) *togatorum,* frequently occur in those acts.

TOKEN. A document or sign of the existence of a fact.

Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating, 12 Johns. N. Y. 292; but if it is a mere privy token, as, counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable. 9 Wend. N. Y. 182; 1 Dall. Penn. 47; 2 Const. So. C. 139; 2 Va. Cas. 65; 4 Hawks, No. C. 348; 6 Mass. 72; 12 Johns. N. Y. 293; 2 Dev. No. C. 199; 1 Rich. So. C. 244.

In Common Law. In England, this name is given to pieces of metal, made in the shape of money, passing among private

persons by consent at a certain value. 2 Chitty, Comm. Law. 182.

TOLERATION (Lat.). In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless permitted to exist; and this permission is called toleration. They are permitted and allowed to remain rather as a matter of favor than a matter of right.

In the United States there is no such thing as toleration; all men have an equal right to worship God according to the dictates of their consciences. See CHRISTIANITY; CONSCIENCE; RELIGIOUS TEST.

TOLL. In Contracts. A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.

The compensation paid to a miller for grinding another person's grain.

The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Washburn, Real Prop.; 6 Q. B. 31.

In Real Law. To bar, defeat, or take away: as, to toll an entry into lands is to deny or take away the right of entry.

TOLLS. In a general sense, tolls signify any manner of customs, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. Coke, 2d Inst. 58.

TON. Twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. See act of congress of Aug. 30, 1842, c. 270, s. 20.

TONNAGE. The capacity of a ship or vessel.

2. This term is most usually applied to the capacity of a vessel in tons as determined by the legal mode of measurement; and, as a general rule, in the United States the official tonnage of a vessel is considerably below the actual capacity of the vessel to carry freight.

For the rule for determining the tonnage of British vessels under the law of England, see McCulloch, Com. Dict. *Tonnage;* English Merchant Shipping Act of 1854, §§ 20–29.

The duties paid on the tonnage of a ship or vessel.

These duties are altogether abolished in relation to American vessels by the act of May 31, 1830, s. 1. And, by the second section of the same act, all tonnage-duties on foreign vessels are abolished, provided the president of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.

The constitution of the United States provides, art. 1, s. 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage.

3. By act of congress, approved May 6, 1864, it is provided that the registered tonnage of a vessel shall be her entire internal cubic capacity, in tons of one hundred cubic feet each, to be ascertained as follows. Measure the length of the vessel in a straight line along the upper side of the tonnage deck, from the inside of the inner plank (average thickness) at the side of the stem to the inside of the plank on the stern timbers (average thickness), deducting from this length what is due to the rake of the bow in the thickness of the deck, and what is due to the rake of the stern timber in the thickness of the deck, and also what is due to the rake of the stern timber in one-third of the round of the beam; divide the length so taken into the number of equal parts required by the following table, according to the class in such table to which the vessel belongs.

TABLE OF CLASSES.

Class I.—Vessels of which the tonnage-length, according to the above measurement, is fifty feet or under, into six equal parts.

Class II.—Vessels of which the tonnage-length, according to the above measurement, is above fifty feet and not exceeding one hundred feet long, into eight equal parts.

Class III.—Vessels of which the tonnage-length, according to the above measurement, is above one hundred feet long and not exceeding one hundred and fifty feet long, into ten equal parts.

Class IV.—Vessels of which the tonnage-length, according to the above measurement, is above one hundred and fifty feet and not exceeding two hundred feet long, into twelve equal parts.

Class V.—Vessels of which the tonnage-length, according to the above measurement, is above two hundred feet and not exceeding two hundred and fifty feet long, into fourteen equal parts.

Class VI.—Vessels of which the tonnage-length, according to the above measurement, is above two hundred and fifty feet long, into sixteen equal parts.

4. Then, the hold being sufficiently cleared to admit of the required depths and breadths being properly taken, find the transverse area of such vessel at each point of division of the length, as follows. Measure the depth at each point of division from a point at a distance of one-third of the round of the beam below such deck, or, in case of a break, below a line stretched in continuation thereof, to the upper side of the floor-timber, at the inside of the limber-strake, after deducting the average thickness of the ceiling which is between the bilge-planks and limber-strake; then, if the depth at the midship division of the length do not exceed sixteen feet, divide each depth into four equal parts; then measure the inside horizontal breadth at each of the three points of division, and also at the upper and lower points of the depth, extending each measurement to the average thickness of that part of the ceiling which is between the points of measurement; number these breadths from above (numbering the upper breadth one, and so on down to the lowest breadth); multiply the second and fourth by four, and the third by two; add these products together, and to the sum add the first breadth and

the last or fifth; multiply the quantity thus obtained by one-third the interval between the breadths, and the product shall be deemed the transverse area; but if the midship depth exceed sixteen feet, divide each depth into six equal parts, instead of four, and measure as before directed the horizontal breadths at the five points of division and also at the upper and lower points of the depth; number them from above, as before, multiply the second, fourth, and sixth by four, and the third and fifth by two; add these products together, and to the sum add the first breadth and the last or seventh; multiply the quantity thus obtained by one-third of the common interval between the breadths, and the product shall be deemed the transverse area.

Having thus ascertained the transverse area at each point of division of the length of the vessel, as required above, proceed to ascertain the register-tonnage of the vessel, in the following manner:—

Number the areas successively one, two, three, etc., number one being at the extreme limit of the length at the bow, and the last number at the extreme limit of the length at the stern; then, whether the length be divided according to table into six or sixteen parts, as in classes one and six, or into any intermediate number, as in classes two, three, four, and five, multiply the second and every even-numbered area by four, and the third and every odd-numbered area (except the first and last) by two; add these products together, and to the sum add the first and last, if they yield any thing; multiply the quantities thus obtained by one-third of the common interval between the areas, and the product will be the cubical contents of the space under the tonnage-deck; divide this product by one hundred, and the quotient, being the tonnage under the tonnage-deck, shall be deemed the register-tonnage of the vessel, subject to the additions hereinafter mentioned.

5. If there be a break, a poop, or any other permanent closed-in space on the upper decks or the spar-deck available for cargo or stores or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows:—

Measure the internal mean length of such space in feet, and divide into an even number of equal parts of which the distance asunder shall be most nearly equal to those into which the length of the tonnage-deck has been divided; measure at the middle of its height the inside breadths,—namely, one at each end and at each of the points of division,—numbering them successively one, two, three, etc.; then to the sum of the end breadths add four times the sum of the even-numbered breadths and twice the sum of the odd-numbered breadths, except the first and last, and multiply the whole sum by one-third of the common interval between the breadths; the product will give the mean horizontal area of such space; then measure the mean height between the planks of the decks, and multiply it by the mean horizontal area; divide the product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the tonnage under the tonnage-deck ascertained as aforesaid.

6. If the vessel has a third deck, or spar-deck, the tonnage of the space between it and the tonnage-deck shall be ascertained as follows:—

Measure in feet the inside length of the space, at the middle of its height, from the plank at the side of the stem to the plank on the timbers at the stern, and divide the length into the same number of equal parts into which the length of the tonnage-deck is divided; measure (also at the middle of its height) the inside breadth of the space at each of the points of division, also the breadth of the stem and the breadth at the stern; number them successively one, two, three, and so forth, commencing at the stem; multiply the second and all other even-numbered breadths by four, and the third and all other odd-numbered breadths (except the first and last) by two; to the sum of these products add the first and last breadths; multiply the whole sum by one-third of the common interval between the breadths, and the result will give, in superficial feet, the mean horizontal area of such space; measure the mean height between the plank of the two decks, and multiply it by the mean horizontal area, and the product will be the cubical contents of the space; divide this product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the other tonnage of the vessel ascertained as aforesaid. And if the vessel has more than three decks, the tonnage of each space between decks above the tonnage-deck shall be severally ascertained in the manner above described, and shall be added to the tonnage of the vessel ascertained as aforesaid.

In ascertaining the tonnage of open vessels, the upper edge of the upper strake is to form the boundary-line of measurement, and the depth shall be taken from an athwartship line extending from the upper edge of said strake at each division of the length.

TONTINE. In French Law. The name of a partnership composed of creditors or recipients of perpetual or life rents or annuities, formed on the condition that the rents of those who may die shall accrue to the survivors, either in whole or in part.

This kind of partnership took its name from *Tonti*, an Italian, who first conceived the idea and put it in practice. Merlin Répert.; Dalloz, Dict.; 5 Watts, Penn. 351.

TOOK AND CARRIED AWAY. In Criminal Pleading. Technical words necessary in an indictment for simple larceny. Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Croke Car. 37; 1 Chitty, Crim. Law, 244. See CAPIT ET ASPORTAVIT.

TOOLS. Those implements which are commonly used by the hand of one man in some manual labor necessary for his subsistence.

The apparatus of a printing-office, such as types, presses, etc., are not, therefore, included under the term *tools*. 13 Mass. 82; 10 Pick. Mass. 423; 3 Vt. 133. And see 2 Pick. Mass. 80; 5 Mass. 313.

By the forty-sixth section of the act of March 2, 1789, 1 Story, U. S. Laws, 612, the tools or implements of a mechanical trade of persons who arrive in the United States are free and exempted from duty.

TORT (Fr. *tort*, from Lat. *torquere*, to twist, *tortus*, twisted, wrested aside). A private or civil wrong or injury. A wrong independent of contract. 1 Hilliard, Torts, 1.

The commission or omission of an act by one without right whereby another receives some injury, directly or indirectly, in person, property, or reputation.

2. As recognized by the law for the enforcement of rights and redress of injuries, torts may be distinguished from contracts by these qualities: that parties jointly committing torts are severally liable without right to contribution from each other; that the death of either party destroys the right of action; that persons under personal disabilities to contract are liable for their torts; that attachment, arrest, and imprisonment are allowed on claims arising under contracts. 1 Hilliard, Torts, 3. A tort, however, may grow out of, or make part of, or be coincident with, a contract: as in the familiar case of a fraudulent sale or fraudulent recommendation of a third person. Indeed, the wrong of fraud almost necessarily implies an accompanying contract. In these cases the law often allows the party injured an election of remedies: that is, he may proceed against the other party either as a debtor or contractor, or as a wrong-doer. 10 Hilliard, Torts, 28; 10 C. B. 83; 24 Conn. 392. Where personal property has been tortiously taken and turned into money or money's worth, the party injured may proceed upon the supposition of a contract implied by law in his favor. In such cases he is said to waive the tort. 1 Chitty, Plead. 88; 10 Mass. 435; 1 Gray, Mass. 509; 2 Greenleaf, Ev. § 108.

3. As distinguished from crimes, the same act may constitute a public wrong (crime) and a private wrong (tort), and, either at the same time or at different times, be the subject of a criminal prosecution and a private action for damages. 1 Bos. & P. 191; 3 Sharswood, Blackst. Comm. 122. The English doctrine that the private tort is merged in a felony is not generally recognized in the United States. 1 Gray, Mass. 83; 6 N. H. 454; 2 Root, Conn. 90; 1 Miles, Penn. 312; 1 Coxe, N. J. 113; 16 Miss. 77; 3 Bland, Ch. Mich. 114; 6 Rand. Va. 223; 3 Hawks, No. C. 251; 4 Ohio, 376; 15 Ga. 349; 6 Humphr. Tenn. 433; 6 B. Monr. Ky. 38; 22 Wend. N. Y. 285, n.; 1 Hilliard, Torts, 71 *et seq.* See 22 Ala. N. s. 613; 1 Bishop, Crim. Law, 329. Such an action might perhaps be forbidden by public policy in some instances. The private action is entirely distinct from the public prosecution, 8 Rich. So. C. 144; 17 Ill. 413; 18 C. B. 599; 37 Eng. L. & Eq. 406; and the private action must be for some special injury sustained by the plaintiff apart from the injury to the public generally, as in case of public nuisance. 1 Hilliard, Torts, 2; 1 Starkie, Ev. 199; 1 Cush. Mass. 477; 1 Gray, Mass. 83; 1 Sandf. N. Y. 1; 25 Ala. N. s. 201; 12 East, 413; Metc. Yelv. 90 *a*, n. 2; 1 Bishop, Crim. Law. 329. In reference to the nature of the act, manual taking, interference, or removal is not necessary to constitute a tort. Any act of a party who has come rightfully into the possession of property in excess of or contrary to his authority over it, and which negatives or is inconsistent with the rights of the owner, constitutes a tort. 23 Wend. N. Y. 422; 1 Ga. 381; 4 McLean, C. C. 378; 2 Harr. Del. 71; 8 Pick. Mass. 543; 15 Mees. & W. Exch. 448.

4. A wrongful or malicious intent is an essential element in many torts: as, for example, assault, fraud, slander, and malicious prosecution. In general, however, it may be stated as a prominent distinction between torts and crimes that in the former the party's intent is immaterial, while in a prosecution for the latter a criminal purpose must always be alleged and proved. On the other hand, an act which does not amount to a legal injury and violates no legal right is not actionable because done with a bad intention. 13 C. B. 285; 28 Vt. 49. It has been sometimes held that the intention of the party is to determine the form of action, trespass being the form for wilful, and case for a negligent, injury. This, however, is not the prevailing rule. 11 Mass. 1137; 18 Vt. 605; 1 R. I. 474; 9 Watts & S. Penn. 32.

A tort may consist in the violation of a statute, 2 Ld. Raym. 953, or the abuse of a privilege given by a statute. 10 Ill. 425. And, in general, though a party's original act or conduct may have been right and lawful, there may be such an abuse of the powers and privileges which the law confers upon him as will render him liable to an action as for a trespass in the first instance, or make him a trespasser *ab initio*. 2 Greenleaf, Ev. § 615; 8 Coke, 145; 11 Barb. N. Y. 390. Acts lawful and innocent in themselves may also become wrongful when done without just regard for the rights of others, and without suitable reference to the time, place, or manner of performing them. 4 Const. 110.

5. But an action cannot be maintained for annoyance received from acts done on land adjoining plaintiff's which the proprietor might lawfully do in the exercise of his dominion over his own. 5 Rich. So. C. 583. A tort may be an injury to the person or body, including assault and battery, also imprisonment and injuries to health. See these several titles. Torts may also be committed

against character or reputation, including slander and libel, and malicious prosecution. See these titles. Another, and the most comprehensive and various, class of torts consists of wrongs to property. See PROPERTY. In general, possession alone is sufficient to maintain an action for tort; while property alone is not sufficient without possession or the right of possession. 1 Term, 475; 1 Dutch. N. J. 443; 22 N. H. 468; 15 Vt. 119; 15 Mo. 403; 6 Nev. & M. 422. Even a wrongful possessor may maintain an action against a third person in the title; and a title of a third person, unless the defendant claims under him, is no defence. 22 N. H. 468; 39 Me. 451; 1 Strange, 505; 11 Johns. N. Y. 529; 16 Mass. 125; 8 Blackf. Ind. 175; 25 Me. 453; 9 Gill, Md. 7. But where no one is in actual possession, the title is sufficient constructive possession to maintain an action: more especially possession of part gives constructive possession of the whole. 1 Hill, N. Y. 312; 6 Dowl. & R. 572; 5 Md. 540; 14 Wend. N. Y. 239. And title is, generally, a good defence to an action founded upon mere possession. 8 Humphr. Tenn. 412; 18 Ga. 539; 5 Metc. Mass. 599; 3 Zabr. N. J. 155.

6. The most comprehensive injury to property is that termed nuisance. See NUISANCE. This embraces all wrongs in their nature indirect or remote, or affecting rights which are not specific or tangible, but incident to or growing out of corporeal property, such as watercourses, lights, patents, and copyrights. See these titles. The remedy for wrongs of this class is an action on the case. See CASE; Hilliard, Torts, *Nuisance* and subsequent chapters. Other injuries to property are trespass, see TRESPASS; conversion, see CONVERSION; Trover, see TROVER; waste, see WASTE; and fraud. See FRAUD. Hilliard, Torts. Torts may be committed against relative as well as absolute rights. Such rights may grow out of public relations involving the privileges and obligations of judicial and ministerial officers. See OFFICER; JUDGE; SHERIFF; ATTACHMENT; EXECUTION; BAIL; ARREST. Torts may also be committed by or against parties mutually related by a joint interest, including corporations. Hilliard, Torts, *Joint Torts*, and subsequent chapters. Torts may also be committed in case of the private relations of master and servant, husband and wife, parent and child, bailor and bailee, landlord and tenant, mortgagor and mortgagee. See these several titles. Hilliard, Torts, *Master and Servant*, and subsequent chapters.

7. The liability to make reparation for an injury rests upon an original moral duty. 3 Ohio St. 172. And an action on the case lies, in general, where one man sustains an injury by the misconduct or negligence of another for which the law has provided no other adequate remedy. 20 Vt. 151.

But to justify an action there must be a loss as well as a wrong: *damnum absque injuria*, and *injuria absque damno*, are alike regarded as beyond the reach of legal redress. But in a variety of cases, a wrong being proved, consequent damage will be presumed. 1 Hilliard, Torts, 82; 36 Me. 322; Broom, Comm. 76; 16 Pick. Mass. 64; 1 Gray, Mass. 186; 2 Ld. Raym. 948.

In order to maintain an action, the relation of cause and effect must be shown between the act and the injury, 12 Barb. N. Y. 657; and the damage must not be remote or indirect, 11 Metc. Mass. 290: although every person who does a wrong is responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances for such misconduct. 5 Exch. 243. And while trespass *vi et armis* is the remedy for immediate injuries, trespass on the case is also provided for indirect or consequent injuries. 2 Greenleaf, Ev. § 224; 1 Chitty, Plead. 115–120; 17 Ill. 580.

8. In general, courts can enforce only local obligations and redress injuries to local rights. 12 La. Ann. 255. Hence the legality or illegality of an act may sometimes determine whether it is to be viewed as a tort. In general, if a party in the exercise of a legal right, more especially if conferred by express statute, does an injury to another's property, he is not liable for damages unless caused by the want of ordinary care and skill. 24 Miss. 93; 2 Stockt. N. J. 352. And this consideration may affect the form of action, it being generally held that where an act is lawful, and merely the consequences of it injurious, the proper form of action is trespass on the case. 1 Strange, 634.

In general, no right of action can arise from an illegal transaction. 11 Cush. Mass. 322; 10 Metc. Mass. 363; 12 *id.* 24; 2 Conn. 13, 501; 9 J. B. Moore, 586. But the rule has been held not to interfere with the right of property even in articles the sale of which is forbidden by law. 1 Gray, Mass. 1; 20 N. H. 181. A party may be debarred from an action by a license, by estoppel, or by a waiver. 8 Metc. Mass. 34; 7 Bingh. 682; 10 Ad. & E. 90; 18 Barb. N. Y. 599; 7 Watts, Penn 337; 19 Ala. N. S. 252.

9. In general, a party injured cannot maintain an action for the injury if caused in any degree by his own neglect or wrong. 1 Hilliard, Torts, c. 4: 6 Hill, N. Y. 592; 2 Md. 160; 19 Conn. 507; 4 Zabr. N. J. 824; 35 Me. 422; 3 C. B. 1. Various and nice distinctions, however, are made upon this general subject, involving the degree of neglect or wrong on the part of the plaintiff, which will debar him from maintaining an action, and its nature, as being the proximate or only the remote cause of injury. 16 Penn. St. 463; 5 Du. N. Y. 21; 12 C. B. 742; 16 *id.* 179; 2 Taunt. 314; 11 Cush. Mass. 364; 3 Mees. & W. Exch. 248; 6 Ind. 82; 1 Den. N. Y. 91. In general, the whole question is for the jury. 19 Conn. 566; 28 Eng. L. & Eq. 48; 30 *id.* 473; 3 Mann. & G. 59; 12 Ad. & E. 439; 16 Ill. 277; 7 Metc. Mass. 274.

TORTFEASOR. A wrong-doer; one who commits or is guilty of a tort.

TORTURE. The rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates.

2. It is to be distinguished from punishment, which usually succeeds a conviction for offences, as it was inflicted *in limine*, and as part of the introductory process leading to trial and judgment.

It was wholly unknown to the common and statute law of England, and was forbidden by Magna Charta, ch. 29. Coke, 2d Inst. 48; 4 Sharswood, Blackst. Comm. 326.

It prevailed in Scotland, where the civil law obtained which allowed it. Dig. 48. 18. It was, however, declared contrary to the claim of right, and was expressly prohibited, 7 Anne, c. 21, § 5, A.D. 1708. Several instances of its infliction may be found in 1 Pitcairn's Criminal Trials of Scotland, 215, 217, 219, 375, 376, 401; 3 *id.* 170, 196, 220, 222, 238 *et seq.*

3. Sir John Kelynge, in the time of Hale, says, persons standing mute were also compelled to answer, by tying their thumbs together with a whip-cord, and that this was said to be the "constant practice at Newgate." Kely. 27.

Although torture was confessedly contrary to the common law of England, it was, nevertheless, often employed as an instrument of state to wring confessions from prominent criminals,—especially in charges of treason. It was usually inflicted by warrant from the privy council. Jardine, Torture, 7, 15, 42; 1 Rush. Coll. 638.

4. In 1596 a warrant was issued to the attorney-general (Sir Edward Coke), the solicitor-general (Sir Thomas Fleming), Mr. Francis Bacon, and the recorder of London, to examine four prisoners "upon such articles as they should think meet, and for the better boulting forth of the truth of their intended plots and purposes, that they should be removed to Bridewell and *put to the manacles and torture.*" Mr. Jardine proves from the records of the privy council that the practice was not unfrequent during the time of Elizabeth, and continued to the close of the reign of the first two Stuarts. There is positive evidence that Guy Fawkes was directed to be tortured in regard to the Gunpowder Plot, in the warrant in the king's handwriting authorizing the commissioners, of whom Coke was one, to examine him upon the rack, "using the gentler tortures first, *et sic per gradus ad ima tenditur.*" 1 Jardine, Crim. Trials, Int. 17; 2 *id.* 106.

This absurd and cruel practice has never obtained in the United States; for no man is bound to accuse himself. An attempt to torture a person to extort a confession of crime is a criminal offence. 2 Tyl. Vt. 380. See QUESTION; PEINE FORTE ET DURE.

TOTAL LOSS. In Insurance. A total loss in marine insurance is either the absolute destruction of the insured subject by the direct action of the perils insured against, or a constructive—sometimes called technical—total loss, in which the assured is deprived of the possession of the subject, still subsisting in specie, or where there may be remnants of it or claims subsisting on account of it, and the assured, by the express terms or legal construction of the policy, has the right to recover its value from the underwriters, so far as, and at the rate at which, it is insured, on abandonment and assignment of the still subsisting subject or remnants or claims arising out of it. 2 Phillips, Ins. ch. xvii.; 2 Johns. N. Y. 286.

2. A constructive total loss may be by capture; seizure by unlawful violence: as, piracy, 1 Phillips, Ins. § 1106; 2 Eng. L. & Eq. 85; or damage to ship or goods over half of the value at the time and place of loss, 2 Phillips, Ins. § 1608; 1 Curt. C. C. 148; 9 Cush. Mass. 415; 5 Den. N. Y. 342; 6 *id.* 282; 19 Ala. N. s. 108; 1 Johns. Cas. N. Y. 141; 6 Johns. N. Y. 219; or loss of the voyage, 2 Phillips, Ins. §§ 1601, 1606, 1619; 4 Me. 431; 24 Miss. 461; 19 N. Y. 272; 1 Mart. La. 221; though the ship or goods may survive in specie, but so as not to be fit for use in the same character for the same service or purpose, 2 Phillips, Ins. § 1605; 2 Caines, Cas. N. Y. 324; Valin, tom. 2, tit. Ass. a. 46; or by jettison, 2 Phillips, Ins. §§ 1616, 1617; 1 Caines, N. Y. 196; or by necessity to sell on account of the action and effect of the peril insured against, 2 Phillips, Ins. § 1623; 5 Gray, Mass. 154; 1 Cranch, 202; or by loss of insured freight consequent on the loss of cargo or ship. 2 Phillips, Ins. §§ 1642, 1645; 18 Johns. N. Y. 208.

3. There may be a claim for a total loss in addition to a partial loss. 2 Phillips, Ins. § 1743; 17 How. 595. A total loss of the ship is not necessarily such of cargo, 2 Phillips, Ins. §§ 1601 *et seq.*, 1622; 3 Binn. Penn. 287; nor is submersion necessarily a total loss, 2 Phillips, Ins. § 1607; 7 East, 38; nor is temporary delay of the voyage. 2 Phillips, Ins. §§ 1618, 1619; 5 Barnew. & Ald. 597.

A constructive total loss, and an abandonment thereupon of the ship, is a constructive total loss of freight; and a constructive total loss and abandonment of cargo has a like effect as to commissions or profits thereon; and the validity of the abandonment will depend upon the actual facts at the time of the abandonment, as the same may subsequently prove to have been. 2 Phillips, Ins. § 1630 *et seq.*; 3 Johns. Cas. N. Y. 93.

TOTIDEM VERBIS (Lat.). In so many words.

TOTIES QUOTIES (Lat.). As often as the thing shall happen.

TOUCH AND STAY. Words frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any

attempt to trade at such a port during such a stay, as, by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay at such a place. 1 Marshall, Ins. 275; 1 Esp. 610; 5 *id.* 96.

TOUJOURS ET UNCORE PRIST (L. Fr.). Always and still ready. This is the name of a plea of tender: as, where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist*. He must then pay the money into court; and if the issue be found for him the defendant will be exonerated from costs, and the plaintiff made justly liable for them. 3 Bouvier, Inst. n. 2923. See TOUT TEMPS PRIST.

TOUR D'ECHELLE. In French Law. A right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party-wall or of buildings which are supported by that wall. It is a species of servitude. Lois des Bât. part 1, c. 3, sect. 2, art. 9, § 1.

The space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience: this is not a servitude, but an actual corporeal property.

TOUT TEMPS PRIST (L. Fr. always ready).

In Pleading. A plea by which the defendant signifies that he has always been ready to perform what is required of him. The object of the plea is to save costs: as, for example, where there has been a tender and refusal. 3 Blackstone, Comm. 303; Comyns, Dig. *Pleader*, 2 Y 5. So, in a writ of dower, where the plea is detinue of charters, the demandant might reply, *always ready*. Rastell, Entr. 229 *b*; Stearns, Real Act. 310. See UNCORE PRIST.

TOWAGE. The act of towing or drawing ships and vessels, usually by means of a small steamer called a tug.

That which is given for towing ships in rivers. Guidon de la Mer, c. 16; Pothier, Des Avaries, n. 147; 2 Chitty, Comm. Law, 16.

TOWN. A term of somewhat varying signification, but denoting a division of a country next smaller in extent than a county.

In Pennsylvania and some other of the Middle states, it denotes a village or city. In the New England states, it is to be considered for many purposes as the unit of civil organization,—the counties being composed of a number of towns. Towns are regarded as corporations or *quasi*-corporations. 13 Mass. 193. In New York and Wisconsin, towns are subdivisions of counties; and the same is true of the *townships* of most of the Western states. In Ohio, Michigan, Illinois, and Iowa, they are called townships. In England, the term *town* or *vill* comprehends under it the several species of cities, boroughs, and common towns. 1 Blackstone, Comm. 114.

TOWN-PLAT. The acknowledgment and recording of a town-plat vests the legal title to the ground embraced in the streets and alleys in the corporation of the town: therefore it is held that the proprietor who has thus dedicated the streets and alleys to the public cannot maintain trespass for an injury to the soil or freehold. The corporation alone can seek redress for such injury. 11 Ill. 554; 13 *id.* 54, 308. This is not so, however, with a highway: the original owner of the fee must bring his action for an injury to the soil. 13 Ill. 54. See HIGHWAY. If the streets or alleys of a town are dedicated by a different mode from that pointed out by the statute, the fee remains in the proprietor, burdened with the public easement. 13 Ill. 312.

TOWNSHIP. The public lands of the United States are surveyed first into tracts called townships, being in extent six miles square. The subdivisions of a township are called sections, each a mile square and containing six hundred and forty acres; these are subdivided into quarter-sections, and from that into lots of forty acres each. This plan of subdividing the public lands was adopted by act of congress of May 18, 1796. See Brightly, Dig. U. S. Laws, 493.

TRADE. Any sort of dealings by way of sale or exchange. The dealings in a particular business: as, the Indian trade; the business of a particular mechanic: hence boys are said to be put apprentices to learn a trade: as, the trade of a carpenter, shoemaker, and the like. Bacon, Abr. *Master and Servant* (D 1). Trade differs from art.

It is the policy of the law to encourage trade; and therefore all contracts which restrain the exercise of a man's talents in trade are detrimental to the commonwealth and therefore void; though he may bind himself not to exercise a trade in a particular place; for in this last case, as he may pursue it in another place, the commonwealth has the benefit of it. 8 Mass. 223; 9 *id.* 522. See Ware, Dist. Ct. 257, 260; Comyns, Dig. *Trade;* Viner, Abr. *Trade.*

TRADE-MARK. A symbol, emblem, or mark, which a tradesman puts upon or wraps or attaches in some way to the goods he manufactures or has caused to be manufactured.

2. It may be in any form of letters, words, vignettes, or ornamental design. Newly-recognized words may form a trade-mark. Burnett *v.* Phalon, New York Superior Court, April, 1859. A common name of an article and of a place may, by combination, become a trade-mark. 2 Bosw. N. Y. 1.

In some of the adjudged cases it has been said that there is no property in a trade-mark; while in others it is stated positively that there is; and although perhaps the right

is best termed "an exclusive right arising from first use," yet it is submitted that the right of property may be a correct one.

Courts of equity have not interfered by injunction in cases of alleged infringement of trade-marks, except in aid of a legal right; and if the fact of a plaintiff's property in the trade-mark or of the defendant's interference with it has appeared even at all doubtful, the plaintiff has been left to establish his case first by an action at law. 4 E. D. Smith, N. Y. 387.

3. Alien merchants and traders have the same right of protection, in regard to their trade-marks as citizens. 2 Woodb. & M. C. C. 1; 3 Kay & J. Ch. 423, 428; 4 Jur. N. S. 865.

Although there may be a similarity of marks, a court will not interfere where a plaintiff's article is put forth to the world under falsehood. This falsehood may consist in untruth as to its ingredients. 6 Beav. Rolls, 67; 8 Sim. Ch. 477; 4 Abb. Pract. N. Y. 144.

No property can be acquired in words, marks, or devices which denote the mere nature, kind, and quality of articles. 17 Barb. N. Y. 608.

4. In the examination of conflicting trade-marks, the courts will judge as would the public. 18 Beav. Rolls, 164.

Mere variations of arrangement of a trade-mark, with secondary additions and omissions, will justify an injunction. Coats *v.* Platt, N. Y. Superior Court, May, 1860.

While there may be striking differences in trade-marks, yet if in the last made there is an ingenuity which would deceive, the court will interfere. 10 Beav. Rolls, 297.

Where injury is not probable, an injunction will not be granted; nor will damages be given where no sales of goods covered by a forged trade-mark have taken place. Monlun *v.* West, N. Y. Superior Court.

Although a defendant may deny all wrongful intent, yet if it appears from circumstances the court will act. 10 Jur. 106.

A simulated article may be equal in value to that covered by the true mark, but still it will be enjoined while it is covered by an imitation mark. 2 Woodb. & M. C. C. 1.

5. Although intermediate buyers may know the difference between true and false, yet if retailers will be deceived an injunction and damages may be had. 2 Sandf. Ch. N. Y. 586. Where conflicting partners claim ownership in a trade-mark, there will be no injunction, 5 McLean, C. C. 256; but the writ has been granted where there has been a dissolution and the old style of partnership is used by either partner in a new business. 4 Abb. Pract. N. Y. 394.

Where goods, with a false mark, are made for a foreign market, an injunction will stop them. 6 Beav. Rolls, 69, n.; 4 Mann. & G. 359; 4 Jur. N. S. 865.

The cunning of fraud has been used in regard to committing wrong on trade-marks: thus, there has been a removal of labels of a lower grade of number from an inferior genuine article, and those of a higher class put thereon. 3 Du. N. Y. 624. Genuine wrappers have been obtained and used about other goods. 4 Barnew. & Ad. 410. True labels have been wrongfully printed and sold as true labels. 1 Kay & J. Ch. 509; 6 DeGex, M. & G. 214.

6. Injunctions have been granted where there have been parties of the same name and the similarity of trade-marks carried the conclusion of simulation. 7 Beav. Rolls, 84; 23 Law Jour. N. S. 255; 25 Barb. N. Y. 76; 3 DeGex, M. & G. 896.

A party runs a chance of affecting his right to a trade-mark by non-use, by a forbearance in suing protectively, and by adopting a new one.

See Edwards, Trade-Marks; 2 Kent, Comm. 484, n.; 1 Western Law Jour. New Series, no. 8; 25 Am. Jur. 279; 4 Mann. & G. 357; 3 Barnew. & C. 541; 5 Dowl. & R. 292; 2 Keen. Rolls, 213; DECEIT.

TRADER. One who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. The *quantum* of dealing is immaterial, when an intention to deal generally exists. 3 Stark. 56; 2 Carr. & P. 135; 1 Term, 572.

2. Questions as to who is a trader most frequently arise under the bankrupt laws; and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

A farmer who, in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold, after he had bought them, for the sake of a guinea profit, was held to be a trader. 1 Term, 537, n.; 1 Price, Exch. 20. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader. 1 Strange, 513. See 7 Taunt. 409; 5 Bos. & P. 78; 11 East, 274.

3. A butcher who kills only such cattle as he has reared himself is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader. 4 Burr. 21, 47. See 2 Rose, Bank. 38; 3 Campb. 233; Cooke, Bank. Law, 48, 73; 2 Wils. Ch. 169; 1 Atk. Ch. 128; Cowp. 745.

A brickmaker who follows the business for the purpose of enjoying the profits of his real estate merely is not a trader; but when he buys the earth by the load or otherwise, and manufactures it into bricks and sells them with a view to profit, he is a trader. Cooke, Bank. Law, 52, 63; 7 East, 442; 3 Carr. & P. 500; Mood. & M. 263; 2 Rose, Bank. 422; 2 Glyn & J. 183; 1 Brown, Ch. 173.

For further examples the reader is referred to 4 Mann. & R. 486; 9 Barnew. & C. 577; 1 Term, 34; 1 Rose, Bank, 316: 2 Taunt. 178; 2 Marsh. 236; 3 Moore & S. 761; 10 Bingh.

292; Peake, 76; 1 Ventr. 270; 3 Brod. & B. 2; 6 Moore, 56.

TRADITIO BREVIS MANUS (Lat.). **In Civil Law.** The delivery of a thing by the mere consent of the parties: as, when Peter holds the property of Paul as bailee, and afterwards he buys it, it is not necessary that Paul should deliver the property to Peter and he should re-deliver it to Paul: the mere consent of the parties transfers the title to Paul. 1 Duverg. n. 252; 21 Me. 231; Pothier, Pand. lib. 50, CDLXXIV.; 1 Bouvier, Inst. n. 944.

TRADITION (Lat. *trans*, over, *do*, *dare*, to give). **In Civil Law.** The act by which a thing is delivered by one or more persons to one or more others.

The delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are, therefore, requisite in order to transmit property in this way: the *intention* or *consent* of the former owner to transfer it, and the *actual delivery* in pursuance of that intention.

Tradition is either real or symbolical. Real tradition takes place where the *ipsa corpora* of movables are put into the hands of the receiver. *Symbolical tradition* is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses, or such as consist *in jure* (things incorporeal), as, things of fishing, and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. Thus, if the subject be under lock and key, the delivery of the key is considered as a legal tradition of all that is contained in the repository. Cujas, Observations, liv. 11, ch. 10; Inst. 2. 1. 40; Dig. 41. 1. 9; Erskine, Inst. 2. 1. 10. 11; La. Civ. Code, art. 2452 *et seq.* See DELIVERY.

TRAFFIC. Commerce; trade; sale or exchange of merchandise, bills, money, and the like.

TRAITOR. One guilty of treason. See charge of Judge Sprague, Dist. Ct. of Mass. 1862; Bishop, Crimes.

The punishment of a traitor is death.

TRAITOROUSLY. In Pleading. A technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed. See Bacon, Abr. *Indictment* (G 1); Comyns, Dig. *Indictment* (G 6); Hawkins, Pl. Cr. b. 2, c. 25, s. 55; 1 East, Pl. Cr. 115; 2 Hale, Pl. Cr. 172, 184; 4 Blackstone, Comm. 307; 3 Inst. 15; Croke Car. 37; Carth. 319; 2 Salk. 683; 4 Hargrave, St. Tr. 701; 2 Ld. Raym. 870; Comb. 259; 2 Chitty, Cr. Law, 104, note (*b*).

TRANSACTION (from Lat. *trans* and *ago*, to carry over). **In Civil Law.** An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree on. In Louisiana this contract must be reduced to writing. La. Civ. Code, art. 3038.

Transactions regulate only the differences which appear to be clearly comprehended in them by the intentions of the parties, whether they be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them. La. Civ. Code, art. 3040.

To transact, a man must have the capacity to dispose of the things included in the transaction. 1 Domat, Lois Civiles, 1, 13, 1; Dig. 2. 15. 1; Code, 2. 4. 41. In the common law this is called a compromise. See COMPROMISE.

TRANSCRIPT (Lat.). A copy of an original writing or deed.

TRANSFER (Lat. *trans*, over, *fero*, to bear or carry). The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter.

TRANSFEREE. He to whom a transfer is made.

TRANSFERENCE. In Scotch Law. The name of an action by which a suit which was pending at the time the parties died is transferred from the deceased to his representatives, in the condition in which it stood formerly. If it be the pursuer who is dead, the action is called a transference *active;* if the defender, it is a transference *passive.* Erskine, Inst. 4. 1. 32.

TRANSFEROR. One who makes a transfer.

TRANSGRESSION (Lat. *trans*, over, *gressio*, a step). The violation of a law.

TRANSHIPMENT. In Maritime Law. The act of taking the cargo out of one ship and loading it in another.

When this is done from necessity, it does not affect the liability of an insurer on the goods. 1 Marshall, Ins. 166; Abbott, Shipp. 240. But when the master transhipps goods without necessity, he is answerable for the loss of them by capture by public enemies. 1 Gall. C. C. 443.

TRANSIRE. In English Law. A warrant for the custom-house to let goods pass; a permit. See, for a form of a *transire*, Hargrave, Law Tr. 104.

TRANSITORY ACTION. In Practice. An action the cause of which might have arisen in one place or county as well as another.

In general, all personal actions, whether *ex contractu*, 5 Taunt. 25; 6 East, 352; 2 Johns. Cas. N. Y. 335; 2 Caines, N. Y. 374; 3 Serg. & R. Penn. 500; 1 Chitty, Plead. 243, or *ex delicto*, 1 Chitty, Plead. 243, are transitory.

Such an action may at common law be brought in any county which the plaintiff elects; but, by statute, in many states of the United States provision is made limiting the right of the plaintiff in this respect to a county in which some one or more of the parties has his domicil.

TRANSITUS (Lat.). A transit. See STOPPAGE IN TRANSITU.

TRANSLATION. The reproduction in one language of what has been written or spoken in another.

In pleading, when a libel or an agreement written in a foreign language must be averred, it is necessary that a translation of it should also be given.

In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury.

The bestowing of a legacy which had been given to one, on another: this is a species of ademption; but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bacon, Abr. *Legacies* (C).

The transfer of property; but in this sense it is seldom used. 2 Blackstone, Comm. 294. See INTERPRETER.

In Ecclesiastical Law. The removal from one place to another: as, the bishop was translated from the diocese of A to that of B. In the civil law, translation signifies the transfer of property. Clef des Lois Rom.

TRANSMISSION (from Lat. *trans*, over, *mitto*, to send). **In Civil Law.** The right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toullier, n. 186; Dig. 50. 17. 54; Code, 6. 51.

TRANSPORTATION (from Lat. *trans*, over, beyond, *porto*, to carry). **In English Law.** A punishment inflicted by virtue of sundry statutes: it was unknown to the common law. 2 H. Blackst. 223. It is a part of the judgment or sentence of the court that the party shall be transported or sent into exile. 1 Chitty, Crim. Law, 789–796; Princ. of Pen. Law, c. 4, § 2.

TRAVAIL. The act of child-bearing.

A woman is said to be in her travail from the time the pains of child-bearing commence, until her delivery. 5 Pick. Mass. 63; 6 Me. 460.

In some states, to render the mother of a bastard child a competent witness in the prosecution of the alleged father, she must have accused him of being the father during the time of her travail. 1 Root, Conn. 107; 2 *id.* 490; 2 Mass. 443; 5 *id.* 518; 6 Me. 460; 8 *id.* 163; 3 N. H. 135. But in Connecticut, when the state prosecutes, the mother is competent although she did not accuse the father during her travail. 1 Day, Conn. 278.

TRAVERSE (L. Fr. *traverser*, to turn over, to deny). To deny; to put off.

In Civil Pleading. To deny or controvert any thing which is alleged in the previous pleading. Lawes, Pl. 116. A denial. Willes, 224. A direct denial in formal words: "Without this, that, etc." (absque hoc). 1 Chitty, Plead. 523, n. *a*. A traverse may deny all the facts alleged, 1 Chitty, Plead, 525, or any particular material fact. 20 Johns. N. Y. 406.

A *common traverse* is a direct denial, in common language, of the adverse allegations, without the *absque hoc*, and concluding to the country. It is not preceded by an inducement, and hence cannot be used where an inducement is requisite. 1 Saund. 103 *b*, n. 1.

A *general traverse* is one preceded by a general inducement and denying all that is last before alleged on the opposite side, in general terms, instead of pursuing the words of the allegation which it denies. Gould, Plead. vii. 5, 6. Of this sort of traverse the replication *de injuria sua propria absque tali causa*, in answer to a justification, is a familar example. Bacon, Abr. *Pleas* (II 1); Stephen, Plead. 171; Gould, Plead. c. 7, § 5; Archbold, Civ. Plead. 194.

A *special traverse* is one which commences with the words *absque hoc*, and pursues the material portion of the words of the allegation which it denies. Lawes, Plead. 116–120. It is regularly preceded by an inducement consisting of new matter. Gould, Plead. c. 7, §§ 6, 7; Stephen, Plead. 188. A special traverse does not complete an issue, as does a common traverse. 20 Viner, Abr. 339; Yelv. 147, 148; 1 Saund. 22, n. 2.

A traverse upon a traverse is one growing out of the same point or subject-matter as is embraced in a preceding traverse on the other side. Gould, Plead. c. 7, § 42, n. It is a general rule that a traverse well intended on one side must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse if the first traverse is material. The meaning of the rule is that when one party has tendered a material traverse the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alternately tender traverses to each other in unlimited succession, without coming to an issue. Gould, Plead. c. 7, § 42. The rule, however, does not apply where the first traverse is immaterial, nor where it is material if the plaintiff would thereby be ousted of some right or liberty which the law allows. Poph. 101; F. Moore, 350; Hob. 104; Croke Eliz. 99, 418; Comyns, Dig. *Pleader* (G 18); Bacon, Abr. *Pleas* (H 4); Bouvier, Inst. Index.

In Criminal Practice. To put off or delay the trial of an indictment till a succeeding term. More properly, to deny or take issue upon an indictment. Dick. Sess. 151; 4 Sharswood, Blackst. Comm. 351.

TREASON. In Criminal Law. This

word imports a betraying, treachery, or breach of allegiance. 4 Sharswood, Blackst. Comm. 75.

2. 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 or comfort. This offence is punished with death. Act of April 30, 1790, 1 Story, U. S. Laws, 83. By the same article of the constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. See, generally, 3 Story, Const. 39, p. 667; Sergeant, Const. c. 30; United States *vs.* Fries, Pamph.; 1 Tucker, Blackst. Comm. App. 275, 276; 3 Wilson, Law Lect. 96–99; Foster, Disc. (I); Burr's Trial; 4 Cranch, 126, 469–508; 1 Dall. 35; 2 *id.* 246, 355; 3 Wash. C. C. 234; 1 Johns. N. Y. 553; 11 *id.* 549; Comyns, Dig. *Justices* (K); 1 East, Pl. Cr. 37–158: 2 Chitty, Crim. Law, 60–102; Archbold, Crim. Plead. 378–387.

TREASURE TROVE. Found treasure.

This name is given to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the earth or other private place so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. In the latter case, by the civil law, when the treasure was found by the owner of the soil he was considered as entitled to it by the double title of owner and finder; when found on another's property, one-half belonged to the owner of the estate and the other to the finder; when found on public property, it belonged one-half to the public treasury and the other to the finder. Leçons du Dr. Rom. §§ 350–352. This includes not only gold and silver, but whatever may constitute riches: as, vases, urns, statues, etc.

The Roman definition includes the same things under the word *pecunia;* but the thing found must have a commercial value; for ancient tombs would not be considered a treasure. The thing must have been hidden or concealed in the earth, and no one must be able to establish his right to it. It must be found by a pure accident, and not in consequence of search. Dalloz, Dict. *Propriété*, art. 3, s. 3.

According to the French law, le trésor est toute chose cachée ou enfouie, sur laquelle personne ne peut justifier sa propriété, et qui est découverte par le pur effet du hasard. Code Civ. 716. See 4 Toullier, n. 34. See, generally, 20 Viner, Abr. 414; 7 Comyns, Dig. 649; 1 Brown, Civ. Law, 237; 1 Blackstone, Comm. 295; Pothier, Traité *du Droit de Propriété*, art. 4.

TREASURER. An officer intrusted with the treasures or money either of a private individual, a corporation, a company, or a state.

It is his duty to use ordinary diligence in the performance of his office, and to account with those whose money he has.

TREASURER OF THE MINT. An officer created by the act of January 18, 1837, whose duties are prescribed as follows: The treasurer shall receive and safely keep all moneys which shall be for the use and support of the mint, shall keep all the current accounts of the mint, and pay all moneys due by the mint, on warrants from the director. He shall receive all bullion brought to the mint for coinage, shall be the keeper of all bullion and coin in the mint except while the same is legally placed in the hands of other officers, and shall, on warrants from the director, deliver all coins struck at the mint to the persons to whom they shall be legally payable. And he shall keep regular and faithful accounts of all the transactions of the mint, in bullion and coins, both with the officers of the mint and the depositors, and shall present quarter-yearly to the treasury department of the United States, according to such forms as shall be prescribed by that department, an account of the receipts and disbursements of the mint, for the purpose of being adjusted and settled.

This officer is required to give bond to the United States, with one or more sureties, to the satisfaction of the secretary of the treasury, in the sum of ten thousand dollars.

TREASURER OF THE UNITED STATES. Before entering on the duties of his office, the treasurer is required to give bond, with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office and for the fidelity of the persons by him employed. Act of 2d September, 1789, s. 4.

His principal duties are—to receive and keep the moneys of the United States, and disburse the same by warrants drawn by the secretary of the treasury, countersigned by the proper officer, and recorded according to law, *id.* s. 4; to take receipts for all moneys paid by him; to render his account to the comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury; to lay before each house, on the third day of each session of congress, fair and accurate copies of all accounts by him from time to time rendered to and settled with the comptroller, and a true and perfect account of the state of the treasury; to submit at all times to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. *Id.* s. 4.

TREASURY. The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. See DEPARTMENT.

TREATY. In International Law A treaty is a compact made between two or more independent nations with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act and are at once perfected in their execution are called agreements, conventions, and pactions.

Personal treaties relate exclusively to the persons of the contracting parties, such as family alliances, and treaties guaranteeing

the throne to a particular sovereign and his family. As they relate to the persons, they expire of course on the death of the sovereign or the extinction of his family.

Real treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state although there may be changes in its constitution or in the persons of its rulers. Vattel, Law of Nat. b. 2, c. 12, §§ 183–197.

2. On the part of the United States, treaties are made by the president, by and with the consent of the senate, provided two-thirds of the senators present concur. Const. art. 2, s. 2, n. 2.

No state shall enter into any treaty, alliance, or confederation, Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state or with a foreign power. *Id.* art. 1, sec. 10, n. 2; 3 Story, Const. § 1395.

3. A treaty is declared to be the supreme law of the land, and is, therefore, obligatory on courts, 1 Cranch, 103; 1 Wash. C. C. 322; 1 Paine, C. C. 55, whenever it operates of itself without the aid of a legislative provision; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the court. 2 Pet. 314. See Story, Const. Index; Sergeant, Const. Law, Index; 4 Hall, Law Journ. 461; 6 Wheat. 161; 3 Dall. 199; 1 Kent, Comm. 165, 284.

TREATY OF PEACE. A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported. Vattel, b. 4, c. 2, § 9.

TREBLE COSTS. In English Practice. The taxed costs and three-fourths the same added thereto. It is computed by adding one-half for double costs, and in addition one-half of one-half for treble costs. 1 Chitty, Bail. 137; 1 Chitty, Pract. 27.

In American Law. In Pennsylvania the rule is different: when an act of assembly gives treble costs, the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled when they are not regularly or usually payable by the defendant. 2 Rawle, Penn. 201.

And in New York the directions of the statute are to be strictly pursued, and the costs are to be trebled. 2 Dunlop, Pract. 731.

TREBLE DAMAGES. In actions arising *ex contractu*, some statutes give treble damages; and these statutes have been liberally construed to mean actually treble damages: for example, if the jury give twenty dollars damages for a forcible entry, the court will award forty dollars more, so as to make the total amount of damages sixty dollars. 4 Barnew. & C. 154; M'Ciel. 567.

2. The construction on the words *treble damages* is different from that which has been put on the words *treble costs*. See 6 Serg. & R. Penn. 288; 1 Browne, Penn. 9; 1 Cow. N. Y. 160, 175, 176, 584; 8 *id.* 115.

TREBUCKET. The name of an engine of punishment, said to be synonymous with *tumbrel*.

TREE. A woody plant, which in respect of thickness and height grows greater than any other plant.

2. Trees are part of the real estate while growing and before they are severed from the freehold; but as soon as they are cut down they are personal property.

Some trees are timber-trees, while others do not bear that denomination. See TIMBER; 2 Blackstone, Comm. 281.

Trees belong to the owner of the land where they grow; but if the roots go out of one man's land into that of another, or the branches spread over the adjoining estates, such roots or branches may be cut off by the owner of the land into which they thus grow. Rolle, 394; 3 Bulstr. 198; Viner, Abr. *Trees* (E), *Nuisance* (W 2); 1 Suppl. to Ves. Jr. 138; 2 Suppl. Ves. Ch. 162, 448; 6 Ves. Ch. 109.

3. When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the owner of the estate where the roots grow. 1 Ld. Raym. 737. See 1 Pick. Mass. 224; 13 *id.* 44; 4 Mass. 266; 6 N. H. 430; 3 Day, Conn. 476; 7 Conn. 125; 11 *id.* 177; 11 Coke, 50; Hob. 310; 2 Rolle, 141; Mood. & M. 112; 8 East, 394; 5 Barnew. & Ald. 600; 1 Chitty, Gen. Pract. 625; 2 Phillipps, Ev. 138; Washburn, Easem.; Code Civ. art. 671; Pardessus, *Tr. des Servitudes*, 297; Broke, Abr. *Demand*, 20; Dalloz, Dict. *Servitudes*, art. 3, § 8; 2 P. Will. 606; F. Moore, 812; Hob. 219; Plowd. 470; 5 Barnew. & C. 897. When the tree grows directly on the boundary-line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not. 12 N. H. 454.

TRESAILE, or TRESAYLE. The grandfather's grandfather. 1 Blackstone, Comm. 186.

TRESPASS. Any misfeasance or act of one man whereby another is injuriously treated or damnified. 3 Blackstone, Comm. 208; 7 Conn. 125.

Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another.

Any unauthorized entry upon the realty of another to the damage thereof.

The word is used oftener in the last two somewhat restricted significations than in the first sense here given. In determining the nature of the act, neither the amount of violence or the intent with which it is offered, nor the extent of the damage accomplished or the purpose for which the act was committed, are of any importance: since a person who enters upon the land of another without leave, to lead off his own runaway horse, and who breaks a blade of grass in so doing, commits a trespass. 2 Humphr. Tenn. 325; 6 Johns. N. Y. 5.

It is said that *some* damage must be committed to make an act a trespass. It is undoubtedly true that damage is required to constitute a trespass *for which an action will lie;* but, so far as the tort itself is concerned, it seems more than doubtful if the mere commission of an act affecting another, without legal authority, does not constitute trespass, though until damage is done the law will not regard it, inasmuch as the law does not regard trifles.

The distinction between the different classes of trespass is of importance in determining the nature of the remedy.

A trespass committed with force is said to be done *vi et armis;* one committed by entry upon the realty, *by breaking the close.*

In Practice. A form of action which lies to recover damages for the injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the same.

2. The action lies for *injuries to the person* of the plaintiff: as, by assault and battery, wounding, imprisonment, and the like. 9 Vt. 352; 6 Blackf. Ind. 375.

It lies, also, for forcible injuries to the person of another, whereby a direct injury is done to the plaintiff in regard to his rights as parent, master, etc. 2 Aik. Vt. 465; 2 Caines, N. Y. 292; 8 Serg. & R. Penn. 36. It does not lie for mere non-feasance, nor where the matter affected was not tangible.

The action lies for *injuries to personal property*, which may be committed by the several acts of unlawfully striking, chasing if alive, and carrying away to the damage of the plaintiff, a personal chattel, 1 Wms. Saund. 84, nn. 2, 3; Fitzherbert, Nat. Brev. 86; Brooke, Abr. *Trespass*, pl. 407; Croke Jac. 362, of which another is the owner and in possession, 2 Root, Conn. 209; 5 Vt. 97, and for the removal or injury of inanimate personal property, 1 Me. 117; 12 *id.* 122; 13 Pick. Mass. 139; 5 Johns. N. Y. 348, of which another has the possession, actual or constructive, 11 Pick. Mass. 382; 21 *id.* 369; 13 Johns. N. Y. 141; 1 N. H. 110; 4 J. J. Marsh. Ky. 18; 2 Bail. So. C. 466; 4 Munf. Va. 444; 6 Blackf. Ind. 136; 4 Ill. 9; 6 Watts & S. Penn. 323, without the owner's assent. A naked possession or right to immediate possession is sufficient to support this action. 1 Term, 480; 7 Johns. N. Y. 535; 8 *id.* 432; 11 *id.* 377; 5 Vt. 274; 1 Penn. St. 238; 17 Serg. & R. Penn. 251; 11 Mass. 70; 11 Vt. 521; 1 Ired. No. C. 163; 10 Vt. 165. See TRESPASSER.

The action lies also for *injuries to the realty* consequent upon entering without right upon another man's land (breaking his close). The inclosure may be purely imaginary, 3 Blackstone, Comm. 209; 1 Dev. & B. No. C. 371, but reaches to the sky and to the centre of the earth. 19 Johns. N. Y. 381.

3. The plaintiff must be in possession with some title, 5 East, 485; 9 Johns. N. Y. 61; 11 *id.* 140, 385; 12 *id.* 183; 1 Nott & M'C. So. C. 356; 2 *id.* 68; 10 Conn. 225; 11 *id.* 60; 6 Rand. Va. 8, 556; 4 Watts, Penn. 377; 4 Pick. Mass. 305; 15 *id.* 32; 4 Bibb, Ky. 218; 2 Hill, So. C. 466; 1 Harr. & J. Md. 295; 31 Penn. St. 304; 5 Harr. Del. 320; 11 Ired. 417; though mere title is sufficient where no one is in possession, 2 Ala. 229; 1 Wend. N. Y. 466; 1 Vt. 485; 8 Pick. Mass. 333; 4 Dev. & B. No. C. 68, as in case of an owner to the centre of a highway, 4 N. H. 36; 1 Penn. St. 336; see 17 Pick. Mass. 357; and mere possession is sufficient against a wrong-doer, 9 Ala. 82; 1 Rice, So. C. 368; 23 Ga. 590; see 22 Pick. Mass. 295; and the possession may be by an agent, 3 M'Cord, So. C. 422; but not by a tenant, 8 Pick. Mass. 235; 1 Hill, So. C. 260; see 13 Ind. 64; other than a tenant at will. 15 Pick. Mass. 102.

An action will not lie unless some damage is committed; but slight damage only is required. 2 Johns. N. Y. 357; 9 *id.* 113, 377; 2 Mass. 127; 4 *id.* 266.

4. Some damage must have been done to sustain the action, 2 Bay, So. C. 421; though it may have been very slight: as, breaking glass. 4 Mass. 140.

The action will not lie where the defendant has a justification sufficient to excuse the act committed, though he acted without authority from the owner or the person affected. 8 Law Rep. 77. See JUSTIFICATION; TRESPASSER. Accident may in some cases excuse a trespass. 7 Vt. 62; 4 M'Cord, So. C. 61; 12 Me. 67.

The declaration must contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*. See CONTINUANDO; PER QUOAD.

The plea of not guilty raises the general issue, and under it the defendant may give in evidence any facts which show that the property was not in possession of the plaintiff rightfully as against the defendant at the time of the injury, or that the injury was not committed by the defendant with force.

Other matters must, in general, be pleaded specially. See TRESPASS QUARE CLAUSUM. Matters in justification, as, authority by law, 3 Hill, N. Y. 619; 4 Mo. 1, defence of the defendant's person or property, taking a distress on premises other than those demised, etc., 1 Chitty, Plead. 439, custom to enter, 4 Pick. Mass. 145, right of way, 7 Mass. 385, etc., must be specially pleaded.

Judgment is for the damages assessed by the jury when for the plaintiff, and for costs when for the defendant.

TRESPASS DE BONIS ASPORTATIS (Lat. *de bonis asportatis*, for goods which have been carried away).

In Practice. A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away. 1 Me. 117.

It is no answer to the action that the defendant has returned the goods. 1 Bouvier, Inst. n. 36 (H).

TRESPASS FOR MESNE PROFITS. A form of action supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation. 3 Blackstone, Comm. 205; 4 Burr. 1668. The person who actually received the profits is to be made defendant, whether defendant to the ejectment or not. 11 Wheat. 280. It lies after a recovery in ejectment, 5 Cow. N. Y. 33; 11 Serg. & R. Penn. 55, or entry, 6 N. H. 391, but not trespass to try title, Const. So. C. 102; 1 M'Cord, So. C. 264; and the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the declaration in ejectment, 1 Blackf. Ind. 56; 2 Rawle, Penn. 49; but suit for any antecedent profits is open to a new defence, and the tenant may plead the statute of limitations as to all profits accruing beyond the period fixed by law. 3 Sharswood, Blackst. Comm. 205, n.; 2 Root, Conn. 440.

TRESPASS ON THE CASE. In Practice. The form of action by which a person seeks to recover damages caused by an injury unaccompanied with force or which results indirectly from the act of the defendant. It is more generally called, simply, case. See CASE; 3 Bouvier, Inst. nn. 3482–3509.

TRESPASS QUARE CLAUSUM FREGIT (Lat. *quare clausum fregit*, because he has broken the close).

In Practice. The form of action which lies to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land.

Mere possession is sufficient to enable one having it to maintain the action, 5 Johns. N. Y. 66; 12 Wend. N. Y. 488; 14 Pick. Mass. 297; 3 A. K. Marsh. Ky. 331; 1 Harr. N. J. 335; 22 Me. 350; 5 Blackf. Ind. 465; 1 Hawks, No. C. 485; 7 Gill & J. Md. 321; see 1 Halst. N. J. 1, except as against one claiming under the rightful owner, 6 Halst. N. J. 197; 6 N. H. 9; 2 Ill. 181; 7 Mo. 333; 3 Metc. Mass. 239; and no one but the tenant can have the action, 13 Me. 87; 19 Wend. N. Y. 507; 9 Vt. 383; 11 *id.* 433, except in case of tenancies at will or by a less secure holding. 8 Pick. Mass. 333; 15 *id.* 102; 7 Metc. Mass. 147; 1 Dev. No. C. 435.

The action lies where an animal of the defendant's breaks the plaintiff's close to his injury. 7 Watts & S. Penn. 367; 31 Penn. St. 525.

TRESPASS VI ET ARMIS (Lat. *vi et armis*, with force and arms).

In Practice. The form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property. 2 Const. So. C. 294. It is distinguished from case in this, that the injury in case is the indirect result of the act done. See CASE, and 4 Bouvier, Inst. n. 3583.

TRESPASS TO TRY TITLE. The name of the action used in South Carolina for the recovery of the possession of real property and damages for any trespass committed upon the same by the defendant.

It was substituted by the act of 1791 in place of the action of ejectment, and is in form an action of trespass *quare clausum fregit*, with the single exception that upon the writ of *capias ad respondendum* and the copy writ a notice must be indorsed that "the action is brought to try the title as well as for damages." The action must be brought in the name of the real owner of the land; and he can only recover on the strength of his own title, and not on the weakness of his adversary's. It is usual to appoint one or more surveyors, who furnish at the trial a map or plot of the land in dispute; and with reference to that the verdict is rendered by the jury. A trespass must be proved to have been committed by the defendant or his agent; and the plaintiff, if he recovers at all, is entitled to a verdict for the value of the rent down to the time of the trial. The judgment for the plaintiff is only for the damages; but upon that he is entitled to a writ of *habere facias possessionem*.

TRESPASSER. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another.

Any act which is injurious to the property of another renders the doer a trespasser, unless he has authority to do it from the owner or custodian, 14 Me. 44; 5 Blackf. Ind. 237; 8 N. H. 220; 18 Pick. Mass. 110, or by law, 2 Conn. 700; 3 Binn. Penn. 215; 10 Johns. N. Y. 138; 6 Ohio, 144; 12 Ala. 257; 1 N. H. 339; 4 *id.* 527; 13 Me. 250; 16 *id.* 132; 6 Ill. 401, 411; 1 Humphr. Tenn. 272; and in this latter case any defect in his authority, as, want of jurisdiction by the court, 11 Conn. 95; 3 Cow. N. Y. 206, defective or void proceedings, 16 Me. 33; 12 N. H. 148; 12 Vt. 661; 2 Dev. No. C. 370, misapplication of process, 6 Monr. Ky. 296; 14 Me. 312; 17 Vt. 412, renders him liable as a trespasser.

So, too, the commission of a legal act in an illegal manner, as, the execution of legal process illegally, 2 Johns. Cas. N. Y. 27; 5 Me. 281; 6 Pick. Mass. 455, abuse of legal process, 1 Chitty, Plead. 183–187; Breese, Ill. 143; 16 Ala. 67, exceeding authority conferred by the owner, 13 Me. 115, or by law, 13 Mass. 520; 10 Serg. & R. Penn. 399; 17 Vt. 609, renders a man a trespasser.

In all these cases, where a man begins an act which is legal by reason of some authority given him, and then becomes a trespasser by subsequent acts, he is held to be a trespasser from the beginning (*ab initio*). 13 Mass. 520; 14 Pick. Mass. 356; 1 Gilm. Va. 221; 10 Johns. N. Y. 253; 20 *id.* 427; 11 N. H. 363; 16 Vt. 393; 2 Ark. 45.

A person may be a trespasser by ordering

such an act done as makes the doer a trespasser, 14 Johns. N. Y. 406; 16 Ov. Tenn. 13; 10 Pick. Mass. 543; or by subsequently assenting, in some cases, 1 Rawle, Penn. 121; 1 B. Monr. Ky. 96; or assisting, though not present. 2 Litt. Ky. 240.

TRESPASSER AB INITIO. A term applied to denote that one who has commenced a lawful act in a proper manner has performed some unlawful act, or some lawful act in an unlawful manner, so connected with the previous act that he is to be regarded as having acted unlawfully from the beginning. See 8 Coke, 146; 5 Taunt. 198; 7 Ad. & E. 176; 11 Mees. & W. Exch. 740; 15 Johns. N. Y. 401. See AB INITIO.

TRET. An allowance made for the water or dust that may be mixed with any commodity. It differs from *tare*.

TRIAL. In Practice. The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. 4 Mas. C. C. 232.

Trial by certificate is a mode of trial allowed by the English law in those cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averments or information of persons in such station as affords them the most clear and complete knowledge of the truth.

As, therefore, such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. 3 Blackstone, Comm. 333; Stephen, Plead. 122.

Trial by grand assize is a peculiar mode of trial allowed in writs of right. See ASSIZE; GRAND ASSIZE.

2. *Trial by inspection or examination* is a form of trial in which the judges of the court, upon the testimony of their own senses, decide the point in dispute.

This trial takes place when, for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it,—who are properly called in to inform the conscience of the court in respect of dubious facts; and, therefore, when the fact from its nature must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment alone. For example, if a defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination whether he be the plaintiff or not. 9 Coke, 30; 3 Blackstone, Comm. 331; Stephen, Plead. 123.

Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright. 5 Ves. Ch. 709; 12 *id.* 270, and the cases there cited. And see 2 Atk. Ch. 141; 2 Barnew. & C. 80; 4 Ves. Ch. 681; 2 Russ. Ch. 385; 1 Ves. & B. Ch. Ir. 67; Croke Jac. 230; 1 Dall. 166.

3. *Trial by jury* is that form of trial in which the facts are determined by twelve men impartially selected from the body of the county. See JURY.

To insure fairness, this mode of trial must be in public: it is conducted by selecting a jury in the manner prescribed by the local statutes, who must be sworn to try the matter in dispute according to law and the evidence. Evidence is then given by the party on whom rests the *onus probandi* or burden of the proof: as the witnesses are called by a party they are questioned by him, and after they have been examined, which is called an examination in chief, they are subject to a cross-examination by the other party as to every part of their testimony. Having examined all his witnesses, the party who supports the affirmative of the issue closes; and the other party then calls his witnesses to explain his case or support his part of the issue: these are in the same manner liable to a cross-examination.

4. In case the parties should differ as to what is to be given in evidence, the judge must decide the matter, and his decision is conclusive upon the parties so far as regards the trial; but *bill of exceptions* may be taken, motion in arrest of judgment made, or other proper means adopted, so that the matter may be examined before another tribunal. When the evidence has been closed, the counsel for the party who supports the affirmative of the issue then addresses the jury, by recapitulating the evidence and applying the law to the facts and showing on what particular points he rests his case. The opposite counsel then addresses the jury, enforcing in like manner the facts and the law as applicable to his side of the case; to which the other counsel has a right to reply. It is then the duty of the judge to sum up the evidence and explain to the jury the law applicable to the case: this is called his charge. See CHARGE. The jurors then retire to deliberate upon their verdict, and, after having agreed upon it, they come into court and deliver it in public.

5. In case they cannot agree, they may, in cases of necessity, be discharged; but it is said in capital cases they cannot be. See DISCHARGE OF A JURY. Very just and merited encomiums have been bestowed on this mode of trial, particularly in criminal cases. Liv-

ingston, Rep. on the Plan of a Penal Code, 13; 3 Story, Const. § 1773.

A trial by jury in criminal cases does not essentially differ from the trial of a civil action; but the accused is entitled to some privileges in the selection of jurors who are to try him, in the former case, which do not exist in the latter. Of these the right of challenge, or of taking exception to the jurors, is much the most extensive. See CHALLENGE. He has a right to be distinctly informed of the nature of the charge against him, with a copy of the indictment. He is also entitled to a list of the jurors who are to pass upon his case, and of the names of the witnesses who will testify, a certain number of days before the trial. And the jury must deliberate and decide upon the principle that every man is to be presumed innocent until he is proved to be guilty; and, as a necessary consequence, they cannot convict him if they have any reasonable doubt of his guilt. See Worthington, Juries; Archbold, Nisi Prius; Graham & W. New Trials; 3 Blackstone, Comm. c. 22; 15 Serg. & R. Penn. 61; DUE PROCESS OF LAW; JURY.

6. *Trial at nisi prius.* Originally, a trial before a justice in eyre. Afterwards, by Westm. 2, 13 Edw. I. c. 30, before a justice of assize. 3 Sharswood, Blackst. Comm. 353. See NISI PRIUS. At nisi prius there is, generally, only one judge, sometimes more. 3 Chitty, Gen. Pract. 39. In the United States, a trial before a single judge.

Trial by the record. This trial applies to cases where an issue of *nul tiel record* is joined in any action. If on one side a record be asserted to exist, and the opposite party deny its existence under the form of traverse, that there is no such record remaining in court, as alleged, and issue be joined thereon, this is called an issue of *nul tiel record;* and the court awards, in such case, a trial by inspection and examination of the record. Upon this the party affirming its existence is bound to produce it in court on a day given for the purpose, and if he fail to do so judgment is given for his adversary.

7. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue; and the parties cannot put themselves upon the country. Stephen, Plead. 122; 2 Sharswood, Blackst. Comm. 330.

Trial by wager of battel. In the old English law, this was a barbarous mode of trying facts, among a rude people, founded on the supposition that heaven would always interpose and give the victory to the champions of truth and innocence. This mode of trial was abolished in England as late as the stat. 59 Geo. III. c. 46, A.D. 1818. It never was in force in the United States. See 3 Sharswood, Blackst. Comm. 337; 1 Hale, Hist. Comm. Law, 188. See a modern case, 1 Barnew. & Ald. 405.

8. *Trial by wager of law.* This mode of trial has fallen into complete disuse; but, in point of law, it seems in England to be still competent in most cases to which it anciently applied. The most important and best-established of these cases is the issue of *nil debet*, arising in action of debt on simple contract, or the issue of *non detinet*, in an action of detinue. In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit* (of which the ancient meaning was *followers* or witnesses, though the words are now retained as mere form) to prove the truth of his claim. On the other hand, if the defendant, by a plea of nil debet or non detinet, deny the debt or detention, he may conclude by offering to establish the truth of such plea "*against* the plaintiff and his suit, in such manner as the court shall direct." Upon this the court awards the wager of law, Coke, Ent. 119 *a;* Lilly, Ent. 467; 3 Chitty, Plead. 479; and the form of this proceeding, when so awarded, is that the defendant brings into court with him eleven of his neighbors and for himself makes oath that he does not owe the debt or detain the property alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment. 3 Blackstone, Comm. 343; Stephen, Plead. 124. Blackstone compares this mode of trial to the canonical purgation of the catholic clergy, and to the decisory oath of the civil law. See OATH, DECISORY.

9. *Trial by witnesses* is a species of trial by witnesses, or per testes, without the intervention of a jury.

This is the only method of trial known to the civil law, in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in the common law, which prefers the trial by jury in almost every instance.

In England, when a widow brings a writ of dower and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges; and so, says Finch, shall no other case in our law. Finch, Law, 423. But Sir Edward Coke mentions others: as, to try whether the tenant in a real action was duly summoned; or, the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And, in every case, Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at least. 3 Blackstone, Comm. 336.

TRIAL LIST. A list of cases marked down for trial for any one term.

TRIBUNAL. The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction. The jurisdiction which the judges exercise.

The term is Latin, and derives its origin from the elevated seat where the tribunes administered justice.

TRIBUTE. A contribution which is sometimes raised by the sovereign from his subjects to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff, § 1145.

TRINEPOS (Lat.). **In Roman Law.** Great-grandson of a grandchild.

TRINEPTIS (Lat.). Great-granddaughter of a grandchild.

TRINITY TERM. In English Law. One of the four terms of the courts: it begins on the 22d day of May and ends on the 12th of June. Stat. 11 Geo. IV., and 1 Will. IV. c. 70. It was formerly a movable term.

TRINODA NECESSITAS (Lat.). The threefold necessary public duties to which all lands were liable by Saxon law,—viz., for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasions. In the immunities enumerated in kings' grants, these words were inserted, "*exceptis his tribus, expeditione, pontis et arcis constructione.*" Kennett, Paroch. Antiq. 46; 1 Sharswood, Blackst. Comm. 263.

TRIORS. In Practice. Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number, without the consent of the prosecutor and defendant, or unless some special case is alleged by one of them, or when only one juror has been sworn and two triors are appointed with him. Coke, Litt. 158 *a*; Bacon, Abr. *Juries* (E 12).

The method of selecting triors is thus explained. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors: if they find him indifferent, he shall be sworn and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

The triors examine the juryman challenged, and decide upon his fitness. 3 Park. Cr. Cas. N. Y. 467; 5 Cal. 347; 1 Mich. 451; 10 Ired. No. C. 295. Their decision is final. They are liable to punishment for misbehavior in office. 4 Sharswood, Blackst. Comm. 353. n. 8; 1 Chitty, Crim. Law, 549; 15 Serg. & R. Penn. 156; 21 Wend. N. Y. 509; 2 Green, N. J. 195. The office is abolished in many of the states, the judge acting in their place. Colby, Pract. 236; 23 Ga. 57; 43 Me. 11. See 13 Ark. 720.

TRIPARTITE. Consisting of three parts: as, a deed *tripartite*, between A of the first part, B of the second part, and C of the third part.

TRIPLICATIO (Lat.). **In Civil Law.** The reply of the plaintiff (*actor*) to the rejoinder (*duplicatio*) of the defendant (*reus*). It corresponds to the surrejoinder of common law. Inst. 4. 14; Bracton, l. 5, t. 5, c. 1.

TRITAVUS (Lat.). **In Roman Law.** The male ascendant in the sixth degree. For the female ascendant in the same degree the term is *tritavia*. In forming genealogical tables this convenient term is still used.

TRITHING (Sax. *trithinga*). The third part of a county, consisting of three or four hundreds.

A court within the circuit of the trithing, in the nature of a court-leet, but inferior to the county court. Camd. 102. The ridings of Yorkshire are only a corruption of trythings. 1 Sharswood, Blackst. Comm. 116; Spelman, Gloss. 52; Cowel.

TRIUMVIRI CAPITALES, or **TREVIRI,** or **TRESVIRI** (Lat.). **In Roman Law.** Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust, *in Catilin.* They had eight lictors to execute their orders. Vicat, Voc. Jur.

TRIVIAL. Of small importance. It is a rule in equity that 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. 4 Bouvier, Inst. n. 4237. See Hopk. 112; 4 Johns. Ch. N. Y. 183; 4 Paige, Ch. N. Y. 364. See MAXIMS, *De minimis.*

TRONAGE. In English Law. A customary duty or toll for weighing wool: so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

TROVER (Fr. *trouver*, to find). **In Practice.** A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.

The action was originally an action of trespass on the case where goods were *found* by the defendant and retained against the plaintiff's rightful claim. The manner of gaining possession soon came to be disregarded, as the substantial part of the action is the *conversion* to the defendant's use: so that the action lies whether the goods came into the defendant's possession by *finding or otherwise*, if he fails to deliver them up on the rightful claim of the plaintiff. It differs from *detinue* and *replevin* in this, that it is brought for damages and not for the specific articles; and from *trespass* in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie; but the converse is not true. In case possession was gained by a trespass, the plaintiff by bringing his action in this form waives his right to damages for the taking, and is confined to the injury resulting from the conversion. 17 Pick. Mass. 1; 21 *id.* 559; 17 Me. 434; 7 T. B. Monr. Ky. 209.

2. *The action lies* for one who has a *general* or absolute property. Buller, Nisi P. 33; 2 Hill, So. C. 587; 25 Me. 220; 7 Ired. No. C. 418; 23 Ga. 484; 22 Mo. 495, together with a right to immediate possession. 15 East, 607; 7 Term, 12; 1 Ry. & M. 99; 5

Pick. Mass. 185; 9 *id.* 156; 22 *id.* 585; 15 Wend. N. Y. 474; 6 Blackf. Ind. 470; 7 *id.* 361; 9 Yerg. Tenn. 262; 1 Brev. So. C. 495; 4 Dev. No. C. 20; 4 Dev. & B. No. C. 323; 2 Penn. St. 318; 5 *id.* 466; 11 Ala. 859; 42 Me. 197; 19 N. H. 419, as, for example, a vendor of property sold upon condition not fulfilled, 2 Brev. So. C. 324; 1 Meigs, Tenn. 76; 19 Vt. 371; see 11 Vt. 388; as to the effect of an intervening lien, see 7 Term, 12; 2 Crompt. M. & R. Exch. 659; 1 Wash. C. C. 174; 1 Hayw. No. C. 193; 15 Mass. 242; 6 Serg. & R. Penn. 300; 2 N. H. 319; 6 Wend. N. Y. 603; or a *special* property, including actual possession as against a stranger; 2 Saund. 47; 1 Barnew. & Ad. 159; 11 East, 626; 2 Bingh. 173; 34 Eng. L. & Eq. 122; 6 Johns. N. Y. 195; 11 *id.* 285; 12 *id.* 403; 7 Cow. N. Y. 297; 13 Wend. N. Y. 63; 15 Mass. 242; 1 Pick. Mass. 389; 9 *id.* 364; 2 N. H. 66, 319; 5 *id.* 237; 11 Vt. 351; 4 Blackf. Ind. 395, as, for example, a sheriff holding under rightful process, 1 Pick. Mass. 232, 389; 9 *id.* 164; 1 N. H. 289; 7 Johns. N. Y. 32; 4 Vt. 81; 5 *id.* 181; 15 *id.* 464; 12 Me. 328; 2 Murph. No. C. 19; a mortgagee in possession, 5 Cow. N. Y. 323; Const. So. C. 141; 6 Harr. & J. Md. 100; 3 Brev. No. C. 68; and see 12 N. H. 382; 31 Ala. N. s. 447; 23 Conn. 70; a simple bailee, 15 Mass. 242; Wright, Ohio, 744, or even a finder merely, 9 Cow. N. Y. 670; 2 Ala. 320; 3 Bibb, Ky. 284; 3 Harr. Del. 608; and including lawful custody and a right of detention as against the general owner of the goods or chattels. 2 Taunt. 268; 7 Cow. N. Y. 329; 8 Wend. N. Y. 445; 3 Blackf. Ind. 419; 2 Rich. So. C. 13. An executor or administrator is held an absolute owner by relation from the death of the decedent, 2 Greenleaf, Ev. § 641; 8 East, 410; 9 Metc. Mass. 504; 2 Ga. 119; 1 Rice, So. C. 264, 285; 3 Sneed, Tenn. 484; see 4 Barnew. & Ald. 744; and he may maintain an action for a conversion in the lifetime of the decedent, T. U. P. Charlt. Ga. 261; 1 Root, Conn. 289; 6 Mass. 394, and is liable for a conversion by the decedent. 1 Hayw. No. C. 21, 308, 362.

3. The property affected must be some personal chattel, 3 Serg. & R. Penn. 513; 3 N. H. 484; 2 D. Chipm. Vt. 116, specifically set off as the plaintiff's, 4 Taunt. 648; 4 Barnew. & C. 948; 5 *id.* 857; 6 *id.* 360; 3 Pick. Mass. 38; 7 Ired. No. C. 370; 5 Jones, No. C. 16; 20 Vt. 144; including title-deeds, 2 Yeates, Penn. 537; a copy of a record, Hardr. 111; 11 Pick. Mass. 492; money, though not tied up, 4 Taunt. 24; 4 E. D. Smith, N. Y. 162; see 1 Mo. 64; negotiable securities, 4 Barnew. & Ald. 1; 3 Barnew. & C. 45; 4 Tyrwh. Exch. 485; 3 Johns. N. Y. 432; 1 Root, Conn. 125, 221; 15 Mass. 389; 1 Pick. Mass. 503; 3 Vt. 99; 9 *id.* 216; 5 Blackf. Ind. 419; 17 Ala. 218; 27 Ala. N. s. 228; animals *feræ naturæ*, but reclaimed, 10 Johns. N. Y. 102; trees and crops severed from the inheritance, 1 Term, 55; 3 Mo. 137, 393; 7 Cow. N. Y. 95; 15 Mass. 204; 8 Penn. St. 244; 9 *id.* 343; 4 Cal. 184. It will not lie for property in custody of the law, 9 Johns. N. Y. 381, if rightfully held, see 2 Ala. 576; 1 Add. Penn. 376, or to which the title must be determined by a court of peculiar jurisdiction only, 1 Cam. & N. No. C. 115; see 14 Johns. N. Y. 273; or where the bailee has lost the property, had it stolen, or it has been destroyed by want of due care. 2 Ired. No. C. 98. See CONVERSION.

There must have been a conversion of the property by the defendant. 5 T. B. Monr. Ky. 89; 8 Ark. 204. And a waiver of such conversion will defeat the action. 20 Pick. Mass. 90. For what constitutes a conversion, see CONVERSION.

The declaration must state a rightful possession of the goods by the plaintiff, 1 Hempst. C. C. 160; must describe the goods with convenient certainty, though not so accurately as in detinue, Buller, Nisi. P. 32; 5 Gray, Mass. 12; must formally allege a finding by the defendant, and must aver a conversion. 12 N. Y. 313. It is not indispensable to state the price or value of the thing converted. 2 Wash. Va. 192.

The plea of not guilty raises the general issue.

Judgment when for the plaintiff is that he recover his damages and costs, or, in some states, in the alternative, that the defendant restore the goods or pay, etc., 19 Ga. 579; when for the defendant, that he recover his costs. The measure of damages is the value of the property at the time of the conversion, with interest. 17 Pick. Mass. 1; 1 Metc. Mass. 172; 7 T. B. Monr. Ky. 209; 8 Dan. Ky. 192; 38 Me. 174; 17 Ala. 191; 26 Ala. N. s. 213; 2 Hill, N. Y. 132; 4 Cow. N. Y. 53; 21 Barb. N. Y. 92; 30 Vt. 307; 19 Mo. 467; 22 *id.* 394.

TROY WEIGHT. A weight less ponderous than the avoirdupois weight, in the proportion of seven thousand for the latter to five thousand seven hundred and sixty to the former. Dane, Abr. See WEIGHTS.

TRUCE. In International Law. An agreement between belligerent parties by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. Burlamaqui, N. & P. Law, pt. 4, c. 11, § 1.

Truces are of several kinds: *general*, extending to all the territories and dominions of both parties; and *particular*, restrained to particular places: as, for example, by sea, and not by land, etc. *Id.* part 4, c. 11, § 5. They are also *absolute*, *indeterminate*, and *general*; or *limited* and *determined* to certain things: for example, to bury the dead. *Ib. idem.* See 1 Kent, Comm. 159; Halleck, Int. Law, 654; Wheaton, Int. Law, 682.

TRUCE OF GOD (Law L. *treuza Dei*; Sax. *treuge* or *trewa*, from Germ. *treu*; Fr. *trève de Dieu*). In the middle ages, a limitation of the right of private warfare introduced by the church. This truce provided that hostilities should cease on holidays, from

Thursday evening to Sunday evening of each week, the whole season of Advent and Lent, and the octaves of great festivals. The penalty for breach of the truce was excommunication. The protection of this truce was also extended constantly to certain places, as, churches, convents, hospitals, etc., and certain persons, as, clergymen, peasants in the field, crusaders, Clermont, 1095, and, in general, all defenceless persons. It was first introduced into Acquitaine in 1077, and into England under William the Conqueror. Encyc. Amer.

TRUE BILL. **In Practice.** Words indorsed on a bill of indictment when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly the indorsement was *Billa vera* when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus*. When the jury do not find it to be a true bill, the better opinion is that the omission of the words a true bill does not vitiate an indictment. 11 Cush. Mass. 473; 13 N. H. 488. See 5 Me. 432, and Bennett's note; GRAND JURY.

TRUST. A right of property, real or personal, held by one party for the benefit of another.

The party holding is called the *trustee*, and the party for whose benefit the right is held is called the *cestui que trust*, or, using a better term, the *beneficiary*.

Sometimes the equitable title of the beneficiary, sometimes the obligation of the trustee, and, again, the right held, is called the trust.

But the right of the beneficiary *is in* the trust; the obligation of the trustee *results from* the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust itself. All together they constitute the trust.

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An equitable right, title, or interest in property, real or personal, distinct from its legal ownership.

A personal obligation for paying, delivering, or performing any thing where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted.

An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence. Willis, Trust. 1; 4 Kent, Comm. 295; 2 Fonblanque, Eq. 1; 1 Saunders, Uses and Tr. 6; Cooper, Eq. Plead. Introd. 27; 3 Blackstone, Comm. 431.

The Roman *fidei-commissa* were, under the name of uses, first introduced by the clergy into England in the reign of Richard II. or Edward III., and, while perseveringly prohibited by the clergy and wholly discountenanced by the courts of common law, they grew into public favor, and gradually developed into something like a regular branch of law, as the court of chancery rose into importance and power. For a long time the beneficiary, or *cestui que trust*, was without adequate protection; but the Statute of Uses, passed in 27 Henry VIII., gave adequate protection to the interests of the *cestui que trust*. Prior to this statute the terms use and trust were used, if not indiscriminately, at least without accurate distinction between them. The distinction, so far as there was one, was between passive uses, where the feoffee had no active duties imposed on him, and active trusts, where the feoffee had something to do in connection with the estate. The Statute of Uses sought to unite the seisin with the use, making no distinction between uses and trusts, the result being that, by a strict construction, both uses and trusts were finally taken out of its intended operation and were both included under the term trust. The statute was passed in 1538; but trusts did not become settled on their present basis till Lord Nottingham's time, in 1676. 2 Washburn, Real Prop. Index, *Trust*; 1 Greenleaf, Cruise, Dig. 338.

Active trusts are those in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated.

An *executed trust* is one where the legal or equitable estate passes to the trustee at its creation. 1 Preston, Est. 190.

An *executory trust* is one which is to be perfected at a future period by a conveyance or settlement: as, in case of a conveyance to B in trust to convey to C.

Express trusts are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions, or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity. They may be created even by parol. 6 Watts & S. Penn. 97.

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties. The term is used in this general sense, including *constructive* and *resulting* trusts, see these titles, and also in a more restricted sense, excluding those classes.

A *passive* or *dry* trust is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the legal title merely rests in the trustee.

2. A trust arises when property has been conferred upon one person and accepted by him for the benefit of another. The former is a trustee, and holds the legal title, and the latter is called the *cestui que trust*, or beneficiary. In order to originate a trust, two things are essential,—*first*, that the ownership conferred be connected with a right, or interest, or duty for the benefit of another; and, *second*, that the property be accepted on these conditions.

Before the Statute of Frauds, 29 Car. II. c. 3, §§ 7, 9, a trust, either in regard to real or personal estate, might have been created by

parol as well as by writing. That statute required all trusts as to real estate to be in writing. 4 Kent, Comm. 305; Adams, Eq. 27, 28; 5 Johns. N. Y. 1; 15 Vt. 525.

No particular form of words is requisite to create a trust. The court will determine the intent from the general scope of the language. 10 Johns. N. Y. 496; 4 Kent, Comm. 305.

The facts, however, to warrant the inference of a trust, must be more than loose and general declarations; but, on the other hand, parol declaration will not be received to contradict the inference of a trust in land fairly deducible from written declarations. 5 Johns. Ch. N. Y. 2.

A trust, as to personal property, may be proved by parol evidence. 1 Bail. Ch. So. C. 510; 1 Hare, Ch. 158; Adams, Eq. 28; 3 Sharswood, Blackst. Comm. 431.

If a trustee dies, or fails or refuses to execute or accept the trust, or no trustee is named, the trust does not for that reason fail. It is a settled rule that the court of chancery will provide a trustee or attend to the execution of the trust. 2 Vern. Ch. 97; 4 Ves. Ch. 108; 10 Sim. Ch. 256; Adams, Eq. 36.

Trusts are interpreted by the ordinary rules of law, unless the contrary is expressed in the language of the trust. 15 Ind. 269; 3 Des. So. C. 256. Most of the states have special legislation upon the subject, making the systems of the different states too various for fuller development here. See 4 Kent, Comm, 290–295; Hill, Trustees; Lewin, Trusts; Greenleaf, Cruise, Dig.; Washburn, Real Prop.; Story, Eq. Jur.; Spence, Eq. Jur.; Adams, Eq.; CONSTRUCTIVE TRUSTS; IMPLIED TRUSTS; RESULTING TRUSTS.

TRUSTEE. A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.

One to whom property has been conveyed to be held or managed for another.

2. To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees. Hill, Trust. 49.

Trusts are not strictly cognizable at common law, but solely in equity. 16 Pet. 25.

A trustee after having accepted a trust cannot discharge himself of his trust or responsibility by resignation or a refusal to perform the duties of the trust; but he must procure his discharge either by virtue of the provisions of the instrument of his appointment, or by the consent of all interested, or by an order of a competent court. 4 Kent, Comm. 311; 11 Paige, Ch. N. Y. 314.

Trustees are not allowed to speculate with the trust-property, or to retain any profits made by the use of the same, or to become the purchasers upon its sale. If beneficial to the parties in interest, the purchase by the trustee may be retained or confirmed by the court. And the trustee may be compelled to account for and pay over to the *cestui que trust* all profits made by any use of the trust property. 4 Kent, Comm. 438; 2 Johns. Ch. N. Y. 252; 4 How. 503.

A court of equity never allows a trust to fail for want of a trustee. 5 Paige, Ch. N. Y. 46; 6 Whart Penn. 571; 5 B. Monr. Ky. 113.

3. Whenever it becomes necessary, the court will appoint a new trustee, and this though the instrument creating the trust contain no power for making such appointment. The power is inherent in the court. 7 Ves. Ch. 480; 2 Sandf. Ch. N. Y. 336; 1 Beav. Rolls, 467. So the court may create a new trustee on the resignation of the former trustee. 11 Paige, Ch. N. Y. 314; 3 Barb. Ch. N. Y. 76; Hill, Trust. 190.

The mere naming a person trustee does not constitute him such. There must be an acceptance, express or implied. But if the person named trustee does not wish to be held responsible as such, he should, before meddling with the duties of a trustee, formally disclaim the trust. 7 Gill & J. Md. 157; 1 Pick. Mass. 370; Hill, Trust. 214.

Ordinarily, no writing is necessary to constitute the acceptance of even a trust in writing. 12 N. H. 432.

4. The office and duties of trustees being matters of personal confidence, they are not allowed to delegate these powers unless such a power is expressly given by the authority by which they were created; and where one of several trustees dies, the trust, as a general rule, in the United States, will devolve on the survivor, and not on the heirs of the deceased. Hill, Trust. 175; 2 Mcll. Ch. 276; 3 Mer. Ch. 412; 11 Paige, Ch. N. Y. 314.

While the law allows any person named as trustee to disclaim or renounce, he cannot, if he has by any means accepted and entered upon the trust, rid himself of the duties and responsibilities after such acceptance, except by a legal discharge by competent authority. 4 Johns. Ch. N. Y. 136; 11 Paige, Ch. N. Y. 314; 1 Mylne & K. Ch. 195.

5. The trustee is in law generally regarded as the owner of the property, whether the same be real or personal. Hill, Trust. 229. Yet this rule is subject to material qualifications when taken in connection with the doctrines of powers and uses, and the legislation of the several states. 2 Atk. Ch. 223; 1 How. 134; 4 Kent, Comm. 321; Cruise, Dig. tit. 12, c. 1, § 25; Sugden, Pow. 174, 6th ed.; Hill, Trust. 229–239.

The quality and continuance of the estate of a trustee will be determined by the purpose and exigency of the trust, rather than by the phraseology employed in the description of the estate conveyed; and, therefore, if the language be that the estate goes to the trustee and his heirs, it may be limited to a shorter period if thereby the purposes of the creation of the trust are satisfied. 8 Hare, Ch. 156; 4 Den. N. Y. 385; 2 Exch. 593; 11 B. Monr. Ky. 233.

6. Where there are several trustees, they are held to hold as joint-tenants, and on the

death of any one the property remains vested in the survivor or survivors; and on the death of the last the property, if personal (at common law), went to the heir or personal representative of the last-deceased trustee. But the rule as to trust-property going to heirs and executors is changed in most of the states, so that in theory the court of chancery assumes the control and it appoints a new trustee on the decease of former trustees. Hill, Trust. 305; 13 Sim. Ch. 91; 4 Kent, Comm. 311; 11 Paige, Ch. N. Y. 13; 10 Mo. 755; 16 Ves. Ch. 27.

Each trustee has equal interest in and control over the trust estate; and hence, as a general rule, they cannot (as executors may) act or bind the trust separately, but must act jointly. 4 Ves. Ch. 97; 3 Atk. Ch. 384; 8 Cow. N. Y. 544; 20 Me. 504; 11 Barb. N. Y. 527.

One trustee may be held responsible for losses which he has *enabled* a co-trustee to cause, though there was no actual participation by him. 18 Ohio, 509; 5 How. 233; 10 Penn. St. 149; 3 Sandf. Ch. N. Y. 99.

Where the legal estate is vested in trustees, all actions at law relative to the trust-property must be brought in their name, but the trustee must not exercise his legal powers to the prejudice of a *cestui que trust*, and third persons must take notice of this limitation of the legal rights of a trustee. 2 Vern. Ch. 197; Hill, Trust. 503.

7. The trustee (and his personal representatives and heirs to the extent of any property received from the trustee) is responsible in suit for any breach of trust, and will be compelled to compensate what his negligence has lost of the trust estate. He is not only chargeable with the principal and income of the trust-property he has received, but is liable for an amount equal to what, with good management, he might have received; and this includes interest on sums he has needlessly allowed to remain where it earned no interest. 11 Ves. Ch. 60; 2 Beav. Rolls, 430; 4 Russ. Ch. 195; 15 Eng. L. & Eq. 591; 2 Johns. Ch. N. Y. 62; 1 Bradf. Surr. N. Y. 325; Hill, Trust. 522.

TRUSTEE. In Scotch Law. He who creates a trust.

TRUSTEE PROCESS. In Practice. A means of reaching goods, property, and credits of a debtor in the hands of third persons, for the benefit of an attaching creditor.

It is a process, so called, in the New England states, and similar to the garnishee process of others. It is a process given by statute 15 of the statutes of Massachusetts. All goods, effects, and credits so intrusted or deposited in the hands of others that the same cannot be attached by ordinary process of law, may by an original writ or process, the form of which is given by the statute, be attached in whose hands or possession soever they may be found, and they shall, from the service of the writ, stand bound and be held to satisfy such judgment as the plaintiff may recover against the principal defendant. Cushing, Trustee Pro. 2.

The trustees on sueing out and service of the process, according to statute, and its entry in court, may come into court and be examined on oath as to property of the principal in their hands. If the plaintiff recovers against the principal, and there are any trustees who have not discharged themselves under oath, he shall have execution against them. Cushing, Trustee Process, 4; 2 Kent, Comm. 8th ed. 497, note.

TRUTH. The actual state of things.

In giving his testimony, a witness is required to tell the truth, the whole truth, and nothing but the truth; for the object in the examination of matters of fact is to ascertain truth.

In actions for slander and libel, the truth of the statements may be given in evidence in some cases. The matter has been made the subject of statutory regulation. See Heard, Libel & S.

TUB. In Mercantile Law. A measure containing sixty pounds of tea, and from fifty-six to eighty-six pounds of camphor. Jacob, Law Dict.

TUB-MAN. In English Law. A barrister who has a pre-audience in the exchequer, and also one who has a particular place in court, is so called.

TUMBREL. An instrument of punishment made use of by the Saxons, chiefly for the correction of scolding women by ducking them in water, consisting of a stool or chair fixed to the end of a long pole.

2. In Domesday it is called *cathedra stercoris*, and is described as *cathedra in quo rixose mulieres sedentes aquis demergebantur*, and seems to be no other than what has more recently been called a ducking or cucking stool. Bracton writes it *tymborella*, of which perhaps tumbrel is a corruption. It was sometimes also called a *trebucket*, from the stool or bucket in which the prisoner was placed when put down into the water being fixed to the end of a tree or piece of timber. Lord Coke, however, says it properly signifies a dung-cart, and that every lord of a leet or market ought to have a pillory and tumbrel, and that the leet could be forfeited for the want of either.

3. This antique punishment was also inflicted upon bakers, brewers, and other transgressors of the sumptuary laws, who were placed upon such a stool and immerged *in stercore*,—that is, in filthy water. By a statute of Henry III., in the year 1250, entitled the statute of the pillory and tumbrel, a baker or brewer offending against the assize of bread or of malt shall suffer bodily punishment; that is, a baker in the pillory and a brewer to the tumbrel, *pistor patiatur collistrigium braciatrix trebucetum*.

The last attempt on record, by legal process, seems to have been on the 27th of April, 1745, of which we find the following account in the London Evening Post of that day. "Last week a woman that keeps the Queen's Head alehouse, at Kingston in Surrey, was ordered by the court to be ducked for scolding, and was accordingly placed in a chair and ducked in the river Thames, under Kingston bridge, in the presence of two thousand or three thousand people." The statute authorizing such punishments was finally repealed by a statute of 1 Victoria, in 1837.

TUN. A measure of wine or oil, containing four hogsheads.

TUNGREVE (Sax. *tungardeva, i.e. villæ præpositus*). A reeve or bailiff. Spelman, Gloss.; Cowel.

One who in estates, which we call manors, sustains the character of master, and in his stead disposes and arranges every thing. *Qui in villis (quæ dicimus maneriis) domini personam sustinet, ejusque vice omnia disponit atque moderatur.*

TURBARY. In English Law. A right to dig turf; an easement.

TURNKEY. A person under the superintendence of a jailer, whose employment is to open and fasten the prison-doors and to prevent the prisoners from escaping.

It is his duty to use due diligence; and he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

TURNPIKE. A gate set across a road, to stop travellers and carriages until toll is paid for passage thereon. In the United States, turnpike-roads are often called turnpikes: just as mail-coach, hackney-coach, stage-coach, are shortened to mail, hack, and stage. Encyc. Am.

TURNPIKE-ROAD. A road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment. 6 Mees. & W. Exch. 428; 1 Railw. Cas. 665; 22 Eng. L. & Eq. 113; 16 Pick. Mass. 175.

2. Turnpike-roads are usually made by corporations under legislative authority; and, the roads being deemed a public use, such corporations are usually armed with the power to take private property for their construction, upon making just compensation. In the execution of this power, they are bound to a strict compliance with the terms upon which it is given, and are subject to the rules which govern the exercise of the right of eminent domain under the constitutions of the several states. 7 Dan. Ky. 81; 3 Humphr. Tenn. 456; 6 Ohio, 15; 10 *id.* 396; 25 Penn. St. 229; 18 Ga. 607; 19 *id.* 427. In estimating the damages to be awarded for lands taken for a turnpike-road, the rule is to allow the value of the land and its improvements, deducting therefrom the benefits from the road and the additional value given by it to the remaining property. 20 Penn. St. 91, 95, 97. The legislature may authorize the conversion of an existing highway into a turnpike-road, 11 Vt. 198; 18 Conn. 32; 3 Barb. N. Y. 459; 4 Humphr. Tenn. 467, without any pecuniary equivalent to the owner of the fee, such road still remaining a public highway. 2 Ohio St. 419. Under the power to take land for this purpose, the corporation may take land for a toll-house and a cellar under it and a well for the use of the family of the toll-keeper. 9 Pick. Mass. 109. A turnpike-road being a highway, any obstruction placed thereon renders the author of it liable as for a public nuisance. 10 Pick. Mass. 175; 8 Wend. N. Y. 555.

3. Turnpike companies, so long as they continue to take toll, are bound to use ordinary care in keeping their roads in suitable repair, and for any neglect of this duty are liable to an action on the case for the damages to any person specially injured thereby, 6 Johns. N. Y. 90; 7 Conn. 86; 11 Wend. N. Y. 597; 11 Ohio, 197; 6 N. H. 147; 10 Pick. Mass. 35; 18 *id.* 357; 9 Penn. St. 20; 5 Ind. 286; 11 Vt. 531; 22 *id.* 119; 23 *id.* 104; 24 *id.* 480; 1 Spence, N. J. 323; and to an indictment on the part of the public. 11 Wend. N. Y. 597; 10 Yerg. Tenn. 525; 4 Ired. No. C. 16; 10 Humphr. Tenn. 97; 26 Ala. N. S. 88; 1 Harr. N. J. 222; 9 Barb. N. Y. 161; 2 Gray, Mass. 58.

The law of travel upon turnpike-roads is the same as upon ordinary roads, except as regards the payment of tolls. If there be any ambiguity in the authority granted to a turnpike company to take toll, it will be construed rather in favor of the public than of the grantee. 2 Barnew. & Ad. 792; 2 Mann. & G. 134. Travellers are liable for toll though they avoid the gates, 2 Root, Conn. 524; 10 Vt. 197; but not for travel between the gates without passing the same. 2 B. Monr. Ky. 30; 10 Ired. No. C. 30; 11 Vt. 381. Exemptions from toll are construed most liberally in favor of the community. Angell, Highw. § 359.

4. A road or turnpike laid out by an individual or by the selectmen of the town to facilitate the evasion of toll by travellers upon a turnpike-road will entitle the turnpike company to an action on the case for the damages, or to an injunction ordering the same to be closed. 10 N. H. 133; 13 *id.* 28; 18 Conn. 451; 8 Humphr. Tenn. 286; 1 Johns. Ch. N. Y. 315; 12 Barb. N. Y. 553. And see 4 Johns. Ch. N. Y. 150; 5 *id.* 101. And such company is entitled to compensation for the injury to their franchise by a highway which intersects their road at two distinct points and thereby enables travellers to evade the payment of tolls, though such highway be regularly established by the proper authorities to meet the necessities of public travel. 1 Barb. N. Y. 286. But see 2 N. H. 199; 10 *id.* 133; 12 La. Ann. 649.

If a turnpike company abuses its powers, or fails to comply with the terms of its charter, it is liable to be proceeded against by *quo warranto* for the forfeiture of its franchise. 23 Wend. N. Y. 193, 223, 254; 1 Zabr. N. J. 9; 2 Swann, Tenn. 282.

TURPIS CAUSA (Lat.). A base or vile consideration, forbidden by law, which makes the contract void: as, a contract the consideration of which is the future illegal cohabitation of the obligee with the obligor.

TURPITUDE (Lat. *turpitudo*, from *turpis*, base). Every thing done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude.

TUTELA (Lat.). A power given by the civil law over a free person to defend him when by reason of his age he is unable to defend himself. Women by the civil law

could only be tutors of their own children. A child under the power of his father was not subject to tutelage, because not a free person, *caput liberum*. D. lib. 26, tit. 1, ff. *de tutelis;* Inst. lib. 1, tit. 13, *de tutelis;* Inst. lib. 3, tit. 28, *de obligationibus quæ ex quasi cont. nascuntur*. Novellæ, 72. 94. 155. 118.

Legitima tutela was where the tutor was appointed by the magistrate. Leg. 1, D. ff. *de leg. tut.*

Testamentaria tutela was where the tutor was appointed by will. D. lib. 26, tit. 2, ff. *de testament. tut.;* C. lib. 5, tit. 28, *de testament. tut.;* Inst. lib. 1, tit. 14, *qui testamento tutores dari possunt.*

TUTOR. **In Civil Law.** One who has been lawfully appointed to the care of the person and property of a minor.

By the laws of Louisiana, minors under the age of fourteen years, if males, and under the age of twelve years, if females, are, both as to their persons and their estates, placed under the authority of a tutor. La. Civ. Code, art. 263. Above that age, and until their majority or emancipation, they are placed under the authority of a curator. *Id.*

TUTOR ALIENUS (Lat.). **In English Law.** The name given to a stranger who enters into the lands of an infant within the age of fourteen, and takes the profits.

He may be called to an account by the infant and be charged as guardian in socage. Littleton, s. 124; Coke, Litt. 89 *b*, 90 *a;* Hargrave, Tracts, n. 1.

TUTOR PROPRIUS (Lat.). The name given to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus*.

TUTORSHIP. The power which an individual, *sui juris*, has to take care of the person of one who is unable to take care of himself. Tutorship differs from curatorship. See PROCURATOR; PROTUTOR.

TUTRIX (Lat.). A woman who is appointed to the office of a tutor.

TWELVE TABLES, LAWS OF THE. Laws of ancient Rome, composed in part from those of Solon and other Greek legislators, and in part from the unwritten laws and customs of the Romans.

These laws first appeared in the year of Rome 303, inscribed on ten plates of brass. 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 all the Roman law, the original source of the jurisprudence of the greatest part of Europe.

See a fragment of the Law of the Twelve Tables in Coop. Justinian, 656; Gibbon, Rome, c. 44; CODE, § 27.

TWELVEMONTH, in the singular, includes the whole year, but in the plural twelve months of twenty-eight days each. 6 Coke, 62; 2 Sharswood, Blackst. Comm. 140, n.

TWICE IN JEOPARDY. See JEOPARDY.

TYBURN TICKET. **In English Law.** A certificate given to the prosecutor of a felon to conviction.

By the 10 & 11 Will. III. c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or ward where the felony shall have been committed. Bacon, Abr. *Constable* (C).

TYRANNY. The violation of those laws which regulate the division and the exercises of the sovereign power of the state. It is a violation of its constitution.

TYRANT. The chief magistrate of the state, whether legitimate or otherwise, who violates the constitution to act arbitrarily, contrary to justice. Toullier, tit. prél. n. 32.

The terms tyrant and usurper are sometimes used as synonymous, because usurpers are almost always tyrants: usurpation is itself a tyrannical act, but, properly speaking, the words usurper and tyrant convey different ideas. A king may become a tyrant, although legitimate, when he acts despotically; while a usurper may cease to be a tyrant by governing according to the dictates of justice.

This term is sometimes applied to persons in authority who violate the laws and act arbitrarily towards others. See DESPOTISM.

U.

UBERRIMA FIDES (Lat. most perfect good faith). A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made: for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 317; 3 Kent, Comm. 283, 4th ed.

UKAAS, UKASE. The name of a law or ordinance emanating from the czar of Russia.

ULLAGE. **In Commercial Law.** The amount wanting when a cask on being gauged is found only partly full.

ULTIMATUM (Lat.). The last proposition made in making a contract, a treaty, and the like: as, the government of the United States has given its *ultimatum*, has made the

last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute.

ULTIMUM SUPPLICIUM (Lat.). The last or extreme punishment; the penalty of death.

ULTIMUS HÆRES (Lat.). The last or remote heir; the lord. So called in contradistinction to the *hæres proximus* and the *hæres remotior*. Dalrymple, Feud. Princ. 110.

ULTRA VIRES (Lat.). The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

2. As a general rule, such acts are void, and impose no obligations upon the corporation although they assume the form of contracts; inasmuch as all persons dealing with a corporation, especially in the state or country in which and under whose laws it was created, are chargeable with notice of the extent of its chartered powers. It is otherwise as to laws imposing restraints upon it not contained in its charter where the contract is made or the transaction takes place without the limits of the state or country under whose laws the corporation exists. 8 Barb. N. Y. 233.

If, however, the corporation receives any money or other valuable consideration under such a transaction or contract, it is not doubted that upon rescinding or repudiating the act or contract under which it was paid or delivered it could be recovered back in an appropriate action. 22 N. Y. 25; 14 Penn. St. 81.

3. So, too, the artificial body—the corporation—is liable to be proceeded against by *quo warranto* for the usurpation of powers in its name by its officers and agents, and its charter may be taken away as a penalty for permitting such acts,—the defence of a want of power to bind the corporation not being available in such cases, since it would lead to entire corporate irresponsibility. 7 Wend. N. Y. 31; 1 Blackf. Ind. 267.

Many of the adjudged cases have held that contracts beyond the powers of a corporation were not only void for that reason, but illegal and incapable of being enforced at law or in equity, as against public policy; but the authorities are not uniform. 11 C. B. 775; 4 Ell. & B. 397; 5 Hou. L. Cas. 331; 22 Conn. 502; 21 How. 442; 22 N. Y. 277.

The more general opinion would seem to be that such contracts cannot be enforced by action, or in virtue of the equity jurisdiction to compel a specific performance. See Opinion of Selden, J., in the case last cited.

4. A court of equity, at the suit of the stockholders of the corporation, will restrain the commission of acts beyond the corporate power, by injunction operating upon the individual officers and directors as well as the corporation. This is now an acknowledged head of equity jurisdiction. Redfield, Railw. 400, § 4; 4 Railw. Cas. 513; 6 *id.* 289; 10 Beav. Rolls, 1; 12 *id.* 339.

Acquiescence for any considerable time in the exercise of excessive powers, after they come to the knowledge of the stockholders, would, however, be a decisive objection to such a remedy. 19 Eng. L. & Eq. 7.

Upon the general subject see, also, 21 Eng. L. & Eq. 319; 22 Law Journ. Q. B. 69; Shelford, Railw. 246, 251 *et seq.*; Pierce, Railroad Law, 395 *et seq.*

ULTRONEUS WITNESS. In Scotch Law. A witness who offers his testimony without being regularly cited. The objection only goes to his credibility, and may be removed by a citation at any time before the witness is sworn. See Bell, Dict. *Evidence.*

UMPIRAGE. The decision of an umpire. This word is used for the judgment of an umpire, as the word award is employed to designate that of arbitrators.

UMPIRE. A person selected by two or more arbitrators who cannot agree as to the subject-matter referred to them, for the purpose of deciding the matter in dispute. Sometimes the term is applied to a single arbitrator selected by the parties themselves. Kyd, Awards, 6, 75, 77; Caldwell, Abr. 38; Dane, Abr. Index; 3 Viner, Abr. 93; Comyns, Dig. *Arbitrament* (F); 4 Dall. 271, 432; 4 Scott, N. S. 378; Bouvier, Inst. Index. The jurisdiction of the umpire and arbitrators cannot be concurrent: if the arbitrators make an award, it is binding; if not, the award of the umpire is binding. T. Jones, 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versâ*. 6 Harr. & J. Md. 403. Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award. 2 Johns. N. Y. 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice. 11 East, 367; 12 Metc. Mass. 293; 1 Harr. & J. Md. 362, note. If an umpire refuse to act, another may be appointed *toties quoties*. 11 East, 367. See 2 Saund. 133 *a*, note.

UNA VOCE (Lat.). With one voice; unanimously.

UNALIENABLE. Incapable of being sold.

Things which are not in commerce, as, public roads, are in their nature unalienable. Some things are unalienable in consequence of particular provisions in the law forbidding their sale or transfer: as, pensions granted by the government. The natural rights of life and liberty are unalienable.

UNANIMITY (Lat. *unus*, one, *animus*, mind). The agreement of all the persons concerned in a thing, in design and opinion.

Generally, a simple *majority* of any number of persons is sufficient to do such acts as the whole number can do: for example, a majority of the legislature can pass a law; but there are some cases in which unanimity is required: for example, a traverse jury composed of twelve individuals cannot decide an issue submitted to them unless they are unanimous.

UNCERTAINTY. That which is unknown or vague. See CERTAINTY.

UNCIA TERRÆ (Lat.). This phrase often occurs in charters of the British kings, and denotes some quantity of land. It was twelve *modii*, each *modius* possibly one hundred feet square. Mon. Angl. tom. 3, pp. 198, 205.

The twelfth part of the Roman *as*. Dess. Dict. du Dig. *As*. The *as* was used to express an integral sum: hence *uncia* for one-twelfth of any thing, commonly one-twelfth of a pound, *i.e.* an ounce. *Id.*; 2 Sharswood, Blackst. Comm. 462, note m.

UNCONSCIONABLE BARGAIN. A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 4 Bouvier, Inst. n. 3848.

UNCONSTITUTIONAL. That which is contrary to the constitution.

When an act of the legislature is repugnant or contrary to the constitution, it is, *ipso facto*, void. 2 Pet. 522; 12 Wheat. 270; 3 Dall. 286; 4 *id.* 18.

The courts have the power, and it is their duty, when an act is unconstitutional, to declare it to be so; but this will not be done except in a clear case; and, as an additional guard against error, the supreme court of the United States refuses to take up a case involving constitutional questions, when the court is not full. 9 Pet. 85.

UNCORE PRIST (L. Fr. still ready). **In Pleading.** A plea or replication that the party pleading is still ready to do what is required. Used in connection with the words *tout temps prist*, the whole denotes that the party always has been and still is ready to do what is required, thus saving costs where the whole cause is admitted, or preventing delay where it is a replication, if the allegation is made out. 3 Sharswood, Blackst. Comm. 303.

UNDE NIHIL HABET. See DOWER.

UNDERLEASE. An alienation by a tenant of a part of his lease, reserving to himself a reversion: it differs from an assignment, which is a transfer of all the tenant's interest in the lease. 3 Wils. 234; W. Blackst. 766. And even a conveyance of the *whole* estate by the lessee, reserving to himself the rent, with a power of re-entry for non-payment, was held to be not an assignment, but an underlease. Strange, 405. In Ohio it has been decided that the transfer of a part only of the lands, though for the whole term, is an underlease. 2 Ohio, 216. In Kentucky, such a transfer, on the contrary, is considered as an assignment. 4 Bibb, Ky. 538. See LEASE; ASSIGNMENT.

UNDER-TENANT. One who holds by virtue of an underlease. See SUB-TENANT.

UNDERTAKING. An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. 5 East, 17; 2 Leon. 224, 225; 4 Barnew. & Ald. 595.

UNDERTOOK. Assumed; promised. This is a technical word which ought to be inserted in every declaration of assumpsit charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability or would be implied in evidence. Bacon, Abr. *Assumpsit* (F); 1 Chitty, Plead. 88, note p.

UNDER-TUTOR. In Louisiana. In every tutorship there shall be an under-tutor whom it shall be the duty of the judge to appoint at the time letters of tutorship are certified for the tutor.

It is the duty of the under-tutor to act for the minor whenever the interest of the minor is in opposition to the interest of the tutor. La. Civ. Code, art. 300, 301; 1 Mart. La. N. S. 462; 9 Mart. La. 643; 11 La. 189; Pothier, Des Personnes, partie prém. tit. 6, s. 5, art. 2. See PROCURATOR; PROTUTOR.

UNDERWRITER. In Insurance. The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer.

UNDIVIDED. Held by the same title by two or more persons, whether their rights are equal as to value or quantity, or unequal.

Tenants in common, joint-tenants, and partners hold an undivided right in their respective properties until partition has been made. The rights of each owner of an undivided thing extend over the whole and every part of it, *totum in toto, et totum in qualibet parte*. See PARTITION; PER MY ET PER TOUT.

UNICA TAXATIO (Lat.). **In Practice.** The ancient language of a special award of *venire*, where of several defendants one pleads, and one lets judgment go by default, whereby the jury who are to try and assess damages on the issue are also to assess damages against the defendant suffering judgment by default. Lee, Dict.

UNIFORMITY OF PROCESS. In English Law. An act providing for uniformity of process in personal actions in his majesty's courts of law at Westminster. 2 Will. IV. c. 39, 23d May, 1832; 3 Chitty, Stat. 494.

UNILATERAL CONTRACT. In Civil Law. When the party to whom an

engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758; Code Nap. 1103. A loan of money and a loan for use are of this kind. Pothier, Obl. part 1, c. 1, s. 1, art. 2; Leç. Elémen. § 781.

UNINTELLIGIBLE. That which cannot be understood.

When a law, a contract, or will is unintelligible, it has no effect whatever. See CONSTRUCTION, and the authorities there referred to.

UNIO PROLIUM (Lat. union of offspring). A species of adoption used among the Germans, which takes place when a widower having children marries a widow who also has children. These parents then agree that the children of both marriages shall have the rights to their succession, as those which may be the fruits of their marriage. Leç. Elém. § 187.

UNION. A popular term for the United States of America: as, the Union must and shall be preserved.

UNITED STATES OF AMERICA. The nation occupying the territory between British America on the north, Mexico on the south, the Atlantic Ocean and Gulf of Mexico on the east, and the Pacific Ocean on the west; being the republic whose organic law is the constitution adopted by the people of the thirteen states which declared their independence of the government of Great Britain on the fourth day of July, 1776.

2. When they are said to constitute one nation, this must be understood with proper qualifications. Our motto, *E pluribus unum*, expresses the true nature of that composite body, by which foreign nations are regarded and in which they look on us. No state can enter into a treaty, nor make a compact with any foreign nation, nor grant letters of marque or reprisal. Art. 1, § 10; art. 4, § 4. To foreigners we present a compact unity, an undivided sovereignty. No state can do a national act nor legally commit the faith of the Union.

In our inter-state and domestic relations we are far more a complex body. In these we are for some purposes one. We are so as far as our constitution makes us one, and no further; and under this we are so far a unity that one state is not foreign to another. Art. 4, § 2. A constitution, according to the original meaning of the word, is an organic law. It includes the organization of the government, the grant of powers, the distribution of these powers into legislative, executive, and judicial, and the names of the officers by whom these are exercised. And with these provisions a constitution, properly so called, terminates. But ours goes further. It contains restrictions on the powers of the government which it organizes.

The migration or importation of any description of persons (and this relates purely to the importation of slaves from Africa) shall not be prohibited prior to the year 1808.

The writ of *habeas corpus*, the great instrument in defence of personal liberty against the encroachment of the government, shall not be suspended but in case of rebellion or invasion, and when the public safety requires it. No bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury where there is not a regular appropriation; no title of nobility shall be granted; and no person holding office shall receive a present from any foreign government. Art 1, § 9. To these, which are in the original constitution, may be added the *eleven* first amendments. These, as their character clearly shows, had their origin in a jealousy of the powers of the general government. All are designed more effectually to guard the rights of the people, and would properly, together with the restrictions in the original constitution, have a place in a bill of rights. Any act or law of the United States in violation of these, with whatever formality enacted, would be null and void, as an *excess* of power.

3. The restrictions on state sovereignty, besides those which relate to foreign nations, are that no state shall coin money, emit bills of credit, make any thing but gold and silver a tender in the payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. These prohibitions are absolute. But without the consent of congress no state shall lay any duties on imports or exports, or any duty on tonnage, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state, or engage in war unless actually invaded or in imminent danger of being so.

What constitutes a duty on exports or imports has been a matter of grave doubt in the supreme court. Whether a tax on passengers introduced from foreign countries, 7 How. 286, or pilot laws enacted by a state, 12 How. 299, be an interference with the exclusive power of the United States to regulate commerce, may be a subject on which men may pause. But whatever these restrictions are, they operate on all states alike, and if any state law violates them the law is void. Of these violations we have various examples; and without any legislation of congress the supreme court has declared them so. 6 Cranch, 100; 4 Wheat. 122, 316, 518; 16 How. 304.

The United States have certain powers, the principal of which are enumerated in art. 1, § 8, running into seventeen specific powers. Others are granted to particular branches of the government: as, the treaty-making power to the president and senate. These have an equal effect in all the states, and so far as an authority is vested in the government of the Union or in any department of it, and so far as the states are prohibited from the exercise of certain powers, so far in our domestic affairs we are a unity.

Within these granted powers the sovereignty of the United States is supreme. The constitution, and the laws made in pursuance of it, and all treaties, are the supreme law of the land. Art. 6. And they not only govern in their words, but in their meaning. If the sense is ambiguous or doubtful, the United States, through their courts, in all cases where the rights of an individual are concerned, are the rightful expositors. For without the authority of explaining this meaning the United States would not be sovereign.

4. In these matters, particularly in the limitation put on the sovereignty of the states, it has been sometimes said that the constitution executes itself. This expression may be allowed; but with as much propriety these may be said to be laws which the people have enacted themselves, and no laws of congress can either take from, add to, or confirm them. They are rights, privileges, or immunities which are granted by the people, and are beyond the power of congress or state legislatures; and they require no law to give them force or efficiency. The members of congress are exempted from arrest, except for treason, felony, and breach of the peace, in going to and returning from the

seat of government. Art. 1, § 6. It is obvious that no law can affect this immunity. On these subjects all laws are purely nugatory, because if they go beyond or fall short of the provisions of the constitution, that may always be appealed to. An individual has just what that gives him,—no less and no more. It may be laid down as a universal rule, admitting of no exception, that when the constitution has established a disability or immunity, a privilege or a right, these are precisely as that instrument has fixed them, and can be *neither augmented nor curtailed* by any act or law either of congress or a state legislature. We are more particular in stating this principle because it has sometimes been forgotten both by legislatures and theoretical expositors of the constitution.

It has been justly thought a matter of importance to determine from what source the United States derive their authority. 4 Wheat. 402. When the constitution was framed, the people of this country were not an unformed mass of individuals. They were united into regular communities under state governments, and to these had confided the whole mass of sovereign power which they chose to intrust out of their own hands. The question here proposed is whether our bond of union is a compact entered into by the states, or the constitution is an organic law established by the people. To this question the preamble gives a decisive answer: *We, the people*, ordain and establish this constitution. The members of the convention which formed it were indeed appointed by the states. But the government of the states had only a *delegated power*, and, if they had an inclination, had no authority to transfer the allegiance of the people from one sovereign to another. The great men who formed the constitution were sensible of this want of power, and recommended it to the people themselves. They assembled in their own conventions and adopted it, acting in their original capacity as individuals, and not as representing states. The state governments are passed by in silence. They had no part in making it, and, though they have certain duties to perform, as, the appointment of senators, are properly not parties to it. The people in their capacity as sovereign made and adopted it; and it binds the state governments without their consent. The United States as a whole, therefore, emanates from the people, and not from the states, and the constitution and laws of the states, whether made before or since the adoption of that of the United States, are subordinate to it and the laws made in pursuance of it.

5. It has very truly been said that out of the mass of sovereignty intrusted to the states was carved a part and deposited with the United States. But this was taken by the people, and not by the states as organized communities. The people are the fountain of sovereignty. The whole was originally with them as their own. The state governments were but trustees acting under a derived authority, and had no power to delegate what was delegated to them. But the people, as the original fountain, might take away what they had lent and intrust it to whom they pleased. They had the whole title, and, as absolute proprietors, had the right of using or abusing,—*jus utendi et abutendi*.

A consequence of great importance flows from this fact. The laws of the United States act directly on individuals, and they are directly and not mediately responsible through the state governments. This is the most important improvement made by our constitution over all previous confederacies. As a corollary from this, if not more properly a part of it, the laws act only on states through individuals. They are supreme over persons and cases, but do not touch the states but through them. 1 Wheat. 368. If a state passes an *ex post facto* law, or passes a law impairing the obligation of contracts, or makes any thing but gold or silver a tender in payment of debts, congress passes no law which touches the state: it is sufficient that these laws are void, and when a case is brought before court it, without any law of congress, will declare them void. They give no person an immunity, nor deprive any of a right. Again: should a state pass a law declaring war against a foreign nation, grant letters of marque and reprisals, arm troops or keep ships of war in time of peace, individuals acting under such laws would be responsible to the United States. They might be treated and punished as traitors or pirates. But congress would and could pass no law against the state; and for this simple reason, because the state is sovereign. And it is a maxim consecrated in public law as well as common sense and the necessity of the case, that a sovereign is answerable for his acts only to his God and to his own conscience.

The constitution and laws made in pursuance of it,—that is, laws within their granted powers,—and all treaties, are the supreme law of the land, art. 6; and the judicial power, art. 3, § 1, gives to the supreme court the right of interpreting them. But this court is but another name for the United States, and this power necessarily results from their sovereignty; for the United States would not be truly sovereign without their interpretation as well as the letter of the law governed. But this power of the court is confined to cases brought before them, and does not embrace principles independent of these cases. They have no power analogous to that of the Roman prætor of declaring the meaning of the constitution by edicts. Any opinion, however strongly expressed, has no authority beyond the reasoning by which it is supported, and binds no one. But the point embraced in the case is as much a part of the law as though embraced in the letter of the law or constitution, and it binds public functionaries, whether of the states or United States, as well as private persons; and this of necessity, as there is no authority above a sovereign to which an appeal can be made.

6. Another question of great practical importance arose at an early period of our government. The natural tendency of all concentrated power is to augment itself. Limitations of authority are not to be expected from those to whom power is intrusted; and such is the infirmity of human nature that those who are most jealous when out of power and seeking office are quite as ready practically to usurp it as any other. A general abrogation commonly precedes a real usurpation, to lull suspicion if for no other purpose. When the constitution was new, and before it had been fully considered, this diversity of opinion was not unnatural, and was the subject of earnest argument, but is, we think, now settled, and rightly, both on technical reasoning and on that of expediency. It is between incidental and constructive or implied powers. The government of the United States is one of delegated power. No general words are used from which a general power can be inferred. Incidental and implied are sometimes used as synonymous; but in accurate reasoning there is a plain distinction between them, and the latter in common use comes nearer to constructive than to incidental.

The interpretation of powers is familiar to courts of justice, as a great part of landed property in England and much in this country is held under powers. A more frequent example is that of common agency, as every agent is created by a power. Courts whose professed object is to carry into effect the intentions of parties have, on this subject, established general rules. Among these no one is more immovably fixed than this, that the interpretation is strict and not liberal. 2 Kent, Comm

617; 4 *id.* 330. But this strictness does not exclude incidental powers. These are included in a general and express power, both in the common and technical use of language. To take a familiar example. A merchant of Philadelphia or Boston has a cargo of tea arrive at New York, and by letter authorizes his correspondent to sell it. This is the whole extent of the power. But it necessarily and properly includes that of advertising, of removing and exhibiting the goods, etc. But it would not authorize the sale of sugar, a horse, and much less a store or real estate. These powers are not incidental to the general power, nor included in it. Or we may take an example directly from the constitution itself. The United States has power "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." This includes the power to create and appoint all inferior officers and to do all subordinate acts necessary and proper to execute the general power: as, to appoint assessors, collectors, keepers and disbursers of the public treasures. Without these subordinate powers the general power could not be executed. And when there is more than one mode by which this general power may be executed, it includes all. The agent is not confined to any one, unless a particular mode is pointed out. 4 Wheat. 410. All that the constitution requires is that it should be necessary and proper. One consequence of this doctrine is that there must be a power expressly granted as a stock to bear this incidental power, or otherwise it would be ingrafted on nothing.

7. A constructive power is one that is inferred, not from an express power, but from the general objects to be obtained from the grant, and, perhaps, in private powers sometimes from the general language in which they are granted. The broad distinction between them may be illustrated by two cases that came before the United States Court. The first is one we have already quoted, 2 Wheat. 317. The question in that case was whether the act incorporating the Bank of the United States was constitutional, or whether it lay beyond the limits of the delegated powers and was, therefore, merely void as usurped or an excess of power. The authority to create a corporation is nowhere expressly given, and if it exists it must be sought as incidental to some power that is specifically granted. The court decided that it was incidental to that of laying taxes as a keeper and disburser of the public treasure. This power could be executed only by the appointment of agents; and the United States might as well create an agent for receiving, keeping, and disbursing the public money as appoint a natural person or an artificial one already created. In the case of Osborne *vs.* The United States Bank, 9 Wheat. 859, 860, the general question was presented again, and reargued, and the court reaffirmed their former decision, but, more distinctly than before, added an important qualification. They might not only create an artificial person, but clothe it with such powers and qualities as would enable it with reasonable convenience to perform its specific duties. The taxes are collected at one end of the country and paid out at another, and the bank instead of removing the specie might pay it where collected, and repay themselves by purchasing a bill of exchange in another place, and this could be conveniently and economically done only by a power of dealing in exchange generally, which when reduced to its last analysis is merely buying specie at one place and paying for it at another. It is in this way, and this only, that the bank gets its general power of dealing in exchange,—that it is essential and proper to enable it to perform its principal duty, that of transferring the funds of the United States. Thus, the authority to create a bank is incidental to that of receiving, keeping, and paying out the taxes, and is comprehended under the specific power. The argument is principally derived from Hamilton's report on a bank, which proved satisfactory to Washington, as that of Chief-Justice Marshall has to the public at large.

8. This is very different from a constructive power which is inferred not as included in any special grant, but from the general tenor of the power and the general objects to be obtained. The objects of the constitution are stated in the preamble, and they are to promote the common weal. But this is followed by the grant of specific powers. And it is the dictate of common sense as well as technical reasoning that this object is to be obtained by the due exercise of these powers. Where these fall short, none are granted; and if they are inadequate, the same consequence follows. No one would infer from a power to sell a ship one to sell a store, though the interest of the principal would thereby be promoted. The general power to regulate commerce is useful, and it is given, and it may be carried to its whole extent by having incidental powers ingrafted upon it. A general power to regulate the descent and distribution of intestate estates and the execution and proofs of wills would be on many accounts useful, but it is not granted. The utility of a power is never a question. It must be expressly granted, or incidental to an express power,—that is, necessary and proper to carry into execution one expressly granted,—*or it does not exist.*

The other illustrative case is that of 16 Pet. 607–679. It will be found on a careful examination that in this a constructive power only is claimed. The only point involved in the case was the constitutionality of the statute of Pennsylvania under which Prigg was indicted as a kidnapper. The court decided this to be unconstitutional; and here its judicial functions properly terminated. But to arrive at this conclusion it was deemed necessary to determine that the general power of arresting and returning fugitives from labor and service was intrusted to the United States. It was not pretended that this power was expressly given, nor that it was incidental to any that was expressly given,—that is, conducive or proper to the execution of such a power. The court say that "in the exposition of this part of the constitution we shall limit ourselves to the considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature." 16 Pet. 610. They do not, as in McCulloch's case, quote the express authority to which this is incidental; but a general argument is offered to prove that this power is most safely lodged with the United States, and that, therefore, it has been placed there *exclusively*. If the canon of criticism which we have endeavored to establish, and which is generally admitted, is correct, the existence of such a power cannot be inferred from its utility.

9. It will be seen, also, that this case stands in strong contrast with that of Martin *vs.* Hunter, 1 Wheat. 304–326, in which the opinion was delivered by the same judge. This was on the validity of the twenty-fifth section of the judiciary act, authorizing an appeal from a final judgment of a state court to the supreme court of the United States; and perhaps in no case has the extent of the powers granted by the constitution been more fully and profoundly examined. In this case the court say that "the government of the United States can claim no powers which are not granted by the constitution; and the powers actually granted must be such as are *expressly given, or given by necessary implication;*"—that is, as the reasoning of the court in the whole opinion proves, such as are included in the express powers, and are necessary, are

proper to carry that into execution. And such is the uniform language of the court whenever this question has been presented. We think it may be averred as a principle that admits of no exception, sanctioned at once by the supreme court, by the artificial reason of the law, and by common sense, that the United States exercise only a delegated and *have no constructive power*, and that these must be sought in an express grant or be necessarily incidental to it.

10. We have seen that the constitution of the United States and the laws made in pursuance of it are the supreme law of the land, and that of the true meaning of these the supreme court, which is nothing else than the United States, is the rightful expositor. This necessarily results from their sovereignty. But the United States government is one of delegated powers; and nothing is better established, both by technical reasoning and common sense, than this,—that a delegate can exercise only that power which is delegated to him. All acts beyond are simply void, and create no obligation. It is a maxim also of constitutional law that the powers of sovereignty not delegated to the United States are reserved to the states. But in so complex an affair as that of government, controversies will arise as to what is given and what is reserved,—doubts as to the dividing line. When this is the case, who is to decide? This is a difficulty which the convention did not undertake to settle.

To avoid all controversy as far as possible, the plainest words in granting powers to the United States were used which the language affords. Still further to preclude doubts, the convention added, at the close of the seventeen powers expressly given, this clause: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Art. 1, § 8. This clause contains no grant of power. But in the Articles of Confederation, which was a compact between the states as independent sovereignties, the word EXPRESSLY was used; and a doubt troubled congress how far incidental powers were included. Articles of Confederation, art. 2. This clause was introduced to remove that doubt. It covered incidental, but not constructive, powers.

11. Strange as it may appear, those who wanted larger powers granted to the United States, and, in the language of that day, thought that things must be worse before they could be better, and those who honestly feared that too much power was granted, both fixed their eyes on this clause; and perhaps no part of the constitution gave greater warmth to the controversy than this. To disarm the designing and counteract the fears of the timid, the tenth amendment was offered by the friends of the constitution. But so jealous were parties of each other that it was offered in the convention of Massachusetts by Governor Hancock, who favored and had the confidence of the opposition, though it was in the handwriting of Mr. Parsons, afterwards chief-justice. Life of Chief-Justice Parsons. That amendment is in these words: "The powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or the people." Were the words of the original constitution and the amendment both stricken out, it would leave the true construction unaltered. Story, Const. § 1232. Both are equally nugatory in fact; but they have an important popular use. The amendment formally admits that certain rights are reserved to the states, and these rights must be sovereign.

We have seen that, within their limited powers, the United States are the natural expositors of the constitution and laws; that when a case affecting individual rights arises, the supreme court stands for the United States, and that they have the sole right to explain and enforce the laws and constitution. But their power is confined to the facts before them, and they have no power to explain them in the form of an ediot to affect other rights and cases. Beyond these powers the states are sovereign, and their acts are equally unexaminable. Of the separating line between the powers granted and the powers withheld, the constitution provides no judge. Between sovereigns there can be no common judge but an arbiter mutually agreed upon. If that power is given to one party, that may draw all power to itself, and it establishes a relation not of equal sovereignties, but of sovereign and subject. On this subject the constitution is silent. The great men who formed it did not undertake to solve a question that in its own nature is insoluble. Between equals it made neither superior, but trusted to the mutual forbearance of both parties. A larger confidence was placed in an enlightened public opinion as the final umpire. The people parcelled out the rights of sovereignty between the states and the United States, and they have a natural right to determine what was given to one party and what to the other. To this enlightened public opinion an appeal may be made, and a peaceful solution of the question may be obtained without recourse to the *ultima ratio regum*.

UNITY. An agreement or coincidence of certain qualities in the title of a joint-estate or an estate in common.

In a joint-estate there must exist four unities: that of *interest*, for a joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life and the other for years: that of *title*, and, therefore, their estates must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period, as well as by one and the same title; and, lastly, the unity of *possession:* hence joint-tenants are seised *per my et per tout*, or by the *half* or *moiety* and by *all:* that is, each of them has an entire possession as well of every *parcel* as of the *whole*. 2 Blackstone, Comm. 179–182; Coke, Litt. 188.

Coparceners must have the unities of interest, title, and possession.

In tenancies in common, the unity of possession is alone required. 2 Sharswood, Blackst. Comm. 192; 2 Bouvier, Inst. nn. 1861–1883. See ESTATE IN COMMON; ESTATE IN JOINT-TENANCY; JOINT-TENANTS; TENANT IN COMMON; TENANTS, JOINT.

UNITY OF POSSESSION. This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement incumbers, or the servient estate, in such case the easement is extinguished. 3 Mas. C. C. 172; Poph. 166; Latch, 153. And see Croke Jac. 121. But a distinction has been made between a thing that has being by prescription, and one that has its being *ex jure naturæ:* in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a watercourse, the unity will not extinguish it. Pothier, Contr. 166.

By the Civil Code of Louisiana, art. 801, every servitude is extinguished when the estate to which it is due and the estate owing it are united in the same hands. But it is necessary that the whole of the two estates should belong to the same proprietor; for if the owner of one estate only acquires the other in part or in common with another person, confusion does not take effect. See MERGER.

UNIVERSAL LEGACY. In Civil Law. A testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease. La. Civ. Code, art. 1599; Code Civ. art. 1003; Pothier, Donations testamentaires, c. 2, s. 1, § 1.

UNIVERSAL PARTNERSHIP. The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Pothier, Du Contr. de Société, n. 29.

In Louisiana, universal partnerships are allowed; but property which may accrue to one of the parties after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void. La. Civ. Code, art. 2800. See PARTNERSHIP.

UNIVERSAL REPRESENTATION. In Scotch Law. The heir universally represents his ancestor, *i.e.* is responsible for his debts. Originally, this responsibility extended only to the amount of the property to which he succeeded; but afterwards certain acts on part of the heir were held sufficient to make him liable for all the debts of the ancestor. Bell, Dict. *Passive Titles.*

UNIVERSITAS JURIS (Lat.). **In Civil Law.** A quantity of things of various kinds, corporeal and incorporeal, taken together as a whole, *e.g.* an estate. It is used in contradistinction to *universitas facti*, which is a whole made up of *corporeal* units. Mackeldey, Civ. Law, § 149.

UNIVERSITAS RERUM (Lat.). **In Civil Law.** Several things not mechanically united, but which, taken together, in some legal respects are regarded as one whole. Mackeldey, Civ. Law, § 149; fr. 30, pr. D. 41. 3.

UNIVERSITY. The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians, by this term is understood a corporation.

UNJUST. That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. 1 Toullier, tit. prél. n. 5; Aust. Jur. 276, n.; Hein. Leç. El. § 1080.

UNKNOWN. When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 2 East, Pl. Cr. 651; 1 Hale, Pl. Cr. 512; Holt, 596; 8 Carr. & P. 773; 14 Mass. 218; 12 Pick. Mass. 174. See INDICTMENT.

UNLAW. In Scotch Law. A witness was formerly inadmissible who was not worth the king's *unlaw*,—*i.e.* the sum of £10 Scots, then the common fine for absence from court and for small delinquencies. Bell, Dict.

UNLAWFUL. That which is contrary to law.

There are two kinds of contracts which are unlawful,—those which are void, and those which are not. When the law expressly prohibits the transaction in respect of which the agreement is entered into, and declares it to be void, it is absolutely so. 3 Binn. Penn. 533. But when it is merely prohibited, without being made void, although unlawful it is not void. 12 Serg. & R. Penn. 237; Chitty, Contr. 230; 23 Am. Jur. 1–23; 1 Mod. 35; 8 East, 236, 237; 3 Taunt. 244; Hob. 14. See CONDITION; VOID.

UNLAWFUL ASSEMBLY. In Criminal Law. A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence. If they move forward towards its execution, it is then a rout; and if they actually execute their design, it amounts to a riot. 4 Blackstone, Comm. 140; 1 Russell, Crimes, 254; Hawkins, Pl. Cr. c. 65, s. 9; Comyns, Dig. *Forcible Entry* (D 10); Viner, Abr. *Riots, etc.* (A).

UNLAWFULLY. In Pleading. This word is frequently used in indictments in the description of the offence: it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word, 1 Mood. Cr. Cas. 339; but it is unnecessary whenever the crime existed at common law and is manifestly illegal. 1 Chitty, Crim. Law, *241; Hawkins, b. 2, c. 25, s. 96; 2 Rolle, Abr. 82; Bacon. Abr. *Indictment* (G 1); 1 Ill. 199; 2 *id.* 120.

UNLIQUIDATED DAMAGES. Such damages as are unascertained. In general, such damages cannot be set off. No interest will be allowed on unliquidated damages. 1 Bouvier, Inst. n. 1108. See LIQUIDATED DAMAGES.

UNQUES (L. Fr.). Still; yet. This barbarous word is frequently used in pleas: as, Ne unques executor, Ne unques guardian, Ne unques accouple; and the like.

UNSOLEMN WAR. That war which is not carried on by the highest power in the states between which it exists, and which lacks the formality of a declaration. Gro-

tius, de Jure Bel. et Pac. l. 1, c. 3, § 4. A formal declaration to enemy is now disused, but there must be a formal public act proceeding from the competent source: with us, it has been said, it must be an act of congress. 1 Kent, Comm. 55; 1 Hill, N. Y. 409.

UNSOUND MIND, UNSOUND MEMORY. These words have been adopted in several statutes, and sometimes indiscriminately used, to signify not only lunacy, which is periodical madness, but also a permanent adventitious insanity as distinguished from idiocy. 1 Ridg. Parl. Cas. 518; 3 Atk. Ch. 171.

2. The term *unsound mind* seems to have been used in those statutes in the same sense as insane; but they have been said to import that the party was in some such state as was contradistinguished from idiocy and from lunacy, and yet such as made him a proper subject of a commission to inquire of idiocy and lunacy. Shelford, Lun. 5; Ray, Med. Jur. prél. § 8; 8 Ves. Ch. 66; 12 *id.* 447; 19 *id.* 286; 1 Beck, Med. Jur. 573; Coop. Ch. Cas. 108; 2 Maddock, Chanc. Pract. 731, 732.

UNSOUNDNESS. See CRIB-BITING; ROARING; SOUNDNESS.

UNWHOLESOME FOOD. Food not fit to be eaten; food which if eaten would be injurious.

Although the law does not, in general, consider a sale to be a warranty or goodness of the quality of a personal chattel, yet it is otherwise with regard to food and liquor when sold for consumption. 1 Rolle, Abr. 90, pl. 1, 2.

UPLIFTED HAND. When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as, when he does not swear upon the gospel, but upon Almighty God, he is requested to hold up his hand.

UPPER BENCH. The king's bench was so called during Cromwell's protectorate, when Rolle was chief-justice. 3 Sharswood, Blackst. Comm. 202.

URBAN. Relating to a city; relating to houses.

2. It is used in this latter sense in the Civil Code of Louisiana, articles 706 and 707. All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

3. The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water. See 3 Toullier, 441; Pothier, Introd. au tit. 13 de la Coutume d'Orléans, n. 2; Introd. Id. n. 2.

URBS (Lat.). **In Civil Law.** A walled city. Often used for *civitas*. Ainsworth, Dict. It is the same as *oppidum*, only larger. *Urbs*, or *urbs aurea*, meant Rome. DuCange. In the case of Rome, *urbs* included the suburbs. Dig. 50. 16. 2. pr. It is derived from *urbum*, a part of the plough by which the walls of a city are first marked out. Ainsworth, Dict.

USAGE. Long and uniform practice.

In its most extensive meaning, this term includes custom and prescription, though it differs from them; in a narrower sense, it is applied to the habits, modes, and course of dealing which are observed in trade generally, as to all mercantile transactions, or to some particular branches of trade.

2. Usage of trade does not require to be immemorial to become established: if it be known, certain, uniform, reasonable, and not contrary to law, it is sufficient. But evidence that a thing has been done in few instances does not establish a usage. 3 Watts, Penn. 178; 3 Wash. C. C. 150; 1 Gall. C. C. 443; 5 Binn. Penn. 287; 9 Pick. Mass. 426; 4 Barnew. & Ald. 210; 7 Pet. 1; 2 Wash. C. C. 7.

3. The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts of an equivocal character, may be ascertained; and the meaning of words and doubtful expressions may become known. 2 Metc. Mass. 65; 13 Pick. Mass. 182; 2 Sumn. C. C. 569; 2 Gill & J. Md. 136; Story, Ag. § 77; 2 Kent, Comm. 662, 3d ed.; 5 Wheat. 326; 2 Carr. & P. 525; 3 Barnew. & Ald. 728; Park. Ins. 30; 1 Marshall, Ins. 186, n. 20; 1 Caines, N. Y. 45; Gilp. 356, 486; 1 Edw. Ch. N. Y. 146; 1 Nott & M'C. So. C. 519; 15 Mass. 433; 1 Hill, So. C. 270; Wright, Ohio, 573; Pet. C. C. 230; 5 Ohio, 436; 1 Pet. 25, 89; 2 *id.* 148; 6 *id.* 715; 15 Ala. 123; 1 Hall, N. Y. 612; 9 Mass. 155; 9 Wheat. 582; 11 *id.* 430.

Courts will not readily adopt these usages, because they are not unfrequently founded in mistake. 2 Sumn. C. C. 377.

See 3 Chitty, Pr. 55; Story, Confl. Laws, § 270; 1 Dall. 178; Vaugh. 169, 383; Bouvier, Inst. Index.

USANCE. In Commercial Law. The time which, by usage or custom, is allowed in certain countries for the payment of a bill of exchange. Pothier, Contr. du Change, n. 15.

The time of *one*, *two*, or *three* months after the date of the bill, according to the custom of the places between which the exchanges run.

Double or treble is double or treble the usual time, and half usance is half the time. Where it is necessary to divide a month upon a half usance (which is the case when the usance is for one month or three), the division, notwithstanding the difference in the length of the months, contains fifteen days.

USE. A confidence reposed in another, who was made tenant of the land, or terre tenant, that he would dispose of the land according to the intention of the *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilbert, Uses, 1; Bacon, Law Tr. 150, 306; Cornish, Uses, 13; 1 Fonblanque, Eq. 363; 2 *id.* 7; Saunders, Uses, 2; Coke, Litt. 272 *b*; 1 Coke, 121; 2 Blackstone, Comm. 328; 2 Bouvier, Inst. n. 1885 *et seq.*

A right in one person, called the *cestui que use*, to take the profits of land of which another has the legal title and possession, together with the duty of defending the same and of making estates thereof according to the direction of the *cestui que use*.

Uses were derived from the *fidei commissa* of the Roman law. It was the duty of a Roman magistrate, the prætor *fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2. 23. 2. They were introduced into England by the ecclesiastics in the reign of Edward III., before 1377, for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissa*, and binding in conscience. To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the Statute of 27 Henry VIII. c. 10, commonly called the Statute of Uses, or, in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc. to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc. of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use,—that is, it conveys the possession to the use, and transfers the use to the possession, and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity. 2 Blackstone, Comm. 333; 1 Saund. 254, note 6.

A modern use has, therefore, been defined to be an estate of right which is acquired through the operation of the statute of 27 Henry VIII. c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate, and when it may not is denominated a use, with a term descriptive of its modification. Cornish, Uses, 35.

The common-law judges decided, in the construction of this statute, that a use could not be raised upon a use, Dy. 155 (A), and that on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as were *seised* to the use of others, it did not extend to a term of years, or other chattel interests, of which a termor is not seised but only possessed. Bacon, Law Tr. 335; Poph. 76; Dy. 369; 2 Blackstone, Comm. 336. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts. 1 Maddock, Chanc. Pract. 448, 450.

Uses and trusts are often spoken of together by the older and some modern writers, the distinction being those trusts which were of a permanent nature and required no active duty of the trustee being called uses; those in which the trustee had an active duty to perform, as, the payment of debts, raising portions, and the like, being called *special* or *active* trusts, or simply trusts. 1 Spence, Eq. Jur. 448.

For the creation of a use, a consideration either *valuable*, as, money, or *good*, as relationship in certain degrees, was necessary. Crompt. 49 *b*; 3 Swanst. Ch. 591; 7 Coke, 40; Plowd. 298; 17 Mass. 257; 4 N. H. 229, 397; 14 Johns. N. Y. 210. See RESULTING USE. The property must have been *in esse*, and such that seisin could be given. Crabb, Real Prop. §§ 1610–1612; Croke Eliz. 401. Uses were alienable, although in many respects resembling choses in action, which were not assignable at common law, Cornish, Uses, 19; 2 Blackstone, Comm. 331: when once raised, it might be granted or devised in fee, in tail, for life, or for years. 1 Spence, Eq. Jur. 455.

The effect of the Statute of Uses was much restricted by the construction adopted by the courts: it practically resulted, it has been said, in the addition of these words, *to the use*, to every conveyance. Williams, Real Prop. 133. The intention of the statute was to destroy the estate of the feoffee to use, and to transfer it by the very act which created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use*. A very full and clear account of the history and present condition of the law of uses is given by Professor Washburn, 2 Real Prop. 91–156, which is of particular value to the American student. Consult, also, Spence, Eq. Jur.; Cornish, Uses; Bacon, Law Tracts; Greenleaf, Cruise, Dig.

In Civil Law. A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from usufruct, which is a right not only to use, but to enjoy. 1 Browne, Civ. Law, 184; Leçons Elém. du Dr. Civ. Rom. §§ 414, 416.

USE AND OCCUPATION. When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation. 1 Munf. Va. 407; 2 Aik. Vt. 252; 7 J. J. Marsh. Ky. 6; 4 Day, Conn. 228; 13 Johns. N. Y. 240, 297; 4 Hen. & M. Va. 161; 15 Mass. 270; 2 Whart. Penn. 42; 10 Serg. & R. Penn. 251.

The action for use and occupation is founded not on a privity of estate, but on a privity of contract, 3 Serg. & R. Penn. 500; Cam. & N.

No. C. 19: therefore it will not lie where the possession is tortious. 2 Nott & M'C. So. C. 156; 3 Serg. & R. Penn. 500; 6 N. H. 298; 6 Ohio, 371; 14 Mass. 95.

USEFUL. That which may be put into beneficial practice.

The Patent Act of Congress of July 4, 1836, sect. 6, in describing the subjects of patents, mentions "new and *useful* art," and "new and *useful* improvement." To entitle the inventor to a patent, his invention must, to a certain extent, be beneficial to the community, and not be for an unlawful object, or frivolous, or insignificant. 1 Mas. C. C. 182; 1 Pet. C. C. 322; Baldw. C. C. 303; 14 Pick. Mass. 217; Paine, C. C. 203. See PATENT.

USHER. This word is said to be derived from *huissier*, and is the name of an inferior officer in some English courts of law. Archbold, Pract. 25.

USQUE AD MEDIUM FILUM VIÆ (Lat.). To the middle thread of the way. See AD MEDIUM FILUM; 7 Gray, Mass. 22, 24.

USUCAPTION. In Civil Law. The manner of acquiring property in things by the lapse of time required by law.

It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merlin, Répert. *Prescription;* Ayliffe, Pand. 320; Wood, Inst. 165; Leçons Elém. du Dr. Rom. § 437; 1 Browne, Civ. Law, 264, n.; Vattel, b. 2, c. 2, § 140.

USUFRUCT. In Civil Law. The right of enjoying a thing the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

Perfect usufruct is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied: as, a house, a piece of land, animals, furniture, and other movable effects.

Imperfect or quasi usufruct is of things which would be useless to the usufructuary if he did not consume and expend them or change the substance of them: as, money, grain, liquors. In this case the alteration may take place. La. Civ. Code, art. 525 *et seq.;* 1 Browne, Civ. Law, 184; Pothier, Tr. du Douaire, n. 194: Ayliffe, Pand. 319; Pothier, Pand. tom. 6, p. 91; Leçons El. du Dr. Civ. Rom. § 414; Inst. lib. 2, t. 4; Dig. lib. 7, t. 1, l. 1; Code, lib. 3, t. 33.

USUFRUCTUARY. In Civil Law. One who has the right and enjoyment of a usufruct.

Domat, with his usual clearness, points out the duties of the usufructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care* of the things subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground-rent; and to keep the thing in repair at his own expense. Lois Civ. liv. 1, t. 11, s. 4. See ESTATE FOR LIFE.

USURPATION. Torts. The unlawful assumption of the use of property which belongs to another; an interruption or the disturbing a man in his right and possession. Tomlin, Law Dict.

According to Lord Coke, there are two kinds of usurpation: *first*, when a stranger, without right, presents to a church and his clerk is admitted; and, *second*, when a subject uses a franchise of the king without lawful authority. Coke, Litt. 277 *b*.

In Governmental Law. The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

USURPED POWER. In Insurance. An invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable. These words can not mean the power of a common mob. 2 Marshall, Ins. 390. By an article of the printed proposals which are considered as making a part of the contract of insurance, it is provided that "no loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

USURPER. One who assumes the right of government by force, contrary to and in violation of the constitution of the country, Toullier, Droit Civ. n. 32.

USURY. The excess over the legal rate charged to a borrower for the use of money. Originally, the word was applied to all interest reserved for the use of money; and in the early ages taking such interest was not allowed.

2. There must be a loan in contemplation of the parties, 7 Pet. 109; 1 Iowa, 252; 22 Barb. N. Y. 118; 14 N. Y. 93; 6 Ind. 232, and if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank-notes, to be repaid in sound funds, to enable the borrower to pay a debt he owed, dollar for dollar, it was considered as not being usurious. 1 Meigs, Tenn. 585. The *bonâ fide* sale of a note, bond, or other security at a greater discount than would amount to legal interest is not, *per se*, a loan, although the note may be indorsed by the seller and he remains responsible. 9 Pet. 103; 1 Iowa, 30; 6 Ohio St. 19; 29 Miss. 212; 10 Md. 57. But if a note, bond, or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan, 2 Johns. Cas. N. Y. 60; 3 *id.* 66; 15 Johns. N. Y. 44; 2 Dall. Penn. 92; 12 Serg. & R. Penn. 46; 6 Ohio St. 19; 4 Jones, No. C. 399; and a sale of a man's own note indorsed by himself will be

considered a loan. It is a general rule that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction. 7 Pet. 109; 10 Md. 57. On the contrary, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious. 15 Mass. 96.

3. There must be a contract for the return of the money at all events; for if the return of the principal with interest, or the principal only, depend upon a contingency, there can be no usury; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law. As the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious. Ord, Usury, 23, 39, 64; 2 Pet. 537.

To constitute usury, the borrower must not only be obliged to return the principal at all events, but more than lawful interest: this part of the agreement must be made with full consent and knowledge of the contracting parties. 3 Bos. & P. 154. When the contract is made in a foreign country, the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater than the amount fixed by law in this. Story, Confl. of Laws, § 292.

4. The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury; but it must plainly appear that the commissions are charged for other services, and are not merely a device to evade the law. 2 Pat. & H. Va. 110. Commission may be charged by a merchant for accepting a bill, 18 Ark. 456; but a commission charged in addition to interest for advancing money is usurious. 12 La. Ann. 660. Where a banker discounts a bill payable in a distant place, he may charge the usual rate of exchange on that place; but if such charge be an excess of the usual rate it will be considered a device to cover usurious interest. 3 Ind. 53. Where the payment of usurious interest depends upon the will of the borrower, as, where he may discharge himself from it by prompt payment of the principal, it is considered in the light of a penalty, but does not make the contract usurious. 6 Cow. N. Y. 653; 9 Paige, Ch. N. Y. 339. Where a gratuity is given to influence the making of a loan, it will be considered usurious. 7 Ohio St. 387. Where a bank which by its charter is prohibited from making loans at over six per cent. makes one at seven, such a contract being prohibited, the courts will not assist the bank in enforcing it. 26 Barb. N. Y. 595. The burden of proof is on the person pleading usury. 22 Ga. 193. Usury is a personal defence, and cannot be set up by any other person than the borrower or his heirs. 8 Ind. 352. A mere mistake in the calculation of interest will not be considered usury. Hill & D. N. Y. 34. Where parties exchange their notes for mutual accommodation, and both or either are sold at a higher than the legal rate, they are usurious. Hill & D. N. Y. 65.

The common practice of reserving the interest on negotiable paper at the time of making the loan, although its effect is to cause the borrower to pay more than the legal rate, is very ancient, having been practised by the Athenian bankers, and is sanctioned by law. Sewell, Banking.

See, generally, Comyns, Dig.; Bacon, Abr.; Lilly, Reg.; Dane, Abr.; Petersdorff, Abr.; Viner, Abr.; Comyns, Usury, *passim;* 1 Pet. Index; Sewell, Banking; Blydenburg, Usury; Parsons, Notes & Bills; INTEREST.

UTAH. One of the territories of the United States. The act establishing the territory was approved Sept. 9, 1850. The territory consists of that portion of the territory of the United States "bounded west by the state of California, on the north by the territory of Oregon, on the east by the summit of the Rocky Mountains, on the south by the thirty-seventh parallel of north latitude." It is provided in the organic act that the United States may divide the territory into two or more, and that when admitted as a state the territory, or any portion of it, shall be received into the Union with or without slavery, as their constitution may provide at the time of their admission. 9 U. S. Stat. at Large, 453. The distribution of powers under the act is precisely the same as in the case of New Mexico. See NEW MEXICO.

UTERINE (Lat. *uter*). Born of the same mother.

UTI POSSIDETIS (Lat. as you possess). **In International Law.** A phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war.

UTRUBI. In Scotch Law. An interdict as to movables, by which the colorable possession of a *bonâ fide* holder is continued until the final settlement of a contested right: corresponding to *uti possidetis* as to heritable property. Bell, Dict.

UTTER. In Criminal Law. To offer; to publish.

To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be *passed* in order to complete the offence of uttering. 2 Binn. Penn. 338. It seems that reading out a document, although the party refuses to show it, is a sufficient uttering. Jebb, Cr. Cas. Ir. 282. See 1 East, Pl. Cr. 179; 2 *id.* 974; Leach, Cr. Cas. 251; 2 Starkie, Ev. 378; 1 Mood. Cr. Cas. 166; Russ. & R. Cr. Cas. 113; 1 Phillipps, Ev. Index; Roscoe, Crim. Ev. 301. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems, would not amount to an

attering. Russ. & R. Cr. Cas. 200. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates fraudulently, to induce the prosecutor to advance money to a third person for whom the defendant proposed to become a surety for its repayment, this was held to be an uttering within the statute. 2 Den. Cr. Cas. 475. And the rule there laid down is that a using of the forged instrument in some way, in order to get money or credit upon it, *or by means of it*, is sufficient to constitute an uttering.

UTTER BARRISTER. **In English Law.** Those barristers who plead without the bar, and are distinguished from benchers, or those who have been readers and who are allowed to plead within the bar, as the king's counsel are. The same as ouster barrister. See BARRISTER.

UXOR (Lat.). **In Civil Law.** A woman lawfully married.

V.

VACANCY. A place which is empty. The term is principally applied to cases where an office is not filled.

By the constitution of the United States, the president has the power to fill up vacancies that may happen during the recess of the senate. Whether the president can create an office and fill it during the recess of the senate, seems to have been much questioned. Story, Const. § 1553. See Sergeant, Const. Law, c. 31; 1 Ill. 70.

VACANT POSSESSION. A term applied to an estate which has been abandoned by the tenant: the abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered. 2 Chitty, Bail. 177; 2 Strange, 1064; Buller, Nisi P. 97; Comyn, Landl. & Ten. 507, 517.

VACANT SUCCESSION. An inheritance for which the heirs are unknown.

VACANTIA BONA (Lat.). **In Civil Law.** Goods without an owner. Such goods escheat.

VACATE. To annul; to render an act void: as, to vacate an entry which has been made on a record when the court has been imposed upon by fraud or taken by surprise.

VACATION. That period of time between the end of one term and beginning of another. During vacation, rules and orders are made in such cases as are urgent, by a judge at his chambers.

VACCARIA (from Lat. *vacca*, a cow). **In Old English Law.** A dairy-house. Coke, Litt. 5 *b*.

VADIUM MORTUUM (Lat.). A mortgage or *dead pledge:* it is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead or gone from the mortgagor. 2 Blackstone, Comm. 257; 1 Powell, Mortg. 4.

VADIUM VIVUM (Lat.). A species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of the land: it was so called because neither the money nor the lands were lost, and were not left in dead pledge, but this was a *living* pledge, for the profits of the land were constantly paying off the debt. Littleton, § 206; 1 Powell, Mortg. 3; Termes de la Ley.

VAGABOND. One who wanders about idly, who has no certain dwelling. The ordonnances of the French define a vagabond almost in the same terms. Dalloz, Dict. *Vagabondage*. See Vattel, liv. 1, § 219, n.

VAGRANT. A person who lives idly, without any settled home. A person who refuses to work, or goes about begging. This latter meaning is the common one in statutes punishing vagrancy. See 1 Wils. 331; 5 East, 339; 8 Term, 26.

VAGRANT ACT. **In English Law.** The statute 5 Geo. IV. c. 83, which is an act for the punishment of idle and disorderly persons. 2 Chitty, Stat. 145.

VAGUENESS. Uncertainty.

Certainty is required in contracts, wills, pleadings, judgments, and, indeed, in all the acts on which courts have to give a judgment, and if they be vague so as not to be understood, they are, in general, invalid. 5 Barnew. & C. 583; 1 Russ. & M. 116; 1 Chitty, Pract. 123. A charge of frequent intemperance and habitual indolence is vague and too general. 2 Mart. La. N. s. 530. See CERTAINTY; NONSENSE; UNCERTAINTY.

VALID (Lat. *validus*). Strong; effectual; of binding force. An act, deed, will, and the like, which has received all the formalities required by law, is said to be valid or good in law.

VALOR BENEFICIORUM (Lat.). **In**

Ecclesiastical Law. The value of every ecclesiastical benefice and preferment, according to which the first-fruits and tenths are collected and paid. The valuation by which the clergy are at present rated was made 26 Hen. VIII., and is commonly called The King's Books. 1 Sharswood, Blackst. Comm. 284*, note 5.

VALOR MARITAGII (Lat.). The amount forfeited under the ancient tenures by a ward to a guardian who had offered her a marriage without disparagement, which she refused. It was so much as a jury would assess, or as any one would give *bonâ fide*, for the value of the marriage. Littleton, 110.

A writ which lay against the ward, on coming of full age, for that he was not married by his guardian, for the *value of the marriage*, and this though no convenient marriage had been offered. Termes de la Ley.

VALUABLE CONSIDERATION. An equivalent in money or value for a thing purchased. See CONSIDERATION.

VALUATION. The act of ascertaining the worth of a thing. The estimated worth of a thing.

It differs from price, which does not always afford a true criterion of value; for a thing may be bought very dear or very cheap. In some contracts, as in the case of bailments or insurances, the thing bailed or insured is sometimes valued at the time of making the contract, so that, if lost, no dispute may arise as to the amount of the loss. 2 Marshall, Ins. 620; 1 Caines, N. Y. 80; 2 *id.* 30; Story, Bailm. §§ 253, 254; Park, Ins. 98; Weskett, Ins.; Phillipps, Ins. See POLICY.

VALUE. The utility of an object. The worth of an object in purchasing other goods. The first may be called value in use; the latter, value in exchange.

Value differs from price. The latter is applied to live cattle and animals: in a declaration, therefore, for taking cattle, they ought to be said to be of such a price; and in a declaration for taking dead chattels, or those which never had life, it ought to lay them to be of such a value. 2 Lilly, Abr. 629.

VALUE RECEIVED. A phrase usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it.

The expression value received, when put in a bill of exchange, will bear two interpretations: the drawer of the bill may be presumed to acknowledge the fact that he has received value of the payee, 3 Maule & S. 351; or when the bill has been made payable to the order of the drawer, it implies that value has been received by the acceptor. 5 Maule & S. 65. In a promissory note, the expression imports value received from the payee. 5 Barnew. & C. 360. See Parsons, Notes & B.

VALUED POLICY. A valued policy is one where the value has been set on the ship or goods insured, and this value has been inserted in the policy in the nature of liquidated damages, to save the necessity of proving it in case of loss. 1 Bouvier, Inst. n. 1230. See POLICY.

VANCOUVER'S ISLAND. An island situated on the western coast of North America, and constituting one of the colonial possessions of England.

It is situated between the parallels of 48° 17′ and 50° 55′ north latitude, and 123° 10′ and 128° 30′ west longitude. By a charter dated January 13, 1849, it was granted to the Hudson Bay Company in fee, with a privilege of re-purchase, in consideration of the yearly payment of seven shillings.

The government of the island is administered by a governor appointed by the crown on the nomination of the Hudson Bay Company, aided by a council of seven members likewise so appointed. The governor is empowered to divide the island into electoral districts, and to convene an assembly, fixing also the number of representatives, who are to be elected by the inhabitant freeholders of twenty acres. Mills, Col. Const. 219.

VARIANCE. In Pleading and Practice. A disagreement or difference between two parts of the same legal proceeding which ought to agree together. Variances are between the writ and the declaration, and between the declaration, or bill in equity, and the evidence.

Variance in matter of substance is fatal to the action, 4 Ala. 319; 1 Harr. Del. 474; 7 B. Monr. Ky. 271; 1 Ohio, 504; 10 Johns. N. Y. 141, and is ground for demurrer or arrest of judgment; 3 Den. N. Y. 356; 3 Brev. No. C. 42; 7 T. B. Monr. Ky. 290; see 12 N. H. 396; but if in matter of form merely, must be pleaded in abatement, 1 Ill. 298; 1 McLean, C. C. 319; 3 Brev. No. C. 42; 3 Ala. 741; 4 Ark. 71, 74, or special demurrer, 2 Hill, So. C. 585; and a variance between the allegations and evidence upon *some material* points only is as fatal as if upon all, 7 Taunt. 385, but, if it be merely formal or immaterial matter, will be disregarded. 7 Cranch, 408; 11 Ala. 542; Hard. Ky. 505; 2 Hill, So. C. 413. Slight variance from the terms of a written instrument which is professedly set out in the words themselves is fatal. 1 Hempst. Ark. 294.

VASSAL. In Feudal Law. The name given to the holder of a fief bound to perform feudal service: this word was then always correlative to that of lord, entitled to such service.

The vassal himself might be lord of some other vassal.

In after-times, this word was used to signify a species of slave who owed servitude and was in a state of dependency on a superior lord. 2 Blackstone, Comm. 53; Merlin, Répert.

VAVASOUR (diminutive from *vasalus*, or, according to Bracton, from *vas sortitus ad valitudinem*). One who was in dignity next to a baron. Britton, 109; Bracton, lib. 1, c. 8. One who held of a baron Encyc. Brit.

VECTIGALIA (Lat.). **In Roman Law.** Duties which were paid to the prince for the importation and exportation of certain merchandise. They differed from tribute, which was a tax paid by each individual. Code, 4. 61. 5. 13.

VEJOURS. An obsolete word, which signified viewers or experts.

VENAL. Something that is bought. The term is generally applied in a bad sense: as, a venal office is an office which has been purchased.

VENDEE. A purchaser; a buyer.

VENDITION. A sale; the act of selling.

VENDITIONI EXPONAS (Lat.). That you expose to sale.

In Practice. The name of a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states lands, which he has taken in execution by virtue of a *fieri facias*, and which remain unsold.

Under this writ the sheriff is bound to sell the property in his hands, and he cannot return a second time that he can get no buyers. Cowp. 406. And see 2 Saund. 47, 1; 2 Chitt. Bail, 390; Comyns, Dig. *Execution* (C 8); Graham, Pract. 359; 3 Bouvier, Inst. n. 3395.

VENDITOR REGIS (Lat.). **In Old English Law.** The king's salesman, or person who exposed to sale goods or chattels seized or distrained to answer any debt due to the king. Cowel. This office was granted by Edw. I. to Philip de Lordiner, but was seized into king's hands for abuse thereof. 2 Edw. II.

VENDOR. The seller; one who disposes of a thing in consideration of money.

VENDOR'S LIEN. An equitable lien allowed the vendor of land sold for the purchase-money, where the deed expresses, contrary to the fact, that the purchase-money is paid. Unless waived, the lien remains till the whole purchase-money is paid. 16 Ves. Ch. 329; 4 Russ. Ch. 336; 1 W. Blackst. 123; 2 P. Will. Ch. 291; 1 Jac. & W. Ch. 234; 1 Vern. Ch. 267.

The lien exists against all the world except *bonâ fide* purchasers without notice. 1 Johns. Ch. N. Y. 308; 9 Ind. 490; 2 Rob. Va. 475. If security is taken for the purchase-money, the court will look into the substance of the transaction and see if it was taken in lieu of the purchase-money. 3 Russ. Ch. 488. As a general rule, the lien does not prevail against creditors of purchaser. 7 Wheat. 46; 10 Barb. N. Y. 626. This lien is recognized in New York, New Jersey, Maryland, Mississippi, Missouri, Alabama, Arkansas, California, Georgia, Florida, Illinois, Indiana, Michigan, Kentucky, Tennessee, Texas, Virginia. But to have effect it must be expressly reserved in Ohio, and courts of the United States. In Pennsylvania, North and South Carolina, it has been exploded; in Vermont, abolished by statute. In Connecticut, Delaware, and Massachusetts, the question is in doubt. 1 Washburn, Real Prop. 508, n. 6. See LIEN.

VENIRE FACIAS (Lat.). That you cause to come.

In Practice. According to the English law, the proper process to be issued on an indictment for any petit misdemeanor, on a penal statute, is a writ called *venire facias*.

It is in the nature of a summons to cause the party to appear. 4 Blackstone, Comm. 18; 1 Chitty, Crim. Law, 351.

VENIRE FACIAS JURATORES (Lat.). (Frequently called *venire* simply.)

In Practice. The name of a writ directed to the sheriff, commanding him to cause to *come* from the body of the county, before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors in the said court. Stephen, Plead. 104; 2 Graydon, Forms, 314. And see 6 Serg. & R. Penn. 414; Comyns, Dig. *Enquest* (C 1), etc., *Pleader* (2 S 12, 3 O 20), *Process* (D 8); 3 Chitty, Pract. 797. See JURY.

VENIRE FACIAS DE NOVO (Lat.). **In Practice.** The name of a new writ of venire facias: this is awarded when, by reason of some irregularity or defect in the proceeding on the first venire, or the trial, the proper effect of the venire has been frustrated, or the verdict become void in law: as, for example, when the jury has been improperly chosen, or an uncertain, ambiguous, or defective verdict has been rendered. Stephen, Plead. 120; 1 Sellon, Pract. 150.

VENTE A REMERE. In French Law. A sale made, reserving a right to the seller to repurchase the property sold by returning the price paid for it.

The term is used in Canada and Louisiana. The time during which a re-purchase may be made cannot exceed ten years, and, if by the agreement it so exceed, it shall be reduced to ten years. The time fixed for redemption must be strictly adhered to, and cannot be enlarged by the judge, nor exercised afterwards. La. Civ. Code, art. 1545–1549.

The following is an instance of a *vente à réméré*. A sells to B, for the purpose of securing B against indorsements, with a clause that "whenever A should relieve B from such indorsements, without B's having recourse on the land, then B would reconvey the same to A for A's own use." This is a *vente à réméré*, and until A releases B from his indorsements the property is B's, and forms no part of A's estate. 7 Mart. La. N. s. 278. See 1 Mart. La. N. s. 528; 3 La. 153; 4 *id.* 142; Troplong, Vente, ch. 6; 6 Toullier, p. 257.

VENTER, VENTRE (Lat. the belly). The wife: for example, a man has three children by the first and one by the second venter. A child is said to be *in ventre sa mère* before it is born; while it is a fœtus.

VENTRE INSPICIENDO (Lat.). **In English Law.** A writ directed to the sheriff, commanding him that, in the presence of

twelve men, and as many women, he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and that he certify the same. It is granted in a case when a widow, whose husband had lands in fee-simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir. Croke Eliz. 506; Fleta, lib. 1, c. 15.

VENUE (L. Lat. *visnetum*, neighborhood. The word was formerly spelled *visne*. Coke, Litt. 125 *a*).

In Practice. The county in which the facts are alleged to have occurred, and from which the jury are to come to try the issue. Gould, Plead. c. 3, § 102; Archbold, Civ. Plead. 86; Cowp. 176; 1 How. 241. Some certain place must be alleged as the place of occurrence for each traverseable fact. Comyns, Dig. *Pleader* (C 20). Generally, in modern pleading, in civil practice, no special allegation is needed in the body of the declaration, the venue in the margin being understood to be the place of occurrence till the contrary is shown. 1 Hempst. 236. See statutes and rules of court of the various states, and Reg. Gen. Hil. T. 4 Hen. IV.

2. *In local actions* the true venue must be laid; that is, the action must be brought in the county where the cause of action arose, being that where the property is situated, in actions affecting real property, 2 Zabr. N. J. 204; and see 18 Ga. 719; and there can be no change of venue in such cases. 3 N. Y. 204. Thus, in actions on a lease at common law, founded on priority of contract, as debt or covenant by lessor or lessee, 1 Saund. 241 *b;* 3 Serg. & R. Penn. 500, venue is transitory, but when founded in privity of estate, as in case of assignment, the venue is local. 1 Saund. 257. By various early statutes, however, actions on leases have become generally transitory. In such action, some particular place, as, a town, village, or parish, must formerly have been designated. Coke, Litt. 125. But it is said to be no longer necessary except in replevin. 2 East, 503; 1 Chitty, Plead. 251. As to where the venue is to be laid in case of a change of county lines, see 18 Ga. 690; 16 Penn. St. 3.

In transitory actions the venue may be laid in any county the plaintiff chooses; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction. 1 Chitty, Plead. 244; Stephen, Plead. 306; Archbold, Civ. Plead. 86; 18 Ga. 690; 1 How. 241; 17 Pet. 245. In case the cause was to be tried in a different county from that in which the matter actually arose, the venue was anciently laid by giving the place of occurrence, with a scilicet giving the place of trial. 1 Chitty, Plead. 250; 1 How. 241; 3 Zabr. N. J. 279. See 1 Taunt. 380. In some cases, however, by statutes, the venue in transitory actions must be laid in the county where the matter occurred or where certain parties reside. 3 Sharswood, Blackst. Comm. 294. And generally, by statute, it must be in the county where one of the parties resides, when between citizens of the same state.

3. *In criminal proceedings* the venue must be laid in the county where the occurrence actually took place, 2 Russell, Crimes, 800; 4 Carr. & P. 363, and the act must be proved to have occurred in that jurisdiction. 2 Hawkins, Pl. Cr. c. 25, § 84; Archbold, Crim. Plead. 40, 95; 1 Starkie, Ev. 466; 26 Penn St. 513; 4 Tex. 450; 6 Cal. 202; 6 Yerg. Tenn. 364. Statement of venue in the margin and reference thereto in the body of an indictment is a sufficient statement of venue, 39 Me. 78; 4 Ind. 141; 8 Mo. 283; and see 20 Mo. 411; 39 Me. 291; and the venue need not be stated in the margin if it appears from the indictment. 5 Gray, Mass. 478; 25 Conn. 48; 2 McLean, C. C. 580.

Want of any venue is cause for demurrer. 1 Lutw. 235; 5 Mass. 94; or abatement, Comyns, Dig. *Abatement* (H 13); Archbold, Civ. Plead. 78; or arrest of judgment. 4 Tex. 450. So defendant may plead or demur to a wrong venue. 13 Me. 130. *Change* of venue may be made by the court to prevent, and not to cause, a defeat of justice, 3 Sharswood, Blackst. Comm. 294; 32 Eng. L. & Eq. 358; 20 Mo. 400; 2 Wisc. 397; 20 Ill. 259; 3 Zabr. N. J. 63; 3 Green, N. J. 63; both in civil, 7 Ind. 110; 31 Miss. 490; 27 N. H. 428, and criminal cases, 7 Ind. 160; 28 Ala. N. S. 28; 4 Iowa, 505; 5 Harr. Del. 512; and such change is a matter of right on compliance with the requirements of the law. 9 Tex. 358; 7 Ind. 110; 2 Wisc. 419; 15 Ill. 511; 8 Mo. 606. That such change is a matter of discretion with the court below, see 28 Ala. N. S. 28; 31 Miss. 490; 3 Cal. 410; 8 Ind. 439; 11 *id.* 481; 5 Harr. Del. 512; 13 La. Ann. 191.

VERAY. An ancient manner of spelling *vrai*, true.

In the English law there are three kinds of tenants: *veray*, or true *tenant*, who is one who holds in fee-simple; *tenant by the manner* (*q. v.*), who is one who has a less estate than a fee which remains in the reversioner; *veray tenant by the manner*, who is the same as tenant by the manner, with this difference only, that the fee-simple, instead of remaining in the lord, is given by him or by the law to another. Hammond, Nisi P. 394.

VERBAL. Parol; by word of mouth: as, verbal agreement; verbal evidence. Sometimes incorrectly used for oral.

VERBAL NOTE. In diplomatic language, a memorandum or note not signed, sent when an affair has continued a long time without any reply, in order to avoid the appearance of an urgency which perhaps the affair does not require, and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of prosecuting it any further, is called a *verbal note*.

VERBAL PROCESS. In Louisiana.

A written account of any proceeding or operation required by law, signed by the person commissioned to perform the duty, and attested by the signature of witnesses. See PROCÈS VERBAL.

VERDEROR (fr. French *verdeur*, fr. *vert* or *verd*, green; Law L. *viridarius*). An officer in king's forest; whose office is properly to look after the *vert*, for food and shelter for the deer. He is also sworn to keep the assizes of the forest, and receive and enroll the attachments and presentments of trespasses within the forest, and certify them to the swainmote or justice-seat. Cowel; Burn, Eccl. Law; Manwood, For. Law, part 1, p. 332.

VERDICT. In Practice. The unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause.

A *general* verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or defendant. Coke, Litt. 228; 4 Blackstone, Comm. 461. The jury may find such a verdict whenever they think fit to do so.

A *partial* verdict in a criminal case is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue.

The following are examples of this kind of a verdict, namely: when they acquit the defendant on one count and find him guilty on another, which is indeed a species of general verdict, as he is generally acquitted on one charge and generally convicted on another; when the charge is of an offence of a higher, and includes one of an inferior degree, the jury may convict of the less atrocious by finding a partial verdict. Thus, upon an indictment for burglary, the defendant may be convicted of larceny and acquitted of the nocturnal entry; upon an indictment for murder, he may be convicted of manslaughter; robbery may be softened to simple larceny; a battery into a common assault. 1 Chitty, Crim. Law, 638, and the cases there cited.

A *privy* verdict is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed, for the convenience of the jury, who, after having given it, separate. This verdict is of no force whatever; and this practice, being exceedingly liable to abuse, is seldom if ever allowed in the United States. The jury, however, are allowed in some states, in certain cases, to seal their verdict and return it into court, as, for example, where a verdict is agreed upon during the adjournment of the court for the day.

A *public* verdict is one delivered in open court. This verdict has its full effect, and unless set aside is conclusive on the facts, and, when judgment is rendered upon it, bars all future controversy, in personal actions. A private verdict must afterwards be given publicly in order to give it any effect.

A *special* verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. 1 Litt. Ky. 376; 1 Jer. 176; 4 Rand. Va. 504; 1 Hen. & M. Va. 235; 1 Wash. C. C. 499; 2 Mas. C. C. 31.

The jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: "that they are ignorant, in point of law, on which side they ought upon those facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, then they find vice versâ." This form of finding is called a *special verdict*. In practice they have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record; and the question of law, arising on the facts found, is argued before the court in banc, and decided by that court as in case of a demurrer. If either party be dissatisfied with their decision, he may afterwards resort to a court of error. Stephen, Plead. 113; 1 Archbold, Pract. 189; 3 Blackstone, Comm. 377; Bacon, Abr. *Verdict* (D, E).

There is another method of finding a special verdict: this is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judges or the court above on a *special case*, stated by the counsel on both sides, with regard to a matter of law. 3 Blackstone, Comm. 378. And see 10 Mass. 64; 11 *id.* 358. See, generally, Bouvier, Inst. Index.

VERIFICATION (Lat. *verum*, true, *facio*, to make). **In Pleading.** An averment by the party making a pleading that he is prepared to establish the truth of the facts which he has pleaded.

2. Whenever new matter is introduced on either side, the plea must conclude with the verification or averment, in order that the other party may have an opportunity of answering it. Carth. 337; 1 Lutw. 201; 2 Wils. 66; Dougl. 60; 2 Term, 576; 1 Saund. 103, n. 1; Comyns, Dig. *Pleader* (E). This applies only to pleas. Replications and subsequent proceedings for counts and avowries need not be verified. Coke, Litt. 362 *b*.

3. In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it: for example, when the matter pleaded is merely negative. Willes, 5; Lawes, Plead. 145. The reason of it is evident: a negative requires no proof; and it would, therefore, be impertinent or nugatory for the pleader, who pleads a negative matter, to declare his readiness to prove it.

The usual form of verification of a plea containing matter of fact is, "*And this he is ready to verify*," etc. See 1 Chitty, Plead. 537, 616; Lawes, Civ. Plead. 144; 1 Saund. 103, n. 1; Willes. 5; 3 Blackstone, Comm. 309.

In Practice. The examination of the truth

of a writing; the certificate that the writing is true. See AUTHENTICATION.

VERMONT. The name of one of the new states of the United States of America.

2. It was admitted by virtue of "An act for the admission of the State of Vermont into this Union," approved February 18, 1791, 1 Story, U. S. Laws, 169, by which it is enacted that the state of Vermont having petitioned the congress to be admitted a member of the United States, on the fourth day of March, one thousand seven hundred and ninety-one, the said state, by the name and style of "the state of Vermont," shall be received and admitted into this Union as a new and entire member of the United States of America.

The history of Vermont before its incorporation into the Union is of interest, because the soil of this state never composed a royal province, and was not governed as a territory of the United States. The territory which composes the present state of Vermont was claimed by both New York and New Hampshire; but, though lands were granted within the limits of the debatable ground by both provinces, yet the conflict of jurisdiction between them left the people of the New Hampshire Grants, New Connecticut, or Vermont (for the tract of country in question was known by these names indifferently), virtually independent of both, and they were self-governed from almost the commencement of the settlement of the Grants until the admission of the state into the Union in 1791. On the 15th of January, 1777, they declared their territory to be "a free independent jurisdiction, or state," and on the 2d of July in the same year a convention of delegates was assembled to frame a constitution.

3. A constitution was accordingly drawn up and approved by the convention, but was revised by the same body in the following December, and went immediately into effect. It was amended in 1786, 1793, 1828, 1836, and 1850. The freemen of the state elect, every seven years, by general ticket, a council of censors, consisting of thirteen persons, whose duty it is to inquire whether the constitution has been preserved inviolate during the last septenary, to propose such amendments to the constitution as they may deem necessary, and to call a convention to determine upon the expediency of adopting such amendments as may be proposed by the council of censors. No other mode of amending the constitution is provided. Const. § 43.

4. Every man of the full age of twenty-one years, who has resided in the state for the space of one whole year next before the election of representatives, is of a quiet and peaceable behavior, will take the oath of allegiance to the state, and, Art. Amend. § 1, is a natural born-citizen of any of the United States, or is naturalized, is entitled to all the privileges of a freeman of the state. Const. § 21.

The writ of habeas corpus is issuable of right, and cannot be suspended. Art. Amend. § 12.

By § 1 of the Bill of Rights prefixed to the frame of government, which by § 42 of the constitution is declared to be a part of that instrument, it is provided, among other things, that no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives at the age of twenty-one years, nor female, in like manner, after she arrives at the age of eighteen years, unless they are bound by their own consent after they arrive at such age, or bound by law for the payment of debt, damages, fines, costs, or the like. This clause is held by the courts to make females of full age, for all purposes whatsoever, at the age of eighteen years.

5. Absolute liberty of conscience and of worship, and absolute equality of rights, are secured to all persons without distinction of religious belief. Bill of Rights, § 3.

6. *The supreme legislative power* is exercised by a senate and the house of representatives, styled, collectively, "the General Assembly of the state of Vermont." The senate and the house of representatives have the like powers in all acts of legislation, and no "bill, resolution, or other thing" passed by the one can have the effect of a law without the concurrence of the other. Revenue bills must originate in the house, but amendments may be proposed in the senate. Neither house can, without the consent of the other, adjourn for more than three days, nor to any other place than that where the two houses are sitting; and in case of disagreement between the two houses respecting adjournment, the governor may adjourn them to such time as he thinks proper. Art. Amend. 3.

7. *The senate* is composed of thirty members, of the freemen of the county for which they are elected, who must have attained the age of thirty years, and who are annually elected, by ballot, by the freemen of each county respectively, according to an apportionment upon the basis of population, to be made by the legislature after each census of the United States, or state census taken for that purpose; but every county is to have at least one senator. Art. Amend. 23.

It has like powers as the house of representatives with respect to election, qualification, and expulsion of its members, election of its own officers, and making its own rules. A majority constitutes a quorum. The lieutenant-governor is president of the senate; but when he exercises the office of governor, or is absent, or the office of lieutenant-governor is vacant, the senate appoints one of its own numbers president *pro tempore*. The president of the senate has a casting vote, but no other.

It tries impeachments, and convicts upon the concurrence of two-thirds of the members present. Judgment in case of impeachment cannot extend further than to removal from office and disqualification to hold office of honor, trust, or profit under the state; but such judgment is not a bar to trial, judgment, and punishment according to law. Art. Amend. § 7.

8. *The house of representatives* "consists of persons most noted for wisdom and virtue" (Const. art. 2, § 8, 7), who are chosen by ballot, by the freemen of every town in the state, on the first Tuesday of September annually, one representative being chosen by each town, without regard to number of population. It has power to choose its own speaker and other officers, to sit on its own adjournments, except as above limited, to judge of the qualifications of its own members, expel members, but not for causes known to their constituents before their election, administer oaths and affirmations in matters depending before it, and impeach state criminals. Const. pt. 2, § 9 and Amend.

The legislative powers of the two houses extend to the preparation of bills and the enactment of the same into laws; the redress of grievances; the granting of acts of incorporation; the constituting of towns, boroughs, cities, and counties; the election of major-generals and brigadier-generals, secretary of state, and other officers not otherwise provided for; and they possess, generally, all other powers necessary for the legislature of a free and sovereign state; but they have no power to alter, abolish, or infringe any part of the constitution.

9. Every bill which has passed both houses is presented to the governor, and signed by him, if approved; if not, it is returned by him, with his objections in writing, to the house in which it originated, which shall proceed to reconsider the same. If passed again by a majority of that house, it is sent, with the objections, to the other house, and if approved by a majority of the members, it becomes a

law. But if the governor does not return a bill within five days after it is presented to him, it becomes a law, unless the two houses, by adjourning within three days after such presentation, prevent its return; in which case it does not become a law. Art. Amend. § 11.

10. *The supreme executive power* of the state is exercised by the governor, or, in case of his absence or disability, by the lieutenant-governor. The duties of the executive are as follows: Const. pt. 2, §§ 11, 27; Art. Amend. § 8. To commission all officers, and appoint officers where provision is not made by law or the constitution; to supply vacancies in offices; to correspond with other states, transact business with officers of government, civil and military, and to prepare such business as may appear necessary to lay before the general assembly; to grant pardons, and remit fines, in all cases whatsoever, except in treason and murder, in which it shall have power to grant reprieves, but not to pardon, until after the end of the next session of the assembly, and except in cases of impeachment, in which there shall be no remission or mitigation of punishment but by act of the legislature; to take care that the laws be faithfully executed; to expedite the execution of such measures as may be resolved upon by the general assembly; to draw upon the treasury for such sums as may be appropriated by the house of representatives; to lay embargoes, or prohibit the exportation of any commodity, for any time not exceeding thirty days, in the recess of the legislature only; to grant such licenses as shall be directed by law; and to call together the general assembly, when necessary, before the day to which it shall stand adjourned. The governor shall be captain-general and commander-in-chief of the forces of the state, but shall not command in person, except advised thereto by the senate, and then only so long as they shall approve thereof. And the lieutenant-governor shall, by virtue of his office, be lieutenant-general of all the forces of the state.

The Judiciary Power.

11. Courts of justice are maintained in every county of the state. All judicial officers are elected annually [the justice of the supreme court, at present, by the legislature]; assistant judges of the county court, by the freemen of their respective counties, Const. pt. 2, § 4; Art. Amend. § 14; judges of probate, by the freemen of their respective districts, Art. Amend. § 16; and justices of the peace, by the freemen of their respective towns. Art. Amend. §§ 5, 13, 15, 16, 18; Const. pt. 2, § 8, 10. Sheriffs and high-bailiffs, and state's attorneys, are elected annually by the freemen of the state, and the respective counties and towns, by ballot, on the first Tuesday in September.

12. *The Supreme Court* consists of one chief and two associate justices.

It has exclusive jurisdiction of all such petitions not triable by jury as may by law be brought before such court, and has power to issue and determine all writs of error, *certiorari*, mandamus, prohibition, and *quo warranto*, and writs to courts of inferior jurisdiction that may be necessary, and has appellate jurisdiction of all questions of law removed from the county courts.

The County Court consists of a chief judge, elected by the general assembly annually, one for each of the four circuits into which the state is divided for the purpose, and two assistant judges, elected in each county for the county. It has original and exclusive jurisdiction of all civil actions, except those cognizable by a justice of the peace, original jurisdiction of all criminal actions, and appellate jurisdiction in certain cases from justices of the peace. An action may be reviewed once at the next term of the court.

13. *Justices of the peace* are elected by the people of the various towns, for the term of one year. Every town may have one, and the larger towns more, those having a population of fifteen thousand or more being entitled to fifteen. They have jurisdiction in civil cases where the debt is not over one hundred dollars, in actions of trespass where the damages are not over twenty dollars, and in criminal matters where the fine is not more than ten dollars.

Probate courts are held by judges elected for one year by the electors of each of the probate districts. They have jurisdiction of the settlement of estates, appointment of guardians, granting letters of administration, admitting wills to probate, and the like. There is an appellate jurisdiction from this court to the county court, and in matters of law to the supreme court.

A *court of chancery* is held by the circuit judge of each circuit, with the powers generally of the English court of chancery. Two stated terms are held annually in each county.

VERSUS. Against: as, A B *versus* C D. This is usually abbreviated *v.* or *vs.*

VERT. Every thing bearing green leaves in a forest. Bacon, Abr. *Courts of the Forest*; Manwood, For. Law, 146.

VESSEL. In Maritime Law. A ship, brig, sloop, or other craft used in navigation. 1 Boulay-Paty, tit. 1, p. 100. See SHIP; PART-OWNER.

By an act of congress, approved July 29, 1850, it is provided that any person, not being an owner, who shall on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor for a term not exceeding ten years nor less than three years, according to the aggravation of the offence.

VEST. To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment. Fearne, Cont. Rem. 2. See Roper, Leg. 757; Comyns, Dig. *Vest*. Vern. Ch. 323, n.; 5 Ves. Ch. 511.

VESTED REMAINDER. An estate by which a present interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. 2 Bouvier, Inst. n. 1831. See REMAINDER.

VESTURE OF LAND. A phrase including all things, trees excepted, which grow upon the surface of the land and clothe it externally.

He who has the vesture of land has a right, generally, to exclude others from entering upon the superficies of the soil. Coke, Litt. 4 *b*; Hammond, Nisi P. 151. See 7 East, 200; 1 Ventr. 393; 2 Rolle, Abr. 2.

VETERA STATUTA (Lat.). The name of *vetera statuta*—ancient statutes—has been given to the statutes commencing with Magna

Charta, and ending with those of Edward II. Crabb, Eng. Law, 222.

VETITUM NAMIUM (Law Lat. *vetitum*, forbidden, *namium*, taking). Where the bailiff of a lord distrains beasts or goods of another, and the lord forbids the bailiff to deliver them when the sheriff comes to make replevin, the owner of the cattle may demand satisfaction in *placitum de vetito namio*. Coke, 2d Inst. 140; Record in *Thesaur. Scacc.*; 2 Sharswood, Blackst. Comm. 148.

VETO (Lat. I forbid). A term including the refusal of the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body, and the message which is usually sent, stating such refusal and the reasons therefor.

By the constitution of the United States government, the president has a power to prevent the enactment of any law, by refusing to sign the same after its passage, unless it be subsequently enacted by a vote of two-thirds of each house. U. S. Const. art. 1, § 7. When a bill is engrossed, and has received the sanction of both houses, it is transmitted to the president for his approbation. If he approves of it, he signs it. If he does not, he sends it, with his objections, to the house in which it originated, and that house enter the objections on their journal and proceeds to reconsider the bill. See Story, Const. § 878; 1 Kent, Comm. 239. Similar powers are possessed by the governors of many of the states.

The veto power of the British sovereign has not been exercised for more than a century. It was exercised once during the reign of Queen Anne. 10 Edinburgh Rev. 411; Parke, Lect. 126. But anciently the king frequently replied, *Le roy s'avisera*, which was in effect withholding his assent. In France the king had the initiative of all laws, but not the *veto*. See 1 Toullier, nn. 39, 42, 52, note 3.

VEXATION. The injury or damage which is suffered in consequence of the tricks of another.

VEXATIOUS SUIT. Torts. A suit which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant.

2. The *suit* is either a criminal prosecution, a conviction before a magistrate, or a civil action. The suit need not be altogether without foundation: if the part which is groundless has subjected the party to an inconvenience to which he would not have been exposed had the valid cause of complaint alone have been insisted on, it is injurious. 4 Taunt. 616; 4 Coke, 14; 1 Pet. C. C. 210; 4 Serg. & R. Penn. 19, 23.

To make it vexatious, the suit must have been instituted *maliciously*. As malice is not in any case of injurious conduct necessarily to be inferred from the total absence of probable cause for exciting it, and in the present instance the law will not allow it to be inferred from that circumstance, for fear of being mistaken, it casts upon the suffering party the *onus* of proving express malice. 2 Wills. 307; 2 Bos. & P. 129; Carth. 417. But see what Gibbs, C. J., says, in Berley *v.* Bethune. 5 Taunt. 583; see, also, 1 Pet. C. C. 210; 2 Browne, Penn. Apx. 42, 49; Add. Penn. 270.

3. It is necessary that the prosecution should have been carried on *without probable cause*. The law presumes that probable cause existed until the party aggrieved can show to the contrary. Hence he is bound to show the total absence of probable cause. 5 Taunt. 580; 1 Camp. 199. See 3 Dowl. Parl. Cas. 160; 1 Term, 520; Buller, Nisi P. 14; 4 Burr. 1974; 2 Barnew. & C. 693; 4 Dowl. & R. 107; 1 Gow, 20; 1 Wils. 232; Croke Jac. 194. He is also under the same obligation when the original proceeding was a civil action. 2 Wils. 307.

4. The *damage* which the party injured sustains from a vexatious suit for a crime is either to his person, his reputation, his estate, or his relative rights. *First*, whenever imprisonment is occasioned by a malicious unfounded criminal prosecution, the injury is complete although the detention may have been momentary and the party released on bail. Carth. 416. *Second*, when the bill of indictment contains scandalous aspersions likely to impair the reputation of the accused, the damage is complete. See 12 Mod. 210; 2 Barnew. & Ald. 494; 3 Dowl. & R. 669. *Third*, notwithstanding his person is left at liberty, and his character is unstained by the proceedings (as, where the indictment is for a trespass, Carth. 416), yet if he necessarily incurs expense in defending himself against the charge, he has a right to have his losses made good. 10 Mod. 148, 214; Gilb. 185. *Fourth*, if a master loses the services and assistance of his domestics in consequence of a vexatious suit, he may claim a compensation. Hammond, Nisi P. 275.

5. With regard to a damage resulting from a *civil* action, when prosecuted in a court of competent jurisdiction, the only detriment the party can sustain is the imprisonment of his person, or the seizure of his property; for, as to any expense he may be put to, this, in contemplation of law, has been fully compensated to him by the costs adjudged. 4 Taunt. 7; 1 Mod. 4; 2 *id.* 306. But where the original suit was *coram non judice*, the party, as the law formerly stood, necessarily incurred expense without the power of remuneration, unless by this action; because any award of costs the court might make would have been a nullity. However, by a late decision, such an adjudication was holden unimpeachable, and that the party might well have an action of debt to recover the amount. 1 Wils. 316. So that the law, in this respect, seems to have taken a new turn; and perhaps it would now be decided that no action can under any other circumstances but imprisonment of the person or seizure of the property be maintained for suing in an improper court. See Carth. 189.

See, in general, Bacon, Abr. *Action on the Case* (H); Viner, Abr. *Actions* (H c); Comyns, Dig. *Action upon the Case upon Deceit*; 5 Am. Law Journ. 514; Yelv. 105 *a*, note 2; Buller, Nisi P. 13, 3 Selwyn, Nisi

P. 535; Co. Litt. Day's ed. 161, n.; 1 Saund. 230, n. 4; 3 Sharswood, Blackst. Comm. 126, n.; MALICIOUS PROSECUTION.

VEXED QUESTION. A question or point of law often discussed or agitated, but not determined or settled.

VI ET ARMIS (Lat.). With force and arms. See TRESPASS.

VIA (Lat.). A cart-way,—which also includes a foot-way and a horse-way. See WAY.

VIABILITY (from the French *vie*). Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence.

2. That a child may be viable, it is necessary that not only the organs should be in a normal state, but likewise all the physiological and pathological causes which are capable of opposing the establishment or prolongation of its life be absent.

Although a child may be born with every appearance of health, yet, from some malformation, it may not possess the physical power to maintain life, but which must cease from necessity. Under these circumstances, it cannot be said to exist but temporarily,—no longer, indeed, than is necessary to prove that a continued existence is impossible.

It is important to make a distinction between a viable and a non-viable child, although the latter may outlive the former. The viable child may die of some disease on the day of its birth, while a non-viable child may live a fortnight. The former possesses the organs essential to life, in their integrity; while the latter has some imperfection which prevents the complete establishment of life.

As it is no evidence of non-viability that a child dies within a few hours of its birth, neither is it a proof of viability if a child appears to be well and the function of respiration be fully established.

3. There are many affections which a child may have at birth, that are not necessarily mortal: such as transposition of some of the organs, and other malformations. There are also many diseases which, without being necessarily mortal, are an impediment to the establishment of independent life, affecting different parts of the system: such as inflammation, in addition to many malformations. There is a third class, in which are many affections that are necessarily mortal: such as a general softening of the mucous membrane of the stomach and intestines, developed before birth, or the absence of the stomach, and a number of other malformations. These distinctions are of great importance; for children affected by peculiarities of the first order must be considered as viable; affections of the second may constitute extenuating circumstances in questions of infanticide; while those of the third admit of no discussion on the subject of their viability.

The question of viability presents itself to the medical jurist under two aspects: *first*, with respect to infanticide, and *second*, with respect to testamentary grants and inheritances. Billard on Infants, translation by James Stewart, M.D., Appendix; Briand, Méd. Lég. 1ère partie, c. 6, art. 2. See 2 Savigny, Dr. Rom. Append. III., for a learned discussion of this subject.

VIABLE (Lat. *vitæ habilis*, capable of living). A term applied to a child who is born alive in such an advanced state of formation as to be capable of living. Unless he is born viable, he acquires no rights, and cannot transmit them to his heirs, and is considered as if he had never been born.

VICARAGE. In Ecclesiastical Law. The living or benefice of a vicar: usually consisting of the small tithes. 1 Burn, Eccl. Law, 75, 79.

VICE. A term used in the civil law and in Louisiana, by which is meant a defect in a thing; an imperfection. For example, epilepsy in a slave, roaring and crib-biting in a horse, are vices. Redhibitory vices are those for which the seller will be compelled to annul a sale and take back the thing sold. Pothier, Vente, 203; La. Civ. Code, art. 2498–2507.

VICE-ADMIRAL. The title of an officer in the navy: the next in rank after the admiral. In the United States we have no officer by this name.

VICE-CHANCELLOR. A judge, assistant to the chancellor. He holds a separate court, and his decrees are liable to be reversed by the chancellor. He was first appointed 53 Geo. III. In 1841 two additional vice-chancellors were appointed; and now there are three vice-chancellor's courts. 3 Sharswood, Blackst. Comm. 54, n.

VICE-CONSUL. An officer who performs the duties of a consul within a part of the district of a consul, or who acts in the place of a consul. See 1 Phillipps, Ev. 306.

VICE-PRESIDENT OF THE UNITED STATES. The title of the second officer, in point of rank, in the government of the United States. He is to be elected in the manner pointed out under the article PRESIDENT OF THE UNITED STATES. See, also, 3 Story, Const. § 1447 *et seq.* His office in point of duration is coextensive with that of the president. The fourth clause of the third section of the first article of the constitution of the United States directs that "the vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided." And by article 2, s. 1, clause 6, of the constitution, it is provided that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

When the vice-president exercises the office of president, he is called the President of the United States.

VICE VERSA (Lat.). On the contrary; on opposite sides.

VICECOMES (Lat.). The sheriff.

VICECOMES NON MISIT BREVE (Lat. the sheriff did not send the writ). An entry made on the record when nothing has been done by virtue of a writ which has been directed to the sheriff.

VICINAGE. The neighborhood; the venue.

VICINETUM (Lat.). The neighborhood; vicinage; the venue. Coke, Litt. 158 *b*

VICONTIEL. Belonging to the sheriff.

VIDELICIT (Lat.). A Latin adverb, signifying to wit, that is to say, namely; *scilicet*. This word is usually abbreviated *viz.*

The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is not required to prove them. Stephen, Plead. 309; 7 Cow. N. Y. 42; 4 Johns. N. Y. 450; 3 Term, 67, 643; 8 Taunt. 107; Greenleaf, Ev. § 60; 1 Litt. Ky. 209. See Yelv. 94; 3 Saund. 291 *a*, note; 4 Bos. & P. 465; Dane, Abr. Index; 2 Pick. Mass. 214, 222; 16 Mass. 129.

VIEW. Inspection; a prospect.

Every one is entitled to a view from his premises; but he thereby acquires no right over the property of his neighbors. The erection of buildings which obstruct a man's view, therefore, is not unlawful, and such buildings cannot be considered a nuisance. 9 Coke, 58 *b*. See ANCIENT LIGHTS; NUISANCE.

VIEW, DEMAND OF. In Practice. In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view* of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues. Viner, Abr. *View;* Comyns, Dig. *View;* Booth, 37; 2 Saund. 45 *b;* 1 Reeve, Hist. Eng. Law, 435.

This right, however, is confined to real or mixed actions; for in personal actions the view does not lie. In the action of dower under nihil habet, it has been much questioned whether the view be demandable or not, 2 Saund. 44, n. 4; and there are other real and mixed actions in which it is not allowed. The view being granted, the course of proceeding is to issue a writ commanding the sheriff to cause the defendant to have a view of the land. It being the interest of the demandant to expedite the proceedings, the duty of suing out the writ lies upon him, and not upon the tenant; and when, in obedience to its exigency, the sheriff causes view to be made, the demandant is to show to the tenant, in all ways possible, the thing in demand, with its metes and bounds. On the return of the writ into court, the demandant must count de novo,—that is, declare again, Comyns, Dig. *Pleader* (2 Y 3); Booth, 40; and the pleadings proceed to issue.

This proceeding of demanding view is, in the present rarity of real actions, unknown in practice.

VIEW OF FRANKPLEDGE. In English Law. An examination to see if every freeman within the district had taken the oath of allegiance and found nine freemen pledges for his peaceable demeanor. 1 Reeve, Hist. Eng. Law, 7. It took place, originally, once in each year, after Michaelmas, and subsequently twice, after Easter and Michaelmas, at the sheriff's tourn or court-leet at that season held. See COURT-LEET; SHERIFF'S TOURN.

VIEWERS. Persons appointed by the courts to see and examine certain matters and make a report of the facts, together with their opinion, to the court. In practice, they are usually appointed to lay out roads, and the like. See EXPERTS.

VIGILANCE. Proper attention in proper time.

The law requires a man who has a claim to enforce it in proper time, while the adverse party has it in his power to defend himself; and if by his neglect to do so he cannot afterwards establish such claim, the maxim *vigilantibus non dormientibus leges subserviunt* acquires full force in such case. For example, a claim not sued for within the time required by the acts of limitation will be presumed to be paid; and the mere possession of corporeal real property as if in fee-simple, and without admitting any other ownership for sixty years, is a sufficient title against all the world, and cannot be impeached by any dormant claim. 3 Blackstone, Comm. 196, n.; 4 Coke, 11 *b*.

VILL. In England this word was used to signify the parts into which a hundred or wapentake was divided. Fortescue, de Laud. c. 24. See Coke, Litt. 115 *b*. It also signifies a town or city. Barrington, Stat. 133.

VILLAIN. An epithet used to cast contempt and contumely on the person to whom it is applied.

To call a man a villain in a letter written to a third person will entitle him to an action without proof of special damages. 1 Bos. & P. 331.

VILLEIN (*vilis*, base, or *villa*, estate). A person attached to a manor, who was substantially in the condition of a slave, who performed the base and menial work upon the manor for the lord, and was, generally, a subject of property and belonging to him. 1 Washburn, Real Prop. 26.

The feudal villein of the lowest order, unprotected as to property, and subject to the most ignoble services. But his circumstances were very different from the slave of the Southern states, for no person was in the eye of the law a villein, except as to his master; in relation to all other persons he was a freeman. Littleton, Ten. ss. 189, 190; Hallam, View of the Middle Ages, vol. 1, 122, 124; vol. 2, 199.

VILLEIN IN GRASS. A villein annexed to the person of the lord, and transferable by deed from one person to another. Littleton, § 181.

VILLEIN REGARDANT. A villein annexed to the manor or land; a serf.

VILLEIN SOCAGE (Sax. *soc*, free, or Lat. *soca*, a plough). The villeins, from living on one piece of land, came at last to be allowed to hold it by tenure of *villeinage*, *e.g.* uncertain menial services. These services at last became fixed; the tenure was then called *villein socage*. 1 Washburn, Real Prop. 26.

VILLENOUS JUDGMENT. In Old English Law. A judgment given by the common law in attaint, or in cases of conspiracy.

Its effects were to make the object of it lose his *liberam legem* and become infamous. He forfeited his goods and chattels, and his lands during life; and this barbarous judgment further required that his lands should be wasted, his houses razed, his trees rooted up, and that his body should be cast into prison. He could not be a juror or witness. Burr. 996, 1027; 4 Blackstone, Comm. 136.

VINCULO MATRIMONII. See A VINCULO MATRIMONII; DIVORCE.

VINDICATION. In Civil Law. The claim made to property by the owner of it. 1 Bell, Comm. 281, 5th ed. See REVENDICATION.

VIOLATION. An act done unlawfully and with force. In the English statute of 25 Edw. III. st. 5, c. 2, it is declared to be high treason in any person who shall violate the king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bacon, Abr. *Treason* (E).

VIOLENCE. The abuse of force. Théorie des Lois criminelles, 32. That force which is employed against common right, against the laws, and against public liberty. Merlin, Répert.

In cases of robbery, in order to convict the accused it is requisite to prove that the act was done with violence; but this violence is not confined to an actual assault of the person, by beating, knocking down, or forcibly wresting from him; on the contrary, whatever goes to intimidate or overawe, by the apprehension of personal violence or by fear of life, with a view to compel the delivery of property, equally falls within its limits. Alison, Pr. Cr. Law of Scotl. 228; 4 Binn. Penn. 379; 2 Russell, Crimes, 61; 1 Hale, Pl. Cr. 553. When an article is merely snatched, as, by a sudden pull, even though a momentary force be exerted, it is not such violence as to constitute a robbery. 2 East, Pl. Cr. 702; 2 Russell, Crimes, 68; Dig. 4. 2. 2. 3.

VIOLENT PROFITS. In Scotch Law. The gains made by a tenant holding over are so called. Erskine, Inst. 2. 6. 54.

VIOLENTLY. In Pleading. This word was formerly supposed to be necessary in an indictment, in order to charge a robbery from the person; but it has been holden unnecessary. 2 East, Pl. Cr. 784; 1 Chitty, Crim. Law, *244. The words "feloniously and against the will," usually introduced in such indictments, seem to be sufficient. It is usual, also, to aver a *putting in fear;* though this does not seem to be requisite.

VIRGA. An obsolete word, which signifies a rod or staff, such as sheriffs, bailiffs, and constables carry as a badge or ensign of their office.

VIRGINIA. One of the thirteen original United States.

2. The name was given in honor of queen Elizabeth, the virgin queen of England. In 1606, James I. granted letters patent for planting colonies in Virginia. These grants in the letters patent embraced a country extending along the sea-coast between 34° and 45° north latitude, and were made to two companies: one of them to Sir Thomas Gates and others,—named the First Colony of Virginia,—the other "to Tho: Hanham and others, of the town of Plimouth," which was called the Second Colony of Virginia. The government prescribed for these colonies was that each should have a council, consisting of thirteen persons, appointed by the king, to govern and order all matters according to laws and instructions given them by the king. There was also a council in England, of thirteen persons, appointed by the crown to have the supervising, managing, and direction of all matters that should concern the government of the colonies. This charter was followed by royal instructions dated the 20th November, 1606. See 1 Hening, Va. Stat. 76, 571. Under this charter a settlement was made at Jamestown in 1607, by the first colony. Upon the petition of the company, a new charter was granted by king James, on the 23d May, 1609, to the treasurer and company of the first (or southern) colony, for the further enlargement and explanation of the privileges of that company. 1 Hening, Stat. 80.

3. This charter granted to the company in absolute property the lands extending from Cape or Point Comfort (at the mouth of James River) along the sea-coast two hundred miles to the northward, and from the same point along the sea-coast two hundred miles to the southward, and up into the land throughout, from sea to sea, west and northwest, and, also, all islands lying within one hundred miles of the coast of both seas of the precinct aforesaid. A new council in England was established, with power to the company to fill all vacancies therein by election.

On the 12th of March, 16$\frac{12}{13}$, king James granted a third charter to the first company, enlarging its domain so as to include all islands within three hundred leagues from its borders on the coasts of either sea. In 1612, a considerable proportion of lands previously held and cultivated in common was divided into three-acre lots and a lot appropriated in absolute right to each individual. Not long afterwards, fifty acres were surveyed and delivered to each of the colonists. In 1618, by a change of the constitution of the colony, burgesses elected by the people were made a branch of the legislature. Up to this time the settlement had been gradually increasing in number, and in 1624, upon a writ of *quo warranto*, a judgment was obtained dissolving the company and re-vesting its powers in the crown. In 1651 the plantation of Virginia came, by formal act, under the obedience and government of the commonwealth of England, the colony, however, still retaining its former constitution. A new charter was to be granted, and many important privileges were secured. In 1680 a change was made in the colonial government, divesting the burgesses of the exercise of judicial power in the last resort, as had before

that time been practised by that body, and allowing appeals from judgments of the general courts, composed of the governor and council, to the king in council, where the matter in controversy exceeded the value of £300 sterling. Marshall, Col. 163; 1 Campb. 337.

4. By the treaty of 1763, all the conquests made by the French in North America, including the territory east of the Mississippi, were ceded to Great Britain.

The constitution of the colonial government of Virginia seems never to have been precisely fixed and accurately adjusted in any written memorials that are now accessible. The powers exercised by the burgesses varied at different periods. The periods of their election and the length of time they continued in office it is difficult to ascertain from the records of colonial history, and the qualifications of voters to elect them varied much at different periods. See Rev. Code, 38, Leigh's note; 2 Burk, App. 1. On the 12th of June, 1776, was unanimously adopted by the convention a declaration of rights pertaining to the people, as a basis and foundation of government was adopted by the convention. This declaration still remains a part of the Virginia Code. On the 29th of June, 1776, Virginia adopted a constitution by a unanimous vote of the convention. The Articles of Confederation were not finally adopted by congress until the 15th of November, 1777, and were adopted, subject to the ratification of the states. These articles were laid before the Virginia Assembly on the 9th of December, 1777, and on the 15th unanimously assented to. In compliance with the recommendation of congress, by a resolution of September 6, 1780, Virginia, by an act passed the 2d of January, 1781, proffered a cession of her western lands. The cession was finally completed and accepted in 1784. Virginia as early as 1785 prepared to erect Kentucky into a state, and this was finally effected in June, 1792.

5. The state constitution framed and adopted by Virginia in 1776 gave way to a second that was framed in convention, adopted by the people, and went into operation in 1830. This second constitution has been superseded by a third, which was framed in convention of 1851, and, being adopted by the people, took effect in 1852. Under this constitution, every white male citizen of the commonwealth, of the age of twenty-one years, who has been a resident of the state for two years and of the county, city, or town where he offers to vote for twelve months next preceding an election, and no other person, shall be qualified to vote for members of the general assembly and all officers elective by the people; but no person in the military, naval, or marine service of the United States shall be deemed a resident of this state by reason of being stationed therein. And no person shall have the right to vote who is of unsound mind, or a pauper, or a non-commissioned officer, soldier, seaman, or marine, in the service of the United States, or who has been convicted of bribery in an election, or of any infamous offence.

Places of voting are to be established, and no person is to be allowed to vote except in the town or city and ward in which he resides. Such voters are exempt from military duty, except in time of war or public danger, from working upon the public roads, from attendance upon court in any capacity, and from arrest under civil process, during the time of holding any election at which he is entitled to vote, and in going to and returning from them. Votes are to be given openly, or *viva voce;* except that dumb persons vote by ballot. Const. art. 3.

The legislative, executive, and judicial departments are to be separate and distinct, and no person may exercise the functions of any two of them, except that justices of the peace are eligible as members of either house of assembly.

6. The *Legislature* is composed of two branches, the house of delegates and the senate, which together are called the general assembly of Virginia.

The members of both houses are apportioned among the towns *nomination*. The sessions of the assembly are to continue ninety days, but may be prolonged thirty days by the concurrence of three-fifths of the members of both branches. They are to meet every two years only, except when called together by the governor. The two houses elect, by a joint vote, a secretary of the commonwealth, treasurer, and auditor of the public accounts. All other officers are to be elected by the people. All officers, whether elected or appointed, are to discharge their duties after the expiration of their terms of service, till their successors are qualified. The house of delegates consists of one-hundred and fifty-two members, chosen biennially. Any person may be elected a delegate who has attained the age of twenty-one years and shall be actually a resident within the city, county, town, or election district, qualified by the constitution to vote for members of the general assembly; but no person holding a lucrative office, no minister of the gospel, or priest of any religious denomination, no salaried officer of any banking corporation or company, and no attorney for the commonwealth, can be elected a member of either house of assembly. The removal of any person elected to either branch of the general assembly from the county, city, town, or district for which he was elected, shall vacate his office. Art. 4, s. 5, § 7.

The senate consists of fifty members, elected for the term of four years; upon the assembling of the senators so elected they were divided into two equal classes numbered by lot. The term of service of the senators of the first class expired with that of the delegates elected under the constitution; and of the senators of the second class, at the expiration of two years thereafter; and this alternation continues, so that one-half of the senators are chosen every second year. Art. 4, § 3.

Any person may be elected a senator who has attained the age of twenty-five years and shall be actually a resident within the district and qualified to vote for members of the general assembly. The other qualifications are the same as those for delegates. Art. 4, s. 5, § 7.

7. The *Chief Executive Power* of the commonwealth is vested in a governor. He holds his office for the term of four years, to commence on the —— day of —— next succeeding his election, and is ineligible to the same office for the term next succeeding for which he was elected, and to any other office during his term of service. He is elected by the voters at the times and places of choosing members of the general assembly. Returns of the election are to be transmitted under seal by the proper officer to the secretary of the commonwealth, who is to deliver them to the speaker of the house of delegates on the first day of the next session of the general assembly. The speaker of the house of delegates must within one week thereafter, in the presence of a majority of the senate and house of delegates, open the said returns; and the votes are then counted. The person having the highest number of votes is to be declared elected; but if two or more shall have the highest and an equal number of votes, one of them is to be chosen governor by the joint vote of the two houses of the general assembly. Contested elections for governor are decided by a like vote; and the mode of proceeding in such cases is prescribed by law.

8. No person is eligible to the office of governor unless he has attained the age of thirty years, is a

native citizen of the United States, and has been a citizen of Virginia for five years next preceding his election.

The governor must reside at the seat of government, receives five thousand dollars for each year of his service, and, while in office, is to receive no other emolument from this or any other government.

He is to take care that the laws be faithfully executed; communicate to the general assembly, at every session, the condition of the commonwealth; recommend to their consideration such measures as he may deem expedient; and convene the general assembly, on application of a majority of the members of both houses thereof, or when in his opinion the interest of the commonwealth may require it. He is commander-in-chief of the land and naval forces of the state; has power to embody the militia to repel invasion, suppress insurrection, and enforce the execution of the laws; conduct, either in person or in such other manner as is prescribed by law, all intercourse with other and foreign states; and, during the recess of the general assembly, fill *pro tempore* all vacancies in those offices for which the constitution and laws make no provision: but his appointments to such vacancies are by commissions to expire at the end of thirty days after the commencement of the next session of the general assembly. He has power to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, or the law shall otherwise particularly direct, to grant reprieves and pardons after conviction, and to commute capital punishment. But he must communicate to the general assembly, at each session, the particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.

He may require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices, and may also require the opinion in writing of the attorney-general upon any question of law connected with his official duties.

Commissions and grants run in the name of the Commonwealth of Virginia, and must be attested by the governor, with the seal of the commonwealth annexed.

A *Lieutenant-Governor* is elected at the same time, and for the same term, as the governor; and his qualifications and the manner of his election in all respects are the same.

In case of the removal of the governor from office, or of his death, failure to qualify, resignation, or removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, devolves upon the lieutenant-governor; and the general assembly is to provide by law for the discharge of the executive functions in other necessary cases.

The lieutenant-governor is president of the senate, but has no vote, and, while acting as such, receives a compensation equal to that allowed to the speaker of the house of delegates. Art. 5, §§ 1–10.

9. The *Judicial Powers* are regulated by the sixth article of the constitution.

There are a supreme court of appeals, district courts, and circuit courts.

The state is divided into twenty-one judicial circuits, ten districts, and five sections.

The general assembly may, at intervals of eight years from the adoption of the constitution, rearrange the circuits, districts, and sections, and place any number of circuits in a district, and of districts in a section; but each circuit must be altogether in one district, and each district in one section; and there must not be less than two districts and four circuits in a section; and the number of sections shall not be increased or diminished.

The *Supreme Court of Appeals* consists of five judges, elected one for each section by the voters of that section, to serve for twelve years, unless sooner removed under the constitution. The judges must be thirty-five years old at the time of their election, and reside in the section for which they are elected during their continuance in office. Any three of the five may hold court. The court has appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition. It does not have jurisdiction in civil causes where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, road, way, ferry, or landing, or the right of a corporation or of a county to levy tolls or taxes; and except in cases of habeas corpus, mandamus, and prohibition, and cases involving freedom or the constitutionality of a law.

Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals, and of the circuit courts, or any of them, to try any cases remaining on the dockets of the present court of appeals when the judges thereof cease to hold their offices; or to try any cases which may be on the dockets of the supreme court of appeals established by this constitution, in respect to which a majority of the judges of said court may be so situated as to make it improper for them to sit on the hearing thereof.

When a judgment or decree is reversed or affirmed by the supreme court of appeals, the reasons therefor must be stated in writing, and preserved with the record of the case.

10. A *Circuit Court* is to be held at least twice a year in every county and corporation thereof wherein a circuit court is now or may hereafter be established, by a judge elected for the circuit by the voters thereof for the term of eight years, unless sooner removed, etc. He must have like qualifications as to age and residence as the judges of sections. But the judges in the same district may be required or authorized to hold the courts of their respective circuits alternately, and a judge of one circuit to hold a court in any other circuit.

A *District Court* must be held at least once a year in every district, by the judges of the circuits constituting the section and the judges of the supreme court of appeals for the section of which the district forms a part, any three of whom may hold a court; but no judge shall sit or decide upon any appeal taken from his own decision. The judge of the supreme court of appeals of one section may sit in the district courts of another section, when required or authorized by law to do so.

This court does not have original jurisdiction except in cases of habeas corpus, mandamus, and prohibition.

Judges are commissioned by the governor, receive fixed and adequate salaries, which are not to be diminished during their continuance in office. The salary of a judge of the supreme court of appeals is not to be less than three thousand dollars, and that of a judge of a circuit court not less than two thousand dollars per annum, except that of a judge of the fifth circuit, which is not to be less than fifteen hundred dollars per annum; and each receives a reasonable allowance for necessary travel. No judge during his term of service can hold any other office, appointment, or public trust; and the acceptance thereof vacates his judicial office; nor

is he during such term, or within one year thereafter, eligible to any political office. No election of judge can be held within thirty days of the time of holding any election of electors of president and vice-president of the United States, of members of congress or of the general assembly.

11. Judges may be removed from office by a concurrent vote of both houses of the general assembly; but a majority of all the members elected to each house must concur in such vote; and the cause of removal must be entered on the journal of each house. The judge against whom the general assembly may be about to proceed receives notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the general assembly acts thereupon.

An *Attorney-General* is elected by the voters of the commonwealth for the term of four years, at every election of a governor. He is commissioned by the governor, performs such duties and receives such compensation as the law prescribes, and is removable in the manner prescribed for the removal of judges.

Writs run in the name of the Commonwealth of Virginia, and are attested by the clerks of the several courts. Indictments conclude against the peace and dignity of the commonwealth.

A county court is to be held monthly in each county of the commonwealth, by not less than three nor more than five justices, except when the law requires the presence of a greater number. Each county is laid off into districts, as nearly equal as may be in territory and population. In each district there are elected, by the voters thereof, four justices of the peace, who are to be commissioned by the governor, reside in their respective districts, and hold their office for the term of four years. The justices so elected choose one of their own body to be the presiding justice of the county court, and whose duty it is to attend each term of said court. The other justices are classified by law for the performance of their duties in court.

The justices receive for their services in court a *per diem* compensation, ascertained by law and paid out of the county treasury, and do not receive any fee or emolument for other judicial services.

VIRILIA (Lat.). The privy members of a man. Bracton, lib. 3, p. 144.

VIRTUTE OFFICII (Lat.). By virtue of his office. A sheriff, a constable, and some other officers may *virtute officii* apprehend a man who has been guilty of a crime in their presence.

VIS (Lat. force). Any kind of force, violence, or disturbance relating to a man's person or his property.

VIS IMPRESSA (Lat.). Immediate force; original force. This phrase is applied to cases of trespass when a question arises whether an injury has been caused by a direct force or one which is indirect. When the original force, or *vis impressa*, had ceased to act before the injury commenced, then there is no force, the effect is mediate, and the proper remedy is trespass on the case.

When the injury is the immediate consequence of the force, or *vis proxima*, trespass vi et armis lies. 3 Bouvier, Inst. n. 3483; 4 *id.* n. 3583.

VIS MAJOR (Lat.). A superior force. In law it signifies inevitable accident.

This term is used in the civil law in nearly the same way that the words *act of God* (*q. v.*) are used in the common law. Generally, no one is responsible for an accident which arises from the vis major; but a man may be so where he has stipulated that he would, and when he has been guilty of a fraud or deceit. 2 Kent, Comm. 448; Pothier, Prêt a Usage, n. 48, n. 60; Story, Bailm. § 25.

VISA. In Civil Law. The formula put upon an act; a register; a commercial book, in order to approve of it and authenticate it.

VISCOUNT (Lat. *vice-comes*). This name was made use of as an arbitrary title of honor, without any office pertaining to it, by Henry VI. for the first time. The sheriff or earl's deputy holds the office of *vice-comes*, of which viscount is a translation, but used, as we have just seen, in a different sense. The dignity of a viscount is next to an earl. 1 Sharswood, Blackst. Comm. 397.

VISITATION. The act of examining into the affairs of a corporation.

The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Blackstone, Comm. 480; 2 Kyd, Corp. 174. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent, Comm. 240.

VISITATION BOOKS. Compilations made out or collected by the heralds in the circuits which their commissions authorized them to make, for the purpose of inquiring into the state of families and registering marriages and descents which were verified to them by oath. They are good evidence of pedigree. 3 Sharswood, Blackst. Comm. 105.

VISITER. An inspector of the government, of corporations, or bodies politic. 1 Blackstone, Comm. 482. See Dane, Abr. Index; 7 Pick. Mass. 303; 12 *id.* 244.

VISNE. The neighborhood; a neighboring place; a place near at hand; the venue.

Formerly the visne was confined to the immediate neighborhood where the cause of action arose, and many verdicts were disturbed because the visne was too large, which becoming a great grievance, several statutes were passed to remedy the evil. The 21 James I. c. 13, gives aid after verdict, where the visne is partly wrong,—that is, where it is warded out of too many or too few places in the county named. The 16 & 17 Charles II. c. 8, goes further, and cures defects of the visne wholly, so that the cause is tried by a jury of the proper county. See VENUE.

VIVA VOCE (Lat. with living voice). Verbally. It is said a witness delivers his evidence viva voce when he does so in open court: the term is opposed to deposition. It is sometimes opposed to ballot: as, the people vote by ballot, but their representatives in the legislature vote viva voce.

VIVARY. A place where *living* things

are kept: as, a park on land; or, in the water, as a pond.

VIVUM VADIUM. See VADIUM VIVUM.

VOCATIO IN JUS (Lat.). **In Roman Law.** According to the practice in the *legis actiones* of the Roman law, a person having a demand against another verbally cited him to go with him to the prætor; *in jus eamus; in jus te voco.* This was denominated *vocatio in jus.* If a person thus summoned refused to go, he could be compelled by force to do so, unless he found a *vindex*,—that is, a *procurator*, or a person to undertake his cause. When the parties appeared before the prætor, they went through the particular formalities required by the action applicable to the cause. If the cause was not ended the same day, the parties promised to appear again at another day, which was called *vadimonium.* See Matt. v. 25.

VOID. That which has no force or effect. Contracts, bequests, or legal proceedings may be void. See those titles.

VOIDABLE. That which has some force or effect, but which, in consequence of some inherent quality, may be legaliy annulled or avoided.

As a familiar example, may be mentioned the case of a contract made by an infant with an adult, which may be avoided or confirmed by the former on his coming of age. See PARTIES.

Such contracts are, generally, of binding force until avoided by the party having a right to annul them. Bacon, Abr. *Infancy* (I 3); Comyns, Dig. *Enfant;* Fonblanque, Eq. b. 1, c. 2, § 4, note *b;* 3 Burr. 1794; 1 Nels. Ch. 55; 1 Atk. Ch. 354; Strange, 937; Perkins, § 12.

VOIR DIRE. A preliminary examination of a witness to ascertain whether he is competent.

2. When a witness is supposed to have an interest in the cause, the party against whom he is called has the choice to prove such interest by calling another witness to that fact, or he may require the witness produced to be sworn on his *voir dire* as to whether he has an interest in the cause or not; but the party against whom he is called will not be allowed to have recourse to both methods to prove the witness's interest. If the witness answers he has no interest, he is competent, his oath being conclusive; if he swears he has an interest, he will be rejected.

3. Though this is the rule established beyond the power of the courts to change, it seems not very satisfactory. The witness is sworn on his *voir dire* to ascertain whether he has an interest which would disqualify him, because he would be tempted to perjure himself if he testified when interested. But when he is asked whether he has such an interest, if he is dishonest and anxious to be sworn in the case, he will swear falsely he has none, and, his answer being conclusive, he will be admitted as competent; if, on the contrary, he swears truly he has an interest, when he knows that will exclude him, he is told that for being thus honest he must be rejected.

See, generally, 1 Dall. Penn. 375; Dane, Abr. *Index;* INTEREST.

VOLUNTARY. Willingly; done with one's consent; negligently. Wolff, § 5.

To render an act criminal or tortious, it must be voluntary. If a man, therefore, kill another without a will on his part, while engaged in the performance of a lawful act, and having taken proper care to prevent it, he is not guilty of any crime. And if he commit an injury to the person or property of another, he is not liable for damages, unless the act has been voluntary or through negligence: as, when a collision takes place between two ships without any fault in either. 2 Dods. Adm. 83; 3 Hagg. Adm. 320, 414.

When the crime or injury happens in the performance of an unlawful act, the party will be considered as having acted voluntarily.

VOLUNTARY CONVEYANCE. The transfer of an estate made without any adequate consideration of value.

2. Whenever a voluntary conveyance is made, a presumption of fraud properly arises, upon the statute of 27 Eliz. c. 4, which presumption may be repelled by showing that the transaction on which the conveyance was founded virtually contained some conventional stipulations, some compromise of interests, or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a subsequent negotiation for sale, is conclusive evidence of statutory fraud. 5 Day, Conn. 223. 341; 1 Johns. Cas. N. Y. 161; 4 Johns. Ch. N. Y. 450; 3 Conn. 450; 4 *id.* 1; 4 Johns. N. Y. 536; 15 *id.* 14; 2 Munf. Va. 363.

3. A distinction has been made between previous and subsequent creditors: such a conveyance is void as to the former, but not as to the latter. 8 Wheat. 229; 3 Johns. Ch. N. Y. 481. And see 6 Ala. N. s. 506; 9 *id.* 937; 10 Conn. 69; 1 Md. Ch. Dec. 507; 2 Gray, Mass. 447. And a conveyance by a father who, though in debt, is not in embarrassed circumstances, who makes a reasonable provision for a child, leaving property sufficient to pay his debts, is not *per se* fraudulent. 4 Wheat. 27; 6 Watts & S. Penn. 97; 4 Vt. 389; 6 N H. 67; 11 Leigh. Va. 137; 5 Ohio, 121.

4. By the statute of 3 Henry VII. c. 4, all deeds of gifts of goods and chattels in trust for the donor were declared void; and by the statute of 13 Eliz. c. 5, gifts of good and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder, and defraud creditors, were rendered

void, as against the person to whom such frauds would be prejudicial.

5. The principles of these statutes, though they may not have been substantially re-enacted, prevail throughout the United States. 3 Johns. N. Y. 481; 1 Halst. N. J. 450; 5 Cow. N. Y. 87; 8 Wheat. 229; 11 *id.* 199; 12 Serg. & R. Penn. 448; 1 Rawle, Penn. 231; 9 Mass. 390; 11 *id.* 421; 4 Me. 52; 2 Pick. Mass. 411; 4 M'Cord, So. C. 294; 1 Const. So. C. 180; 2 Nott & M'C. So. C. 334; Coxe, N. J. 56; Hare & Wall. Sel. Dec. 33–69.

6. As between the parties, such conveyances are, in general, good. 2 Rand. Va. 384; 1 Johns. Ch. 329, 336; 1 Wash. C. C. 274. And when it has once been executed and delivered, it cannot be recalled, even where an unmarried man executes a voluntary trust-deed for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. 2 Mylne & K. 496. See 2 Moll. Ch. 257.

VOLUNTARY DEPOSIT. **In Civil Law.** A deposit which is made by the mere consent or agreement of the parties. 1 Bouvier, Inst. n. 1054.

VOLUNTARY ESCAPE. The giving to a prisoner voluntarily any liberty not authorized by law. 5 Mass. 310; 2 Chipm. Vt. 11; 3 Harr. & J. Md. 559; 2 Harr. & G. Md. 106; 2 Bouvier, Inst. n. 2332. See ESCAPE.

VOLUNTARY JURISDICTION. **In Ecclesiastical Law.** That kind of jurisdiction which requires no judicial proceedings: as, the granting letters of administration and receiving the probate of wills.

VOLUNTARY NONSUIT. **In Practice.** The abandonment of his cause by a plaintiff, and an agreement that a judgment for costs be entered against him. 3 Bouvier, Inst. n. 3306.

VOLUNTARY SALE. One made freely, without constraint, by the owner of the thing sold. 1 Bouvier, Inst. n. 974.

VOLUNTARY WASTE. That which is either active or wilful: in contradistinction to that which arises from mere negligence, which is called *permissive* waste. 2 Bouvier, Inst. 2391 *et seq.* See WASTE.

VOLUNTEERS. Persons who receive a voluntary conveyance.

It is a general rule of the courts of equity, that they will not assist a mere volunteer who has a defective conveyance. Fonblanque, Eq. b. 1, c. 5, s. 2; and see the note there for some exceptions to this rule. See, generally, 1 Madd. Ch. 271; 1 Supp. to Ves. Ch. 320; 2 *id.* 321; Powell, Mortg. Index; 4 Bouvier, Inst. nn. 3968–3973.

In Military Law. Persons who, in time of war, offer their services to their country and march in its defence.

Their rights and duties are prescribed by the municipal laws of the different states. But when in actual service they are subject to the laws of the United States and the articles of war.

VOTE. Suffrage; the voice of an individual in making a choice by many. The total number of voices given at an election: as, the presidential vote.

Votes are either given by ballot or *viva voce:* they may be delivered personally by the voter himself, or, in some cases, by proxy. A majority of the votes given carries the question submitted, unless in particular cases when the constitution or laws require that there shall be a majority of all the voters, or when a greater number than a simple majority is expressly required: as, for example, in the case of the senate, in making treaties by the president and senate, two-thirds of the senators present must concur. See Angell, Corp.

When the votes are equal in number, the proposed measure is lost.

VOTER. One entitled to a vote; an elector.

VOUCHEE. In common recoveries, the person who is called to warrant or defend the title is called the vouchee. 2 Bouvier, Inst. n. 2093.

VOUCHER. **In Accounts.** An account-book in which are entered the acquittances or warrants for the accountant's discharge. Any acquittance or receipt which is evidence of payment, or of the debtor's being discharged. See 3 Halst. N. J. 299; 1 Metc. Mass. 218.

In Old Conveyancing. The person on whom the tenant to the *præcipe* calls to defend the title to the land, because he is supposed to have warranted the title to him at the time of the original purchase.

The person usually employed for this purpose is the crier of the court, who is therefore called the common voucher. See Cruise, Dig. tit. 36, c. 3, s. 1; 22 Viner, Abr. 26; Dane, Index; and see RECOVERY.

VOUCHER TO WARRANTY. The calling one who has warranted lands, by the party warranted, to come and defend the suit for him. Coke, Litt. 101 *b.*

VOYAGE. **In Maritime Law.** The passage of a ship upon the seas from one port to another, or to several ports.

2. Every voyage must have a *terminus a quo* and a *terminus ad quem.* When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured both outward and homeward, for one entire *premium,* this, with reference to the insurance, is considered but one voyage, and the *terminus a quo* is also the *terminus ad quem.* Marshall, Ins. b. 1, c. 7, s. 1–5. As to the commencement and ending of the voyage, see RISK.

3. The voyage, with reference to the legality of it, is sometimes confounded with the traffic in which the ship is engaged, and is frequently said to be illegal only because

the trade is so; but a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful. Marshall, Ins. b. 1, c. 6, s. 1. See Lex Merc. Amer. c. 10, s. 14; Park. Ins. c. 12; Weskett, Ins. *Voyages;* DEVIATION.

4. In the French law, the *voyage de conserve* is the name given to designate an agreement made between two or more sea-captains that they will not separate in their voyage, will lend aid to each other, and will defend themselves against a common enemy or the enemy of one of them in case of attack. This agreement is said to be a partnership. 3 Pardessus, Dr. Com. n. 656; 4 *id.* 984; 20 Toullier, n. 17.

VULGO CONCEPTI (Lat.). **In Civil Law.** Bastards whose father was unknown. Leg. 53, ff. *de statu hominum.* Those, also, whose fathers, though known, could not lawfully be recognized as such: viz., the offspring of incest and adultery. Code Civ. 3. 7. 1.

W.

WADSET. In Scotch Law. A right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. Like other heritable rights, it is protected by seisin.

Wadsets, by the present practice, are commonly made out in the form of mutual contracts, in which one party sells the land and the other grants the right of reversion. Erskine, Inst. 2. 8. 1. 2.

Wadsets are *proper*, where the use of the land shall go for the use of the money; *improper*, where the reverser agrees to make up the deficiency; and where it amounts to more, the surplus profit of the land is applied to the extinction of the principal. Erskine, Inst. 2. 8. 12. 13.

WADSETTER. In Scotch Law. A creditor to whom a wadset is made.

WAGE. To give a pledge or security for the performance of any thing: as, to wage or gage deliverance, to wage law, etc. Coke, Litt. 294. This word is but little used.

WAGER OF BATTEL. A superstitious mode of trial which till lately disgraced the English law.

The last case of this kind was commenced in the year 1817, but not proceeded in to judgment; and at the next session of the British parliament an act was passed to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue or trial by battel, in writs of right. 59 Geo. III. c. 46. For the history of this species of trial the reader is referred to 3 Blackstone, Comm. 337; 4 *id.* 347; Encyclopédie, *Gage de Bataille;* Stephen, Plead. 122, and App note 35.

WAGER OF LAW. In Old Practice. An oath taken by a defendant in an action of debt that he does not owe the claim, supported by the oaths of eleven neighbors.

When an action of *debt* is brought against a man upon a simple contract, and the defendant pleads *nil debit,* and concludes his plea with this plea, with this formula, "And this he is ready to defend against him the said A B and his suit, as the court of our lord the king here shall consider," etc., he is then put in sureties (*vadios*) *to wage his law* on a day appointed by the judge. The *wager of law* consists in an oath taken by the defendant on the appointed day, and confirmed by the oaths of eleven neighbors or *compurgators.* This oath had the effect of a verdict in favor of the defendant, and was only allowed in the actions of debt on simple contract, and detinue; nor was it allowed to any one not of good character. In consequence of this privilege of the defendant, *assumpsit* displaces debt as a form of action on simple contracts, and instead of detinue, trover was used. But in England wager of law was abolished by 3 & 4 Will. IV. c. 42, § 13. And even before its abolition it had fallen into disuse. It was last used as a method of defence in 2 Barnew. & C. 538, where the defendant offered to wage his law, but the plaintiff abandoned the case. This was in 1824. If it ever had any existence in the United States, it is now completely abolished. 8 Wheat. 642.

The name (in law Latin, *vadiatio legis*) comes from the defendant's being put in pledges (*vadios*) to make his oath on the appointed day. There was a similar oath in the Roman law, and in the laws of most of the nations that conquered Rome. It was very early in use in England, as Glanville distinctly describes it. Glanville, lib. 1, c. 9, 12. See Stephen, Plead. 124, 250, and notes xxxix.; Coke, 2d Inst. 119; Mod. Entr. 179; Lilly, Entr. 467; 3 Chitty, Plead. 497; 13 Viner, Abr. 58; Bacon, Abr.; Dane, Abr. Index. For the origin of this form of trial, see Stephen, Plead. notes xxxix.; Coke, Litt. 394, 395; 3 Sharswood, Blackst. Comm. 341.

WAGER POLICY. One made when the insured has no insurable interest.

It has nothing in common with insurance but the name and form. It is usually in such terms as to preclude the necessity of inquiring into the interest of the insured: as, "interest or no interest," or, "without further proof of interest than the policy."

Such contracts, being against the policy of the law, are void. 1 Marshall, Ins. 121; Park, Ins. Index; Weskett, Ins. See 1 Sumn. C. C. 451; 2 Mass. 1; 3 Caines, N. Y. 141.

WAGER. A bet; a contract by which two parties or more agree that a certain sum

of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event.

2. In general, it seems that a wager is legal and may be enforced in a court of law, 3 Term, 693, if it be not contrary to public policy, or immoral, or if it do not in some other respect tend to the detriment of the public, or if it do not affect the interest, feelings, or character of a third person. 1 P. A. Browne, Penn. 171.

Wagers on the event of an election laid before the poll is open, 1 Term, 56; 4 Johns. N. Y. 426; 4 Harr. & McH. Md. 284, or after it is closed, 8 Johns. N. Y. 454, 147; 2 Browne, Penn. 182, are unlawful. And wagers are against public policy if they are in restraint of marriage, 10 East, 22; if made as to the mode of playing an illegal game, 2 H. Blackst. 43; 1 Nott & M'C. So. C. 180; 7 Taunt. 246; or on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest. 12 East, 247, and Day's notes. But see 1 Cowp. 37.

3. Wagers as to the sex of an individual, 1 Cowp. 729, or whether an unmarried woman had borne or would have a child, 4 Campb. 152, are illegal, as unnecessarily leading to painful and indecent considerations. The supreme court of Pennsylvania have laid it down as a rule that every bet about the age, or height, or weight, or wealth, or circumstances, or situation, of any person, is illegal; and this, whether the subject of the bet be man, woman, or child, married or single, native or foreigner, in this country or abroad. 1 Rawle, Penn. 42. And it seems that a wager between two coach-proprietors, whether or not a particular person would go by one of their coaches, is illegal, as exposing that person to inconvenience. 1 Barnew. & Ald. 683.

4. In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event happens. And if, after his authority has been countermanded and the stake has been demanded, he refuse to deliver it, trover or assumpsit for money had and received is maintainable. 1 Barnew. & Ald. 683. And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has been paid over. 4 Taunt. 474; 5 Term, 405. But see 12 Johns. 1. See, further, on this subject, 7 Johns. N. Y. 434; 10 *id.* 406, 468; 11 *id.* 23; 12 *id.* 376; 13 *id.* 88; 15 *id.* 5; 17 *id.* 192; STAKEHOLDER.

WAGES. A compensation given to a hired person for his or her services. As to servants' wages, see Chitty, Contr. 171; as to sailors' wages, Abbott, Shipp. 473.

WAIFS. Stolen goods waived or scattered by a thief in his flight in order to effect his escape.

Such goods, by the English common law, belong to the king. 1 Blackstone, Comm. 296; 5 Coke, 109; Croke Eliz. 694. This prerogative has never been adopted here against the true owner, and never put in practice against the finder, though against him there would be better reason for adopting it. 2 Kent, Comm. 292. See Comyns, Dig. *Waif;* 1 Bro. Civ. Law, 239, n.

WAINAGIUM (Sax. *woeg*, Lat. *vagina*). What is necessary to the farmer for the cultivation of his land. Barrington, Stat. p. 12; Magna Charta, c. 14. According to Selden and Lord Bacon, it is not the same as *contenementum*, used in the same chapter of Magna Charta, meaning the power of entertaining guests, or countenance, as common people say.

WAIVE. A term applied to a woman as outlaw is applied to a man. A man is an outlaw; a woman is a waive. Crabb, Tech. Dict.

To abandon or forsake a right.

To abandon without right: as, "if the felon waives,—that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do,—he forfeits them, whether they be his own goods, or goods stolen by him." Bacon, Abr. *Forfeiture* (B).

WAIVER. The relinquishment or refusal to accept of a right.

2. In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement; for his plea amounts to a waiver.

3. In seeking for a remedy, the party injured may, in some instances, waive a part of his right and sue for another: for example, when the defendant has committed a trespass on the property of the plaintiff by taking it away, and afterwards he sells it, the injured party may waive the trespass and bring an action of assumpsit for the recovery of the money thus received by the defendant. 1 Chitty, Plead. 90.

4. In contracts, if, after knowledge of a supposed fraud, surprise, or mistake, a party performs the agreement in part, he will be considered as having waived the objection. 1 Brown, Parl. Cas. 289.

5. It is a rule of the civil law, consonant with reason, that any one may renounce or waive that which has been established in his favor. *Regula est juris antiqui omnes licentiam habere his quæ pro se introducta sunt, renunciare.* Code, 2. 3. 29. As to what will amount to a waiver of a forfeiture, see 1 Conn. 79; 7 *id.* 45; 1 Johns. Cas. N. Y. 125; 14 Wend. N. Y. 419; 8 Pick. Mass. 292; 2 N. H. 120, 163; 1 Ohio, 21; CONDITION.

WAKENING. In Scotch Law The revival of an action.

An action is said to sleep when it lies over, not insisted on for a year, in which case it is

suspended. Erskine, Inst. 4. 1. 33. With us a revival is by *scire facias*.

WAND OF PEACE. In Scotch Law. The wand which the messenger carries along with his blazon, in executing a caption, and with which he touches the prisoner. A sliding along this staff of a movable ring, or the breaking of the staff, is a protest that the officer has been resisted or deforced. Burton, Law of Scotl. p. 572; Bell, Dict. *Imprisonment.*

WANTONNESS. In Criminal Law. A licentious act by one man towards the person of another, without regard to his rights: as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offence would be an assault, and if he touched him it would amount to a *battery*.

In such case there would be no malice, but the wantonness of the act would render the offending party liable to punishment.

WAPENTAKE (from Sax. *wapen*, i.e. *armatura*, and *tac*, i.e. *tactus*). A Saxon court, held monthly by the alderman for the benefit of the hundred.

It was called a *wapentake* from *wapen*, arms, and *tac*, to touch; because when the chief of the hundred entered upon his office he appeared in the field on a certain day, on horseback, with a pike in his hand, and all the principal men met him with lances. Upon this he alighted, and they all touched his pike with their lances, in token of their submission to his authority. In this court causes of great moment were heard and determined, as Mr. Dugdale has shown from several records. Besides which, it took cognizance of theft, trials by ordeal, view of frankpledge, and the like; whence after the conquest it was called the sheriff's tourn, and, as regarded the examination of the pledges, the court of the view of frankpledge. These pledges were no other than the freemen within the liberty, who, according to an institution of king Alfred, were mutually pledged for the good behavior of each other. Fortescue, de Laud. c. 24; Dugdale, Orig. Jur. 27; 4 Blackstone, Comm. 273. Sir Thomas Smith derives it from the custom of taking away the arms at the muster of each hundred, from those who could not find sureties for good behavior. Rep. Angl. lib. 2, c. 16.

WARD. An infant placed by authority of law under the care of a guardian.

While under the care of a guardian, a ward can make no contract whatever binding upon him, except for necessaries. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate from the former. During the existence of this relation the ward is under the subjection of his guardian, who stands *in loco parentis*. See GUARDIAN.

A subdivision of a city to watch in the daytime, for the purpose of preventing violations of the law. It is the duty of all police-officers and constables to keep ward in their respective districts.

WARD IN CHANCERY. An infant who is under the superintendence of the chancellor

WARD-HOLDING. In Old Scotch Law. Military tenure by which lands were held. It was so called from the yearly tax in commutation of the right to hold vassals' lands during minority. It was abolished in 1747. Burton, Law of Scotl. p. 375; Bell, Dict.

WARDEN. A guardian; a keeper. This is the name given to various officers: as, the warden of the prison, the wardens of the port of Philadelphia, church-wardens.

WARDEN OF THE CINQUE PORTS. Governor of the ports of England lying next France, with the authority of admiral, and power of sending out writs in his own name, etc. The constable of Dover Castle is the warden of the Cinque Ports, and was first appointed by William the Conqueror; but John I. granted to the wardens their privileges on condition that they should provide a certain number of vessels for forty days as often as the king should require them. See CINQUE PORTS.

WARDMOTE (from *ward*, and Sax. *mote*, or *gemote*, a meeting).

In English Law. A court held in every ward in London.

The wardmote inquest has power to inquire into and present all defaults concerning the watch and police doing their duty, that engines, etc. are provided against fire, that persons selling ale and beer be honest and suffer no disorders nor permit gaming, etc., that they sell in lawful measures, and searches are to be made for beggars, vagrants, and idle persons, etc., who shall be punished. Chart. Hen. II.; Lex Lond. 185; Cunningham, Law Dict.; Wharton, Law Dict. 2d Lond. ed. *Wardmote*. See Cowel; Coke, 4th Inst. 249; 2 Show. 525; Lex Lond. 185; Chart. Hen. II.

WARDSHIP. In English Law. The right of the lord over the person and estate of the tenant, when the latter was under a certain age.

When a tenant by knight's service died, and his heir was under age, the lord was entitled to the custody of the person and the lands of the heir, without any account, until the ward, if a male, should arrive at the age of twenty-one years, and, if a female, at eighteen. Wardship was also incident to a tenure in socage; but in this case not the lord, but the nearest relation to whom the inheritance could not descend, was entitled to the custody of the person and estate of the heir till he attained the age of fourteen years; at which period the wardship ceased, and the guardian was bound to account. Wardship in copyhold estates partook of that in chivalry and that in socage. Like the former, the lord was the guardian; like the latter, he was required to account. 2 Blackstone, Comm. 67, 87, 97; Glanville, lib. 7, c. 9; Grand Cout. c. 33; Reg. Maj. c. 42.

WAREHOUSE. A place adapted to the reception and storage of goods and merchandise. 23 Me. 47.

A radical change was made in the revenue laws of the United States by the establishment, under the act of congress of Aug. 6, 1846, 9 U. S. Stat. at Large, 53, of the warehousing system. This statute is commonly called the Warehousing Act. Its evident object is to facilitate and encourage commerce by exempting the importer from the pay-

ment of duties until he is ready to bring his goods into market. 13 How. 295. Previous to the passage of that act, no goods chargeable with cash duties could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom-house. Before that act, the only provisions existing in relation to the warehousing of goods were merely applicable to special cases, such as where the vessel in which the goods were imported was subject to quarantine regulations, or where the entry might have been incomplete or the goods had received damage, or where a landing was compelled at a port other than the one to which the vessel was destined, on account of distress of weather or other necessity, or in case of the importation of wines or distilled spirits. Andrews, Rev. Laws, 72.

The warehousing system was extended by the establishment of private bonded warehouses. Act of Mar. 28, 1854, 10 U. S. Stat. at Large, 270.

WAREHOUSEMAN. A person who receives goods and merchandise to be stored in his warehouse for hire.

He is bound to use ordinary care in preserving such goods and merchandise, and his neglect to do so will render him liable to the owner. 1 Peake, 114; 1 Esp. 315; Story, Bailm. § 444; Jones, Bailm. 49, 96, 97; 7 Cow. N. Y. 497; 12 Johns. N. Y. 232; 2 Wend. N. Y. 593; 9 *id.* 268; 2 Ala. 284. The warehouseman's liability commences as soon as the goods arrive and the crane of the warehouse is applied to raise them into the warehouse. 4 Esp. 262.

WARRANDICE. In Scotch Law. A clause in a charter of heritable rights, by which the grantor obliges himself that the right conveyed shall be effectual to the receiver. It is either personal or real. A warranty. Erskine, Inst. 2. 3. 11.

WARRANT. A writ issued by a justice of the peace or other authorized officer, directed to a constable or other proper person, requiring him to arrest a person therein named, charged with committing some offence, and to bring him before that or some other justice of the peace.

A *bench-warrant* is a process granted by a court, authorizing a proper officer to apprehend and bring before it some one charged with some contempt, crime, or misdemeanor. See BENCH-WARRANT.

A *search-warrant* is a process issued by a competent court or officer, authorizing an officer therein named or described to examine a house or other place for the purpose of finding goods which it is alleged have been stolen. See SEARCH-WARRANT.

A warrant should regularly bear the hand and seal of the justice, and be dated. It should contain a command to the officer to make a return thereof and of his doings thereon. But the want of such a command does not excuse him from the obligation of making a proper return. 3 Cush. Mass. 438. And it is no ground for discharging a defendant that the warrant does not contain such a command. 2 Gray, Mass. 74. No warrant ought to be issued except upon the oath or affirmation of a witness charging the defendant with the offence. 3 Binn. Penn. 88.

The reprehensible practice of issuing blank warrants, which once prevailed in England, was never adopted here. 2 Russell, Crimes, 512; Ld. Raym. 546; 1 Salk. 175; 1 H. Blackst. 13; Doctrina Pl. 529; Wood, Inst. 84; Comyns, Dig. *Forcible Entry* (D 18, 19), *Imprisonment* (H 6), *Pleader* (3 K 26), (3 M 23). See SEARCH-WARRANT.

WARRANT OF ATTORNEY, In Practice. An instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.

2. This general authority is usually qualified by reciting a bond which commonly accompanies it, together with the condition annexed to it, or by a written defeasance stating the terms upon which it was given and restraining the creditor from making immediate use of it.

In *form*, it is, generally, by deed; but it seems it need not necessarily be so. 5 Taunt. 264.

This instrument is given to the creditor as a security. Possessing it, he may sign judgment and issue an execution, without its being necessary to wait the termination of an action. See 14 East, 576; 2 Term, 100; 1 H. Blackst. 75; 1 Strange, 20; 2 W. Blackst. 1133; 2 Wils. 3; 1 Chitty, Bail. 707.

3. A warrant of attorney given to confess a judgment is not revocable, and, notwithstanding a revocation, judgment may be entered upon it. 2 Ld. Raym. 766, 850; 1 Salk. 87; 7 Mod. 93; 2 Esp. 563. The death of the debtor is, however, generally speaking, a revocation. Coke, Litt. 52 *b*; 1 Vent Ch. 310.

The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular. 1 Penn. 245; 6 Serg. & R. Penn. 296; 14 *id.* 170; Add. Penn. 267; 2 Browne, Penn. 321; 3 Wash. C. C. 558. See, generally, 1 Salk. 402; 1 Sellon, Pract. 374; Comyns, Dig. *Abatement* (E 1, 2), *Attorney* (B 7, 8); 2 Archbold, Pract. 12; Bingham, Judgm. 38.

WARRANTEE. One to whom a warranty is made. Sheppard, Touchst. 181.

WARRANTIA CHARTÆ. An ancient and now obsolete writ, which was issued when a man was enfeoffed of land with warranty, and then he was sued or impleaded in assize or other action, in which he could not vouch or call to warranty.

It was brought by the feoffor pending the first suit against him, and had this valuable incident, that when the warrantor was vouched, and judgment passed against the

tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. Termes de la Ley; Fitzherbert, Nat. Brev. 134; Dane, Abr. Index; 2 Rand. Va. 141, 148, 156; 4 Leigh, Va. 132; 11 Serg. & R. Penn. 115; Viner, Abr.; Coke, Litt. 100; Hob. 22, 217.

WARRANTOR. One who makes a warranty. Sheppard, Touchst. 181.

WARRANTY. In Insurance. A stipulation or agreement on the part of the insured party, in the nature of a condition.

An *express* warranty is a particular stipulation introduced into the written contract by the agreement of the parties.

An *implied* warranty is an agreement which necessarily results from the nature of the contract: as, that the ship shall be seaworthy when she sails on the voyage insured.

2. An express warranty usually appears in the form of a condition, expressed or directly implied in the phraseology of the policy, stipulating that certain facts are or shall be true, or certain acts are or shall be done by the assured, who by accepting the insurance ratifies the stipulation.

Where the stipulation relates wholly to the future, it is a promissory condition or warranty. 1 Phillips, Ins. § 754.

An express warranty must be strictly complied with; and the assured is not permitted to allege, in excuse for non-compliance, that the risk was not thereby affected, since the parties have agreed that the stipulated fact or act shall be the basis of the contract, Bouvier, Inst. Index; 1 Phillips, Ins. § 755, unless compliance is rendered illegal by a subsequent statute. 1 Phillips, Ins. § 769.

3. The more frequent express warranties in *marine policies* are—time of sailing, and, in time of hostilities, the national character of the insured subject, and neutral insignia and conduct. In fire and life policies they are quite numerous, comprehending all the facts stated by the applicant in his application when incorporated, as it usually is, into the policy and expressly contracted by reference. In fire insurance, express reference is often made to the charter of the company, especially in mutual companies, and, in such companies, to rules and regulations, and conditions indorsed upon the policy. 1 Phillips, Ins. §§ 28, 63, 64. A policy of insurance, no less than any other contract, is subject to the condition against fraud.

4. The doctrine of the divers warranties and conditions in the different species of insurance has been the subject of a great mass of jurisprudence: viz.,—

In fire policies, with reference to assignments of the insured property, or the policy, 15 Barb. N. Y. 413; 23 *id.* 628; 25 *id.* 189; Hill & D. N. Y. 101, 133; 17 N. Y. 424, 509; 6 Gray, Mass. 160; 30 Penn. St. 311; 26 Conn. 165; 3 Dutch. N. J. 163; 25 Ala. 355; 1 Sneed, Tenn. 444; 19 Eng. L. & Eq. 283; 22 *id.* 73; conformity to charter, 32 N. H. 313; 8 Cush. Mass. 393; 1 Wall. 273; 25 N. H. 359; condition of the premises, including construction, locality, and manner of using, 14 Barb. N. Y. 383; 16 *id.* 119; 21 *id.* 154; 6 N. Y. 469; 8 *id.* 370, 530, 554; 10 *id.* 469; 17 *id.* 94; 18 *id.* 168, 385; 1 Bosw. 520; 6 Du. N. Y. 6; 8 Cush. Mass. 79; 1 Gray, Mass. 426; 2 *id.* 221; 3 *id.* 53; 5 *id.* 384; 6 *id.* 185; 7 *id.* 257; 31 N. H. 231; 2 Curt. C. C. 610; 10 Rich. So. C. 202; 4 Ohio St. 285; 27 Penn. St. 325; 30 *id.* 299, 315; 4 R. I. 141; 37 Eng. L. & Eq. 561; 38 *id.* 337; distance of other buildings, 7 N. Y. 153; 18 *id.* 376; 6 Gray, Mass. 105; 7 *id.* 261; frauds, 28 N. H. 149, 157; 2 Ohio St. 452; kind of risk, 25 N. H. 550; 3 Md. 341; 6 McLean, C. C. 324; 26 Eng. L. & Eq. 238; limiting right of action, 26 N. H. 22; 27 Vt. 99; 5 Gray, Mass. 432; 6 *id.* 174, 185, 596; 7 *id.* 61, 69; 6 Ohio, 599; 5 R. I. 394; 24 Ga. 97; notice and demand, 18 Barb. N. Y. 69; 20 *id.* 468; 33 N. H. 203, and proof of loss, 8 Cush. Mass. 393; 2 Gray, Mass. 480; 28 Barb. N. Y. 412; 11 N. Y. 81; 29 Penn. St. 198; 18 Ill. 553; 6 Ind. 137; 5 *id.* 417; 5 Sneed, Tenn. 139; 20 Eng. L. & Eq. 541, 590; other insurance, 14 Barb. N. Y. 206; 20 *id.* 635; 13 N. Y. 79, 253; 17 *id.* 415, 609; 22 Conn. 575; 5 Md. 165; 16 N. H. 203; 26 *id.* 169; 33 *id.* 9; 37 Me. 137; 9 Cush. Mass. 479; 10 *id.* 350; 11 *id.* 265; 2 Gray, Mass. 397; 4 *id.* 237; 5 *id.* 52; 6 *id.* 169; 4 N. J. 447; 26 Penn. St. 199; 21 Mo. 97; payment of premium, 18 Barb. N. Y. 541; 20 *id.* 458; 25 *id.* 189; suspension of risk, 11 N. Y. 89; 33 N. H. 9; 43 Me. 393; title, 1 Curt. C. C. 193; 1 Cush. Mass. 280; 8 *id.* 127; 10 *id.* 446, 540; 2 Gray, Mass. 334; 5 *id.* 52, 384; 9 *id.* 370; 25 N. H. 550; 28 *id.* 143; 30 *id.* 153; 31 *id.* 231; 17 Mo. 247; 18 *id.* 128; 22 Conn. 575; 23 Penn. St. 50; 17 Mo. 247; 18 *id.* 128; 21 *id.* 587; 40 Me. 587; 41 *id.* 208; 42 *id.* 22; 22 Barb. N. Y. 527; 25 *id.* 497; 14 N. Y. 253; 5 Du. N. Y. 101; value, 11 Cush. Mass. 324; waiver of compliance with a warranty. 4 N. J. 67; 6 Gray, Mass. 192.

In life policies, with reference to assignment, 5 Sneed, Tenn. 259, representation, or other stipulations. 11 Cush. Mass. 448; 3 Gray, Mass. 180; 1 Bosw. N. Y. 338; 3 Md. 341; 21 Penn. St. 134; 13 La. Ann. 504; 19 Mo. 506; 24 Eng. L. & Eq. 1; 2 C. B. N. S. 257.

In marine policies, with reference to assignments, 33 La. 338; contraband trade, 43 Me. 460; other insurance, 17 N. Y. 401; seaworthiness, 3 Ind. 23; 1 Wheat. 399; 1 Binn. Penn. 592; 1 Johns. N. Y. 241; 10 *id.* 58; 7 Pick. Mass. 259; 16 *id.* 383; 4 Mas. C. C. 439; 1 Pet. 170; Cowp. 143; Dougl. 781; 1 Dowl. 32; 1 Holt, 30; 7 Term, 160; 1 Campb. 1; 2 Barnew. & Ald. 320; 5 Mees. & W. Exch. 414; 1 Phillips, Ins. ch. viii. sect. 2; 1 Arnoult, Ins. 662; Roccus, n. 22; suspension of risk, 3 Gray, Mass. 415; title. 19 N. Y. 179.

Waiver of the right to insist upon the performance of a condition may occur under a policy of this description: as, of the condition relative to assignment, 32 N. H. 95; or

answers to questions, 7 Gray, Mass. 261; or distance of buildings, 6 Gray, Mass. 175; 7 *id.* 261; going out of limits, 33 Conn. 244; limitation of action, 14 N. Y. 253; offer of arbitration, 6 Gray, Mass. 192; payment of premium or assessment, 19 Barb. N. Y. 440; 26 *id.* 116; 25 Conn. 442; 38 Me. 439; 31 Penn. St. 438; proof of loss, 21 Mo. 81; 2 E. D. Smith, N. Y. 268; 17 N. Y. 428; seaworthiness, 37 Me. 137; title. 35 N. H. 328.

See DEVIATION; POLICY; SEAWORTHINESS; Bouvier, Inst. *Warranties.*

In Sales of Personal Property. An *express* warranty is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is, or is not, as there mentioned: as, that a horse is sound; that he is not five years old.

An *implied* warranty is one which, not being expressly made, the law implies by the fact of the sale: for example, the seller is understood to warrant the *title* of goods he sells, when they are in his possession at the time of the sale, 1 Ld. Raym. 593; 1 Salk. 210; but if they are not then in his possession, the rule of *caveat emptor* applies, and the buyer purchases at his risk. Croke Jac. 197.

5. In general, there is no implied warranty of the *quality* of the goods sold. 2 Kent, Comm. 374; Coke, Litt. 102 *a*; 2 Blackstone, Comm. 452; Bacon, Abr. *Action on the Case* (E); Comyns, Contr. 263; Dougl. 20; 2 East, 314, 448, n.; Ross, Vend. c. 6; 1 Pet. 317; 1 Johns. N. Y. 274; 20 *id.* 196; 2 Caines, N. Y. 48; 3 Barb. N. Y. 323; 4 Conn. 428; 10 Mass. 197; 11 Metc. Mass. 569; 3 Yeates, Penn. 262; 12 Serg. & R. Penn. 181; 1 Hard. Ky. 531; 1 Murph. No. C. 138; 2 *id.* 245; 4 Hayw. Tenn. 227. The rule of the civil law was that a fair price implied a warranty of quality. Dig. 21. 2. 1. This rule has been adopted in Louisiana, 1 La. Ann. 27, and in South Carolina. 1 Bay, So. C. 324; 2 *id.* 380; 2 Const. So. C. 353. There may be an implied warranty as to character, 13 Mass. 139; 2 Pick. Mass. 214; 2 Harr. & G. Md. 495; 5 Harr. & J. Md. 117; 2 Mann. & G. 279; 20 Johns. N. Y. 204; 4 Barnew. & C. 108, and even as to quality, from statements of the seller, 40 Me. 9; 24 Barb. N. Y. 549; or a purchase for a specified purpose. 4 Taunt. 847; 1 Wisc. 420; 18 Ill. 420; 28 Vt. 227. And see 16 Mees. & W. Exch. 644; 1 Den. N. Y. 385; 7 Watts, Penn. 55; Sedgwick, Dam. 289; 11 Ired. No. C. 166; 20 Penn. St. 448.

In Sales of Real Property. A real covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and, either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by a paramount title. Coke, Litt. 365 *a*.

Collateral warranty existed when the heir's title was not derived from the warranting ancestor and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. 2 Blackstone, Comm. 301, 302.

Lineal warranty existed when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

6. The statute of 4 Anne, c. 16, annulled these collateral warrantees, which had become a great grievance. Warranty in its original form, it is presumed, has never been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to be sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases. And in England the matter has become one of curious learning and of little or no practical importance. See 4 Kent, Comm. 469; 3 Rawle, Penn. 67, n.; 2 Wheat. 45; 9 Serg. & R. Penn. 268; 11 *id.* 109; 4 Dall. Penn. 442; 1 Sumn. C. C. 358; 17 Pick. Mass. 14; 1 Ired. No. C. 509; 2 Saund. 38, n. 5.

WARRANTY, VOUCHER TO. **In Old Practice.** The calling a warrantor into court by the party warranted (when tenant in a real action brought for recovery of such lands), to defend the suit for him, Coke, Litt. 101 *b*; Comyns, Dig. *Voucher* (A 1); Booth, Real Act. 43; 2 Saund. 32, n. 1; and the time of such voucher is after the demandant has counted.

It lies in most real and mixed actions, but not in personal. Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ (called a summons ad warrantizandum), commanding the sheriff to summon him. Where he, either voluntarily or in obedience to this writ, appears and offers to warrant the land to the tenant, it is called entering into the warranty; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him de novo, the vouchee pleads to the new count, and the cause proceeds to issue.

WARREN (Germ. *wahren*, French, *garenne*). A place privileged by prescription or grant of the king for the preservation of hares, conies, partridges, and pheasants, or any of them. Termes de la Ley. A action lies for killing beasts of warren inside the warren; but they may be killed *damage feasant* on another's land. 5 Coke, 104. It need not be inclosed. Coke, 4th Inst. 318.

WASHINGTON. One of the territories of the United States of America.

2. This territory, lying between the Columbia river and the 46th parallel of latitude on the south and the 49th parallel on the north, the Rocky Mountains on the east, and the Pacific ocean on the west, and formerly constituting a part of Oregon, was established by an act of congress of March 2, 1853, which act is the fundamental law of the territory. 10 Stat. at Large. The limits upon the north were settled by treaty of the United States with Great Britain signed June 15, 1846. Proclamation thereof was made by

the president, Aug. 5, 1846. The organic act erecting the territory was approved March 2, 1853. The territory includes that part of the territory of Oregon lying north of the Columbia river to the point where said river crosses the 46th parallel of north latitude, thence on said parallel to the summit of the Rocky Mountains. The provisions of the organic act are the same, with the exceptions here given, as those of the act erecting the territory of New Mexico. See NEW MEXICO.

The present qualifications of voters, subject to change by legislation, are as follows:—all free white male inhabitants who have lived in the territory three months, and in the county in which they offer to vote fifteen days, before election, provided they are citizens of the United States, or have declared their intention to become such. This is not to prevent half-breed Indians whom the judges think to have adopted the habits of civilized life, from voting. But no person under guardianship, non compos mentis, or convicted of treason, felony, or bribery, can vote, unless restored to civil rights.

3. The *Legislative Power* and authority of said territory is vested in a legislative assembly, consisting of a council and house of representatives. *The council* consists of nine members, having the qualifications of voters, who hold their offices for the term of three years. The *house of representatives* consists of any number of members, not less than eighteen nor over thirty, who hold their office for one year. No session of the legislature can exceed sixty days. The legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. No law is to be passed interfering with the primary disposal of the soil; no tax is to be imposed upon the property of the United States; nor can the lands or other property of non-residents be taxed higher than the lands or other property of residents. All laws passed by the legislative assembly must be submitted to congress, and if disapproved are null and of no effect. The legislature has no power to incorporate a bank, or any institution with banking powers, or to borrow money in the name of the territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly; can pass no charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or grant any other banking powers or privileges, or allow the establishment of any branch or agency of any such corporation, derived from other authority; cannot authorise the issue of any obligation, scrip, or evidence of debt in any mode or manner whatever, except certificates for service to said territory. All township, district, and county officers not otherwise provided for in the organic act are to be appointed or elected in such manner as is provided by the legislative assembly of the territory. No member of the legislative assembly can hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States can be a member of the legislative assembly, or hold any office under the government of said territory.

4. The *Executive* branch of the government of this territory is vested in a governor, who holds his office for four years and until his successor is appointed and qualified, unless sooner removed by the president of the United States. He must reside in the territory; is commander-in-chief of the militia thereof; may grant pardons, remit fines and forfeitures for offences against the laws of the territory, and respites for offences against the laws of the United States until the decision of the president can be made known; shall commission all officers who shall be appointed to office under the laws of said territory, when by law such commission shall be required, and shall take care that the laws be faithfully executed. He can neither approve nor veto any act of the legislature.

The *secretary* of the territory holds his office for four years, subject to removal by the president of the United States. In case of the death, removal, resignation, or absence of the governor from the territory, he is authorized and required to execute and perform the powers and duties of the governor during such vacancy or absence.

The *judicial power* of the territory is vested in a supreme court, district courts, probate courts, and justices of the peace.

The *supreme court* consists of a chief justice and two associate justices, who hold a term at the seat of government annually, and hold their office for four years, subject to removal by the president of the United States.

5. A *district court* is holden, in each of the three districts into which the territory is divided for the purpose, by one of the justices of the supreme court, who must reside in the district assigned to him by the legislative assembly. Each of said district courts has and exercises the same jurisdiction, under the constitution of the United States and the laws of said territory, as is vested in the circuit and district courts of the United States. Writs of error and appeal may be taken from the district to the supreme court, and from the supreme court of the territory to the supreme court of the United States, where the amount in controversy exceeds two thousand dollars. Each court appoints its own clerk.

The county commissioners, three in each county, are elected by the people of the county, for three years. They are so classified that one goes out of office each year. They have the general care of the county buildings and finances, divide the county into election-precincts, and take charge of the county poor.

Justices of the peace, one or more, if authorized by the county commissioners, are elected annually by the voters of each election-precinct. They have jurisdiction in all actions founded on contract, where the sum involved is not over one hundred dollars, for injury to real or personal property, for detainer of personal property, for penalty where the amount does not exceed one hundred dollars, for foreclosure of mortgage, or enforcement of lien on personal property, of forcible entry and detainer, to try right to mining claims. A jury of six may be demanded by either party, and an appeal lies from the decision of the justice to the circuit court. They have also a criminal jurisdiction where the penalty does not exceed thirty dollars. For the rest of the judicial system as established by the organic act, see NEW MEXICO.

6. A *delegate* to the house of representatives of the United States, to serve for the term of two years, who must be a citizen of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who is entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other territories of the United States to the house of representatives.

By the territorial legislature, all common-law forms of action, and all distinctions between law and equity, are abolished, and there can be but one form of action to establish and enforce private rights, which is called a civil action. Stats. W. T. 1854, p. 131.

Real estate descends as follows:

To the children of the intestate in equal shares, or to the issue of his deceased children.

If he dies leaving no issue, to the father.

Leaving no issue, or father, in equal shares to his brothers, and sisters, and mother.

Leaving no issue, father, brother, or sister, to his mother, to the exclusion of the issue of his deceased brothers or sisters.

Leaving no issue, father, mother, brother, or sister, his estate descends to his next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor are preferred.

If any person die leaving several children, or leaving one child and the issue of one or more others, and any such surviving child 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 the issue of any such other children who have died, by right of representation.

If at the death of such child who dies under age, not having been married, all the other children of the said parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from his said parent descends to all the issue of the other children of the same parent; and if all the said issue are in the same degree of kindred to the said child, they share the estate equally; otherwise they take according to the right of representation.

If the intestate leave no kindred, his estate escheats to the county of which he was a resident. Stats. W. T. 1854, p. 305.

7. *Deeds* to convey real estate or any interest therein must be in writing, signed and sealed by the party bound thereby, witnessed by two witnesses, and acknowledged before a judge of the supreme court, a judge of the probate court, a justice of the peace, or a notary public. A married woman, to be bound, must join with her husband. Stats. W. T. 1854, p. 402.

Wills. Every person of twenty-one years of age and upwards, of sound mind, may by last will devise all his estate, real and personal, saving to the widow her dower. A married woman may by will dispose of any real estate held in her own right, subject to any right her husband may have as tenant by curtesy.

Every will must be in writing, signed by the testator or by some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. Stats. W. T. 1854, p. 313.

WASTE. Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir or of him in reversion or remainder.

Permissive waste consists in the mere neglect or omission to do what will prevent injury: as, to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises.

Voluntary waste consists in the commission of some destructive act: as, in pulling down a house or ploughing up a flower-garden. 1 Paige, Ch. N. Y. 573.

2. *Voluntary waste* is committed upon cultivated *fields*, *orchards*, *gardens*, *meadows*, and the like, whenever a tenant uses them contrary to the usual course of husbandry or in such a manner as to exhaust the soil by negligent or improper tillage. 5 Term, 373; 6 Ves. Ch. 328; 2 Hill, N. Y. 157; 2 Bos. & P. 86. It is, therefore, waste to convert arable into wood land, or the contrary. Coke, Litt. 53 *b*. Cutting down fruit-trees, although planted by the tenant himself, is waste, 2 Rolle, Abr. 817; and it was held to be waste for an outgoing tenant of garden-ground to plough up strawberry-beds which he had bought of a former tenant when he entered. 1 Campb. 227. When lands are leased on which there are open mines of metal or coal, or pits of gravel, lime, clay, brick-earth, stone, and the like, the tenant may dig out of such mines or pits; but he cannot open any new mines or pits without being guilty of waste. Coke, Litt. 53 *b*. See MINES. Any carrying away of the soil is also waste. Comyns, Dig. *Waste* (D 4); 14 East, 489; 2 Hill, N. Y. 157; 6 Barb. N. Y. 13; Coke, Litt. 53 *b*; 1 Schoales & L. Ir. Ch. 8.

3. It is committed *in houses* by pulling them down, or by removing wainscots, floors, benches, furnaces, windows, doors, shelves, and other things once fixed to the freehold, although they may have been erected by the lessee himself, unless they are mere fixtures. See FIXTURES. And this kind of waste may take place not only in pulling down houses or parts of them, but also in changing their forms: as, if the tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first, 2 Rolle, Abr. 815; or convert a parlor into a stable, or a grist-mill into a fulling-mill, 2 Rolle, Abr. 814, 815, or turn two rooms into one. 2 Rolle, Abr. 815. The building of a house where there was none before was, by the strict rules of the common law, said to be waste, Coke, Litt. 53 *a*; and taking it down after it was built was waste also. Comyns, Dig. *Waste* (D 2); 2 East, 88; 1 Barnew. & Ad. 161; 8 Mass. 416; 1 Metc. Mass. 27; 4 Pick. Mass. 310; 19 N. Y. 234; 16 Conn. 322; 2 M'Cord, So. C. 329; 1 Harr. & J. Md. 289; 1 Watts, Penn. 378.

4. Voluntary waste may also be committed *upon timber;* and in those countries where timber is scarce and valuable, the law is strict in this respect. But many acts which in England would amount to waste are not so here. The law of waste accommodates itself to the varying wants and conditions of different countries: that will not, for instance, be waste in an entire woodland country which would be so in a cleared one. The clearing up of land for the purposes of tillage in a new country where trees abound is no injury to the inheritance, but, on the contrary, is a benefit to the remainderman, so long as there is sufficient timber left and the land cleared bears a proper relative proportion to the whole tract. 4 Kent, Comm. 316; 3 Yeates, Penn. 261; 4 Watts, Penn. 463; 6 Munf. Va. 134; 1 Rand. Va. 258; 2 South. N. J. 552; 6 T. B. Monr. Ky. 342; 6 Yerg. Tenn. 334; 5 Mas. C. C. 13; 2 Hayw. No. C. 339; 26 Wend. N. Y. 122; 2 Hill, N. Y. 157.

5. The extent to which wood and timber on such land may be cut without waste, is a question of fact for a jury to determine under the direction of the court. 7 Johns. N. Y. 27. A tenant may always cut trees for the repair of the houses, fences, hedges, stiles, gates, and the like, Coke, Litt. 53 *b*, and for making and repairing all instruments of husbandry: as, ploughs, carts, harrows, rakes, forks, etc. Wood, Inst. 344. See ESTOVERS. And he may, when unrestrained by the terms of the lease, cut timber for firewood, if there be not enough dead timber for such purposes. Comyns, Dig. *Waste* (D 5); Fitzherbert, Nat. Brev. 59 *m*. But where, under such circumstances, he is entitled to cut down timber, he is restrained, nevertheless, from cutting ornamental trees or those planted for shelter, 6 Ves. Ch. 419, or to exclude objects from sight. 16 Ves. Ch. 375; 7 Ired. Eq. No. C. 197; 6 Barb. N. Y. 9.

A tenant of a dove-house, warren, park, fish-pond, or the like, would also be guilty of waste if he took away animals therefrom to such an extent as not to leave as large a stock of them as he found when he came in. Coke, Litt. 53; 2 Leon. 222.

Windfalls are the property of the landlord; for whatever is severed by inevitable necessity, as, by a tempest, or by a trespasser, and by wrong, belongs to him who has the inheritance. 3 P. Will. Ch. 268; 11 Coke, 81; Bacon, Abr. *Waste* (D 2).

6. In general, a tenant is answerable for waste although it is committed by a stranger; for he is the custodian of the property, and must take his remedy over. 2 Dougl. 745; 1 Taunt. 198; 1 Den. N. Y. 104. But he is not liable when the damage is caused by lightning, tempest, or a public enemy. Coke, 2d Inst. 303; F. Moore, 69; 5 Coke, 21; Sheppard, Touchst. 173; 4 Kent, Comm. 77. He was also liable, at common law, for all damages done by fire, accidental or otherwise, upon the premises; but the English statute of 14 Geo. III. c. 78, first enacted that no action should be had against any person in whose house, chamber, or other building or on whose estate a fire shall *accidentally* begin; and this statute has been very generally re-enacted throughout the United States. The protection afforded by these statutes, however, extends only to a case of accidental fire,—that is, to one which cannot be traced to any particular or wilful cause,—and stands opposed to the negligence of either servants or masters. And therefore an action still lies against a person upon whose premises a fire commences through the negligence of himself or his servants and is productive of injury to his neighbor. 1 Den. N. Y. 207; 8 Johns. N. Y. 421; 2 Harr. Del. 443; 21 Pick. Mass. 378; 1 Halst. N. J. 127; 6 Taunt. 44; Taylor, Landl. & T. 196.

7. *Permissive waste* to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering, or the foundation to be injured by neglecting to turn off a stream of water, and the like. Coke, Litt. 53 *a*; Ow. 43. See LANDLORD AND TENANT. At common law, the mere suffering of a house to remain unroofed, if it was so at the commencement of the lease, would not be waste, but a tenant assumed the responsibility of any other part of the house thereby becoming ruinous or decayed. And so, although the injury or destruction of a house by lightning, tempest, or a public enemy would not be waste, yet to suffer it to remain ruined would be. 2 Rolle, Abr. 818; F. Moore, 69; 10 Ad. & E. 398; 4 Leon. 240. Permissive waste in houses, however, as a general rule, is now only punishable when a tenant is bound to repair, either expressly or by implication. 4 Bos. & P. 298; 10 Barnew. & C. 312.

8. *The redress* for this injury is of two kinds, *preventive* and *corrective*. A reversioner or remainderman, in fee, for life, or for years, may now recover, by an ordinary action at law, all damages he has sustained by an act of *voluntary waste* committed by either his tenant or a stranger, provided the injury affects his reversion. But as against a tenant for years, or from year to year, he can only sustain an action for damages for *permissive waste* if his lease obliges the tenant to repair. 2 Saund. 252 *d*, note; 3 East, 38; 10 Barnew. & C. 312. The statutes of the several states also provide special relief against waste in a great variety of cases, following, in general, the English Statute of Gloucester, which not only forfeits the premises, but gives exemplary damages for all the injury done. These legal remedies, however, are still so inadequate, as well to prevent future waste as to give redress for waste already committed, that they have in a great measure given way to the remedy by bill in equity, by which not only future waste, whether voluntary or permissive, will be prevented, but an account may be decreed and compensation given for past waste in the same proceeding. 2 Mer. Ch. 408; 1 Ves. Ch. 93; 2 Story, Eq. Jur. 179; Taylor, Landl. & T. 690.

9. The reversioner need not wait until waste has actually been committed before bringing his action; for if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere and restrain him by injunction from doing so. 2 Atk. Ch. 182; 18 Ves. Ch. 355; 2 Ves. & B. Ch. Ir. 349; 1 Johns. Ch. N. Y. 435; 1 Jac. & W. Ch. 653.

Sometimes a tenant, whether for life or for years, by the instrument creating his estate, holds his lands *without impeachment of waste*. This expression is equivalent to a general permission to commit waste, and at common law would authorize him to cut timber, or open new mines and convert the produce to his own use. Coke, Litt. 220; 11 Coke, 81 *b*; 15 Ves. 425. But equity puts a limited

construction upon this clause, and only allows a tenant those powers under it which a prudent tenant in fee would exercise, and will, therefore, restrain him from pulling down or dilapidating houses, destroying pleasure-houses, or prostrating trees planted for ornament or shelter. 2 Vern. Ch. 739; 3 Atk. Ch. 215; 6 Ves. Ch. 110; 16 *id.* 375.

See, on the subject in general, Woodfall, Landl. & T. 217, c. 9, s. 1; Bacon, Abr. *Waste;* Viner, Abr. *Waste;* Comyns, Dig. *Waste;* Sharswood, Blackst. Comm. 180; 1 Washburn, Real Prop.

As to remedies against waste by injunction, see 1 Vern. Ch. 23, n.; 5 P. Will. 268, n. F; 1 Eq. Cas. Abr. 400; 6 Ves. Ch. 107, 419, 787; 8 *id.* 70; 16 *id.* 375; 2 Swanst. Ch. 251; 3 Madd. Ch. 498; Jac. Ch. 70; Drewry, Inj. pt. 2, c. 1, p. 134. As between tenants in common, 5 Taunt. 24; 16 Ves. Ch. 132; 19 *id.* 159; 3 Brown, Ch. 622; 2 Dick. Ch. 667; Bouvier, Inst. Index; INJUNCTION.

As to remedy by writ of estrepement to prevent waste, see ESTREPEMENT; Woodfall, Landl. & T. 447; 2 Yeates, Penn. 281; 4 Smith, Laws of Penn. 89; 3 Blackstone, Comm. 226.

As to remedies in cases of fraud in committing waste, see Hovenden, Frauds, c. 7, pp. 226–238.

WASTE-BOOK. In Commercial Law. A book used among merchants. All the dealings of the merchants are recorded in this book in chronological order as they occur.

WATCH. To stand sentry and attend guard during the night-time. Certain officers called watchmen are appointed in most of the United States, whose duty it is to arrest all persons who are violating the law or breaking the peace. See 1 Sharswood, Blackst. Comm. 356; 1 Chitty, Crim. Law, 14, 20.

WATCH AND WARD. A phrase used in the English law to denote the superintendence and care of certain officers whose duties are to protect the public from harm.

WATCHMAN. An officer in many cities and towns, whose duty it is to watch during the night and take care of the property of the inhabitants.

He possesses, generally, the common-law authority of a constable to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed. 1 Chitty, Crim. Law, 24; 2 Hale, Pl. Cr. 96; Hawkins, Pl. Cr. b. 2, c. 13, s. 1, etc.; 1 East, Pl. Cr. 303; Coke, 2d Inst. 52; Comyns, Dig. *Imprisonment* (H 4); Dane, Abr. Index; 3 Taunt. 14; 1 Barnew. & Ald. 227; Peake, 89; 1 Mood. Cr. Cas. 334; 1 Esp. 294.

By an act of congress, approved Sept. 30, 1850, the compensation of watchmen in the various departments of government is fixed at five hundred dollars per annum.

WATER. That liquid substance of which the sea, the rivers, and creeks are composed.

A pool of water, or a stream or watercourse, is considered as part of the land: hence a pool of twenty acres would pass by the grant of twenty acres of land, without mentioning the water. 2 Blackstone, Comm. 18; 2 N. H. 255, 391; 1 Wend. N. Y. 255; 5 Paige, Ch. N. Y. 141; 5 Cow. N. Y. 216; 5 Conn. 497; 14 Mass. 49; 8 Metc. Mass. 466; 2 Harr. & J. Md. 195; 8 Penn. St. 13. A mere grant of water passes only a fishery. Coke, Litt. 4 *b;* 5 Cow. N. Y. 216. But the owner of land over which water flows may grant the land, reserving the use of all the water to himself, or may grant the use of all or a portion of the water, reserving the fee of the land to himself. 26 Vt. 64; 3 Hill, N. Y. 418; 22 Pick. Mass. 333; 6 Metc. Mass. 131; 18 Eng. L. & Eq. 164.

WATER BAILIFF. In English Law An officer appointed to search ships in ports. 10 Hen. VII. 30.

WATER-COURSE. This term is applied to the flow or movement of the water in rivers, creeks, and other streams.

2. In a legal sense, property in a watercourse is comprehended under the general name of *land:* so that a grant of land conveys to the grantee not only fields, meadows, and the like, but also all the rivers and streams which naturally pass over the surface of the land. 1 Coke, Litt. 4; 2 Brownl. 142; 2 N. H. 255; 5 Wend. N. Y. 423. See WATER.

Those who own land bounding upon a water-course are denominated by the civilians *riparian* proprietors; and this convenient term has been adopted by judges and writers on the common law. Angell, Wat.-Courses, 3; 3 Kent, Comm. 354; 4 Mas. C. C. 397.

3. By the rules of the common law, all proprietors of lands have precisely the same rights to waters flowing through their domains, and one can never be permitted so to use the stream as to injure or annoy those situated on the course of it, either above or below him. They have no property in the water itself, but a simple usufruct: *aqua currit et debet currere ut currere solebat,* is the language of the law. Accordingly, while each successive riparian proprietor is entitled to the reasonable use of the water for the supply of his natural wants and for the operation of mills and machinery, he has no right to flow the water back upon the proprietor above, Croke Jac. 556; 9 N. H. 502; 24 *id.* 364; 9 Watts, Penn. 119; 20 Penn. St. 85; 3 Rawle, Penn. 84; 4 Eng. L. & Eq. 265; 1 Barnew. & Ald. 874; 3 Green, N. J. 116; 4 Ill. 452; 38 Me. 243; nor to discharge it so as to flood the proprietor below, 17 Johns. N. Y. 306; 3 Hill, N. Y. 531; 5 Vt. 371; 3 Harr. & J. Md. 231; nor to divert the water, 17 Conn. 288; 13 Johns N. Y. 212; 10 Barb. N. Y. 518; 24 Ala. N. s. 130; 28 Vt. 670; 38 Eng. L. & Eq. 526, even for the purpose of irrigation, unless it be returned without essential diminution, 38 Eng. L. & Eq. 241; 13 Mass. 420; 5 Pick. Mass. 175; 8 Me. 253; 12 Wend. N. Y. 330;

4 Ill. 496; nor to obstruct or detain it, except for some reasonable purpose, such as to obtain a head of water for a mill and to be again discharged, so as to allow all on the same stream a fair participation, 17 Barb. N. Y. 654; 10 Cush. Mass. 367; 6 Ind. 324; 28 Vt. 459; 6 Penn. St. 32; 29 *id.* 98; 4 Mas. C. C. 401; 17 Johns. N. Y. 306; 13 Conn. 303; nor to corrupt the quality of the water by unwholesome or discoloring impurities. 24 Penn. St. 298; 22 Barb. N. Y. 297; 3 Rawle, Penn. 397; 8 Eng. L. & Eq. 217; 3 Hill, N. Y. 479; 4 Ohio, 833. But, while such are the rights of the riparian proprietors when unaffected by contract, these rights are subject to endless modifications on the part of those entitled to their enjoyment either by grant, 3 Conn. 373; 13 Johns. N. Y. 525; 17 Me. 281; 3 Hill, N. Y. 418; 6 Metc. Mass. 131; 7 *id.* 94; 7 Penn. St. 348; 18 Eng. L. & Eq. 164; 9 N. H. 282; 3 N. Y. 253, or by reservation, 6 N. Y. 33; 20 Vt. 250, or by a license, 2 Gill, Md. 221; 13 Conn. 303; 1 Metc. Mass. 331; 14 Serg. & R. Penn. 267; 4 East, 107, or by agreement, 19 Pick. Mass. 449; 21 *id.* 417; 22 *id.* 333; 3 Harr. & J. Md. 282; 17 Wend. N. Y. 136, or by twenty years' adverse enjoyment from which a grant or contract will be implied, 6 East, 208; 1 Campb. 463; 4 Mas. C. C. 397; 6 Scott, 167; 9 Pick. Mass. 251, in such a way as to adapt the uses of the water to the complex and multiplying demands and improvements of modern civilization.

4. Wherever a water-course *divides two estates*, each estate extends to the thread or central line of the stream; but the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite, each riparian proprietor being entitled not to half or other proportion of the water, but to the whole bulk of the stream, undivided and indivisible, or *per my et per tout*. 13 Johns. N. Y. 212; 8 Me. 253; 3 Sumn. C. C. 189; 13 Mass. 507; 1 Paige, Ch. N. Y. 447. When an island is on the side of a river, so as to give the riparian owner of that side only one-fourth of the water, he has no right to place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river, but the owner opposite is entitled to the flow of the remaining three-fourths. 10 Wend. N. Y. 260.

Where there is an under-ground flow of water so well defined as to be a constant stream, the owner of the land through which it flows has no right to divert it to the injury of the person on whose land it comes to the surface as a spring. 25 Penn. St. 528; 29 *id.* 59; 6 Paige, Ch. N. Y. 435; 1 Stor. C. C. 387. But see 12 Mees. & W. Exch. 324; 28 Vt. 49; Angell, Wat. §§ 109, 114. And see, generally, Washburn, Easements; Angell, Water-Courses; 3 Kent, Comm. 439, 441; Woolrych, Waters; 78 Law Lib.; Schultes, Aquatic Rights; Comyns, Dig. *Action for Nuisance;* Crabb, Real Prop. §§ 398–443; Lois des Bât. pt. 1, c. 3, sec. 1, art. 3.

WATERGANG (Law Lat. *watergangium*). A Saxon word for a trench or course to carry a stream of water, such as are commonly made to drain water out of marshes. Ordin. Marisc. de Romn. Chart. Hen. III.

WATERGAVEL. A rent paid for fishing in, or other benefit from, some river. Chart. 15 Hen. III.

WAVESON. Such goods as appear upon the waves after shipwreck. Jacob, Law Dict.

WAY. A passage, street, or road.

2. A right of way is the privilege which an individual, or a particular description of individuals, as, the inhabitants of a village or the owners or occupiers of certain farms, have of going over another's ground. It is an incorporeal hereditament of a real nature, entirely different from a common highway. Cruise, Dig. tit. xxiv. s. 1.

A right of way may arise *by prescription* and immemorial usage, or by an uninterrupted enjoyment for twenty years under a claim of right. Coke, Litt. 113; 1 Rolle, Abr. 936; 5 Harr. & J. Md. 474; 36 Eng. L. & Eq. 564; 4 Gray, Mass. 177, 547; 20 Penn. St. 331, 458; 4 Barb. N. Y. 60; 4 Mas. C. C. 402; 8 Pick. Mass. 504; 24 N. H. 440. By grant: as, where the owner grants to another the liberty of passing over his land. 3 Lev. 305; 1 Ld. Raym. 75; 17 Mass. 416; 19 Pick. Mass. 250; 20 *id.* 291; 7 Barnew. & C. 257; Crabb, Real Prop. § 366. If the grant be of a freehold right, it must be by deed. 5 Barnew. & C. 221; 4 R. I. 47. *By necessity:* as, where a man purchases land accessible only over land of the vendor, or sells reserving land accessible only over land of the vendee, he shall have a way of necessity over the land which gives access to his purchase or reservation. 2 Lutw. 1487; 5 Taunt. 311; 23 Penn. St. 333; 2 Mass. 203; 14 *id.* 56; 3 Rawle, Penn. 495; 11 Mo. 513; 29 Me. 499; 27 N. H. 448; 19 Wend. N. Y. 507; 15 Conn. 39. The necessity must be absolute, not a mere convenience, 2 M'Cord, So. C. 445; 24 Pick. Mass. 102; 8 Rich. So. C. 158; and when it ceases the way ceases with it. 18 Conn. 321; 1 Barb. Ch. N. Y. 353. *By reservation* expressly made in the grant of the land over which it is claimed. 10 Mass. 183; 25 Conn. 331. *By custom:* as, where navigators have a right of this nature to tow along the banks of navigable rivers with horses. 3 Term, 253. *By acts of legislature;* though a private way cannot be so laid out without the consent of the owner of the land over which it is to pass. 15 Conn. 39, 83; 4 Hill, N. Y. 47, 140; 4 B. Monr. Ky. 57.

3. A right of way may be either a right in gross, which is a purely personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant. 3 Kent, Comm. 420; 6 Mod. 3; 2 Ld. Raym. 922; 1 Watts, Penn. 35; 19 Pick. Mass. 250; 3 Metc. Mass. 457. A right of way appurtenant to land is appurtenant to all and every part of the

land, and if such land be divided and conveyed in separate parcels a right of way thereby passes to each of the grantees. 1 Cush. Mass. 285; 1 Serg. & R. Penn. 229.

Twenty years' occupation of land adverse to a right of way and inconsistent therewith bars the right. 2 Whart. Penn. 123; 16 Barb. N. Y. 184.

Lord Coke, adopting the civil law, says there are three kinds of ways: a footway, called *iter;* a footway and horseway, called *actus;* a cartway, which contains the other two, called *via.* Coke, Litt. 56 *a.* To which may be added a *driftway*, a road over which cattle are driven. 1 Taunt. 279; Pothier, Pandectæ, lib. 8, t. 3, § 1; Dig. 8. 3; 1 Brown, Civ. Law, 177.

See 3 Kent, Comm. 419; Washburn, Easements; Crabb, Real Prop.; Cruise, Dig.; HIGHWAY.

WAY-BILL. A writing in which are set down the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land, when the goods are carried by water, the instrument is called a *bill of lading.*

WAY-GOING CROP. In Pennsylvania. By the custom of the country, a tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he had put into the ground the preceding fall. This is called the *way-going crop.* 5 Binn. Penn. 289; 2 Serg. & R. Penn. 14; 1 Penn. St. 224. See AWAY-GOING CROP; EMBLEMENTS.

WAYS AND MEANS. In legislative assemblies, there is usually appointed a committee whose duties are to inquire into and propose to the house the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means.

WEAR. A great dam made across a river, accommodated for the taking of fish or to convey a stream to a mill. Jacob, Law Dict. See DAM.

WED. A covenant or agreement: whence a wedded husband.

WEEK. Seven days of time.

The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter.

The first day of the week is called *Sunday;* the second, Monday; the third, Tuesday; the fourth, Wednesday; the fifth, Thursday; the sixth, Friday: and the seventh, Saturday. See 4 Pet. 361.

WEIGHAGE. In English Law. A duty or toll paid for weighing merchandise: it is called *tronage* for weighing wool at the king's beam, or *pesage* for weighing other avoirdupois goods. 2 Chitty, Com. Law, 16.

WEIGHT. A quality in natural bodies by which they tend towards the centre of the earth.

2. Under the article *Measure*, it is said that by the constitution congress possesses the power "to fix the standard of weights and measures," and that this power has not been exercised.

The weights now generally used in the United States are the same as those of England; they are of two kinds.

AVOIRDUPOIS WEIGHT.

First, used in almost all commercial transactions, and in the common dealings of life.

27 11/32 grains = 1 dram.
16 drams = 1 ounce.
16 ounces = 1 pound (lb.).
28 pounds = 1 quarter. (qr.).
4 quarters = 1 hundredweight (cwt.).
20 hundredweight = 1 ton.

Second, used for meat and fish.

8 pounds = 1 stone.

Third, used in the wool-trade.

			Cwt.	qr.	lb.
7 pounds	= 1 clove.				
14 pounds	= 1 stone.	=	0	0	14
2 stones	= 1 tod.	=	0	1	2
6½ tods	= 1 wey.	=	1	2	14
2 weys	= 1 sack.	=	3	1	0
12 sacks	= 1 last.	=	39	0	0

Fourth, used for butter and cheese.

8 pounds = 1 clove.
56 pounds = 1 firkin.

TROY WEIGHT.

24 grains = 1 pennyweight.
20 pennyweights = 1 ounce.
12 ounces = 1 pound.

3. These are the denominations of troy weight when used for weighing gold, silver, and precious stones, except diamonds. Troy weight is also used by apothecaries in compounding medicines; and by them the ounce is divided into eight drams, and the dram into three scruples, so that the latter is equal to twenty grains. For scientific purposes the grain only is used, and sets of weights are used constructed in decimal progression from 10,000 grains downward to one-hundredth of a grain. The carat used for weighing diamonds is three and one-sixth grains.

A short account of the French weights and measures is given under the article MEASURE.

WEIGHT OF EVIDENCE. This phrase is used to signify that the proof on one side of a cause is greater than on the other.

When a verdict has been rendered against the weight of the evidence, the court may, on this ground, grant a new trial; but the court will exercise this power not merely with a cautious but a strict and sure judgment, before they send the case to a second jury.

The general rule, under such circumstances, is that the verdict once found shall stand: the setting aside is the exception, and ought to be an exception of rare and almost singular occurrence. A new trial will be granted on this ground for either party: the evidence, however, is not to be weighed in golden scales. 3 Bingh. N. C. 109; Gilp. Dist. Ct. 356; 4 Yeates, Penn. 437; 3 Me. 276; 8 Pick. Mass. 122; 5 Wend. N. Y. 595; 7 *id.* 380; 2 Va Cas. 235.

WELCH MORTGAGE. In English Law. A species of security which partakes of the nature of a mortgage, as there is a

debt due, and an estate is given as a security for the repayment, but differs from it in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and there is no remedy to enforce payment, while the mortgagor has a perpetual power of redemption.

It is a species of *vivum vadium*. Strictly, however, there is this distinction between a Welch mortgage and a *vivum vadium*: in the latter the rents and profits of the estate are applied to the discharge of the principal after paying the interest; while in the former the rents and profits are received in satisfaction of his interest only. 1 Powell, Mortg. 373 *a*.

WELL. A hole dug in the earth in order to obtain water.

The owner of the estate has a right to dig in his own ground at such a distance as is permitted by law from his neighbor's land: he is not restricted as to the size or depth, and is not liable to any action for rendering the well of his neighbor useless by so doing. Lois des Bât. pt. 1, c. 3, sect. 2, art. 2, § 2.

WELL KNOWING. **In Pleading.** Words used in a declaration when the plaintiff sues for an injury which is not immediate and with force, and the act or nonfeasance complained of was not *primâ facie* actionable. Not only the injury, but the circumstances under which it was committed, ought to be stated: as, where the injury was done by an animal. In such case the plaintiff, after stating the injury, continues, the defendant, *well knowing* the mischievous propensity of his dog, permitted him to go at large. See SCIENTER.

WERE. The name of a fine among the Saxons imposed upon a murderer.

The life of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *were*, or *æstimatio capitis*. The amount varied according to the dignity of the person murdered. The price of wounds was also varied according to the nature of the wound, or the member injured.

WERGILD, WEREGILD. **In Old English Law.** The price which, in a barbarous age, a person guilty of homicide or other enormous offence was required to pay, instead of receiving other punishment. 4 Blackstone, Comm. 188.

See, for the etymology of this word, and a tariff which was paid for the murder of the different classes of men, Guizot, Essais sur l'Histoire de France, Essai 4ème, c. 2, § 2.

WEST SAXON LAGE. The law of the West Saxons, which was observed in the counties to the south and west of England, from Kent to Devonshire, in the beginning of the eleventh century. Supposed by Blackstone to have been much the same with the laws of Alfred. 1 Blackstone, Comm. 65.

WETHER. A castrated ram, at least one year old: in an indictment it may be called a sheep. 4 Carr. & P. 216.

WHALER. **In Maritime Law.** A vessel employed in the whale-fishery.

It is usual for the owner of the vessel, the captain, and crew, to divide the profits in just proportions, under an agreement similar to the contract Di Colonna.

WHARF. A space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel.

2. At common law, the soil of all tide-waters below high-water mark being vested in the crown as the conservator of the public rights of navigation and fishing, the erection of a wharf thereon without the consent of the crown is an encroachment upon the royal domain of that kind which has been denominated a *purpresture*, and, as such, may be either abated, or, if more beneficial to the crown, seized and arrested, unless indeed it be likewise a public nuisance. Angell, Tide-Wat. 196; 1 Anstr. 606; 2 Wils. Exch. 101; 10 Price, Exch. 350, 378; 18 Ves. Ch. 214; 2 Story, Eq. Jur. § 920 *et seq.* But if it obstruct navigation to such a degree as to be a public nuisance, neither the crown nor its grantee has authority to erect or maintain it without the sanction of an act of parliament. 5 Taunt. 705; 8 Ad. & E. 336; 4 Barnew. & C. 598; 5 Mees. & W. Exch. 327; 11 Ad. & E. 223; Pheas. Rights of Water, 54. It is not every wharf erected in navigable water, however, which is a nuisance; for it may be a benefit rather than an injury to the navigation; and it is for the jury to determine, in each particular case, whether such a wharf is a nuisance or not, the question being whether it occasions any substantial hindrance to the navigation of the river by vessels of any description, and not whether it causes a benefit to navigation in general. 2 Stark. 511; 1 Carr. & M. 496; 4 Ad. & E. 384; 6 *id.* 143; 15 Q. B. 276. Wharves must be assigned in open places only. 1 W. Blackst. 581.

3. In this country, the several states, being the owners of the soil of the tide-waters within their respective territories, may by law authorize and regulate the erection of wharves thereon, at least until the general government shall have legislated upon the subject. 4 Ga. 26; 7 Cush. Mass. 53; 2 Harr. & M'H. Md. 244; 11 Gill & J. Md. 351. In Massachusetts and Maine, by a colonial ordinance, the provisions of which are still recognized as the law of those states, the property of the shores and flats between high and low water mark, for one hundred rods, subject to the rights of the public, was transferred to the owners of the upland, who may, therefore, wharf out to that distance, if by so doing they do not unreasonably interrupt navigation. 1 Cush. Mass. 313, 395; 3 *id.* 9; 7 *id.* 53; 6 Mass. 435; 17 *id.* 413; 13 Pick. Mass. 255; 17 *id.* 357; 9 Me. 42; 36 *id.* 16; 39 *id.* 451; 40 *id.* 31; 42 *id.* 9. If without legislative sanction they extend a wharf beyond that distance, such extension is *primâ facie* a nuisance, and

will be abated as such, unless it can be shown that it is no material detriment to navigation. 3 Am. Jur. 185; Angell, Tide-Wat. 206; 20 Pick. Mass. 186. In Connecticut, and probably in other states, by the law of the state founded upon immemorial usage, the proprietor of the upland has the right to wharf out to the channel,—subject to the rights of the public. 9 Conn. 38; 25 *id.* 345; 16 Pet. 369; 1 Dutch. N. J. 525; 6 Ind. 223. In Pennsylvania, the riparian proprietor is held to be the owner of the soil between high and low water mark, and to be entitled to erect wharves thereon. 1 Whart. Penn. 131, 137; 2 *id.* 539.

4. In the great navigable fresh-water rivers of this country, the riparian proprietors, being the owners of the bed of the stream, have undoubtedly the right to wharf out to the channel,—subject only to the condition that they do not materially interrupt the navigation. See, generally, 2 Sandf. N. Y. 258; 3 *id.* 487; 4 Den. N. Y. 581; 3 How. 212; 1 Edw. Ch. N. Y. 579; 2 *id.* 220; 1 Sandf. Ch. N. Y. 214; 1 Gill & J. Md. 249; 11 *id.* 351; 8 Term, 606.

WHARFAGE. The money paid for landing goods upon, or loading them from, a wharf. Dane, Abr. Index; 4 Cal. 41, 45.

Wharfingers in London are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharves. 3 Burr. 1409; 1 W. Blackst. 243. And see 5 Sandf. N. Y. 48. It has been held that, owing to the interest which the public have in the matter, rates of wharfage may be regulated by statute. 11 Ala. N. s. 586. And see 5 Hill, N. Y. 71; 7 *id.* 429; 21 Wend. N. Y. 110; 1 E. D. Smith, N. Y. 80, 294; 2 Rich. So. C. 370; 8 Barnew. & C. 42; 2 Mann. & R. 107.

WHARFINGER. One who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.

2. A wharfinger stands in the situation of an ordinary bailee for hire, and, therefore, like a warehouseman, he is responsible for ordinary neglect, and is required to take ordinary care of the goods intrusted to him as such. 2 Barb. N. Y. 328; 4 Ind. 368; 10 Vt. 56; Peake, 119; 4 Term, 581; 2 Stark. 400. He is not, like an innkeeper or carrier, to be considered an insurer unless he superadd the character of carrier to that of wharfinger. 1 Stark. 72; 4 Campb. 225; 5 Burr. 2825; 12 Johns. N. Y. 232; 7 Cow. N. Y. 497; 5 Mo. 97. The responsibility of a wharfinger begins when he acquires and ends when he ceases to have the custody of the goods in that capacity.

3. When he begins and ceases to have such custody depends, generally, upon the usages of trade and of the business. When goods are delivered at a wharf, and the wharfinger has agreed, expressly or by implication, to take the custody of them, his responsibility commences; but a mere delivery at the wharf, without such assent, does not make him liable. 3 Campb. 414; 4 *id.* 72; 6 Cow. N. Y. 757; 10 Vt. 56; 2 Stark. 400; 14 Mees. & W. Exch. 28. When goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the possession and the care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility. 5 Esp. 41; Story, Bailm. § 453; Abbott, Shipp. 226; Molloy, b. 2. c. 2, s. 2; Roccus, Not. 88; Dig. 9. 4. 3; 1 Mees. & W. Exch. 174; 16 *id.* 119; 1 Gale, Exch. 420. The wharfinger does not, however, discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board of it. 1 Carr. & P. 638. And see 10 Bingh. 246; 2 Carr. & M. 531; 7 Scott, 876; 4 Q. B. 511.

A wharfinger has a general lien upon all goods in his possession for the balance of his account. 1 Esp. 109; 3 *id.* 81; 6 East, 519; 7 *id.* 224; 4 Barnew. & Ald. 50; 12 Ad. & E. 639; 7 Barnew. & C. 212. A wharfinger has equally a lien on a vessel for wharfage. Ware, Dist. Ct. 354; Gilp. Dist. Ct. 101; 1 Newb. Adm. 553.

WHEEL. The punishment of the wheel was formerly to put a criminal on a wheel, and then to break his bones until he expired. This barbarous punishment was never used in the United States; and it has been abolished in almost every civilized country.

WHELPS. The young of certain animals of a base nature or *feræ naturæ*.

It is a rule that when no larceny can be committed of any creatures of a base nature which are *feræ naturæ*, though tame and reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. Coke, 3d Inst. 109; 1 Russell, Cr. 153.

The owner of the land is, however, considered to have a qualified property in such animals, *ratione impotentia*. 2 Blackstone, Comm. 394.

WHEN. At which time.

In wills, standing by itself unqualified and unexplained, this is a word of condition denoting the time at which the gift is to commence. 6 Ves. Ch. 243; 2 Meriv. Ch. 286. The context of a will may show that the word *when* is to be applied to the possession only, not to the vesting of a legacy; but to justify this construction there must be circumstances, or other expressions in the will, showing such to have been the testator's intent. 7 Ves. Ch. 422; 9 *id.* 230; 11 *id.* 489; Coop. 145; 3 Brown, Ch. 471. For the effect of the word *when* in contracts and in wills in the French law, see 6 Toullier, n. 520.

WHEN AND WHERE. See DEFENCE.

WHEREAS. This word implies a recital, and, in general, cannot be used in the direct and positive averment of a fact in a

declaration or plea. Those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred in positive and direct terms; but facts, however material, which are not directly denied by the terms of the general issue, though liable to be contested under it, and which, according to the usage of pleading, cannot be specially traversed, may be alleged in the declaration by way of recital, under a whereas. Gould, Plead. c. 43, § 42, c. 3, § 47; Bacon, Abr. *Pleas*, etc. (B 5, 4); 2 Chitty, Plead. 151, 178, 191.

WHIPPING. The infliction of stripes.

This mode of punishment, which is still practised in some of the states, is a relic of barbarism; it has yielded in most of the middle and northern states to the penitentiary system.

The punishment of whipping, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 28, 1839, s. 5. See 1 Chitty, Crim. Law, 796; Dane, Abr. Index.

WHITE BONNET. In Scotch Law. A fictitious bidder at an auction. Where there is no upset price, and the auction is not stated to be without reserve, there is no authority for saying that employment of such person is illegal. Burton, Law of Scotl. 362.

WHITE PERSONS. The acts of congress which authorize the naturalization of aliens confine the description of such aliens to free *white persons*.

This, of course, excludes the African race when pure; but it is not easy to say what shade of color or mixture of blood will make a *white person*.

The constitution of Pennsylvania, as amended, confines the right of citizenship to free white persons; and these words, *white persons*, or similar words, are used in most of the constitutions of the southern states, in describing the electors.

WHITE RENTS. In English Law. Rents paid in silver, and called *white rents*, or *reddituæ albi*, to distinguish them from other rents which were not paid in money. Coke, 2d Inst. 19. See ALBA FIRMA.

WHOLE BLOOD. Being related by both the father and mother's side: this phrase is used in contradistinction to *half blood*, which is relation only on one side. See BLOOD.

WHOLESALE. To sell by wholesale is to sell by large parcels, generally in original packages, and not by retail.

WIDOW. An unmarried woman whose husband is dead.

2. In legal writings, widow is an addition given to a woman who is unmarried and whose husband is dead. The addition of spinster is given to a woman who never was married. Lovelace, Wills, 269. See ADDITION. As to the rights of a widow, see DOWER.

WIDOW'S CHAMBER. In English Law. In London, the apparel of a widow and the furniture of her chamber, left by her deceased husband, is so called, and the widow is entitled to it. 2 Blackstone, Comm. 518.

WIDOWER. A man whose wife is dead. A widower has a right to administer to his wife's separate estate, and, as her administrator, to collect debts due to her, generally for his own use.

WIDOWHOOD. The state of a man whose wife is dead, or of a woman whose husband is dead. In general, there is no law to regulate the time during which a man must remain a widower, or a woman a widow, before they marry a second time. The term widowhood is mostly applied to the state or condition of a widow.

WIFE. A woman who has a husband.

The relation confers upon her certain rights, imposes on her certain obligations, and deprives her of certain powers and privileges.

2. At Common Law. A wife has a right to the love and protecting care of her husband. She has a right to share his bed and board. She can call upon her husband to provide her with necessary food and clothing according to her position in life, and if he neglects or refuses to do it she can procure them on his account. See NECESSARIES. She is entitled, on his death, to dower in all the real estate of which he is seised at any time during coverture. See DOWER. She can require that her husband shall be sued with her, and be made jointly liable for all causes of action existing against her at the time of marriage, and for all torts committed by her during coverture. See JOINDER.

She is under obligation to love, honor, and obey her husband, and is bound to follow him wherever in the country he may choose to go and establish himself, provided it is not, for other causes, unreasonable. She is under obligation to be faithful in chastity to her marriage vow. 5 Mart. La. N. s. 60. See DIVORCE; ADULTERY.

3. For her protection, the wife is rendered incapable of binding herself by contract, express or implied, by parol or under seal. In most if not all of the states, she is, however, empowered by statute to join her husband in a sale of her real estate.

She can gain rights of a political character: these rights stand on the general principles of the law of nations. 2 Hard. Ky. 5; 3 Pet. 242. When she commits a crime in the presence of her husband, unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible. Under other circumstances she is liable, criminally, as if she were a feme sole. See WILL; DURESS.

At common law, by marriage the wife loses the title to all her personal estate, to the use of her real estate, and to a part of her rights to her choses in action and chattels real. See HUSBAND.

Under Statutes. A great change in favor of the wife has been produced by recent statutes in a majority of the United States.

4. In *Alabama*, all property of the wife, held by her previous to marriage, or to which she may become entitled in any manner after marriage, becomes her separate estate, and not subject to the debts of the husband, but it is vested in the husband as trustee, but he is not answerable for the rents and profits. Her right to the rents and profits is not liable to be taken in execution for his debts. Ala. Code, § 1882.

In *Arkansas*, the property of a wife, whether real or personal, or whether acquired before or after marriage, in her own right, cannot be sold to pay the debts of the husband contracted or damages incurred before marriage. Ark. Dig. Laws, 603.

5. In *California*, all property, both real and personal, owned by the wife before marriage, and that acquired after marriage by gift, bequest, devise, or descent, becomes her separate property; and all property, both real and personal, owned by the husband before marriage, or acquired by him afterwards by gift, bequest, devise, or descent, becomes his separate property.

All other property acquired during coverture by either husband or wife becomes the common property of both; and the rents and profits of the same are the common property of both. Wood, Dig. Cal. Law, 486.

6. In *Connecticut*, all personal property of the wife owned by the wife before marriage, and all that accrues during marriage to her by gift or bequest, or by distribution to her as heir at law, or that accrues to her by reason of patent-rights, copyright, or pensions issued on her account, vests in the husband as trustee for the wife.

The husband is entitled, however, during the coverture to take and use the rents, profits, and interests; but such rents, profits, and interests are not liable to be taken for his debts, except for debts contracted for the support of the wife and her children, arising after the vesting of the title in the husband. Real estate conveyed to the wife during coverture in consideration of her personal services is held by her as her separate estate.

The avails of the wife's real estate, when vested in her name or that of a trustee for her, continues to be her property, and is not liable to be taken for the husband's debts.

Where the wife acquires personal property while absent from him by his abandonment or in consequence of his abuse, it is held by her to her sole and separate use. Other statutes have been passed to secure to the wife the enjoyment of her property. Conn. Comp. Stat. 376, 378.

7. In *Florida*, it is enacted that when any female, a citizen of this state, shall marry, or when any female shall marry a citizen of this state, the female being seized or possessed of real or personal property, her title to the same shall continue separate, independent, and beyond the control of her husband, notwithstanding her coverture, and shall not be taken in execution for his debts: provided, however, that the property of the female shall remain in the care and management of her husband.

Married women may become seized or possessed of real and personal property, during coverture, by bequest, devise, gift, purchase, or distribution, subject, however, to certain restrictions, limitations, and provisions contained in the foregoing section. Thompson, Dig. Fla. Laws, 221, tit. V, c. 1, §§ 2, 3.

In *Georgia*, if the husband deserts the wife, her earnings vest in her.

In *Indiana*, the personal property of the wife, held by her at the time of the marriage or acquired by her during coverture by descent, devise, or gift, remains her own property to the same extent and under the same rules as her real estate. Ind. Acts, 1853.

In *Kentucky* and *Louisiana*, the rights of married women are materially changed by statute. Ky. Rev. Stat. 1852, 388; La. Rev. Stat. 242.

In *Maine*, a married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase, and may manage, sell, convey, and devise the same by will, as if sole, and without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance. Me. Rev. Stat. 1857, c. 1, § 1.

8. In *Massachusetts*, it is provided that payment may be made to a married woman for wages earned by her labor, and her receipt for the income of property held in trust for her, or for the principal, when the same is payable to her, or for the payment to her of money deposited by or due to her before or after marriage, shall be a valid receipt and discharge, although her husband does not join therein. The real estate and shares in any corporation standing in the name of a married woman, which were her property at the time of her marriage or which became her property by devise, bequest, or gift of any person except her husband, shall not be liable to be taken in execution against her husband for any debt contracted or cause of action arising after the third day of June, 1855.

A married woman having separate property may be sued for any cause of action which originated against her before marriage, and her property may be attached and taken in execution in the same manner and with the same effect as if she were sole. The husband of a woman married in this state after the third day of June in the year 1855 shall not be liable to be sued for any cause of action which originated against her before marriage; but she shall be liable to be sued for the same in the manner aforesaid. *Id.* p. 438.

"When a married woman comes from another state or country into this state without her husband, he never having lived with her in this state, she shall have all the rights and powers given to married women by the preceding provisions of this chapter" (including some not here specified), "and may also transact business, make contracts, and commence, prosecute, and defend suits in her own name, and dispose of her property which may be found here, in like manner as if she were unmarried. She shall also be liable to be sued, as if she were unmarried, upon all contracts and for all other acts made or done by her after her arrival in this state. She may make and execute deeds and other instruments in her own name, and do all other lawful acts that may be proper to carry such powers into effect.

"When a husband and his wife, married in another state or country, come into this state, either at the same time or different times, and reside here as husband and wife, she shall retain all property which she had acquired by the laws of any other state or country, or by a marriage contract or settlement made out of the state. Their so residing together here shall have the same effect with regard to their subsequent rights and liabilities as if they had married at the time of their first residing in this state.

"A wife whose husband has absented himself from the state, abandoning or not sufficiently maintaining her, or whose husband has been sentenced to confinement in the state prison," may, on application to the supreme judicial court, obtain certain powers over her property. Mass. Gen. Stat. 540.

9. In *Michigan*, the rights of married women are secured by statute by numerous provisions. 2 Mich. Comp. Laws, 1857, c. 109.

In *New Hampshire*, it is enacted that when any husband shall have deserted his wife, and re-

mained absent for the space of three months, without making suitable provision for her support and the maintenance and education of their minor children, or when any cause is in existence which is, or which if it continues to exist for a longer period may be, a cause of divorce, and the wife is the injured party, she shall be entitled to hold in her own right and to her separate use any property acquired by her by descent, legacy, or otherwise, and to the earnings of her minor children, until said parties shall afterwards cohabit, and may dispose of the same without the interference of her said husband or of any person claiming under him.

Whenever any married woman shall be entitled to hold property in her own right and to her separate use, she may make contracts, may sue and be sued in her own name, and may dispose of said property by will or otherwise, as if she were sole and unmarried; and if she shall decease intestate, her husband shall be excluded from any share in her said estate, and such estate shall be administered and inherited in the same manner as if she were sole and unmarried.

If any woman, being the wife of an alien or of a citizen of any other state, shall have resided in this state for the term of six months successively, separate from her husband, she shall be capable of making contracts, may sue and be sued in her own name for any cause of action that may accrue during such separate residence, may acquire and hold property in her own right, and may have the exclusive care, custody, and guardianship of her minor children living with her in this state; and the earnings of such children shall be expended in the same manner as if her husband had deceased; but such woman shall not contract another marriage, nor sue nor be sued for a breach of such contract.

When any husband shall become insane, his wife shall be entitled to hold in her own right and to her separate use any property acquired by her by descent, legacy, or otherwise, and shall be entitled to her own earnings and those of her minor children, during the continuance of her husband's insanity; and such property and earnings shall in no case be liable for any claim against her husband. Whenever any married woman shall be thus entitled to hold property in her own right and to her separate use, she may make contracts, may sue and be sued in her own name, and may dispose of said property by will or otherwise as if she were sole and unmarried. N. H. Comp. Stat. 400.

10. In *New Jersey*, it is enacted that the real and personal property of any female who may marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

The real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband contracted before the statute by any legal lien.

It shall be lawful for any married female to receive, by gift, grant, devise, or bequest, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof; and the same shall not be subject to the disposal of her husband, nor be liable for his debts. Nixon, Dig. N. J. Laws, 456.

In *New York*, by statute, the real and personal property of any female who may marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

The real and personal property, and the rents, issues, and profits thereof, of any female married when the statute was passed, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband contracted before the statute.

Any married female may take, by inheritance or by gift, grant, devise, or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband nor be liable for his debts. 3 N. Y. Rev. Stat. 5th ed. 239.

11. In *Pennsylvania*, it is provided that every species and description of property, whether consisting of real, personal, or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband; nor shall such property be sold, conveyed, mortgaged, transferred, or in any manner incumbered, by her husband, without her consent given according to law. Provided that her said husband shall not be liable for the debts of the wife contracted before marriage; provided that nothing in the act shall be so construed as to protect the property of any such married woman from liability for debts contracted by herself, or in her name by any person authorized so to do, or from levy and execution on any judgment that may be recovered against a husband for the torts of the wife; and in such cases execution shall be first had against the property of the wife. Purdon, Dig. Penn. Laws, 1856 ed. 570.

In *Rhode Island*, the real estate, chattels real, and personal estate which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property.

The chattels real, household furniture, plate, jewels, stock or shares in the capital stock of any incorporated company, money on deposit in any savings-bank or institution for savings, with the interest thereon, or debts secured by mortgage on property, which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall not be sold, leased, or conveyed by the husband unless by deed in which the wife shall join as grantor,—which deed shall be acknowledged in the manner by law provided for the conveyance of the real estate of married women.

Any married woman may sell and convey any of her personal estate, other than that described in the next preceding section, in the same manner as if she were single and unmarried, and may make contracts respecting the sale and conveyance thereof with the same effect and with the same rights, remedies, and liabilities as if such contracts had been

made before marriage; but nothing in this section shall be construed to authorize any married woman to transact business as a trader. R. I. Rev. Stat. 315.

12. In *Tennessee*, it is enacted that the interest of a husband in the real estate of his wife, acquired by her either before or after marriage, by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree, or execution against him; nor shall the husband and wife be ejected from or dispossessed of such real estate of the wife by virtue of any such judgment, sentence, or decree, nor any husband sell his wife's real estate during her life, without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands.

This exemption of the husband's interest in his wife's land from sale shall not extend beyond his wife's life.

The proceeds of real or personal property belonging to a married woman cannot be paid to any person except by consent of such married woman upon privy examination by the court or some suitable commissioner appointed by the court, or unless a deed or power of attorney is executed by the husband and wife, and her privy examination taken as in other cases.

Where a husband has either abandoned his wife or discharged or driven her from his residence, and where the wife has left her husband, and lives separate from him, in consequence of receiving from him personal abuse or violent and ill treatment, property acquired by her after such separation, or that she may receive by descent or otherwise, shall not be subject to his debts, nor be liable to execution on judgments recovered against him, unless she shall again live with him after such separation; nor shall he interfere with or dispose of such property while the separation continues.

Whenever a husband has been ascertained to be insane by the verdict of a jury in the manner prescribed by law, his wife may act as a single woman, to purchase, receive, and hold property real and personal, to contract and be contracted with, to sue and be sued, plead and be impleaded; and such property as she may acquire by purchase or otherwise while so acting shall not be taken or made subject to the satisfaction of the debts or contracts of the husband. Tenn. Code, 487.

In *Wisconsin*, by statute, the real and personal property of any female who may marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property.

Any married female may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband nor be liable for his debts.

Any married woman whose husband, either from drunkenness, profligacy, or from any other cause, shall neglect or refuse to provide for her support, or for the support and education of her children, and any married woman who may be deserted by her husband, shall have the right in her own name to transact business, and to receive and collect her own earnings and the earnings of her own minor children, and apply the same for her own support and the support and education of such children, free from the control and interference of her husband, or any person claiming the same or claiming to be released from the same by or through her husband. Wisc. Rev. Stat. 1858, 571.

WIFE'S EQUITY. The equitable right of a wife to have settled upon her and her children a suitable provision out of her estate whenever the husband cannot obtain it without the aid of a court of equity. Shelford, Marr. & D. 605.

2. By the marriage the husband acquires an interest in the property of his wife, in consideration of the obligation which he contracts by the marriage of maintaining her and their children. The common law enforces this duty thus voluntarily assumed by him, by an action, and, therefore, allows him to alien the property to which he is thus entitled *jure mariti*, or in case of his bankruptcy or insolvency it would vest in his assignee for the benefit of his creditors, and the wife would be left, with her children, entirely destitute, notwithstanding her fortune may have been great. To remedy this evil, courts of equity, in certain cases, give a provision to the wife, which is called the wife's equity.

The principle upon which courts of equity act is, that he who seeks the aid of equity must do equity; and that will be withheld until an adequate settlement has been made. 1 P. Will. Ch. 459, 460. See 5 Mylne & C. 105; 11 Sim. Ch. 569; 4 Hare, Ch. 6.

3. Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her, 2 P. Will. Ch. 639; and where, though the property be legal in its nature, it becomes from collateral circumstances the subject of a suit in equity, the wife's right to a settlement will attach. 5 Mylne & C. 97. See 2 Ves. Ch. 607, 680; 3 *id.* 166, 421; 9 *id.* 87; 4 Brown, Ch. 338; 5 Madd. Ch. 149; 13 Me. 124; 10 Ala. N. S. 401; 9 Watts, Penn. 90; 5 Johns. Ch. N. Y. 464; 3 Cow. N. Y. 591; 2 Paige, Ch. N. Y. 303; 6 *id.* 366; 2 Bland, Ch. Md. 545.

The wife's equity to a settlement is binding not only upon the husband, but upon his assignee, under the bankrupt or insolvent laws. 2 Atk. Ch. 420; 3 Ves. Ch. 607; 4 Brown, Ch. 138; 6 Johns. Ch. N. Y. 25; 1 Paige, Ch. N. Y. 620; 4 Metc. Mass. 486; 4 Gill & J. Md. 283; 5 T. B. Monr. Ky. 338; 10 Ala. N. S. 401; 1 Ga. 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable. 4 Ves. Ch. 19.

4. As to the amount of the rights of the wife, the general rule is that one-half of the wife's property shall be settled upon her. 2 Atk. Ch. 423; 3 Ves. Ch. 166. But it is in the discretion of the court to give her an adequate settlement for herself and children. 5 Johns. Ch. N. Y. 464; 6 *id.* 25; 3 Cow. N. Y. 591; 1 Des. Eq. So. C. 263; 2 Bland. Ch. Md. 545; 1 Cox, N. J. 153; 5 B. Monr. Ky. 31; 3 Ga. 193; 9 Sim. & S. Ch. 597; 1 Sim. & S. Ch. 250.

Whenever the wife insists upon her equity, the right will be extended to her children; but the right is strictly personal to the wife, and her children cannot insist upon it after

her death. 2 Ed. Ch. 337; 1 Jac. & W. Ch. Ir. 472; 1 Madd. Ch. 467; 11 Bligh, N. S. 104; 2 Johns. Ch. N. Y. 206; 3 Cow. N. Y. 591; 1 Sandf. N. Y. 129; 10 Ala. N. S. 401.

The wife's equity will be barred by an adequate settlement having been made upon her, 2 Ves. Ch. 675; by living in adultery apart from her husband, 4 Ves. Ch. 146; but a female ward of court, married without its consent, will not be barred although she should be living in adultery. 1 Ves. & B. Ch. Ir. 302.

WILD ANIMALS. Animals in a state of nature; animals *ferœ naturæ*. See ANIMALS; FERÆ NATURÆ.

WILFULLY. Intentionally.

In charging certain offences, it is required that they should be stated to be wilfully done. Archbold, Crim. Plead. 51, 58; Leach, Cr. Cas. 556.

In Pennsylvania, it has been decided that the word *maliciously* was an equivalent for the word *wilfully*, in an indictment for arson. 5 Whart. Penn. 427.

WILL (last will and testament). The disposition of one's property, to take effect after death. Swinburne, Wills, pt. 1, § 2; Godolphin, pt. 1, c. 1, s. 2.

The term will, as an expression of the final disposition of one's property, is confined to the English law and those countries which derive their jurisprudence from that source. The term *testamentum*, or *testament*, is exclusively used in the Roman civil law and by the continental writers upon that subject. Some controversy seems to exist whether the word *testamentum* is strictly derived from *testatum* or from that in combination with *mentis*. There does not seem to be much point in this controversy, for in either view the result is the same. It is the final declaration of the person in regard to the disposition of his property. It is his *testimony* upon that subject, and that is the expression of his *mind* and *will* in relation to it.

The practice of allowing the owner of property to direct its destination after his death is of very ancient date, coeval with civilization itself, so far as we know. Genesis, xlviii. 22; Gal. iii. 15; Plutarch's Life of Solon; Roman Laws of the Twelve Tables.

In some countries the right of disposing of property by will did not, indeed, exist in early times: as, among the ancient Germans, and with the Spartans under the laws of Lycurgus, and the Athenians before the time of Solon. 4 Kent, Comm. 502, and note. But, with rare exceptions, it has existed *semper ubique in omnibus*.

And in England, until comparatively a recent period, this right was to be exercised under considerable restrictions, even as to personal estate. 2 Blackstone, Comm. 492, 493.

Until the statute of 32 & 34 Henry VIII., called the Statute of Wills, the wife and children were each entitled to claim of the executor their reasonable portion of the testator's goods, *i.e.* each one-third part. So that if one had both a wife and children, he could only dispose of one-third of his personal estate, and if he had either a wife or child, but not both, he could dispose of one half. Fitzherbert. Nat. Brev. 122 H (b), 9th ed.; 2 Saund. 66, n. (9); 2 Sharswood, Blackst. Comm. 492. All restrictions are now removed from the disposition of property by will, in England, whether real or personal, by the statute of 1 Vict. c. 26. And in the Roman civil law the children were always entitled to their share, or legitime, being one fourth part of the estate, of which they could not be deprived by the will of their father. The legitime was by the emperor Justinian increased to one-third part of the estate where there were four or a less number of children, and if more than four then they might claim one-half the estate, notwithstanding the will. Novell. 18, c. 1; 2 Domat, Civil Law, 15.

And by the existing law of the state of Louisiana, one is restrained of disposing of his whole estate if he have children. One child may claim one-third of the estate, two may claim half, and three two-thirds, as their legitime, or reasonable part of the estate. See Louisiana Code.

According to the civil law, the naming of an executor was of the essence of a will; and that constituted the essential difference between a will and a codicil; the latter, not making any such appointment, was, on that account, called an inofficious testament, or will. Swinburne, Wills, pt. 1, § 5, pl. 2. 8; 1 Williams, Exec. 7.

2. Wills are unwritten or nuncupative, and written. The former are called nuncupative from *nuncupare*, to name, declare, or make a solemn declaration, because this class of wills were required to be made in solemn form before witnesses, and by the appointment or naming of an executor. Swinburne, Wills, pt. 1, § 12, pl. 1; Godolphin, pt. 1, c. 4, § 6.

This class of wills is liable to much temptation to fraud and perjury. The statute of 29 Charles II. c. 3, laid them under several restrictions; and that of 1 Vict. c. 26, rendered them altogether invalid except as to "any soldier in actual military service, or any mariner or seaman, being at sea," who may dispose of personal estate the same as before the act.

By the insertion of the clause "in actual military service," it has been held to include only such as were on *an expedition*, and not to include those quartered in barracks, either at home or in the colonies. 3 Curt. 522, 818. But see, also, 2 Curt. 368, 341.

So the exception does not extend to the commander-in-chief of the naval force in Jamaica, who lived on shore at the official residence with his family. The Earl of Easton *v.* Seymour, cited by the court in 2 Curt. Eccl. 339; 3 *id.* 530. The statutes of most of the American states have either placed nuncupative wills under special restrictions, or else reduced them within the same narrow limits as the English statutes. In many of the states they still exist much as they did in England before the statute of 1 Vict. c. 26, being limited to a small amount of personal estate. 1 Jarman, Wills, Perkins ed. 136, and note.

Written Wills.

3. THE TESTATOR'S CAPACITY. He must be *of the age of discretion*, which, by the common law of England, is fixed at twelve in females, and fourteen in males. Swinburne, pt. 2, § 2, pl. 6; Godolphin, pt. 1, c. 8, § 1; 1 Williams, Ex. 13; 1 Jarman, Wills, 29.

This is now regulated by statute, both in England and most of the United States. The

period of competency to execute a will, in England, is fixed at twenty-one years, and the same rule is adopted in many of the United States, and the disposition is strongly manifested in that direction throughout the states. 1 Jarman, Wills, Perkins ed. 29 *et seq.* *Coverture* is a disability to the execution of a will, unless by the consent of the husband or where the disability is removed by statute. 2 Blackstone, Comm. 498; 4 Kent, Comm. 505, 506; 1 Williams, Ex. 42, 43; 1 Jarman, Wills, 30, 31. But see 12 Mass. 525; 5 N. H. 205; 10 Serg. & R. Penn. 445, where the power of a feme covert to make a will, as to lands, by the husband's consent, is denied. *Blindness* is so far an incapacity that it requires express and satisfactory proof that the testator understood the contents of the will, in addition to what is required in other cases. 1 Rob. Eccl. 278; 3 Strobh. So. C. 297; 1 Jarman, Wills, 49. *Deaf and dumb* persons will labor under a similar inconvenience, and especially in communicating with the witnesses, unless they have been educated so as to be able to write. Wharton & Stillé, Med. Jur. § 13. But the witnesses must, to be present with the testator, be within the possible cognizance of his remaining senses. *Richardson*, J., in Reynolds *v.* Reynolds, 1 Speers, So. C. 256, 257. Persons deaf, dumb, and blind were formerly esteemed wholly incapable of making a will; but that class of persons are now placed upon the same basis as the two former, with only the additional embarrassment attending the defect of another sense. 1 Williams, Ex. 17, 18.

4. *Idiots* are wholly incapable of executing a will, whether the defect of understanding is congenital or accidental. *Lunatics* are incapable of executing a last will and testament, except during such a lucid interval as allows the exercise of memory and judgment. It must be an absolute, but not necessarily a perfect, restoration to reason and reflection, and not a mere temporary remission. Taylor, Med. Jur. 642; 3 Brown, Ch. 441; Pothier, Obl. Evans ed. App. 579; Wharton & Stillé, Med. Jur. § 255; Rush, Mind, 162, 163; Ray, Med. Jur. § 279; Combe, Ment. Der. 241; 9 Ves. Ch. 611; 11 *id.* 10; 13 *id.* 87. *Monomania*, or partial insanity. This is a mental or moral perversion, or both, in regard to a particular subject or class of subjects, while in regard to others the person seems to have no such morbid affection. Taylor, Med. Jur. 626. It consists in the belief of facts in regard to the particular subject of the affection, which no sane person would or could believe. 1 Add. Eccl. 279; 3 *id.* 79. When it appears that the will is the direct offspring of this morbid affection, it should be held invalid, notwithstanding the general soundness of the testator. 6 Ga. 324; 7 Gill, Md. 10; 8 Watts, Penn. 70. See, also, 6 Moore, Priv. Coun. 341, 349; 12 Jurist, 947, where the distinguished ex-chancellor, Brougham, contends for the extreme notion that every person laboring under any form of partial insanity or monomania is incompetent to execute a valid will, because the mind being one and entire, if unsound in any part it is an unsound mind. This extreme view will scarcely gain final acceptance in the courts. Wharton & Stillé, Med. Jur. § 18, *contra*.

5. *Delirium* from disease, or stimulus. This, while the paroxysm continues to such an extent as to deprive a person of the right exercise of reason, is a sufficient impediment to the execution of a will. Ray, Ins. §§ 253, 254, 390; Taylor, Med. Jur. 626; Wharton & Stillé, §§ 36, 235; Rush, Mind, 282; 18 Ves. Ch. 12; 23 Eng. L. & Eq. 18; 17 Jur. 1045; 1 Ves. Sen. Ch. 19. See, also, 2 Aik. Vt. 167; 1 Bibb, Ky. 168, 406; 1 Hen. & M. Va. 70.

But there is not the same presumption of the continuance of this species of mental perversion, whether it proceed from the intoxication of stimulus or the delirium of fever, as in ordinary insanity. 3 Hill, So. C. 68; 4 Metc. Mass. 545. *Senile dementia.* This is a defect of capacity which comes very frequently in question in courts of justice in testing the validity of wills. If the testator has sufficient memory remaining to be able to collect the elements of the transaction,—viz., the amount and kinds of property he had, and the number of his children, or other persons entitled to his bounty,—and to hold them in mind sufficiently to form an understanding judgment in regard to them, he may execute a valid will. Ray, Ins. § 243; Taylor, Med. Jur. 650; 21 Vt. 168. Age itself is no sure test of incapacity. 2 Phill. 261, 262. But when one becomes a child again, he is subject to the same incapacities as in his first childhood. 1 Williams, Ex. 35; 3 Madd. Ch. 191; 2 Hagg. Eccl. 211; 6 Ga. 324.

6. The Mode of Execution. This depends upon the particular form of the statute requirements.

Under the English Statute of Frauds, 29 Car. II., as "signing" only was required, it was held that a mark was sufficient. 3 Nev. & P. 228; 8 Ad. & E. 94; 10 Paige, Ch. N. Y. 85. And under the statute of 1 Vict. c. 26, the same form of execution is required, so far as signing is concerned. But sealing seems not to be sufficient where signing is required. 1 Wils. 313; 1 Jarman, Wills, 69, 70, and cases cited. So, it was immaterial in what part of the will the testator signed. It was sufficient if the instrument began, I, A B, etc., and was in the handwriting of the testator, and he treated that as signing or did not regard the instrument as incomplete, as it evidently would be so long as he intended to do some further act to authenticate it. 3 Lev. 1; Freem. 538; 1 Eq. Cas. Abr. 403, pl. 9; Prec. in Chanc. 184; 21 Vt. 256. But if it appear, from the form of attestation at the close, or in any other way, that the testator did not regard the instrument as complete, the introduction of the testator's name at the beginning, in his own handwriting, is not a sufficient signing. Doug. 241; 1 Gratt. Va. 454; 13 *id.* 664; 10 Paige, Ch. N. Y. 85. See 7 Q. B. 450. It was not held

necessary under the Statute of Frauds of Charles II. that the witnesses should subscribe in the presence of each other. They might attest the execution at different times. Prec. in Chanc. 184; 1 Ves. Ch. 12; 1 Williams, Ex. 79. But the statute 1 Vict. requires both the witnesses to be present when the testator signs the will or acknowledges his signature; and they must afterwards attest in the presence of the testator, although not of each other. 3 Curt. Eccl. 659; 1 Williams, Ex. 79, and note.

7. The statutes in the different states differ to some extent, but agree substantially with the English statute of Charles II. The revised statutes of New York require the signature of the testator and of the witnesses to be at the end of the will. 4 Wend. N. Y. 168; 13 Barb. N. Y. 17; 20 *id.* 238. So, also, in Arkansas, Pennsylvania, and Ohio, and probably some other of the American states. 1 Williams, Ex. Perkins ed. 117, n.

Questions have often arisen in regard to what declaration is requisite for the testator to make, to constitute a publication in the presence of the witnesses. But the later and best-considered cases, under statutes similar to that of Charles II., only require that the testator shall produce the instrument to the witnesses for the purpose of being witnessed by them, and acknowledge his own signature in their presence. The production of the instrument by the testator for the purpose of being attested by the witnesses, if it bear his signature, will be a sufficient acknowledgment. 11 Cush. Mass. 532; 1 Metc. Mass. 349; 10 *id.* 54; 1 Burr. 421; 3 *id.* 1775; 4 Burn, Eccl. Law, 102; 6 Bingh. 310; 7 *id.* 457; 7 Taunt. 361; 1 Crompt. & M. Exch. 140; 3 Curt. Eccl. 181. Where a will or codicil refers to an existing unattested will or other paper, it thereby becomes a part of the will. 2 Ves. Ch. 228; 1 Ad. & E. 423; 1 Williams, Ex. 86, and note; 1 Rob. Eccl. 81. Witnesses may attest by a mark. 8 Ves. Ch. 185, 504; 5 Johns. N. Y. 144; 4 Kent, Comm. 514, n.

8. Revocation. The mode of revocation of a will provided in the Statute of Frauds, Car. II., is by "burning, cancelling, tearing, or obliterating the same." In the present English Statute of Wills, the terms used are, "burning, tearing, or otherwise destroying." If the testator has torn off or effaced his seal and signature at the end of a will, it will be presumed to have been done *animo revocandi.* 1 Add. Eccl. 78; 1 Cas. *temp.* Lee, 444; 3 Hagg. Eccl. 568. So, too, where lines were drawn over the name of the testator. 2 Cas. *temp.* Lee, 84. So, also, where the instrument had been cut out from its marginal frame, although not otherwise defaced, except that the attestation clause was cut through, it was held to amount to a revocation. 1 Phill. Eccl. 375, 406.

It is not requisite in order to effect the revocation that the testator should effect the destruction of the instrument. It is sufficient if he threw it upon the fire with the intention of destroying it, although some one snatch it off after it is slightly burned, and preserve it without his knowledge. 2 W. Blackst. 1043. But it would seem that it must be an actual burning or tearing to some extent,—an intention merely to do the acts not coming within the statute. 6 Ad. & E. 209; 2 Nev. & P. 615. But, aside from the statute, a mere intention to revoke evidenced by any other act, will be effectual to revoke as burning or tearing, etc. 8 Ad. & E. 1. How much the will must be burned or torn to constitute a revocation under the statute of frauds, was left by the remarks of the different judges in Doe *v.* Harris, *supra*, in perplexing uncertainty. 1 Williams, Ex. 121.

If the testator is arrested in his purpose of revocation before he regards it as complete, it will be no revocation, although he tore the will to some extent. 3 Barnew. & Ald. 489.

A will may be revoked in part. 2 Rob. Eccl. 563, 572. But partial revocations which were made in anticipation of making a new will, and intended to be conditional upon that, are not regarded as complete until the new will is executed. 1 Add. Eccl. 409; 2 *id.* 316. See 8 Sim. Ch. 73.

9. By the present English statute, every obliteration or interlineation or alteration of a will must be authenticated in the same mode that the execution of the will is required to be. Hence, unless such alterations are signed by the testator, and attested by two witnesses, they are not to be regarded as made, however obvious the intention of the testator may be. But if the words are so obliterated as to be no longer legible, they are treated as blanks in the will. 3 Curt. Eccl. 761. The mere act of defacing a will by accident and without the intention to revoke, or under the misapprehension that a later will is good, will not operate as a revocation. 1 P. Will. 345; Cowp. 52; 1 Saund. 279 *b, c;* Swinburne, Wills, pt. 7, § 16, pl. 4; 1 Add. Eccl. 53. The revocation of a will is *primâ facie* a revocation of the codicils. 4 Hagg. Eccl. 361. But it is competent to show that such was not the testator's intention. 2 Add. Eccl. 230; 1 Curt. Eccl. 289; 1 Williams, Ex. 134. The same capacity is requisite to revoke as to make a will. 7 Dan. Ky. 94; 11 Wend. N. Y. 227; 9 Gill, Md. 169; 7 Humphr. Tenn. 92.

The making of a new will purporting on its face to be the testator's last will, and containing no reference to any other paper, and being a disposition of all the testator's property, and so executed as to be operative, will be a revocation of all former wills, notwithstanding it contain no express words of revocation. 2 Curt. Eccl. 468; 18 Jur. 560; 4 Moore, Parl. Cas. 29. So the appointment of an executor is a circumstance indicating the exclusiveness of the instrument. 1 Macq. Hou. L. 163, 173. And the revocation will become operative, notwithstanding the second will becomes inoperative from the incapacity of the devisee. 1 Pick. Mass. 535, 543.

Where there are numerous codicils to a will, it often becomes a question of difficulty

to determine how far they are intended as additions to, and how far as substitutes for, each other. In such cases, the English ecclesiastical courts formerly received parol evidence to show the animus of the testator. But it was held, in a recent case of this kind, that parol evidence could not be received unless there was such doubt on the *face of the papers* as to require the aid of extrinsic evidence to explain it. 2 Curt. Eccl. 799.

10. It is regarded as the *primâ facie* presumption from the revocation of a later will, a former one being still in existence and uncancelled, that the testator did intend its restoration without any formal republication. 4 Burr. 2512; Cowp. 92; 3 Phill. Eccl. 554. But it is still regarded as mainly a question of intention, to be decided by all the facts and circumstances of the case. 1 How. Miss. 336; 2 Add. Eccl. 125; 3 Curt. Eccl. 770; 1 Moore, Parl. Cas. 299, 301; 1 Williams, Ex. 155, 156. An express revocation must be made in conformity with the statute, and proved by the same force of evidence requisite to establish the will in the first instance. 8 Bingh. 479; 1 Williams, Ex. 160. If one republish a prior will, it amounts to a revocation of all later wills or codicils. 1 Add. Eccl. 38; 7 Term, 138.

Implied revocations were very common before the statute of frauds. But since the new statute of 1 Vict. c. 26, § 19, as to all estates real and personal, it is provided that no will shall be revoked on the ground of a presumed intention resulting from change of circumstances. Before that, it was held under the statute of frauds, by a succession of decisions, that, even as to lands, the marriage of the testator and the birth of children who were unprovided for was such a change of circumstances as to work an implied revocation of the will. 2 Show. 242; 4 Burr. 2171, in note, 2182; and, finally, by all the judges in England in the exchequer chamber, 8 Ad. & E. 14; 2 Nev. & P. 504. This latter case seems finally to have prevailed in England until the new statute. 2 Moore, Parl. Cas. 51, 63, 64; 2 Curt. Eccl. 854; 1 Rob. Eccl. 680. And the subsequent death of the child or children will not revive the will without republication. 1 Phill. Eccl. 342; 2 *id.* 266.

The marriage alone or the birth of a child alone is not sufficient to operate a revocation. 4 Burr. 2171; Ambl. Ch. 487, 557, 721; 5 Term, 52, 53, and note. But the birth of a child with circumstances favoring such a result may amount to an implied revocation. 5 Term, 52, 53, and note; 1 Phill. Eccl. 147. This matter is controlled in most of the American states, more or less, by statute. In many of them a posthumous child unprovided for in the will of the father inherits the same as if no will had been made. In others, all children born after the execution of the will, and in some states all children not provided for in the will, are placed on the same ground as if no will existed. 1 Williams, Ex. 170, n. 1, 171, n. 1. And by the express provisions of the act of 1 Vict. the marriage of the testator, whether man or woman, amounts to a revocation. 1 Jarman, Wills, 106–173.

11. Republication. This, under the statute of frauds, could only be done in the same manner a will of lands was required to be first executed. And the same rule obtains under the statute of 1 Vict., and in many, perhaps most, of the American states. This is what is generally understood by an express republication. 12 Ired. No. C. 355; 2 Conn. 67. See, also, 2 Whart. Penn. 103.

Constructive republication is effected by means of a codicil, unless neutralized by internal evidence of a contrary intention. Com. 381; 1 Eq. Cas. Abr. 406, D, pl. 5; 1 Ves. Sen. Ch. 437; 1 Jarman, Wills, 175, and notes.

Probate of Wills. The proof of a will of personal property must always be made in the probate court. But in England the probate of the will is not evidence in regard to real estate. In most of the American states the same rule obtains in regard to real as to personal estate,—as that court have exclusive jurisdiction, in most of the states, in all matters pertaining to the settlement of estates. 9 Coke, 36, 38 *a;* Fonblanque, Eq. b. 4, pt. 2, c. 1, § 2; 4 Term, 260; 1 Jarman, Wills 218; 8 N. H. 124; 12 Metc. Mass. 421; 6 Ohio, 5; 3 Gill, Md. 198; 20 Miss. 134; 23 Conn. 1. The probate of the will gives effect to a devise in most of the states, but that gives it operation from the death of the testator. 2 Story, C. C. 327; 11 Me. 127; 3 N. H. 517; 4 McLean, C. C. 75. In some of the states the English rule prevails that the probate of the will has no effect as to devises of real estate. 12 Johns. N. Y. 192; 14 *id.* 407; 5 Rawle, Penn. 80; 1 Nott & M'C. So. C. 326.

The probate of a will has no effect out of the jurisdiction of the court before which probate is made, either as to persons or property in a foreign jurisdiction. 8 Ves. Ch. 44; 1 Johns. Ch. N. Y. 153; 12 Vt. 589; Story, Confl. Laws, §§ 512–517. But the indorsement of negotiable paper by the executor or administrator in the place of his appointment will enable the indorsee to maintain an action in a foreign state upon the paper in his own name. 9 Wend. N. Y. 425. But see 5 Me. 261; 2 N. H. 291, where the rule is held otherwise. The executor may dispose of bank-shares in a foreign state without proving the will. 12 Metc. Mass. 421.

12. Any person interested in the will may compel probate of it by application to the probate court, who will summon the executor or party having the custody of it. 4 Pick. Mass. 33; 3 Bacon, Abr. 34, *Executors.* The judge of probate may cite the executor to prove the will at the instance of any one claiming an interest. 4 Pick. Mass. 33; 1 Williams, Ex. 201; 1 Jarman, Wills, 224. The attesting witnesses are indispensable, if the contestants so insist, as proof of the execution and authenticity of the will and the competency of the testator, when they can be had. 2 Greenleaf, Ev. §§ 691, 692; 1 Jarman, Wills. 225, and note. But if all or part of

the subscribing witnesses are absent from the state, deceased, or disqualified, then their handwriting must be proved. 9 Ves. Ch. 381; 19 Johns. N. Y. 186; 1 Jarman, Wills, 226, and notes. And see 17 Ga. 364; 9 Pick. Mass. 350; 6 Rand. Va. 33. It will be presumed that the requisite formalities were complied with when the attestation is formal, unless the contrary appear. 8 Md. 15; 11 N. Y. 220; 30 Penn. St. 218; 1 Jarman, Wills, 228, and notes. But it has sometimes been held that no such presumption will be made in the absence of a subscribing witness who might be called. 19 Johns. N. Y. 386. Wills over thirty years old, and appearing regular and perfect, and coming from the proper custody, are said to prove themselves. 1 Greenleaf, Ev. §§ 21, 570; 2 Kay & J. Ch. 112. See, also, 2 Nott & M'C. So. C. 400. Wills lost, destroyed, or mislaid at the time of the testator's death may be admitted to probate upon proper proof of the loss and of the execution. 1 Phill. Eccl. 149; 1 Green, Ch. N. J. 220; 1 Jarman, Wills, 231, note.

Time from which a will speaks. In general, a will speaks from the death of a testator, that being the point of time at which it becomes operative. 21 Conn. 550, 616. But often the language of the testator requires to be taken with reference to the time it is used. Ambl. Ch. 397; 1 Eq. Cas. Abr. 201; 2 Atk. Ch. 597; 1 Jarman, Wills, 299. But it will receive the former interpretation if it can reasonably be made to bear it. 2 Cox, Ch. 384.

13. Gifts void for uncertainty. Where the subject-matter of the gift is not so defined in the will as to be ascertainable with reasonable certainty. 25 Penn. St. 460; 12 Gratt. Va. 196; 1 Jarman, Wills, 317; 1 Lev. 130; 1 Swanst. Ch. 201. The person intended to be benefited may not be so described or named that he can be identified. But, in general, by rejecting obvious mistakes, this kind of uncertainty is overcome. 1 Jarman, Wills, 330–348, and notes and cases cited.

Parol evidence, how far admissible. The rule in regard to the admissibility of parol evidence to vary, control, or to render intelligible the words of a will, is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relation to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order as far as practicable to enable them the more fully to understand the sense in which he probably used the language found in his will. 1 Nev. & M. 524; 15 Pick. Mass. 400; 11 *id.* 257; 1 Phillipps, Ev. 532–547; Cowen & Hill's Notes; 1 Greenleaf, Ev. §§ 287–289; 1 Jarman, Wills, 349, and notes; 2 Ired. No. C. 192. Letters and oral declarations of the testator are not admissible to show the intention of the testator. 2 Vern. Ch. 625; 14 Johns. N. Y. 1; 2 Watts & S. Penn. 455. But see 22 Wend. N. Y. 148. Parol evidence is not admissible to supply any word or defect in the will. 7 Gill & J. Md. 127; 8 Conn. 254; 23 Barb. N. Y. 285; 27 Ala. N. s. 489. Parol declarations of the testator about the time of making the will are often admitted to show the state of mind, capacity, and understanding of the testator; but they are not to be used to show his intention: that must be learned from the language used. 8 Conn. 254.

14. Courts of equity cannot reform a will upon proof of mistake, as they do a contract. 5 Madd. Ch. 364; 1 Moore & S. 352; 6 Conn. 34; 23 Vt. 336. Parol evidence is admissible to explain and remove a latent ambiguity. 1 Maule & S. 345; 4 Barnew. & Ad. 787; 6 Metc. Mass. 404, 405; 2 Jones, Eq. No. C. 377; 6 Md. 224; 1 Jarman, Wills, 170, and cases cited; 1 Crompt. & M. Exch. 235; 1 Mer. Ch. 384; 1 Paige, Ch. N. Y. 291; 5 Mees. & W. Exch. 369. So, also, to rebut a resulting trust. 14 Johns. N. Y. 1; 1 Jarman, Wills, 157, and cases cited. But where a wrong name is inserted in the will by mistake of the scrivener, or where the name is left wholly blank, parol evidence is not admissible in order to carry into effect the purpose of the testator. 7 Metc. Mass. 188; 3 Brown, Ch. c. 311. But a partial blank may be supplied. 4 Ves. Ch. 680. See 1 Jarman, Wills, 349–384; 2 Williams, Ex. 1037, 1049, 1050, 1080–1082, 1164–1166; 5 Mees. & W. Exch. 363. But where the residuary legatee was described by a wrong Christian name, parol evidence was received to show who was intended. 1 Paige, Ch. N. Y. 291. See, also, 4 Johns. Ch. N. Y. 607.

Contradictory Provisions. As a general rule, where there are portions of a will wholly incapable of standing with other portions (and where they cannot both be allowed to operate so as to give the persons to be benefited a joint estate in the thing), the latter provision must control, as being the latest declaration of the intention of the testator. 5 Ves. Ch. 247; 6 *id.* 100; 2 Taunt. 109; 2 Mylne & K. 149; 2 Metc. Mass. 202; 22 Me. 430; 6 Pet. 84; 1 Jarman, Wills, 411–425.

In Criminal Law. The power of the mind which directs the action of a man.

In criminal jurisprudence, the necessity of the concurrence of the will is deemed so far indispensable that, in general, those persons are held not amenable as offenders against the law who have merely done the act prohibited, without the concurrence of the will. This has reference to different classes of persons who are regarded as laboring under defect of will, and are, therefore, incapable of committing crime.

15. *Infants*, who, from want of age, are excused from punishment. The age of discretion, or capacity for crime, is fixed, by the common law of England, at fourteen years. 1 Hale, Pl. Cr. 25–29; 1 Hawkins, Pl. Cr. c. 1, s. 1; 1 Russell, Crimes, 2–6. Below the age of fourteen years all persons, both male and female, are presumed incapable of committing felony or other crime. For, although

the law makes a distinction in regard to the age of consent to marriage between males and females, fixing it at fourteen in the former and twelve in the latter, no such distinction is made in regard to capacity for crime. 1 Hale, Pl. Cr. 25–29.

Below the age of seven years, infants are presumed so incapable of any malicious design as not to incur the guilt of felony or of any other crime. Hence an infant below the age of seven years, whatever art or malice he may exhibit in the act constituting the corpus delicti, is nevertheless to go acquit, on account of his presumed incapacity to incur the guilt of crime. 1 Hawkins, Pl. Cr. c. 1, § 1; 1 Hale, Pl. Cr. *supra*.

Between the ages of seven and fourteen years, an infant, although presumed, *primâ facie*, incapable of incurring the guilt of crime, is, nevertheless, liable to trial and to be proved guilty upon the facts of the particular case evincing guilty consciousness. The reports abound with cases where clear evidences of criminal consciousness were shown, and of very marked atrocity, from the age of nine years and upward. 1 Russell, Crimes, 2–6; 1 Hale, Pl. Cr. 25–29.

16. Persons laboring under *mental imbecility* are not amenable for crime. This class of persons has been subdivided according to the character of the malady and the permanency or continuity of its operation. An *idiot*, or one who suffers an entire defect of mind from birth. The writers upon this subject have attempted to define idiocy as an incapacity "to count twenty, to tell who was his father or mother, or how old he was." Fitzherbert, Nat. Brev. 532 *b*. But although incapable, perhaps, of other definition than that first given, it is not easily misunderstood such persons are wholly incapable of crime. 1 Hale, Pl. Cr. c. 4. One rendered *non compos by sickness* or other cause, and where the malady is, therefore, not congenital but accidental. This, if it produce an entire defect of mind and will, either permanently or temporarily, is, during its continuance, a bar to all criminal responsibility. 1 Hale, Pl. Cr. 26–29; 1 Russell, Crimes, 7, and cases cited by these writers.

Lunacy, which is much the same as the last above, except that it is attended with lucid intervals, during the continuance of which the person is responsible criminally. But care should be exercised to discriminate correctly between a lucid interval, where the mind is fully restored, and a mere remission of the paroxysm, where the patient seems comparatively but not absolutely restored. Taylor, Med. Jur. 642; Redfield, Wills, c. iii. sect. xii § 14.

17. *Persons subject to the power of others.* This exemption from crime, in the English common law, extends to the wife while in the immediate presence and under the power of the husband, but not to a child or servant. And in respect of the enormity of the offences of treason and murder, the wife even is not excused by the command of the husband. 1 Hale, Pl. Cr. 44, 516; 1 Hawkins, Pl. Cr. c. 1, s. 14. The wife is liable, too, for all offences committed not in the presence of the husband, and also where she is the principal party concerned. 1 Hawkins, Pl. Cr. c. 1, § 14; 1 Hale, Pl. Cr. 44, 516. The distinction between the wife and the child and especially the servant, where the relation of master and servant is of a permanent character, or where the law gives the master unlimited control over the acts of the servant, seems not to rest upon any well-founded basis in present social relations. The English law does not regard one in the power of robbers or of an armed force of rebels as responsible, *criminaliter*, for his acts. No more should one be who is wholly under the power of another, as a child or servant may be. 1 Russell, Crimes, 14. See Ch. J. Howe, 18 State Trials, 293, 394. These questions should, in strictness, be referred to the jury as matters of fact. See DURESS.

Ignorance of law will not excuse any one. But ignorance of fact sometimes renders that innocent which would otherwise be a crime: as, where one kills an innocent person, mistaking him for an assassin or robber. 1 Hale, Pl. Cr. c. 6; 1 Russell, Crimes, 19, 20.

WINCHESTER, STATUTE OF. An English statute, 13 Edw. I. 1285, relating to the internal police of the kingdom. It required every man to provide himself with armor to aid in keeping the peace; and if it did not create the offices of high and petty constables, it recognized and regulated them, and charged them with duties answering somewhat to those of our militia officers. The statute took its name from the ancient capital of the kingdom. It was repealed by the statute of 7 & 8 Geo. IV. c. 27.

WINDOW. An opening made in the wall of a house to admit light and air, and to enable those who are in to look out.

The owner has a right to make as many windows in his house, when not built on the line of his property, as he may deem proper, although by so doing he may destroy the privacy of his neighbors. Bacon, Abr. *Actions in General* (B).

In cities and towns it is evident that the owner of a house cannot open windows in the partition-wall without the consent of the owner of the adjoining property, unless he possesses the right of having *ancient lights*, which see. The opening of such windows and destroying the privacy of the adjoining property is not, however, actionable; the remedy against such encroachment is by obstructing them, without encroaching upon the rights of the party who opened them, so as to prevent a right from being acquired by twenty years' use. 3 Campb. 82. See LIGHT AND AIR.

WIRTA. A measure of land among the Saxons, containing sixty acres.

WISBUY, LAWS OF. See CODE, § 28.

WISCONSIN. One of the new states of the United States.

2. It was originally a part of the territory northwest of the Ohio river, and subject to the ordinance of July 13, 1787, establishing that territory. It was made a separate territory, with the name of Wisconsin, by act of congress approved April 20, 1836. Said territory was afterwards divided, and the territory of Iowa set off, June 12, 1838. It was admitted into the Union as a state May 29, 1848, with the following boundaries,—viz.: beginning at the northeast corner of the state of Illinois, *i.e.* a point in the centre of lake Michigan where the line of forty-two degrees and thirty minutes crosses the same, thence running with the boundary-line of the state of Michigan, through lake Michigan and Green Bay, to the mouth of Menomonee river, thence up the channel of said river to the Brule River, thence up said last-mentioned river to lake Brule, thence along the southern shore of lake Brule in a direct line to the centre of the channel between Middle and South Islands in the lake of the Desert, thence in a direct line to the head-waters of the Montreal River, as marked upon the survey made by Captain Crawm, thence down the main channel of Montreal river to the middle of lake Superior, thence through the centre of lake Superior to the mouth of the St. Louis river, thence up the main channel of said river to the first rapids in the same above the Indian village, according to Nicollet's map, thence due south to the main branch of the river St. Croix, thence down the main channel of said river to the Mississippi, thence down the centre of the main channel of that river to the northwest corner of the state of Illinois, thence due east with the northern boundary of the state of Illinois to the place of beginning.

3. The constitution of Wisconsin was adopted by a convention at Madison, on the first day of February, 1848. The constitution is prefaced by a bill of rights, which declares that all men are born free and equal; that there shall be no slavery or involuntary servitude but for crime; that there shall be freedom of speech and of the press; that the rights of petition ought to exist; that indictment must precede trial; that there should be remedies for injury to property or person; that there shall be security from unreasonable searches of house or person; defines treason; makes all tenures allodial; gives aliens the same rights of property as subjects; abolishes imprisonment for debts; forbids religious tests of fitness for office and citizenship. Every male person, twenty-one years old or more, who has resided in the state one year next preceding an election, and who is a white citizen of the United States, or a white person of foreign birth who has declared his intention to become a citizen, or a person of Indian blood who has once been declared by law of congress to be a citizen of the United States, any subsequent act of congress to the contrary notwithstanding, or a civilized person of Indian descent not a member of any tribe. And the right may be extended to other persons by act of legislature approved by a majority of the voters at a general election. All persons under guardianship, non compos mentis, or insane, all persons convicted of treason or felony, unless restored to civil rights, are excluded. No soldier, seaman, or marine in the army or navy of the United States shall be deemed a resident in consequence of being stationed within the state.

The Legislative Power.

4. The *Senate* is to be composed of not more than one-third nor less than one-fourth the number of the representatives. The present number is thirty, elected by the people of their respective districts for one year. A senator must be a qualified voter, and have lived in the state one year next preceding the election.

The *Assembly* is to be composed of not less than fifty-four and not more than one hundred (the present number is ninety-six), elected annually in each of the districts into which the state is divided for the purpose. The qualifications to be the same as those of the senators.

An apportionment of members of both houses is to be made every tenth year from 1855. The members are exempt from arrest on civil process during the session of the legislature and fifteen days before and after. The constitution contains the usual provisions for organization of the two houses; for giving each house the regulation and control of the conduct of its members and judging of their qualification; for keeping and publishing a journal of its proceedings; for open sessions.

The Executive Power.

5. The *Governor* is elected by the people, for the term of two years. In case two have an equal number of votes and the highest number, the two houses of legislature by joint ballot designate which of the two shall be governor. He must be a citizen of the United States, and a qualified voter in the state. The governor is commander-in-chief of the military and naval forces of the state; has power to convene the legislature on extraordinary occasions, and in case of invasion or danger from the prevalence of contagious disease at the seat of government, to convene them at any other suitable place within the state; must communicate to the legislature at every session the condition of the state, and recommend such matters to them for their consideration as he may deem expedient; transacts all necessary business with the officers of the government, civil and military; must expedite all such measures as may be resolved upon by the legislature, and take care that the laws be faithfully executed; has the power to grant reprieves, commutations, and pardons after conviction for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason he has the power to suspend the execution of the sentence until the case is reported to the legislature at its next meeting, when the legislature may either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He must annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve, with his reasons for granting the same.

The governor may also veto any bill, returning it to the legislature with his objections: if it is then passed by a vote of two-thirds in each house, it becomes a law.

6. The *Lieutenant-Governor* is elected at the same time as the governor, for the same term, and must possess the same qualifications as the governor. He is president of the senate, but has only a casting vote. In case of the impeachment of the governor, or of his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office devolve upon him for the residue of the term, until the governor absent or impeached has returned, or the disability ceases. But when the governor, with the consent of the legislature, is out of the state in time of war, at the head of the military force thereof, he continues commander-in-chief of the military forces of the

state. If during a vacancy in the office of governor the lieutenant-governor is impeached, displaced, resign, die, or from mental or physical disease becomes incapable of performing the duties of his office, or is absent from the state, the secretary of state is to act as governor until the vacancy is filled or the disability ceases.

The secretary of state, the treasurer, and the attorney-general are chosen by the people for two years. Sheriffs, coroners, registers of deeds, and district attorneys are chosen by the people in each county for two years.

The Judicial Power.

7. The *Supreme Court* consists of one chief and two assistant justices, elected by the people for the term of six years. It is a court of appellate jurisdiction only, but may issue writs of mandamus, certiorari, habeas corpus, quo warranto, procedendo, and supersedeas.

The *Circuit Court* is composed of judges elected one from each judicial district (the present number is ten) for the term of six years, by the people. A judge must be at least twenty-five years old, a citizen of the United States, and a qualified elector. Two terms of the court are to be held by the judges annually in each county, and special law terms also as the statutes may provide. This court has original jurisdiction of all civil and criminal matters, and appellate jurisdiction from all inferior courts and tribunals, and a supervisory power over the same.

County Courts are held in each county, and in five counties—Milwaukee, La Crosse, St. Croix, Douglass, and La Pointe—have a civil jurisdiction at common law where the sum involved is less than five thousand dollars. In the other counties they have jurisdiction of probate of wills, administration of estates of decedents, care of minors, and general probate jurisdiction only.

8. *Justices of the Peace* are elected in each town for two years, by the people. They have a general jurisdiction in civil cases arising from contracts, injury to persons where personal property is sought to be recovered, of forcible entry and detainer, and to recover statute penalties where the amount involved does not exceed one hundred dollars, with an appellate jurisdiction to the circuit or county court. They have a criminal jurisdiction concurrent with the circuit court where the fine imposed is less than one hundred dollars.

Tribunals of Conciliation are organized in the various counties under statutes which have final powers when the parties consent to their arbitration.

The state may incur a debt of one hundred thousand dollars, but must at the time pass a law raising a tax sufficient to pay principal and interest in five years, which is to be irrepealable. It may also borrow money to repel invasion.

Corporations without banking powers may be created under general laws, but no banking corporation may be created without the sanction of a direct vote of the people.

WITENA-GEMOTE (spelled, also, witena-gemot, gewitena-gemote, from the Saxon *wita*, a wise man, *gemote*, assembly,—the assembly of wise men).

An assembly of the great men of the kingdom in the time of the Saxons, to advise and assist in the government of the realm.

2. It was the grand council of the kingdom, and was held, generally, in the open air, by public notice or particular summons, in or near some city or populous town. These notices or summonses were issued upon determination by the king's select council, or the body met without notice, when the throne was vacant, to elect a new king. Subsequently to the Norman conquest it was called *commune concilium regni, curia magna*, and, finally, *parliament*; but its character had become considerably changed. It was a court of last resort more especially for determining disputes between the king and his thanes, and, ultimately, from all inferior tribunals. Great offenders, particularly those who were members of or might be summoned to the king's court, were here tried. The casual loss of title-deeds was supplied, and a very extensive equity jurisdiction exercised. 1 Spence, Eq. Jur. 73–76; 1 Blackstone, Comm. 147, 148; 1 Reeve, Hist. Eng. Law, 7; 9 Coke, Preface.

3. The principal duties of the witena-gemote, besides acting as high court of judicature, was to elect the sovereign, assist at his coronation, and co-operate in the enactment and administration of the laws. It made treaties jointly with the king, and aided him in directing the military affairs of the kingdom. Examinations into the state of churches, monasteries, their possessions, discipline, and morals, were made before this tribunal. It appointed magistrates, and regulated the coin of the kingdom. It also provided for levying upon the people all such sums as the public necessities required; and no property of a freeman was, in fact, taxable without the consent of the gemote. Bede, lib. 2, c. 5; 3 Turner, Angl.-Sax. 209; 1 Dugdale, Mon. 20; Sax. Chron. 126, 140.

WITH STRONG HAND. In Pleading. A technical phrase indispensable in describing a forcible entry in an indictment. No other word or circumlocution will answer the same purpose. 8 Term, 357.

WITHDRAWING A JUROR. In Practice. An agreement made between the parties in a suit to require one of the twelve jurors impanelled to try a cause to leave the jury-box; the act of leaving the box by such a juror is also called the withdrawing a juror.

This arrangement usually takes place at the recommendation of the judge, when it is obviously improper the case should proceed any further.

The effect of withdrawing a juror puts an end to that particular trial, and each party must pay his own costs. 3 Term, 657; 2 Dowl. 721; 1 Crompt. M. & R. Exch. 64.

But the plaintiff may bring a new suit for the same cause of action. Ry. & M. 402; 3 Barnew. & Ad. 349. See 3 Chitty, Pract. 916.

WITHDRAWING RECORD. The withdrawing by plaintiff's attorney of the nisi prius record filed in a cause, before jury is sworn, has the same effect as a motion to postpone. 2 Carr. & P. 185; 3 Campb. 333; Paine & Duer, Pract. 465.

WITHERNAM. **In Practice.** The name of a writ which issues on the return of *elongata* to an alias or pluries writ of re-

plevin, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely, not to deliver them to the plaintiff until such time as the defendant chooses to submit himself and allow the distress, and the whole of it to be replevied, and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. Hammond, Nisi P. 453; Coke, 2d Inst. 140; Fitzherbert, Nat. Brev. 68, 69; Grotius, 3. 2. 4. n. 1.

WITHOUT DAY. This signifies that the cause or thing to which it relates is indefinitely adjourned: as, when a case is adjourned without day it is not again to be inquired into. When the legislature adjourn without day, they are not to meet again. This is usually expressed in Latin, *sine die.*

WITHOUT IMPEACHMENT OF WASTE. When a tenant for life holds the land without impeachment of waste, he is, of course, dispunishable for waste, whether wilful or otherwise. But still this right must not be wantonly abused so as to destroy the estate; and he will be enjoined from committing malicious waste. Dane, Abr. c. 78, a. 14, § 7; Bacon, Abr. *Waste* (N); 2 Eq. Cas. Abr. *Waste* (A, pl. 8); 2 Bouvier, Inst. n. 2402. See IMPEACHMENT OF WASTE; WASTE.

WITHOUT RECOURSE. See SANS RECOURS; INDORSEMENT.

WITHOUT RESERVE. These words are frequently used in conditions of sale at public auction, that the property offered, or to be offered, for sale, will be sold *without reserve.*

When a property is advertised to be sold without reserve, if a puffer be employed to bid, and actually bid at the sale, the courts will not enforce a contract against a purchaser, into which he may have been drawn by the vendor's want of faith. 5 Madd. Ch. 34. See PUFFER.

WITHOUT THIS, THAT. In Pleading. These are technical words used in a traverse (*q.v.*) for the purpose of denying a material fact in the preceding pleadings, whether declaration, plea, replication, etc. In Latin it is called *absque hoc* (*q.v.*). Lawes, Plead. 119; Comyns, Dig. *Pleader* (G 1); Summary of Pleading, 75; 1 Saund. 103, n.; Ld. Raym. 641; 1 Burr. 320; 1 Chitty, Plead. 576, note a.

WITNESS (Anglo-Saxon *witan*, to know). **In Practice.** One who testifies to what he knows. One who testifies under oath to something which he knows at first hand. 1 Greenleaf, Ev. §§ 98, 328.

One who is called upon to be present at a transaction, as, a wedding, or the making of a will. When a person signs his name to an instrument, as, a deed, a bond, and the like, to signify that the same was executed in his presence, he is called an attesting witness.

2. The principal rules relating to witnesses are the same in civil and in criminal cases, and the same in all the courts, as well in those various courts whose forms of proceeding are borrowed from the civil law, as in those of the common law. 3 Greenleaf, Ev. §§ 249, 402; 2 Ves. Ch. 41; 17 Mass. 303; 4 T. B. Monr. Ky. 20, 157.

AS TO THE COMPETENCY OF WITNESSES. All persons, of whatever nation, may be witnesses. Bacon, Abr. *Evidence* (A); Jacob, Law Dict. *Evidence.* But in saying this we must, of course, except such as are excluded by the very definition of the term; and we have seen it to be essential that a witness should qualify himself by taking an oath. Therefore, all who cannot understand the nature and obligation of an oath, or whose religious belief is so defective as to nullify and render it nugatory, or whose crimes have been such as to indicate an extreme insensibility to its sanctions, are excluded. And, accordingly, the following classes of persons have been pronounced by the common law to be incompetent. 5 Mas. C. C. 18. See OATH

Infants so young as to be unable to appreciate the nature and binding quality of an oath. A child under the age of fourteen is presumed incapable until capacity be shown. But the law fixes no limit of age which will of itself exclude. A child five years old has been admitted to testify. 1 Greenleaf, Ev. § 367; 1 Phillippe, Ev. with Cowen and Hill's notes, 3d ed. 4; 3 Carr. & P. 598; 1 Mood. Cr. Cas. 86; 10 Mass. 225; 8 Johns. N. Y. 98.

3. *Idiots, lunatics, intoxicated persons,* and, generally, those who labor under such privation or imbecility of mind that they cannot understand the nature and obligation of an oath. The competency of such is restored with the recovery or acquisition, 10 Johns. N. Y. 362; 28 Conn. 177; 16 Vt. 474; 7 Wheat. 453; 2 Leach, Cr. Cas. 482, of this power. And so a lunatic in a lucid interval may testify. 1 Greenleaf, Ev. § 365. Persons deaf and dumb from their birth are presumed to come within this principle of exclusion until the contrary be shown. 1 Greenleaf, Ev. § 366. See 1 Leach, Cr. Cas. 455; 3 Carr. & P. 127; 8 Conn. 93; 14 Mass. 207; 5 Blackf. Ind. 295. A person in a state of intoxication cannot be admitted as a witness. 15 Serg. & R. Penn. 235. See Ray, Med. Jur. c. 22, §§ 300-311; 16 Johns. N. Y. 143.

Such as are insensible to the obligation of an oath, from defect of religious sentiment or belief. Atheists, and persons disbelieving in any system of divine rewards and punishments, are of this class. It is reckoned sufficient qualification in this particular if one believe in a God and that he will reward and punish us according to our deserts. It is enough to believe that such punishment visits us in this world only. 1 Greenleaf, Ev. § 369; 5 Mas. C. C. 18; 14 Mass. 184; 26 Penn. St. 274; 1 Swan, Tenn. 44; 16 Ohio, 121; 7 Conn. 66. It would seem to be sufficient to believe ir such punishment as existing for perjury only,—if indeed it be suppos-

able that a man might believe thus much without extending his faith to any general system of rewards and punishments; and this is declared sufficient in New York, by statute. 2 Rev. Stat. N. Y. ed. 1852, 653.

It matters not, however, so far as mere competency is concerned, that a witness should believe in one God, or in one God rather than another, or should hold any particular form of religious belief, provided only that he brings himself within the rule above laid down. And, therefore, the oath may be administered in any form whatever, and with any ceremonies whatever, that will bind the conscience of the witness. 1 Greenleaf, Ev. § 371; 1 Atk. Ch. 21; Willes, 538. See OATH.

Persons infamous, i.e. those who have committed and been legally convicted of crimes the nature and magnitude of which show them to be insensible to the obligation of an oath. See INFAMY. Such crimes are enumerated under the heads of treason, felony, and the *crimen falsi*. 1 Greenleaf, Ev. § 373; CRIMEN FALSI; 2 Dods. Adm. 191.

4. The only method of establishing infamy is by producing the record of conviction. It is not even sufficient to show an admission of guilt by the witness himself. 9 Cow. N. Y. 707; 2 Mass. 108; 2 Mart. La. N. s. 466; 1 Starkie, Ev. 3d Am. ed. 144. And pardon or the reversal of a sentence restores the competency of an infamous person, unless where this disability is annexed to an offence by a statute in express terms. 1 Greenleaf, Ev. § 378; 2 Salk. 513; 2 Hargrave, Jurid. Arg. 221.

This exclusion on account of infamy or defect in religious belief applies only where a person is offered as a witness. 1 Bost. Law Rep. 347, 348; 1 Greenleaf. Ev. § 374; 2 Q. B. 721. But wherever one is a party to the suit, wishing to make affidavit in the usual course of proceeding, and, in general, wherever the law requires an oath as the condition of its protection or its aid, it presumes conclusively and absolutely that all persons are capable of an oath. Starkie, Ev. 393; Bacon, Abr. *Evidence;* Jacob, Law Dict. *Evidence;* 1 Phillipps, Ev. pp. 1–25, and Cowen and Hill's Notes, nn. 1–18; 1 Ashm. Penn. 57.

Slaves were generally held incompetent to testify, by statutory provisions, in the slave states, in suits between white persons. 7 T. B. Monr. Ky. 91; 4 Ohio, 353; 5 Litt. Ky. 171; 3 Harr. & J. Md. 97; 1 M'Cord, So. C. 430.

And, again, in saying that all persons may be witnesses, it is not meant that all persons may testify in all cases. The testimony of such as are generally qualified and competent under other circumstances or as to other matters is sometimes excluded out of regard to their special relations to the cause in issue or the parties, or from some other circumstances not working a general disqualification.

5. *Parties to the record* are not competent witnesses for themselves or their co-suitors. See Conn. Comp. Stat. 1854, 95, § 141; Ohio Stat. 1850, Mar. 3, §§ 1, 2; Mich. Rev. Stat. 1846, c. 102, § 100; 3 N. Y. Rev. Stat. 3d ed. 769; Wisc. Rev. Stat. 1849, c. 98, §§ 57, 60; Nixon, N. J. Dig. 1855, 187; Mo. Rev. Stat. 1845, c. 93, §§ 24, 25; Mass. Gen. Stat. 1860, 673; Me. Rev. Stat. 1857, c. 82, §§ 78, 83; N. H. Act of 1857, c. 1952; R. I. Rev. Stat. 1857, c. 187, § 34. Nor are they compellable to testify for the adverse party, 7 Bingh. 395; 20 Johns. N. Y. 142; 21 Pick. Mass. 57; 11 Conn. 342; but they are competent to do so; although one of several cosuitors cannot thus become a witness for the adversary without the consent of his associates. 1 Greenleaf, Ev. § 354; 12 Pet. 149; 5 How. 91; 6 Humphr. Tenn. 405; 3 Washb. Vt. 371. Regard is had not merely to the nominal party to the record, but also to the real party in interest; and the former will not be allowed to testify for the adverse side without the consent of the latter. 1 Greenleaf, Ev. §§ 329–364; 16 Pick. Mass. 501; 20 Johns. N. Y. 142; 12 Conn. 134.

In some jurisdictions a party has the right of compelling his adversary to answer interrogatories under oath, as also to appear and testify. And, in equity, parties may reciprocally require and use each other's testimony; and the answer of a defendant as to any matters stated in the bill is evidence in his own favor. 1 Greenleaf, Ev. § 329; 2 Story, Eq. Jur. 1528; Gresley, Eq. Ev. 243.

There are other exceptions to this rule. Cases where the adverse party has been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence than that of the complainant himself can be had of the amount of damage,—cases, also, where evidence of the parties is deemed essential to the purposes of public justice, no other evidence being attainable,—are such exceptions. 1 Greenleaf, Ev. § 348; 1 Vern. Ch. 308; 1 Me. 27; 11 *id.* 412. See 12 Metc. Mass. 44; 6 Watts & S. Penn. 495; 3 Mich. 51; 10 Penn. St. 45.

On this same principle, *persons directly interested in the result of the suit*, see INTEREST, or in the record as an instrument of evidence, are excluded; and where the event of the cause turns upon a question which if decided one way would render the party offered as a witness liable, while a contrary decision would protect him, he is excluded. Starkie, Ev. 1730. But to this rule, also, there are exceptions, Starkie, Ev. 1731, of which the case of agents testifying as to matters to which their agency extended forms one. Starkie, Ev. 83–91; 1 Phillipps, Ev. pp. 81–161, and Cowen and Hill's Notes, nn. 74–138; 1 Greenleaf, Ev. §§ 386–431.

6. *Husband and wife* are excluded from giving testimony for or against each other when either is a party to the suit or interested. And neither is competent to prove a fact directly tending to criminate the other. This rule is founded partly on their identity

of interest, and partly, perhaps chiefly, on the policy of the law which aims to protect the confidence between man and wife that is essential to the comfort of the married relation, and, through that, to the good order of society. Whether or not the disability of husband or wife may ever be removed by consent of the other is matter of dispute. 1 Ves. Ch. 49; 1 Wheat. Crim. Cas. N. Y. 479; 4 Term, 679; 3 Carr. & P. 558; 1 Greenleaf, Ev. § 340. But it is not removed by the death of the other, nor by the dissolution of the marriage relation.

Some exceptions to this rule, 1 Greenleaf, Ev. § 343, are admitted out of necessity for the protection of husband and wife against each other, and for the sake of public justice. Bacon, Abr. *Evidence* (A); 1 Greenleaf, Ev. §§ 334–347; 1 Phillipps, Ev. 69–81, and Cowen and Hill's Notes, nn. 53–74; Starkie, Ev. p. iv. 706–715; 1 Ves. Ch. 49; 1 Jebbs & S. 563; Ry. & M. Cr. Cas. 253.

Parties to negotiable instruments are, in some jurisdictions, held *incompetent to invalidate these instruments* to which they have given currency by their signature. Such seems to be the prevailing, but not universal, rule in the United States; while in England such testimony is admitted. 1 Greenleaf, Ev. §§ 383–386; 1 Term. 296; 11 East, 309; 9 Metc. Mass. 471; 12 Pet. 149; 3 How. 73; 13 *id.* 229; 5 N. H. 147; 4 Me. 191, 374; 20 Penn. St. 469; 22 *id.* 492; 24 Vt. 459; 18 Ohio, 579; 1 Miss. 541; 3 Rand. Va. 316; 1 Conn. 260; 3 M'Cord, So. C. 71; 4 Tex. 371; 3 Harr. & J. Md. 172; 2 Harr. N. J. 192.

And, finally, there are certain *privileged communications*, 1 Greenleaf, Ev. §§ 236–255, to which the recipient of them, from general considerations of policy, is not allowed to testify.

Attorneys, counsellors, and solicitors at law, and members of the legal profession generally, are not competent to testify to confidential communications, or to produce papers received from their clients in the course of professional business relative thereto and pending the relation of counsel or attorney and client. This incompetency is the privilege of the client, and continues forever, unless removed by his consent. Starkie, Ev. 395–401.

The same principle extends to the case of attorney's clerk coming to the knowledge of such communications while employed in that capacity; also to that of interpreters and other necessary agents and organs of communication between the client and legal adviser; so, also, to the case of an arbitrator. 1 Greenleaf, Ev. § 239.

But it does not extend to the case of any other class of professional men: such as confessors or other religious advisers, or physicians. 1 Phillipps, Ev. 161–177, and Cowen & Hill's Notes, nn. 139–153.

Judges are not allowed to testify to what was made known to them or took place before them in the hearing of causes. 1 Greenleaf, Ev. § 249.

Persons in possession of secrets of state or matters the disclosure of which would be prejudicial to the public interest, are not allowed to testify thereto. 1 Greenleaf, Ev. §§ 250–252 (A).

Grand jurors and persons present before a grand jury, 1 Greenleaf, Ev. § 252, are not permitted to testify to the proceedings had before that body. 1 Phillipps, Ev. 177–184, and Cowen & Hill's Notes, nn. 154–157. See PRIVILEGED COMMUNICATIONS.

7. THE MEANS OF SECURING THE ATTENDANCE AND TESTIMONY OF WITNESSES. In general, all persons who are competent may be compelled to attend and testify. Yet it would seem that experts who are permitted to testify to their opinion in cases where the inference to be drawn by the jury "is one of skill and judgment," cannot be compelled to give their opinion, unless in pursuance of a special contract for their time and services. 1 Greenleaf, Ev. § 310, n. 3; 1 Carr. & K. 23.

Provision has been made by statute, in most if not in all of the states, for the case of persons living at an inconvenient distance from the place of trial, as well as for the case of such as are sick or about to leave the state, or otherwise likely to be put to great inconvenience by a compulsory attendance, and also for such as are already in a foreign jurisdiction, by allowing the taking of their deposition in writing before some magistrate near at hand, to be read at the trial. 1 Greenleaf, Ev. § 321.

In criminal cases, where the state itself is the plaintiff prosecuting an offence committed against the public, all persons are compellable to appear and testify without any previous tender of their fees; and any bystander in court may be compelled to testify without a previous summons or tender of fees. 1 Greenleaf, Ev. § 311; 4 Cow. N. Y. 49; 13 Mass. 501; 4 Cush. Mass. 249; 2 Lew. Cr. Cas. 259.

But in civil suits which are between man and man, a party is allowed to compel the attendance and testimony of a witness only on condition of a prepayment or tender of his fees for travel to the place of trial, and for one day's attendance there. This seems, as a general rule, to be the least that can be tendered. 1 Greenleaf, Ev. § 310; 4 Johns. N. Y. 311; 1 Metc. Mass. 293; 8 Mo. 288; 41 N. H. 121. In the courts of the United States, as well as in England, a witness may require his fees for travel both ways. 1 Greenleaf, Ev. § 310; 1 Starkie, Ev. 110; 6 Taunt. 88. And in civil cases a person cannot be compelled to testify, although he chance to be present in court, unless regularly summoned and tendered his fees. 1 Phillipps, Ev. Cowen & Hill's Notes, n. 338. Being in attendance in obedience to a summons, he may, nevertheless, refuse to testify from day to day, unless his daily fees are paid or tendered. 2 Phillipps, Ev. § 376. Whether or not he may refuse to *attend* from day to day without the prepayment or tender of his daily fees, is a matter about which there are different decisions. 1 Greenleaf, Ev. § 310; 10 Vt.

493; 14 East, 15. A witness may maintain an action against the party summoning him for his fees. Starkie, Ev. 1727.

8. Witnesses are also compellable to produce papers in their custody to which either party has a right as evidence, on the same principle that they are required to testify what they know. 1 Greenleaf, Ev. § 558. But there is this difference between the obligation of a witness to testify to facts and the obligation to produce papers.—to wit: that in the latter case he is not compellable to produce title-deeds or other documents belonging to him or to one for whom he holds them as agent, where the production would prejudice his own or his principal's civil rights,—an exemption which is not allowed in reference to oral testimony. 1 Starkie, Ev. 1722, 1723. But in all cases the witness must bring the documents, if regularly summoned to do so, and the court will decide as to the question of producing them. See DISCOVERY.

The attendance of witnesses is ordinarily procured by means of a writ of subpœna; sometimes, when they are in custody, by a writ of *habeas corpus ad testificandum;* and sometimes, in criminal cases, by their own recognizance, either with or without sureties. 1 Greenleaf, Ev. §§ 309, 312, 313; 2 Phillipps, Ev. 370, 374. If a witness disobey the summons, process of attachment for contempt will issue to enforce his attendance, and an action also lies against him at common law. 1 Greenleaf, Ev. § 319; 1 Starkie, Ev. 1727; 2 Phillipps, Ev. 376, 377.

Nor can any third party intervene to prevent the attendance of a witness. Neither can he take advantage of a witness's attendance at the place of trial to arrest him. Witnesses are protected from arrest while going to the place of trial, while attending there for the purpose of testifying, and on their return,—*eundo, morando, et redeundo,*—it being the policy of the law as well to encourage and facilitate as to enforce the attendance of witnesses. 1 Greenleaf, Ev. § 316; 1 Starkie, Ev. 119. See ARREST.

9. AS TO THE EXAMINATION OF WITNESSES. In the common-law courts, examinations are had *viva voce*, in open court, by questions and answers. The same course is now adopted to a great extent in equity and admiralty courts, and others proceeding according to the forms of the civil law. But the regular method of examining in these last-named courts is by deposition taken in writing out of court. 2 Parsons, Marit. Law, 721; 2 Conkling, Adm. Pract. 284; 2 Story, Eq. Jur. § 1527; 3 Greenleaf, Ev. § 251.

On motion, in civil and criminal cases, witnesses will generally be excluded from the court-room while others are undergoing examination in the same case: this, however, is not matter of right, but within the discretion of the court. 1 Starkie, Ev. 1733; 1 Greenleaf, Ev. § 432; 2 Phillipps, Ev. 395; 4 Carr. & P. 585; 7 *id.* 632; 2 Swan, Tenn. 1237; 3 Wisc. 214.

Witnesses are required to testify from their own knowledge and recollection. Yet they are permitted to refresh their memory by reference, while on the stand, to papers written at or very near the time of the transaction in question,—even though they were not written by themselves and though the writing in itself would be inadmissible in evidence. 1 Greenleaf, Ev. §§ 436–440; 2 Phillipps, Ev. 411–416; 2 Cowen & Hill's Notes, n. 377; 1 Starkie, Ev. 128; 20 Pick. Mass. 441; 2 Carr. & P. 75; 10 N. H. 544.

Being once in attendance, a witness may, in general, be compelled to answer all questions that may legally be put to him. See EVIDENCE.

Yet there are exceptions to this rule. He is not compellable where the answer would have a tendency to expose him to a penal liability or any kind of punishment, or to a criminal charge or a forfeiture of his estate. 1 Greenleaf, Ev. §§ 451, 453; 2 Phillipps, Ev. 417. See PRIVILEGE.

The court, it is said, decides as to the tendency of the answer, and will instruct the witness as to his privilege. 2 Phillipps, Ev. 417; 4 Cush. Mass. 594; 1 Den. N. Y. 319. It has been held that the question whether an answer would have this tendency is to be determined by the oath of the witness. 17 Jur. 393. And in point of fact, out of the necessity of the case, it is a matter which the witness may be said practically to decide for himself. The witness may answer if he chooses; and if he do answer after having been advised of his privileges, he must answer in full; and his answer may be used in evidence against him for all purposes. 1 Greenleaf, Ev. §§ 451, 453; 1 Starkie, Ev. 144; 2 Phillipps. Ev. 425; 4 Wend. N. Y. 252; 11 Cush. Mass. 437; 12 Vt. 491; 20 N. H. 540.

Whether a witness be compellable to answer to his own degradation or infamy is a point as to which some distinctions are to be taken: a witness cannot refuse to testify simply because his answer would *tend* to disgrace him; it must be seen to have that effect certainly and directly. 1 Greenleaf, Ev. § 456. He cannot, it would seem, refuse to give testimony which is material and relevant to the issue, for the reason that it would disgrace him. 1 Greenleaf, Ev. § 454; 1 Mood. & M. 108; 4 Wend. N. Y. 250; 2 Ired. No. C. 346.

10. But it would appear that he may refuse where the question (being one put on cross-examination) is not relevant and material, and does not in any way affect the credit of the witness. 1 Greenleaf, Ev. § 458; 3 Campb. 519; 13 N. H. 92; 1 Gray, Mass. 108. Whether a witness, when a question is put on the cross-examination which is not relevant and material to the issue, yet goes to affect his credit, will be protected in refusing to answer, simply on the ground that his answer would have a direct and certain effect to disgrace him, is a matter not clearly agreed upon. There is good reason to hold that a witness should be compelled to answer in such a case. 1 Greenleaf, Ev. § 4[illegible];

1 Starkie, Ev. 144–147; 2 Phillipps, Ev. 421–431; 1 Carr. & P. 85; 2 Swanst. 216; 2 Campb. 637; 3 Yeates, Penn. 429.

But the whole matter is one that is largely subject to the discretion of the courts. 1 Greenleaf, Ev. §§ 431, 449.

And there seems no doubt that a witness is in no case competent to allege his own turpitude, or to give evidence which involves his own infamy or impeaches his most solemn acts, if he be otherwise qualified to testify. Starkie, Ev. 1737.

The course of examination is, first, a direct examination by the party producing the witness; then, if desired, a cross-examination by the adverse party, and a re-examination by the party producing. 1 Starkie, Ev. 123, 129, 150. As to the *direct* examination, the general rule is that leading questions, *i.e.* such as suggest the answer expected or desired, cannot be put to a witness by the party producing him. But this rule has some reasonable exceptions. 1 Greenleaf, Ev. §§ 434, 435. See LEADING QUESTION.

Leading questions, however, are allowed upon cross-examination. Nor are the rules against questions not relevant and material to the issue always enforced upon cross-examination,—a stage of the trial at which great latitude in the form and subject-matter of questions is generally allowed, in order that juries may be fully apprized of "the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description." 1 Greenleaf, Ev. §§ 446, 449; 1 Starkie, Ev. 129.

11. Yet witnesses cannot be cross-examined as to collateral and irrelevant matters for the purpose of contradicting them by other evidence. 1 Greenleaf, Ev. § 449. Their testimony as to such matters is always conclusive against the party questioning. "If, by an unfortunate or unskilful question put on cross-examination, a fact be extracted which need not have been evidence upon an examination-in-chief, it then becomes evidence against the party so cross-examining." 1 Starkie, Ev. 144; 2 Phillipps, Ev. 398, 429.

The right of cross-examination, which is that of treating a person as the witness of the opposing party and examining him by leading questions, is confined by some courts to matters upon which he has already been examined in chief, *e.g.* by the courts of the United States and of Pennsylvania. 14 Pet. 448; 6 Watts & S. Penn. 75. By others, *e.g.* those of England, Massachusetts, and New York, 1 Starkie, Ev. 131; 17 Pick. Mass. 490; 1 Cow. N. Y. 238, it is extended to the whole case. 1 Greenleaf, Ev. § 445. Yet a party is not permitted to introduce his own case by cross-examining the witnesses of his adversary. 1 Greenleaf, Ev. § 447.

It is to be considered, however, that the cross-examination of witnesses is a matter depending much upon the discretion of the court, which will sometimes permit one to cross-examine his own witness, when he appears to be in the interest of the adverse party. 1 Starkie, Ev. 132; 1 Greenleaf, Ev. § 447; 2 Phillipps, Ev. 403, 406, 407.

The right of re-examination extends to all topics upon which a witness has been cross-examined; but the witness cannot at this stage be questioned as to any new facts unconnected with the subject of the cross-examination and not tending to explain it. 1 Starkie, Ev. 150; 2 Phillipps, Ev. 407; 1 Greenleaf, Ev. § 467.

A party cannot impeach the credit of his own witness. But he is sometimes, in cases of hardship, permitted to contradict him by other testimony. 1 Starkie, Ev. 147; 1 Greenleaf, Ev. §§ 442, 443.

12. The credit of an adversary's witness may be impeached by cross-examination, or by general evidence affecting his reputation for veracity (but not by evidence of particular facts which otherwise are irrelevant and immaterial), and by evidence of his having said or done something before which is inconsistent with his evidence at the trial. Also, of course, he may be contradicted by other testimony. Starkie, Ev. p. iv. 1753; 1 Greenleaf, Ev. §§ 401, 402.

Generally, where proof is to be offered that a witness has said or done something inconsistent with his evidence, a foundation must first be laid and an opportunity for explanation offered, by asking the witness himself whether he has not said or done what it is proposed to prove, specifying particulars of time, place, and person. 1 Greenleaf, Ev. § 462; 2 Phillipps, Ev. 433; 2 Cowen & Hill's Notes, n. 390.

Evidence of general good character may be offered to support a witness, whenever his credit is impeached, either by general evidence affecting his character, or on cross-examination. 1 Starkie, Ev. 1757; 1 Greenleaf, Ev. § 469.

13. MODIFICATIONS OF THE COMMON LAW. There have been various important modifications of the common law as to witnesses, in respect to their competency and otherwise, as well in England as in this country. A general and strong tendency is manifest to do away with the old objections to the competency of witnesses, and to admit all persons to testify that can furnish to courts and juries any relevant and material evidence,—leaving these to judge of the credibility of the witnesses.

We shall state the changes introduced in England, the United States, Massachusetts, New York, Pennsylvania, Illinois, and Mississippi.

England. By various statutes, 7 & 8 Will. III. c. 34, 1698; 8 Geo. I. c. 6, 1721; and 9 Geo. IV. c. 32, 1828, Quakers and Moravians are allowed to testify under affirmation, subject to the penalties of perjury.

Incompetency from interest is done away with in various specified cases, by special statutes.

By 3 & 4 Will. IV. c. 26, it is declared that no witness shall be incompetent on the ground that the verdict or judgment would be admissible in evidence for or against him; and such verdict or judgment for his party shall not be admissible for him or any one claiming under him; nor shall a verdict or judgment against his party be admissible against him or any one claiming under him.

By the statutes 6 & 7 Vict. c. 85 (1843), and 14 & 15 Vict. c. 99 (1851), incompetency by reason of being a party, or one in whose behalf a suit is brought or defended, or by reason of crime or interest, is removed. But no person charged with a criminal offence is competent or compellable to give evidence for or against himself; nor is a husband or wife of such a one competent or compellable to give evidence for or against the other; nor is one compellable to criminate himself; nor does the provision as to parties apply to proceedings instituted on account of adultery or for breach of promise of marriage.

By statute 16 & 17 Vict. c. 83 (1853), the husband or wife of a party, or one in whose behalf a suit is brought or defended, is made admissible in all cases and before all tribunals, excepting in criminal proceedings or any proceeding instituted in consequence of adultery: but neither is compellable to disclose the conversation of the other during marriage.

By statutes of 15 & 16 Vict. c. 27 (1852), and 16 & 17 Vict. c. 20, similar changes are made in the law of Scotland.

14. *The United States.* By the Judiciary Act (Sept. 24, 1789), s. 34, it is provided that the laws of the several states, excepting where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be the rules of decision in trials at common law in the courts of the United States, in cases where they apply.

This is held to include the statute and common law of the several states, Curtis, Const. s. 30 *a;* to embrace statutes relating to the law of evidence in civil cases at common law, including those passed subsequently to the Judiciary Act, M'Niel *vs.* Holbrook, 12 Pet. 84; but not to apply to criminal cases: as to which, the laws of the several states as existing at the time this act was passed are the rules of decision. 12 How. 361.

In accordance with this provision, parties and others formerly disqualified are allowed to testify in the district and circuit courts of the United States, in civil cases at common law, in states which admit such testimony before their own courts.

A remarkable provision is made in a statute passed 24th January, 1857, 11 U. S. Stat. at Large, 155, as to witnesses testifying before either house of congress or any committee of either,—to the effect that no person shall be held to answer criminally in any court of justice, or be subject to any penalty or forfeiture, for any fact or act touching which he shall be required to testify as aforesaid; and no statement made or paper produced by him as aforesaid shall be competent evidence against him in any criminal proceeding in any court of justice. By the same statute, no person so testifying can refuse to answer, or produce a paper, on the ground that it would tend to disgrace or render him infamous,—a provision, however, which seems to effect no change in the law.

But the subject of witnesses before legislative bodies has not come within the scope of this article.

15. *Massachusetts.* Quakers and persons having conscientious scruples against taking an oath are allowed to affirm. Gen. Stat. c. 131, ss. 10, 11.

Persons disbelieving "in any religion" are rendered competent; and evidence of their disbelief "in the existence of God" is admissible to affect their credibility. Gen. Stat. c. 131, s. 12.

No person is incompetent by reason of crime or interest. Gen. Stat. c. 131, s. 13.

Parties in all civil actions and proceedings (excepting divorce suits in which a divorce is sought on the ground of the alleged adultery of either party) are competent witnesses for themselves or any other party;—with a *proviso*. Gen. Stat. c. 131, s. 14.

Husband and wife, in all civil actions and proceedings in which the wife is a party or one of the parties, are competent for and against each other, excepting as to private conversations with each other. Gen. Stat. c. 131, s. 14. And in actions brought against a husband, where the cause of action grows out of a wrong or injury done by him to the wife or his neglect to support her, the wife is competent. Gen. Stat. c. 131, s. 16.

New York. Persons declaring that they have conscientious scruples against taking an oath may affirm. 2 Rev. Stat. ed. 1852, 653.

"No person shall be rendered incompetent to be a witness on account of his opinion on matters of religious belief." N. Y. Const. 1846, art. 1, s. 3.

No person shall be excluded by reason of interest in the event of the action, excepting parties and those for whose immediate benefit the action is prosecuted or defended, with a *proviso* admitting parties in certain cases. 2 Rev. Stat. 549.

No crime other than a felony shall render incompetent. 2 Rev. Stat. 885. Felony is defined as an offence punishable with death or imprisonment in a state prison. 2 Rev. Stat. 886. But, by special statutes, felons are admitted in some cases. 2 Rev. Stat. 869, 969.

No minister of the gospel, or priest, is allowed to disclose any confession made to him in his professional character in the course of discipline enjoined by rules or practice of his denomination. And no authorized physician or surgeon is allowed to disclose any information acquired in attending a patient professionally, which was necessary to enable him to prescribe or act professionally for the patient. 2 Rev. Stat. 652.

There are other statutes in New York modifying the common law as to witnesses in specified cases: *e.g.* one admitting the wife in one case where the husband is party. Stat. 1860, c. 508, s. 3.

16. *Pennsylvania.* Persons conscientiously opposed to taking an oath are allowed to affirm. Stats. 31 May, 1718, and 21 Mar. 1772, Dunlap, Laws of Penn. 2d ed. 67, 111.

Other changes in the law as to witnesses in Pennsylvania seem to consist in certain removals of the disqualification of interest in special cases.

Illinois. In all cases witnesses are allowed to affirm. Ill. Stat. Purple's ed. 786.

No black or mulatto person or Indian is permitted to testify for or against any white person whatsoever in criminal cases. Ill. Stat. ed. 1858, 377. And in civil cases no negro, mulatto, or Indian can testify, in any court or case, against a white person. Ill. Stat. ed. 1858, 237.

In certain special cases the disqualification of interest is removed. Approvers are not competent in criminal cases. Ill. Stat. ed. 1858, 377. Parties are competent witnesses in certain proceedings before auditors. Ill. Stat. ed. 1858, 212.

17. *Mississippi.* Persons conscientiously scrupulous as to taking an oath are allowed to affirm. Miss. Rev. Code, 513.

No person is incompetent in any suit at law or in equity, whether a party or not, by reason of interest; but the deposition of such a witness is not to be read; and there is another *proviso*.

No person is incompetent by reason of any crime, excepting that of perjury or subornation of perjury; and no person convicted of perjury or subornation is rendered competent by pardon or punishment.

Husband and wife are competent for each other in criminal cases.

Negroes, mulattoes, Indians, and persons of mixed blood descended from such, to the second generation inclusive, are not competent in any case whatever, excepting for or against each other. Miss. Rev. Code, 510.

Again, it is provided that no negro or mulatto, bond or free, is a good witness, excepting in criminal cases against a negro or mulatto, bond or free, and in civil cases where a free negro or mulatto alone are parties. Miss. Rev. Code, 249.

No witness may refuse to answer any question material and relevant, unless the answer would expose him to a criminal prosecution or penalty or a forfeiture of his estate. Miss. Rev. Code, 513.

No female is compellable to attend court in any civil action, excepting by special process, obtainable upon affidavit of the party wishing for her attendance that the same is necessary to the ends of justice. Miss. Rev. Code, 514, 515.

No attorney or counsellor is allowed his fees as a witness in any case in which he is attorney or counsellor. Miss. Rev. Code, 152.

Excepting in criminal cases, witnesses are entitled to receive their fees for each day's attendance at the end of the day: if not paid, they are not compellable to attend further until paid for previous attendance. Miss. Rev. Code, 512.

The disqualification for crime is set aside under special circumstances. Miss. Rev. Code, 641.

WOLF'S HEAD. In Old English Law. A term applied to outlaws. They who were outlawed in old English law were said to carry a wolf's head; for if caught alive they were to be brought to the king, and if they defended themselves they might be slain and their heads carried to the king, for they were no more to be accounted of than wolves. Termes de la Ley, *Woolforthfod.*

WOMEN. All the females of the human species. All such females who have arrived at the age of puberty. *Mulieris appellatione etiam virgo viri potens continetur.* Dig. 50. 16. 13.

Single or unmarried women have all the civil rights of men: they may, therefore, enter into contracts or engagements; sue and be sued; be trustees or guardians; they may be witnesses, and may for that purpose attest all papers; but they are, generally, not possessed of any political power: hence they cannot be elected representatives of the people, nor be appointed to the offices of judge, attorney at law, sheriff, constable, or any other office, unless expressly authorized by law; instances occur of their being appointed postmistresses; nor can they vote at any election. Wooddeson, Lect. 31; Coke, 4th Inst. 5. But see Callis, Sew. 252; Coke, 2d Inst. 34; Coke, 4th Inst. 311, marg.

WOODGELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Coke, Litt. 233 *a.* The same as PUDZELD.

WOODMOTE. The court of attachment. Cowel.

WOODS. A piece of land on which forest-trees in great number naturally grow. According to Lord Coke, a grant to another of *omnes boscos suos*, all his woods, will pass not only all his trees, but the land on which they grow. Coke, Litt. 4 *b.*

WOOLSACK. The seat of the lord chancellor of England in the house of lords, being a large square bag of wool, without back or arms, covered with red cloth. Webster, Dict. The judges, king's counsel-at-law, and masters in chancery sit also on woolsacks. The custom arose from wool's being a staple of Great Britain from early times. Encyc. Amer.

WORD. One or more syllables which when united convey an idea; a single part of speech.

2. Words are to be understood in a proper or figurative sense, and they are used both ways in law. They are also used in a technical sense. It is a general rule that contracts and wills shall be construed as the parties understood them: every person, however, is presumed to understand the force of the words he uses, and, therefore, technical words must be taken according to their legal import even in wills, unless the testator manifests a clear intention to the contrary. 1 Brown, Ch. 33; 3 *id.* 234; 5 Ves. Ch. 401; 8 *id.* 306.

3. Every one is required to use words in the sense they are generally understood; for, as speech has been given to man to be a sign of his thoughts for the purpose of communicating them to others, he is bound, in treating with them, to use such words or signs in the sense sanctioned by usage,—that is, in the sense in which they themselves understand them,—or else he deceives them. Heineccius, Prælect. in Puffendorff, lib. 1, cap. 17, § 2; Heineccius, de Jure Nat. lib. 1, § 197; Wolff, Inst. Jur. Nat. § 798.

4. Formerly, indeed, in cases of slander, the defamatory words received the mildest interpretation of which they were susceptible; and some ludicrous decisions were the consequence. It was gravely decided that to say of a merchant, "he is a base broken rascal, has broken twice, and I will make him break a third time," furnished no ground for maintaining an action because it might be intended that he had a hernia: *ne poet dar porter action, car poet estre intend de burstness de belly.* Latch, 104. But now they are understood in their usual signification. Comb. 37; Hammond, Nisi P. 282. See LIBEL; SLANDER.

WORK AND LABOR. In actions of assumpsit it is usual to put in a count, commonly called a common count, for work and labor done and materials furnished by the plaintiff for the defendant; and when the work was not done under a special contract the plaintiff will be entitled to recover on the common count for work, labor, and materials. 4 Tyrwh. 43; 2 Carr. & M. 214. See ASSUMPSIT; QUANTUM MERUIT.

WORKHOUSE. A prison where prisoners are kept in employment; a penitentiary. A house provided where the poor are taken care of and kept in employment.

WORKING DAYS. In settling lay-days, or days of demurrage, sometimes the

contract specifies "working days;" in the computation, Sundays and custom-house holidays are excluded. 1 Bell, Comm. 577, 5th ed.

WORKMAN. One who labors; one who is employed to do business for another.

The obligations of a workman are to perform the work he has undertaken to do, to do it in proper time, to do it well, to employ the things furnished him according to his contract.

His rights are to be paid what his work is worth, or what it deserves, and to have all the facilities which the employer can give him for doing his work. 1 Bouvier, Inst. nn. 1000–1006.

WORSHIP. Honor and homage rendered to God.

In the United States this is free, every one being at liberty to worship God according to the dictates of his conscience. See CHRISTIANITY; RELIGIOUS TEST.

In English Law. A title or addition given to certain persons. Coke, 2d Inst. 666; Bacon, Abr. *Misnomer* (A 2).

WORTHIEST OF BLOOD. An expression used to designate that in descent the sons are to be preferred to daughters, which is the law of England. See some singular reasons given for this, in Plowd. 305.

WOUND. In Medical Jurisprudence. Any lesion of the body.

In this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity; while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like. Cooper, Surgical Dict.; Dunglison, Med. Dict. See Dictionnaire des Sciences médicales, mot *Blessures*; 3 Fodére, Méd. Lég. §§ 687–811.

2. Under the statute 9 Geo. IV. c. 21, s. 12, it has been held in England that to make a wound, in criminal cases, there must be an injury to the person by which the skin is broken. 6 Carr. & P. 684. See 6 Metc. Mass. 565; Beck, Med. Jur. c. 15; Ryan, Med. Jur. Index; Roscoe, Cr. Ev. 652; Dane, Abr. Index; 1 Mood. Cr. Cas. 278, 318; 4 Carr. & P. 381, 558; Guy, Med. Jur. c. 9, p. 446; Merlin, Répert. *Blessure*.

3. When a person is found dead from wounds, it is proper to inquire whether they are the result of suicide, accident, or homicide. In making the examination, the greatest attention should be bestowed on all the circumstances. On this subject some general directions have been given under the article DEATH. The reader is referred to 2 Beck, Med. Jur. 68–93. As to wounds on the living body, see *id.* 188.

WRECK (called in law Latin *wreccum maris*, and in law French *wrec de mer*).

In Maritime Law. Such goods as after a shipwreck are cast upon the land by the sea, and left there within some country so as not to belong to the jurisdiction of the admiralty, but to the common law. Coke, 2d Inst. 167; 1 Sharswood, Blackst. Comm. 290–293.

2. Goods found at low water, between high and low water mark, and goods between the same limits partly resting on the ground, but still moved by the water, are wreck. The King *vs.* Forty-Nine Casks of Brandy, 3 Hagg. Adm. 257, 294. Wreck, by the common law, belongs to the king or his grantee; but if claimed by the true owner within a year and a day the goods, or their proceeds, must be restored to him, by virtue of stat. Westm. I., 3 Edw. I. c. 4. Ships and goods found derelict or abandoned at sea belonged until lately to the office of the lord high admiral, by a grant from the crown, but now belong to the national exchequer, subject, however, to be claimed by the true owner within a year and a day. 1 Hagg. 383; The Merchant Shipping Act, 1854, § 475.

3. In this country, the several states bordering on the sea have enacted laws providing for the safe keeping and disposition of property wrecked on the *coast*. In one case, Peabody *vs.* 28 bales of cotton, decided in the district court of Massachusetts, and reported in the American Jurist for July, 1829, it was held that the United States have succeeded to the prerogative of the British crown, and are entitled to derelict ships or goods found *at sea* and unclaimed by the true owner; but in the southern district of Florida it is held that such derelicts, in the absence of any act of congress on the subject, belong to the finder or salvor, subject to the claim of the true owner for a year and a day. Marvin, Wreck and Salvage. Stealing, plundering, or destroying any money or goods from or belonging to any vessel, boat, or raft in distress, lost, or stranded, wilfully obstructing the escape of any person endeavoring to save his life from such ship, boat, or raft, holding out or showing any false light or lights, or extinguishing any true one, with intention to bring any vessel, boat, or raft on the sea into danger, or distress, or shipwreck, are made felony, punishable by fine and imprisonment, by act of congress of the 3d March, 1825, 4 U. S. Stat. at Large, 115. Wrecked goods upon a sale or other act of voluntary importation become liable to duties. 9 Cranch, 387; 4 *id.* 347.

WRIT. In Practice. A mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.

It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under seal and tested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same. Writs are divided into—original, of mesne process, of execution. See 3 Blackstone, Comm. 273; 1 Tidd, Pract. 93; Gould, Plead. c. 2, s. 1.

WRIT OF ASSOCIATION. In English Practice. A writ whereby certain

persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and sergeants; and they are required to admit the said persons into their society in order to take the assizes. 3 Sharswood, Blackst. Comm. 59. See ASSIZE.

WRIT DE BONO ET MALO. See DE BONO ET MALO; ASSIZE.

WRIT OF CONSPIRACY. The name of an ancient writ, now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. Fitzherbert, Nat. Brev. 260. See CONSPIRACY.

WRIT OF COVENANT. In Practice. A writ which lies where a party claims damages for breach of covenant, *i.e.* of a promise under seal.

WRIT OF DEBT. In Practice. A writ which lies where the party claims the recovery of a debt, *i.e.* a liquidated or certain sum of money alleged to be due to him.

This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called the debt *in the detinet*, which lies for the specific recovery of *goods* under a contract to deliver them. 1 Chitty, Plead. 101.

WRIT OF DECEIT. The name of a writ which lies where one man has done any thing in the name of another, by which the latter is damnified and deceived. Fitzherbert, Nat. Brev. 217.

The modern practice is to sue a writ of trespass on the case to remedy the injury. See DECEIT.

WRIT OF DETINUE. In Practice. A writ which lies where a party claims the specific recovery of goods and chattels, or deeds and writings, detained from him. This is seldom used: trover is the more frequent remedy, in cases where it may be brought.

WRIT OF DOWER. In Practice. A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chitty, Plead. 393; Booth, 166.

There is another species, called a *writ of right of dower*, which applies to the particular case where the widow has received a part of her dower from the tenant himself, and of land lying in the same town in which she claims the residue. Booth, 166; Glanville, lib. 6, c. 4, 5. This latter writ is seldom used in practice.

WRIT DE EJECTIONE FIRMÆ. A writ of ejectment. See EJECTMENT.

WRIT OF EJECTMENT. In Practice. The name of a process issued by a party claiming land or other real estate, against one who is alleged to be unlawfully in possession. See EJECTMENT.

WRIT OF ENTRY. See ENTRY, WRIT OF.

WRIT OF ERROR. In Practice. A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases, themselves to examine the record, in others to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. Stephen, Plead. 138; 2 Saund. 100, n. 1; Bacon, Abr. *Error*.

2. The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not, in general, any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as, for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant. Stephen, Plead. 139. But there are some facts which affect the validity and regularity of the proceeding itself; and to remedy these errors the party in interest may sue out the writ of error coram vobis. The death of one of the parties at the commencement of the suit, the appearance of an infant in a personal action by an attorney and not by guardian, the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind. 1 Saund. 101; 1 Archbold, Pract. 212; 2 Tidd, Pract. 1033; Stephen, Plead. 140; 1 Browne, Penn. 75.

3. The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable or cured at common law or by some of the statutes of amendment or jeofail. See, generally, Tidd, Pract. 43; Graham, Pract. b. 4, c. 1; Bacon, Abr. *Error*; 1 Vern. Ch. 169; Yelv. 76; 1 Salk. 322; 2 Saund. 46, n. 6, and 101, n. 1; 3 Blackstone, Comm. 405; Sergeant, Const. Law, c. 5.

It lies only to remove causes from a court of record. It is in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing which is withheld from him, not when its operation is entirely defensive. 3 Story, Const. § 1721. And it is considered, generally, as a new action. 15 Ala. 9.

WRIT OF EXECUTION. A writ to put in force the sentence that the law has given. See EXECUTION.

WRIT OF EXIGI FACIAS. See EXIGENT; EXIGI FACIAS; OUTLAWRY.

WRIT OF FORMEDON. In Practice. This writ lies where a party claims the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner, upon the determination of an estate in tail. Coke, Litt. 236 *b*; Booth, Real Act. 139 151, 154. See FORMEDON.

WRIT DE HÆRETICO COMBURENDO. In English Law. The name of a writ formerly issued by the secular courts,

when a man was turned over to them by the ecclesiastical tribunals after having been condemned for heresy.

It was founded on the statute 2 Hen. IV. c. 15; it was first used A.D. 1401, and as late as the year 1611. By virtue of this writ, the unhappy man against whom it was issued was burned to death. See 12 Coke, 92.

WRIT DE HOMINE REPLEGIANDO. **In Practice.** See DE HOMINE REPLEGIANDO.

WRIT OF INQUIRY. See INQUISITION; INQUEST.

WRIT OF MAINPRIZE. **In English Law.** A writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence and bail has been refused, or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, commonly called mainpernors, and to set him at large. 3 Blackstone, Comm. 128. See MAINPRIZE.

WRIT OF MESNE. **In Old English Law.** A writ which was so called by reason of the words used in the writ, namely, *Unde* idem A *qui medius est inter C et præfatum B;* that is, A, who is mesne between C, the lord paramount, and B, the tenant paravail. Coke, Litt. 100 *a.*

WRIT DE ODIO ET ATIA. See DE ODIO ET ATIA; ASSIZE.

WRIT OF PRÆCIPE. This writ is also called a writ of covenant, and is sued out by the party to whom lands are to be conveyed by fine,—the foundation of which is a supposed agreement or covenant that the one shall convey the land to the other. 2 Blackstone, Comm. 349, 350.

WRIT OF PREVENTION. This name is given to certain writs which may be issued in anticipation of suits which may arise. Coke, Litt. 100. See QUIA TIMET.

WRIT OF PROCESS. See PROCESS; ACTION.

WRIT OF PROCLAMATION. **In English Practice.** A writ which issues at the same time with the exigi facias, by virtue of stat. 31 Eliz. c. 3, s. 1, by which the sheriff is commanded to make proclamations in the statute prescribed.

When it is not directed to the same sheriff as the writ of *exigi facias* is, it is called a foreign writ of proclamation. Lee, Dict.; 4 Reeve, Hist. Eng. Law, 261.

WRIT OF QUARE IMPEDIT. See QUARE IMPEDIT.

WRIT DE RATIONABILI PARTE BONORUM. A writ which was sued out by a widow when the executors of her deceased husband refused to let her have a third part of her late husband's goods, after the debts were paid. Fitzherbert, Nat. Brev. 284.

WRIT OF RECAPTION. **In Practice.** A writ which lies where, pending an action of replevin, the same distrainer takes, for the same supposed cause, the cattle or goods of the same distrainee. See Fitzherbert, Nat. Brev. 169.

This writ is nearly obsolete, as trespass, which is found to be a preferable remedy, lies for the second taking; and, as the defendant cannot justify, the plaintiff must necessarily recover damages proportioned to the injury.

WRIT OF REPLEVIN. See REPLEVIN.

WRIT OF RESTITUTION. A writ which is issued on the reversal of a judgment commanding the sheriff to restore to the defendant below the thing levied upon, if it has not been sold, and, if it has been sold, the proceeds. Bacon, Abr. *Execution* (Q). See RESTITUTION.

WRIT PRO RETORNO HABENDO. **In Practice.** The name of a writ which recites that the defendant was summoned to appear to answer the plaintiff in a plea whereof he took the cattle of the said plaintiff (specifying them), and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc. 2 Sellon, Pract. 168.

WRIT OF RIGHT. **In Practice.** The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee-simple, founding his title on the right of property, or mere right, arising either from his own seisin or the seisin of his ancestor or predecessor. Fitzherbert, Nat. Brev. 1 (B); 3 Blackstone, Comm. 391.

At common law, a writ of right lies only against the tenant of the freehold demanded. 8 Cranch, 239.

This writ brings into controversy only the rights of the parties in the suit; and a defence that a third person has better title will not avail. 7 Wheat. 27; 3 Pet. 133; 3 Bingh. N. S. 434; 4 *id.* 711; 5 *id.* 161; 4 Scott, 209; 6 *id.* 435, 738; 6 Ad. & E. 103; 1 H. Blackst. 1; 3 Taunt. 167; 5 *id.* 326; 1 Marsh. 68; 2 Bos. & P. 570; 4 *id.* 64; 4 Taunt. 572; 2 W. Blackst. 1261; 2 Carr. & P. 187, 271; 8 Cranch, 229; 2 Wheat. 306; 11 Me. 312; 7 Wend. N. Y. 250; 3 Bibb, Ky. 57; 3 Rand. Va. 563; 2 J. J. Marsh. Ky. 104; 2 A. K. Marsh. Ky. 396; 1 Dan. Ky. 410; 2 Leigh. Va. 1; 4 Mass. 64; 17 *id.* 74.

WRIT OF TOLL. **In English Law.** The name of a writ to remove proceedings on a writ of right patent from the court-baron into the county court. 3 Blackstone, Comm. App. No. 1, § 2.

WRIT OF WASTE. The name of a writ to be issued against a tenant who has committed waste of the premises. There are several forms of this writ. That against a tenant in dower differs from the others. Fitzherbert, Nat. Brev. 125. See WASTE.

WRITERS TO THE SIGNET. In Scotch Law. Anciently, clerks in office of the secretary of state, by whom writs passing the king's signet were prepared. Their duty now is to prepare the warrants of all lands flowing from the crown, and to sign almost all diligencies of the law affecting the person or estate of a debtor, or for compelling implement of decree of superior court. They may act as attorney or agent before court of sessions, and have various privileges. Bell, Dict. *Clerk to Signet.*

WRITING. The act of forming by the hand letters or characters of a particular kind, on paper or other suitable substance, and artfully putting them together so as to convey ideas.

It differs from printing, which is the formation of words on paper or other proper substance by means of a stamp. Sometimes by writing is understood printing, and sometimes printing and writing mixed.

Many contracts are required to be in writing; all deeds for real estate must be in writing, for it cannot be conveyed by a contract not in writing, yet it is the constant practice to make deeds partly in printing and partly in writing. Wills, except nuncupative wills, must be in writing, and signed by the testator; and nuncupative wills must be reduced to writing by the witnesses within a limited time after the testator's death.

Records, bonds, bills of exchange, and many other engagements must, from their nature, be made in writing.

See FRAUDS, STATUTE OF; LANGUAGE.

WRITING OBLIGATORY. A bond; an agreement reduced to writing, by which the party becomes bound to perform something, or suffer it to be done.

WRONG. An injury; a tort; a violation of right.

In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract: a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made. 3 Blackstone, Comm. 158.

A *public* wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence; and it is punishable in various ways, such as indictments, summary proceedings, and, upon conviction, by death, imprisonment, fine, etc.

Private wrongs, which are injuries to individuals, unaffecting the public: these are redressed by actions for damages, etc. See REMEDIES; TORT.

WRONG-DOER. One who commits an injury; a *tort-feasor*. See Dane, Abr. Index.

WRONGFULLY INTENDING. In Pleading. Words used in a declaration when in an action for an injury the motive of the defendant in committing it can be proved; for then his malicious intent ought to be averred. This is sufficiently done if it be substantially alleged, in general terms, as wrongfully intending. 3 Bouvier, Inst. n. 2871.

Y.

YARD. A measure of length, containing three feet, or thirty-six inches.

A piece of land inclosed for the use and accommodation of the inhabitants of a house. In England it is nearly synonymous with backside. 1 Chitty, Pract. 176; 1 Term, 701.

YARDLAND. In Old English Law. A quantity of land containing twenty acres. Coke, Litt. 69 *a*.

YEAR. The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed.

2. The civil year differs from the astronomical, the latter being composed of three hundred and sixty-five days, five hours, forty-eight seconds and a fraction, while the former consists sometimes of three hundred and sixty-five days, and at others, in leap-years, of three hundred and sixty-six days.

The year is divided into half-year, which consists, according to Coke, Litt. 135 *b*, of one hundred and eighty-two days; and quarter of a year, which consists of ninety-one days. *Id.*; 2 Rolle, Abr. 521, l. 40. It is further divided into twelve months.

3. The civil year commences immediately after twelve o'clock at night of the thirty-first day of December, that is, the first moment of the first day of January, and ends at midnight of the thirty-first day of December twelve months thereafter. See Comyns, Dig. *Annus*; 2 Chitty, Blackst. Comm 140, n.; Chitty, Pract. Index, *Time*. Before the alteration of the calendar from old to new style in England (see BISSEXTILE) and the colonies of that country in America, the year in chronological reckoning was supposed to com-

mence with the first day of January, although the legal year did not commence until March 25, the intermediate time being doubly indicated: thus, February 15, 172¼, and so on. This mode of reckoning was altered by the statute 24 Geo. II. c. 23, which gave rise to an act of assembly of Pennsylvania, passed March 11, 1752, 1 Smith, Laws, 217, conforming thereto, and also to the repeal of the act of 1710.

4. In New York it is enacted that whenever the term "year" or "years" is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; half a year, of a hundred and eighty-two days; and a quarter of a year, of ninety-two days; and the day of a leap-year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day. Rev. Stat. pt. 1, c. 19, t. 1, § 3.

YEAR AND DAY. A period of time much recognized in law.

It is not in all cases limited to a precise calendar year. In Scotland, in computing the term, the year and day is to be reckoned, not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination. 1 Bell, Comm. 5th ed. 721; 2 Stair, Inst. 842. See Bacon, Abr. *Descent* (I 3); Erskine, Inst. 1. 6. 22. In the law of all the Gothic nations, it meant a year and six weeks.

It is a term frequently occurring: for example, in case of an estray, if the owner challenged it not within a year and a day, it belonged to the lord. 5 Coke, 108. So of a wreck. Coke, 2d Inst. 168. This time is given to prosecute appeals and for actions in a writ of right, and, after entry or claim, to avoid a fine. Plowd. 357 *a*. And if a person wounded die in that time, it is murder. Coke, 3d Inst. 53; 6 Coke, 107. So, when a judgment is reversed, a party, notwithstanding the lapse of time mentioned in the statute of limitations pending that action, may commence a fresh action within a year and a day of such reversal. 3 Chitty, Pract. 107. Again, after a year and a day have elapsed from the day of signing a judgment, no execution can be issued till the judgment be revived by *scire facias*. Bacon, Abr. *Execution* (H); Tidd, Pract. 1108.

Protection lasted a year and a day; and if a villein remain from his master a year and a day in an ancient demesne, he is free. Cunningham, Dict. If a person is afraid to enter on his land, he may make claim as near as possible,—which is force for a year and a day. 3 Sharswood, Blackst. Comm. 175. In case of prize, if no claim is made within a year and a day, the condemnation is to captors as of course. 2 Gall. C. C. 388. So, in case of goods saved, the court retains them till claim, if made within a year and a day, but not after that time. 8 Pet. 4.

The same period occurs in the Civil Law, in Book of Feuds, the Laws of the Lombards, etc.

YEAR-BOOKS. Books of reports of cases in a regular series from the reign of the English King Edward II., inclusive, to the time of Henry VIII., which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually,—whence their name Year-Books. They consist of eleven parts, namely:—Part 1. Maynard's Reports *temp.* Edw. II.; also divers Memoranda of the Exchequer *temp.* Edward I. Part 2. Reports in the first ten years of Edw. III. Part 3. Reports from 17 to 39 Edward III. Part 4. Reports from 40 to 50 Edward III. Part 5. Liber Assisarum; or, Pleas of the Crown *temp.* Edw. III. Part 6. Reports *temp.* Hen. IV. & Hen. V. Parts 7 and 8. Annals; or, Reports of Hen. VI. during his reign, in 2 vols. Part 9. Annals of Edward IV. Part 10. Long Quinto; or, Reports in 5 Edward IV. Part 11. Cases in the Reigns of Edward V., Richard III., Henry VII., and Henry VIII.

YEAR, DAY, AND WASTE (Lat. *annus, dies, et vastum*) is a part of king's prerogative, whereby he takes the profits of the lands and tenements of those attainted of petty treason or felony, for a year and a day, but, in the end, may waste the tenements, destroy the houses, root up the woods, gardens, and pasture, and plough up the meadows (except the lord of the fee agree with him for redemption of such waste); after which the lands are to be restored to the lord of the fee. Staundford, Prerog. c. 16, fol. 44. By Magna Charta, it would appear that the profits for a year and day were given in lieu of the waste. 9 Hen. III. c. 22. But 17 Edw. II. declares the king's right to both.

YEARS, ESTATE FOR. See ESTATE FOR YEARS.

YEAS AND NAYS. The list of members of a legislative body voting in the affirmative and negative of a proposition.

The constitution of the United States, art. 1. s. 5, directs that "the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal." See 2 Story, Const. 301.

The power of calling the yeas and nays is given by all the constitutions of the several states; and it is not, in general, restricted to the request of one-fifth of the members present, but may be demanded by a less number; and, in some, one member alone has the right to require the call of the yeas and nays.

YEOMAN. In the United States this word does not appear to have any very exact meaning. It is usually put as an addition to the names of parties in declarations and indictments. In England it signifies a free man who has land of the value of forty shillings a year. Coke, 2d Inst. 668; 2 Dall. Penn. 92.

YIELDING AND PAYING. These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent, Platt, Cov. 50; 3 Penn. 464; 1 Sid. 447, pl. 9; 2 Lev. 206; 3 Term, 402;

1 Barnew. & C. 416; 2 Dowl. & R. 670; but whether it be an express covenant or not seems not to be settled. Styles, 387, 406, 451; Sid. 240, 266; 2 Lev. 206; T. Jones, 102; 3 Term, 402.

In Pennsylvania, it has been decided to be a covenant running with the land. 3 Penn. 464. See 1 Saund. 233, n. 1; 9 Vt. 191.

YORK, CUSTOM OF, is recognized by 22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17. By this custom, the effects of an intestate are divided according to the anciently universal rule of *pars rationabilis*. 4 Burn, Eccl. Law, 342.

YORK, STATUTE OF. The name of an English statute, passed 12 Edw. II., Anno Domini 1318, and so called because it was enacted at York. It contains many wise provisions and explanations of former statutes. Barrington, Stat. 174. There were other statutes made at York in the reign of Edward III., but they do not bear this name.

YOUNG ANIMALS. It is a rule that the young of domestic or tame animals belong to the owner of the dam or mother, according to the maxim, *Partus sequitur ventrem*. Dig. 6. 1. 5. 2; Inst. 2. 1. 9.

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